No. _____ - Capital Case

IN THE
Supreme Court of the United States

MICHAEL WAYNE REYNOLDS,

Petitioner,

v.

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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***** CAPITAL CASE *****
QUESTIONS PRESENTED

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254(d)(2), requires federal habeas courts to defer to state court factual determinations unless the state court's decision is "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Section 2254(e)(1) states that "a determination of a factual issue made by a State court shall be presumed to be correct" and the habeas petitioner "shall have the burden of rebutting the presumption . . . by clear and convincing evidence."

Federal courts below diverge on the extent to which § 2254(d)(2)'s deference is conditioned on the adequacy of the state court's fact-finding procedures, including whether the state court conducted an evidentiary hearing on a petitioner's colorable claims. Federal courts also diverge on whether, in seeking to clear a path to federal relief under § 2254(d)(2), petitioners must first satisfy § 2254(e)(1). In the decision below, the United States Court of Appeals for the Eleventh Circuit merged § 2254(e)(1)'s clear and convincing standard with § 2254(d)(2)'s unreasonableness requirement and deferred to the incomplete record before the state court, without addressing Petitioner's claims that the state court's factual findings were based on a defective fact-finding process, including the absence of an evidentiary hearing on his colorable *Brady/Giglio* claims.

1. When a state court refuses to conduct an evidentiary hearing, at which a petitioner would have an opportunity to test and rebut testimonial and other

evidence relied upon by the State to defeat his colorable claims, will its factual findings be entitled to deference under 28 U.S.C. § 2254(d)(2)?

2. In bringing a challenge under 28 U.S.C. § 2254(d)(2), is a petitioner required to first satisfy 28 U.S.C. § 2254(e)(1)'s requirement to rebut the presumption of correctness of a state court's factual findings by clear and convincing evidence?

PARTIES TO THE PROCEEDINGS

This petition arises from a habeas corpus proceeding in which the petitioner, Michael Wayne Reynolds, was the petitioner before the United States District Court for the Northern District of Alabama, as well as the petitioner-appellant before the Eleventh Circuit. Mr. Reynolds is a prisoner sentenced to death and in the custody of Terry Raybon, Warden of William C. Holman Correctional Facility and John Hamm, Commissioner of the Alabama Department of Corrections. The Commissioner and his predecessors were the respondents before the Northern District of Alabama and the respondent-appellee before the Eleventh Circuit.

STATEMENT OF RELATED CASES

State v. Reynolds, CC-05-257.01-WAM (Etowah Co. Cir. Ct. Dec. 7, 2015)

Reynolds v. State, CR-07-0443 (Ala. Crim. App. Oct. 1, 2010)

Reynolds v. State, CR-13-1907 (Ala. Crim App. Apr. 22, 2016)

Reynolds v. Dunn, 4:18-cv-00236 (N.D. Ala. Mar. 25, 2022)

Reynolds v. Dunn, 22-14015 (11th Cir. Oct. 7, 2024)

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PETITION FOR WRIT OF CERTIORARI

Petitioner Michael Wayne Reynolds respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

RELEVANT OPINIONS

The unpublished Eleventh Circuit opinion affirming denial of relief is reproduced in the appendix at Pet. App. 1a. The Eleventh Circuit's unpublished order denying rehearing is reproduced in the appendix at Pet. App. 35a.

The unpublished memorandum opinion of the United States District Court for the Northern District of Alabama denying habeas relief and an evidentiary hearing is reproduced in the appendix at Pet. App. 93a.

The unpublished decision of the Alabama Court of Criminal Appeals (ACCA) affirming denial of habeas relief is reproduced in the appendix at Pet. App. 383a.

The decision of the ACCA remanding the proceedings is reported as *Reynolds v. State*, 236 So.3d 189 (Ala. Crim. App. 2015), and is reproduced in the appendix at Pet. App. 464a.

The decision of the ACCA affirming Mr. Reynolds' conviction and death sentence is reported as *Reynolds v. State*, 114 So.3d 61 (Ala. Crim. App. 2010), and is reproduced in the appendix at Pet. App. 554a.

JURISDICTION

The Eleventh Circuit issued its judgment on October 7, 2024, Pet. App. 1a, and denied a timely petition for rehearing and rehearing *en banc* on December 4, 2024, Pet. App. 35a. On February 19, 2025, Justice Thomas extended the time within which to file a petition for writ of certiorari by 30 days.

The Eleventh Circuit had jurisdiction under 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the Constitution provides in pertinent part that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law[.]"

Section 1 of the Fourteenth Amendment to the Constitution provides in pertinent part, "[n]or shall any State deprive any person of life, liberty, or property, without due process of law[.]"

Under AEDPA, a federal court may grant habeas corpus relief to a state prisoner for claims adjudicated on the merits by a state court only if the petitioner shows that the state court proceedings resulted in a decision that was:

(1) contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, or

(2) based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1)—(2).

Section 2254(e)(1) requires federal courts to presume that a state court's factual determinations are correct unless the habeas petitioner rebuts the presumption of correctness with clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

Postconviction proceedings in Alabama are governed by Alabama Rule of Criminal Procedure 32 ("Rule 32"). Rule 32.9(a) provides for evidentiary hearings:

> 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.

INTRODUCTION

Immediately following the murders of Charles, Melinda, and Savannah Martin, Chad Martin, Charles' nephew, provided a detailed confession to police that he and two other individuals killed the Martins for drugs. Chad did not implicate Reynolds in the murders, even when the police inquired specifically about Reynolds multiple times. Because of Reynolds' counsel's ineffectiveness, the jury never heard

this confession. Reynolds has steadfastly denied killing the Martins, at trial and ever since. And the State's forensic evidence, at best, placed Reynolds at the Martins' house at some point *after* the murders.

Instead, Marcie West provided the State with its only direct evidence that linked Reynolds to the Martins' murders when she testified that Reynolds committed the crimes. As the State's only alleged eyewitness to the murders, West testified that she was not promised anything by the prosecution in exchange for her damning testimony that Reynolds committed the crimes. Pet. App. 804a–805a, 813a. Nevertheless, on the morning of her plea hearing, her attorney, Jeffrey Montgomery, discussed an agreement with then—District Attorney Jimmy Harp, which Montgomery memorialized later that day in a memorandum to file, that West would "serve no longer than one year" in a substance abuse program on her criminal charges related to the murders and prior drug felonies—charges that the State held in abeyance until after Reynolds was convicted and sentenced. That is exactly what happened after Assistant District Attorney Marcus Reid advocated vigorously for West at her sentencing hearing, though the charges pending against her could have led to *decades* of incarceration.

In the two weeks before her sentencing: (1) Reid sent Montgomery a letter, (2) Reid and Montgomery held at least two conversations about West, and (3) Montgomery faxed Reid a copy of his memo memorializing the "[a]greement with

D.A." Pet. App. 654a, 676a. Throughout his Rule 32 state postconviction proceedings, Reynolds sought a copy of that letter and the DA's notes regarding the phone calls. He also repeatedly sought the State's full, unredacted files on West's prosecutions. Crucially, he also sought an opportunity to cross-examine West and the attorneys who submitted affidavits to the Rule 32 court denying the existence of a formal deal.

But the Rule 32 court thwarted him at every turn. Reynolds never got a copy of that letter, nor any notes about the numerous communications between the State and West. And he was never allowed to cross-examine West, Montgomery, or Reid about the statements in their affidavits—written testimony that was internally inconsistent and contradicted by the record. Instead, the Rule 32 court found that there was no "deal" between West and prosecutors on a cold record, never even addressing the memorandum referencing a deal between them.

On federal habeas, Reynolds argued that the federal courts should not defer to the Rule 32 court's factual determinations under § 2254(d)(2) because its fact-finding process was defective. But the federal courts held that Reynolds could not show, by clear and convincing evidence, that the Rule 32 court's finding that there was no deal between the State and West was an unreasonable determination of the facts. The courts ignored that Reynolds was not permitted to cross-examine West, Montgomery, and Reid in an evidentiary hearing and that Reynolds was not given

all documents relevant to his *Brady* claim, meaning that Reynolds faces the ultimate punishment of death without having been given any real process to determine whether his conviction was tainted.

By rejecting Reynolds' claim in this manner, the Eleventh Circuit deepened two longstanding splits of authority: first, whether federal courts must consider a state court's fact-finding process when a petitioner challenges it as deficient under § 2254(d)(2) and second, whether a petitioner must satisfy § 2254(e)(1) before relief under § 2254(d)(2) can be granted. Certiorari is necessary to resolve the important constitutional issues presented by this case.

STATEMENT OF THE CASE

A. The Police Obtained a Confession That the Jury Did Not Hear

On the evening following the murders, Chad Martin, Charles Martin's nephew, confessed that he, John Langley, and John Zook had killed the Martins. Members of the Gadsden police department and the former Etowah County District Attorney, Jimmie Harp, were present for all or portions of Chad's confession. Pet. App. 822a–24a. Chad said that he, Langley, and Zook went to the Martins' to get drugs. *Id.* at 822a. When Charles refused to give Zook the drugs, Zook stabbed him. *Id.* at 822a–23a. To Chad's knowledge, Langley killed Melinda and then told Chad to kill Savannah. *Id*. at 823a. Chad then detailed that murder and other information relating to the crime scene. *Id.*

Chad never implicated Reynolds in the murders. Even when the police asked him multiple times whether Reynolds was with him, Chad said: "I have told you the truth but you won't listen." *Id.* at 824a. The jury never heard this confession as substantive evidence, impeachment material when Chad testified at trial, or as evidence relevant to sentencing because trial counsel did nothing to ensure that the confession was admitted into evidence. Instead, the jury heard from Marcie West.

B. Reynolds Was Not Alerted to The Possibility That West Had A Deal Until She Was Sentenced

The Martins' murders occurred in May 2003. Montgomery was appointed as West's counsel the year before, following West's indictment on four drug charges: two felony counts of distribution of hydrocodone and misdemeanor possession of marijuana and drug paraphernalia. A1558–61,[1] Pet. App. 645a–49a. West was facing up to 60 years of imprisonment on these charges. Pet. App. 680a–81a.

During the week following the Martins' murders, West and her counsel spent at least ten hours discussing the murders and West's drug charges with the State. *Id.* at 649a. Despite West's admitted presence at the crime scene during the murders and her subsequent efforts to cover it up, the State charged West only with felony

[1] For ease of review, Petitioner cites to the Record on Appeal that accompanied his Eleventh Circuit Appeal (22-14015), available on PACER at ECF 22-1–22-15.

hindering prosecution. A1690. After pleading not guilty, her trial was set for February 2004. A1680; A1692.

After the State moved to continue West's trial multiple times in 2004, A1692–94, then-DA Jimmy Harp to put off her charges "indefinitely." Pet. App. 665a. West's cases were delayed until 2008, after she testified at Reynolds' trial and gave the State what no other witness could provide: eyewitness testimony that Reynolds committed the murders as part of a robbery. *Id.* at 714a–16a; A1663–64; A1666–67; A1671–72. In fact, West provided the State with its only direct evidence against Reynolds, as the State's forensic evidence at best placed Reynolds at the Martins' house at some point *after* the murders along with other identified and unidentified individuals. A2981–83, A2985–87.

Later in 2008, as Reynolds was appealing his conviction, West's cases suddenly reappeared on the docket, and her plea hearing was set for January 13, 2009. A1663–64; A1666–67; A1671–72; Pet. App. 678a. Ten days before West's hearing, Montgomery and Reid had a call and a conference. Pet. App. 659a. On the day of her plea hearing, Montgomery and Harp discussed West's sentence. *Id*. at 667a–68a. Montgomery memorialized this conversation in a memorandum to file on the same date, January 13. *Id*. at 676a–77a. Per her "[a]greement with the D.A.," West would "serve no longer than one year" in a substance abuse program. Notwithstanding this agreement, West's guilty plea on the record was characterized

as "blind"—meaning that she did not have an agreement with the State on what her sentence would be. *Id.* at 682a–83a. The State recommended that the court accept her plea. *Id.* at 689a.

West's sentencing hearing was scheduled for May 13, 2009. On May 1, ADA Reid sent Montgomery a letter, which has never been produced to Reynolds despite the letter being neither privileged nor confidential. *Id.* at 654a. On May 4, Montgomery spoke to the State about West. *Id*. On May 12, the day before West's sentencing, Montgomery spoke to Reid by telephone and faxed Reid a copy of his January 13 memorandum. *Id*. at 654a, 676a–77a.

At the sentencing, Reid characterized the agreement with West as a "blind plea," *id.* at 695a, despite adhering to the deal memorialized in Montgomery's memorandum faxed the prior day. *Id.* at 676a–77a. Reid then strenuously advocated for West, explaining at length how important West's cooperation was to Reynolds' prosecution, emphasizing that she "fully cooperated" with the DA, was "a key part of the prosecution and probably the key witness," and provided "critical information" that the DA "may not have gotten otherwise." *Id.* at 695a–99a. Reid went so far as to reserve the right on the record to request West be released from prison after serving only six months of her already lenient sentence. *Id.* at 703a–704a.

West's sentencing went exactly as laid out in Montgomery's memorandum. The State dismissed three of West's drug charges. *Id.* at 700a–703a. While she was sentenced on two charges to 20 years of imprisonment, running concurrently, *id.* at 701a, her actual time served was significantly less. Six months into her sentence, the exact time specified in Montgomery's memorandum, West's sentence was suspended per the State's recommendation, and she was immediately released. A1667.

To put West's sentence in perspective, Donald Harvey was similarly charged with hindering prosecution for helping West destroy the murder weapons. A1738. Unlike West, Harvey testified for the defense and did not incriminate Reynolds in the crime. A3027. He was detained in advance of his trial, sentenced to twenty years imprisonment, and served three years with five years of supervised probation. A1757.

C. Reynolds Tries to Obtain *Brady* Material

Reynolds' Rule 32 proceedings began in December 2013, and he immediately tried to obtain West's file and requested an evidentiary hearing, A1249–1332, on the apparent deal between the State and West. Although the State possessed highly relevant documents, including the deal memorandum, it refused to produce any documents and opposed the request for an evidentiary hearing. A1333–1422; A1437–43. The Rule 32 court dismissed Reynolds' *Brady/Giglio* claims on their

face, without ordering discovery, ruling on his discovery requests, or conducting an evidentiary hearing, A1444–1504. But the ACCA reversed, finding that Reynolds had alleged facts showing that West had a deal with the State to testify in exchange for favorable treatment on her pending charges:

> In his petition, Reynolds pleaded facts that, if true, would establish that the State violated Brady and Giglio. Reynolds detailed the importance of West's testimony to the State's case. Reynolds alleged facts that, if proven, would establish that the jury's determination regarding his guilt depended on weighing West's credibility against Reynolds's credibility. The facts contained in Reynolds's petition, if true, would show that West testified pursuant to a deal with the State for favorable treatment on multiple pending charges. He also alleged facts indicating that the State failed to disclose West's deal to defense counsel and that it failed to correct West's testimony that there had been no deal. Thus, Reynolds alleged facts that, if true, would establish that the State suppressed evidence that was favorable to the defendant. He also alleged facts indicating that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."

Reynolds v. State, 236 So. 3d 189, 201–202 (Ala. Crim. App. 2015) (internal citations omitted). The ACCA remanded the matter to the Rule 32 court for proceedings consistent with its decision. *Id.* at 202.

On remand, the Rule 32 court provided Reynolds with a mere *twenty* days to submit evidence on his *Brady* claim. A1555. It never ruled on his extant requests to take discovery or have an evidentiary hearing. *Id*. Thus, the evidence that Reynolds had to proffer to the Rule 32 court in twenty-days' time was limited to what was

already in the public record—where *Brady* material is rarely found. *See Banks v. Dretke*, 540 U.S. 668, 696 (2004) (rule declaring "'prosecutor may hide, defendant must seek,' is not tenable is a system constitutionally bound to accord defendants due process"); *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (prosecution alone knows what is undisclosed); *United States v. Agurs*, 427 U.S. 97, 106 (1976) ("In many cases . . . exculpatory information in the possession of the prosecutor may be unknown to defense counsel."). So, Reynolds again moved for discovery of West's file (A1557–69) and the State again opposed (A1570–81). And once again, the court denied Reynolds any discovery, purportedly on the basis that its pre-trial *in camera* review of *Reynolds'* file—not West's—sufficed to ferret out any potential *Brady* material. (A1582–83).

With the twenty-day clock running out, Reynolds served interrogatories on the State to try to learn about the deal. A1596. The State ignored them. Stonewalled, Reynolds sought an extension to the twenty-day period which the Rule 32 court denied. A1591; A1608. Reynolds then asked the court to reconsider its denial of his discovery motion. A1584. Finally, the court relented, ordering the State to give Reynolds access—for the first time—to West's prosecution files. A1609. These files revealed the highly relevant memorandum from Montgomery memorializing West's "[a]greement with [the] D.A." that should have been produced by the State in the first instance. Pet. App. 676a–77a. But the letter sent by ADA Reid to Montgomery

reflected in Montgomery's time records (*id.* at 654a) was never produced, nor were any notes memorializing the numerous calls, meetings, and conferences between the State and West reflected in Montgomery's time records in the days after West began cooperating and leading up to her plea and sentencing. *Id.* at 649a–51a, 654a, 659a.

Notwithstanding the discovery restraints imposed upon him by the Rule 32 court, Reynolds pieced together a compelling circumstantial case showing the State's *Brady/Giglio* violation from public records. A1610–36. The evidence established the timeline for West prosecution, plea, and sentencing, and details of the State's representations to the sentencing court for West. *Id.* Reynolds further established, based on Montgomery's time records: (i) West's many interactions with the State; (ii) the lack of any speedy trial motions for West's case; (iii) the lack of any preparation of West for testimony at Reynolds' trial; (iv) Montgomery's absence from trial when West testified; and (v) correspondence between the State and Montgomery about West, including the highly relevant memorandum *referencing a deal* between West and the DA. Reynolds submitted his evidence and argument to the Rule 32 court as directed. *Id.*

As part of its opposition, the State submitted written statements from Reid, Montgomery, and West denying the existence of a deal. A1841–81, Pet. App. 666a–75a. Reid averred that West's plea was blind (Pet. App. 667a) yet the memorandum in the State's file explicitly references an "agreement with the DA," was addressed

to Reid, and was dated for the day of West's plea hearing (*id.* at 677a). Reid claimed that Montgomery's memorandum was merely a recitation of a *potential* sentence discussed with the late DA Harp (*id.* at 667a–68a)—yet the memorandum summarizes the *exact* sentence West ultimately served. A1729; A1735. Reid also characterized his advocacy for West at her sentencing as a "routine part of argument" and claimed that the State did not recommend the sentence reflected in Montgomery's memorandum. A1862; Pet. App. 668a. But the record says different: the State vigorously recommended the exact sentence agreed to in the memorandum and entered by the court. Pet. App. 695a–703a.

For his part, Montgomery claimed that he did not recall having a "formal" agreement in place, and that the memorandum reflected his "practice to draft a memo to file to memorialize contemporaneously a defendant's guilty plea." Pet. App. 672a. But a review of the actual contemporaneous record of West's plea—the court transcript—leaves this explanation wanting, as nothing in the memorandum was said during the plea.

Because West had no contemporaneous documents to explain away, West's affidavit was the most straightforward. She merely denied the existence of a deal a few times and then recounted the terms of her sentence. *Id.* at 674a.

Without so much as a nod to these inconsistencies or gaps in the record, or addressing the deal memorandum at all, the Rule 32 court made the following findings:

> There is nothing in the record that indicates there was an agreement between the prosecution and West . . . West's affidavit in the State's opposition to Defendant's claims denied any agreement. West's attorney, Jeff Montgomery, denied any knowledge of any agreement for West's testimony. Chief Deputy District Attorney Marcus Reid denied any agreement with West for her testimony.

Id. at 461a.

On a cold record, the Rule 32 court deemed the written statements of the three witnesses credible and dismissed Reynolds' claims without allowing him any process at all: to obtain all relevant documents and to cross-examine the witnesses on their written statements. As for West, the Rule 32 court—like the district court after it—justified this outcome on the premise that West had once been cross-examined at Reynolds' trial. *Id.* at 461a, 171a–72a. But not all cross-examinations are equal. During his trial, Reynolds did not yet have the substantial documentary and circumstantial evidence showing that there was a deal between West and the State, evidence that he would have confronted her with during a postconviction evidentiary hearing. No court—state nor federal—provided a reason as to why Reynolds should not have been entitled to cross-examine Reid, or Montgomery on their affidavits, the written memorandum referencing a deal exchanged between

them, and on the numerous phone calls and meetings they had in the days leading up to West's plea and sentencing.

Reynolds timely appealed, and the ACCA affirmed the Rule 32 court's decision. Pet. App. 383a. After exhausting his state court appeals, Reynolds petitioned for habeas corpus in the district court and, once again, sought discovery and an evidentiary hearing on his *Brady* claim. A10; A421. And again, Reynolds was denied all relief. Pet. App. 381a; *Reynolds v. Dunn*, 2022 WL 895947, at *153 (N.D. Ala. Mar. 25, 2022).

Reynolds appealed to the Eleventh Circuit. During oral argument, the court inquired as to whether the State had made West's file available in full during the Rule 32 proceedings and directed the parties to file post-hearing letters on that issue. Pet App. 47a–49a. The State averred that it had produced the entire file but never mentions the missing letter or notes of its communication with West's attorney, neither of which have ever been produced. *Id.* at 44a–46a. Reynolds articulated the reasons why he believed that the State had withheld from him documents from West's file. *Id.* at 38a–40a.

The Eleventh Circuit affirmed the denial of Petitioner's claims and request for an evidentiary hearing, despite acknowledging at oral argument that the State gave West a "sweetheart deal" that "stinks to high heaven" and that "[t]here are too many flags that go up in this case to say that there was no deal, no agreement, no

understanding." Pet. App. 63a, 65a (Jordan, J., Oral Argument Tr., at 51:17–18, 59:25–60:2). Contrary to this Court's instructions in *Miller-El v. Cockrell*, 537 U.S. 322, 341 (2003), the court merged the clear and convincing standard of § 2254(e)(1) with the unreasonableness requirement of § 2254(d)(2*)* and deferred to the Rule 32 court's finding that there was no agreement between West and the State, without considering at all Reynolds' argument that such a finding was a result of a defective fact-finding process. Pet. App. 19a, 22a. This deference is particularly troubling given the court's apparent inclination to have ruled the other way had they been able to exercise their "independent judgment." *Id*. at 19a.

This timely petition for certiorari follows.

REASONS FOR GRANTING THE PETITION

AEDPA imposes a highly deferential standard for evaluating state court rulings. After a state court has adjudicated a claim on the merits, AEDPA precludes relief unless the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law," 28 U.S.C. § 2254(d)(1), or "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)(2). Separately, 28 U.S.C. § 2254(e)(1) states "a determination of a factual issue made by a State court shall be presumed to be correct" unless rebutted by the petitioner "by clear and convincing evidence."

Although the ACCA found that Reynolds alleged a colorable *Brady* claim, he was denied a meaningful opportunity for discovery and an evidentiary hearing in state court. Once the case was in federal court, the courts deemed themselves bound by AEDPA's deference scheme to the state court's factual findings under §§ 2254(d)(2) and (e)(1). Neither the state nor federal court ever addressed Reynolds' argument that the fact-finding process employed by the state court was defective and therefore its conclusions should not be entitled to deference under either provision.

Prior to AEDPA's 1994 amendments, the interplay of these concepts was less opaque. State court findings of fact were presumed correct if, among other things, there was a hearing on the merits of a factual issue. 28 U.S.C. § 2254(d) (1994) (superseded). This presumption did not kick in, however, if a petitioner could show that the "factfinding procedure employed by the State court was not adequate to afford a full and fair hearing." 28 U.S.C. § 2254(d)(2) (1994) (superseded). The current version of AEDPA does not contain the "full and fair" language. Instead, AEDPA now states that federal courts must defer to factual and legal determinations with "respect to any claim that was adjudicated on the merits in the state court proceedings." 28 U.S.C. § 2254(d). The presumption of correctness is retained in the current statute and requires a habeas petitioner to rebut that presumption by "clear and convincing" evidence. 28 U.S.C. § 2254(e)(1).

There are two distinct but related Circuit splits on the application of these provisions. First, there is a question of whether and when a federal court must review the procedural adequacy of the state court's fact-finding in determining whether to defer to state court factual findings under § 2254(d)(2). Second, there is a question of whether a petitioner must first overcome § 2254(e)(1)'s presumption of correctness before relief can be granted under § 2254(d)(2). The manner in which courts evaluate these issues overlap to some extent, but the outcome is the same for both: the level of deference a federal court owes the factual findings of the state court will vary based on what Circuit a petitioner is in.

Granting certiorari on one or both of the Circuit splits presented by this case will allow this Court to end the disparate outcomes received by habeas petitioners across the country.

I. THERE IS AN INTRACTABLE CIRCUIT SPLIT ON WHETHER A FEDERAL COURT MAY REVIEW THE PROCEDURAL ADEQUACY OF THE STATE COURT'S DECISION UNDER SECTION 2254(D)(2)

The Circuits are split on whether and how to review the state court fact-finding processes as part of its analysis of whether the state court factual findings are unreasonable under § 2254(d)(2).

The Ninth Circuit has a well-developed body of case law that holds that when state courts make factual findings based on a defective fact-finding process, those findings result in an "unreasonable determination" of the facts under § 2254(d)(2),

thus allowing federal courts to review the claims *de novo*. *See, e.g., Taylor v. Maddox*, 366 F.3d 992, 1001 (9th Cir. 2004), *overruled on other grounds by Murray v. Schriro*, 745 F.3d 984, 999–1000 (9th Cir. 2014); *Earp v. Ornoski*, 431 F.3d 1158 (9th Cir. 2005). Relevant here, the Ninth Circuit deems fact-finding procedures flawed when a state court fails to grant a petitioner an evidentiary hearing on credibility or testimonial issues or ignores evidence that supports a petitioner's claim. *Taylor v. Maddox*, 366 F.3d 992, 1001 (9th Cir. 2004); *Velasquez v. Ndoh*, 824 F. App'x 498, 501 (9th Cir. 2020) (holding state court's refusal to grant evidentiary hearing resulted in decision based on unreasonable determination of facts).

Likewise, the Sixth and Seventh Circuits follow *Taylor*'s approach. *See Stermer v. Warren*, 959 F.3d 704, 721 (6th Cir. 2020) ("if a review of the state court record shows that additional fact-finding was required under clearly established federal law or that the state court's factual determination was unreasonable, the requirements of § 2254(d) are satisfied and the federal court can review the underlying claim on its merits."); *McManus v. Neal*, 779 F.3d 634, 660–61 n.12 (7th Cir. 2015) (noting that while the standard of review under AEDPA is deferential, federal due process standards must still apply).

The Tenth Circuit also cites to *Taylor* with approval. In *Smith v. Aldridge*, 904 F.3d 874, 882 (10th Cir. 2018), the Tenth Circuit found that when a state court denies

a request for an evidentiary hearing, the failure to hold a hearing can render the court's subsequent factual findings unreasonable under § 2254(d)(2). Before the failure to hold a hearing is deemed unreasonable, however, the Tenth Circuit requires a finding that "reasonable minds" would agree that the state court needed to hold a hearing to make those factual determinations. *Smith*, 904 F.3d at 882; *see also Ersland v. Bear*, 750 F. App'x 649, 654 (10th Cir. 2018) (finding that "failing to hold an evidentiary hearing may so affect a state court's fact-finding process that it calls into question the reasonableness of its factual determination.").

The Fifth Circuit, however, takes the opposite approach. In *Valdez v. Cockrell*, 274 F.3d 941, 954 (5th Cir. 2001), the Fifth Circuit held that whether a petitioner received a "full and fair" hearing in state court is not relevant to whether AEDPA deference applies. In the view of the Fifth Circuit, the omission of the "full and fair" language from the amendments to AEDPA means that Congress intended that the limitations of § 2254 apply regardless of whether the state court afforded petitioner a procedurally fair process to litigate his claims. *Id.* at 951 n.17; *see also Wardrip v. Lumpkin*, 976 F.3d 467, 476 (5th Cir. 2020) (holding district court erred by finding that denial of evidentiary hearing was unreasonable factual determination).

The First, Third, Fourth, and Eleventh Circuits appear to fall somewhere in the middle of the spectrum. On the one hand, the First, Third, and Fourth Circuits follow the Fifth Circuit's approach in finding that AEDPA does not make deference

to state court fact-finding dependent on the adequacy of the state court's fact-finding procedures. *Sharpe v. Bell*, 593 F.3d 372, 378 (4th Cir. 2010); *Teti v. Bender*, 507 F.3d 50, 59 (1st Cir. 2007); *Rolan v. Vaughn*, 445 F.3d 671, 679 (3d Cir. 2006). Although these courts do not consider a state court's fact-finding procedures in assessing whether deference applies, they may consider such procedures when determining whether a petitioner has successfully rebutted state court factual findings by clear and convincing evidence. *Sharpe*, 593 F.3d at 378; *Teti*, 507 F.3d at 59; *Rolan*, 445 F.3d at 679.

In the Eleventh Circuit's decision in *Landers v. Warden*, *Att'y Gen. of Ala.*,776 F.3d 1288, 1297 (11th Cir. 2015), the court noted that there is no binding Supreme Court (or Eleventh Circuit) precedent on whether § 2254(d)(2) deference "is conditioned on a state court having held an evidentiary hearing . . . ." *Id.* Citing to *Shriro v. Landrigan*, 550 U.S. 465, 471 (2007), it recognized that this Court "seems to have foreclosed a per se rule that a state court must conduct an evidentiary hearing to resolve every disputed factual question." *Landers*, 776 F.3d at 1297. But it recognized the "possibility that a state court's fact-finding procedure could be so deficient and wholly unreliable as to result in an unreasonable determination of the facts under § 2254(d)(2) and to strip its factual determinations of deference." *Id.* That said, the Eleventh Circuit does not appear to have relied on *Landers* in the years since as a basis to refuse to defer to a state court's factual determinations on the

ground that its fact-finding was deficient, putting into question whether the Eleventh Circuit in fact follows the statement in *Landers*.

These disparate outcomes amongst the Circuits have life-and-death ramifications for habeas petitioners. Under the Ninth Circuit's approach, courts have "held repeatedly that where a state court makes factual findings without an evidentiary hearing or other opportunity for the petitioner to present evidence, the fact-finding process itself is deficient, and not entitled to deference." *Jones v. Ryan*, 52 F.4th 1104, 1120 (9th Cir. 2021) (citation omitted), *reversed and remanded on other grounds*, *Thornell v. Jones*, 602 U.S. 154 (2024). But if the requirements of § 2254(d)(2) do not impose any reasonableness of process, then federal courts will end up deferring to unfair state processes in violation of due process, "sealing the state's unfairness in the protective gloss of the AEDPA." Justin Marceau, *Don't Forget Due Process: The Path Not (Yet) Taken in § 2254 Habeas Corpus Adjudications*, 62 HASTINGS L.J. 1, 58 (2010). As this Court has cautioned, AEDPA "deference does not imply abandonment or abdication of judicial review." *Miller-El*, 537 U.S. at 340. Because the split remains, habeas petitioners will have different standards applied to their claims based not on the statutory language but on the vagaries of geography. This Court should intervene and resolve this important question.

II. THERE IS AN ENTRENCHED CIRCUIT SPLIT ON WHETHER 2254(e)(1) IS A PREREQUISITE TO RELIEF UNDER 2254(d)(2)

The relationship between §§ 2254(d)(2) and (e)(1) has split the Courts of Appeals for two decades now. This Court granted *certiorari* on the issue in 2010, *Wood v. Allen*, but decided the case on other grounds. 558 U.S. 290, 300 (2010). Yet the question of whether § 2254(e)(1) is a prerequisite to relief under § 2254(d)(2) divides the Circuits and is ripe for this Court's intervention.

In the Ninth Circuit, § 2254(e)(1) does not apply to cases where petitioners bring challenges under § 2254(d)(2) when the challenge is "based entirely on the state record." *Taylor*, 366 F.3d at 999. In this circumstance, a federal habeas court looks only to § 2254(d)(2) to determine whether the state court factual findings are unreasonable. *Id*. Such unreasonable determinations "come in several flavors," including "where the fact-finding process itself is defective." *Mike v. Ryan*, 711 F.3d 998, 1007 (9th Cir. 2013) (quoting *Taylor*, 366 F.3d at 1000) (finding state court's fact-finding process defective because of prosecution's suppression of evidence under *Brady* and state court's failure to consider all evidence that was presented to it). If the findings are unreasonable, then there would be no need to consider whether those findings are correct under § 2254(e)(1) since the court would review the claims *de novo* and grant relief if it reaches an independent determination that the claims are meritorious. *See Kirkpatrick v. Chappell*, 950 F.3d 1118, 1132 n.3 (9th Cir. 2020) (§ 2254(e)(1) does not apply if state court's fact-finding process deemed to be

deficient under *Taylor*). If the state court determinations are not unreasonable, then its findings are entitled to deference regardless of the standard of proof.

Likewise, the Third Circuit recognizes that "the language of § 2254(d)(2) and § 2254(e)(1) implies an important distinction: § 2254(d)(2)'s reasonableness determination turns on a consideration of the totality of the 'evidence presented in the state-court proceeding,' while the § 2254(e)(1) contemplates a challenge to the state court's individual factual determinations . . ." *Lambert v. Blackwell*, 387 F.3d 210, 235 (3d Cir. 2004). *But see Rountree v. Balicki*, 640 F.3d 530, 537–38 (3d Cir. 2011) (holding § 2254(e)(1) as prerequisite to § 2254(d)(2)).

The Ninth Circuit's approach reconciles §§ 2254(d)(2) and (e)(1) in a way that gives each a role to play in a coherent and workable framework. It also finds support in this Court's caselaw. In *Miller-El*, this Court explained that it is improper for courts "to merge the independent requirements of §§ 2254(d)(2) and (e)(1)." 537 U.S. at 341. The Ninth Circuit's approach adheres to this command by keeping the requirements of §§ 2254(d)(2) and (e)(1) independent, meaning that a petitioner does not have to satisfy both to get relief.

The Eleventh Circuit rejected the Ninth Circuit's approach. *Pye v. Warden, Ga. Diagnostic Prison*, 50 F.4th 1025, 1040 n. 9 (11th Cir. 2022). In the Eleventh Circuit, in determining whether to grant relief under § 2254(d)(2), a federal habeas court begins by applying § 2254(e)(1) and presuming that a state court's factual

determinations are correct. *Pye*, 50 F.4th at 1034–35. If the habeas petitioner cannot overcome this presumption by clear and convincing evidence, the petitioner necessarily cannot satisfy § 2254(d)(2). *See Lamarca v. Sec'y, Dep't of Corr.*, 568 F.3d 929, 942 (11th Cir. 2009) (holding that because petitioner could not refute the state court findings by clear and convincing evidence, he did not establish an unreasonable determination of the facts). This application conflates the two provisions into one because a court in the Eleventh Circuit cannot evaluate the reasonableness of the state court's factual findings under § 2254(d)(2) outside of the confines of the clear and convincing evidence standard.[2] By layering § 2254(e)(1) on top of § 2254(d)(2), the Eleventh Circuit has created an almost insurmountable barrier to questioning whether a state factual determination was unreasonable for purposes of § 2254(d)(2)—the explicit purpose of that section. And in so doing, the Eleventh Circuit both renders § 2254(d)(2) superfluous and contradicts *Miller-El's* requirement to keep §§ 2254(d)(2) and 2254(e)(1) separate.

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[2] Several other circuits also apply § 2254(e)(1) in some fashion in every case presenting a § 2254(d)(2) challenge. *See Field v. Hallett*, 37 F.4th 8, 16–17 (1st Cir. 2022); *Hyman v. Hoekstra*, 41 F.4th 272, 286 (4th Cir. 2022); *Neal v. Vannoy*, 78 F.4th 775, 783 (5th Cir. 2023); *Michael v. Butts*, 59 F.4th 219, 225 (6th Cir. 2023); *Shannon v. Hepp*, 27 F.4th 1258, 1268–69 (7th Cir. 2022); *Stephen v. Smith*, 963 F.3d 795, 800 (8th Cir. 2020); *Johnson v. Martin*, 3 F.4th 1210, 1218–19 (10th Cir. 2021).

This split causes disparate outcomes. By allowing review of the state court's fact-finding process before any presumption of correctness attaches, petitioners in the Ninth Circuit have a mechanism to litigate a deficient fact-finding process to which other federal courts would defer. *E.g.*, *Hurles v. Ryan*, 752 F.3d 768, 790 (9th Cir. 2014) (declining to apply § 2254(e)(1) to state court factual findings because petitioner satisfied § 2254(d)(2) on grounds that state court did not provide him with evidentiary hearing or another mechanism to contest court's version of events, despite its conclusion that petitioner offered no factual evidence to support his allegations). On the other hand, the Eleventh Circuit's requirement that a petitioner satisfy § 2254(e)(1) as a threshold matter effectively renders challenges to the state's court's fact-finding process unavailable. To overcome § 2254(e)(1)'s presumption of correctness, a petitioner must show by clear and convincing evidence that the state court's factual determination was incorrect. But if a petitioner's basis for relief is that the state court's fact-finding process was defective due to a lack of meaningful opportunity to present evidence, the petitioner necessarily cannot rebut § 2254(e)(1)'s presumption because there would be a lack of evidence in the state court record on which to rely. *See Hayes v. Sec'y, Fla. Dep't of Corr.*, 10 F.4th 1203, 1225 (11th Cir. 2021) (Newsom, C.J., concurring).

There should be uniformity amongst the Circuits on this issue and review by this Court will assist lower courts in delineating the opaque relationship between these two provisions. This Court should grant *certiorari*.

III. THIS CASE IS AN IDEAL VEHICLE TO RESOLVE ONE OR BOTH OF THESE CIRCUIT SPLITS

This case offers the Court an opportunity to resolve one or both Circuit splits together, or to resolve one of them independently.

A. This Case Presents a Clean Way to Resolve the Question of Whether AEDPA Allows a Review of the Fact-Finding Processes of State Courts

The unique circumstances of this case offer this Court a narrow vehicle to resolve the question of whether a state court's factual findings are entitled to deference under AEDPA when it denies an evidentiary hearing to test and rebut evidence, including testimonial evidence, relied upon by the State to defeat a *Brady* claim. The facts regarding Reynolds' continual requests for an evidentiary hearing to cross-examine those offering affidavits in opposition to his *Brady* claim are not in controversy. Despite noting the incomplete fact-finding, the Eleventh Circuit felt constrained to defer to the state court's factual findings under AEDPA. This case exposes the exact conflict of whether the federal habeas court should afford deference to the state court without determining if that fact-finding was complete.

It is undisputed that state courts are not required to conduct evidentiary hearings in all instances as a prerequisite to its factual findings receiving AEDPA

deference. Numerous federal courts, including the Ninth Circuit, recognize that a state court evidentiary hearing is not a mandatory requirement for AEDPA deference. *E.g., Hibbler v. Benedetti*, 693 F.3d 1140, 1147 (9th Cir. 2012); *Sharpe*, 593 F.3d at 378; *Teti*, 507 F.3d at 61–63.

But there are many good reasons why an evidentiary hearing was needed *here*, not least of which is because: (1) the ACCA recognized that Reynolds had a colorable *Brady* claim; (2) the State submitted written statements that went to the heart of that *Brady* claim; and (3) the witnesses were not subjected to cross-examination on their statements and were not confronted with the specific evidence that contradicted their claims that there was no deal. Such process would have ensured that the fact-finding conducted by the Rule 32 court was complete by allowing Reynolds to confront those who offered testimony against him and to test the reliability of their statements in the crucible of cross-examination.

The right to confront and cross-examine witnesses is one of the most fundamental aspects of due process. In criminal proceedings, that due process right is reflected in the Confrontation Clause of the Sixth Amendment. *Lee v. Illinois*, 476 U.S. 530, 540 (1986). While the Sixth Amendment does not apply to civil proceedings such as habeas, the Constitution affords due process to ensure fair procedures in civil proceedings. And cross-examination is critical to protecting litigants' rights and to ensuring the accuracy and reliability of the evidence before

the courts. *Id*. (right to confront and to cross-examine witnesses is a functional right that promotes reliability in criminal trials); *see also California v. Green*, 399 U.S. 149, 158 (1970) (the mechanisms of confrontation and cross-examination advance the pursuit of truth in criminal trials).

Justice Scalia's opinion in *C.f. Crawford v. Washington*, 541 U.S. 36 at 61 (2004) recognized that defendants should be allowed to confront witnesses and cross-examine them, especially when it comes to "testimonial" statements. The foundation of *Crawford* remains:

> To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination . . . .

541 U.S. at 61; *see also Maryland v. Craig*, 497 U.S. 836, 845–46 (1990) (citing *Mattox v. United States*, 156 U.S. 237, 242–43 (1895)) (accused should have the opportunity to test the recollection, demeanor, and credibility of the witness); *Goldberg v. Kelly*, 397 U.S. 254, 267–70 (1970) (disclosure of and opportunity to refute crucial for ensuring the accuracy and fairness of the fact-finding process).

Cross-examination provides the "principal means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 316 (1974). Confrontation

> (1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth"; (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the **witness** making his statement, thus aiding the jury in assessing his credibility"

Green, 399 U.S. at 158 (footnote omitted). By providing a forum to scrutinize the evidence, evidentiary hearings allow for the examination of witness credibility and the potential invalidity of certain testimony and ensure that decisions are based on credible information. *See Craig*, 497 U.S. at 845–46; *Lilly v. Virginia*, 527 U.S. 116, 123–24 (1999); *see also Williams v. Taylor*, 529 U.S. 420, 442–43 (2000) (in habeas proceeding, grant of evidentiary hearing on jury bias and prosecutorial misconduct was correct where factual basis of claims was not reasonably available during state habeas proceedings).

Here, the Rule 32 court precluded Reynolds from cross-examining those witnesses who offered affidavits against him to defeat his constitutional *Brady* claim. As this Court has recognized, a *Brady* claim goes to the heart of due process and a defendant's right to a fair trial. *See United States v. Bagley*, 473 U.S. 667, 675 (1985) ("The Brady rule is based on the requirement of due process. Its purpose is … to ensure that a miscarriage of justice does not occur."); *Moore v. Illinois*, 408 U.S. 786, 809–10 (1972) (Marshall, C.J., concurring in part and dissenting in part) (*Brady*

obligations are "the essence of due process of law. It is the State that tries a man, and it is the State that must insure that the trial is fair"). Rather than ferret out the truth, the Rule 32 court substituted its own judgment of the affiants in lieu of cross-examination. *Crawford*, 541 U.S. at 61 ("Admitting statements deemed reliable by a judge is fundamentally at odds with the right to confrontation."); *Hemphill v. New York*, 595 U.S. 140, 152–53, 156 (2022) ("[t]he Confrontation Clause requires that the reliability and veracity of the evidence against a criminal defendant be tested by cross-examination, not determined by a trial court."); *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986) (constitutionally improper for trial court to prohibit inquiry into witness' bias or otherwise impeach witness); *see also Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 174–75 (1988) (in civil action, court abused its discretion where it curtailed cross-examination based on its factual determinations).

That the ACCA provided the Rule 32 court with an option—hold an evidentiary hearing or receive evidence in the form of paper submissions—did not provide the Rule 32 court with license to disregard Reynolds' due process rights to confront the witnesses who offered testimony against him and to fully litigate the circumstances surrounding the arrangement between West and the State. Had the parties submitted only documents or prior testimony that had been subjected to cross-examination to advance their respective positions, the Rule 32 court may very

well have received and considered such evidence with no harm to Reynolds' due process rights.

But where, as here, new affidavits were submitted by the State, with no mechanism for Reynolds to challenge those statements, Reynolds' right to due process could only be guaranteed through a proceeding that permits cross-examination—an evidentiary hearing. *United States v. Raddatz*, 447 U.S. 667, 677 (1980) (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (the guarantees of due process further call for a "hearing appropriate to the nature of the case."); *Blackledge v. Allison*, 431 U.S. 63, 82 n.25 (1977) ("When the issue is one of credibility, resolution on the basis of affidavits can rarely be conclusive...."') (internal quotation marks and citation omitted). *Cf. Hunt v. State*, 940 So.2d 1041, 1050 (Ala. Crim. App. 2005) (in evidentiary hearing under Rule 32.9, court did not err in excluding affidavits where whereabouts of witnesses were unknown and State had no opportunity to cross-examine affiants); *Hamm v. State*, 913 So.2d 460, 478–79 (Ala. Crim. App. 2002) (affidavit properly rejected by court in evidentiary hearing under Rule 32.9 where State had no opportunity to question affiant); *Callahan v. State*, 767 So.2d 380, 403 (Ala. Crim. App. 1999) ("[p]resenting the testimony by affidavit prevented the State from confronting the affiant, and did not allow the trial court the opportunity to closely examine the complete testimony."). While there is not, nor should there be, a *per se* right to an

evidentiary hearing in postconviction cases, *Landrigan*, 550 U.S. at 476, there will be many cases where a hearing is not required because a claim is not colorable or because there are no further facts that need to be developed—that was not the record before the Rule 32 court here.

Reynolds was deprived of his fundamental right to due process. The state court's fact-finding procedure—resolving a credibility dispute on the basis of dueling affidavits, without an evidentiary hearing and without ensuring that Reynolds had all the documents within the State's possession relevant to his claim—was so inadequate that its factual determinations should not have been accorded deference under AEDPA. Deference to an unfair proceeding, where it is the only forum for vindicating a federal right, cannot be reconciled with due process. Instead, due process precludes the application of § 2254(d)(2) deference to a claim adjudicated in a procedurally unreasonable manner by the state court. Had Reynolds been in a different circuit, the refusal of the state court to allow him discovery and an evidentiary hearing to test and rebut the State's evidence on his *Brady* claim might indeed have stripped its factual findings of any deference.

This case allows the Court to set forth the parameters for when courts may review a state court's fact-finding process.

B. This Case Presents a Unique Opportunity to Resolve the Question of Whether § 2254(e)(1) Applies When Petitioners Challenge a State Court's Factual Findings Under § 2254(d)(2)

When the Eleventh Circuit denied Reynolds' claim that the state court's refusal to allow him an evidentiary hearing was an unreasonable determination of the facts, the court cited to § 2254(e)(1) and *Pye*, holding that Reynolds could not show by clear and convincing evidence that the Rule 32 court's finding that there was no agreement between West and the State was an unreasonable determination of the facts. Pet. App. 23a. Because it is unclear whether the court's conclusion would have been different had it not required Reynolds to meet the "clear and convincing" standard of § 2254(e)(1), but had instead analyzed his claims solely under § 2254(d)(2), this case presents an ideal vehicle for the Court to resolve a question that it has deferred for many years now: whether § 2254(e)(1) applies when petitioners challenge findings under § 2254(d)(2) solely on the state court record.

The facts of this case demonstrate why imposing the § 2254(e)(1) standard on a (d)(2) challenge essentially eliminates any federal court review under (d)(2). Because the state court did not give Reynolds a chance to cross-examine the three witnesses on the existence of a deal and to challenge their version of events relating to the deal memorandum, Reynolds was precluded from gathering the type of evidence that the "clear and convincing" standard requires. And by using § 2254(e)(1) as the threshold inquiry, rather than § 2254(d)(2) standing alone, the

Eleventh Circuit was able to completely sidestep Reynolds' process argument that he was deprived of the ability to obtain the evidence on his colorable *Brady* claim. The fact that Reynolds has not been given a hearing is relevant (in some Circuits) to the analysis of § 2254(d)(2) but that fact defeats his ability to prove his claim if he is required to first rebut the presumption of correctness of § 2254(e)(1). Had the Eleventh Circuit used the framework of the Ninth Circuit, § 2254(e)(1) would not have limited the Eleventh Circuit's review of whether the state court's refusal to hold an evidentiary hearing rendered its factual findings unreasonable under § 2254(d)(2). Instead, the Eleventh Circuit could have engaged in its statutory duty to make an overall reasonableness determination in light of the state record.

This case cleanly presents the conflict inherent in §§ 2254(d)(2) and (e)(1) and allows the Court to rectify the confusion percolating amongst the courts below.

CONCLUSION

Reynolds respectfully asks this Court to grant *certiorari*.

Respectfully submitted,

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[DO NOT PUBLISH]

In the United States Court of Appeals

For the Eleventh Circuit

No. 22-14015

MICHAEL WAYNE REYNOLDS,

Petitioner-Appellant,

versus

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Alabama
D.C. Docket No. 4:18-cv-00236-RDP

Before JORDAN, LUCK, and LAGOA, Circuit Judges.

PER CURIAM:

Michael Wayne Reynolds was sentenced to death in 2007 after he was found guilty on five counts of capital murder. Since the conclusion of his direct-appeal proceedings, he has unsuccessfully sought post-conviction relief in the state and federal courts.

We granted Mr. Reynolds a certificate of appealability to determine three issues: (1) whether the prosecution violated *Brady v. Maryland*, 373 U.S. 83 (1963), and/or *Giglio v. United States*, 405 U.S. 150 (1972), and their progeny with respect to the testimony of Adrian Marcella West; (2) whether the district court properly denied the *Brady*/*Giglio* claims without discovery or an evidentiary hearing; and (3) whether counsel rendered ineffective assistance by failing to secure the admission of Chad Martin's confession to the murders.

After a review of the record, and with the benefit of oral argument, we affirm the district court's denial of habeas corpus relief. We also affirm the district court's denial of the requests for discovery and an evidentiary hearing.

I

In October of 2007, an Alabama jury found Mr. Reynolds guilty on five counts of capital murder. The jury recommended, by a vote of 12-0, that Mr. Reynolds be sentenced to death. The trial court accepted the jury's recommendation and sentenced Mr. Reynolds to death.

A

The facts underlying Mr. Reynolds' conviction were described in detail by the Alabama Court of Criminal Appeals (ACCA) on direct appeal. *See Reynolds v. State*, 114 So. 3d 61, 74–81 (Ala. Crim. App. 2010). We provide a summary below.

During the early morning hours of Sunday, May 25, 2003, Charles Martin III, his wife, Melinda Martin, and their 8–year–old daughter, Savannah Martin, were murdered in their home. All three of them were stabbed, doused in gasoline, and set on fire. [1]

The murders were discovered later that morning when Mrs. Martin's father, Jerry Veal, drove by the Martin home. He noticed that Mrs. Martin's car was in the driveway at a time during which he expected his daughter to be at church. Mr. Veal called Mrs. Martin and received no response. Concerned, he drove back to the Martin home. He knocked on the carport door, but no one answered. Mr. Veal then opened the door, discovered that the kitchen was in disarray, and saw Mr. Martin lying there in a pool of blood. Mr. Veal returned outside and told his wife, who had been waiting in the car, what he had seen. Mr. Veal's wife called 911.

While Mr. Veal was on the phone with a 911 dispatcher, he saw James Mulkey, a retired police officer, drive by the home. Mr. Veal, who knew Mr. Mulkey, flagged him down and told him what he had seen in the Martin home.

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[1] In the remainder of the opinion, we refer to Charles Martin III as Mr. Martin; to Melinda Martin as Mrs. Martin; and to Savannah Martin as Savannah.

Mr. Mulkey then went to the carport, opened the door, and saw Mr. Martin laying on the kitchen floor. Mr. Mulkey did not go into the home at that time because he could smell gasoline and gunpowder. Paramedics arrived shortly thereafter and went inside with Mr. Mulkey. They discovered the bodies of Mrs. Martin and her daughter in one of the bedrooms. Mrs. Martin was found on the floor of the bedroom with slits in her clothing that were consistent with stab wounds. Savannah was found on the bed with stab wounds.

Investigators then arrived and processed the scene. While doing so, they found a bloody footprint and a blood drop outside the carport door. They also discovered three bloody shoe prints (one of which matched Mr. Reynolds) on the kitchen floor, as well as blood droplets in the hallway. In the kitchen they noticed a utensil drawer open with blood underneath.

The investigators also found a phone cord that extended from the wall by the bed in the room where Mrs. Martin was found, but no telephone was attached to the cord. The bedding in the room where Mrs. Martin and Savannah were found was removed from the scene. Later that day, when the bedding was laid out to dry, a television remote and what appeared to be a piece from a pair of glasses fell out.

All three members of the Martin family were found to have stab wounds. They also each had chemical burns.

B

The police interviewed and questioned several people after the murders were discovered, including Chad Martin, who was Mr. Martin's nephew, and John Langley, a friend of Chad Martin who lived in the same neighborhood as the Martins.

Chad Martin provided three different statements about his knowledge of and involvement in the murders.

In his first statement, Chad Martin denied having any involvement in the murders. This denial was reduced to writing and signed by Chad Martin.

In his second statement, however, Chad Martin confessed to being involved in and committing one of the murders. He told the police that he and two friends, Mr. Langley and John Zook, had killed the Martins. According to Chad Martin, the group had gone to the Martin home to obtain drugs from Mr. Martin. Mr. Zook stabbed Mr. Martin after he refused to give them any drugs. Mr. Langley then followed Mrs. Martin into the hallway, where he stabbed her. Afterwards, Mr. Langley asked Chad Martin to kill Savannah. According to Chad Martin, Savannah "looked at [him] with those big brown eyes wide open" before he stabbed her. Chad Martin also said that he became overwhelmed with emotion after he stabbed Savannah and kept asking aloud "Why did he make me stab her?" and "Why did he make me stick that little girl in the neck?" Chad Martin then got gasoline from Mr. Langley's car, and he doused Mr. and Mrs. Martin with it. He also poured some gasoline around the kitchen.

This confession was not memorialized in an official statement signed by Chad Martin. It was, however, detailed in two police reports. One report, dated May 25, 2003, was prepared by Sergeant Dale Fincher. The other report, dated May 29, 2003, was signed by Captain Roy Harbin.

Several days later, however, Chad Martin returned to the police station with an attorney and recanted his confession. He provided a statement that was consistent with his initial denial of any involvement in the murders. According to Chad Martin, the police had questioned him for about 18 hours, and he confessed to the murders after he decided to "tell them anything" so he could "get out of there."

C

Adrian Marcella West, Mr. Reynolds' girlfriend at the time of the murders, provided an account at trial of her involvement, and that of Mr. Reynolds, in the murders. According to Ms. West, Mr. Reynolds was responsible for the murders.

Ms. West testified that, either late at night on May 24, 2003, or very early on the morning of May 25, 2003, she drove Mr. Reynolds to the Martin home in a car that belonged to Sandra Roberts, the girlfriend of Mr. Reynolds' father (Harold Reynolds). Mr. Reynolds lived with his father at the time of the murders. Mr. Reynolds told Ms. West that they were going to the Martin home "to get some money." *Reynolds*, 114 So. 3d at 74. Mr. Reynolds and Mr. Martin were acquainted and had been for some years.

At the Martin home, Ms. West parked in the driveway, where she stayed while Mr. Reynolds went inside. Mr. Reynolds was not wearing shoes and entered the home with a scabbard that held a dagger-style knife. Ms. West had seen the knife before at Harold Reynolds' home.

Mr. Martin opened the door to let Mr. Reynolds in. He also waved at Ms. West. Some moments later, Ms. West heard Mrs. Martin scream, and that caused her to run into the home. There, she saw Mr. Martin lying on the kitchen floor. She also heard Mrs. Martin scream again from the back of the house. Ms. West then went towards the bedroom. She saw Mr. Reynolds stabbing Mrs. Martin, who was bent over the bed.

Ms. West explained that Mr. Reynolds accidentally stabbed her when she tried to intervene and stop him from continuing to stab Mrs. Martin. Mr. Reynolds screamed at her and told her to take the telephone in the home and Mrs. Martin's purse and return to the car to wait for him. He also handed her two knives she had not seen before.

Doing as she was told, Ms. West grabbed the purse, the telephone, and the knives and left the bedroom. Before exiting, she saw that Mrs. Martin was slouched over and that Savannah was standing on the bed. Ms. West felt faint on her way out and leaned on the wall in the hallway, and also against the kitchen counter. Ms. West placed the items she removed from the home on the floorboard of the front passenger seat in the car.

At some point, Mr. Reynolds returned to the car, grabbed one of the knives Ms. West had left with, and went back into the home. Mr. Reynolds then came back to the car, instructed Ms. West not to leave, and then returned once again to the home. Ms. West said that she followed Mr. Reynolds' command because she feared for her life.

Mr. Reynolds returned to the car a third and final time. He got into the car and told Ms. West, who did not realize that she had been hurt, that she had been stabbed. He also said he should be the one to drive them back. Ms. West refused and drove back to Harold Reynolds' home. Ms. West said she could see the orange glow of a fire at the Martin home before they left.

When they arrived, Mr. Reynolds took the clothes from Ms. West and told her to take a shower. Mr. Reynolds also later bandaged her arm. He told her that he had cleaned Sandra Roberts' car and that there was no blood in the car.

Ms. West explained that when she and Mr. Reynolds woke up the next morning, she noticed that the pair of glasses Mr. Reynolds had been wearing the day before were broken and missing a piece. When she told Mr. Reynolds, he said that the missing piece would melt in the fire at the Martin home. Mr. Reynolds also told her that the knives from the previous night were under a truck, and

that the clothes they had been wearing that night were in a white bag.[2]

On the morning of May 25, 2003, the day the murders were discovered, a man named Donald Harvey came to Harold Reynolds' home to ask Mr. Reynolds to install a radio in his car. Mr. Reynolds obliged and Mr. Harvey paid him with cocaine.

After this exchange, Ms. West saw Mr. Harvey drive into an alley behind Harold Reynolds' home. She went into his car, and Mr. Harvey asked her if Mr. Reynolds was involved in the murders of the Martins. Ms. West confirmed that he was. She and Mr. Harvey both agreed to destroy evidence of Ms. West's involvement in the crimes. To that end, they purchased gas and drove to a place in the woods. There they burned the clothes that Ms. West and Mr. Reynolds had been wearing at the Martin home. Then they threw the knives into a river and the telephone base into the woods.

A few days later, Ms. West told a former employer, who happened to be an attorney, what she knew about the murders. The former employer contacted the district attorney's office, which then took Ms. West's statement. With the information Ms. West provided, the police located the burn pile of the clothes she and Mr. Reynolds wore on the day of the murders. They also

[2] At trial, the prosecution introduced the piece from Mr. Reynolds' glasses, which was found at the Martin home. The piece had Mrs. Martin's DNA on it.

found a telephone base, which was established at trial to have been removed from the Martin home.

D

Sandra Roberts, Harold Reynolds' girlfriend at the time, also testified at trial. Ms. Roberts explained that she was asleep at Harold Reynolds' home when Ms. West and Mr. Reynolds returned during the early hours of Sunday, May 25, 2003. She was awakened when Mr. Reynolds placed the keys to her car on a nightstand. She got out of bed shortly after that and went into the kitchen, where Mr. Reynolds joined her and gave her money to buy some drugs. Ms. Roberts left to purchase crack cocaine.

Ms. Roberts and Mr. Reynolds divided the crack cocaine when she returned. She ingested her portion while Mr. Reynolds took some to his bedroom. According to Ms. Roberts, Mr. Reynolds returned shortly and asked her to have sex, but she refused. She also testified that he wanted more drugs but said that Ms. West would not give him any more money. Mr. Reynolds asked Ms. Roberts to speak to Ms. West to see if she would give them the money. According to Ms. Roberts, Ms. West acted strangely and was unable to hold a conversation. She also testified that she observed Ms. West walking with her arms folded.

Ms. Roberts decided to return to her own home shortly after her interactions with Ms. West and Mr. Reynolds. On her drive home, she noticed a cordless telephone, which she had not seen before, on the floorboard of her car.

E

Mr. Reynolds testified at trial and provided a different version of events. According to Mr. Reynolds, he and Ms. West used drugs, including crack cocaine, with Ms. Roberts during the day on May 24, 2003, and then again later that evening. He then sent Ms. West and Ms. Roberts to obtain more drugs while he stayed home and eventually fell asleep. Sometime after midnight, he was awoken by Ms. West, who told him that the Martins had been murdered, and that she had been stabbed when she tried to stop someone from stabbing Mrs. Martin. Mr. Reynolds asked Ms. West who had stabbed her, but she would not say who. He then grabbed a first aid kit and went outside with Ms. West barefoot so that his father would not hear them. He also tended to her stab wound. At her insistence, she drove them both to the Martin home to remove all evidence that she had been there during the murders.

When they arrived, Mr. Reynolds asked Ms. West to remain in the car while he went into the home barefoot. Inside, he saw Mr. Martin lying on the floor with blood around him. He then went into the bedroom to check on Mrs. Martin because Ms. West had told him that she was stabbed in the bedroom. He did not see Mrs. Martin until he tripped over her body and fell. When he fell, his glasses came off. Mrs. Martin, according to Mr. Reynolds, was lodged between the door and the bed.

Mr. Reynolds then went back to Ms. West in the car and asked her what she had touched in the Martin home. Ms. West could not remember specifically what she had touched, so Mr.

Reynolds went back into the home to wipe down any trace of Ms. West having been there. But he did not know "where to begin" because everything "was a mess." So he decided to "burn the house down." He grabbed a "gas jug" he had seen by the side door, doused the house, lit it on fire, and went back to Ms. West in the car outside. They then drove back to Harold Reynolds' home. Mr. Reynolds testified that he rewrapped Ms. West's arm when they arrived there.

After they returned, he gave Ms. Roberts $10 to buy them drugs. Ms. Roberts left and returned about five minutes later with "dope." Mr. Reynolds and Ms. Roberts did some "dope" together in the kitchen and then he took some back to Ms. West, who was in the bedroom. Ms. West did not want any drugs, so he went back to the kitchen and ingested the rest of the drugs. He then fell asleep and did not wake up until later that morning. He said that later that day he tried to get Ms. West to tell him what had happened at the Martin home, but she refused to say anything more.

F

Based on her conduct, Ms. West was charged with unlawful distribution of a controlled substance and first-degree hindering prosecution. A year before the murders, on August 6, 2002, Ms. West had also been arrested for unlawful distribution of a controlled substance, second-degree unlawful possession of marijuana, and unlawful possession of drug paraphernalia.

Ms. West pled not guilty to both sets of charges. Her trials were continued a handful of times. After her testimony in Mr.

Reynolds' trial, Ms. West pled guilty, in a blind plea, to the charges of distribution of a controlled substance and hindering prosecution. The remaining charges were dropped. Ms. West was sentenced to three years in prison, but she was released after serving only six months following a recommendation filed by the prosecution.[3]

G

Before trial, while the parties discussed logistics, Mr. Reynolds' counsel told the trial court that the defense had subpoenaed Sergeant Fincher, who had signed one of the reports that memorialized Chad Martin's confession to the murders, but had not received a response. Sergeant Fincher no longer lived in Alabama at the time of trial. Counsel also told the trial court that Sergeant Fincher was not considered a "critical" witness. Sergeant Fincher did not testify at trial.

At trial, Mr. Reynolds' counsel tried to introduce Chad Martin's confession through Captain Harbin, who had signed the second report containing Chad Martin's confession. Captain Harbin, however, could not authenticate the report because he said he had not prepared the report and had not been present for the entirety of Chad Martin's statement. Captain Harbin also testified that the report was not consistent with his recollection of Chad Martin's statement. As a result, the trial court did not allow the report to be admitted at trial. The trial court, however, clarified that it was only ruling that the report itself was not admissible, but that the defense

[3] We discuss Ms. West's plea and sentence in more detail later.

could ask Captain Harbin any questions without limitation on the subject matter. Mr. Reynolds' counsel, however, moved on to the next witness.[4]

H

At the conclusion of the trial, the jury found Mr. Reynolds guilty of five counts of capital murder. The five murder charges were made capital because: (1) two or more persons were killed by one act or pursuant to one scheme or course of conduct (Count I of the indictment); (2) the murder of Mr. Martin was committed during the course of a first-degree robbery (Count II of the indictment); (3) the murder of Mrs. Martin was committed during the course of a first-degree robbery (Count III of the indictment); (4) Savannah was less than 14 years of age when she was murdered (Count IV of the indictment); and (5) the murder of Savannah was committed during the course of a first-degree robbery (Count V of the indictment).

The jury also recommended, by a vote of 12-0, that Mr. Reynolds be sentenced to death. The trial court accepted the jury's recommendation and sentenced Mr. Reynolds to death.

Mr. Reynolds appealed his conviction and sentence to the ACCA, which affirmed. *See Reynolds*, 114 So. 3d at 162. He filed a petition for certiorari with the Alabama Supreme Court, but that

[4] Mr. Reynolds' counsel was also unable to introduce the confession through Chad Martin. Though he testified at trial, Chad Martin said he did not recall the details of the statement that included his confession.

petition was denied. His petition for a writ of certiorari with the United States Supreme Court was also denied.

III

Mr. Reynolds timely sought post-conviction relief pursuant to Rule 32 of the Alabama Rules of Criminal Procedure, asserting numerous claims. As relevant here, he alleged that (i) the prosecution failed to comply with its obligations under *Brady* and/or *Giglio* by failing to disclose that it had an agreement with Ms. West in exchange for her testimony at Mr. Reynolds' trial; and that (ii) he was denied effective assistance of counsel in violation of the Sixth Amendment due to his counsel's failure to introduce Chad Martin's confession.

The Rule 32 court summarily denied Mr. Reynolds' petition. On appeal, the ACCA remanded the matter back to the Rule 32 court on the *Brady*/*Giglio* claims. *See Reynolds v. State*, 236 So. 3d 189, 202 (Ala. Crim. App. 2015). The ACCA instructed the Rule 32 court to give Mr. Reynolds the opportunity to challenge the procedural bars the state asserted and to prove his *Brady*/*Giglio* claims, and to permit the state to present its own evidence in rebuttal. *See id.* Importantly, the ACCA explained that the Rule 32 court could comply with its instructions by either holding an evidentiary hearing or by receiving evidence in the form of evidentiary submissions in document form. *See id.*

On remand, the Rule 32 court issued a scheduling order that included a deadline for both parties to present evidentiary submissions on Mr. Reynolds' *Brady*/*Giglio* claims. Days after the issuance

of the scheduling order, Mr. Reynolds filed an initial discovery motion. The state opposed the motion, arguing that Mr. Reynolds had failed to establish good cause for his "overly broad" discovery requests. The Rule 32 court agreed with the state's response, and denied the motion.

Mr. Reynolds subsequently filed a motion asking for a 30-day extension to present his evidentiary submissions. He also asked the Rule 32 court to reconsider its ruling denying the motion for discovery. The Rule 32 court denied the motion for an extension but granted, in part, the motion to reconsider its denial of the motion for discovery. In partially granting the motion to reconsider, the Rule 32 court ordered the state to provide Mr. Reynolds "any and all files . . . pertaining to the prosecution of Adrian Marcella West for hindering prosecution, unlawful distribution of a controlled substance, possession of a controlled substance and/or drug paraphernalia."

After both parties filed their respective evidentiary submissions, the Rule 32 court denied Mr. Reynolds' request for relief on his *Brady*/*Giglio* claims. The Rule 32 court found that Mr. Reynolds' allegation of an agreement between Ms. West and the prosecution was unfounded because nothing in the record indicated such an agreement existed. The Rule 32 court noted that, on at least two occasions, Ms. West denied the existence of an agreement while testifying under oath. The Rule 32 court also explained that Ms. West, Ms. West's attorney, and the Chief Deputy District Attorney all averred in sworn statements that there was no

agreement. Accordingly, the Rule 32 court concluded that Mr. Reynolds had failed to meet his burden of proof on his *Brady*/*Giglio* claims.

The case was returned to the ACCA, which affirmed the Rule 32 court's decision. The ACCA explained that the Rule 32 court's order was supported by the record. The ACCA also stated that "the claims were insufficiently plead under Rules 32.3 and 32.6(b), [ ] were without merit, or were procedurally barred."

The ACCA also affirmed the dismissal of Mr. Reynolds' claims of ineffective assistance of counsel. With respect to counsel's failure to introduce Chad Martin's confession, the ACCA held that Mr. Reynolds had not pled facts sufficient to make a showing of a Sixth Amendment violation pursuant to *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The ACCA observed that though Mr. Reynolds argued that there were other people who could have authenticated the report containing the confession, he failed to plead facts "that would indicate that they could, in fact, do so." "More importantly," the ACCA stated, "[Mr.] Reynolds failed to plead how Chad Martin's confession was consistent with the defense's theory of the case," given that his strategy at trial was to limit his role to helping Ms. West cover her own involvement in the murders.

The Alabama Supreme Court denied certiorari review. Mr. Reynolds subsequently filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. In his petition, Mr. Reynolds raised numerous claims, including claims that the prosecution had

violated its *Brady*/*Giglio* obligations and that he had been denied the effective assistance of counsel. Mr. Reynolds also sought discovery and an evidentiary hearing on his claims.

The district court denied the § 2254 petition, concluding that Mr. Reynolds had not met his burden of showing that he was entitled to relief on any of his claims. The district court also denied the requests for discovery and for an evidentiary hearing because Mr. Reynolds had not shown that either was warranted. The district court also declined to issue a certificate of appealability.

Mr. Reynolds sought our review of the district court's denial. We issued a certificate of appealability to address three issues: (1) whether the prosecution violated *Brady* and/or *Giglio* and their progeny with respect to the testimony of Ms. West; (2) whether the *Brady*/*Giglio* claims were properly denied without discovery and an evidentiary hearing; and (3) whether counsel rendered ineffective assistance by failing to secure the admission of Chad Martin's confession. We address each of these issues in turn.

IV

We review a district court's denial of a habeas corpus petition under 28 U.S.C. § 2254 *de novo*. *See Sims v. Singletary*, 155 F.3d 1297, 1304 (11th Cir. 1998). Because Mr. Reynolds filed his petition after April 24, 1996, however, this appeal is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which "establishes a highly deferential standard for reviewing state court judgments." *Parker v. Sec'y, Dep't. of Corr.*, 331 F.3d 764, 768 (11th Cir. 2003). Pursuant to AEDPA, a federal court may grant a writ

of habeas corpus only if the state court's determination of a federal claim was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law," or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

A state court's determination is "contrary to" clearly established federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 413 (2000). A state court's determination is "an unreasonable application" of clearly established federal law "if the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id*. Reasonableness is an objective standard, and a federal court may not issue a writ of habeas corpus simply because it concludes in its independent judgment that the state court was incorrect. *See id*. at 410. *See also Woods v. Donald*, 575 U.S. 312, 316 (2015) ("[A]n unreasonable application . . . must be objectively unreasonable, not merely wrong; even clear error will not suffice.") (citation and internal quotation marks omitted).

Under § 2254(d)(2), we presume that a state court's factual findings are correct unless rebutted by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1); *Pye v. Warden*, 50 F.4th 1025, 1034–35 (11th Cir. 2022) (en banc). "This deference requires that a

federal habeas court more than simply disagree with the state court before rejecting its factual determinations. Instead, it must conclude that the state court's findings lacked even fair support in the record." *Rose v. McNeil*, 634 F.3d 1224, 1241 (11th Cir. 2011) (citations omitted).

In addition, our review of the evidence is limited to what the parties presented at the trial, the direct appeal, and the Rule 32 proceeding. *See Shinn v. Ramirez*, 596 U.S. 366, 378 (2022) (a federal habeas court's review of a state court judgment is "highly circumscribed" and is "based solely on the state-court record.").

V

Mr. Reynolds asserts that the prosecution violated its *Brady* and *Giglio* obligations in two ways: (1) by failing to disclose that it struck a deal with Ms. West in exchange for her testimony at his trial; and (2) by failing to correct Ms. West's testimony at trial that there was no agreement.

A

Although related, *Brady* and *Giglio* claims are distinct and require different showings.

To establish a *Brady* violation, a defendant must prove that (1) the evidence was favorable to him, either because it is exculpatory or impeaching; (2) the prosecution suppressed the evidence, either willfully or inadvertently; and (3) the evidence suppressed was material (i.e., that there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would

have been different). *See Turner v. United States*, 582 U.S. 313, 323 (2017); *Banks v. Dretke*, 540 U.S. 668, 691 (2004). To establish a *Giglio* violation, on the other hand, the defendant must prove that "(1) the prosecutor knowingly used perjured testimony or failed to correct what he subsequently learned was false testimony; and (2) such use was material i.e., that there is any reasonable likelihood that the false testimony could . . . have affected the judgment." *Ford v. Hall*, 546 F.3d 1326, 1332 (11th Cir. 2008) (quotation marks omitted).

The gravamen of Mr. Reynolds' *Brady*/*Giglio* claims is that the timing and outcome of Ms. West's own criminal cases lead to the conclusion that she assisted the prosecution by testifying against Mr. Reynolds in exchange for a lenient sentence for her own (and significant) criminal charges. According to Mr. Reynolds, Ms. West was facing up to a total of 60 years in prison for her charged offenses, but served less than a year in custody after the prosecution recommended leniency. Mr. Reynolds also points to the delay in Ms. West's cases and asserts that the cases were inexplicably postponed until after Mr. Reynolds' trial and conviction.

Under AEDPA, Mr. Reynolds is entitled to relief only if he can establish that the ACCA's decision on these claims was unreasonable. The question for us is not whether we would have reached a different conclusion, but whether the determination by the ACCA was objectively unreasonable.

The Rule 32 court found, as a matter of fact, that "nothing in the record . . . indicate[d] there was an agreement between the prosecution and [Ms.] West." In making this finding, the Rule 32

court noted that, in the months preceding Mr. Reynolds' trial, the trial court ordered the prosecution to provide all its files on the case—including any incentives provided to or agreements made with witnesses. The trial court also granted Mr. Reynolds access to all files he needed to ensure a fair trial, and any files that were not provided to Mr. Reynolds were reviewed *in camera* by the trial court.

The Rule 32 court based its finding that there was no agreement on the following subsidiary facts: (1) Ms. West denied the existence of an agreement on the stand at trial on at least two occasions; (2) her attorney, in a sworn statement, denied knowledge of any agreement; and (3) the Chief Deputy District Attorney, Marcus Reid, also in a sworn statement, denied the existence of an agreement.

As further support for its finding, the Rule 32 court reasoned that Ms. West's sentence was consistent with those of offenders in similar circumstances. Although Mr. Harvey received a harsher sentence for hindering prosecution, he was a habitual offender known to the courts.

In sum, the Rule 32 court found that Mr. Reynolds had not, despite being provided the opportunity to do so, shown "by a preponderance of the evidence or any other legal standard" the existence of an agreement between the prosecution and Ms. West. The Rule 32 court said that Mr. Reynolds' *Brady*/*Giglio* claims were based on "speculation and conjecture."

Mr. Reynolds appealed to the ACCA. But the ACCA affirmed the Rule 32 court's findings and rulings, concluding that they were supported by the record.

B

Mr. Reynolds' *Brady*/*Giglio* claims depend on the existence of an agreement between the prosecution and Ms. West. If there was no such agreement, the prosecution did not violate *Brady* (because nothing was withheld from the defense), or *Giglio* (because Ms. West did not provide false testimony that needed to be corrected).

A determination that there was no agreement between the prosecution and a defendant is a finding of fact. *See, e.g., United States v. Butler*, 297 F.3d 505, 513 (6th Cir. 2002). And the Rule 32 court found that there was no agreement between the prosecution and Ms. West. As a result, Mr. Reynolds must show that the Rule 32 court's factual finding "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). He must demonstrate that the finding "lacked even fair support in the record." *Rose*, 634 F.3d at 1241.

This he has not done. Although factual inferences can be drawn in the way Mr. Reynolds suggests, the record can also be read differently. As described above, the Rule 32 court's finding that there was no agreement was based on first-hand evidence, including sworn statements by those with personal knowledge of the situation attesting that there was no agreement, as well as its

determination that Ms. West was sentenced in a manner similar to individuals with similar criminal charges and histories.

We are not the original triers of fact and our review of the state court factual findings is deferential under AEDPA. Our limited review means that we may not issue a writ of habeas corpus simply because we conclude, in our independent judgment, that the Rule 32 court and the ACCA were incorrect. *See Williams*, 529 U.S. at 410. The decision must be objectively unreasonable.

On the record here, we cannot say that the Rule 32 court's finding that there was no agreement between Ms. West and the prosecution was an unreasonable determination of the facts. *See* § 2254(d)(2); *Pye*, 50 F.4th at 1034–35; *Rose*, 634 F.3d at 1241. Because "'fairminded jurists could disagree' on the correctness of the state court's decision," Mr. Reynolds is not entitled to relief on his *Brady*/*Giglio* claims. *See Harrington v. Richter*, 562 U.S. 86, 102 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

VI

We also granted Mr. Reynolds a certificate of appealability to determine whether the district court erred in denying his *Brady*/*Giglio* claims without granting him discovery or conducting an evidentiary hearing. We review a district court's denial of a habeas petitioner's request for discovery for abuse of discretion. *See Bracy v. Gramley*, 520 U.S. 899, 909 (1997). We also review a district court's refusal to hold an evidentiary hearing for abuse of discretion. *See Pugh v. Smith*, 465 F.3d 1295, 1298, 1300 (11th Cir. 2006). Upon review, we conclude that the district court's denials of the

requests for discovery and an evidentiary hearing were not an abuse of discretion.

A habeas petitioner is generally "not entitled to discovery as a matter of ordinary course," but he may be granted leave to conduct discovery upon a showing of "good cause," *Bracy*, 520 U.S. at 908–09, to believe that the evidence sought would "raise[ ] sufficient doubt about [his] guilt to undermine confidence in the result of the trial." *Arthur v. Allen*, 459 F.3d 1310, 1310 (11th Cir. 2006) (per curiam) (quoting *Schlup v. Delo*, 513 U.S. 298, 317 (1995)). Good cause is shown "where specific allegations . . . show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he . . . is entitled to relief." *Bracy*, 520 U.S. at 908–09. "[G]ood cause for discovery cannot arise from mere speculation" or "pure hypothesis." *Arthur*, 459 F.3d at 1311. *See Borden v. Allen*, 646 F.3d 785, 810 n.31 (11th Cir. 2011) ("[A] habeas case is not a vehicle for a so-called fishing expedition via discovery, an effort to find evidence to support a claim.").

The district court denied the requests for discovery and an evidentiary hearing because it concluded that Mr. Reynolds had not sufficiently articulated what additional discovery would reveal. The abuse of discretion standard gives the district court a "range of choice" and that means that there are times when we will affirm even though we might have ruled the other way had it been our call in the first instance. *See In re Rasbury*, 24 F.3d 159, 168 (11th Cir. 1994). This is one of those cases. Given the denials of an agreement by those who would have had first-hand knowledge, the

denials of discovery and an evidentiary hearing were not a "clear error of judgment." *Id.*

VII

We now turn to Mr. Reynolds' claim of ineffective assistance of counsel.

A

The Sixth Amendment entitles criminal defendants to the "effective assistance of counsel"—that is, representation that does not fall "below an objective standard of reasonableness" relative to "prevailing professional norms." *Strickland*, 466 U.S. at 686–88. That standard is necessarily flexible, as "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Id.* at 688–89. The relevant question is whether counsel's conduct was "outside the wide range of professionally competent assistance." *Id.* at 690. To prevail on his ineffective assistance of counsel claim, Mr. Reynolds must demonstrate both (1) that his "counsel's representation fell below an objective standard of reasonableness," *id.* at 688, and (2) 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.

"[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690. To overcome this presumption on the performance prong, Mr. Reynolds must

demonstrate that "no competent counsel would have taken the action that his counsel did take." *Chandler v. United States*, 218 F.3d 1305, 1315 (11th Cir. 2000) (en banc).

The prejudice prong of a *Strickland* claim is satisfied when "there is 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. A "reasonable probability" is one that is "sufficient to undermine confidence [in the sentence]," and does not require a showing that "counsel's deficient conduct more likely than not altered the outcome of [the petitioner's] penalty proceeding." *Porter v. McCollum*, 558 U.S. 30, 44 (2005) (quoting *Strickland*, 466 U.S. at 693–94). Nevertheless, the likelihood of a "different result must be substantial, not just conceivable." *Harrington*, 562 U.S. at 111–12. *See also Thornell v. Jones*, 144 S. Ct. 1302, 1310 (2024) ("A reasonable probability is a probability sufficient to undermine confidence in the outcome. That requires a substantial, not just conceivable, likelihood of a different result. This standard does not require a defendant to show that it is more likely than not that adequate representation would have led to a better result, but the difference should matter only in the rarest case.") (citations and internal quotation marks omitted).

B

Mr. Reynolds argues that his counsel rendered deficient performance by failing to introduce Chad Martin's confession at the trial and at his penalty phase. According to Mr. Reynolds, his counsel "made only an abortive attempt" to secure Sergeant Fincher's

presence at trial. *See* Appellant's Br. at 74. Mr. Reynolds also contends that his counsel failed to interview Captain Harbin before trial, which would have revealed that he could not authenticate the report detailing the confession before the trial. It was unreasonable, Mr. Reynolds argues, for counsel to have failed to find someone else who could have authenticated the report or otherwise testified about Chad Martin's confession. *See id.* at 75. Mr. Reynolds asserts that he was prejudiced by these deficiencies because Chad Martin's confession was inconsistent with Ms. West's testimony, and without the confession, "the jury was left with [Ms.] West's testimony that [he] was the perpetrator, over [his] denials." *Id.* at 83.

The Rule 32 court dismissed this claim as insufficiently pled. Mr. Reynolds appealed and the ACCA affirmed this dismissal. In doing so, the ACCA agreed that Mr. Reynolds' ineffective assistance of counsel claim was insufficiently pled. The ACCA explained that Mr. Reynolds was repeating the alleged mistake that his counsel made—assuming that any of the officers present for some portion of Chad Martin's confession could authenticate the report containing the confession.

The ACCA also reasoned that Mr. Reynolds had not explained "how Chad Martin's confession would have been consistent with the defense's theory of the case." This was so because, according to Mr. Reynolds, he cleaned the Martin home after the murders, got the gas from outside the home, and set the home on fire in order to assist Ms. West. Chad Martin, however, testified that he was the one responsible for dousing the home. For all these

reasons, the ACCA alternatively concluded that Mr. Reynolds failed to establish that he was prejudiced by his counsel's failure to introduce Chad Martin's confession—both at the guilt and penalty phases of his trial.

We "may decline to reach the performance prong of the ineffective assistance test if convinced that the prejudice prong cannot be satisfied." *Waters v. Thomas*, 46 F.3d 1506, 1510 (11th Cir. 1995) (en banc). The Supreme Court has explained that "there is no reason . . . to address both components of the inquiry if the defendant makes an insufficient showing on one." *Strickland*, 466 U.S. at 697. *See, e.g., Frazier v. Bouchard*, 661 F.3d 519, 532 (11th Cir. 2011) (declining to analyze the performance prong where the petitioner "[could not] make the requisite showing of prejudice under *Strickland*'s second prong"). Because we conclude that Mr. Reynolds cannot satisfy the prejudice prong, we need not and do not examine whether his counsel's performance was deficient.

We set out the standard for the prejudice prong of *Strickland* earlier, and do not repeat it here. But we note that, as a federal court conducting habeas review under AEDPA, the question is not whether Mr. Reynolds has shown prejudice under *Strickland*. It is, instead, whether a fair-minded jurist could agree with the no-prejudice determination of the ACCA. *See Shinn v. Kayer*, 592 U.S. 111, 121 (2020) (explaining that the "question is whether a fairminded jurist could take a different view" than the one advanced by the habeas petitioner). *See also id.* at 124 (a federal court cannot grant habeas relief unless the state court's determination was "so

obviously wrong as to be 'beyond any possibility for fairminded disagreement'") (citation omitted).

Applying AEDPA deference, we conclude that the ACCA's ruling as to prejudice was reasonable.

First, the jury heard some of the details of Chad Martin's confession. During her testimony at trial, Lieutenant Faye Gary testified that Chad Martin appeared to know where the Martins' bodies were in the home. Lieutenant Gary also told the jury that Chad Martin made comments about smelling gasoline, losing his sunglasses in the Martin home, and hearing Savannah say "don't hurt me."

Second, as the ACCA observed, Chad Martin's confession was inconsistent with Mr. Reynolds' defense theory and testimony at trial. According to his confession, Chad Martin had gotten the gas out of the trunk of one of his friend's car, and then poured the gas on Mrs. Martin and around the home. At trial, Mr. Reynolds testified that he was at the Martin home only to help Ms. West cover her tracks. He also testified—contrary to what Chad Martin had confessed to—that he was the one who got gas from a can located beside the porch steps, doused the rooms, and set the home ablaze. Given Mr. Reynolds' own testimony, this was not a case in which the defense could have put up a lot of different factual scenarios in an effort to create reasonable doubt as to the prosecution's theory.

Third, the jury was not, as Mr. Reynolds posits in his brief, left with just Ms. West's testimony about the murders. Other

evidence at trial included the following: (1) a piece of Mr. Reynolds' prescription glasses was found at the crime scene with Mrs. Martin's DNA on it; (2) the other parts of the same glasses were found in Mr. Reynolds' room at his father's house; (3) a bloody footprint at the crime scene matched Mr. Reynolds footprint; and (4) the blood of both Mrs. Martin and Mr. Reynolds were on the handle of the gasoline can.

Accordingly, we conclude that the ACCA's determination that Mr. Reynolds had not established prejudice under *Strickland* was reasonable.

VIII

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

AFFIRMED.

JORDAN, Circuit Judge, Concurring.

I join the court's opinion with these additional thoughts.

Mr. Reynolds contends that the Rule 32 court unreasonably found that no agreement existed between the prosecution and Ms. West. Though the timing and circumstances surrounding the resolution of Ms. West's charges might seem suspicious, it cannot be said that the Rule 32 court's determination that no agreement existed is unreasonable.

On this record, the district court could have granted Mr. Reynolds some discovery and/or conducted an evidentiary hearing. Mr. Reynolds was denied the opportunity in the Rule 32 proceedings to depose Ms. West, her attorney, or the Chief Deputy District Attorney. An evidentiary hearing could have given Mr. Reynolds a chance to test for the first time, in an adversarial setting, the sworn declarations filed by the state in the Rule 32 proceedings. But our review of the district court's decision is deferential, and I agree that Mr. Reynolds has not shown an abuse of discretion.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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

David J. Smith
Clerk of Court

For rules and forms visit
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October 07, 2024

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 22-14015-P
Case Style: Michael Wayne Reynolds v. Commissioner, Alabama Department of Corrections
District Court Docket No: 4:18-cv-00236-RDP

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

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

Costs
No costs are taxed.

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

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

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

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

Clerk's Office Phone Numbers

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CM/ECF Help Desk:	404-335-6125	Cases Set for Oral Argument:	404-335-6141

OPIN-1 Ntc of Issuance of Opinion

In the

United States Court of Appeals

For the Eleventh Circuit

No. 22-14015

MICHAEL WAYNE REYNOLDS,

Petitioner-Appellant,

versus

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Alabama
D.C. Docket No. 4:18-cv-00236-RDP

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

Before JORDAN, LUCK, and LAGOA, Circuit Judges.

PER CURIAM:

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

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

December 04, 2024

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 22-14015-P
Case Style: Michael Wayne Reynolds v. Commissioner, Alabama Department of Corrections
District Court Docket No: 4:18-cv-00236-RDP

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

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

Clerk's Office Phone Numbers

General Information:	404-335-6100	Attorney Admissions:	404-335-6122
Case Administration:	404-335-6135	Capital Cases:	404-335-6200
CM/ECF Help Desk:	404-335-6125	Cases Set for Oral Argument:	404-335-6141

REHG-1 Ltr Order Petition Rehearing

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July 15, 2024

VIA ECF

United States Court of Appeals for the Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, GA 30303

Re: Michael Wayne Reynolds v. Commissioner, Alabama Dep't of Corrs., No. 22-14015-P

Dear Clerk of Court:

On behalf of Petitioner Michael Reynolds, we submit this letter in response to the Court's Order that the parties provide record citations on whether the State made Marcie West's complete prosecution file available during the Rule 32 proceedings. (Doc. 41). The record is silent on what the State said or represented when it allowed Reynolds to inspect and copy the file. Reynolds' good faith belief that the State withheld documents from West's file is premised on: (1) the State's withholding of documents from Reynolds' prosecution file during his trial (A1871); (2) the State's objection to providing a privilege log for any documents withheld from West's file (A1580); (3) the lack of documents in West's file that can be reasonably expected to have existed, including a letter authored by the State to West's counsel that has never been produced (A1734; A1832–1834); and (4) the State's failure to directly address Reynolds' assertion, made several times over the last ten years, that West's file was incomplete (A1957; A172; A826; Opp'n, Doc. 30). Accordingly, Reynolds respectfully requests that the Court remand his case to the district court with directions to make West's complete file available and allow him to examine, in the evidentiary hearing that the district court denied, the State's witnesses about the contents of the file, any missing documents, and the circumstances leading up to West's testimony, plea, and sentencing.

Before Reynolds' trial in October 2007, the State produced Reynolds' prosecution file to him with the exception of certain documents, claiming work product. (A1871); *see* Alabama Criminal Rule of Procedure 16.1 (permitting State to withhold non-exculpatory documents for work product). Reynolds' entire file, including the withheld documents, was produced to the trial court and reviewed *in camera* by September 2007. (A1582). This file was placed under seal and made part of the appellate record. *Id.*

The earliest indication of the State's undisclosed deal with West was in May 2009—after Reynolds had been sentenced to death and his direct appeal was fully briefed—when the State advocated strenuously on her behalf at her sentencing hearing after she pleaded guilty to felony hindering the prosecution of the Martins' murders and one of her pending felony drug charges. During the Rule 32 proceedings, Reynolds moved for discovery of the State's files on West to find additional evidence of the deal (A1424) and a privilege log for any withheld documents (A1433). The State opposed. (A1437). After the Alabama Court of Criminal Appeals remanded, finding that Reynolds had plead a facially meritorious *Brady* claim, Reynolds again moved for discovery of the State's file on West (A1558) and

a privilege log (A1566–67). The State objected to providing a privilege log on the bases that "[a] state agency is not required in the Rule 32 post-conviction context to provide privilege logs of any documents that are withheld" and that "requiring a state agency to produce a privilege log would be overly burdensome." (A1580). The court denied the motion. After Reynolds moved the court to reconsider, the court ordered that the State make its files on West available to Reynolds under the supervision of the State. (A1609). Unlike the State's file on Reynolds, the Alabama state court never reviewed the State's files on West *in camera*, nor was it made part of any appellate record under seal.

Two attorneys who were then employed by BakerHostetler, Mary Howe and Hannah Choate, inspected and copied West's file at the State's office. In an affidavit filed during the Rule 32 proceedings, Howe identified categories of documents missing from West's file that one would have expected to see. (A1832–1834). Notably, West's file did not include any: (i) notes of the several calls and conferences West or her counsel had with the State between May 27 and June 9, 2003 (A1686)—before, during, and after West gave her initial incriminating statement to the State, other than the previously provided undated and typed statement; (ii) documents or notes indicating the reasons why the State put off West's multiple felony charges "indefinitely" (A1821), only to be put back on the docket in July 2008, after Reynolds was convicted and sentenced to death on the basis of West's testimony; (iii) notes of the State's communications with West's counsel in January 2009 before it was agreed that she would plead guilty to only two of her felony charges (A1769), in March 2009 before she moved to reset her sentencing hearing date (A1734), or in May 2009 before she received her "sweetheart" sentence of 12 months in a substance abuse program in Etowah County prison—on charges that could have sent her to prison for decades (A1658; A1690; A1689-99; A1734); or (iv) documents or notes on why on November 24, 2009, the State recommended that West be released after serving only six months of her already extraordinarily lenient sentence (A1667). In addition, a letter from the State to West's counsel before her sentencing hearing was not in the file. (A1734). This letter, as well as the conferences and calls in (i) and (iii) above, were corroborated by entries in West's counsel's time records. (A1686; A1769).

Based on the foregoing, Reynolds asserted in good faith that the State withheld documents from West's file no less than seven times, including in briefing before this Court. (A1887 at 1937; A10 at 20; A421 at 455-56; A789 at 800; COA Application, Doc. 11 at 30; Pet'r Br., Doc. 25 at 62; Pet'r Reply, Doc. 34 at 2). The State has never confirmed whether it provided West's full file. (A1957; A172; A826; Opp'n, Doc. 30).

This record underscores Reynolds' need for the discovery and evidentiary hearing that he has asked for from every court since 2015. The Rule 32 court's and district court's findings that Reynolds had not shown "good cause" for discovery beyond the limited discovery he did obtain (which included a memorandum referencing a deal with the District Attorney) were, at least in part, premised on Reynolds' having the State's entire file on West. (A2011 at 2082; A499 at 564, 572). Yet this remains an unknown.

Reynolds does not know what the State will say now about this. But the State's answer should not control the outcome here, which should be to allow Reynolds meaningful discovery and an evidentiary hearing to fully and fairly resolve the grave Constitutional issues this case presents. If the State did not make West's complete file available, it should do so now. *See Moore v. Kemp*, 809 F.2d 702, 730 (11th

Cir. 1987) (finding state habeas court's refusal to give petitioner access to key witness's file containing *Brady/Giglio* material denied petitioner opportunity to prove his claim). If the State claims that there is nothing more to produce from West's file—whether because documents are missing, were destroyed, or never existed—Reynolds should be able to test that claim under oath, as well as question the State, West, and her counsel about the numerous calls and conferences between them; the contents of the written non-privileged communications that indisputably occurred between them, including a letter written by the State that it has never produced or explained; why the State put West's serious criminal charges on hold for over almost four years; or why she received only minimal punishment—six months in a prison substance abuse program—after admitting to covering up a triple homicide. Any arrangement the State had with West, even if it was just for the delay of her criminal charges until after she testified against Reynolds, is impeachment evidence that should have been disclosed. *See Haber v. Wainwright*, 756 F.2d 1520, 1524 (11th Cir. 1985) ("*Giglio* . . . extends to '*any* understanding[s] or agreement[s].'"). While the State submitted affidavits from relevant witnesses on the existence of a deal, the affiants were not subjected to cross-examination,[1] which was particularly prejudicial where the affiants did not discuss the nature and full extent of their numerous communications or the compelling circumstantial evidence of a deal. While written affidavits may suffice in some cases, they do not here where Reynolds sets forth facts that make a deal between the State and West facially plausible[2] and where he has pointed to significant inconsistencies in the affidavits themselves. (Pet'r Br., Doc. 25 at 48–51; Pet'r Reply, Doc. 34 at 10–14).

For all of these reasons, this Court should not allow Reynolds' death sentence to stand without allowing him discovery and the opportunity to test these grave allegations of Constitutional violations in the crucible of an evidentiary hearing. *See also United States v. White*, 492 F.3d 380, 413 (6th Cir. 2007) (finding district court abused its discretion in denying evidentiary hearing on withheld potential *Brady* materials, stating "[a]bsent a more searching inquiry of claims as serious as those lodged by Defendants here, we effectively permit the government to ride roughshod over the accused, stripping the accused of both sword and shield").

Respectfully submitted,

/s Patrick T. Campbell

Patrick T. Campbell
Partner

[1] West was cross-examined at Reynolds' trial in 2007 (A2252-A2313) but obviously was not cross-examined about critical events that had yet to occur, such as her plea and sentencing in 2009.

[2] Reynolds' claims were summarily dismissed by the Rule 32 court, which unreasonably held Reynolds to a proof rather than pleading standard. *See Johnson v. State*, 835 So. 2d 1077, 1080 (Ala. Crim. App. 2001) ("A claim may not be summarily dismissed because the petitioner failed to meet his burden of *proof* at the initial pleading stage, a stage at which the petitioner has only a burden to *plead.*"). Likewise, the district court held Reynolds to the wrong standard when denying him an evidentiary hearing. The standard is, once a petitioner has established diligence in attempting to develop the factual basis of his claims, he "must proffer evidence that, if true, would entitle him to relief." *Pope v. Sec'y for Dep't of Corr.*, 680 F.3d 1271, 1291 (11th Cir. 2012). There is no dispute that Reynolds has been diligent and that, if West was given or promised any leniency in exchange for her testimony, that would violate *Brady* because it was material and not disclosed.

CERTIFICATE OF INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT

Counsel hereby certifies that the following listed persons and entities described in Eleventh Circuit Rule 26.1 may have an interest in the outcome of this appeal:

1. Alonso, Gabriella, former habeas counsel for Mr. Reynolds
2. Anderson, Richard, Assistant Attorney General
3. Bernhardt, Sophia F., state appellate counsel for Mr. Reynolds
4. Brown, Seanna, habeas counsel for Mr. Reynolds
5. Buttram, Walden M., state appellate counsel for Mr. Reynolds
6. Campbell, Patrick, habeas counsel for Mr. Reynolds
7. Cardwell, William W., Alabama Circuit Judge
8. Casey, Pamela Lynn, Assistant Attorney General
9. Choate, Hannah, former state habeas counsel for Mr. Reynolds
10. Cowherd, Matthew, former habeas counsel for Mr. Reynolds
11. Drake, Mary M., former habeas counsel for Mr. Reynolds
12. Dunn, Jefferson S., former Commissioner of Alabama Department of Corrections, former Appellee
13. Franklin, Samuel H., habeas counsel for Mr. Reynolds
14. Govan, Thomas R., Deputy Attorney General

15. Granger, Patricia Hall, trial counsel for Mr. Reynolds

16. Hamm, John, Commissioner of Alabama Department of Corrections, appellee

17. Harp, Jr., Jimmie Gary, former District Attorney (deceased)

18. Hart, Charles C., trial counsel for Mr. Reynolds

19. Hoang, Lan, habeas counsel for Mr. Reynolds

20. Howe, M. Elizabeth, former state habeas counsel for Mr. Reynolds

21. King, Troy, former Attorney General

22. Malone, Dan Lashaun, state appellate counsel for Mr. Reynolds

23. Marshall, Steve, Alabama Attorney General

24. Martin, Charles, deceased victim

25. Martin, Melinda, deceased victim

26. Martin, Savannah, deceased victim

27. McWhorter, David K., trial counsel for Mr. Reynolds

28. Millican, Wm. Allen, Alabama Circuit Judge

29. Phillips, Gary, District Attorney

30. Proctor, David R., federal habeas judge

31. Reid, Marcus, Chief Deputy District Attorney

32. Rich, David, former habeas counsel for Mr. Reynolds

33. Roberts, II, Paul R., trial counsel for Mr. Reynolds

34. Rutter III, James H., Assistant Attorney General

35. Setzer, Angela L., state appellate counsel for Mr. Reynolds

36. Smithart, M. Wesley, habeas counsel for Mr. Reynolds

37. Stevenson, Bryan A., state appellate counsel for Mr. Reynolds

38. Stork, Victoria, habeas counsel for Mr. Reynolds

39. Strange, Luther, Attorney General

40. Wang, Ona, former state habeas counsel for Mr. Reynolds

Counsel further certifies that no publicly-traded company or corporation has an interest in the outcome of this case or appeal.

STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL

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July 15, 2024

David J. Smith
Clerk of Court
U.S. Court of Appeals for the 11th Circuit
56 Forsyth St., N.W.
Atlanta, Georgia 30303

Re: Michael Wayne Reynolds v. Commissioner, ADOC
No. 22-14015-P

Dear Mr. Smith:

In accordance with the Court's June 25, 2024 Order, Appellee files this letter brief. This Court ordered the parties to address whether the record shows that "the state made available the complete West prosecution file" to Reynolds during the state court remand. Based on the record that is before this Court, the answer to that question is "yes."

As an initial matter, in order to grant the relief that Reynolds seeks, this Court would have to find that no reasonable jurist could fail to find that the State of Alabama, the trial judge, a witness, and that witness's attorney all engaged in a multi-decade conspiracy to suppress an alleged "deal" that resulted in *no sentencing recommendation* from the State at the witness's subsequent sentencing hearing. Respondents respectfully submit that, particularly given the AEDPA deference owed the state court's factfinding, Reynolds has fallen far short of his burden.

It is undisputed that the state postconviction court ordered the prosecution to provide Reynolds with "any and all files held by the Etowah County District Attorney's Office pertaining to the prosecution of Adrian Macella West… ." (Vol. 28, R32 C. 98.) Reynolds now suggests that the prosecution must have *violated the state court's order* and removed items from their files before allowing Reynolds to inspect them. The accusation is baseless. There is no doubt that the inspection occurred–Reynolds' postconviction counsel filed an affidavit attesting to that fact. Counsel

inspected the state's files in the company of the prosecutor, Marcus Reid. (Vol. 29, R32 C. 337.) In an affidavit presented to support his postconviction *Brady* claims, Reynolds' counsel did not claim that the prosecutor held back documents, asserted the work product privilege, or otherwise violated the court's order. *Id.* Indeed, the affidavit shows that the prosecutor cooperated with counsel in tracking down the availability of records.[1] Of course, had Reynolds alleged that the State did not comply with the trial court's order, the State would have had the opportunity to make a record and offer evidence to the contrary. Consequently, to the extent that the record is bare of *direct* evidence that the state complied with the order to make "any and all files" available to Reynolds, the fault lies not with the State, but with Reynolds.

At best, the affidavit simply complains that the file did not contain any documents that Reynold's counsel "expect[ed] to see" regarding "communications[2]" between the State and West's attorney and that the file contained no documents created between 2005 and 2007, but there is no reason to believe that such documents ever existed. *Id.* at 329. Indeed, both West's trial counsel's timesheets and the case action summary for her case show that very little of substance was happening during those years. (A1663-1664; A1666-1667; A1686-1688.) Tellingly, the file *did* contain the January 13, 2009 faxed memorandum that Reynolds has frequently pointed to as evidence of a suppressed "deal." *Id.* Surely if the State had "prescreened" the file as Reynolds alleges (Reynolds' Br., p. 30), that document would have been removed also.

Further, it is apparent that the Etowah County District Attorney's office did not as a practice create or hold back extensive amounts of work product or communications. On direct appeal, the circuit court ordered that the record be supplemented with "all portions of the States' [sic] file that was not

---

[1] The affidavit describes counsel inquiring about a reference to audio tapes from Ms. West's files that the prosecutor candidly admitted had been destroyed in the intervening decade. (Vol. 29, R32 C. 337.) There is no other indication that Reynolds' counsel similarly inquired about other records, including those Reynolds "expected to see."

[2] Reynolds buttresses his suppression claim by arguing that the DA's file did not contain any notes regarding communications with West's counsel. But Reynolds' own appendix shows that very little communication occurred, other than the conferences regarding her statement, the DA's notes of which were put into the record on direct appeal (Vol 15, C.Supp. 156-166), West's counsel had only four conversations with the DA, each of which was less than 6 minutes long. A1682-1688.

provided to the Defendant." (Vol. 28, C.Supp. II 70-71.) Those documents amounted to less than 100 pages and were made a part of the record on appeal. (Vol. 15, C.Supp. 88-183.) In that supplement are found the prosecution's handwritten notes regarding Ms. West's statement–notes that contain no references to any deal or offer, further demonstrating that Ms. West's cooperation was *not* premised on a promise by the State. (Vol 15, C.Supp. 156-166.)

At bottom, Reynolds complaints about the discovery he was afforded echo his empty *Brady* claims: "because I did not find any evidence of a deal, they must have suppressed it *again*." But that is no proper basis on which to reverse the district court. Undersigned counsel regrets that he cannot cite any portion of the record that *disproves* Reynolds' "surmise" that the DA held back "work product" during the 2015 inspection of the State's file (Reynolds' Brief, p. 30), but that is simply because Reynolds' surmise is, in scientific parlance, unfalsifiable. The State has already offered *substantial* evidence that no deal ever existed (and thus there never were any documents to suppress), but the more that Appellee shows that the record contains no evidence of a deal or suppression, the more that Reynolds will insist that the very absence of evidence "proves" suppression.

Moreover, if the record is bare of any evidence to directly *refute* Reynold's theory that the prosecutor disobeyed the state court's order and did not produce the entire file for inspection, it is likewise bare of any evidence to *substantiate* it. Thus, the venerable principle that when the "record is silent on the point error will not be presumed" militates strongly against Reynolds' invitation to this Court to imagine improper conduct by the State. *Morgan v. Sun Oil Co.*, 109 F.2d 178, 181 (5th Cir. 1940).

Respectfully submitted,

Steve Marshall
Attorney General

Edmund G. LaCour Jr.
Solicitor General

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

In the

United States Court of Appeals

For the Eleventh Circuit

No. 22-14015

Non-Argument Calendar

MICHAEL WAYNE REYNOLDS,

Petitioner-Appellant,

versus

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Alabama
D.C. Docket No. 4:18-cv-00236-RDP

Before JORDAN, LUCK, and LAGOA, Circuit Judges.

ORDER:

The parties are directed to file, by July 15, 2024, letter briefs providing citations to the portions of the record which provide information about whether the state made available the complete West prosecution file during the Rule 32 proceedings. The letter briefs shall not exceed 3 pages.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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

David J. Smith
Clerk of Court

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June 25, 2024

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Appeal Number: 22-14015-P
Case Style: Michael Wayne Reynolds v. Commissioner, Alabama Department of Corrections
District Court Docket No: 4:18-cv-00236-RDP

The enclosed order has been ENTERED.

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

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MOT-2 Notice of Court Action

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 22-14015

COPY

MICHAEL WAYNE REYNOLDS,

Petitioner-Appellant,

v.

COMMISSIONER, ALABAMA

DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

Oral Argument

June 24, 2024

B E F O R E:

HON. ADALBERTO JORDAN

HON. ROBERT J. LUCK

HON. BARBARA LAGOA

Appellate Judges

Page 2

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PROCEEDINGS

CLERK: Hear ye, hear ye, hear ye, the United States Court of Appeals for the 11th Circuit is now open according to law. God save the United States and this Honorable Court.

HON. ADALBERTO JORDAN: Good afternoon. Please be seated. We are here for argument in Case Number 22-14015, Michael Wayne Reynolds v. the Commissioner of the Alabama Department of Corrections.

We have Mr. Campbell for Mr. Reynolds and Mr. Anderson for the Commissioner.

HON. ADALBERTO JORDAN: Mr. Campbell, whenever you're ready.

MR. CAMPBELL: Thank you and good afternoon, Your Honors. May it please the Court. My name is Patrick Campbell and I represent the Petitioner, Michael Wayne Reynolds.

The jury who convicted Mr. Reynolds to death did not hear two critical pieces of evidence; that there was another person who confessed to the crimes and that the state's star witness, Marcy West, the only witness directly linking Mr. Reynolds to the crimes, had a deal with the state for leniency on her own criminal

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charges.

I want to start with the Brady/Giglio violation and I want to focus the Court's attention here today on what the State has withheld from Mr. Reynolds throughout these proceedings.

Mr. Reynolds has never had the full file on Ms. West. When the Alabama Court of Criminal Appeals remanded the proceedings back to the Rule 32 trial court to give Mr. Reynolds an opportunity to prove his Brady/Giglio claim, the State did not turn over the full file of Ms. West. Rather, it removed files that Mr. Reynolds has never been able to see.

Now, I want to refer Your Honors to --

HON. ROBERT J. LUCK: Why do you believe that?

MR. CAMPBELL: We believe that because these records are reflected in Mr. Montgomery's time records.

HON. ROBERT J. LUCK: Why does that -- it seems to be an inferential leap. Now, whether it's a reasonable one or not is I guess a question that we have to talk about. But it seems like an inferential leap to say I have

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other records which indicate documents that should be in the file, but they are not in the file, so that means that they are withholding it from us versus there are other documents that are referred to that are not in the file because for one reason or another they are not in the file of a case that is 10, 15, whatever many years old from there. Stuff gets lots, it never was in the file in the first place. In other words, they got a letter, they sent a letter, they never kept a copy, they put it in the trash can. Why do we make assumption that from those missing documents that there must be withheld documents?

MR. CAMPBELL: well, Your Honors, the State has never explained why those documents aren't in there. The State has never given an explanation, although we pointed them to very specific documents. One document, the letter that was sent from ADA Reid to Mr. Montgomery on 5/1/2009, that's at A1734, that he reviewed. His time records said he reviewed that letter. That was just a couple of weeks before Ms. West's sentencing hearing where Mr. Reid strenuously argued and advocated for Ms. West's early release.

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HON. ROBERT J. LUCK: Well, they were -- but Counsel, they were ordered -- and I've read the order. They were ordered to turn over any and all. There was no indication as I understand below -- by below I mean in the Rule 32 court there was no indication that there was any inference that anything had been withheld. There was no I didn't get this document, so give me more.

The state trial court -- I'm sorry, the ACCA found that there was a full file given over and we have some deference with regard to that fact-finding. In other words, we're required to presume it's correct until it's clearly and convincingly wrong. That's the position we're in right now.

And you're telling me I have to find it clearly and convincingly wrong that particular finding of fact, which is relevant to your discovery claim and some other stuff, based on an inference that stuff that you think should be in the file is not?

MR. CAMPBELL: Well, Your Honors, there are materials that were clearly removed from the file. There was a post-it note on one of the

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docket sheets from Ms. West.

HON. ROBERT J. LUCK: That's not the file though. That's the court docket, right? And I understand that. There was a post-it note in the court docket.

MR. CAMPBELL: It was removed.

HON. ROBERT J. LUCK: I'm a little familiar with that because when I was a state court trial judge, we had literally the same type, written, handwritten dockets and stuff like that. So that post-it note wasn't there. But that's not the state court file. I mean, that's not the prosecutor's file.

MR. CAMPBELL: I submit to Your Honor that that post-it note was on a document in the prosecution's file. And counsel at Rule 32 habeas proceeding noted that for the Court and also noted for the Court in the supplemental petition. Because the trial court only gave counsel 20 days for an opportunity prove Mr. Reynolds' claim. After the circuit court had remanded the case to give Mr. Reynolds an opportunity to prove his claim, the trial court gave 20 days. After Mr. Reynolds made --

HON. ROBERT J. LUCK: Sorry, Counsel.

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This is at Appendix 1821. At the top of it, it says, "Alabama Judicial Information System, Case Action Summary, Circuit Criminal." This is a court docket. This is not a prosecution file.

MR. CAMPBELL: Well, I submit, Your Honor, that the file was from the court docket. But when the state's files were given over to counsel to inspect, that document was in there and the post-it was removed. So that is part of the evidence. That is part of the reason --

HON. ROBERT J. LUCK: I know. But this came from the -- the post-it came from -- and you even articulated this in your brief. This is not contested. You got this originally from pulling the court docket. And what you're saying is the copy that was in the state didn't have the post-it, but it was never on the post-it in the state's file. It was in the post-it that was in the court file. The whole point was a court telling, stating to itself, don't schedule this because the prosecutor told me not to schedule this. That's a court file. I don't see how that proves by clear and convincing evidence what you're talking about.

MR. CAMPBELL: Okay. If you don't

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accept that, Your Honor --

HON. ROBERT J. LUCK: It's not a matter of me accepting it, that's just -- I just stated the facts.

MR. CAMPBELL: There is a letter, clear reference to a letter between Reid and Montgomery that wasn't in the file. There are numerous communications that Montgomery and Ms. West and the State had throughout various different time periods before the guilty plea, Ms. West's guilty plea, before the sentencing hearing.

HON. ROBERT J. LUCK: It was indicated they met. In other words, they talked.

MR. CAMPBELL: They talked.

HON. ROBERT J. LUCK: But how is that going to be reflected in a paper file?

MR. CAMPBELL: Notes. Notes, Your Honors.

HON. ADALBERTO JORDAN: Those are -- I don't know what happened in this case, obviously. But there are times when meetings, decisions, offers and the like are reflected in notes to the file by the attorney. Right? that's what you're saying.

MR. CAMPBELL: Yes. And I posit that

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that is a common practice that -- and we're not talking about just a couple of random communications. We're talking about --

HON. ADALBERTO JORDAN: When the State turned over -- you say it was an incomplete file.

MR. CAMPBELL: Yes.

HON. ADALBERTO JORDAN: But when the State turned that over during the Rule 32 proceedings on remand, what did the State represent it was giving you?

MR. CAMPBELL: So the State made the file for inspection, available for inspection at the State's office under the State's supervision.

HON. ADALBERTO JORDAN: Right, but did the State -- whether it's a correct or an incorrect characterization, did the State tell you, as sometimes happens, here is the entire casefile, go through it, see what you want and what you want to copy? Whether that's a correct characterization or not of what was actually there, is that what they represented, like here's the entire file, go through it? Or did they say nothing, or did they say something different?

MR. CAMPBELL: I wasn't there, Your Honor. I have to consult and I'll get you the

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answer to that. But my understanding is they gave over a case file and said, you know, here it is, you can inspect it. But I'm not positive about the representation that they made.

HON. ADALBERTO JORDAN: All right. Let's talk about the Brady/Giglio claim. And you've got two different things or arguments with regard to that claim, right? You've got the merits issue on both of the claims and you've got the evidentiary hearing aspect of those claims. So you can start with whichever one you want, but I don't want you to run out of time without getting on the merits of the arguments you've got present here.

MR. CAMPBELL: I appreciate that, Your Honor. And I did want to start with the discovery evidentiary hearing claim. And, you know, we just discussed the documents that we believe have been withheld from the file and that they show -- that they would show relevant information just based on the context of when those communications happened that would further prove -- further allow Mr. Reynolds to develop his claim.

And I just want to just be clear about

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why we believe this is a problem. The evidence that Mr. Reynolds does have showing an understanding between Ms. West and the State for leniency, he either got lucky finding it or he had to fight tooth and nail to get it. And the part that he got lucky finding were the post-it notes that we talked about before where his trial counsel had made a copy of the docket sheet with the post-it notes on it that clearly said to put Ms. West's criminal charges, all of her criminal charges, off indefinitely while she cooperated against Mr. Reynolds.

And the memorandum, the one he had to fight tooth and nail to get --

HON. ROBERT J. LUCK: You just added the while she was cooperating, right?

MR. CAMPBELL: Yes.

HON. ROBERT J. LUCK: That's not what the post-it note says.

MR. CAMPBELL: No, no, no, Your Honor.

HON. ROBERT J. LUCK: Okay.

MR. CAMPBELL: The post-it note does not. The post-it note says from the DA Harp to West's trial judge at the time, put off these cases indefinitely. And it included both the

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drug cases and the hindering the prosecution case, which is what she was charged under in the Martin's murder case.

HON. ADALBERTO JORDAN: Okay, Mr. Campbell. Let me tell you I'm really afraid you're going to be running out of time on some of this stuff. So let me tell you where I sort of see things.

MR. CAMPBELL: Okay.

HON. ADALBERTO JORDAN: And then you can direct me one way or another.

If I were sitting as the trial judge in this case or even an appellate judge on the Alabama Court of Criminal Appeals, this would cause me great concern.

There is a lot of circumstantial evidence. And people who have been around doing criminal work for a long time see patterns. And this is the sort of pattern that sometimes looks like there was a deal in place or a deal to be had.

Having said all of that, you've got findings by the Alabama courts based on the affidavits of the defense lawyer, the prosecutor, and Ms. West herself that there was no deal

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before Mr. Reynolds' trial.
And you've got not only the clear error standard to deal with, but you've got the AEDPA gloss on how we look at state court factual findings. So tell me how you overcome those.
MR. CAMPBELL: So I'll tell you both on -- because it related I think in terms of the substance. But first we have the failure to grant an evidentiary hearing. And --
HON. ADALBERTO JORDAN: That one is -- that's a district court issue.
MR. CAMPBELL: Yes.
HON. ADALBERTO JORDAN: Right? It doesn't -- they overlap I think, but it's not necessarily dictated by the state court's findings of fact.
MR. CAMPBELL: That's correct.
HON. ADALBERTO JORDAN: Right. You can have a case where there are state court findings of fact and you may have room for an evidentiary hearing under AEDPA. So I get that. Put that one off to the side. Let's talk about the Brady/Giglio claims on the merits.
MR. CAMPBELL: Okay.
HON. ADALBERTO JORDAN: Because if

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those findings stand under AEDPA's deferential standard, you lose on both of those claims, right? Because then there's no deal to have been reported to you or given to you. And her testimony at trial about no deal was not false and didn't need to be corrected, right?
MR. CAMPBELL: Well, Your Honor, I think the standard is slightly different for evidentiary hearings. Under the Pope case it's --
HON. ADALBERTO JORDAN: I know.
MR. CAMPBELL: Okay.
HON. ADALBERTO JORDAN: I'm trying to compartmentalize those two. If you want to start evidentiary hearings, start evidentiary hearing.
MR. CAMPBELL: I gather what you want to hear, Your Honor.
HON. ADALBERTO JORDAN: No, I don't want to hear anything. But I don't think the two are exactly the same. As you said, they have different legal standards. So there's a standard for analyzing the denial of an evidentiary hearing and there's a standard for analyzing the merits decisions of the Alabama courts on your Brady/Giglio claims. You can start with

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whichever one you want, but I think they are different.
MR. CAMPBELL: Okay. You're right, Your Honor, when you pointed out that the Rule 32 Circuit Court was concerned. That's why they remanded the case. They found that Mr. Reynolds pled a Brady claim. They remanded for an opportunity for Mr. Reynolds to prove that claim. They didn't give him that opportunity, though he made various requests for discovery and evidentiary hearing and never got it.
I will submit, Your Honor, that that lack of diligence plus what I'm about to tell you about the record evidence of the brady claim, entitles Mr. Reynolds to an evidentiary hearing at least in this case.
And what he had before the Circuit Court at the end of the day was substantial proof of a deal.
HON. ROBERT J. LUCK: Doesn't Section 2254(e)(2) though require -- and there's a bunch of different levels to this evidentiary hearing claim. But at least 2254(e)(2) seems to require evidence of factual innocence, does it not?
MR. CAMPBELL: I don't think so, Your

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Honor. It requires diligence that there couldn't be any reason on the part of the defendant.
HON. ROBERT J. LUCK: That's part of the --
MR. CAMPBELL: And also requires the defendant to show that the allegations pled, if true, would entitle him to relief. Those are the two components of the evidentiary hearing standard. We feel that the processing wasn't given, though requested every time, meets the first component.
And the second component, I would posit to Your Honors that the Rule 32 court's determination already that he pled a meritorious Brady claim even before it went back up, but satisfy that standard.
HON. ROBERT J. LUCK: Isn't the claim -- I'm just reading from (e)(2). "If the Applicant has failed to develop the factual basis of a claim in the state court proceedings, the Court shall not hold an evidentiary hearing on the claim unless the Applicant shows that...the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error," in other words,

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you have to show that constitutional error, "no reasonable fact finder would have found the applicant guilty of the underlying offense."

You have to show that, don't you?

MR. CAMPBELL: I think though, Your Honor, the way that --

HON. ROBERT J. LUCK: Or that a reasonable fact finder would...

MR. CAMPBELL: The way that Pope v. Secretary of Department of Corrections, it's cited in our brief, 680 F.3d 1271, interpreted that provision to say that there's two components here, that the petitioner has to demonstrate the facts underlying its Brady/Giglio claim personalizing to us would be sufficient to entitle him to relief. That's the first component.

And the second component is the failure to establish those facts in earlier stage was not due to a lack of diligence.

So that's how the 11th Circuit interpreted (e)(3), is really the diligence prong because of the way they constructed the statute. And then the second component is on the merits.

HON. ADALBERTO JORDAN: But your point,

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the way you read it is that you have not failed to develop the facts because you kept asking and asking and asking, and you didn't get, didn't get, didn't get.

MR. CAMPBELL: Right. So we --

HON. ADALBERTO JORDAN: And so you're not at fault under (e)(2) and therefore the actual innocence kicker doesn't apply to you. That's your reading of that provision.

MR. CAMPBELL: That's our reading of Pope. That's how we see that case. And so, correct, the amount of times that he requested an evidentiary hearing below and wasn't given one and the district court didn't give him an evidentiary hearing or discovery either I think satisfies the diligence prong.

Now, when you're getting into the merits, Your Honors, again, I think the Rule 32 circuit court's finding that there was a meritorious Brady claim could be enough. But even if you --

HON. ADALBERTO JORDAN: But that's on the pleading side, right?

MR. CAMPBELL: Yes.

HON. ADALBERTO JORDAN: If you can

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prove these facts, you've got a meritorious Brady claim. But now you have factual findings crediting the affidavits of the prosecutor, the defense lawyer, and Ms. West herself. So how do you deal with those?

MR. CAMPBELL: We think those are unreasonable application of facts to the case. Two respects. Number one, those affidavits were never tested. Okay? There was never an opportunity for cross-examination. They fly in the face of the overwhelming record evidence that was presented through Rule 32 court. For that reason, we think that the Rule 32 court made an unreasonable application of the facts. So that is part of the standard.

HON. ROBERT J. LUCK: Alabama rules allow for evidentiary submissions for which a court can make findings of fact, does it not?

MR. CAMPBELL: They allow for that, correct.

HON. ROBERT J. LUCK: Right. Isn't that what happened here?

MR. CAMPBELL: Well, our position is it was unreasonable for them to not grant Mr. Reynolds an evidentiary hearing in light of the

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overwhelming record evidence that we put in, in Rule 32, and only defer to those affidavits that were never tested on cross-examination, that were self-serving, that were inconsistent in --

HON. ROBERT J. LUCK: I know. But the Alabama rules allow for findings of fact to be made based on competing evidence based on evidentiary submissions. In fact, the remand instruction on the first appeal from the ACCA specifically said you can do it one way or you can do it another way. And they picked one of the ways.

MR. CAMPBELL: Yes. We're not saying that the circuit court required the trial court to hold an evidentiary hearing. That's not our argument. Our position is that that circuit courts -- the trial courts and the circuit courts' adoption of that order to rely on those affidavits in the face of all the other evidence -- you had Ms. West facing 70 years in prison before Mr. Reynolds' trial, which gave her a clear incentive to cooperate.

You had her cooperating right away, spending significant time with the agents and the prosecutors in the first couple days after the

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murders where she started the pattern of inculpating herself, seemingly without fear of putting herself in further jeopardy of her drug charges or of her hindering the prosecution charge.

HON. ROBERT J. LUCK: How can we say that it's either clear and convincing wrong or no fair-minded jurors can reach that fact where there's the three affidavits from all the relevant parties saying that there was no deal at the time. And the court did an in-camera review of the file itself, the one that you say you didn't get a chance to look at. It looked at all those documents in there and it looked at the plea colloquy from the eventual -- from the blind plea that was eventually entered into.

Based on all of that, why is it not reasonable, let alone whether it's right or not we can talk about. But whether it's reasonable for fair-minded jurors to make that call?

MR. CAMPBELL: On that file that you are speaking about, Your Honor, that's Mr. Reynolds' prosecution file. The documents were withheld from that file as well. The trial court, Mr. Reynolds' trial court ordered the

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production of that file and the state was able to take documents out of that file on work product grounds. Work product grounds are not justified --

HON. ROBERT J. LUCK: But, Counsel, I am talking about the in-camera review that was done by this judge. So this judge saw all the documents, including the privileged ones and the affidavits and the blind plea colloquy, and based on all of that evidence made a call.

Now, that doesn't mean there isn't contrary evidence or contrary inferences, it just means that where there's two choices, it's not unreasonable to pick one over the other.

MR. CAMPBELL: And our view, Your Honor, is that it was unreasonable because the reasoning was that there was a blind plea.

But you had an agreement, a deal, a memorandum that was drafted by West's lawyer --

HON. ROBERT J. LUCK: But, Counsel, that memorandum states that there is an agreement with the DA.

MR. CAMPBELL: Yes.

HON. ROBERT J. LUCK: It doesn't indicate timeframes. You inferred that that

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agreement existed at the time of the original trial, but it's just as reasonable, even putting aside counsel's own explanation for it, even saying that that's a lie. It still is reasonable to say that the agreement was the agreement they made on the spot when the memo was drafted, not three or four years before, right?

MR. CAMPBELL: If that's the case, Your Honor, it still casts into doubt the trial court's -- one of the bases that there was a blind plea. If there was a blind plea, there would be no sorts of discussions about an agreement between the State and West on any deal. If it's a blind plea, then there's no agreement, the court is going to make its decision.

But then you had that memoranda that reflected the conversation that there was an understanding.

HON. ROBERT J. LUCK: What that calls into question is whether there was an agreement at the time of the plea. That doesn't indicate the question you need to answer and defined to be clearly erroneous from the state court, and that is that there was a deal at the time of the trial or before he was actually sentenced.

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MR. CAMPBELL: Well, Your Honor, we believe that the evidence puts that memorandum into context, which was the evidence that was going through, you know, West's pattern, her lawyer's conduct during the proceeding where, you know, he did not prepare her for her examination at trial, didn't attend the examination at trial, he didn't prepare a mitigating case. You know, his conduct reflects that she had an agreement in place.

And then you have the State's own conduct. You have --

HON. ROBERT J. LUCK: Well, it reflects a lack of work, that's certainly what it reflects. Given that we are here on an ineffective assistance of counsel claim, is it unreasonable that counsel was ineffective in representing Ms. West?

MR. CAMPBELL: Your Honor, just from looking at the record, either he was unethical --

HON. ROBERT J. LUCK: Let me ask you this. How many ineffective assistance of counsel subclaims did you file against the trial counsel for Mr. Reynolds here?

MR. CAMPBELL: Several. Several.

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HON. ROBERT J. LUCK: Twenty, 30?
MR. CAMPBELL: Several.
HON. ROBERT J. LUCK: Right. So it's not unreasonable that a counsel didn't do something because counsel is not effective. You take from that and infer from that that it must mean that he had a deal. I'm having trouble understanding that.
MR. CAMPBELL: That's just one piece of evidence, Your Honor. The other -- the critical piece of evidence we believe is the State's conduct where the State advocated for Ms. West at her sentencing hearing. And that's the reason why this claim had ripened and they brought the Rule 32 claim on it where ADA Reid got up there, even though it was supposed to be a blind plea, and strenuously argued for Ms. West to get up to a year on drug charges and hindering prosecution charges that would have gotten her 70 years in jail.
And then they went back to the court and recommended early release as to six months. When you put all that together, then not only does it show that Mr. Reynolds has a meritorious Brady claim, but it shows that he is at least

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entitled to an evidentiary hearing. Because he tried to get one all through the process, the state courts and district court. And, you know, with the evidence that was produced already, he at least has a claim that if true entitles him to relief.
He's never gotten an evidentiary hearing claim. There's never been an explanation of the lack of records, the lack of notes and documents in the State's file that we believe should be there. If the State doesn't have anything to hide, if the State doesn't think there is a deal in place or there's no records in Ms. West's file that show a deal, what's the harm in giving Mr. Reynolds a day in court and finally giving him an evidentiary hearing?
HON. ADALBERTO JORDAN: Like I said, Mr. Campbell, I think Mr. Reynolds probably got the raw end of the stick in the Alabama courts because given the -- in my personal opinion, the evidence that was presented was circumstantial, no doubt, but pretty strong circumstantial evidence that there was something going on. But you've got to deal with the findings of the Alabama courts on that issue afterwards.

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So let me ask you if you can in the time you have left -- can you give him another couple of minutes, please?
Can you address the claim related to Mr. Martin's confession?
MR. CAMPBELL: Thank you, Your Honor.
HON. ADALBERTO JORDAN: And particularly this. In a normal case, one would think that the failure to put on a third party's confession to a murder is per se ineffective assistance of counsel on the performance side.
But in this case you've got this wrinkle. And I would like you to talk about it, please. The wrinkle is that that confession would have run counter to Mr. Reynolds' own narrative in this respect. Mr. Reynolds admitted that he went into the house with Ms. West, although it was Ms. West who had done something that she didn't really reveal in detail to him. And then he tried to help her out by doing what he said he did.
But that third-party confession would have run counter to that narrative even if you believe Mr. Reynolds completely. So how does that plan into the ineffectiveness claim?

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MR. CAMPBELL: Your Honor, you are correct in that there is that deviation between the confession and Mr. Reynolds' testimony. However, we still think the confession, the lack of getting the confession before the jury prejudices Mr. Reynolds.
One, it contradicts Marcy West's testimony. Marcy West was the direct evidence between the crimes and Mr. Reynolds. The state at most, at most had select forensic evidence that just showed he was there at some point, and like he testified after the crime.
Even though Mr. Martin's confession doesn't totally match up with Mr. Reynolds' testimony, it directly contradicts that -- Ms. West's testimony. Had the jury heard that Chad Martin confessed --
HON. ROBERT J. LUCK: Wouldn't it have demolished your client's credibility and the entire defense if they had put that in?
MR. CAMPBELL: I don't believe so, Your Honor. First of all, in the timing of things --
HON. ROBERT J. LUCK: The entire defense was that your client went in afterwards to burn down the house to cover for Ms. West and

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himself for having gone in to clean up after her. That's the theory. The confession is completely contrary to that. Completely.

MR. CAMPBELL: Well, let me start by saying this. The confession was disallowed before Mr. Reynolds took the stand. Okay? So there could have been a decision made not to have Mr. Reynolds take the stand. That's the timing of it.

But also, again, there are contradictions. But --

HON. ROBERT J. LUCK: It's actually worse than Judge Jordan described, at least to me. Because the confession not only says the complete opposite of what your client testified to, it actually implicates your client as having been there at the time of the murders.

MR. CAMPBELL: Well, I don't think it implicates. Chad Martin never admitted that Mr. Reynolds was there.

HON. ROBERT J. LUCK: If the jury heard this confession that said Michael -- who else was there? Michael was there. Who is Michael? Michael Reynolds? Damn, darn, dammit. Michael Reynolds was there? No, I'm clamming up, I want

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my lawyer, I don't want to talk anymore. That is damming to your client. How could you -- how can an attorney possibly admit that into evidence when your client's saying that he didn't do it, wasn't there until after it's done?

MR. CAMPBELL: Well, he did determine it was reasonable. He did determine that was strategy because the attorney did try to get it in. That statement was made after the police were berating Mr. Martin and they didn't believe him. We know the circumstances. You know why they didn't do that --

HON. ROBERT J. LUCK: That would have undermined your whole defense, the third-party confession, if you said they beat it out of him.

MR. CAMPBELL: No, at that part they did.

HON. ROBERT J. LUCK: Right.

MR. CAMPBELL: That part -- they refused to believe when he was confessing. And it's not Mr. Reynolds' burden to prove his theory as the state's --

HON. ROBERT J. LUCK: You're right. But the problem is at this point, at the prejudice side -- I'm not talking about the

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deficiency side -- we have to weigh -- we actually have to see if it was reasonable for the appellate court, the state appellate court, to have weighed the aggravating and mitigating circumstances. And here -- and also the -- how this would have affected the verdict. And we have to weigh the good with the bad. And there just seems to be a lot of bad here that it would be reasonable for an attorney or reasonable to conclude that this didn't affect the verdict.

MR. CAMPBELL: I think what you have, Your Honor, is the only evidence of someone saying they committed the crime. Chad Martin said he committed the crime. Chad Martin said two other people committed the crime with him. Mr. Reynolds denied committing the crime. Ms. West pointed at Reynolds. This evidence, had it been before the jury, would have created at least a reasonable doubt for them to believe Ms. West's side of the story. And that's why we think it was prejudiced.

HON. ADALBERTO JORDAN: All right, Mr. Campbel. Thank you very much. You have saved all of your time for rebuttal.

Mr. Anderson?

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MR. ANDERSON: Thank you, Your Honor. May it please the Court. I am Richard Anderson for the State of -- excuse me, for the Appellee in this matter.

This was a highly-aggravated case. In the early morning hours of May 25th, 2003, Michael Wayne Reynolds in the company of Ms. West traveled to the Martin family home. In his words, it was "to get some money".

When he arrived there, he took a knife into the house and he exterminated the Martin family. In the kitchen he found Mr. Martin. He stabbed him 11 times, killing him.

Then he went to a bedroom where he first found Melinda Martin. In a struggle, his glasses were broken, leaving part of his glasses on the bed. And in the course of that, he stabbed Mr. Martin 24 times before moving on to eight-year-old Savanah Martin.

Now, Savanah Martin was a little thing. At her autopsy she only weighed 73 pounds. It only took five stab wounds to kill her.

Afterwards, Mr. Reynolds tried to cover up his guilt by dousing the scene with gasoline.

Mr. Reynolds' guilt is not in

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legitimate question. There is --
HON. ADALBERTO JORDAN: Well, I mean, you say that, and maybe you're right with regards to the deferential standards we have to apply. But when you have a third-party confession, that puts guilt in play. Maybe not to the point that he needs it to succeed in a habeas petition, but this is not one of those cases where you're just talking about legal sufficiency. There's a little more here. It may not get him to where he needs to go, but you've got a third-party confession, and that makes this case different, at least in some ways.
MR. ANDERSON: Your Honor, for the purposes of this proceeding here, we are under a deferential standard. We're looking at facts --
HON. ADALBERTO JORDAN: You have that -- the AEDPA standard does -- okay. The AEDPA standard does not change the existence of that third-party confession by Mr. Martin, correct? That confession exists. And no one can wish it away, write it away, explain it away, right?
MR. ANDERSON: Your Honor, I would dispute you on one point, Your Honor. It is not a third-party confession; it is a police report

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that purports to document --
HON. ADALBERTO JORDAN: Come on, Mr. Anderson. Come on.
MR. ANDERSON: -- a third-party confession.
HON. ADALBERTO JORDAN: And a policeman is going to make that up in a report and just make up that somebody confessed to the horrible triple murder that you just described? Some police officer in Alabama is going to be bad enough at his job and evil enough at his job that he is going to write a report implicating an innocent third party? That's the State's position?
MR. ANDERSON: Your Honor, that report is full of self-contradictory material and inaccuracies. Some of them are very --
HON. ADALBERTO JORDAN: So are a lot of confessions.
MR. ANDERSON: Some of them are very significant factual inaccuracies, Your Honor. One of which is this, perhaps the most evocative and powerful part of that purported confession is the purported statement by Mr. Martin, Chad, that when he was stabbing Savanah, "She was just

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looking at me with those big brown eyes." A very powerful statement, Your Honor.
But there's a problem. I've read Savanah Martin's autopsy report, as I'm sure that the jury did. Savanah Martin's eyes were blue.
HON. ROBERT J. LUCK: Counsel, this is not where you need to be arguing in my view.
I will tell you the part that I'm troubled by. And I can't speak for anyone else. And it isn't at the guilt phase, but it is at the residual doubt penalty side of it. Because it would seem to me that I understand the strategic reason and I understand prejudice-wise given all the testimony that was there how this may not have affected the ultimate verdict of guilt. But why would you not -- how would this not have affected the residual doubt argument such that at least -- were we in a ten-two situation during this trial?
MR. ANDERSON: I am actually -- I think it was a unanimous verdict, actually, Your Honor.
HON. ROBERT J. LUCK: I know. But was Alabama law ten --
MR. ANDERSON: Yes, I believe it was.
HON. ROBERT J. LUCK: So three jurors

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would not have been persuaded.
MR. ANDERSON: Well, Your Honor, again, what you've pointed out earlier, the problem with that Chad Martin statement -- I'll go ahead and call it that -- is that it is so self-contradictory and it is so critically contradictory with Mr. Reynolds' theory of the case, and it is so in some very important ways. Because one of those that -- one of Mr. Reynolds' points of his strategy was saying, well, I was there, but only to pour gasoline over the scene.
HON. BARBARA LAGOA: But wasn't -- I mean, maybe I'm incorrect.
MR. ANDERSON: Yes, Your Honor.
HON. BARBARA LAGOA: But my understanding is that they didn't learn about it until after Mr. Reynolds made the decision to testify.
MR. ANDERSON: The Chad Martin...
HON. BARBARA LAGOA: The Chad Martin. Did they know about the Chad --
MR. ANDERSON: I believe that Counsel was aware of that for some time. The Chad -- there's -- I'm not aware of any allegation that the Chad Martin statement was suppressed or

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anything like that. I believe everyone knew about it.

HON. ADALBERTO JORDAN: No, I think you're right. I mean, that's why he tried to get it in a couple of ways. It didn't work, and then he said I'm not going to try any further ways to get the officer here.

MR. ANDERSON: And one of the -- as Judge Luck was pointing out, one of the problems again with that statement is that it put Mr. Reynolds there when the crime was occurring.

HON. ROBERT J. LUCK: I know. But for residual doubt, unlike a trial, there doesn't need to be sort of perfectness. In other words, the whole concept of residual doubt is if you have any doubt in your mind about how this thing came, you should err on the side of life as opposed to death.

MR. ANDERSON: And residual doubt, Your Honor, under Alabama law, is not a mitigating circumstance.

HON. ROBERT J. LUCK: Yeah, but that is -- I have to tell you, that is not something that we would defer to. I mean, there is federal case after federal case, including our own. I think

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your opposing counsel does a good job in their brief of pointing out all the times that we've said sometimes residual doubt is all you've got. And so even the federal district court didn't rely on that fact, because it's just not right as a matter of federal law. So that may be the rule in Alabama, and that's fine. And their court can do whatever it wants. But I don't think that's something that we would defer to AEDPA-wise because it's not a conclusion with which that would impact the question that we have.

And so with this in there, why would a court -- why is it not prejudicial that three jurors would not have been persuaded that someone else confessed to the crime and to do the most horrible thing that you've just described at the start of your oral argument.

MR. ANDERSON: Your Honor, one, again, that statement just doesn't create any legitimate doubt. Mr. Reynolds admits to having poured gasoline on the bodies or on the scene and the victims. And in the autopsy reports, all of the victims had chemical burns to their bodies. Also the testimony from the pathologist was that they all didn't die instantaneously from stab wounds.

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HON. ROBERT J. LUCK: I know. But Chad said that he smelled the gasoline. I mean, he essentially indicated that I am still burdened with the smell of gasoline from having murdered someone I considered to be my brother, his wife and daughter.

MR. ANDERSON: And, Your Honor, the jury did hear that Chad Martin said I can smell the gasoline on my hands. The jury heard that Chad Martin said that Savanah screamed --

HON. ROBERT J. LUCK: Is that then the response? In other words, that Lieutenant Gray's testimony allowed them to make the residual doubt argument if they wished to make that? In other words, the factual record was there for which they could have made the residual doubt argument.

MR. ANDERSON: The testimony was in and was not objected to, Your Honor. So certainly counsel could have if they had chosen to --

HON. ADALBERTO JORDAN: But you fought to exclude the substantive testimony. It's very hard for you to get up here now and say the jury had it. You did not have to object to the testimony of the witness about the statement that Mr. Martin purportedly gave, but you objected.

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And the objection was sustained.

MR. ANDERSON: And, Your Honor, we're looking here at the prejudice question and whether that jury heard that information, and they did. So whether the state objected at the time to the entire statement coming in is not --

HON. ADALBERTO JORDAN: Well, did it hear that Mr. Martin had confessed to the murders?

MR. ANDERSON: I'm sorry, Your Honor?

HON. ADALBERTO JORDAN: Did the jury hear that Mr. Martin had confessed to the murders? The answer is a resounding no. Because smelling the gasoline could mean that he was there as an accessory or that he was there to rob and steal, but didn't commit the murder. And his statement, confession, whatever you call it, saying maybe as Judge Luck said that it implicates Mr. Reynolds in being there doesn't mean that Mr. Reynolds was the person who committed the murders personally, either.

So there's a way of understanding his statement to help Mr. Reynolds.

MR. ANDERSON: At the end of the day, Your Honor, this Court would simply have to

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decide whether no reasonable jurist could defer to the judgment of the Alabama courts. Because the Alabama courts considered all of this and reached a conclusion. And the plain fact of the matter is that this statement such as it is wouldn't have changed the picture in a powerful way.

HON. ROBERT J. LUCK: Can we talk about what did come in?

MR. ANDERSON: Yes, Your Honor.

HON. ROBERT J. LUCK: I read Lieutenant Gary's testimony, so I want to -- Judge Jordan asked about that and I want to sort of see what actually did and what didn't come in.

So as I understand it -- and I'm looking at docket entry 18-18 starting at about Page 53. It may be at different places in the docket entries, but that's the one that I'm looking at.

Lieutenant Gary said that Chad told her that -- told Lieutenant Gary where Savanah was in the house and where Savanah was. That was at the murder scene. In other words, Chad just shows up on his own and tells Lieutenant Gary where Savanah is in the house without having been in

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the house, or supposedly not having been in the house, right?

MR. ANDERSON: Yes, Your Honor. And that's how he came to the attention of the police and why he was taken in and questioned. It was later --

HON. ROBERT J. LUCK: He actually -- sorry to interrupt, but he actually knew where the father and the mother were as well. Right?

MR. ANDERSON: Yes, Your Honor. But looking at that testimony, it's actually not clear whether he was right about it. Because Lieutenant Gary said that Chad said that Savanah was in the closet. But Savanah was found on the bed with the bedclothes which had Mr. Reynolds' broken piece of prescription eyeglasses on it.

HON. ROBERT J. LUCK: Speaking of which, he said -- he told Lieutenant Gary, "And then he was talking about his sunglasses." That he lost his sunglasses, a pair of sunglasses. Right?

MR. ANDERSON: Right. But there is absolutely no question in this case that the prescription sunglasses were Mr. Reynolds.

HON. ROBERT J. LUCK: And all of that

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led Lieutenant Gary to then say -- to tell the sergeant in charge that she was suspicious and later they determined he was actually a suspect. Chad, right?

MR. ANDERSON: That's correct, Your Honor. That's the point at which he was taken in and questioned.

HON. ROBERT J. LUCK: Right. And so when he was taken in, he then is -- he has the statement that's there, and then he actually sits down with Lieutenant Gary again. And he tells Lieutenant Gary without any prompting by her, you know, this may seem or sound crazy, but it's as if I'm seeing through Chuck's eyes. He says -- Chad said he could smell the gas on his hands and he didn't know where the cuts came from, that he could not hurt Savanah, but a phone call that he made was going to probably make him look bad and that he could hear Savanah screaming don't hurt me, something to that effect. Right?

MR. ANDERSON: Correct, Your Honor.

HON. ROBERT J. LUCK: That all came in, didn't it?

MR. ANDERSON: Yes, Your Honor, it did.

HON. ROBERT J. LUCK: The jury heard

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all that.

MR. ANDERSON: As well I believe a little bit more about that phone call in which he said to either his uncle or his brother was Mr. Martin, "You should change your message, you sound dead." So yes, Your Honor, all of that came in.

HON. ROBERT J. LUCK: So how does that weigh into the prejudice analysis, having gone through all that?

So now, whether residual doubt or whether at the guilt stage, how does that play into whether the exclusion of a piece of paper or the authentication of that piece of paper, a fair-minded jurist would conclude that it was no reasonable probability of a different result.

MR. ANDERSON: Yes. The Court would have to look at what the jury heard and what it didn't hear. And the very minimal additional amount, which as Judge Jordan does point out, a statement that he stabbed Savanah is what the jury didn't hear. There was -- the report doesn't actually say that he stabbed anyone else other than Savanah. But as I've noted, that report, if the jury looks at it, they're going to

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see this statement, she was looking at me with her big brown eyes when I did it and they would have seen -- and I'm sure that State would have pointed out if that had come in that she had blue eyes and that Chad Martin certainly knew that, being either her uncle or her cousin. So there were a lot of problems and a lot of reasons why a jury would not have given that statement very much weight.

HON. ADALBERTO JORDAN: Can we slide over to the first issue that Mr. Campbel started on?

MR. ANDERSON: Yes, Your Honor. Absolutely.

HON. ADALBERTO JORDAN: Can you -- when the State was ordered to provide records to Mr. Reynolds' counsel on remand to the Rule 32 court, what does the record show that the State did?

MR. ANDERSON: Well, first I want to back up just a tiny bit, Your Honor, to look at what the Rule 32 trial court ordered. And what the court ordered was production of the entire file. The order reads essentially the district attorney is to produce to the petitioner the entire file for inspection under the supervision

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of the district attorney.

HON. ADALBERTO JORDAN: Any and all.

MR. ANDERSON: Yes, Your Honor. That is the order. It doesn't contain an exception. And I am not aware of any evidence in the record to suggest that the state did anything less than that.

HON. ADALBERTO JORDAN: Did the state withhold any privileged documents or work product or anything like that?

MR. ANDERSON: Not that I am aware of, Your Honor.

HON. ADALBERTO JORDAN: But Campbell says yes.

MR. ANDERSON: Well, I am not aware of any.

HON. ADALBERTO JORDAN: If that was -- if the State turned everything over, why did the judge have to review everything in-camera?

MR. ANDERSON: Well, the judge had already reviewed everything in-camera prior to Rule 32. Because there were a lot of Brady issues at the time of trial. And the judge before trial entered an order to the district attorney to produce his entire file regarding Ms.

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West and Mr. Reynolds to the court for inspection. The court reviewed the entire prosecution file, everything.

HON. BARBARA LAGOA: Before trial?

MR. ANDERSON: Before trial, looking for any sort of exculpatory evidence and found none. And it's the same judge who heard the Rule 32. And in his order denying relief, that was one of the factors he looked at. I mean, this is the judge who heard Ms. West's testimony. He had had the advantage of looking at everything prior to this being an issue, prior to this particular issue coming before him. So that's why that was so important.

But Judge Luck correctly points out this post-it note issue does not demonstrate anything was being withheld.

HON. ROBERT J. LUCK: Can you answer Judge Jordan's question though?

MR. ANDERSON: Yes, Your Honor.

HON. ROBERT J. LUCK: Which as I understood it -- and he can correct me if I'm wrong. He often -- I am often wrong and he often does. If documents were withheld -- in other words, if there was privileged documents that

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were withheld, in other words, there was not compliance with any and all, how does that impact the issue of whether there should be an evidentiary hearing or whether there should be additional discovery? I think that's your -- was that the question?

MR. ANDERSON: It wouldn't, Your Honor. Because this Court, federal courts are looking at issues like this. Based on the record that was before the trial court, before the state court. And in this case, we do have an evidentiary record. The state courts did have an evidentiary basis for making the findings they did. And we look at what the evidence was, that there was affirmatively no deal. And that was the testimony from Ms. West both at trial and in her affidavit. There was the affidavit testimony of Ms. West's attorney.

And I would like to point out in that affidavit, Mr. Montgomery, he did explain the supposed document that referenced a deal. And all it was, to the extent that --

HON. ROBERT J. LUCK: But Counsel --

MR. ANDERSON: Yes, Your Honor.

HON. ROBERT J. LUCK: The good cause

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finding from the federal district court is based on the concept that there was any and all documents turned over. That's a large part of why it denied relief here under Rule 6 of the Section 2254 rules.

MR. ANDERSON: Yes, Your Honor.

HON. ROBERT J. LUCK: And so if the record supports your opposing counsel's position that at least some documents were withheld because of privilege or whatever, does that call into question the good cause finding of the federal district court?

MR. ANDERSON: No, Your Honor. Because there's nothing to suggest that things were withheld, much less that things of Brady materiality were withheld. Excuse me.

I would like to note also that --

HON. ADALBERTO JORDAN: So there is not a single memorandum or anything in the file from the prosecutor about why Ms. West was getting the recommended sentence she got?

MR. ANDERSON: Here's another interesting point about that, Judge Jordan --

HON. ADALBERTO JORDAN: First a yes or no.

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MR. ANDERSON: There was no recommendation of a sentence.

HON. ADALBERTO JORDAN: First a yes or no.

MR. ANDERSON: There is no record that I am aware of about why she was getting -- why she ended up getting favorable treatment. But, Your Honor --

HON. ADALBERTO JORDAN: Doesn't that sound really strange to you in a case --

MR. ANDERSON: Not at all, Your Honor.

HON. ADALBERTO JORDAN: In a case where she was the state's start witness? Hold on.

MR. ANDERSON: Yes, sir.

HON. ADALBERTO JORDAN: The case was put off for so long. And then she gets this sweetheart deal on a blind plea. That stinks to high heaven.

MR. ANDERSON: Not at all, Your Honor. This -- I understand you are referencing points that opposing counsel has made in their --

HON. ADALBERTO JORDAN: No, no, I am not. Those are undeniable points. Let's start -- did she get a sweetheart deal?

MR. ANDERSON: No, Your Honor. I would

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not characterize it as such.

HON. ADALBERTO JORDAN: You're kidding me, right?

MR. ANDERSON: I would say that --

HON. ADALBERTO JORDAN: What did she do on the drug side, Mr. Anderson?

MR. ANDERSON: Ms. West received favorable treatment in the --

HON. ADALBERTO JORDAN: What did she do on the drug side? What did she do as a person that got her in trouble with drugs? Tell me.

MR. ANDERSON: She got into trouble with drugs because she was associated with --

HON. ADALBERTO JORDAN: What did she do?

HON. BARBARA LAGOA: What was she charged with? It's very simple.

HON. ADALBERTO JORDAN: What did she do?

MR. ANDERSON: She was charged with several drug offenses, possession of paraphernalia, distribution, and something else I believe.

HON. ADALBERTO JORDAN: If that's all you had, I could see this not being a sweetheart deal. But then she does what she says she did

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with Mr. Reynolds.

MR. ANDERSON: Yes, Your Honor.

HON. ADALBERTO JORDAN: So that's undeniable that she gets this deal, right? The case --

MR. ANDERSON: No, Your Honor. She did not get a deal. I do have to call into question that characterization. Because a deal implies that there was a deal reached, and there was none in this case.

HON. BARBARA LAGOA: Well, wouldn't she have been charged with being an accessory?

MR. ANDERSON: I do not know the answer to that. I know she was charged with hindering the prosecution for the destruction of evidence. And I would like to note that at that sentencing hearing for Ms. West, one, the prosecution recommended nothing in the way of sentencing. And in fact, what the prosecution did --

HON. ADALBERTO JORDAN: Didn't the judge say something about what he had discussed before with the parties?

MR. ANDERSON: The judge said there was discussion of whether she would serve six months or 12 months if she successfully --

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HON. ADALBERTO JORDAN: That's still 12 months. Mr. Anderson, you're not looking at reality. You may win this case on AEDPA deference, but I cannot believe your answers to some of these questions. They're just factual questions.

Her case gets put off until well after Mr. Reynolds' trial. She testifies as the State's star witness. She gets less than a year in custody. There's a statement in the defense lawyer's file about an agreement having been reached. When that agreement was reached is another question. Right? That's all undeniable so far. Have I missed anything?

MR. ANDERSON: that's correct, Your Honor.

HON. ADALBERTO JORDAN: Okay. And then she gets less than a year in prison on a supposed blind plea. And you're telling me the prosecutor didn't say anything on her behalf at the hearing?

MR. ANDERSON: She said nothing on her behalf at the hearing, Your Honor.

HON. ADALBERTO JORDAN: The prosecutor just stayed mute.

MR. ANDERSON: No, sir. What the

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prosecutor said --

HON. ADALBERTO JORDAN: Is what?

MR. ANDERSON: He didn't recommend a sentence. What he said was --

HON. ADALBERTO JORDAN: What did he say?

MR. ANDERSON: He told the judge I am going to tell you, Your Honor, the good and the bad about Marcy West. And that's exactly what he did. He told the judge both that she provided critical information to the prosecution and also that she destroyed critical evidence.

HON. ADALBERTO JORDAN: And you think that a prosecutor worth his or her salt would not have at least told the defense lawyer, listen, I'm not making any promises, but if your client testified truthfully, I'll let that be known to the trial judge and let the trial judge exercise his or her discretion?

MR. ANDERSON: I'm not telling you that, Your Honor; the evidence is telling you that. Because all of the evidence in this case is absolutely clear that there was no deal.

HON. ADALBERTO JORDAN: You say that so confidently. I don't see how you can do that.

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Like I said, you may win this case based on standards of review, but things like this do not generally happen in a capital case.

MR. ANDERSON: Your Honor --

HON. ADALBERTO JORDAN: They just do not.

MR. ANDERSON: It's axiomatic that defendants who have valuable information to the state may hope that they will receive favorable treatment if they are helpful, if they cooperate. It is also true that if someone --

HON. ADALBERTO JORDAN: Why wasn't her case set immediately for plea and sentencing then?

MR. ANDERSON: If Ms. West's attorney had done that, he would have been committing malpractice. Because if her case had been disposed of early, she would have lost any hope she had to get favorable treatment.

HON. BARBARA LAGOA: Right, but that's --

HON. ADALBERTO JORDAN: Of course. There's the promise.

MR. ANDERSON: No, Your Honor.

HON. ADALBERTO JORDAN: There's the

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hope.

MR. ANDERSON: No, Your Honor. There is the hope -- there is the hope, Your Honor.

Yes, Judge, Lagoa.

HON. BARBARA LAGOA: But even as an AUSA, you could have a witness who is a defendant who received a sentence and then understood that they would get potentially a reduction in sentence afterwards for cooperation. So it's very unusual to me to think that you're going to have a star witness who has no -- you're going to have a debriefing with this defendant, with this star witness, correct?

MR. ANDERSON: Yes, Your Honor.

HON. BARBARA LAGOA: And I don't imagine any defense counsel worth their salt is going to allow for a debriefing without any kind of understanding of what's happening.

MR. ANDERSON: Your Honor, and you've made a very good point there when you reference what an AUSA could do in this sort of situation, allow a case to be disposed of with the understanding we'll revisit sentencing or motion for new sentencing or something based on cooperation. But that's only if you have a deal.

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If you don't have a deal, then everyone loses their influence at the moment the case is disposed of.

HON. ADALBERTO JORDAN: Do you think the prosecutor knew her testimony before he put her on the stand?

MR. ANDERSON: She had come to the police to tell her what --

HON. ADALBERTO JORDAN: Do you think the prosecutor knew her testimony before he put her on the stand?

MR. ANDERSON: I don't know, Your Honor. I assume that he assumed that she would testify based on --

HON. ADALBERTO JORDAN: I know you don't know, because you weren't there and I wasn't there. Do you think the prosecutor knew her testimony before he put her on the stand?

MR. ANDERSON: I think the prosecutor expected that she would testify honestly based on her statements to the police and to the district attorney earlier. When she first came to --

HON. ADALBERTO JORDAN: And you don't think the defense lawyer, if you think he was doing his job would have requested some sort of

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protection against use of her statements against her later? She comes in and testifies to what she says she did with Mr. Reynolds. If you don't have any sort of agreement with the State, the state can say, you know what, your charge is just going up. Because you just admitted to X, Y, and Z. And we didn't know about X, Y, and Z before. So now you're got higher charges to deal with. No defense lawyer would have done that and let her go in blind like that.

MR. ANDERSON: And in that hypothetical, Your Honor, a prosecutor's office who took advantage of people that provided helpful information like that would soon find that the well was drying up, that no one wanted to cooperate. So I think that everyone had ever motivation to not dispose of those charges.

HON. ADALBERTO JORDAN: Well, you're looking at this through rose-tinted glasses, Mr. Anderson. So again, that doesn't affect the ultimate disposition of the case. But I think you're just ignoring reality to understand how criminal cases play out, specifically capital cases, and the way that witnesses are treated when they're testifying. There are too many

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flags that go up in this case to say that there was no deal, no agreement, no understanding. Do you think she expected to get some benefit if she testified truthfully?

MR. ANDERSON: I am certain that she hoped to benefit from testifying truthfully.

HON. ADALBERTO JORDAN: Was she asked at trial whether she accepted something?

MR. ANDERSON: She was not asked. She was asked whether she faced charges, and she said that she did. No, I take that back. She was asked if there was a deal at the time of trial. And she testified that she did not have one. But what she expected, I don't think the question was asked quite that way.

HON. ADALBERTO JORDAN: Where do we look in the record, Mr. Anderson, to find out whether or not there were any qualifiers put on the State's production of its files to Mr. Reynolds during the Rule 32 proceedings or whether they were turned over fully as the Rule 32 court ordered?

MR. ANDERSON: Well, as I stand here, Your Honor, I don't have a record cite to point you to.

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HON. ADALBERTO JORDAN: Do you think there's somewhere to find that though, or do you think the record is just silent on that?

MR. ANDERSON: I am not certain of the answer to that, Your Honor.

HON. ADALBERTO JORDAN: Okay.

MR. ANDERSON: So --

HON. ROBERT J. LUCK: Can I point one thing out briefly?

MR. ANDERSON: Yes, Your Honor.

HON. ROBERT J. LUCK: So your opposing counsel filed a very long brief. In fact, they asked for additional words, which is not something we always grant, but was appropriate here and we granted it here. Your brief is 20 pages. It's the shortest that I've ever seen on a first time habeas, ever.

MR. ANDERSON: Yes, Your Honor.

HON. ROBERT J. LUCK: In any court that I've ever served on. Some of those things maybe could have been addressed if it was longer than 20 pages. In other words, the question that Judge Jordan is asking you was brought up in the brief of your opposing counsel. He said exactly that, that privilege documents were withheld an I

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didn't any and all. So that just seems like something that could have been addressed with the 30 or 40 more pages you had to work with here.

MR. ANDERSON: Perhaps so, Your Honor. But the factual pattern that was before the state courts is so very clear, that's what the State chose to focus on, that's what I chose to focus on, is what the evidence actually was before the state court, contrasting it with the evidence that Mr. Reynolds put forward, what he called an expansive evidentiary basis for deal existing was nothing more than some inferences based on timing and a single document that referenced an agreement that happened -- to the extent it was an agreement, it happened a year after trial. And that's it.

HON. ROBERT J. LUCK: I want to go back to something Judge Jordan asked you about.

MR. ANDERSON: Yes, Your Honor.

HON. ROBERT J. LUCK: He asked you whether this was a sweetheart deal or not or something to that effect.

MR. ANDERSON: Yes, Your Honor.

HON. ROBERT J. LUCK: What did -- it was ADA Reid is the Assistant District Attorney,

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right?

MR. ANDERSON: That's correct, Your Honor.

HON. ROBERT J. LUCK: What did he have to say about this plea agreement in terms of others that are either consistent or not consistent like that for people who have been charged with similar crimes as Ms. West?

MR. ANDERSON: The judge -- I don't know that Mr. Reid said much about it, but Judge Milliken, who actually heard this case in post-conviction, he talked about the differences, the fact that one or the other witnesses was -- who was also charged with hindering prosecution, was sentenced by a different judge. And he said that's a practice that's no longer done in that circuit.

HON. ADALBERTO JORDAN: I'm looking at -- this is Appendix 1873 and it's Paragraph 8 of the Reid affidavit. "The sentences to the maximum terms possible on her charges are actually severe compared to other defendants charged with similar offenses given the Defendant's personal circumstances. Ms. West had no prior felony conviction, no subsequent

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encounters with the law, and goes on to explain. Is that not what the record suggests?

MR. ANDERSON: That's correct, Your Honor. And part of what DA Reid explained at the sentencing hearing and part of his telling the good and the bad to the court was that the drug charges, Ms. West had no prior charges at all. She had no criminal history. And the drug charges arose out of her association with Mr. Reynolds. In fact, on the day of the murder, Mr. Reynolds was arrested on drug charges. So her -- yeah, the prosecutor took into account the fact that her criminal problems really arose entirely out of her association and her relationship with Mr. Reynolds.

HON. ROBERT J. LUCK: What about Attorney Montgomery? Did he comment at all about the nature of this particular deal, whether it was good or not good or consistent with how other defendants are...

MR. ANDERSON: Well, again, they were -- I'm sorry to keep saying this, but it wasn't a deal, the sentence she actually received, based on the value of her testimony I think was appropriate.

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HON. ROBERT J. LUCK: So I'm looking at --

HON. ADALBERTO JORDAN: You say there was no deal or agreement even after the fact?

MR. ANDERSON: There was an agreement -- so what the record indicates is that in January around the time of the plea, Mr. Montgomery told the prosecution I am going to ask -- I am -- the agreement is I am going to be allowed to ask the judge for kind of a drug treatment program and to have a six-month sentence rather than a 12-month sentence upon successful completion of that program.

That's what Mr. Montgomery says the deal was.

HON. ADALBERTO JORDAN: But deal means there's willing parties on both sides. So the prosecutor agreed to that?

MR. ANDERSON: The prosecutor agreed that he was going to be -- apparently -- now, DA Harp says he doesn't remember it. But according to Mr. Montgomery --

HON. ADALBERTO JORDAN: How convenient.

MR. ANDERSON: -- at most there was an agreement that he would reserve the right to make

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that argument.
HON. ADALBERTO JORDAN: How can there be an agreement or a deal if there aren't two sides, each on one side of the bargain?
MR. ANDERSON: When there's not a meeting of the minds, Your Honor. That's how. When one party thinks there's --
HON. ADALBERTO JORDAN: But then there can't be an agreement.
MR. ANDERSON: When one party thinks there's an agreement and says I believe there was an agreement, and there wasn't.
But again, there may have been -- I don't know, there may have actually been an agreement in January of 2009. But I know this from the record that was before the state court, there was no agreement prior to trial and there was no Brady violation in this case, Your Honor.
HON. ADALBERTO JORDAN: Last question.
MR. ANDERSON: Yes, Your Honor.
HON. ADALBERTO JORDAN: How much was she facing on the charges that were actually filed against her?
MR. ANDERSON: I think there was -- I believe there was a 20-year sentence on one of

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the charges. So it was a substantial possible sentence.
HON. ADALBERTO JORDAN: All right. Thank you very much.
MR. ANDERSON: Thank you, Your Honor.
Okay, Mr. Campbell, one question before you start.
MR. CAMPBELL: Yes.
HON. ADALBERTO JORDAN: The same question I asked Mr. Anderson. Where in the record do I find something to tell me whether or not the State produced its prosecution file to Mr. Reynolds fully, completely, without any deletions, withdrawals, withholdings, or anything else, or whether it withheld some things, like you said, some privileged documents. Where do I go in the record to find that one way or the other?
MR. CAMPBELL: Standing here, Your Honor, I don't have a record cite for you. I'm happy to supplement and try to find one.
What I do have for you though is just a couple of things that I want to comment on that relate to that question. One, Your Honor has just asked the State very clearly, very clearly,

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were any document removed. You heard I'm not aware, you heard the record doesn't suggest. You didn't hear one thing; you didn't hear no. You didn't hear no.
HON. ROBERT J. LUCK: Counsel, on Page 31 of your brief, it says, "Nor did the Court," the Rule 32 court, "address the fact that Reynolds had not been given all files related to West because the State had unilaterally removed files for privilege. There isn't a single record cite after that. That generally indicates something to me.
MR. CAMPBELL: But the State had unilaterally moved for privilege that we know for sure was to file Reynolds' prosecution file at the trial court below. Okay? What was removed from Ms. West's file, because there was a clear lack of documents that should have been in there, indicated to us the files were removed from there as well.
And I just want to clarify another --
HON. ROBERT J. LUCK: It's one thing to say or to argue to a court that the court can draw an inference from something. Whether or not that's appropriate in an AEDPA setting is another

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question. But it's a fair argument to make that, hey, you have facts A, B, and C. From A, B, and C, you can draw inference D and maybe inference E. But it's quite another thing to say Fact A is they withheld.
And my reaction was maybe not the same as Judge Luck's, but I was looking for somewhere to be able to find some record evidence one way or another about what the State turned over or what the State didn't turn over. And now neither one of you -- and I'm not blaming anybody, but neither one of you is able to tell me where in the record I can find something that gives me an answer. And that's a concern for an appellate judge.
MR. CAMPBELL: I understand, Your Honor. What we've shown you in our briefs and what I told you before, there's a letter, there's clearly a letter referenced that was exchanged that wasn't in the file. There are numerous communications (indiscernible). It says nothing in there from 2005 to 2007. And the State cannot tell you no. The State (indiscernible) get up here and with a very direct question tell you no.
I think at the least the standard that

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the district court was operating under here in terms of the discovery and evidentiary hearing was an abuse of discretion. Okay? Of course it's the AEDPA standard. But for the evidentiary hearing and discovery it's abuse of discretion. And you have, Your Honors, the significant evidence that we put below about the deal that you've characterized as unusual, struggling with it, all of the flags that exist here.

We posit, Your Honor, just give Mr. Reynolds the opportunity to develop it. Let the State testify under oath that they gave over the whole file. Let us proceed with a discovery request that we asked the district court to give us the opportunity to do.

HON. ROBERT J. LUCK: But there's a finding of the lower court and an order from the lower court which says all of it was to be turned over. And there was a finding by the ACCA that all of it was turned over. How are we -- how is the District Court to abuse its discretion to rely on that finding?

MR. CAMPBELL: That finding was based on the production of Mr. Reynolds' file at the trial court --

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HON. ROBERT J. LUCK: No. That is simply not the finding of the ACCA and that's not the case. The order from the Rule 32 court was any and all documents in the file for Ms. West and the ACCA found that that was turned over and that that was sufficient when you argued to them that we got insufficient discovery. Right?

MR. CAMPBELL: Well, I submit, Your Honor, that was an abuse of discretion. Because of the evidence that we've shown through Montgomery's time records and just common sense.

HON. ROBERT J. LUCK: You're mixing the courts. That's the underlying state court. The federal court then takes that and says you've said -- the district judge here in his 250-page order abuses discretion when the district judge here said these are these findings, they got any and all file here. I know they have argued there's some missing stuff here, but based on my review and based on the lower court's findings, I don't think they need additional information here and they haven't established that basis. How can we say that's an abuse of discretion?

MR. CAMPBELL: The district court didn't say I know that they indicated the other

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filings. That's the problem. The state courts and district court have not addressed this issue. They have not addressed our argument through the evidence that we have that files are missing.

HON. ROBERT J. LUCK: Did you make the argument to the district court?

MR. CAMPBELL: Yes.

HON. ROBERT J. LUCK: And it ruled, right?

MR. CAMPBELL: But it didn't reference -- no one has dealt with this question.

HON. ROBERT J. LUCK: There's no requirement. We have tons of law which says there's no requirement to go over every single point raised in either party. It made a bottom-line conclusion here. And I guess what I'm asking is based on the underlying ACCA findings and based on the record here, how is that conclusion an abuse of discretion?

MR. CAMPBELL: Because the evidence that there is -- there's certainly a letter that was sent from the State. Okay? And that was in Montgomery's files, and that wasn't in the file. And then there are hours and hours of conferences where there's not a single note in the record of

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any of those conferences before the plea, before the sentencing, during that five or six-day period where Ms. West came in and cooperated and gave her incriminating statement. There's no notes in that file. And the State can't say no. The State was up here, had an opportunity to say there was nothing that was removed, and he could not tell you no. That is the evidence that we have that there were documents in there that was removed.

And we submit just to give Mr. Reynolds a chance to take discovery and to test his theories in the crucible of an evidentiary hearing. Again, Your Honors, if the State didn't remove any evidence, if there is nothing else that's there about the deal that we've already shown by clear and convincing evidence, let us develop that claim and let us get an evidentiary hearing before a sentence of death is executed without a single opportunity to have an evidentiary hearing in this case.

HON. ADALBERTO JORDAN: All right, Mr. Campbell, thank you very much.

Mr. Anderson, thank you very much as well.

All right, we're in recess on this case.

CLERK: All rise.

(Proceedings concluded)

CERTIFICATION

I, Sonya Ledanski Hyde, certify that the foregoing transcript is a true and accurate record of the proceedings.

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U.S. DISTRICT COURT
N.D. OF ALABAMA

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

MICHAEL WAYNE REYNOLDS,	}	
	}	
Petitioner,	}	
	}	
v.	}	**Case No.: 4:18-CV-00236-RDP**
	}	
JEFFERSON S. DUNN, Commissioner, Alabama Department of Corrections,	}	
	}	
Respondent.	}	

MEMORANDUM OPINION

This matter is before the court on Michael Wayne Reynolds's Petition for Writ of Habeas Corpus by Prisoner in State Custody Under Death Sentence Pursuant to 28 U.S.C. § 2254 and his Motion to Permit Discovery and for an Evidentiary Hearing. (Docs. # 1, 32).[1] Reynolds was convicted of five counts of capital murder for the killing of Charles ("Chuck") James Martin III, Melinda Martin, and their 8-year-old daughter Savannah Martin. In his petition, Reynolds seeks habeas relief from both his conviction and death sentence.

Through his timely-filed federal habeas petition, Reynolds presents numerous claims for consideration by the court, including ten "Substantive Claims"; six "Ineffective Assistance of Counsel Claims"; and one "Cumulative-Effect Claim." (*See generally* Docs. # 1, 31). Reynolds highlights four of these claims: (1) violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972); (2) violation of *Doyle v. Ohio*, 426 U.S. 610 (1976); (3)

[1] Reference to a document number ("Doc. _____"), refers to the docket number assigned to each document as filed in the court's record and citations to the page numbers in such documents refer to page number assigned to the document within the court's electronic filing system. Unless otherwise indicated, citations to the state-court records reflect the volume and PDF page number.

ineffective assistance of counsel; and (4) a violation of Reynolds's right to confront and adequately cross-examine witnesses at trial. (Doc. # 31 at 8).

The Petition is fully briefed and ripe for the court's review. (*See* Docs. # 1, 20, 21, 31, 32). After careful consideration of Reynolds's claims in light of the state record and for the reasons stated below, Reynolds has not met the requirements for habeas relief under 28 U.S.C. § 2254. Thus, Reynolds's Petition for Writ of Habeas Corpus (Doc. # 1) and his Motion to Permit Discovery and for an Evidentiary Hearing (Doc. # 32) are due to be denied.

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I. BACKGROUND

On direct appeal, the Alabama Court of Criminal Appeals ("ACCA") noted the following regarding the charges against Reynolds and his trial on those charges:

> In March 2005, an Etowah Grand Jury returned an indictment against . . . Michael Wayne Reynolds, charging him with five counts of capital murder in connection with the deaths of Charles James Martin III, Melinda Martin, and the Martins' eight-year-old daughter, Savannah Martin. The murders were made capital because: (1) two or more persons were killed by one act or pursuant to one scheme or course of conduct, *see* § 13A-5-40(a)(10), Code of Alabama 1975 (count I of the indictment); (2) the murder of Charles Martin III was committed during the course of a first-degree robbery, *see* § 13A-5-40(a)(2), Code of Alabama 1975 (count II of the indictment); (3) the murder of Melinda Martin was committed during the course of a first-degree robbery, *see* § 13A-5-40(a)(2), Code of Alabama 1975 (count III of the indictment); (4) Savannah Martin was less than 14 years of age when she was murdered, *see* § 13A-5-40(a)(15), Code of Alabama 1975 (count IV of the indictment); and (5) the murder of Savannah Martin was committed during the course of a first-degree robbery, *see* § 13A-5-40(a)(2), Code of Alabama 1975 (count V of the indictment). Following a trial by jury, Reynolds was convicted of all five counts of capital murder, as charged in the indictment. The jury recommended, by a vote of 12-0, that Reynolds be sentenced to death. The circuit court accepted the jury's recommendation and sentenced Reynolds to death for the five capital-murder convictions.

Reynolds v. State, 114 So. 3d 61, 73 (Ala. Crim. App. 2010) ("*Reynolds I*").

A. The Offense Conduct

The ACCA observed the following factual basis for the charges against Reynolds:

> The State presented evidence that in the early morning hours of Sunday, May 25, 2003, Charles Martin, III, his wife, Melinda, and their 8-year-old daughter, Savannah, were stabbed to death in their house. Their bodies were doused with gasoline and set on fire. The crimes were discovered later that morning by Melinda's father, Jerry Veal. Melinda Martin's purse and a cordless telephone were missing from the house.
>
> Adrian Marcella "Marcie" West, ["West"] who was Michael Reynolds's girlfriend at the time of the murders, testified at trial. She and Reynolds lived with Reynolds's father, Harold Reynolds, at the time of the crimes. West testified that on Saturday, May 24, 2003, Michael Reynolds installed a car stereo for Donald Harvey, who was also known as "Dino," in exchange for some cocaine. West and Reynolds used the cocaine; they also used crack cocaine several more times throughout that day and night.

West testified that later that night or early on Sunday morning, she drove Michael Reynolds to the Martins' house in a vehicle that was owned by Harold Reynolds's girlfriend, Sandra Roberts ["Roberts"]. West said that Michael Reynolds and Charles Martin were good friends. Reynolds told West that they were going to the Martins' house "to get some money," and she assumed he meant that he was going to rob Charles Martin.

When they arrived at the Martin residence, West parked the vehicle in the driveway, and Michael Reynolds got out. Reynolds told West to wait in the car. West said that Reynolds was not wearing any shoes, and that he was carrying a scabbard containing a dagger-style knife. She had seen the knife before at Harold Reynolds's residence. West testified that she was not alarmed that Reynolds had the knife with him because, she said, Reynolds sometimes traded various items for drugs or money.

Reynolds went to the carport door and knocked. Charles Martin opened the door and waved at West, and then Martin and Reynolds went into the house.

While West was waiting in the car, she heard Melinda Martin scream. West got out of the car and ran into the house. She saw Charles Martin lying on the kitchen floor and she heard Melinda Martin screaming in the back of the house. West went to the bedroom, where she saw Melinda Martin bent over next to the bed as Michael Reynolds stabbed her. Savannah Martin was on the bed.

West testified that she got between Reynolds and Melinda and tried to stop him from stabbing her. Reynolds accidentally stabbed West through the arm when she tried to intervene. West testified that Reynolds yelled at her and asked her what she was doing there. He told West to get the telephone and Melinda Martin's purse and to go wait in the car. Reynolds handed her two knives—the knife that he had taken into the house, and a steak knife that West had not seen before.

West grabbed the telephone and Melinda Martin's purse and took the knives and left the bedroom. When she left the room, Melinda Martin was "slouched over" at the end of the bed, and Savannah Martin was standing on the bed. West testified that she felt faint, so she leaned up against the wall in the hallway. She again felt faint when she crossed over Charles Martin's body in the kitchen, so she leaned against the kitchen counter. West left the house and went to the car.

West opened the front passenger door and placed the items in the floorboard . . . and then crawled to the driver's side of the vehicle – the driver's door was damaged and did not open.

West testified that Reynolds came to the car and told West not to leave, and then he grabbed the larger knife and went back into the house. Reynolds apparently returned to the car a second time and again told West not to leave. West testified

that she was afraid, so she did not leave or call for help. At that time, West did not realize that she had been stabbed.

West testified that when Reynolds returned to the car for the third time, he got in the vehicle and told her that she had been stabbed and that he should drive. West said that she did not allow Reynolds to drive because she feared that he was going to take her somewhere and kill her. West could see the orange glow of a fire in the house.

She drove back to Harold Reynolds's residence. When they arrived at Reynolds's house, Michael Reynolds told West to give her clothes to him and to take a shower. West stated that she saw Reynolds looking through Melinda Martin's purse. While West was taking a shower, Reynolds took a cloth and cleaned Sandra Roberts's car. After West showered, Reynolds bandaged her arm, using a first-aid kit they had in their bedroom. Reynolds told West [that] there was no blood in the car.

Sandra Roberts testified that she was asleep in Harold Reynolds's bed when West and Michael Reynolds arrived back at the house. She testified that around 3:00 or 4:00 a.m. she was awakened when Reynolds placed her car keys on the nightstand beside the bed. West and Reynolds then went to their bedroom. Roberts noticed that West was walking with her arms folded.

Roberts got out of the bed and went into the kitchen and sat down at the kitchen table. A short time later, Michael Reynolds entered the kitchen and gave Roberts some money and told her to go buy some drugs. Roberts left and purchased some crack cocaine. West said that while Roberts was gone, Michael Reynolds took a shower and that is when she noticed blood on Reynolds's legs.

When Roberts returned to the house, she and Michael [Reynolds] divided the crack cocaine. Roberts used her portion of the drugs while she was seated at the kitchen table, but Michael Reynolds took his and West's share of the crack to his bedroom.

Roberts testified that a short time later, Michael Reynolds reentered the kitchen and propositioned her for sex, but she refused. Roberts said that Michael Reynolds wanted more drugs but, according to him, he could not get West to give him more money. Reynolds asked Roberts to talk to West. Roberts agreed.

When Roberts entered the bedroom, West was in [the] bed with the covers pulled up to her neck, staring at the ceiling. Roberts testified that West was acting strangely and that she was unable to engage West in any conversation. Roberts decided to leave and go to her house. As she was driving, she noticed a cordless telephone without the base on the backseat of her car. Roberts had never seen that telephone before.

West and Michael Reynolds woke around 9:00 or 9:30 on that morning. West noticed that the eyeglasses Michael Reynolds had been wearing the night before

were broken. When she pointed this out to Reynolds, he told her that the missing eyeglass piece would melt in the fire. West testified that Reynolds told her that the knives were under the truck and [that] their clothes and Melinda Martin's purse were in a white bag.

Around 10:00 am on Sunday, May 25, Jerry Veal, Melinda Martin's father, drove by Charles and Melinda Martin's residence located on Tidmore Bend Road in Etowah County. Veal became concerned when he saw Melinda's vehicle parked in the driveway because Melinda regularly attended church services on Sunday mornings. Veal telephoned Melinda on his cell phone, but no one answered.

Veal drove back to the Martin residence and parked his vehicle in the driveway. He got out and went to the carport door and knocked. When no one came to the door, Veal opened the carport door and found the kitchen in disarray—furniture had been moved around, the window treatments were partially torn down, and there was blood everywhere. Veal saw his son-in-law lying on the kitchen floor in a pool of blood.

Veal returned to his car and told his wife, and she telephoned 911. While Jerry Veal was talking on the cell phone with the 911 dispatcher, he saw James Mulkey, a retired Gadsden police officer, drive by the house. Veal was acquainted with Mulkey, so he stopped Mulkey and told him what he had seen.

Mulkey instructed Veal to remain outside, and Mulkey went to the carport door. When Mulkey opened the carport door, he saw Charles Martin, who appeared to be dead, lying on the kitchen floor. Mulkey did not enter the residence at that time because he could detect the strong odor of gasoline and gunpowder.

When the paramedics arrived, Mulkey and the paramedics entered the residence; they determined that Charles Martin was dead. Mulkey and the paramedics proceeded down the hallway to determine if anyone was in need of medical assistance. They discovered the bodies of Melinda Martin and Savannah Martin in a bedroom. The bedroom was in disarray and there was blood everywhere.

The smell of gasoline was overpowering, so Mulkey opened the back door to the residence, and then he and the paramedics left through the back door of the house, being careful not to disturb the scene.

Investigators arrived and processed the scene. During the investigation, a bloody partial footprint and a blood drop were discovered on the steps outside the carport door. Charles Martin was found lying on the floor in a pool of blood with a cigarette by his mouth. There were bloody shoe prints on the kitchen floor. The kitchen chairs were knocked over, the kitchen blinds had been ripped or slashed, and there was blood spattered everywhere. A gasoline can was sitting on the floor beside Charles Martin's body and exploded bottle rockets were scattered throughout the house[, the] kitchen[,] and into the living room.

A utensil drawer in the kitchen was open, and there were blood droplets under the drawer. There were two sandwiches on a Styrofoam plate on the kitchen counter by the stove, and one of the burners of the kitchen stove was lit. Investigators observed a spoon with gray material in it and a syringe located on the counter beside the stove. A basket of prescription drugs was also on the counter.

Blood droplets were found on the hallway wall opposite the door to the bedroom where the bodies of Melinda and Savannah were discovered.

Melinda Martin was found lying on the floor on the right side of the foot of the bed. She had slits in her clothing that were consistent with stab wounds. She was also wearing a back brace. A walking cane was found near her body. A telephone cord extended from the wall by the headboard of the bed to Melinda Martin's body, but no telephone was attached to the cord.

Savannah Martin was lying on her back on the bed. She had been stabbed multiple times and had a prominent stab wound through her neck. A bloody handprint was discovered near Savannah's body on the fitted sheet; however, due to the soft surface, there was no ridge detail to the print.

An investigator collected the wet, bloody comforter and bed linens and put them in a large paper bag in order to transport the bedding to the forensic laboratory for further testing. When the bedding was unpackaged and put up to dry later that day, a television remote and a temple piece to a pair of eyeglasses fell out of the bedding. Law-enforcement personnel were informed about the eyeglass piece.

An autopsy of the victims confirmed that Melinda died as a result of 24 stab wounds to her body. Charles Martin died as a result of 11 stab wounds to his body. Savannah Martin died as a result of 5 stab wounds to her body. All the victims had chemical burns to their bodies, and Charles Martin also had thermal burns on his body. None of the stab wounds to the victims was immediately fatal.

West testified that as she and Reynolds were walking to a nearby convenience store later that same Sunday morning, Reynolds asked West if he had made the headlines, and he inquired whether West had seen Charles Martin's face. Later that day, the police arrested Michael Reynolds on an unrelated matter.

That same afternoon, West saw Donald Harvey drive into the alley behind Reynolds's residence. West got into Harvey's car, and he asked her if Reynolds had anything to do with what happened to Charles Martin. West nodded in the affirmative. Although the evidence was conflicting regarding whose idea it was, West and Harvey agreed that they should get rid of the evidence from the crime scene.

Harvey and West went to a gasoline service station and purchased some gasoline and drove to an area near Tuscaloosa Avenue. West threw the telephone base into the woods, and then Harvey doused the bag containing their clothes and the purse with gasoline and set the items on fire. West and Harvey threw the knives into the Coosa River from a pier at a boat launch located at Gadsden State Junior College.

On the day the murders were discovered and in the days that followed, the police questioned several persons regarding their potential involvement in the murders and robbery, including Charles Martin's nephew, Chad Martin, and John Langley, who lived in the same neighborhood as the Martin family. The police ultimately ruled these individuals out as suspects.

A few days after the discovery of the crimes, West talked with her former employer, who was an attorney, and told him what had happened. The attorney contacted the district attorney's office, and as a result, West subsequently gave the police a statement regarding the crimes.

Based on the information provided by West, the Gadsden police located and photographed the burn pile where West said the clothes and purse had been burned, and the police also recovered the telephone base in the woods a short distance from the burn pile. The phone base, the cordless phone found in Roberts's car, and the telephone cord lying across the floor in the room where the bodies of Melinda and Savannah Martin were found were all Uniden brand products.

Gadsden police conducted a search of Harold Reynolds's residence. In the bedroom shared by Michael Reynolds and West, the police discovered a pair of prescription tinted eyeglasses. The glasses were broken—the temple piece was missing, and one of the lenses was lying beside the glasses. The glasses were consistent with the prescription lenses and frames sold to Reynolds by a professional optician. The temple piece recovered from the bedding at the Martin house matched the temple piece still attached to the frame found at the Reynolds residence. A first-aid kit was also discovered in the bedroom.

A scuba diver with the Etowah County Rescue Squad recovered an oriental-style scabbard from the Coosa River in the area where the knives had been discarded by West and Harvey. Sandra Roberts testified that the scabbard['s decorative sheath] appeared to be the same [sheath] she had previously seen at Reynolds's residence. West also testified that the scabbard was the one that she and Harvey had disposed of in the Coosa River.

Photographs of Michael Reynolds's hands taken by [the] Gadsden police after his arrest showed bruising and flaking skin. West testified the bruising and flaking was not present at the time of the murders.

A forensic examination of the interior of Roberts's car did not indicate the presence of any blood. Forensic testing of the DNA extracted from the swab of the blood

drop from the outside steps and the hallway at the Martin residence matched the DNA obtained from Adrian West. There was a mixture of DNA on the blood swabbed from the handle of the gasoline can. The primary contributor of DNA was determined to be Savannah Martin, but neither Michael Reynolds nor Melinda Martin could be excluded as a contributor of the DNA. There was also a mixture of DNA from a swab of blood obtained from the lens of Michael Reynolds's glasses—Melinda Martin's DNA was the primary component of that DNA mixture. The bloody footprint on the outside doorstep matched a known ink print of Michael Reynolds's footprint.

The shoe prints in the kitchen did not match any of the known samples submitted for comparison purposes, and a blood swab from the outside door frame did not match any of the known DNA samples.

Michael Reynolds testified in his defense. He testified that he met Charles Martin in May 2002 and that he and Charles became good friends. Reynolds testified that Martin was one of the people authorized to take Reynolds's son home from school. Reynolds and his son even lived with Charles Martin for several months, at Martin's mother's residence.

Reynolds said that he saw Martin several times a week up until the time Reynolds was arrested for a different offense. Reynolds testified that he had seen Melinda Martin a couple of times, but that he had never seen Savannah Martin. He testified that the last time he saw Martin alive was two or three weeks before the Martins were killed.

Reynolds testified that at the time of the incident, he and Adrian West were living with his father at his father's residence. Reynolds said that on the morning of . . . May 24, 2003, his "boss" came by the residence and paid his father and him for a painting job they had completed the day before. Later that morning, Donald Harvey came to the Reynolds residence and asked Michael Reynolds to install a car radio for him. Reynolds said that he installed the radio, and Harvey gave him a gram of cocaine in return.

Reynolds said that between 9:00 and 10:00 p.m., Sandra Roberts came to the residence. Reynolds and West shared the last of their drugs with Roberts. Reynolds testified that he gave Roberts some money to get some more drugs. Reynolds explained that he had money to purchase the drugs because in addition to the money that he had received that morning for completing the painting job, West also had $500 that Reynolds's father[, Harold Reynolds,] had given her to hold in case Reynolds needed to post bond – he testified that there was an outstanding warrant for his arrest at that time.

Reynolds testified that Sandra Roberts left and went to buy more drugs. When she returned with the drugs, Reynolds, Roberts, and West used all of those drugs. Reynolds testified that sometime later, Adrian West and Sandra Roberts left

together in Sandra's car to go get more drugs. Reynolds testified that he instructed West to go with Roberts because he thought Roberts had cheated them out of drugs on the previous transaction.

Reynolds testified that after Roberts and West had been gone for a couple of hours, he changed into a pair of shorts and a T-shirt, went to bed, and fell asleep. His father was passed out; he was intoxicated.

Reynolds said that sometime later, Adrian West woke him and told him that she was hurt. Reynolds got out of bed to attend to West. When Reynolds asked her how she was hurt, she told him that she had been stabbed. Reynolds then asked West how she had been stabbed, and she responded that "Chuck was dead and she ... got stabbed trying to stop them from stabbing Chuck's wife." Reynolds testified that West did not tell him who she was with at the time of the stabbings.

Reynolds stated that he was concerned about her arm, so he bandaged it using a first-aid kit he had in the bedroom. He said that the wound was not bleeding very much but that it looked bad. After bandaging her arm, Reynolds instructed West to accompany him outside the house so that he could talk to her without fear of his father overhearing.

Reynolds testified that when they got outside, he continued to question her about what happened, but West did not want to talk about it. Reynolds said that West was very worried, so he told her to get Sandra Roberts's car keys and she did.

Reynolds said that they left in Roberts's car, and that West drove because Reynolds's license had been revoked. Reynolds was still dressed in the clothes he had on when he went to sleep, and, although he put on his glasses, he did not put on any shoes.

They went to the Martin residence. He said that when they got to the residence, West slowed down in order to pull into the driveway; however, Reynolds said that because the lights were on in the house, he instructed her to keep driving. West drove to a nearby gas station, turned around, and then drove back to the Martin residence.

When they got to the Martin residence, West asked Reynolds what he wanted her to do. He testified that he again instructed her to "just drive." West began to drive back to Reynolds's residence. Reynolds testified that as they were traveling, West told him that she was scared, and she asked him what they were going to do. Reynolds said that as they neared his father's residence, he "just knew [he] had to do something," so he instructed West to again drive to the Martin residence.

Reynolds testified that when they arrived at the Martin residence at that time, West drove the car into the driveway. The carport light was on. Reynolds got out of the car and told West to remain in the car. As Reynolds approached the carport door,

he saw that the door was cracked open. Reynolds pushed the door open and saw Charles Martin lying on the floor. Reynolds said there was blood all around Martin so, he said, he knew at that point that West had told him the truth.

He testified that he did not telephone the police; instead, he went inside, stepped over Charles Martin's body, and went to the Martin's bedroom. He explained that he went to that bedroom because West told him she had been hurt "trying to stop them from stabbing Chuck's wife." Reynolds said that although the television was on in the bedroom, the bedroom lights were not on, so he did not see Melinda Martin's body when he first went into the room. Reynolds said that he tripped over Melinda Martin, who was lying in the floor between the bed and the doorway. When he tripped, his glasses fell off onto the bed, and he caught himself on the bed. Reynolds testified that he grabbed his glasses from the bed and stood up and that is when he saw Melinda Martin, who appeared to be dead. Reynolds testified that he never saw Savannah Martin.

Reynolds said that he went back through the house and outside, stepping back over Charles Martin in the process. He gave West his glasses and told her to hold them. Reynolds then asked West to tell him everything that she had touched so that he could wipe it off, but West could not recall everything she had touched. Reynolds testified that he went back into the house, intent on wiping the surfaces off. Reynolds said that everything in the house was such a mess that he did not know where to start. He said that at that point, he looked and saw that one of the burners on the stove was lit, so he decided to burn the house down. Reynolds testified that he got the gasoline can that was located beside the porch steps and doused the rooms with gasoline.

Reynolds said that when he got back to the kitchen, he got a napkin and lit it from the burner, and threw it on the gasoline trail. Reynolds then left the house and got in the car and told West to leave. As West drove back toward Harold Reynolds's residence, she asked Reynolds what was going to happen and he told her "[N]othing, I caught the place on fire."

Reynolds testified that when they got back to Harold Reynolds's residence, they parked Sandra's car and went into the house. As they walked by his father's bedroom, Sandra Roberts asked them if they had "anything," meaning drugs. Reynolds told her they did not, and then he and West went to the bedroom they shared. Reynolds testified [that] at that point, he told West to give him some money and West gave him $20. He gave that money to Sandra Roberts and told her to go get some more drugs. He testified that he wanted to get Roberts out of the house. Reynolds said that he and West went into the bathroom, and he cleaned and rewrapped the injury on West's arm. In a few minutes, Roberts returned with more drugs.

When Roberts returned with the drugs, Reynolds went into the kitchen and he and Roberts took some of the drugs. Reynolds prepared a syringe of the drugs for West

> and took it into their bedroom; however, West refused the drugs, saying she just wanted to go to sleep. Reynolds offered the drugs to Roberts, and when she declined to take the drugs, Reynolds used them. He then went back to sleep.
>
> Reynolds testified that later that morning while he and West were walking home from the convenience store, he again tried to question West about what had happened the night before. Reynolds said that West was acting strangely and she told him that she did not want to think about it. He testified that at that point, he did not want to think about it either.
>
> Reynolds said that shortly after they arrived back at his father's residence, the police arrived and arrested him and that he had been incarcerated since that time.

Reynolds I, 114 So. 3d at 74-81 (internal citations omitted).

B. Third-Party Conduct

The ACCA discussed certain findings made regarding Chad Martin and Langley's initial status as persons of interest and their testimony at Reynolds's trial as witnesses for the prosecution. *See id.* at 92-98. Specifically, "[o]n May 25, 2003, during the hours following the discovery of the crimes, the police interviewed several people of interest – including Charles Martin's 25-year old nephew, Chad Martin, and Chad Martin's friend, . . . Langley." *Id.* at 92. Upon further investigation, Chad Martin and Langley were ruled out as suspects in the Martins' murders. *Id.* The State called Chad Martin and Langley to testify, and both adamantly denied having anything to do with the Martins' murders. *Id.* Langley's testimony corroborated Chad Martin's alibi. *Id.*

The ACCA noted that the record on appeal indicated that Chad Martin was questioned by police on May 25, 2003 (the day the Martins's bodies were discovered). *Id.* During the interview, Chad Martin told investigators "two conflicting versions of his whereabouts at the time of the murders." *Id.* Chad Martin's first statement denied "any involvement in the crime," while his second statement included a "purport[ed] confess[ion] to the [murders]." *Id.* The ACCA explained that "[a]fter investigation, the police excluded Chad Martin as a suspect," and the court noted that

"[s]everal days later, [by which time Reynolds had become the primary suspect,] Chad Martin recanted his confession in a third oral narrative to the police." *Id.*

The ACCA acknowledged that "Chad Martin's first narrative account to the police," in which he denied any involvement in the crimes, "was reduced to a written statement . . . and signed by [Chad] Martin." *Id.* However, the ACCA determined that Chad Martin's second statement, in which he purportedly confessed, "was not reduced to an official statement, but [instead] documented in two [distinct] police reports," signed by different individuals and presumably rendered on different days. *Id.*

Regarding the second statement, the ACCA described the first police report dated May 25, 2003, as being "prepared and signed by [Sergeant] Dale Fincher," but the report was not "introduced as evidence at Reynolds's trial" because "Fincher had moved out of state and did not testify at trial." *Id.*; *see also id.* at 92 n.8 ("Before trial, the prosecutor offered to assist in Fincher's presence at trial; however, the defense indicated that Fincher was not a critical witness to its case."). The ACCA observed that the second police report dated May 29, 2003 "purportedly document[ed] Chad Martin's confession was . . . signed by Captain Roy Harbin." *Id.* at 92 However, due to certain circumstances at trial and "after a hearing [on the matter,] the circuit court ruled that the May 29 police report signed by Capt. Harbin could not be used to impeach Chad Martin's trial testimony." *Id.*; *see, e.g., id.* at 93-97.

The ACCA also recognized that before trial the "the State filed a . . . motion in limine to prevent the defense from mentioning any 'alleged statements' made by Chad Martin regarding the events surrounding the deaths of the victims." *Id.* The State argued that these "'statements' were hearsay and were unreliable." *Id.* The trial court addressed this motion "[a]t the beginning of

[Reynolds's] trial" and "considered arguments" in favor and against. *Id*. The ACCA provided that during this hearing, "one of Reynolds's defense counsel stated:"

> I would also anticipate – we have the one – we do have one statement signed by Chad Martin. We also have some statements signed by some investigating officers. Two of those three officers are available. And I would anticipate talking about those statements; maybe possibly asking Mr. Martin about them through those officers. They signed them, and he supposedly made these verbal statements to them. They are very pertinent to the crime.

Id. at 93. The ACCA continued:

> [t]he [trial] court ruled that until Chad Martin testified at trial, neither party could refer to Martin's previous oral or written statements[,] [but] . . . indicated that it would be willing to consider arguments from counsel regarding the admissibility of the statements for impeachment purposes [at the appropriate time][,] [and that] [b]oth parties indicated . . . satisf[action] with [this] ruling.

Id. (internal citations omitted).

Further, the ACCA acknowledged that during Reynolds's trial Chad Martin testified on "direct examination . . . that he was very close to his uncle, Charles Martin, and . . . considered [Charles Martin] to be like a brother[,] and "that he also had a good relationship with [Charles] Martin's wife and daughter." *Id.* (citing Vol. 9 at 86-87). The ACCA then reiterated that "Martin testified that he had nothing to do with the murders and robbery of the Martin family." *Id.*

Regarding Chad Martin's testimony, the ACCA noted:

> Chad Martin testified that he spent Saturday afternoon through the following Sunday morning [on which] the murders [occurred] doing construction work at John Langley's house, which was located in the same neighborhood as the Martin [family's] house.[9] [Chad] Martin testified that he and Langley took drugs during their time together and that at one point they left Langley's house to get more drugs . . . [,] [and] said that at various times, other people were also at Langley's house.
>
> > John Langley's testimony corroborated Chad Martin's testimony with regard to what transpired while Chad Martin was at his residence.
>
> [Chad] Martin [also] testified that the only time that he was out of Langley's sight was when he went to Langley's garage to work on Langley's lawnmower[,] [and]

[that] . . . [Langley's] back door to [the] house was open . . . , and Langley knew where [Chad Martin] was.

[Chad Martin also testified that] Langley drove [him] home sometime early Sunday morning because [he] thought he [would need] to go to work . . . . [but explained] that his employer telephoned him around 6:00 a.m. and told him that he did not have to work that day because it was going to rain. [Chad] Martin [then testified he] took a shower, went to a friend's house, and . . . returned to . . . Langley's house.

[Chad] Martin testified that on the way to Langley's house, he saw a fire truck and police vehicles at the Martin residence. [Once at] Langley's house, he told Langley what he had seen . . . and expressed his concern about Charles Martin, [who was suffering from depression], . . . [because he thought] [Charles] Martin might have committed suicide.

Chad Martin [testified that he then] drove back to the Martin['s] residence and parked the car he was driving behind the fence in the Martins' backyard[,] [when] . . . police officer approached him and told him that he could not be there and that he could not be with the family. Recogniz[ing] [Sergeant] James Mulkey standing nearby[,] . . . [Chad Martin] engaged him in a conversation.

[Chad] Martin testified that Sgt. Mulkey told him that Charles Martin was dead and that Mulkey also told him where Charles Martin's body was found. [Sergeant] Mulkey then asked Chad Martin for the names of [Charles] Martin's wife and daughter. Chad Martin testified that when [Sergeant] Mulkey asked him for [his] niece's name, [Savannah,] he became so upset that he collapsed.

Although not clear from his testimony, it appear[ed] [to the ACCA] that Chad Martin left the scene for a short time, and during that time he ingested substantial amounts of crystal methamphetamine, Prozac, and cocaine. [Chad] Martin claimed that he was . . . trying to kill himself because he was so distraught over the Martins' deaths.

Chad Martin testified that when he returned to the scene, some of the other family members where there and that is when he heard police officers talking about the details of the crimes. [Chad] Martin instigated a conversation with [Lieutenant] Faye Gary while he was on the scene[,] [and] . . . although [Chad Martin] did not recall the details of his conversation with [Lieutenant] Gary, he did not tell [the Lieutenant] that he had overheard the other police officers discussing the details of the crimes. Chad Martin was [then] taken to the police station for questioning.

[Chad] Martin testified that while he was at the police station, he was under the influence of the drugs[,] . . . suffering from sleep deprivation because of his drug abuse[,] [and that] . . . [he] was questioned for many hours by the police. Around 8:40 p.m., Chad Martin signed a written statement that had been prepared by one of the officers in which Martin apparently denied any participation in the crimes.[10]

> [10] The statement, which was referred to as both State's Exhibit 63 and Defendant's Exhibit 2, was not introduced into evidence by either party.

> [Chad] Martin [also] testified that the police . . . continued to interrogate him [even after his first signed statement], and after 18 or 19 hours of questioning, he decided that he would "tell them anything just to get out of there." [Chad] Martin testified that he did not remember what he told the investigators at that point; however, *the inference from the record is that at that time [Chad] Martin apparently confessed to being involved in the crimes*.
>
> *Although Martin purportedly confessed to the crimes, after further investigation, the police ultimately excluded Chad Martin as a suspect*.[11]

> [11] The police determined that Chad Martin knew details of the crime because of what he had overheard while at the scene of the crimes.

> [Chad] Martin testified that several days later, he contacted a lawyer who accompanied him to the police station, and he gave another narrative in which he recanted his confession[,] and [w]hen [doing so], he apparently told the police the same version of events he gave in his first statement, and to which he testified at trial.

Reynolds I, 114 So. 3d at 93-95 (internal citations omitted) (emphasis added).

The ACCA also reviewed the record concerning defense counsel's cross-examination of Chad Martin, in which Chad Martin was asked if he "made a statement to [Lieutenant] Faye Gary." *Id.* Chad Martin stated "that he had but that he did not recall what [was] said," so defense counsel began "question[ing] [Chad] Martin about *specific incriminating statements* that [Chad Martin] [purportedly] made to [the Lieutenant] by asking a series of questions."[2] *Id.*

> "Did you tell Ms. Gary that 'You knew this sounded crazy but it was like you were seeing this through Chuck's eyes?'" and "Did you tell Ms. Gary that ... 'I could see Savannah's eyes and I could hear her screaming for help?'" [Chad] Martin could not recall what he told Gary because, he was under the influence of drugs at the time he made the incriminating statement[,] and further clarified that the only

[2] The ACCA also observed that upon the completion of the prosecution's questions for Chad Martin on direct examination, the prosecution "intimated that he might later offer Chad Martin's exculpatory statements into evidence[,]" and that defense counsel affirmatively "responded that counsel had no objection to the admission of Chad Martin's exculpatory statement, provided the court also admit Martin's inculpatory version of events that he told to the investigators during the questioning[,]" while recognizing that the circuit court "indicated that the discussion was premature at that point in the trial. *See Reynolds I*, 114 So. 3d at 95 (citing Vol. 9 at 109).

reason he remembered what he said in his first statement – the exculpatory statement that he signed – was because he had read the statement before trial.

Defense counsel then asked Martin whether he remembered making a statement to [Captain] Roy Harbin[,] . . . [to which Chad] Martin responded that, although he recalled making a statement, he could not recall to whom he made the statement[;] [prompting] the prosecutor [to] request[] a sidebar conference.

Outside the hearing of the jury, the prosecutor asserted that defense counsel should not be allowed to "back-door" the contents of the May 29 report signed by [Captain] Harbin by asking Martin line-by-line questions from the report like counsel had done when questioning Martin about his statements to [Lieutenant] Gary. Defense counsel responded that because the confession was an oral statement made by Martin to the investigators, counsel needed to introduce the contents of statement through Martin's testimony. [To which,] [t]he prosecutor replied: "[I]f Chad testifies he doesn't remember giving the statement to Roy Harbin and doesn't remember anything in it, the proper method is for him to call Roy Harbin and say 'Did he do it and what did he say?'" The Court agreed and instructed defense counsel that if Martin did not remember what he told the investigator, defense counsel could not elicit the contents of the report by questioning Martin line-by-line regarding the details of the report.

When defense counsel resumed cross-examination, Martin reiterated that he did not remember to whom he had made the inculpatory oral statement, so defense counsel ended its cross-examination of Martin.

Later in the trial, after the State rested and before the defense's presentation of its case, the prosecutor informed the Court that he had learned that defense counsel intended to introduce the May 29 police report . . . signed by Capt[ain] . . . Harbin, which supposedly documented Martin's confession. The State moved the Court for an order in limine prohibiting the introduction or mention of the May 29 police report. A[nother] hearing was conducted outside the presence of the jury.

During [this] hearing, the State elicited testimony from Capt[ain] . . . Harbin that in May 2003, he was the head of the detective division and that he supervised several investigators who were involved in the investigation of the Martin murders and robbery. When the prosecutor showed Harbin the May 29, 2003, police report, which was labeled Defendant's Exhibit 10, Capt[ain] Harbin admitted that although he had signed the report, he did not prepare or type the report – that was done by [Sergeant] Fincher – and he had not even read a completed version of the report until a few days before trial. Capt[ain] Harbin testified that he was not present during the entire interview with Chad Martin because he was also monitoring interviews with other suspects. Capt[ain] Harbin stated that the May 29 police report did not contain an accurate version of what he had heard during the interview with Chad Martin.

> Defense counsel cross-examined Capt[ain] Harbin at length regarding why he would sign a report purporting to be his rendition of Martin's confession when he had not read the report, when he was not present for the entire interview with Chad Martin, and when he could not recall what Martin had said during the interview. In response to questions propounded by defense counsel, [Captain] Harbin conceded, "Detective Fincher put the paper on my desk ... [and] I signed it."

Reynolds I, 114 So. 3d at 95-96 (internal citations omitted). The ACCA concluded its factual discussion of the testimony and events surrounding Chad Martin's status as a person of interest determining that "[d]uring the State's redirect examination, Capt. Harbin confirmed that at the time he signed the May 29 report, Reynolds was the primary suspect in the crimes and was already in custody." *Id*. at 96. The ACCA also observed that the circuit court was particularly careful in "clarify[ing] its ruling," and expressly noted that, although the "document itself [was] not in," counsel was free to call "[Captain] Harbin and . . . ask him anything that [he thought was] appropriate in regard to this case. [The trial court did] not in any way limit [the] questioning of that particular witness." The circuit court also reiterated that defense counsel could "ask [Captain Harbin] whatever you think is appropriate, any inconsistencies, just not the document." *See id.* at 97. Further, "toward the end of the defense's case-in-chief" the ACCA recognized that defense counsel decided not to call Captain Harbin and explained to the trial court that to call him "doesn't help me at this point." *Id.* Further, even when challenged by the trial court as to whether this was his true belief in light of the wide latitude the trial court would offer him in questioning Captain Harbin, defense counsel again declined and noted that there was not anyone else that the defense could get from the witness. *See id.*

C. The Sentencing Order

The trial court's sentencing order made the following findings and set forth the following rationale:

From the evidence presented at trial the Court finds that the defendant Michael [Reynolds] did as outlined in count one intentionally kill Charles James Martin, III, Melinda Martin and Savannah Martin by one act or pursuant to one scheme or course of conduct in violation of 13A-5-40(A)(10) of the Code of Alabama 1975, as amended.

Pursuant to counts two, three, and five, that the defendant did intentionally kill Charles Martin, III, Melinda Martin and Savannah Martin in the course of first degree robbery in violation of Title 13A-5-40(A)(2) of the Code of Alabama 1975, as amended.

And as to count four, did intentionally kill Savannah Martin, a child under the age of 14 years, in violation of Title 13A-5-40(A)(15) of the Code of Alabama 1975, as amended.

As to the Court's finding concerning the existence or nonexistence of aggravating – or nonexistence of aggravating circumstances,[3] the Court finds that three statutory aggravating circumstances are applicable in the case at bar, having been proven beyond a reasonable doubt and are due to be considered in the determination of the appropriate sentence in this case. The applicable statutory circumstances are as follows: A, that the intentional murder was committed while the defendant was engaged in[,] or was an accomplice in the commission of[,] or an attempt to commit[,] or flight after committing[,] or attempting to commit robbery in accordance with Section 13A-5-49[(4)] of the Code of Alabama 1975.

The second aggravating offense: The capital offense was established that it was heinous, atrocious or cruel compared to other capital offenses in accordance with

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[3] Section 13A-5-49 of the Alabama Code (1975) enumerates the statutory aggravating circumstances as follows:

(1) The capital offense was committed by a person under sentence of imprisonment;
(2) The defendant was previously convicted of another capital offense or a felony involving the use or threat of violence to the person;
(3) The defendant knowingly created a great risk of death to many persons;
(4) The capital offense was 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;
(5) The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;
(6) The capital offense was committed for pecuniary gain;
(7) The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or enforcement of the laws;
(8) The capital offense was especially heinous, atrocious, or cruel compared to other capital offenses;
(9) The defendant intentionally caused the death of two or more persons by one act or pursuant to one scheme or course of conduct; or
(10) The capital offense was one of a series of intentional killings committed by the defendant.

Ala. Code § 13A-5-49 (1975).

Section 13A-5-49[(8)] of the Code of Alabama 1975; and C, that the defendant intentionally caused the death of two or more persons by one act or pursuant to one scheme or course of conduct in accordance with Section 13A-5-49[(9)] of the Code of Alabama 1975.

The jury in this case by its verdict of guilt found beyond a reasonable doubt at least two of the three statutory aggravating circumstances set out above existed in this case.

The Court has independently reviewed the evidence in this case and concurs that the evidence is sufficient to establish beyond a reasonable doubt that this defendant committed the murders in this case in connection with the theft of the purse and the telephone from the Martins' residence and under circumstances that support the conclusion that these facts constitute robbery in the first degree under Alabama law.

The Court also concurs that the evidence clearly establishes beyond a reasonable doubt, as the jury concluded, that the murders in this case constituted the intentional killing of two or more persons by one act or pursuant to one scheme or course of conduct.

The Court also finds that the evidence in this case was clearly sufficient to establish beyond a reasonable doubt that the intentional killing of Chuck, Melinda and Savannah Martin were as committed especially heinous, atrocious or cruel compared to other capital offenses.

Each victim in this case died from multiple stab wounds. Chuck Martin was stabbed eleven times. His wife Melinda was stabbed twenty-four times. And young Savannah was stabbed five times.

The number of wounds inflicted and the fact that for all of these victims[,] death was not instantaneous[,] are certainly cruel and heinous enough to satisfy the requirements of the law when considered with all of the facts of this case.

When we consider the killing of the eight-year-old Savannah, however, whose death was an apparent afterthought, a brutal execution to prevent her from identifying her parents' killer, there is absolutely no doubt that the murders in this case satisfy the requirement of the law.

The three aggravating circumstances set out above were established beyond a reasonable doubt and must be weighed against the mitigating circumstances in this case.

As to the existence or nonexistence of the mitigating circumstances, the Court in determining, considering and weighing mitigating circumstances in this case

reviewed all statutory mitigating circumstances[4] and also considered all of the mitigating factors as charged to the jury in the penalty phase of this trial and the additional mitigating circumstances re-offered today – or offered to the defendant or by the defendant on October 22nd, 2007, and on today's date and those offered at trial.

The Court also considered the contents of the defendant's motion for the Court to consider the attached exhibits as additional mitigating evidence at the sentencing docket of December the 6th, which is today, and all exhibits attached thereto as substantive submissions in support of the mitigating circumstances presented by the defendant.

The Court finds no evidence that the defendant was acting under influence of extreme mental or emotional disturbance or that he lacked the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.
The Court further finds no evidence that that the victims participated in the defendant's conduct or consented to it.

The Court further finds no evidence that the defendant acted under duress or under the substantial domination of another person.

More particularly, the Court finds and considers as mitigating circumstances in the defendant's behalf evidence presented of the defendant's environmental, educational, life, background, family, school history, the love of the defendant's family for the defendant, the love of the defendant's friends for the defendant and the defendant's love for his family and friends.

This Court also finds and considers as a mitigating circumstance that the defendant experienced neglect and abuse as a child and had a history of drug abuse and addiction.

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[4] Section 13A-5-51 of the Code of Alabama defines statutory mitigating circumstances as follows:

Mitigating circumstances shall include, but not be limited to, the following:

(1) The defendant has no significant history of prior criminal activity;
(2) The capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance;
(3) The victim was a participant in the defendant's course of conduct or consented to it;
(4) The defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor;
(5) The defendant acted under extreme duress or under the substantial domination of another person;
(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and
(7) The age of the defendant at the time of the crime.

Ala. Code § 13A-5-51 (1975).

The Court has considered as a mitigating circumstance the poverty experienced by the defendant as a child, the fact that his father was at times a brutal, abusive alcoholic. The fact that the defendant's mother was not maternal, apparently did not bond with or nurture her children and had health problems, the fact that the defendant was reared in a filthy home with hygiene and health issues, the fact that the defendant was homeless for a significant period of time during his childhood and has essentially been on his own since he was the age of thirteen, the fact that the defendant was physically abused by his father as a small child and had little if any structure in his home, the fact that the defendant dropped out of the school when he was in the seventh grade and has received little if any formal education since that time, the fact that the defendant apparently witnessed his father physically abusing his mother and possibly other family members when he was a child as well as the fact that the defendant allegedly being [exposed to] – [and/]or abusing drugs or alcohol at age thirteen and later developed a serious drug dependency to crystal methamphetamine and cocaine and that these addictions led to the loss of custody of his child, the loss of jobs and eventually emotional issues that resulted from drug addictions and the consequences of drug addiction.

The Court has also seriously considered as a mitigating factor the fact that the defendant does have a child and family members who love him, that he has been described as the glue that holds his disjoin[t]ed family together and that the imposition of the death penalty in this case would have a devastating effect on many members of his family.

The Court also considered the fact that the defendant was a good father and stepfather at points in his life.

The Court specifically finds and considers as a mitigating circumstance the fact that the defendant has no significant history of prior criminal activity as provided in Section 13[A]-5-51[(1)] of the Code of Alabama 1975.
In essence, the Court considered all mitigating circumstances presented by the evidence and weighed each of them. Each fact and circumstance offered in mitigation was accepted and considered by this Court as valid and accorded due weight in the sentence of this case.

. . . The Court finds from the consideration of the evidence presented at the trial of this case and the sentencing hearing, the aggravating and mitigating circumstances applicable to this case and the recommendation of the jury contained in its advisory verdict that the aggravating circumstances set out in the Code of Alabama, that being again 13A-5-49[(4)], that the intentional murder was committed while the defendant was engaged in or was an accomplice in the commission of or an attempt to commit or flight after committing or attempting to commit robbery in accordance with Section 13A-5-49[(4)] of the Code of Alabama 1975; under 13A-5-49[(8)], that the capital offense was especially heinous, atrocious or cruel compared to other capital offenses in accordance with Section 13[A]-5-49[(8)] of the Code of

> Alabama 1975; and under 13[A]-5-49[(9)], that the defendant intentionally caused the death of two or more persons by one act or pursuant to one scheme or course of conduct in accordance with Section 13A-5-49[(9)], that these existed in this case and are sufficient to support the sentence of death.
>
> It is the opinion of this Court that the mitigating circumstances heretofore enumerated are insufficient to outweigh the aggravating circumstance. The Court theretofore finds that the punishment of the defendant should be fixed by the Court as death for the capital murders of Charles Martin, III, Melinda Martin and Savannah Martin.
>
> It is therefore ordered and adjudged by this Court and it is the judgment of this Court that the defendant be and is hereby sentenced to death, said sentence to be carried out in the manner and at such time and place as may be prescribed by law.

(Vol. 14 at 11-22).

D. Procedural History

In March 2005, Reynolds was indicted in the Etowah County Circuit Court on five counts of capital murder for the stabbing deaths of Charles, Melinda, and their eight-year old daughter, Savannah, committed during the course of a robbery. (*See* Vol. 1 at 38-39, 80, 90). On August 29, 2006, due to Circuit Judge William M. Cardwell's retirement, Reynolds's case was reassigned to Presiding Circuit Judge W. Allen Millican. (Vol. 1 at 108). At trial, Charles C. Hart, David McWhorter, and Paul R. Roberts represented Reynolds.[5] (Vol. 5 at 200). On October 19, 2007, following the guilt phase of the trial, Reynolds was found guilty of capital murder. A penalty phase of the trial followed, and the jury -- by a unanimous vote of 12-0 -- recommended that Reynolds be sentenced to death. (*See* Vol. 13 at 153-54). As required under Alabama Code § 13A-5-47, a formal sentencing hearing was conducted on December 6, 2007. (*See generally* Vols. 13 at 195-

[5] Patricia Granger initially served as Reynolds's co-counsel with Charles Hart until April 26, 2007, when, due to a conflict of interest, the court granted Ms. Granger's request to withdraw from representation. (*See* Vol. 1 at 154). On that same day, the court appointed David McWhorter. (*Id.* at 155). And thereafter, on June 6, 2007, the court appointed Paul Roberts to serve as additional counsel for Reynolds. (*Id.* at 157).

202; 14 at 1-24). The trial court accepted the jury's recommendation and sentenced Reynolds to death. (Vol. 2 at 67-101).

Reynolds appealed his conviction and sentence to the ACCA. (*See* Vol. 19). On October 1, 2010, the ACCA entered a published opinion affirming Reynolds's conviction and death sentence. *Reynolds I*, 114 So. 3d 61. On December 10, 2010, the ACCA denied Reynolds's request for rehearing. (Vol. 22 at 215). The Alabama Supreme Court followed by denying Reynolds's petition for certiorari on December 14, 2012. On October 7, 2013, the United States Supreme Court denied Reynolds's petition for writ of certiorari and denied his request for rehearing on December 2, 2013. *Reynolds v. Alabama*, 134 S. Ct. 97 (U.S. Oct. 7, 2013), *reh'g denied* (Dec. 2, 2013).

On December 10, 2013, Reynolds filed a petition for relief from judgment pursuant to Rule 32 of the Alabama Rules of Criminal Procedure. (*See* Vol. 24 at 10-139). On March 24, 2014, with permission from the Rule 32 court, Reynolds filed his amended Rule 32 petition. (*See* Vols. 24 at 140-201; 25 at 3-24). On August 20, 2014, the Circuit Court of Etowah County issued an order summarily dismissing Reynolds's amended Rule 32 petition. (*See* Vols. 25 at 162-202; 26 at 3-22). Reynolds filed a post-judgment motion challenging the Rule 32 court's summary dismissal order, which was denied. (*See* Vol. 26 at 23-46).

On September 18, 2015, after pretermitting the discussion of Reynolds's other claims raised in his Rule 32 amended petition, the ACCA remanded to the Circuit Court with instructions to conduct further proceedings on Reynolds's *Brady/Giglio* claim. *See Reynolds v. State*, 236 So. 3d 189 (Ala. Crim. App. 2015) (*Reynolds II*). The ACCA's remand instructions provided that:

> [t]he circuit court may order any discovery relating to this claim that it deems necessary to allow the parties to litigate Reynolds's claim. It must, however, provide Reynolds an opportunity to disprove the procedural bars asserted by the State and to prove his *Brady/Giglio* claim, and it must provide the State an opportunity to present evidence in rebuttal. The circuit court may comply with this Court's remand instructions by conducting an evidentiary hearing or by taking

> evidence in the form of evidentiary submissions. Rule 32.9, Ala. R. Crim. P. Further, the circuit court shall make specific findings of fact regarding its disposal of Reynolds's claim.
>
> Further, the circuit court is instructed to take all necessary action to see that the circuit clerk makes due return to this Court *at the earliest time possible and within 56 days* of the release of this opinion.

Reynolds II, 236 So. 3d at 202 (emphasis added).

On September 23, 2015, the Circuit Court of Etowah County issued a scheduling order in accordance with the ACCA's instructions regarding the presentation of evidence pertaining to Reynolds's *Brady/Giglio* claim. (Vol. 28 at 43-44). In the Rule 32 court's scheduling order issued on remand, Reynolds was afforded twenty (20) days to present evidentiary submissions on the remanded issues; the State had twenty (20) days to file any rebuttal evidence in accordance with the relevant provisions of Rule 32.9, and the Rule 32 court reserved the remaining ten or eleven days of the fifty-six days provided to make return to the ACCA. (Vol. 28 at 43). During the respective time frames, the court indicated that it would review the parties' submissions, issue findings, and, if necessary, hold an expedited evidentiary hearing or, alternatively, request further evidence to review. (*Id.*).

On September 25, 2015, Reynolds filed his initial discovery motion. (*Id.* at 45-58). The State responded, arguing that Reynolds had failed to establish good cause for his "overly broad" discovery requests. (*Id.* at 59-70). The Rule 32 court agreed with the State's response, and, on September 29, 2015, issued an order denying Reynolds's initial discovery motion. (*Id.* at 71-72) (explaining that "[t]he Defendant has requested every conceivable item, record, file, statement, communication, and/or information not only from the State's file but from individuals who have since retired or are now deceased").

On October 5, 2015, Reynolds filed a motion requesting a thirty-day extension to prepare and present evidence to the Rule 32 court. (*Id.* at 73-77). On October 6, Reynolds then filed his motion requesting the court to reconsider its order denying his previous discovery motion and attached an exhibit containing his Interrogatories to the State. (*Id.* at 78-97). The next day, the Rule 32 court denied Reynolds's request for a thirty-day extension, but it granted in part Reynolds's motion to reconsider his discovery requests. (*Id.* at 98-99). Specifically, the court's order instructed:

> The State shall immediately, as of the date of this Order, make available to Counsel for the Defendant any and all files held by the Etowah County District Attorney's Office pertaining to the prosecution of Adrian Marcella West for hindering prosecution, unlawful distribution of a controlled substance, possession of a controlled substance and/or drug paraphernalia. . . . Said file to be reviewed and inspected by Counsel for the Defendant in the presence of and under the supervision of the Etowah County District Attorney and/or his staff.

(*Id.* at 99). In a separate order, issued October 8, 2015, the court granted Reynolds's request to file his Rule 32 Evidentiary Submissions by email or facsimile, recognizing the added constraint a holiday would have on Reynolds's approaching deadline. (*Id.* at 103).

Reynolds filed evidentiary submissions in support of his *Brady* claim, to which the State replied and offered evidentiary submissions in rebuttal. (*See generally id.* at 104-201; Vol. 29 at 3-189). After receiving these evidentiary submissions, the Rule 32 court issued a written order denying relief on Reynolds's *Brady/Giglio* claim. (Vol. 29 at 190-94). On November 12, 2015, the court issued its opinion on remand, deciding:

> Reynolds'[s] claims are not true and further that the prosecution did not suppress evidence that was favorable to the Defendant. Further, this Court finds the Defendant did not prove his *Brady/Giglio* claim . . . by a preponderance of the evidence . . . ; likewise, the Defendant could have raised this issue on direct appeal and failed to do so and is therefore procedurally barred, in accordance with the provisions of Rule 32.2(a)(5), [Ala. R. Cr. P.].

(*Id*. at 193). The court concluded:

> Based upon all of the foregoing, and upon due consideration of the same, it is hereby ORDERED, ADJUDGED, DECREED AND DETERMINED BY THIS COURT as follows:
>
> 1. That, though provided an opportunity to disprove the procedural bars asserted by the State, the Defendant has utterly and completely failed to do so, by a preponderance of the evidence or any other legal standard.
>
> 2. That, as to the *Brady/Giglio* issue dealing with an alleged agreement with Witness Marcie West for her testimony, the Defendant has further failed to meet his burden as to proof of the same; and, indeed, this Court finds as a matter of fact and law that no such agreement ever existed.

(*Id.* at 194). The Rule 32 court directed the clerk to return the order to the ACCA as instructed. (*Id.*).

On return from remand, the ACCA affirmed the Rule 32 court's decision on April 22, 2016. (Vol. 33 at 100-75). After addressing Reynolds's claims individually, the ACCA found that Reynolds's non-*Brady/Giglio* claims were properly dismissed by the Rule 32 court "because the claims were insufficiently pleaded under Rules 32.3 and 32.6(b) [] were without merit, or were procedurally barred." (*Id.* at 175) (internal citations omitted). The ACCA also noted that Reynolds's *Brady/Giglio* claims were properly raised on remand but were correctly denied below. (*Id.*). On January 27, 2017, the ACCA denied Reynolds's request for rehearing. (*Id*. at 176). And, on April 27, 2017, the Alabama Supreme Court denied certiorari review. (Vol. 34 at 207).

Less than one year later, on February 9, 2018, Reynolds filed this Petition for Writ of Habeas Corpus by Prisoner in State Custody under Death Sentence in this court. (Doc. # 1). On May 30, 2018, Respondent filed his response and brief in support. (Docs. # 20, 21). Reynolds replied on September 27, 2018. (Doc. # 31).

II. FEDERAL HABEAS REVIEW STANDARDS

The claims in Reynolds's petition are governed by the deferential standard of review mandated by Congress in 28 U.S.C. § 2254(d). AEDPA governs this court's review of Morris's

habeas claims. *See Guzman v. Sec'y, Fla. Dep't of Corr.*, 663 F.3d 1336, 1345 (11th Cir. 2011) (explaining that AEDPA applies to habeas petitions filed after April 24, 1996). When a petitioner has obtained a state-court adjudication of a constitutional claim on the merits, § 2254(d) places significant restrictions on a federal court's authority to award habeas relief. "AEDPA imposes a highly deferential standard for evaluating state-court rulings and demands that state-court decisions be given the benefit of the doubt." *Guzman*, 663 F.3d at 1345 (internal quotation marks omitted), quoting *Renico v. Lett*, 559 U.S. 776, 773 (2010). Under this standard, a federal court may grant habeas corpus relief to a state prisoner for claims adjudicated on the merits by a state court only if the petitioner shows that the state court proceedings resulted in a decision that was:

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

28 U.S.C. § 2254(d)(1)(2). The Supreme Court has explained how the statutory language operates:

> As amended by AEDPA, 2254(d) stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings. It preserves authority to issue the writ in cases where there is no possibility fair-minded jurists could disagree that the state court's decision conflicts with [the Supreme] Court's precedents. It goes no farther. Section 2254(d) reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal. As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.
>
> The reasons for this approach are familiar. Federal habeas review of state convictions frustrates both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights. It disturbs the State's significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal authority.

> Section 2254(d) is part of the basic structure of federal habeas jurisdiction, designed to confirm that state courts are the principal forum for asserting constitutional challenges to state convictions.

Harrington v. Richter, 562 U.S. 86, 102-03 (2011) (internal citations and quotations omitted).

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

This court's review of Reynolds's claims under § 2254(d)(1) is limited to the record that was before the state courts that adjudicated those claims on the merits. *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). Similarly, the state courts' decisions must be "measured against [the Supreme] Court's precedents as of the time" the state court rendered its decisions. *Id.* at 182 (internal quotation marks omitted).

A. Exhaustion, Procedural Default, and the "Cause and Prejudice Standard"

In keeping with well-established principles of comity and federalism, a petitioner is required to present his federal claims to the state court by exhausting the state's available procedures. *Medellin v. Dretke*, 544 U.S. 660, 666 (2005) (holding that a petitioner "can seek

federal habeas relief *only on claims* that have been *exhausted* in state court") (emphasis added). 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. 28 U.S.C. ' 2254(b)(1)(A) ("An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State. . . ."). "When the process of direct review . . . comes to an end, a presumption of finality and legality attaches to the conviction. . . . The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials." *Smith v. Newsome*, 876 F.2d 1461, 1463 (11th Cir. 1989), quoting *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983).
>
> Exhaustion of state remedies requires that the state prisoner "fairly presen[t][6] 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. *See also Duncan*, 513 U.S. at 365, 115 S. Ct. at 888 ("Respondent did not apprise the state court of his claim that the evidentiary ruling of which he complained was not only a violation of state law, but denied him the due process of law guaranteed by the Fourteenth Amendment.").
>
> Thus, to exhaust state remedies fully the petitioner must make the state court aware that the claims asserted present federal constitutional issues. "It is not enough that

[6] The phrases "fairly presented" and "properly exhausted" are synonymous. *O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999) (observing that the question is "not only whether a prisoner has exhausted his state remedies, but also whether he has *properly* exhausted those remedies, *i.e.*, whether he has fairly presented his claims to the state courts") (emphasis in original).

> 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

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 may decide the claim is not entitled to a review on the merits. In other words, if such a failure occurs "the petitioner will have *procedurally defaulted* on that claim." *Mason v. Allen*, 605 F.3d 1114, 1119 (11th Cir. 2009) (emphasis added).

1. General Principles

The procedural default doctrine was explained by the Supreme Court in *Woodford v. Ngo*, 548 U.S. 81 (2006):

> 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, 731-32, 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 744-51, 111 S. Ct. 2546.

Woodford, 548 U.S. at 92-93.

Generally, if the last state court to examine a claim states clearly and 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 is also precluded. *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.").

When a petitioner fails to comply with state procedural rules, federal habeas review is strictly limited.

> The federal courts' authority to review state court criminal convictions pursuant to writs of habeas corpus is severely restricted when a petitioner has failed to follow applicable state procedural rules in raising a claim, that is, where the claim is procedurally defaulted. *Federal review of a petitioner's claim is barred by the procedural default doctrine if the last state court to review the claim states clearly and expressly that its judgment rests on a procedural bar, Harris v. Reed*, 489 U.S. 255, 263, 109 S. Ct. 1038, 1043, 103 L. Ed. 2d 308 (1989), *and that bar provides an adequate and independent state ground for denying relief. See id.* at 262, 109 S. Ct. at 1042-43; *Johnson v. Mississippi*, 486 U.S. 578, 587, 108 S. Ct. 1981, 1987, 100 L. Ed. 2d 575 (1988). The doctrine serves to ensure petitioners will first seek relief in accordance with state procedures, *see Presnell v. Kemp*, 835 F.2d 1567, 1578-79 (11th Cir. 1988), *cert. denied*, 488 U.S. 1050, 109 S. Ct. 882, 102 L. Ed. 2d 1004 (1989), and to "lessen the injury to a State that results through reexamination of a state conviction on a ground that a State did not have the opportunity to address at a prior, appropriate time." *McCleskey v. Zant*, 499 U.S. 467, 111 S. Ct. 1454, 1470, 113 L. Ed. 2d 517 (1991).

Johnson v. Singletary, 938 F.2d 1166, 1173 (11th Cir. 1991) (emphasis added).

When the last state court rendering judgment affirms without an explanation, "the federal court should 'look through' that 'unexplained' decision to the last related state-court decision that does provide a relevant rationale," and "should then presume that the unexplained decision adopted the same reasoning." *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018). The state can "rebut the presumption by showing that the unexplained affirmance [actually] relied or most likely [relied] on different grounds than the lower state court's decision, such as alternative grounds for

affirmance that were briefed or argued to the state supreme court or obvious in the record it reviewed." *Id.*

Federal deference to a state court's clear finding of procedural default under its own rules is strong:

> [A] state court need not fear reaching the merits of a federal claim in an *alternative* holding. Through its very definition, the adequate and independent state ground doctrine requires the federal court to honor a state holding that is a sufficient basis for the state court's judgment, even when the state court also relies on federal law. *Harris*, 489 U.S. at 264 n.10, 109 S. Ct. 1038 (emphasis in original). *See also Alderman v. Zant*, 22 F.3d 1541, 1549-51 (11th Cir. 1994) (where a Georgia habeas corpus court found that the petitioner's claims were procedurally barred as successive, but also noted that the claims lack merit based on the evidence, "this ruling in the alternative did not have an effect . . . of blurring the clear determination by the [Georgia habeas corpus] court that the allegation was procedurally barred"), *cert. denied*, 513 U.S. 1061, 115 S. Ct. 673, 130 L. Ed. 2d 606 (1994).

Bailey v. Nagle, 172 F.3d 1299, 1305 (11th Cir. 1999) (alterations and emphasis in original).

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). In other words, 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 renders 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). Rather, 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, then it will not be considered adequate, and the state court decision based upon such a rule may 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 a 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 a state procedural rule was not "firmly established and regularly followed"; *or* (3) where a 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); *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."); *Davis v. Terry*, 465 F.3d 1249, 1252 n.4 (11th Cir. 2006) ("It would be considered a fundamental miscarriage of justice if 'a constitutional violation has probably resulted in the conviction of one who is actually innocent.'"), quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995), in turn quoting *Murray*, 477 U.S. at 496).

The court has already addressed the law related to whether a state procedural rule is firmly established and regularly followed. Below, the court reviews the legal principles surrounding the other two circumstances.

a. "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) (citing *Wainwright*

v. Sykes, 433 U.S. 72, 84-85 (1977)) (emphasis added). This "cause and prejudice" standard is clearly framed in the conjunctive; therefore, a petitioner must prove both elements.

(1) "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; *see also Amadeo v. Zant*, 486 U.S. 214, 221-22 (1988). As explained by the Supreme Court:

> Objective factors that constitute cause include "interference by officials" that makes compliance with the State's procedural rule impracticable, and "a showing that the factual or legal basis for a claim was not reasonably available to counsel." In addition, constitutionally "[i]neffective assistance of counsel . . . [on direct review] is cause." Attorney error short of ineffective assistance of counsel [on direct review], however, does not constitute cause and will not excuse a procedural default.

McCleskey v. Zant, 499 U.S. 467, 493-94 (1991) (internal citations omitted).

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 so 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)).

Nevertheless, the Supreme Court has extended its prior decision in *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 *Maples v. Thomas*, 565 U.S. 266 (2012), the Supreme 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 default. *Maples*, 565 U.S. at 281. And, in *Martinez v. Ryan*, 566 U.S. 1 (2012), the Supreme 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. *Martinez*, 566 U.S. at 11-12.

(2) "Prejudice"

In addition to proving the existence of "cause" for a procedural default, a habeas petitioner must also show that he was actually "prejudiced" by the alleged constitutional violation. He must establish "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); *see also McCoy v. Newsome*, 953 F.2d 1252, 1261 (11th Cir. 1992). 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)).

b. "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. But there are only two circumstances where that door may be opened: (a) a petitioner demonstrates that there has been a fundamental miscarriage of justice, which "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* 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) (emphasis in *Schlup*); *see also, e.g.*, *Smith*, 477 U.S. at 537-38.

C. The Antiterrorism and Effective Death Penalty Act of 1996 & Habeas Review

The writ of habeas corpus "has historically been regarded as an extraordinary remedy." *Brecht v. Abrahamson*, 507 U.S. 619, 633 (1993). And, this description is especially apt when federal courts are asked to engage in habeas review of a state court conviction pursuant to 28 U.S.C. § 2254.

Direct review is and remains the principal avenue for challenging a conviction. "When the process of direct review . . . comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials." *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. That is due to the fact that, under the federal system of governments created by the United States Constitution, the States possess primary authority for defining and enforcing the criminal law. In criminal trials they also hold the initial responsibility for vindicating constitutional rights. Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights. *Engle v. Isaac*, 456 U.S. 107, 128 (1982). "The reason most

frequently advanced in our cases for distinguishing between direct and collateral review is the State's interest in the finality of convictions that have survived direct review within the state court system." *Brecht*, 507 U.S. at 635 (citing *Wright v. West*, 505 U.S. 277, 293 (1992); *McCleskey*, 499 U.S. at 491; *Wainwright*, 433 U.S. at 90).

Congress legislated these principles in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which amended preexisting habeas law. Indeed, several provisions of AEDPA require federal courts to give even greater deference to state court determinations of federal constitutional claims than before. As the present petition was filed after April 24, 1996, AEDPA applies. *McNair v. Campbell*, 416 F.3d 1291, 1297 (11th Cir. 2005).

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 of correctness with clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1); *see also, e.g., Fugate v. Head*, 261 F.3d 1206, 1215 (11th Cir. 2001) (observing that § 2254(e)(1) provides "a highly deferential standard of review for factual determinations made by a state court"). 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. Secretary, Department of Corrections*, 679 F.3d 1301, 1313 (11th Cir.

2012). 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.

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 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 it was made. *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. Therefore, 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 §§ 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.

Title 28 U.S.C. § 2254(d). 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); *Osborne v. Terry*, 466 F.3d 1298, 1305 (11th Cir. 2006).

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

a. Section 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:

> 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); *Putman v. Head*, 268 F.3d 1223, 1240-41 (11th Cir. 2001). 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.[7] Instead, the statutory

[7] Indeed, as one commentator has observed, the possible permutations are not just two, but at least four in number:

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. Section 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; s*ee also, e.g.*, *Putman*, 268 F.3d at 1240-41 (same). "[A]n *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Williams*, 529 U.S. 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, the question to be asked when deciding

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> The word "contrary" denotes incompatibility or logical inconsistency. Two propositions are incompatible with one another if both cannot be true or correct. Thus, a state court decision is contrary to federal law if that decision and the applicable federal law cannot both be true or correct. Given this premise, there appear to be four possible combinations of state court adjudications and resulting decisions that are pertinent to this textual inquiry:
>
> - the state court applies the correct federal standard and arrives at a correct outcome;
> - the state court applies an incorrect federal standard and arrives at an incorrect outcome;
> - the state court applies an incorrect federal standard [but] arrives at a correct outcome; and,
> - the state court applies the correct federal standard [but] arrives at an incorrect outcome.

Allan Ides, *Habeas Standards of Review Under 28 U.S.C. § 2254(d)(1): A Commentary on Statutory Text and Supreme Court Precedent*, 60 WASH. & LEE L. REV. 677, 685 (2003) (footnotes omitted).

the federal constitutional issue is not whether the state court "correctly" applied Supreme Court precedent but whether the state court's determination was objectively unreasonable. *Id*. at 409; *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."); *Harrington v. Richter*, 562 U.S. 86, 100-03 (2011).

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 there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 786-87. Stated another way, if the state court's resolution of a claim is debatable among fair-minded jurists, it is not objectively unreasonable.

Also, "[b]y its very language, [the phrase] 'unreasonable application' refers to mixed questions of law and fact, when a state court has "unreasonably" applied clear Supreme Court precedent to the facts of a given case." *Neelley v. Nagle*, 138 F.3d 917, 924 (11th Cir. 1998) (citation and footnote omitted). Mixed questions of constitutional law and fact are those decisions "which require the application of a legal standard to the historical-fact determinations." *Townsend v. Sain*, 372 U.S. 293, 309 n.6 (1963).

c. Section 2254(d)(2)

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) (alterations in original).

d. Evaluating State Court Factual Determinations under 28 U.S.C. §§ 2254(d)(2) and (e)(1)

As explained above, § 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 by a state prisoner that are grounded in a state court's factual findings, unless the state court's 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); *Ward v. Hall*, 592 F.3d 1144, 1155 (11th Cir. 2010). ("Clear and convincing evidence entails proof that a claim is highly probable, a standard requiring more than

a preponderance of the evidence but less than proof beyond a reasonable doubt.") (internal quotation marks omitted).

Nevertheless, the manner in which §§ 2254(d)(2) and (e)(1) relate to one another remains an open question. *See Rice v. Collins*, 546 U.S. 333, 339 (2006); *Wood v. Allen*, 558 U.S. 290 (2010); *Raheem v. GDCP Warden*, 995 F.3d 895, 908 n.4 (11th Cir. 2021); *Cave v. Secretary for Department of Corrections*, 638 F.3d 739, 744-45 (11th Cir. 2011) ("[N]o court has fully explored the interaction of § 2254(d)(2)'s 'unreasonableness' standard and § 2254(e)(1)'s 'clear and convincing evidence' standard," quoting *Gore v. Secretary for Department of Corrections*, 492 F.3d 1273, 1294 n.51 (11th Cir. 2007)). Even so, the Eleventh Circuit's earlier opinion in *Ward v. Hall* concluded that 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." *Id*. at 1177 (citing § 2254(e)(1); *Parker v. Head*, 244 F.3d 831, 835-36 (11th Cir. 2001)). That same opinion observed that § 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); *see also* 28 U.S.C. § 2254(a). 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.

First, the habeas petitioner bears the burden of (1) overcoming the presumption of "legality" that attaches to the state court conviction and sentence, and (2) establishing a factual basis demonstrating that federal post-conviction relief should be granted. *See, e.g.*, 28 U.S.C. §§ 2254(d), (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 *Henson v. Estelle*, 641 F.2d 250, 253 (5th Cir. 1981)).

Second, the habeas petitioner must meet "heightened pleading requirements." *McFarland v. Scott*, 512 U.S. 849, 856 (1994); *Borden v Allen*, 646 F.3d 785, 810 (11th Cir. 2011) (holding that § 2254 requires "fact pleading," and not merely "notice pleading"). 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 "the facts supporting each ground"). Rule 2(c)(1)-(2), *Rules Governing 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*). *Cf. Hill v. Lockart*, 474 U.S. 52, 60 (1986) ("Petitioner did not allege in his habeas petition that, had counsel correctly informed him about his parole eligibility date, he would have pleaded not guilty

and insisted on going to trial. He alleged no special circumstances that might support the conclusion that he placed particular emphasis on his parole eligibility in deciding whether or not to plead guilty."); *Diaz v. United States*, 930 F.2d 832, 835 (11th Cir. 1991) (holding in a case premised upon 28 U.S.C. § 2255 that, despite the liberal construction due a *pro se* petitioner's allegations, dismissal was appropriate because the movant did not allege "facts that, if proven, would entitle him to relief"). 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 stated it:

> 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. Claims Dismissed Pursuant to Rules 32.3, 32.6(b), and 32.7(d) of the Alabama Rules of Criminal Procedure

Rule 32.3 of the Alabama Rules of Criminal Procedure requires:

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

Ala. R. Crim. P. 32.3. Further, Rule 32.6(b) of the Alabama Rules of Criminal Procedure mandates:

> Each claim in the [Rule 32] 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.

Ala. R. Crim. P. 32.6(b). Lastly, Rule 32.7(d) of the Alabama Rules of Criminal Procedure allows summary disposition of a state habeas petition if:

> the court determines that he petition is not sufficiently specific, or is precluded, or fails to state a claim, or that no material issue of fact or law exists which would entitle the petitioner to relief under this rule and that no purpose would be served by any further proceedings, the court may either dismiss the petition or grant leave to file an amended petition. Leave to amend shall be freely granted. Otherwise, the court shall direct that the proceedings continue and set a date for hearing.

Ala. R. Crim. P. 32.7(d).

The Eleventh Circuit has observed that "[a] ruling by an Alabama court under Rule 32.6(b) is also a ruling on the merits." *Borden v. Allen*, 646 F.3d 785, 812 (11th Cir. 2011). Under AEDPA principles, when a claim has been dismissed by the state courts pursuant to Rule 32.6(b), the reviewing federal habeas court may only "examine the reasonableness of the ACCA's adjudication of [a petitioner's] claims based upon the allegations contained in his [Rule 32] Petition." *Id.* at 816-17 (citing *Cullen*, 563 U.S. at 181) ("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."). The *Borden* court explained that the court's task was "to evaluate whether the [ACCA's] determination that [the petitioner's] relevant ineffective assistance of counsel claims were due to be dismissed for failure to state a claim with sufficient specificity under Rule 32.6(b) was 'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" *Id*. at 818-19 (citing 28 U.S.C. § 2254(d)(1)).

Of note, the Eleventh Circuit has recognized that Rule 32.6(b) possesses a "heightened pleading requirement—fact pleading." *Id*. at 810. Further, it is well settled in state courts that under Alabama procedural law, "[t]he burden of pleading under Rule 32.3 and Rule 32.6(b) is a heavy

one." *Hyde v. State*, 950 So. 2d 344, 356 (Ala. Crim. App. 2006). Specifically, Alabama courts hold:

> Rule 32.6(b) requires that the *petition* itself disclose the *facts* relied upon in seeking relief. In other words, it is not the pleading of a *conclusion* which, if true, entitles the petitioner to relief. It is the allegation of *facts* in pleading which, if true, entitles a petitioner to relief. After *facts* are pleaded, which, if true, entitle the petitioner to relief, the petitioner is then entitled to an opportunity, as provided in Rule 32.9, Ala. R. Crim. P., to present evidence proving those *alleged* facts.

Boyd v. State, 913 So. 2d 1113, 1125 (Ala. Crim. App. 2003) (emphasis in original) (internal citations and quotations omitted). Alabama courts have consistently observed the following legal principle:

> Conclusions unsupported by specific facts will not satisfy the requirements of Rule 32.3 and Rule 32.6(b). The *full* factual basis for the claim must be included in the petition itself. If, assuming every factual allegation in a Rule 32 petition to be true, 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). 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." [*Strickland*,] 466 U.S. at 694. A bare allegation that prejudice occurred without specific facts indicating how the petitioner was prejudiced is not sufficient.

Hyde, 950 So. 2d at 356 (emphasis in original) (parallel citations omitted).

F. Ineffective Assistance of Counsel Claims

Federal ineffective assistance of counsel claims are specifically limited to the performance of attorneys who represented a state prisoner at trial or on direct appeal from the conviction. *See* 28 U.S.C. § 2254(i) ("The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254."). *See also Coleman v. Thompson*, 501 U.S. 722, 752 (1991) ("There is no

constitutional right to an attorney in state post-conviction proceedings. Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings.").

The Supreme Court's "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:

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

Id. at 687 (emphasis added); *see also, e.g., Williams*, 529 U.S. at 390; *Grayson v. Thompson*, 257 F.3d 1194, 1215 (11th Cir. 2001). Both parts of the *Strickland* standard must be satisfied: that is, a habeas petitioner bears the burden of proving, by "a preponderance of competent evidence," that (1) the performance of his trial or appellate attorney was *deficient*; *and* (2) that such deficient performance *prejudiced his defense*. *Chandler v. United States*, 218 F.3d 1305, 1313 (11th Cir. 2000) (en banc). Thus, a federal court is not required to address both parts of the *Strickland* standard when the habeas petitioner makes an insufficient showing on one of the prongs. *See, e.g.*, *Holladay v. Haley*, 209 F.3d 1243, 1248 (11th Cir. 2000) ("Because both parts of the test must be

satisfied in order to show a violation of the Sixth Amendment, the court need not address the performance prong if the defendant cannot meet the prejudice prong, or vice versa.").

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 the performance prong of the *Strickland* test, a petitioner must prove that counsel made errors so serious that he or she was not functioning as the counsel guaranteed by the Sixth Amendment. *Strickland*, 466 U.S. at 687.

The standard set forth by *Strickland* for gauging attorney performance is "reasonableness under prevailing professional norms." *Id.* at 688; *see Williams*, 529 U.S. at 390-91: *Darden v. Wainwright*, 477 U.S. 168, 184 (1986); *Chandler*, 218 F.3d at 1313. "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, [the reviewing court] 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) (internal quotation marks omitted). No guarantee is made by the Sixth Amendment that a defendant is to be provided the very best counsel, or the most skilled attorney; rather, the Sixth Amendment provides only for counsel that performs within a reasonable range of professional norms. *See Grayson*, 257 F.3d at 1196. That is, the court "ask[s] only whether some reasonable lawyer at 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. *See, e.g.*, *Johnson v. Alabama*, 256 F.3d 1156, 1176 (11th Cir. 2001) (providing attorneys with "the benefit of the doubt for 'heat of the battle' tactical decisions"); *Mills v. Singletary*, 161 F.3d 1273, 1286 (11th Cir. 1988) (explaining that *Strickland* performance review is a "deferential review of all the circumstances from the perspective of counsel at the time of the alleged errors"). Under the *Strickland* standard of review:

> [T]here are no "absolute rules" dictating what reasonable performance is or what line of defense must be asserted. [*Chandler*, 218 F.3d] at 1317. Indeed, as we have recognized, "[a]bsolute rules would interfere with counsel's independence – which is also constitutionally protected – and would restrict the wide latitude counsel have in making tactical decisions." *Putnam v. Head*, 268 F.3d 1223, 1244 (11th Cir. 2001).

Michael v. Crosby, 430 F.3d 1310, 1320 (11th Cir. 2005). "Judicial scrutiny of counsel's performance must be highly deferential." *Strickland*, 466 U.S. at 689. It follows that, "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." *Id.* (internal quotations and citation omitted); *see also Rogers v. Zant*, 13 F.3d 384, 386 (11th Cir. 1994). Moreover, the fact that a particular defense was unsuccessful does not prove ineffective assistance of counsel. *See Chandler*, 218 F.3d at 1314. "[C]ounsel cannot be adjudged incompetent for performing in a particular way in a case, as long as the approach taken 'might be considered sound trial strategy.'" *Id.*, quoting *Darden*, 106 S. Ct. at 2474. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Strickland*, 466 U.S. at 693.

But upon this strong presumption of competent assistance, it follows that "to show that counsel's performance was unreasonable, the petition must establish that *no competent counsel would have taken the action that his counsel did take*." *Grayson,* 257 F.3d at 1216 (emphasis in original). *See, e.g., Stewart,* 476 F.3d at 1209; *Chandler*, 218 F.3d at 1315; *c.f. Rogers,* 13 F.3d at 386 ("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."). Particularly relevant with respect to this court's review, although "[a]n attorney has a duty to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence . . . [t]his duty does not necessarily require counsel to investigate every evidentiary lead." *Williams v. Allen,* 542 F.3d 1396, 1337 (11th Cir. 2008) (citations omitted).

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. Fla. Dep't. of Corr.*, 290 F.3d 1318, 1322 (11th Cir. 2002). "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; *see also Harrington*, 562 U.S. at 112. Instead to prove prejudice, the habeas petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *see Williams*, 529 U.S. at 391. Critically, "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington,* 562 U.S. at 112. 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.

Further, to satisfy this 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. Stated differently, "[a] finding of prejudice requires proof of unprofessional errors so egregious that the trial was rendered unfair and the verdict rendered suspect." *Johnson*, 256 F.3d at 1177, quoting *Eddmonds v. Peters*, 93 F.3d 1307, 1313 (7th Cir. 1996), quoting in turn *Kimmelman v Morrison*, 477 U.S. 365, 374 (1986) (internal quotation marks omitted).

3. Deference Afforded State Court's Decisions

When the state court has adjudicated a petitioner's ineffectiveness claims on the merits, the findings of historical facts made in the course of evaluating the claim are subject to a presumption of correctness under §§ 2254(d)(2), (e)(1). *see Thompson v. Haley*, 255 F.3d 1292, 1297 (11th Cir. 2001). To overcome the state court's findings of fact, the petitioner must show that those findings were unreasonable in light of the evidence before the state court and carry his burden of proving the facts by clear and convincing evidence. *See id.*

Deference to a state court's resolution of a claim of ineffective assistance of counsel involves a double layer of reasonableness. Under the AEDPA, the federal habeas court may grant relief on such a claim only if the state court determination involved an "unreasonable application" of *Strickland* to the facts of the case. *See Harrington*, 562 U.S. at 100-01. As previously noted, *Strickland* requires an assessment of whether counsel's conduct was professionally unreasonable and whether such conduct resulted in actual prejudice. The assessment of the reasonableness of the state court's determination and the assessment of the alleged attorney error cannot be conflated

into one inquiry. *See id.* at 101-02. Thus, habeas relief on a claim of ineffective assistance of counsel can be granted with respect to a claim decided on the merits by the state court only if the habeas court determines that it was "objectively unreasonable" for the state court to find that counsel's conduct was not "professionally unreasonable" or did not result in actual prejudice.

As the Supreme Court put it in *Harrington*:

> "Surmounting *Strickland's* high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010). An ineffective-assistance [of counsel] 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 of the right to counsel is meant to serve. *Strickland*, 466 U.S., at 689-690. 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; *see also Bell v. Cone*, 535 U.S. 685, 702 (2002); *Lockhart v. Fretwell*, 506 U.S. 364, 372 (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.
>
> Establishing that a state court's application of *Strickland* was unreasonable under [Section] 2254(d) is all the more difficult. The standards created by *Strickland* and [Section] 2254(d) are both "highly deferential," *id.*, at 689; *Lindh v. Murphy*, 521 U.S. 320, 333, n. 7 (1997), and when the two apply in tandem, review is "doubly" so, *Knowles* [*v. Mirzayance*], 556 U.S. [111, 123] [(2009)]. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. [*Knowles*,] 556 U.S. at 123. Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under [Section] 2254(d). When [Section] 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 (internal citations omitted); *see also Premo v. Moore*, 562 U.S. 115, 123 (2011).

Here, the Rule 32 court adjudicated Reynolds's ineffectiveness claims on the merits. It appears he has since significantly altered the factual basis he relies upon to present in this court

his ineffectiveness claims (at least as compared to what he originally presented to the Rule 32 court) to the point that he is essentially asserting new claims. Accordingly, as explained in more detail below, these new claims (or these new aspects of his claims), which were not presented to the state courts, are subject to dismissal for non-exhaustion, and thus are procedurally defaulted on that basis. *See Kelley v. Sec'y, Dept. of Corr.*, 377 F.3d 1317, 1345 ("The habeas petitioner can escape the exhaustion requirement only by showing cause for the default and actual prejudice resulting therefrom. . . . Absent the applicability of [this] exception [ ], nonexhausted claims cannot be raised in federal habeas corpus petitions.") (citations omitted).

As a general matter, though, to the extent Reynolds petitioned the Alabama Supreme Court for a writ of certiorari, both on direct appeal and following his post-conviction proceedings (*see* Vols. 22, 34), he has generally "invok[ed] one complete round of [Alabama's] established appellate review process," and has theoretically exhausted his state court remedies as required by 28 U.S.C. § 2254(b)(1). *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999); *see Smith v. Jones*, 256 F.3d 1135, 1141 (11th Cir. 2001); *Pruitt v. Jones*, 348 F.3d 1355, 1359 (11th Cir. 2003). As a result, with exceptions noted below, there are no overarching exhaustion or procedural default issues under § 2254 raised by Reynolds's federal habeas petition. However, to the extent exhaustion or procedural default issues may apply within individual claims and subclaims the court will address them as they are presented.

III. REQUEST FOR DISCOVERY AND EVIDENTIARY HEARING MOTION

On September 27, 2018, Reynolds filed a Motion for Discovery of Records and Files and for an Evidentiary Hearing. (Doc. # 32). In the motion, Reynolds requested the court's permission to conduct discovery on his claim that the prosecution suppressed evidence under *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), and their progeny

(the "Rule 32 *Brady/Giglio*" claim). (*Id.* at 19-41). Reynolds also requested an evidentiary hearing on his Rule 32 *Brady/Giglio* claim and on his ineffective assistance of counsel claim. (*Id.* at 42-55).

On April 1, 2019, the court denied Reynolds's Motion without prejudice, explaining:

> A habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course." *Bracy v. Gramley*, 520 U.S. 899, 904 (1997). Rather, a habeas petitioner's ability to conduct discovery is governed by the interplay between 28 U.S.C. § 2254(e)(2) and Rules 6 (Discovery) and 8 (Evidentiary Hearing) of the Rules Governing § 2254 Cases in the United States District Courts. …
>
> [Thus,] the court can only determine whether discovery and an evidentiary hearing is warranted under Rules 6 and 8 of the Rules Governing § 2254 Cases in the context of the court's substantive review of the habeas petition itself. Accordingly, the court will consider Petitioner's entitlement to discovery and an evidentiary hearing during its substantive review of the petition. If the court finds that either discovery and/or a hearing is warranted, it will grant Petitioner's request at that time.

(Doc. # 36 at 1-2). The court will now address whether (1) discovery and/or (2) an evidentiary hearing is warranted in this case.

A. Discovery Is Not Warranted on Reynolds's Rule 32 *Brady/Giglio* Claim

As previously mentioned, "[a] habeas petitioner, unlike the usual civil litigant in federal court is not entitled to discovery as a matter of ordinary course." *Bracy*, 520 U.S. at 904. Furthermore, the "broad discovery provisions" of the Federal Rules of Civil Procedure do not apply in habeas proceedings. *Harris v. Nelson,* 394 U.S. 286, 295 (1969). The *Harris* Court also held that the All Writs Act provides federal courts the power to "fashion appropriate modes of procedure." *Id.* at 299; *see* 28 U.S.C. § 1651.

Rule 6 of the Rules Governing § 2254 Cases permits a petitioner "to invoke the processes of discovery available under the Federal Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion *and for good cause shown* grants leave to do so, but not

otherwise." *See* Rule 6 of the Rules Governing § 2254 Cases in the U.S. Dist. Courts (emphasis added). The rule embodies the principle that a court must permit discovery in a proceeding only "where specific allegations before the court show reason to believe that the petitioner may, if the facts are more fully developed, be able to demonstrate that he is . . . entitled to relief." *Bracy*, 520 U.S. at 908-09, quoting *Harris*, 394 U.S. at 300; *see also Williams v. Bagley*, 380 F.3d 932, 974 (6th Cir. 2004). In keeping with the well-settled principle that habeas petitioners are not entitled to go on fishing expeditions in search of supporting evidence, the "good cause" standard requires a petitioner to identify what he expects to uncover through his discovery requests. *See Williams*, 380 F.3d at 976.

Reynolds complains that he should have been provided an adequate opportunity to engage in discovery but he was not. The court disagrees. As explained below, Reynolds has not established "good cause" for permitting additional discovery on his Rule 32 *Brady/Giglio* claim.

During the post-conviction appeal that followed the Rule 32 court's summary dismissal for insufficient pleading, the ACCA concluded that Reynolds pleaded specific facts, that if true, would establish a *Brady/Giglio* violation. *See Reynolds II*, 236 So. 3d at 202. Thus, the ACCA remanded the case to the Rule 32 court with instructions "to conduct further proceedings on Reynolds's *Brady/Giglio* claim." *Id.* The ACCA further explained that "[t]he circuit court may comply with this Court's remand instructions by conducting an evidentiary hearing or by taking evidence in the form of evidentiary submissions." *Id.* (citing Ala. R. Crim P. 32.9). On remand, the Rule 32 court permitted Reynolds to engage in discovery relevant to his *Brady/Giglio* claim and to submit his arguments. Ultimately, the Rule 32 court denied relief. *Reynolds II*, 236 So. 3d at 202.

On Reynolds's subsequent appeal, the ACCA rejected Reynolds's argument that the Rule 32 court "denied him access to basic discovery," "[prevented] him from having a full and fair

opportunity to present evidence of his *Brady/Giglio* claim," and hindered his ability to fairly present his claims. (Vol. 33 at 166-71). The ACCA discussed the relevant timeline of events and legal standards before deciding that "[t]he circuit's court's granting of limited discovery was reasonable." (*Id.*). For example, the ACCA specifically noted that "[p]ost-conviction discovery does not provide a petitioner with a right to 'fish' through official files and . . . 'it is not a device for investigating possible claims, but a means of vindicating actual claims.'" (*Id.* at 170, quoting *Jackson v. State*, 910 So. 2d 797, 801 (Ala. Crim. App. 2005) (citations omitted)).

The ACCA agreed with the Rule 32 court that "Reynolds's initial motion for discovery was overly broad . . . [and] sought information far beyond the scope of remand." (*Id.*). The ACCA also concluded that Reynolds did not satisfy the "good cause" standard for post-conviction discovery on the overly broad matters and that "the circuit court did not abuse its discretion in denying his initial motion for discovery." (*Id.*). Finally, the ACCA held that "[t]he circuit court's decision to accept evidentiary submissions in lieu of an evidentiary hearing was consistent with [the ACCA's] remand." (*Id.* at 171).

At this federal habeas stage, Reynolds still has failed to articulate what it is he would have been able to find if, on remand in the Rule 32 court, he had been entitled to conduct more comprehensive discovery. Based on the record, Reynolds has not shown good cause, even though on remand he was granted the ability to conduct reasonable, limited discovery in the Rule 32 court. (*See id.* at 170). Additionally, to the extent Reynolds objects to the Alabama Rules of Criminal Procedure's allowance of a court's acceptance of evidentiary submissions in lieu of an evidentiary hearing, that contention rests on state procedural law that is outside this court's jurisdiction. *See Landers v. Warden, Atty. Gen. of Ala.*, 776 F.3d 1288, 1296 (11th Cir. 2015) ("If the Alabama state

habeas court violated Alabama state law [Rule 32.9 of the Alabama Rules of Criminal Procedure], that is for the Alabama appellate courts to determine. . . .")

The state court provided Reynolds a full and fair opportunity either to engage in the discovery he now requests or argue good cause on why he was entitled to that discovery. This court agrees with the ACCA's conclusion that Reynolds has failed to show good cause for further post-conviction discovery. Reynolds is not entitled to discovery under Rule 6 of the Rules Governing § 2254 Cases. Accordingly, Reynolds's Motion (Doc. # 32) to conduct discovery regarding his *Brady/Giglio* claim is due to be denied.

B. An Evidentiary Hearing Is Not Warranted on Reynolds's *Brady/Giglio* or *Strickland* Claims

"[B]efore a habeas petitioner may be entitled to a federal evidentiary hearing on a claim that has been adjudicated by the state court, he must demonstrate a clearly established federal-law error or an unreasonable determination of fact on the part of the state court [and he must do so] based solely on the state court record." *Landers*, 776 F.3d at 1295. "Once a petitioner has demonstrated such an error or unreasonable determination, 'the decision to grant [an evidentiary] hearing rests in the discretion of the district court.'" *Id.* (citing *Schriro v. Landrigan*, 550 U.S. 465, 468 (2007)).

For the reasons provided below, the court concludes that Reynolds has not pleaded sufficient facts to demonstrate a *Brady/Giglio* claim after being afforded an opportunity to develop his state record. *See* Part IV(A)(2), *infra*. Also, Reynolds has not sufficiently pleaded his Rule 32 *Strickland* claims. *See* Part V, *infra*. Therefore, Reynolds is not entitled to a federal evidentiary hearing on either claim.

Alternatively, Reynolds failed to develop the factual basis of these claims in his state court proceedings, and he has failed to establish that either exception in § 2254(e)(2) applies: (1) the

claims do not rely on a new, retroactive rule of constitutional law; and (2) there is no factual predicate that could not have been previously discovered through the exercise of due diligence. Reynolds also fails to show that the facts underlying either claim "would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." Therefore, § 2254(e)(2) precludes the district court from granting an evidentiary hearing. *Holland v. Jackson*, 542 U.S. 649, 653 (2004); *accord Bradshaw v. Richey*, 546 U.S. 74, 79 (2005).

Furthermore, even if Reynolds satisfied § 2254(e)(2)'s standard, "the decision to grant such a hearing rests in the discretion of the district court." *Schriro*, 550 U.S. at 468. And, in this case, the court concludes that an evidentiary hearing is not warranted.

In sum, and as explained in detail below, this court concludes that Reynolds has not shown he is entitled to relief under § 2254(d). The court further concludes that Reynolds failed to factually develop these claims in the state court and, therefore, he is precluded from obtaining an evidentiary hearing in this court.

IV. SUBSTANTIVE CLAIMS

A. *Brady/Giglio*

Reynolds contends that the State violated the principles of *Brady*/*Giglio* and, thus, deprived him of his rights guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (Docs. # 1 at 4, 17-42; 31 at 11-34). Reynolds divides his *Brady/Giglio* argument into three contentions: (1) the prosecution failed to disclose the existence of a deal between it and West (Docs. # 1 at 2, 19-42; 31 at 11-28); (2) the prosecution suppressed the forensic investigator's field notes indicating that no blood was found on the interior of Sandra Roberts's car, and that another vehicle was investigated, and handwritten notes taken by the police

while interviewing several of the prosecution's witnesses (Docs. # 1 at 7, 19-20, 42-48; 31 at 11, 29-34); and (3) the cumulative effect of each of these alleged violations was error. (Doc. # 31 at 34). The court has considered each of Reynolds's arguments and meticulously reviewed the state court record. For the reasons provided below, the court concludes that Reynolds's *Brady/Giglio* claims are without merit and, thus, are due to be denied.

In *Brady v. Maryland*, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. "There are three components of a true *Brady* violation: [1] The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently;" and, [3] the suppressed evidence must be material to the issues at trial. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). "Evidence is 'material' … when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Turner v. United States*, 137 S. Ct. 1885, 1893 (2017), quoting *Cone v. Bell*, 556 U.S. 449, 469 (2009), citing in turn *United States v. Bagley*, 473 U.S. 667, 682 (1985); *see, e.g.*, *Strickler*, 527 U.S. at 280. "A 'reasonable probability' of a different result is one in which the suppressed evidence 'undermines confidence in the outcome of a trial.'" *Turner*, 137 S. Ct. at 1893 (citing *Kyles v. Whitley*, 514 U.S. 419, 434 (1995), quoting in turn *Bagley*, 473 U.S. at 678). Notably, a petitioner is entitled to a new trial only if he "establishe[s] the prejudice necessary to satisfy the 'materiality' inquiry." *See Strickler*, 527 U.S. at 282.

This issue tends to be "legally simple but factually complex. [A court] must examine the trial record, 'evaluat[e]' the withheld evidence 'in the context of the entire record,' and determine

in light of that examination whether 'there is reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.'" *Turner*, 137 S. Ct. at 1893, quoting *Cone*, 556 U.S. at 470, citing in turn *Bagley*, 473 U.S. at 682. The latter "question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles*, 514 U.S. at 434; *see Bagley*, 473 U.S. at 678.

Stated differently, "favorable evidence is subject to constitutionally mandated disclosure when it 'could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Cone*, 556 U.S. at 470, quoting *Kyles*, 514 U.S. at 435, citing *Banks v. Dretke*, 540 U.S. 668, 698-99 (2004); *Strickler*, 527 U.S. at 290. In fact, "undisclosed evidence can require a new trial even if it is more likely than not that a jury seeing the new evidence would still convict." *Hays v. Alabama*, 85 F.3d 1492, 1498 (11th Cir. 1996). Nonetheless, withheld evidence is not material if -- when considered in the context of the entire record -- it "is too little, too weak, or too distant from the main evidentiary points of the case." *See Turner*, 137 S. Ct. at 1894.

The court recognizes that the prosecution is firmly obligated under *Brady* to disclose evidence favorable to the defendant. *See Berger v. United States*, 295 U.S. 78, 88 (1935). And to be sure, when fulfilling this obligation, the State should err on the side of cautionary disclosure. *See id.* In other words, *Brady* requires the prosecution to turn over "material evidence," which includes evidence that, if it had been disclosed to the jury, would undermine confidence in the outcome of the trial or sentence as a whole. *Agurs*, 427 U.S. at 97-98; *see, e.g., Cone v. Bell*, 556 U.S. 449, 469-70; *Kyles*, 514 U.S. at 434. But, there is no constitutional violation if the evidence merely "might have helped the defense" or is not particularly probative. *Agurs*, 427 U.S. at 109-

10. Put differently, *Brady* does not give a defendant a right to "complete discovery" of the prosecution's files. *Agurs*, 427 U.S. at 109.

Indeed, the Supreme Court has recognized the impropriety of applying the broadest possible interpretation to decide *Brady* disclosure violations and warned against the application of a backward-looking standard, as that may result in the unintended and undesirable consequence of requiring the State to effectively turn over its entire file including potential work product. *Agurs*, 427 U.S. at 108-09 ("If everything that might influence a jury must be discovered, the only way a prosecutor could discharge his constitutional duty would be to allow complete discovery of his files as a matter of routine practice."). And, the *Agurs* Court has also cautioned that such expansive disclosure requirements would undermine the interest of the judiciary to maintain public confidence in and the reliability of judicial sentencing through the stripping of the State's right to develop and protect its own theory of the case without undue uncertainty. *Id.* at 109-10 (recognizing that there is "no constitutional requirement to make a complete and detailed accounting to the defense of all police investigatory work on a case. The mere possibility that an item of undisclosed information *might have helped* the defense, or *might have affected* the outcome of trial, does not establish 'materiality' in the constitutional sense"), quoting *Moore v. Illinois*, 408 U.S. 786, 795 (1972) (emphasis added).

1. Alleged Failure to Disclose Deal with West and to Correct Her Testimony

This portion of Reynolds's *Brady/Giglio* argument is further divided into three subclaims. First, Reynolds alleges that the "overwhelming evidence [he] present[ed] to the Rule 32 trial court and the ACCA shows by clear and convincing evidence" that there was an agreement between West and the State under which the prosecution would reduce West's sentence on outstanding criminal charges in exchange for her testimony against Reynolds, but that the purported agreement

was not disclosed. (*See generally* Docs. # 1 at 26-42; 31 at 11-28). Second, Reynolds contends that the prosecution knowingly failed to correct West's testimony when she expressly denied the existence of such a deal. (Doc. # 1 at 26-27). Third, Reynolds argues that the Rule 32 court did not provide him with a sufficient opportunity to conduct discovery and present evidence on these issues. (*Id.* at 34). Reynolds claims that the ACCA's decision (1) was an unreasonable determination of the facts in light of the evidence presented in the State court proceeding; and (2) was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. (*Id.* at 42). For the reasons explained below, the court concludes that Reynolds is not entitled to relief on this *Brady/Giglio* subclaim under either of § 2254(d)'s provisions.

a. Procedural History

To properly evaluate Reynolds's *Brady/Giglio* claims, it is important to carefully review the state court record regarding his assertion of those claims.

(1) The Rule 32 Court's Initial Dismissal and the Reversal by ACCA

Reynolds presented this *Brady/Giglio* subclaim in his state habeas appeal. (Vol. 31 at 101-08). On its first review, the Rule 32 court dismissed the claim as procedurally barred under Rules 32.2(a)(3) and 32.2(a)(5) of the Alabama Rules of Criminal Procedure. (Vol. 26 at 21). The Rule 32 court also decided that, under Rules 32.6(b) and 32.7(d), Reynolds insufficiently pleaded his *Brady/Giglio* claims. (*Id.*). However, on appeal, the ACCA remanded, holding that "Reynolds pleaded facts, that if true, would establish that the State violated both *Brady* and *Giglio*." *Reynolds II*, 236 So. 3d at 202, 202 n.1. On the pleadings, the ACCA reasoned that Reynolds was "entitled to an opportunity . . . to prove [this] claim" under Rule 32.9. *Id.* at 202; *see also id.* at 200-01, quoting *Boyd v. State*, 913 So. 3d 113, 1125 (Ala. Crim. App. 2003).

The ACCA also noted that the State "pleaded that [this] claim [was] procedurally barred because it could have been but was not raised at trial or on [direct] appeal." *Id.* at 202 (citing Ala. R. Crim. P. 32.2(a)(3), (a)(5)). As a result, the ACCA instructed that, on remand, Reynolds "must present evidence both disproving [the procedural bar] and proving his *Brady/Giglio* claim by a preponderance of the evidence." *Id.* at 200-02 (citing Ala. R. Crim. P. 32.2-32.3). Accordingly, the ACCA remanded Reynolds's case with the following instructions:

> The circuit court may order any discovery relating to this claim that it deems necessary to allow the parties to litigate Reynolds's claim. It must, however, provide Reynolds an opportunity to disprove the procedural bars asserted by the State and to prove his *Brady/Giglio* claim, and . . . provide the State an opportunity to present evidence in rebuttal. The circuit court may comply with this Court's remand instructions by conducting an evidentiary hearing or taking evidence in the form of evidentiary submissions. Rule 32.9, Ala. R. Crim. P. Further, the court shall make specific findings of fact regarding its disposal of Reynolds's claim.
>
> [T]he circuit court is instructed to take all necessary action to see that the circuit clerk makes due return to this Court at the earliest time possible and within 56 days of the release of this opinion. The return to remand shall include the circuit court's written findings along with a transcript of the evidentiary hearing, if any, and all evidence taken by the court.

Reynolds II, 236 So. 3d at 202 (emphasis added).

(2) Rule 32 Court's Decision on Remand

The Rule 32 court compiled a list of the evidence it considered on remand, which included certain factual findings. (Vol. 29 at 190-94; Vol. 33 at 171-73). First, "the [trial c]ourt on May 12, 2005, required prosecution to make known any incentives or agreements made with witnesses who will testify in the case." (Vol. 29 at 191). Second, the trial court granted Reynolds's "motion for discovery of prosecution files, records and information necessary to a fair trial … [to] the extent provided by Rule 16 of the Alabama Rules of Criminal Procedure and *Ex parte Monk* [, 557 So. 2d 832 (Ala. 1989)]." (*Id.*). Third, "[i]n the twelve (12) months preceding the trial of this case [the trial c]ourt held eight (8) different hearings dealing with discovery issues." (*Id.*). Fourth, "[t]o

ensure that [Reynolds] was given all exculpatory evidence [the trial c]ourt performed an in camera inspection of the prosecution's file. Those portions of the prosecution's file that were not provided to the Defendant were placed under seal with the Clerk and by Order of [the Circuit Court] were filed as a supplement of the record on appeal." (*Id.*). Fifth, after Reynolds raised his *Brady/Giglio* concerns, the trial court ordered the State to produce records concerning West. (*Id.* at 192). Sixth, Reynolds "first sought to exclude" West's testimony "by asserting a common law marriage and privilege"; however, after holding a hearing, the trial court found there was no common law marriage. (*Id.*). During his examination of West, Reynolds's trial counsel "specifically asked" if she "made any deals with the District Attorney's Office for [her] testimony" and West responded, "[n]o Sir." (*Id.*, quoting Vol. 8 at 158). Seventh, "[w]hen asked by the prosecution" if she had "made any kind of agreement with [the prosecutor's] office for [her] testimony," over the objection of defense counsel, West again responded, "[n]o, sir." (*Id.*, quoting Vol. 8 at 166).

The Rule 32 court found "nothing in the record that indicate[d] there was an agreement between the prosecution and West." (Vol. 33 at 172; Vol. 29 at 192-93). Instead, the court held:

> on at least two (2) occasions, once by the defense and once by the prosecution, West denied any agreement. West's affidavit in the State's opposition to [Reynolds]'s claims denied any agreement. West's attorney, Jeff Montgomery, denied any knowledge of any agreement for West's testimony. Chief Deputy District Attorney Marcus Reid denied any agreement with West for her testimony.

(Vol. 33 at 172, quoting Vol. 29 at 192). The Rule 32 court found further support for its finding that there was no such deal in "Judge David Kimberley's plea colloquy at West's guilty plea hearing[,] [which] indicate[d] West's plea was a blind plea." (*Id.*, quoting Vol. 29 at 192). Also, after noting the differences between West's and another defendant's sentences, the Rule 32 court found that West's sentence was "consistent with other sentences of similar character … depending on the judge assigned the case." (*Id.*, quoting Vol. 29 at 193).

The Rule 32 court concluded that Reynolds's *Brady/Giglio* claims were based solely on speculation and conjecture. (Vol. 29 at 193). Reynolds's assertion that West received preferential treatment in her sentencing did not come close to outweighing clear, documented evidence to the contrary: (1) the affidavits from Chief Deputy District Attorney Marcus Reid, Jeff Montgomery (West's attorney), and West; (2) West's testimony at trial; the colloquy with Judge Kimberly; and (3) other testimony and representations in the trial transcript. (*Id.* at 73-74, quoting Vol. 29 at 193). All of that evidence indicated there was no agreement between West and the prosecution in exchange for West's testimony at Reynolds's trial.

The Rule 32 court restated its holding as follows:

> 1. That, [when] provided an opportunity to disprove the procedural bars asserted by the State, [Reynolds] has utterly and completely failed to do so, by a preponderance of the evidence or any other legal standard.
>
> 2. That, as to the *Brady Giglio* issue dealing with an alleged agreement with Witness Marcie West for her testimony, [Reynolds] has further failed to meet his burden as to proof of the same: and, indeed, this Court finds as a matter of fact and law that no such agreement ever existed.

(Vol. 29 at 194).

(3) ACCA's Decision After Return from Remand

After the Rule 32 court's decision on remand, Reynolds again appealed to the ACCA. (*See generally* Vol. 33 at 166-74). As Reynolds acknowledges in his federal habeas petition, he argued to the ACCA that the Rule 32 court deprived him of a full and fair opportunity to present evidence in support of his *Brady/Giglio* claim. Reynolds also argued that the circuit court erroneously concluded he had not proven his *Brady/Giglio* claims by a preponderance of the evidence. (*See id.* at 166). The ACCA addressed these arguments in turn and held that each was without merit. (*Id.*). Accordingly, the ACCA affirmed the Rule 32 court's determination and underlying factual findings. (*See id.* at 166-73).

The ACCA noted that the remand instructions had directed the Rule 32 court "to take all necessary action to see that the circuit clerk makes due return to this Court at the *earliest time possible and within 56 days of the release of this opinion*." (*Id.*, quoting *Reynolds II*, 236 So. 3d at 202) (emphasis added). Consistent with that deadline, the Rule 32 court entered a schedule that provided "Reynolds 20 days to present the circuit court with any legal, competent, and relevant evidence supporting his claim. The State was [also] afforded 20 days from the filing of Reynolds's evidence to present the circuit court with any rebuttal evidence." (*Id*. at 166). Reynolds then sought a thirty-day extension of time, which the circuit court denied. (*Id*.).

The ACCA held that the Rule 32 court did not abuse its discretion (and in fact noted that the lower court had granted Reynolds access to any and all of the State's files pertaining to the prosecution of West). The ACCA also noted that Reynolds did not point to any specific evidence that he would have been able to obtain if not for the limits on discovery or the Rule 32 court's denial of his motion for an enlargement of time. (*Id.* at 168). The ACCA concluded that the Rule 32 court reasonably limited discovery and rejected the use of interrogatories under state law. (*Id*. at 170). The ACCA also determined that the Rule 32 court did not abuse its discretion when it allowed evidentiary submissions in lieu of an evidentiary hearing. (*Id.* at 171).

The ACCA further observed that under Alabama law, "where there are disputed facts in a postconviction proceeding and the [Rule 32] court resolves those disputed facts, '[t]he standard of review on appeal . . . is whether the trial judge abused his discretion.'" (*Id.* at 171, quoting *Boyd v. State*, 913 So. 3d 1113, 1112 (Ala. Crim. App. 2003), quoting in turn *Elliott v. State*, 601 So. 2d 1118, 1119 (Ala. Crim. App. 1992)). Ultimately, the ACCA rejected Reynolds's *Brady/Giglio* claim, holding that "the circuit court did not err in denying this claim" because "[t]he findings of

the circuit court are supported by the record." (*Id.* at 173) (citing *Hunt v. State*, 940 So. 2d 1041, 1055 (Ala. Crim. App. 2005)); (*see, e.g., id.* at 172-73).

b. Reynolds is Not Entitled to Relief Under § 2254(d)(2)

"Factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary, § 2254(e)(1), and a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding, § 2254(d)(2)." *Miller–El*, 537 U.S. at 340. This court must give proper deference to the state court's findings of fact and in particular the finding that the State did not enter into an agreement with West for her testimony at Reynolds's trial. As explained by the Eleventh Circuit, § 2254(d)(2) "requires that we accord the state trial court substantial deference." *Raheem v. GDCP Warden*, 995 F.3d 895, 907 (11th Cir. 2021) (citing *Brumfield v. Cain*, 576 U.S. 305, 314 (2015)). "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.* (citing *Brumfield v. Cain*, 576 U.S. 305, 314 (2015), quoting in turn *Wood v. Allen*, 558 U.S. 290, 301 (2010)). "In addition, on AEDPA review, 'a determination of a factual issue made by a State court shall be presumed to be correct' -- a presumption the petitioner has the burden of rebutting 'by clear and convincing evidence.'" *Id.* at 907-08 (citing 28 U.S.C. § 2254(e)(1)). The Supreme Court has not defined the "precise relationship between 2254(d)(2) and 2254(e)(1), and as our circuit court has stated several times before, "we need not do so here." *Id.* at 908 n. 4, quoting *Tharpe v. Warden*, 834 F.3d 1323, 1337 (11th Cir. 2016), citing in turn *Burt v. Titlow*, 571 U.S. 12, 18 (2013).

Here, Reynolds's petition contains nothing more than speculation and conclusory assertions that there was a deal between West and the State in exchange for West's testimony

against Reynolds. Reynolds claims that the State delaying West's criminal charges until after his conviction in conjunction with the fact that West incriminated herself at Reynolds's trial is sufficient evidence to prove that the State entered into a deal with West. (*See* Doc. # 1 at 36-37). That argument is far off the mark. Reynolds also points to a memorandum that references an agreement between West and the D.A.; however, nothing in the memorandum links the agreement (if any existed) to West testifying against Reynolds. (*See id.* at 38-39). The court explains its reasons for rejecting Reynolds's arguments below.

First, as discussed by the ACCA, a Rule 32 proceeding is governed by the provisions of Alabama's Rules of Criminal Procedure. (Vol. 33 at 171). Here, the ACCA reasonably recognized that the Rule 32 court's receipt of evidentiary submissions, in lieu of an evidentiary hearing, satisfied its remand order and Rule 32.9. (*Id.*). Additionally, Reynolds has not shown that the timeline adhered to by the Rule 32 court resulted in any unreasonable determination of fact. To the extent that the decision rested on state law grounds, the court declines to opine further on this issue. However, the court notes that the Eleventh Circuit has recognized that an evidentiary hearing is not a requirement for § 2254(d)(2) deference. *Landers v. Warden, Atty. Gen. of Ala.*, 776 F.3d 1288, 1297 (11th Cir. 2015) (citing *Schriro v. Landrigan*, 550 U.S. 465, 471, 476 (2007)).

The sworn affidavits of Reid, West, and West's counsel (Montgomery) specifically and categorically deny the existence of a deal made between the State and West for the purpose of inducing her testimony and cooperation at Reynolds's trial. For example, Reid attested that "[t]here was no deal in any form or at any time between the Etowah County District Attorney's Office and . . . West for her testimony during . . . Reynolds's trial" and that "[n]o promises or inducements concerning . . . West's pending charges, or any other matter, were made to . . . West in exchange for her testimony at Reynolds's trial." (Vol. 29 at 176). Similarly, in Montgomery's affidavit, he

attested that "[a]t no time was there a deal or agreement of any kind with the Etowah County District Attorney's Office in exchange for [his client West]'s testimony during the Reynolds trial. No promises were made of any kind concerning [her] pending charges." (*Id.* at 182).

Moreover, consistent with her prior trial testimony, West again confirmed through affidavit that there was no deal between her and the State in exchange for her testimony. In her affidavit, West swore that she "did not make any deals or agreements of any kind with the Etowah County District Attorney's Office" for her testimony at Reynolds's trial and that she wanted to testify at Reynolds's trial "because [she] knew [she] needed to tell the truth and tell what happened." (*Id.* at 186). West has also attested that "[n]o one ever promised [her] anything for [her] testimony[,]" "suggested that [her] charges might be lessened by testifying[,]" or "promised [her] anything at all about [her] charges." (*Id.*). West concluded her affidavit by swearing that "[a]t the time of Reynolds [*sic*] trial, [she] had no idea what would happen in [her] [pending] cases." (*Id.*).

These sworn statements are consistent with the record, including West's testimony. As recognized by the state courts, the nature of West's "blind plea" was plain from Judge David Kimberly's colloquy of her at the plea hearing. (*See* Vol. 33 at 172; Vol. 29 at 193). These facts are sufficient to establish the reasonableness of the ACCA's decision, which rejected Reynolds's claim that a *Brady/Giglio* violation occurred. *See Baxter v. Thomas*, 45 F.3d 1501, 1507 (11th Cir. 1995) (denying federal habeas relief on a claim that a witness testified pursuant to a deal with the State where the Assistant District Attorney, the witness, and a law enforcement officer provided sworn testimony that no such deal was made, and finding that "there is nothing to suggest that a deal had been made and, consequently, no *Brady* violation.").

As recognized by the state courts, West's affidavit was consistent with her testimony at Reynolds's trial, when she was tested in the "crucible of cross examination." (*See* Doc. # 31 at 15)

(citing *Jones v. Campbell*, 436 F.3d 1285, 1259 (11th Cir. 2006)). Moreover, the Rule 32 court, as the factfinder, is entitled to receive deference with respect to its credibility determinations. *Thompson v. Keohane*, 516 U.S. 99, 111 (1995).

Reynolds has not come close to articulating why it was unreasonable for the Rule 32 court to find West's affidavit credible and reliable. After all, West's declaration is consistent with her trial testimony during cross examination and her sworn testimony on re-direct. (Vol. 8 at 158, 166; Vol. 29 at 176-80, 182-84; Vol. 29 at 202; Vol. 30 at 3-10). And, it was confirmed by the substance of her blind plea. (*Id.*). Reynolds has failed to meet his AEDPA burden of showing that the ACCA's findings are objectively unreasonable.

To the extent Reynolds now relies on a January 13, 2009 memorandum composed by Mr. Montgomery, his assertions are simply insufficient to meet AEDPA's exacting standards. The memorandum referenced by Reynolds, *at most*, suggests that if "any agreement . . . existed regarding any portion of Ms. West's plea and/or sentence[,]" that agreement was entered into *after* Reynolds's conviction and sentence and did not relate "in [any] way to Ms. West's testimony during the Reynolds's trial." (Vol. 29 at 178). *See Burgess v. Terry*, 478 F. App'x 597, 600 (11th Cir. 2012) (holding that under *Brady*, "there can be no suppression of evidence that does not exist at the time of trial or sentencing"). While it is true that the State has an ongoing duty of disclosure, Reynolds cannot possibly prove he was prejudiced at trial or sentencing based upon purported evidence of an agreement between West and the prosecutor that did not even exist – at the time of trial or later. *See Landers*, 776 F.3d at 1297-98 (holding that the state court did not err in crediting an attorney's testimony over petitioner's version of facts where the "state court had plausible reasons" for reliability findings.)

Furthermore, Montgomery, who dictated the memorandum on the day of West's change of plea, explained in his affidavit that, "[a]lthough the memo indicates an 'Agreement with the D.A.'[,] I do not recall having any formal agreement in place at that time; only general discussions concerning the type of sentence I would request from the Court and any objections the District Attorney may have had, if any." (Vol. 29 at 178). Reynolds has not provided *any* evidence at all to demonstrate that the ACCA and the Rule 32 court were objectively unreasonable in finding that no *quid pro quo* agreement existed between West and the State. Rather, he relies on nothing more than rank speculation. Accordingly, Reynolds has not established that a *quid pro quo* agreement was orchestrated between West and the State "only days" after Reynolds's arrest. (*See* Doc. # 1 at 37). Nor has Reynolds demonstrated that the state courts' factual findings were objectively unreasonable. *See* 28 U.S.C. § 2254(d)(2).

Similarly unavailing is Reynolds's comparison of the sentence that was received and served by West (who testified for the State) to the sentence received and served by Harvey (who testified for the defense). Both West and Harvey were charged with (1) hindering the prosecution and (2) distribution of a controlled substance. And they each received "virtually the same sentence" -- three-year split sentences -- despite the fact that they each entered blind pleas before different judges. (*See* Vol. 31 at 36, 36 n.13, Vol. 29 at 11-31, 49-56, 61-36, 202; Vol. 30 at 3-8).

Reynolds wholly ignores this point and instead focuses on West's later admission into a treatment program. However, Reynolds has not presented any evidence rebutting the Rule 32 court's finding that West qualified for the program because she was a first-time offender, in contrast with Harvey, who was a habitual offender. (Vol. 29 at 193; Vol. 33 at 172; *see, e.g.*, Vol. 29 at 61-62). And, the record shows that Harvey and his status were personally known to the Rule 32 court. (*Id.*). Given these key differences, Reynolds has failed to demonstrate that West's entry

into the program was pursuant to a plea deal[8] (*see id.*; Vol. 29 at 49, 178-79, 193), and Reynolds's attempt to compare Harvey's case to that of West is unavailing. The two were similarly situated (except as it relates to their criminal history) and their sentences were not in any manner disproportionate to their prior records.

Reynolds has fallen far short of meeting his burden under AEDPA. He has not shown that no reasonable jurist could agree with the state court's determination of the facts. On return from remand, the ACCA determined that the record evidence supported the Rule 32 court's conclusion that no deal between the State and West existed. (Vol. 33 at 173). The Rule 32 court found that the affidavits from the Chief Deputy District Attorney, West's attorney, and West herself unequivocally denied the existence of any alleged deal made between the State and West. (*See* Vol. 33 at 172). And, as the ACCA recognized, the Rule 32 court's finding is supported by Reynolds's trial record showing that West twice denied the existence of such a deal while on the stand and when questioned by both Reynolds's trial counsel and the prosecution. (*See id.*; *see also* Vol. 8 at 158, 166). Reynolds has failed to demonstrate how the ACCA's affirmance of the Rule 32 court's factual findings on remand was based on an unreasonable determination of the facts. Accordingly, Reynolds is not entitled to relief under § 2254(d)(2).

c. Reynolds is Not Entitled to Relief Under § 2254(d)(1)

Reynolds argues that the ACCA's rejection of this *Brady/Giglio* subclaim was contrary to, or an unreasonable application of, clearly established federal law. (*See* Doc. # 1 at 42). As discussed above, the Rule 32 court reasonably found there was no *quid pro quo* deal made by the

[8] Moreover, in support of West's credibility, the court notes that at the time West's affidavit was given, on October 29, 2015 (*see* Vol. 29 at 187), it appears from the record that her supervised probationary period of five years had ended without incident. West was released from custody upon completion of a six-month SAP program on November 24, 2009, with her remaining sentence suspended. She was placed on five years of supervised probation, which would have concluded November 24, 2014. (*See* Vol. 28 at 132-33; Vol. 29 at 179).

State promising leniency to West in exchange for her testimony. The point is as tautological as it is true: there can be no *Brady* claim for "failing to disclose" something that did not exist. And for the same reasons explained above, Reynolds cannot succeed on a *Giglio* claim based on the prosecution's alleged failure to correct truthful testimony that such a deal did not exist.

A *Brady/Giglio* claim is predicated on the suppression of evidence. So here, to succeed on such a claim, Reynolds must show there was an agreement between West and the State that was withheld. *Wearry v. Cain*, 577 U.S. 385, 393-94 (2016) (citing *Napue v. People of the State of Illinois*, 360 U.S. 264 (1959) (holding that the State violated *Brady* when it failed to disclose that a witness had sought a deal and may have been motivated by the possibility of a reduced sentence, rather than his relationship with the victim as the prosecutor insisted at trial). Here, there is no evidence of an agreement between West and the State.

Reynolds also contends that, under Eleventh Circuit precedent, mere advice by a prosecutor must be disclosed because it could constitute an informal understanding which could affect the jury's determination of credibility. (Doc. # 1 at 24-25 (citing *Haber v. Wainright*, 756 F.2d 1520, 1524 (11th Cir. 1985))). First, the court notes that, under § 2254(d)(1), Reynolds's burden is to prove that the ACCA's decision is contrary to clearly established law as determined by the *Supreme Court of the United States*. Second, the ACCA's decision is not contrary even to the Eleventh Circuit case he cites, *Haber*, because there is no evidence of an informal understanding between West and the State. Therefore, Reynolds has not shown that the ACCA's decision is contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court. Accordingly, Reynolds's *Brady/Giglio* claim is without merit and is due to be denied.

2. Alleged Suppression of Notes

Reynolds also alleges that the State violated *Brady* and *Giglio* by suppressing field notes of forensic testing performed on Roberts's car and hand-written notes from the preliminary investigation interview of Langley, the State's witness.[9] (*See* Docs. # 1 at 7, 19-20, 42-48; 31 at 11, 29-34). According to Reynolds, these notes were favorable to his theory of the case because they contained impeachment and exculpatory evidence that could have been used against the State's "key witnesses" to undermine the State's theory of events and exculpate Reynolds. (Doc. # 1 at 45, 47).

Reynolds specifically points to two notations in the undisclosed police interview notes (presumably written during Langley's interview with investigators). (*See* Doc. # 1 at 47). These notations report that Langley indicated Chad Martin was working in his garage around 2:30 to 3:30 a.m. on the morning that the murders occurred, that Chad Martin visited the garage during that time, and that, at some unspecified time, Chad Martin showed Langley a black, pocketknife with a serrated blade. (Doc. # 1 at 47) (citing Vol. 15 at 171).

Reynolds compares Langley's testimony at Reynolds's trial with the police interview notes to assert a temporal discrepancy. (*Id.*, quoting Vol. 15 at 170). And, Reynolds contends this

[9] The court notes that Reynolds also contends that the prosecution suppressed police interview notes of state-witness West and defense-witness Harvey. (Doc. # 1 at 20, 40, 46). Reynolds asserts that the interview notes from West and Harvey "contain facts that the defense could have used to cross-examine these and other key witnesses at trial." (*Id.* at 46). However, Reynolds's arguments are conclusory. He has not provided any argument in support of this allegation and he has failed to point to any specific facts within either West's or Harvey's police interview notes that could be favorable to the defense. *See U.S. Steel Corp. v. Astrue*, 495 F.3d 1272, 1287 n.13 (11th Cir. 2007) ("We will not address this perfunctory and underdeveloped argument"); *see also Flanigan's Enters. Inc. v. Fulton Coty, Ga.*, 242 F.3d 976, 987 n.16 (11th Cir. 2001) (holding that a party waives an argument if the party "fail[s] to elaborate or provide any citation of authority in support" of the argument). As such, Reynolds is due no relief on this portion of his claim and has abandoned and/or waived it.

Alternatively, Reynolds has not carried his burden of showing that the ACCA's adjudications of these unaddressed claims were contrary to, or involved an unreasonable application of, clearly established Supreme Court precedent or that the decisions were based on unreasonable factual findings. (*See* Doc. # 1 at 46-48). Accordingly, no federal habeas relief is warranted on this portion of Reynolds's *Brady/Giglio* claim.

discrepancy directly conflicts with Langley's testimony at Reynolds's trial indicating that Chad Martin was in his garage working around 5:30 or 6:00 a.m., which he argues "is significant because . . . Langley provided an alibi for Chad Martin on the night of the crime." (*Id.*) (citing Vol. 9 at 57-59). At trial, both Langley and Chad Martin unequivocally denied having any involvement in the murders. Reynolds emphasizes that neither Langley nor Chad Martin mentioned the pocketknife in their testimony. (*Id.*). According to Reynolds, this was prejudicial, because his trial "counsel could have used the undisclosed notes of interviews of [these] witnesses to place a knife in the hands of Chad Martin and discredit his alibi." (*Id.*).

Additionally, Reynolds points to the forensic investigator's field notes that revealed that no blood was detected in Roberts's vehicle. He asserts these notes "were crucial to rebut the State's theory of the crime" that "West suffered a serious stab wound when she tried to intervene in the crime[,]" and that under Reynolds's instruction, West placed the knives from the murder scene "on the floorboards" of "Roberts's Car." (*Id.* at 46). Reynolds maintains that the negative-blood-test results from Roberts's car demonstrates that the State's version of events could not have occurred and that these results also corroborated Reynolds's testimony "that he drove to the Martins' house" after their murders "to help cover up West's involvement." (*Id.*). Reynolds concedes that this information was revealed to the jury during his counsel's cross-examination of the forensic investigator. But, he nevertheless contends that the failure to disclose these forensic field notes prejudiced his defense because he could not incorporate "these facts into his trial strategy." (*Id.*). Reynolds claims disclosure of the field notes would have permitted him to utilize the negative results in his opening argument, to impeach "key State witnesses," and to confront the forensic investigators about the "full scope of their investigation." (*Id.*).

a. ACCA's Decision

Reynolds presented these same arguments on direct appeal. *See Reynolds I*, 114 So. 3d at 111-15. The ACCA rejected Reynolds's contention that the State allegedly suppressed police interview notes of a defense witness, Harvey, and two of the State's witnesses, West and Langley. *Id.* at 111-13. The ACCA clarified the difference between a statement and interview notes to explain that Reynolds's argument focused on "the investigators' interview notes with West, Langley, and Harvey" rather than statements by them as those notes "purportedly contain[ed] impeachment evidence." *Id.* at 112. The ACCA criticized Reynolds's failure to "specify [in his brief] how the notes in question were exculpatory or what portion of the notes were inconsistent with the witnesses' trial testimony." *Id.* at 113. Nevertheless, the ACCA analyzed this *Brady/Giglio* claim by reviewing the "notes from the interviews conducted with West, Langley, and Harvey" contained in the appellate record. *Id.* (citing Vol. 15 at 157-65, 168-74, 179). The ACCA determined that it was "not clear how these additional notes could have been used to impeach the three witnesses' trial testimony." *Id.* Further, while recognizing that the police interview notes "may [have] contain[ed] more or less detail than the witnesses' trial statements," the ACCA denied Reynolds's request for relief, concluding that the police interview notes did not "appear to contain either any conflicting information," any information that was "useful for impeachment purposes [,] or any exculpatory information" sufficient to establish a *Brady* violation. *Id.*

Similarly, the ACCA rejected Reynolds's assertion that the "State withheld notes prepared by . . . Hopwood, a forensic scientist," who assisted with the investigation of the murders. *Id.* at 113-14. The ACCA explained that "during defense counsel's cross-examination of Hopwood, Hopwood testified that he had performed a chemical-screening test for the presence of blood in

various places of the interior of the automobile that Reynolds and West used on the night of the murders but that the test did not detect the presence of blood." *Id.* at 114. The ACCA found that the record established that Hopwood "did not reduce his field notes regarding the testing of this vehicle to an official report," that "Reynolds was not necessarily entitled to Hopwood's field/investigative notes," and that Reynolds failed to show that "the State suppressed the evidence." *Id*. Further, the ACCA held that, even assuming Reynolds was entitled to Hopwood's forensic field notes, no *Brady* violation occurred because Reynolds had not demonstrated prejudice, as West testified to the same fact (*i.e.*, that no blood was visible in the vehicle). *Id.*, quoting *Giles v. State*, 906 So. 2d 963, 973 (Ala. Crim. App. 2004), *overruled on other grounds*, *Ex parte Jenkins*, 972 So. 2d 159 (Ala. 2005).

Reynolds now contends that the ACCA's determination was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court. (Doc. # 1 at 44). For the reasons explained below, the court disagrees.[10]

b. 28 U.S.C. § 2254(d)(1)

As an initial matter, Reynolds has utterly failed to develop any argument in support of his position that the ACCA's rejection of his *Brady* claim was "contrary to . . . clearly established

[10] The court notes that Reynolds has not pleaded or argued that the ACCA's determination rejecting his two *Brady/Giglio* claims presented on direct appeal resulted from the ACCA's unreasonable finding of fact. (*See* Doc. # 1 at 44) ("The [ACCA]'s decision was contrary to and an unreasonable application of, clearly established Supreme Court precedent."). (*See, e.g.*, *id.* at 41-48); 28 U.S.C. § 2254(d)(2).

It is well-established that "[a] party abandons all issues on appeal that he or she does not 'plainly and prominently' raise in his or her initial brief." *United States v. Krasnow*, 484 F. App'x 427, 429 (11th Cir. 2012), quoting *United States v. Jernigan*, 341 F.3d 1273, 1283 n.8 (11th Cir. 2003). "Nor may "[p]arties ... raise new issues in reply briefs." *Krasnow*, 484 F. App'x at 429 (citing *Timson v. Sampson*, 518 F.3d 870, 874 (11th Cir. 2008)). "The[se] same principles apply at the district court level." *Al-Amin v. Shartle*, No. 1:12-CV-1688-AT-GGB, 2016 WL 10718765, at *17 (N.D. Ga. Mar. 24, 2016), *report and recommendation adopted in part, rejected in part on other grounds*, No. 1:12-CV-1688-AT-GGB, 2017 WL 6596602 (N.D. Ga. Sept. 29, 2017), *aff'd sub nom. Al-Amin v. Warden Georgia Dep't of Corr.*, 932 F.3d 1291 (11th Cir. 2019), *cert. denied*, 2020 WL 1668291, at *1 (U.S. Apr. 6, 2020). Accordingly, Reynolds has waived and/or abandoned any such argument under § 2254(d)(2) with respect to this claim.

Supreme Court precedent." (Doc. # 1 at 44). "[M]ere recitation in a petition, unaccompanied by argument, in effect forces a judge to research and thus develop supporting arguments-hence litigate-on a petitioner's behalf. Federal judges cannot litigate on behalf of the parties before them, and it is for this reason that any claims in [Reynolds's] petition that were not argued in his brief are abandoned." *Blankenship v. Terry*, 2007 WL 4404972 at *40 (S.D. Ga.), *aff'd* 542 F.3d 1253 (11th Cir. 2008) (citing *United States v. Burkhalter*, 966 F. Supp. 1223, 1225 n.4 (S.D. Ga. 1997); *GJR Inv., Inc. v. Cnty. of Escambia*, 132 F.3d 1359, 1369 (11th Cir. 1998)). Accordingly, Reynolds has abandoned any intended argument under the contrary to prong of § 2254(d)(1).

In the alternative, the court concludes that Reynolds has not met his burden under AEDPA to show that the ACCA's decision was contrary to Supreme Court precedent. Reynolds has not pointed to any Supreme Court decision that indicates a different result than that reached by the ACCA. That is, there is not a Supreme Court case involving a similar set of facts that comes to a different conclusion. *Putman v. Head*, 268 F.3d 1223, 1241 (11th Cir. 2001); 28 U.S.C. § 2254(d)(1). Nor has Reynolds demonstrated that the ACCA's rejection of this claim involved an unreasonable application of *Brady* and its progeny. Thus, federal habeas relief under the contrary to prong of § 2254(d)(1) is not warranted.

(1) Investigator Notes from Langley Interview

The ACCA correctly concluded that, while containing "more or less detail" than Langley's signed, handwritten statement provided to defense counsel, the investigator's notes from Langley's *interview did not conflict with the* "trial statement" prepared and signed by Langley. *Reynolds I*, 114 So. 2d at 113. Reynolds has simply not provided any evidence at all to the contrary. (*See* Doc. # 1 at 46-47). And, he has not attempted to compare the allegedly impeaching and exculpatory

information found in the police interview notes to Langley's official statement that was undisputedly disclosed to trial counsel. (*Id.*).

Despite this material failure, the court has reviewed the record before the ACCA and readily concludes that the ACCA's decision was not objectively unreasonable. The undisclosed police interview notes do not conflict with Langley's statement provided to the defense. And any impeachment of Langley's testimony as to the exact time when Chad Martin was working in his garage would have been cumulative. Langley's testimony surrounding Chad Martin's alibi was impeached with his prior statement, which (as the ACCA recognized) is not contradictory to the police interview notes at issue here. *See Banks v. Dretke.* 540 U.S. at 672-73; *see, e.g., Turner v. United States*, 137 S. Ct. 1885, 1894-95 (2017) (finding that the record reflected that undisclosed "impeachment evidence" was immaterial "in the context of this trial, the cumulative effect of the withheld evidence is insufficient to "'undermine confidence'" in the jury's verdict, when considering the effect of the "largely cumulative . . . impeachment evidence . . . [that was] already . . . used at trial"), quoting in part *Smith v. Cain*, 565 U.S. 73, 75-76 (2012), quoting in turn *Kyles*, 514 U.S. at 434. *Cf. Wearry v. Cain*, 577 U.S. 385 (2016) (holding that the State's failure to disclose material evidence, including inmates' *statements* casting doubt on the credibility *of the State's star witness*, violated defendant's due process, despite this witness's prior impeachment with other evidence, where, "the State's trial evidence resembles a house of cards, built on the jury crediting [a key State witness's] account rather than [a petitioner's] alibi") (citing *Agurs*, 427 U.S. at 113) ("[I]f the verdict is already of questionable validity, additional evidence of relatively minor importance *might* be sufficient to create a reasonable doubt.") (emphasis added). Moreover, Langley was not a "crucial" witness for the State to the extent Reynolds asserts. *See Banks*, 540 U.S. at 672-73; *Kyles*, 514, U.S. at 433-34, 4367.

The court also rejects Reynolds's contention that a single, isolated reference from the police investigator's notes of Langley's interview -- documenting Langley's purported recollection, that Chad Martin once showed him a black, serrated pocketknife -- amounts to impeachment or exculpatory evidence that could have been used by defense counsel to undermine the State's theory of the case and "place[] a knife in the hands" of Chad Martin on "the night of the crime." (Doc. # 1 at 47). As determined by the ACCA, this evidence did not constitute impeachment or exculpatory evidence as contemplated by *Brady*. Reynolds disagrees, but he has fallen far short of meeting his burden of demonstrating that this conclusion was "objectively unreasonable" under AEDPA.

For example, although Reynolds suggests that this evidence could have been used as impeachment evidence, he has not pointed to any inconsistencies between Martin's and Langley's trial statements (or even their trial testimony regarding the possession or ownership of a knife). (*See id.* at 47). This is significant, particularly in light of Reynolds's concession that at trial neither Chad Martin nor Langley made any mention of a knife in their testimony. (*Id.*). Instead, they repeatedly and adamantly denied having anything to do with the murders. It is unclear how Reynolds's defense counsel would have used this isolated reference to impeach the truthfulness of either Chad Martin or Langley's testimony. Moreover, under Rule 613(b) of the Alabama Rules of Evidence, extrinsic evidence of a prior inconsistent statement, which was not made under oath, may *only* be introduced for the purposes of impeaching the witness's *credibility*, not for the purpose of introducing substantive evidence. *See* Ala. R. Evid. 603(b); *Reynolds I*, 114 So. 3d at 113. So, Reynolds would not have been able to circumvent rules of evidence to introduce this notation as substantive evidence of the truth of the matter asserted.[11] Thus, Reynolds has failed to

[11] Thus, Reynolds's "revised" position that he would have used the police-interview note to impeach Langley's already impeached testimony is also off the mark. Reynolds would have been barred from doing so because

show that the ACCA's decision that the police interview notes did not amount to impeachment evidence subject to disclosure under *Brady* was objectively unreasonable.

Moreover, Reynolds does not even argue that this information was "exculpatory." And yet, even if he did, he has failed to make the required showing under AEDPA (*See* Doc. # 1 at 46-48). That is, Reynolds has not explained why the ACCA's decision was objectively unreasonable. The police interview notes suggest that Chad Martin showed Langley a pocketknife at one unidentified time, but this indication does not constitute exculpatory evidence as defined by *Brady* and its progeny. Moreover, this information (even if disclosed to the jury) would not undermine the direct evidence of Reynolds's involvement in the murders. Nor does it call into question the evidence about the ornamental scabbard sheath (which Roberts identified as the ornamental cover to Reynolds's six to eight inch scabbard). It does not answer or impeach the fact that such a sheath was recovered by a diver in the exact location where West testified that Reynolds threw it into the water. Similarly, it does not call into question the autopsy evidence and other testimony indicating that the wounds sustained by the Martins were consistent with wounds that would have been caused by the unrecovered scabbard. (*See* Vol. 9 at 4-5, 8-9, 45-48; Vol. 15 at 173-74; *see, e.g.*,

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in such an instance his intention was not to impeach Langley's credibility but to introduce inadmissible evidence as substantive proof of the matters contained therein to undermine Chad Martin's alibi. (Doc. # 1 at 47) ("Thus, counsel could have used the undisclosed notes of interview of [Langley] to place a knife in the hands of Chad Martin and discredit his alibi."). Consequently, the ACCA's determination that such evidence is not impeachment evidence is not objectively unreasonable.

Additionally, a review of the record on appeal demonstrates that the notes do not indicate that Chad Martin was in actual possession of this knife on or around the time of the murders. In fact, no other evidence regarding the pocketknife exists in the record. (*See* Vol. 15 at 171). Further, the police investigator who took the notes did not testify at trial. Engaging in total speculation about what context she could provide -- even assuming the notes would be admissible for *impeachment* purposes -- is beyond the scope of this court's AEDPA *Brady* review. *See McWhorter v. Dunn*, 4:13-cv-02150-RDP, 2019 WL 277385 at *59 (N.D. Ala. Jan. 22, 2019); *aff'd sub nom. McWhorter v. Comm'r, Ala. Dep't of Corr.*, 824 F. App'x 773 (11th Cir. 2020) (finding that where an individual did not testify at the respective trial the court cannot know whether that individual would have offered testimony inconsistent "with his alleged prior statement" that would've permitted the use of extrinsic evidence and qualification of another as an impeachment witness) (citing *Wright v. Hopper*, 169 F.3d 695, 703 (11th Cir. 1999)); *cf. Spaziano v. Singletary*, 36 F.3d 1028, 1044 (11th Cir. 1994).

Vol. 15 at 164). Thus, Reynolds has not shown that (1) the ACCA unreasonably applied *Brady* or its progeny or (2) that its decision is contrary to clearly established federal law.

(2) Forensic Field Notes

To the extent Reynolds argues that the ACCA unreasonably applied clearly established Federal law in rejecting his claim that the State violated *Brady* for failing to disclose forensic investigator's field notes, Reynolds fails to cite to any specific portion of the record in support of his argument. (*See* Doc. # 1 at 45-46). Nonetheless, the court has reviewed the relevant portions of the record considered by the ACCA on direct appeal and, as explained below, concludes that the ACCA's rejection of this claim was not objectively unreasonable.

As the ACCA noted, West testified that Reynolds cleaned the interior of the car after he returned to his father's home. *See Reynolds I*, 114 So. 3d at 115. (*See also* Vol. 8 at 144-45). On cross examination, Hopwood explained that several days later he also "looked at a Nissan Maxima," which belonged to Roberts, as well as a "beige Oldsmobile Toronado" (Vol. 10 at 76; *see, e.g.*, Vol. 11 at 113). When asked by defense counsel if he had taken any samples from the passenger floorboard, Hopwood answered that he had not because there was nothing "obviously visible." (Vol. 10 at 76). Hopwood did, however, take swabbed samples to detect if any blood was present from the seats, the gearshift, the steering wheel, and the headliner which had a visible stain. (*Id.* at 76-77). To the extent Reynolds argues the lack of any indication of blood on the floorboards of Roberts car (which is where West testified the knives were placed) that argument lacks merit. Hopwood's testimony regarding the forensic examination of Roberts's car specifically stated that no swabs were taken from, or tests performed on the floorboards, where West testified she placed the knives. (*See* Vol. 8 at 144; Vol. 10 at 76-77).

Moreover, Hopwood's response to defense counsel's cross-examination question regarding the type of blood detection tests that were used on Roberts's car lends additional support to the ACCA's finding. West had already testified to the fact that she had not seen any blood on the floorboards, and that any blood in the car was cleaned by Reynolds. (*See* Vol. 8 at 144-45; Vol. 10 at 76-77). *See also Reynolds I*, 114 So. 3d at 115. More specifically, Hopwood testified that he employed tetra-methyl-benzoline ("TMB") as a "chemical screening test" to confirm the presence of blood when it is visible "to the naked eye." (Vol. 10 at 76-77). Hopwood explained that the reason he used TMB, despite its obvious shortcomings, was to prevent the frequent false-positives of its widely-known alternative, Luminol (which reacts to oxidizers like Febreze). (*See id.* at 77). Reynolds has not pointed to anything in the record that demonstrates that, if he had been provided information about the lack of blood evidence in the car, there is a reasonable probability that the outcome of his trial would have been different.

Finally, Reynolds argues that if he had been provided with these field notes the state's theory of the case would be untenable because no blood was found to be present (despite West's stab wound). Reynolds's argument is without merit. Reynolds himself testified that West and Roberts went together to buy drugs and, while awaiting their return, he fell asleep, (Vol. 11 at 112-15, 136). Reynolds's story is that he remained asleep until West woke him, saying that she was injured. (*See id.*). Reynolds testified that, at first, West was not bleeding badly at the time she woke him up, despite what Reynolds described as a gross-looking stab wound to her arm. He contends that it was then that he went to the Martins's home to destroy evidence that could implicate West. And, according to his version of events, it was later that morning, when he returned from the Martins's home (after Reynolds attempted to burn the Martins's home down), West's arm began bleeding. (*Id*. at 115, 124). So, even Reynolds's version of events places a bleeding West in

Roberts's car — whether she was with Reynolds or Roberts. It follows that the absence of visible blood does nothing to corroborate his testimony (nor does it undermine the State's case). Also, and again, West testified that she did not see blood on the floorboards and that, in any event, Reynolds had cleaned the car. (*See* Vol. 9 at 144-45). Therefore, Reynolds fails to prove prejudice under *Brady* (as the ACCA decided) even if the State were required to disclose Hopwood's field notes.

c. Conclusion

For all these reasons, Reynolds is not due federal habeas relief on his claims that the State withheld police interview and forensic field notes. Reynolds has simply not shown prejudice under *Brady*. This claim is therefore due to be denied.

3. Cumulative-Effect

Reynolds next argues that the *Brady/Giglio* violations considered cumulatively entitle him to federal habeas relief under § 2254(d). Reynolds contends that he "has shown a reasonable probability of a different outcome of his trial had the jury been provided this suppressed evidence." (Doc. # 31 at 34). The court disagrees.

First, there is no evidence that a deal existed between West and the prosecution in exchange for her testimony against Reynolds. It follows that the prosecution was not under any obligation to disclose something that did not exist.

Second, the police interview notes purportedly containing information that conflicts with Langley's testimony are not material for the purposes of *Brady*. Langley was not a key witness at Reynolds's trial. And, as Langley's testimony had already been impeached, the jurors were fully able to assess his credibility. Moreover, the evidence implicating Reynolds (unrelated to any aspect of the matter related to Langley) was so strong and overwhelming that any temporal disparity in Langley's testimony was simply not prejudicial under *Brady*.

Third, to the extent Langley's police interview notes made any reference to Chad Martin's ownership of a pocketknife, that is wholly insufficient to undercut the corroborated testimony of West and Harvey as to where they disposed of Reynolds's ornamental sheathed dagger and the steak knife taken from the murder scene. In fact, the ornate leather sheath was found exactly where West had indicated it would be.

Fourth, Reynolds cannot demonstrate that the lack of blood evidence in Roberts's car was in any way prejudicial to his defense. West testified that Reynolds cleaned the car at his father's home after returning from the murder scene.

Therefore, even considering these claims cumulatively, the ACCA's decision was not contrary to, or an unreasonable application of, clearly established federal law. Nor has Reynolds met his burden to show that the ACCA's decision was based on an unreasonable determination of fact. Thus, Reynolds's *Brady/Giglio* claims are due to be denied.

B. Prosecutorial Misconduct

In his federal habeas petition, Reynolds argues that the prosecution's improper behavior deprived him of a fair trial, due process, and a reliable jury verdict in violation of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (Doc. # 1 at 48). Reynolds presents three prosecutorial-misconduct claims: (1) the prosecution improperly used Reynolds's post-arrest silence for impeachment purposes during his cross examination of Reynolds (*see* Docs. # 1 at 49-58; 31 at 35-50); (2) the prosecution engaged in "a pattern of improper behavior" during the guilt and penalty phases of Reynolds's trial (*see* Docs. # 1 at 58-67; 31 at 50-72); and (3) the cumulative effect of the alleged prosecutorial errors resulted in an unreliable conviction and sentence. (*See* Docs. # 1 at 48, 66-67; 31 at 35). The court addresses these arguments, in turn.

1. Reynolds's *Doyle* Claim

Reynolds claims that the prosecution violated his Fifth Amendment right against self-incrimination as articulated in *Doyle* by repeatedly using his post-*Miranda* silence for impeachment purposes during cross-examination and closing arguments. (*See* Docs. # 1 at 48-57; 31 at 35-50). And, he contends that the ACCA erroneously upheld the prosecution's commentary on direct appeal. (*Id.*). For the reasons discussed below, the court disagrees.

According to Reynolds, the prosecutor made numerous disparaging comments regarding Reynolds's "post-arrest silence" during cross-examination and closing arguments. (Doc. # 1 at 50, 57) (citing Vol. 11 at 134-39, 142-44, 147, 154, 156; Vol. 12 at 21). He argues that the prosecution improperly suggested that he should have voluntarily offered his personal knowledge of the Martins' murders to investigators even after invoking his right to remain silent. (Doc. # 1 at 51-53). Reynolds also argues that the prosecution violated *Doyle* when the prosecutor offered his theory that Reynolds waited to hear the State's evidence before fabricating and presenting his exculpatory explanation. (*Id.*) (citing Vol. 11 at 138).[12]

Reynolds maintains that these "repeated references" to his purported "post-arrest silence" were not made for the purpose of impeaching his testimony with prior inconsistent statements, but rather were designed to encourage the jury to infer guilt from Reynolds's "silence." (*Id.* at 50, 57). After defense counsel objected on the grounds that the prosecutor's line of questioning invaded Reynolds's rights to silence and counsel, Reynolds alleges that the prosecutor's illicit purpose is evinced from his response that "[h]e doesn't have a right to remain silent . . . [because h]e is on the stand." (*Id.*, quoting Vol. 11 at 139). Reynolds also alleges the prosecutor returned to the "same

[12] Reynolds also complains that the prosecutor repeatedly criticized Reynolds's decision to remain silent prior to trial despite his invocation of *Miranda*. (*See id.* at 50-51, 55) (citing Vol. 11 at 137, 143; Vol. 15 at 156). However, Reynolds does not dispute that after being informed of his *Miranda* rights, he answered a "few" of the investigating officers' questions before he invoked his right to remain silent and his right to counsel.

line of questioning" despite the trial court's instruction to ask his next question. (*Id.*) (citing Vol. 11 at 139).

Reynolds contends that this alleged error was not harmless. He argues that the record is devoid of overwhelming evidence of his guilt, and therefore the prosecution's actions adversely affected the jury's decision-making abilities. (*Id.* at 53). In particular, Reynolds points to the jury's question about whether Reynolds had provided the police with a statement, and the trial court's answer to that question. (*Id.*) (citing Vol. 12 at 153, 155).

Reynolds argues that he is due federal habeas relief because (1) the ACCA's decision was contrary to, and an unreasonable determination of, *Doyle* and its progeny, (2) and the decision resulted from an unreasonable determination of the facts of record before the ACCA. (*See id.* at 57) (citing *Doyle*, 426 U.S. at 619; 28 U.S.C. § 2254(d)). The court disagrees.

a. The ACCA's Decision

The ACCA addressed these same arguments and held that there was "no basis for reversal in either the prosecutor's cross-examination questions or [the prosecutor's] comments during closing arguments" when considering "the particular facts of this case, together with Reynolds's [testimony] admi[tting] that he regretted not coming forward much earlier with [his] exculpatory version of the facts." *Reynolds I*, 114 So. 3d at 140. Before reaching this conclusion, the ACCA extensively reviewed and examined relevant and controlling legal authorities and provided a thorough evaluation of the challenged cross-examination and closing argument. *See id*. at 126-40.

The ACCA summarized its factual findings after reviewing the disputed portion of the record in its proper context. *See generally id.* at 126-33, 139; *see also id.* at 126 ("The prosecutor's questions and comments cannot be considered in the abstract but must be considered in the context in which they occurred"), quoting *Brown v. State*, 11 So. 3d 866, 909 (Ala. Crim. App. 2007),

aff'd, 11 So. 3d 933 (Ala. 2008), *cert. denied*, 557 U.S. 938 (2009). In doing so, the ACCA looked to the State's case, finding on cross-examination that defense counsel asked Gadsden Police Investigator Lumpkin if he was the arresting officer who "picked up Mr. Reynolds [on] . . . [the day the murders were discovered]" and "whether [Lumpkin] talk[ed] to him [that day]" *Id.* Lumpkin affirmed that Reynolds was "picked up" the day of the murders but testified that he was not the arresting officer and did not speak with Reynolds the day of his arrest. *Id.* Apart from this exchange, the ACCA found that "[t]here was no other testimony in the State's case regarding the circumstances of Reynolds's arrest." *Id.*

The ACCA then reviewed Reynolds's direct testimony. *See id.* at 126-27. Reynolds testified "that he was not present when the crimes occurred and that he had nothing to do with the crimes[,] and only "went to the scene . . . to protect his girlfriend who, he claimed, although present, did not participate in the crimes." *Id.* at 139; *see also id.* at 126, 130. The ACCA also found that Reynolds "testified on direct [examination] that [instead of] calling the police after discovering that the Martins had been murdered, he tried to burn the bodies and the house in order to cover crimes that some other undisclosed persons supposedly committed." *Id.* at 139-40; *see also id.* at 126-27 (observing that Reynolds's counsel "asked [him] whether he contacted the police after [finding] his friend Charles Martin lying in a pool of blood" to which "Reynolds admitted that he did not call the police") (citing Vol. 11 at 119).

The ACCA then turned to the prosecution's cross-examination of Reynolds. The ACCA found that Reynolds admitted that after his arrest he told the police that he had no knowledge of the crimes but that he wished that he had told the truth when he first talked to the police. *Reynolds I*, 114 So. 3d at 140; *see id.* at 127-28, quoting Vol. 11 at 136-39. Moreover, the ACCA noted that "Reynolds expressed confusion as to why he was being prosecuted for the crimes instead of the

people who supposedly committed the crimes[,]" while "intimat[ing] that he even knew who committed the robbery and murders, but . . . declined to reveal their identity when asked to do so by the prosecutor on cross-examination." *Reynolds I*, 114 So. 3d at 140; *see also id.* at 129, quoting Vol. 11 at 144-45. The ACCA also observed that "Reynolds testified he had been incarcerated for over four years before trial and that during that time he regretted not telling his version of what had happened." *Reynolds I*, 114 So. 3d at 140.; *see id.* at 129-30, quoting Vol. 11 at 150; *see also id.* at 130, quoting Vol. 11 at 152-56.

The prosecution's questioning during cross-examination highlighted Reynolds's intimate knowledge of the State's witnesses and their activities surrounding the murders. *See id.* at 127. The ACCA observed that the prosecutor's questions challenged Reynolds's prior testimony, in which Reynolds admitted his alleged attempt to destroy evidence by burning the Martin's home after testifying that some unknown individuals killed the Martins. *Id.* at 127, quoting Vol. 11 at 128-56. The ACCA also quoted several portions of Reynolds's cross-examination to support its conclusion that the prosecutor directed his questions to showcase the logical inconsistencies embedded within Reynolds's testimony. *See Reynolds I*, 114 So. 3d at 127-29, quoting Vol. 11 at 136-39, 142-44.

Based on its analysis of the State's case-in-chief, the direct examination of Reynolds, and the prosecution's cross-examination of Reynolds, the ACCA concluded that the prosecutor's purpose was to elicit testimony in support of the State's theory that Reynolds's story was created with the benefit of hindsight. *See Reynolds I*, 114 So. 3d at 126-29, quoting Vol. 11 at 136-39, 142-44 (providing "the prosecutor continued to cross-examine Reynolds as to how his version of what happened dovetailed with the State's evidence").

The ACCA then reviewed the closing arguments. *See id.* at 130-32. The ACCA found that defense counsel's closing argument highlighted the credibility conflict that existed between Adrian West and Reynolds. *Id*. at 130. (*See generally* Vol. 12 at 12). The ACCA noted that the defense changed its strategy from elaborating on West's "self-serving" interests when testifying against Reynolds to attacking the prosecution's sufficiency of evidence. *See Reynolds I*, 114 So. 3d at 130-31. (*See* Vol. 12 at 12). Against this contrasting backdrop, the ACCA evaluated the allegedly offensive portion of the prosecution's closing rebuttal argument.[13] *Reynolds I*, 114 So. 3d at 131, quoting Vol. 12 at 21.

The ACCA also observed that during its deliberation the jury submitted a question to the court asking whether "Michael Reynolds [made] a statement to the police after being questioned," and, if so, "was [this statement] submitted as evidence and available" for the jury's review. *Id.*, quoting Vol. 12 at 153 (internal quotations omitted). The judge said he "ha[d] no idea" and the prosecutor opined, "he made a statement, and I questioned him about it, and he responded that he made a statement." *Id.* (emphasis removed), quoting Vol. 12 at 153-54. The court answered the jury's question as follows: "No written statement made by the defendant was offered into evidence; you have to remember the testimony." *Id.*, quoting Vol. 12 at 154-59.

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[13] The ACCA provided the contested portion of the prosecution's closing argument:

> "[Adrian West] told you what happened out there. And what that man did: He sat over there in jail. He came up with a story that you and I heard for the first time Tuesday.
>
> "The evidence dribbles in as it always does in an investigation like this. You know you have got a killing. He is questioned for the first time about these killings. *He didn't know nothing about it. He is questioned a second time. Didn't know nothing about it.* Well of course, he is not questioned again. He is charged. But all they would have had to do was somebody had to call [Investigator] Roger Dale there or call us up, '[H]ey, listen, we have got all the facts. We can tell you exactly what happened. Just like [Adrian West] did. A couple of days after the killing she came in and told us what happened.' *We didn't hear from this man except for him to say ['N]o, I wasn't there[;] I don't know nothing about it*.'"

Reynolds I, 114 So. 3d at 131, quoting Vol. 12 at 21 (emphasis in *Reynolds I*).

Of note, the ACCA found that the reference to a "statement" made by Reynolds to police was a generalization made by both parties, as the statement was actually a "set of handwritten interview notes made by investigators during their questioning of Reynolds." *Reynolds I*, 114 So. 3d at 131. The ACCA summarized Reynolds's statement as:

> The first notes are dated May 26, 2003[,] and indicate that Reynolds was advised of his rights. During that interview, Reynolds apparently told investigators that he was not at the Martin's residence on the night of the crimes and that he did not kill the Martins or know who did. Reynolds said that he did not know where the Uniden brand telephone found in Sandra Roberts's car came from. He also said that Chad Martin stole drugs from Charles Martin on previous occasions and that Charles Martin knew about it. Reynolds told the investigators that when Charles Martin used drugs, he was slow and could be "taken." In this same conversation, Reynolds described the black bag where Charles Martin kept his prescription drugs, and Reynolds described in some detail how Charles Martin "cooked" his drugs on the stove. In other interview notes, Reynolds admitted that he had used drugs with Charles Martin, and he again denied committing the crimes or being at the Martin residence on the night of the crimes.

Reynolds I, 114 So. 3d at 131-32 (citing Vol. 15 at 156, 175-77, 180) (internal citations omitted).

With this factual predicate, the ACCA began its analysis of the legal precedent that Reynolds cited to support his claim that "on twenty-one different occasions during cross-examination and closing arguments, the prosecutor ... commented on [his] post-*Miranda* silence by drawing attention to the fact that [he] did not disclose his subsequent exculpatory [trial] explanation to the State before trial," in violation of *Doyle v. Ohio,* 426 U.S. 610 (1976), and its progeny." *Reynolds I*, 114 So. 3d at 132 (internal quotations and citations omitted). The ACCA stated, however, that while Reynolds alleged twenty-one separate violations, defense counsel objected only "once on this particular ground during the purportedly improper line of questioning." *Id*. The court explained that the absence of continuing objections would "not preclude [the ACCA] from reviewing the issue," but acknowledged that the absence of these objections would "weigh

against any claim of prejudice . . . on appeal." *Id.* (citing *Dill v. State*, 600 So. 2d 343 (Ala. Crim. App. 1991), *aff'd*, 600 So. 2d 372 (Ala. 1992)).

The ACCA noted that the Supreme Court in *Doyle* granted certiorari to address whether "a state prosecutor may seek to impeach a defendant's exculpatory story, told for the first time at trial, by cross-examining the defendant about his failure to have told the story after receiving *Miranda* warnings *at the time of his arrest*." *Reynolds I*, 114 So. 3d at 132, quoting *Doyle*, 426 U.S. at 611. The ACCA recognized that the *Doyle* Court held "'the use for impeachment purposes of petitioners' *silence, at the time of arrest and after receiving Miranda warnings*, violated the Due Process Clause of the Fourteenth Amendment.'" *Id.*, quoting *Doyle*, 426 U.S. at 619-20. While recognizing that the use of post-*Miranda* silence for the purpose of impeaching a defendant was a due process violation, the ACCA also observed that the *Doyle* Court contemplated and expressly "acknowledged the importance of impeachment cross-examination to the prosecution." *Id.* (citing *Doyle* 426 U.S. at 619, 620, n.7 and n.11). The ACCA provided in support:

> We recognize of course, that unless prosecutors are allowed wide leeway in the scope of impeachment cross-examination some defendants would be able to frustrate the truth-seeking function of a trial by presenting tailored defense insulated from effective challenge. . . . It goes almost without saying that the fact of post-arrest silence could be used by the prosecution to contradict a defendant who testifies to an exculpatory version of the events and claims to have told the police the same version upon arrest. In that situation the fact of earlier silence would not be used to impeach the exculpatory story, but rather to challenge the defendant's testimony as to his behavior following arrest. *Cf. United States v. Fairchild*, 505 F.2d 1378, 1383 (C.A.5 1975).

Reynolds I, 114 So. 3d at 132, quoting *Doyle*, 426 U.S. at 619, 620, n.7 & n.11 (citations omitted).

The ACCA also recognized that the Supreme Court "specifically declined to address the constitutionality of the prosecutor's inquiry as to why neither defendant had told his exculpatory story at any time before trial." *Reynolds I*, 114 So. 3d at 135 (citing *Doyle*, 426 U.S. at 616 n.6).

Thus, the ACCA found "no error in the prosecutor's line of questions regarding why Reynolds did not come forward with his exculpatory story at any time before trial." *Id*.

The ACCA then turned to *Anderson v. Charles*, 447 U.S. 404 (1980). *See Reynolds I*, 114 So. 3d at 132-33. The ACCA explained that, like Reynolds, the defendant in *Anderson* testified in his own defense at trial. *Id.* at 132. The ACCA also recognized that, like Reynolds's testimony, the defendant's testimony in *Anderson* differed from the explanation he gave to an interviewing officer shortly after being arrested and informed of his *Miranda* rights. *Id.* at 132-33. Continuing its analysis, the ACCA explained that, in *Anderson*, "[d]uring cross-examination the prosecutor asked [the defendant] a series of questions challenging [his] credibility based on his failure to tell the detective the same story that he told at trial." *Id.* at 133. The ACCA observed that the Supreme Court distinguished *Anderson* from its predecessor *Doyle*:

> *Doyle* bars the use against a criminal defendant of silence maintained after receipt of governmental assurances. *But Doyle does not apply to cross-examination that merely inquiries into prior inconsistent statements. Such questioning makes no unfair use of silence because a defendant who voluntarily speaks after receiving Miranda warnings has not been induced to remain silent. As to the subject matter of his statements, the defendant has not remained silent at all*.
>
> In this case, the Court of Appeals recognized that the respondent could be questioned about prior statements inconsistent with his testimony. The court therefore approved the 'latter portion of the above quoted cross-examination. . . .' But the Court of Appeals found that 'the earlier portion of this exchange' concerned the 'separate issu[e]' of the respondent's failure to tell arresting officers the same story he told the jury.' *Ibid.* In the court's view, these questions were unconstitutional inquiries about post arrest silence. Thus, the Court of Appeals divided the cross-examination into two parts. It then applied *Doyle* to bar questions that concerned the respondent's failure to tell the police the story he recounted at trial.
>
> *We do not believe that the cross-examination in this case can be bifurcated so neatly.* The quoted colloquy, taken as a whole, does 'not refe[r] to the [respondent's] exercise of his right to remain silent; rather [it asks] the [respondent] why, if [his trial testimony] were true he didn't tell the officer that he stole the decedent's car from the tire store parking lot instead of telling him that he took it from the street.' Any ambiguity in the prosecutor's initial questioning was quickly

> resolved by explicit reference to Detective LeVanseler's testimony, which the jury heard only a few hours before. *The questions were not designed to draw meaning from silence, but to elicit an explanation for a prior inconsistent statement*.
>
> We conclude that *Doyle* does not apply to the facts of this case. Each of two inconsistent descriptions of events may be said to involve 'silence' insofar as it omits facts included in the other version. But *Doyle* does not require any such formalistic understanding of 'silence' and we find no reason to adopt such a view in this case.

Reynolds I, 114 So. 3d at 133, quoting *Anderson*, 447 U.S. at 408-409 (emphasis added). After assessing *Anderson*, the ACCA turned to the prosecution's cross-examination of Reynolds and found the record clearly supported a finding "that the prosecutor's intent was to impeach the credibility of Reynolds's trial testimony by contrasting his testimony with his prior inconsistent statements to the investigators" when "question[ing] Reynolds [about] what [he] told the police after his arrest[.]" *Id.* at 133-34.

The ACCA disagreed with Reynolds's argument that "because [Reynolds] admitted to making only 'a few statements,' and that because [the content of] those statements are not in the [trial] record, the prosecutor's questions were akin to commenting on his post-*Miranda* silence and thus do not fall under *Anderson*." *Id.* at 134. Instead, Reynolds's arguments erroneously distinguished *Anderson* and improperly relied on *Doyle* and *Edwards v. State*, 502 So. 2d. 846 (Ala. Crim. App. 1986). *See id.*

As the ACCA explained, in *Doyle* one defendant remained silent after arrest while Doyle asked, "What's this all about?" *Id.*, quoting *Doyle*, 426 U.S. at 623-24. When told why he was being arrested, Doyle exclaimed, "[Y]ou got to be crazy" or "I don't know what you are talking about." *Id.*, quoting *Doyle*, 426 U.S. at 623-24. The ACCA recognized that the Supreme Court construed Doyle's response as silence, and the ACCA further noted that Doyle's explanation did not contradict his trial testimony. *Id.* (citing *Anderson*, 447 U.S. at 406 n.2).

The ACCA then turned to *Edwards* and observed that in that case, after evidence was introduced that the defendant invoked his right to silence following his arrest, the prosecutor cross-examined the defendant regarding a statement to the authorities that defendant denied making. *Id*.; *see also Edwards*, 502 So. 2d. at 849-51. The ACCA recognized that the scenario presented in *Edwards* "constituted reversible error." *Reynolds I*, 114 So. 3d at 134; *see Edwards*, 502 So. 2d at 852. But, the ACCA distinguished *Edwards* from Reynolds's appeal by turning to the Supreme Court of the United States' analysis:

> [T]here is an indication in the record that the prosecutor may have been attempting to use a prior inconsistent statement made by the appellant to the arresting officer after he had claimed his right to remain silent; those facts would have brought this case under the holding of *Anderson v. Charles*, 447 U.S. 404 (1980).
>
> Any indication ... that the prosecutor intended to impeach the appellant by the introduction of a prior inconsistent statement, is not upheld by the record. Such a statement was never introduced into evidence, *nor was there any testimony regarding such a statement by Sergeant Boone, the appellant, or any other witness.* Thus, the *Anderson* holding is inapplicable to this case.

Reynolds I, 114 So. 3d at 134, quoting *Edwards*, 502 So. 2d at 851-52 (citations omitted).

As the ACCA explained, unlike the facts of *Edwards* and *Doyle*, in Reynolds's trial "there was *direct evidence from Reynolds* that he made two statements and that those [statements] were inconsistent with Reynolds's trial testimony." *Id.* As a result, the ACCA concluded there was no error even though "the statements themselves were not admitted into evidence" at Reynolds's trial. *Id*.

Further, the ACCA found that no harm resulted from the failure to introduce into evidence the written statements. As the ACCA noted, "Alabama Rules of Evidence do not require the admission into evidence of written prior inconsistent statements," and do not require that "the statement . . . be shown []or its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel" presumably for the purposes of

rehabilitating the witness on redirect. *Id.* at 134-35, quoting *McElory's Alabama Evidence* § 157.01(a), quoting in turn *Ala. R. Evid.* § 613(a).[14] "Most significantly," the ACCA determined that "the introduction into evidence of the actual statements to investigators in which Reynolds denied any knowledge of the crimes would have only solidified for the jury the disparity between Reynolds's trial testimony and his previous statements." *Id.* at 135.

The ACCA added that the "prosecution's questions do not constitute a *Doyle* violation because '[s]uch questioning makes no unfair use of silence because a defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent. As to the subject matter of his statements, the defendant has not remained silent at all.'" *Reynolds I*, 114 So. 3d at 135, quoting *Anderson*, 447 U.S. at 408; citing *Gobble v. State*, 104 So. 2d 920, 945 (Ala. Crim. App. 2010). As a result, the ACCA found no error in the prosecution's use of Reynolds's prior inconsistent statements to impeach Reynolds's trial testimony. *Id.*

The ACCA also examined the Supreme Court's opinion in *Jenkins v. Anderson*, 447 U.S. 231 (1980). The *Jenkins* Court held that a prosecutor's use of a defendant's pre-arrest silence to impeach the defendant's trial testimony was not a violation of the Fifth or Fourteenth Amendments to the Constitution. *Reynolds I*, 114 So. 3d at 135 (citing *Jenkins*, 447 U.S. at 240). The ACCA found the Supreme Court's reasoning in *Jenkins* to be "particularly relevant to the facts of [Reynolds's] case."[15] *Id.*

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[14] The ACCA also found that Reynolds's counsel never requested to be shown the prior statements and never objected to the testimony "that Reynolds was arrested the day the murders were discovered, that upon his arrest he answered questions propounded by investigators, and those answers were inconsistent with his exculpatory trial testimony." *Id.* at 135.

[15] The ACCA specifically pointed to the line of questioning at issue in *Jenkins* – with the understanding that the exchange involved pre-arrest statements (or absence of statements):

> Q. [PROSECUTOR]: And I suppose you waited for the Police to tell them what happened?
> A. [JENKINS]: No, I didn't.
> Q. [PROSECUTOR]: You didn't?

The ACCA recognized that although "[i]t can be argued that a person facing arrest will not remain silent if his failure to speak later can be used to impeach him. . . . [T]he Constitution does not forbid 'every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights.'" *Id.* at 136, quoting *Jenkins*, 447 U.S. at 236, quoting *Chaffin v. Stynchcombe*, 412 U.S. 17, 30 (1973). The ACCA explained that "the rule that [an accused who] testified . . . must testify fully, [does not] add[] in any substantial manner to the inescapable embarrassment which the accused must experience in determining whether he shall

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> A. [JENKINS]: No.
> Q. [PROSECUTOR]: I see . . . . [a]nd how long was it after this day that you were arrested, or that you were taken into custody?
>
> After some discussion of the date on which [Jenkins] surrendered, the prosecutor continued:
>
> Q. [PROSECUTOR]: When was the first time that you reported the things you have told us in Court today to anybody?
> A. [JENKINS]: Two days after it happened.
> Q. [PROSECUTOR]: And who did you report it to?
> A. [JENKINS]: To my probation officer.
> Q. [PROSECUTOR]: Well, apart from him?
> A. [JENKINS]: No one.
> Q. [PROSECUTOR]: Who?
> A. [JENKINS]: No one but my –
> Q. [PROSECUTOR]: (Interposing) Did you ever go to a Police Officer or to anyone else?
> A. [JENKINS]: No, I didn't.
> Q. [PROSECUTOR]: As a matter of fact, it was two weeks later, wasn't it?
> A. [JENKINS]: Yes.
>
> In closing argument to the jury, the prosecutor again referred to the [Jenkins's] prearrest silence. The prosecutor noted that [Jenkins] had waited two weeks, according to the testimony—at least two weeks before he did anything about surrendering himself or reporting [the stabbing] to anybody. The prosecutor contended that [Jenkins] had committed murder in retaliation for the robbery the night before.
>
> . . .
>
> At trial the prosecutor attempted to impeach [Jenkins's] credibility by suggesting that [Jenkins] would have spoken out if he had killed in self-defense. . . . *In this case, of course, [Jenkins] did not remain silent throughout the criminal proceedings. Instead, he voluntarily took the witness stand in his own defense.*

Reynolds I, 114 So. 3d at 135-36, quoting *Jenkins*, 447 U.S. at 233-234 (internal citations omitted).

testify or not." *Id.*, quoting *Jenkins*, 447 U.S. at 237, quoting *Raffel*, 271 U.S. at 499 (internal quotations omitted).

As the ACCA explained, in *Raffel v. United States*, 271 U.S. 494 (1926), the Supreme Court recognized that the Fifth Amendment "is not violated when a defendant who testifies in his own defense is impeached with his prior silence." *Reynolds I*, 114 So. 3d at 136, quoting *Jenkins*, 447 U.S. at 235. The defendant in *Raffel* was tried twice. "[A]t the first trial, [a witness for the prosecution] testified that Raffel . . . had made a [prior] inculpatory statement[,] but [Raffel] did not testify." *Id.*, quoting *Jenkins*, 447 U.S. at 235. When the first trial ended in a mistrial, the same witness testified at the second trial, and Raffel "took the stand to deny making such a statement[;]" however, "cross-examination revealed that [Raffel] did not testify at the first trial. *Id.*, quoting *Jenkins*, 447 U.S. at 235 (alterations added). The ACCA recognized that "[t]he [*Raffel*] Court held that inquiry into prior silence was proper because [t]he immunity from giving testimony is one which a defendant may waive by offering himself as a witness . . . [w]hen he takes the stand in his own behalf, he does so as any other witness, and within the limits of the appropriate rules he may be cross-examined . . . ." *Id.*, quoting *Jenkins*, 447 U.S. at 235-36 (internal quotations omitted).

The ACCA also acknowledged the Supreme Court's holding "that a statement taken in violation of *Miranda* . . . may be used to impeach a [testifying] defendant's credibility [and] reject[ed] the contention that such impeachment violated the Fifth Amendment." *Reynolds I*, 114 So. 3d at 137, quoting *Jenkins* 447 U.S. at 237, quoting in turn *Harris v. New York*, 401 U.S. 222, 225 (1971). The *Harris* Court reasoned:

> Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury, . . . Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process.

Reynolds I, 114 So. 3d at 137, quoting *Jenkins* 447 U.S. at 237-38, quoting in turn *Harris*, 401 U.S. at 225, citing *Oregon v. Hass*, 420 U.S. 714, 721-23 (1975); *Walder v. United States*, 347 U.S. 62, 65 (1954).[16] Therefore, the ACCA concluded "*impeachment follows the defendant's own decision to cast aside his cloak of silence and advances the truth-finding function of the criminal trial*." *Reynolds I*, 114 So. 3d at 137, quoting *Jenkins*, 447 U.S. at 238 (emphasis added).

The ACCA also supported its decision with precedent that has concluded that "the use of pre-arrest silence to impeach a defendant's credibility does not violate the Constitution." *Id*. at 138, quoting *Jenkins*, 447 U.S. at 240-41 (internal citations omitted). Of course, each state "remains free to formulate evidentiary rules defining the situations in which silence is viewed as more probative than prejudicial." The Alabama Rules, as referenced by the ACCA, provide "[t]he right to cross-examine a witness extends to any matter relevant to any issue and to matter affecting the credibility of the witnesses . . ." Ala. R. Evid. 611(b). Rule 611(b) generally does not limit the scope of cross-examination with respect to matters brought out on a witness's direct examination. *See Reynolds I*, 114 So. 3d at 138, quoting *McElroy's Alabama Evidence* § 136.01(1). The ACCA also recognized that "adverse parties in . . . criminal cases are entitled to conduct a thorough and sifting cross-examination" with "wide latitude for testing a witness'[s] credibility[,]" and though "not absolute . . . the latitude and extent of such cross-examination rests largely within the sound discretion of the trial court . . . reversible only [for] abuse[]." *See id.* at 138-39, quoting *McElroy's Alabama Evidence* § 136.01(2).

[16] The ACCA also referenced judicial considerations that provide "[o]nce a defendant decides to testify, the interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination." *Reynolds I*, 114 So. 3d at 137, quoting *Jenkins*, 447 U.S. at 238, quoting in turn *Brown v. United States*, 356 U.S. 148, 156 (1958).

In further support of its conclusion, the ACCA explained that both federal and Alabama precedent respects the jury's "paramount right to consider a witness's motivation, and any evidence testing his interest, bias, or prejudice so as to illustrate or impeach the accuracy of his testimony is a competent, material, and relevant subjection of cross examination." *Id.* at 139, quoting *Gobble*, 104 So. 3d at 953, quoting in turn *Ex parte Brooks*, 393 So. 2d 486, 487-88 (Ala. 1980) (internal quotations omitted); *see Davis v. Alaska*, 415 U.S. 308, 316 (1974). The ACCA reasoned, "when the accused takes the stand to testify in his own behalf, he does so in a dual capacity – (1) as the accused and (2) as a witness[;] [thus] as a witness his credibility [is subject to] impeach[ment]" just as "any other witnesses may be impeached." *Id.*, quoting *Gobble*, 104 So. 3d at 953, quoting in turn *Fisher v. State*, 328 So. 2d 311, 317 (Ala. Crim. App. 1976); *Chambers v. State*, 84 So. 2d 342, 343-44 (Ala. 1955). And, the state court noted that "[a] defendant, who testifies for himself as a witness, may be impeached in the same manner as other witnesses, by showing that he has made contradictory statements"). *See id.*, quoting *Gobble*, 104 So. 3d at 953, quoting in turn *Fisher*, 328 So. 2d at 317; *Chambers*, 84 So. 2d at 343-44) (internal quotations omitted).

For these reasons, the ACCA concluded that Reynolds's *Doyle* claim was without merit: "Given the particular facts of this case, together with Reynolds's admission that he regretted not coming forward much earlier with his exculpatory version of the facts, we find no basis for reversal in either the prosecutor's cross-examination questions or his comments during closing arguments." *Reynolds I*, 114 So. 3d at 140.

b. Section 2254(d)(2)

The court addresses Reynolds's prosecutorial misconduct claim and his argument that the ACCA's decision resulted from an unreasonable application of facts in light of the evidence before

the ACCA at the time of its decision. (*See* Doc. # 1 at 46, 55). For the following reasons, the court disagrees with his position.

Reynolds asserts that habeas relief is appropriate under § 2254(d)(2) because the ACCA's decision contains unreasonable factual determinations. But, that argument cuts no ice.

Reynolds acknowledges that a presumption of correctness attaches to state court factual findings under § 2254(e)(1). And, obviously he has the initial burden to point to those state court findings he claims are unreasonable. However, his references to the record simply fail to identify which specific factual findings he contends the ACCA unreasonably determined. Instead, Reynolds cites to the record pages (that were thoroughly evaluated in their proper context by the ACCA), and either rehashes his arguments presented to the state courts or relies on circular logic. (*See* Doc. # 31 at 35-37, 41). He simply has not identified which factual findings he contends were unreasonable.

But, even if Reynolds had adequately identified the factual findings he attacks, there is another flaw in his position. He has not explained the significance of any such finding in a non-conclusory manner; therefore, he has not established his *Doyle* claim as one that is a "highly probable" of succeeding. (*See* Doc. # 31 at 41); *Ward*, 592 F.3d at 1177; *see also Lee*, 987 F.3d at 1018 n.2 (explaining that unless a petitioner "can[] show that the state court's decision 'was based on' the challenged findings, they provide no basis for federal habeas relief whether or not those findings were unreasonable"). Reynolds's imprecise citations to the record coupled with his conclusory allegations are insufficient to overcome the heightened pleading requirement that the petition should state facts support each ground. *See* Rule 2(c) of the *Rules Governing Section 2254 Cases in the U.S. District Courts*. *See also* Advisory Committee Note to Rule 4 of the *Rules Governing 2254 Cases in the U.S. District Courts*, quoting *Aubut v. Maine*, 431 F.2d 688, 689 (1st

Cir. 1970) (internal quotation omitted). As a result, Reynolds did not establish that the ACCA or the Circuit Court unreasonably determined a fact of record relevant to the dismissal of his *Doyle* claim. Consequently, relief under § 2254(d)(2) is unavailable to Reynolds.[17]

In the alternative, the court concludes that Reynolds's argument that the ACCA's decision resulted from an unreasonable determination of the facts is without merit, ambiguous, and conclusory in nature. The court disagrees with Reynolds's contention that the "record is clear that the [prosecutor's] cross-examination questions were designed to suggest guilt from Reynolds's silence, not to impeach him by introducing evidence of a prior inconsistent statement." (Doc. # 31 at 41). Additionally, Reynolds does not address the ACCA's findings that, on multiple occasions, Reynolds admitted he answered "some" of the police's questions, *Reynolds I*, 114 So. 3d at 127, quoting Vol. 11 at 136; that he admitted that "the first time the police talked to [him] . . . [he] didn't know anything about it," *id.* at 128, quoting Vol. 11 at 142; that he stated later that "[h]e was trying to protect [West]," *id.* at 130, quoting Vol. 11 at 154; that he repeatedly admitted he "should have told [the investigators] at the beginning of this what happened," *id.* at 128, 130, quoting Vol. 11 at 139, 156; and, that the police interview notes that refer to Reynolds's inconsistent "statement" completely contradict his direct testimony, *see id.* at 131-32 (Vol. 15 at 156, 180).

Reynolds also asserts that the prosecutor's "intent was manifest by the frequency of the prosecutor's improper comments[.]" (Doc. # 31 at 41) (citing Vol. 11 at 137-39, 142-44, 147, 154, 156; Vol. 12 at 21). Contrary to this unsupported supposition, the prosecutor's comments did not indicate that the prosecution intended to comment on Reynolds's post-arrest silence. Rather, the prosecutor's remarks were directed at Reynolds's obligation to testify fully and truthfully.

[17] The court also notes that Reynolds has not sought to expand the habeas record nor attempted to meet § 2254(e)(1)'s clear and convincing standard on any state court factual determination applicable to his *Doyle* claim.

Reynolds also argues that the prosecutor's alleged failure to discontinue his line of questioning after the trial judge directed the prosecution to "ask [his] next question" amounts to evidence of his intent to comment on Reynolds's post-*Miranda* silence. But this argument is also without merit. (*See* Doc. # 1 at 51). As observed by the ACCA, and as demonstrated by the record, the prosecutor's next question -- "You could have solved this whole crime, couldn't you?" -- was not a repeated question. Instead, the question honed-in on the prosecution's theory that Reynolds tailor-made his exculpatory version of the events after listening to all of the inculpatory evidence in the State's possession. *See Reynolds I*, 114 So. 3d at 128, quoting Vol. 11at 139.

In conclusion, Reynolds has not pointed to any specific facts showing that the ACCA's decision was the result of an objectively unreasonable determination of the record. As such, Reynolds's argument that he is due federal habeas relief on this claim under 28 U.S.C. § 2254(d)(2) is due to be denied.

c. Section 2254(d)(1)

Nor has Reynolds met his burden of proof under § 2254(d)(1) of showing that the ACCA's determination was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." *See* 28 U.S.C. § 2254(d)(1). The ACCA decided Reynolds's claim of improper use of "post-arrest silence" under *Doyle* and its progeny. Reynolds has wholly failed to identify a decision in which the Supreme Court reached a "different result" based on "materially indistinguishable facts. Thus, at a minimum, fair-minded jurists could debate the correctness of the state court's decision. *Harrington v. Richter*, 562 U.S. 86, 102 (2011); *Brown v. Payton*, 544 U.S. 133, 141 (2005); *see Shinn v. Kayer*, ___ U.S. ___, 141 S. Ct. 517, 523 (2020) (precluding review of claims under § 2254(d)(1)'s contrary to standard because "the state court applied 'the correct governing legal principle . . . to

the facts of the prisoner's case'"), quoting *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003) (internal quotations omitted). That is all that is required to uphold the ACCA's legal conclusion.

Here, Reynolds alleges that the state court unreasonably applied *Doyle* and its progeny in rejecting his claim that the prosecutor intentionally "made improper statements regarding [his] [*Miranda*] invocation" for the alleged purpose of encouraging the jury to infer guilt from his silence and invocation of counsel. Reynolds cites numerous cases, mostly in support of a singular proposition without any further analysis.[18] (*See generally* Doc. # 1 at 35-57). In reply, Reynolds cites to other cases for support, [19] but he often does so without any development or application to the facts of his case. (*See generally* Doc. # 31 at 35-50).

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[18] In support of this claim, Reynolds cites to numerous federal and state court cases. (*See generally* Doc. # 1 at 35-57). But, these cases do not support Reynolds's arguments, particularly as related to his AEDPA burden under § 2254(d). Specifically, the cases cited to by Reynolds include: *Miranda*; *Doyle*; *Wainwright v. Greenfield*, 474 U.S. 284, 295 (1986); *Jenkins*; *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *Anderson*; *United States v. Jenkins*, 499 F. Supp. 2d 1268, 1279 (M.D. Fla. 2007) (holding that prosecutor's repeated references to defendant's refusal to provide *written statement* to inspector, while having otherwise waived his *Miranda* rights, violated his right to due process, and that such error was not harmless due to the lack of inculpatory evidence and repeated objections by defense counsel); *U.S. v. Pennington*, 20 F.3d 593, 599 (5th Cir. 1999) (holding that prosecution did not improperly comment on defendant's post-*Miranda* silence); *U.S. v. Laury*, 985 F.2d 1293, 1303 (5th Cir. 1993) (finding prosecutor's statements were harmless error because of sufficient evidence of guilt in the record, where the prosecutor repeatedly commented on defendant's "partial" post *Miranda* silence and where "nothing [he] told the FBI agents was inconsistent with his trial testimony"); *United States v. Canterbury*, 985 F.2d 483 (10th Cir. 1993); *Ex parte Great Am. Surplus Lines Ins. Co.*, 540 So. 2d 1357 (Ala. 1989) (granting insurer's petition for writ of mandamus ordering trial court to vacate order compelling insurer to produce coverage opinion letter prepared by insurer's legal counsel, holding that the opinion letter fell within attorney client privilege, was not waived, and was within the work product doctrine's "zone of privacy"); *Arthur v. State*, 575 So. 2d 1165, 1175-76 (Ala. Crim. App. 1990) (holding that the trial court's admission of testimony of statement defendant made to police officer over two weeks after defendant invoked his right to remain silent was "plain" error and likely had prejudicial impact on jury, where there was no proof that such statement offered was made voluntarily or knowingly waiving Miranda invocation); *Wiley v. State*, 516 So. 2d 812 (Ala. Crim. App. 1986), *rev'd Ex parte Wiley*, 516 So. 2d 816 (Ala. 1987) (holding defendant could reclaim right to remain silent and that prosecution's questions to the arresting officer about the defendant's assertion of his right to remain silent and retain counsel was unconstitutional). (*See generally* Doc. # 1 at 35-57).

With respect to most of these cases, Reynolds completely fails to even offer a rudimentary explanation of why they support his AEDPA claim. Those failures present a strong case that Reynolds has abandoned or waived these arguments.

[19] *Davis v. Alaska*, 415 U.S. 308 (1974) (holding that a defendant was denied his right of confrontation with the court's refusal to allow defendant to cross-examine key prosecution witness); *Chapman v. California*, 386 U.S. 18 (1967) (holding that, where the court charged the jury that the defendant's failure to testify in combination with prosecutions repeated references to defendant's silence, that harmless error could not be presumed where State had not made showing beyond a reasonable doubt that those comments did not contribute to the convictions); *Fugate v. Head*, 261 F.3d 1206 (11th Cir. 2001) (denying petition for writ of habeas corpus, holding that counsel was not

The court has analyzed each of the cases on which Reynolds relies, but concludes that Reynolds's claim is due to be denied.

(1) *Doyle v. Ohio*

Reynolds's argument that the ACCA's decision is contrary to *Doyle* lacks merit. In *Doyle*, the court considered whether a prosecutor may impeach a suspect for failing to say something when that silence occurred soon after the police arrested the suspect and informed him of the right to remain silent. *See* 426 U.S. at 611-12. The court analyzed the issue as though both defendants had remained mute after receiving their *Miranda* rights, and described the case as one involving cross-examination of a person "who remain[s] silent" after police informed him of his Miranda warnings. *Id.* at 620 (Stevens, J., dissenting). Not until trial did the defendants in *Doyle* assert that they had been framed and, after they took that position, the prosecutor improperly impeached their

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ineffective under *Strickland* during guilt or penalty phases); *United States v. Dodd*, 111 F.3d 867 (11th Cir. 1997) (holding that district court did not abuse discretion in finding prosecutor's comment during rebuttal was not remark on defendant's right to remain silent, as it referred to context of defendant's prior statement); *United States v. Tenorio*, 69 F.3d 1103, 1107 (11th Cir. 1995) (holding prosecution and witness violated defendant's right to remain silent when commenting that under the circumstances no reasonable person would remain silent, where no inconsistent statements were given by defendant prior to his testimony at trial); *United States v. Gabay*, 923 F.3d 1536, 1541 (11th Cir. 1991) (holding joinder of indictments was proper where defendant demonstrated no prejudice; transcript of prior testimony of deceased was admissible exception to hearsay rule; and that the continuation of deliberations with eleven jurors after one was dismissed for misconduct was not abuse of district court's discretion); *United States v. De Parais*, 805 F.2d 1447, 1455 (11th Cir. 1986) (finding the "prosecutor was not commenting on appellant's post arrest silence[,]" rather "was attempting to impeach [defendant's] testimony on the basis of his prior inconsistent statements.), *overruled on other grounds by United States v. Kaplan*, 171 F.3d 1351, 1357 (11th Cir. 1999); *United States v. Gates*, 351 F. App'x 362 (11th Cir. 2009) (holding there was sufficient evidence to support conviction for attempting to persuade minor to engage in sexual activity and that any error in governments closing argument shifting burden of proof was harmless); *Anderson v. State*, 571 So. 2d 1290, 1295 (Ala. Crim. App. 1990) (holding prosecutor's pervasive behavior, including asking defendant who, invoked his right to remain silent and had made no prior inconsistent statements to officers before testifying, what he had "to hide by exercising his right to remain silent" over multiple objections by the defense, amounted to reversible error); *Edwards v. State*, 502 So. 2d 846, 851-52 (Ala. Crim. App. 1986) (holding a prosecutor's repeated references on cross-examination to a defendant's repeated assurances he invoked his right to remain silent, response that when questioned by officers he remained silent, and where no inconsistent statement was introduced into evidence by defendant or anyone else, was a *Doyle* violation). (*See generally* Doc. # 31 at 35-50).

The court notes that Reynolds makes reference to most of these cases briefly in support of a generalized proposition that is, quite clearly, taken out of context. But even putting aside that flaw in his argument, Reynolds has not met his burden under AEDPA of demonstrating that the ACCA's decision is contrary to, or an unreasonable application of, clearly established Supreme Court precedent as related to his *Doyle* claim. Accordingly, these arguments are without merit and due to be dismissed.

exculpatory trial testimony by cross-examining the co-defendants as to why they had not told the same "frameup" story to the police at time of the arrest. *Id.* at 614-15.

In *Doyle*, the state court explained that the prosecution's use of defendant's post-*Miranda* silence "was not evidence offered by the state in its case in chief as a confession by silence or as substantive evidence of guilt but rather cross examination of a witness as to why he had not told the same story earlier at his first opportunity." *Id.* at 615-16; *see also id*. at 614 n.5. The Supreme Court rejected the state court's characterization of the cross-examination and held that this form of impeachment violated the defendant's due process rights. *Id.* at 620.

But, as the ACCA correctly recognized, the *Doyle* Court "specifically declined to address the constitutionality of the prosecutor's inquiry as to why neither defendant had told his exculpatory story at any time before trial." *Reynolds I*, 114 So. 3d at 135 (citing *Doyle*, 426 U.S. at 616 n.6). Indeed, as the Supreme Court elaborated, "unless prosecutors are allowed wide leeway in the scope of impeachment cross-examination some defendants would be able to frustrate the truth-seeking function of a trial by presenting tailored defenses insulated from effective challenge." *Doyle*, 426 U.S. at 619 n.7 (citing *Fitzpatrick v. United States*, 178 U.S. 304, 315 (1900)).

The facts presented in Reynolds's state court trial are materially distinguishable from those in *Doyle*. Unlike the defendants in *Doyle*, Reynolds waived his *Miranda* rights and admitted on cross-examination that he answered "some" of the questions posed by the officer. (*See* Vol. 11, Tab 19, TR. 1564). Reynolds also admitted that his statements to police were inconsistent with his direct testimony and that he "wished" he had told the truth earlier. *Reynolds I*, 114 So. 3d at 134, 140.

As the ACCA found, Reynolds's statements to police repeatedly denied committing the murders; denied knowing who was responsible for the murders (despite intimating otherwise on

cross-examination); and denied being at the Martin's home on the night of the murders (which contradicts his testimony on direct examination). *See Reynolds I,* 114 So. 3d at 131-32. Additionally, the prosecution provided several pieces of physical evidence that placed Reynolds at the Martin's home: Reynolds's DNA mixed with Melinda Martin's on a gas can handle, Reynolds's bloody footprint, Reynolds's prescription broken eyeglass piece found in the bed with Savannah Martin, and the broken frames found at his father's home (where he lived) with Mrs. Martin's blood on them.[20]

Moreover, the statement that Reynolds admitted to the police directly contradicted his exculpatory version of events provided in his direct testimony. But, in *Doyle*, the defendant's "silence" did not reflect a direct (or even indirect) contradiction to his exculpatory version of events.[21] Simply put, the prosecution's impeachment of Reynolds's post-*Miranda* statement offered to the investigators that were inconsistent with his testimony at trial make Reynolds's conviction distinguishable from the facts of *Doyle*.

The ACCA did not unreasonably apply *Doyle* when rejecting this claim. As discussed above in detail, the state court concluded that the facts presented in *Doyle* were patently distinguishable from those presented in Reynolds's case. Reynolds fails to demonstrate that no reasonable jurist could agree with the ACCA's application of *Doyle* to his case. And, to the extent

[20] Another distinguishing characteristic of this case compared to *Doyle* is that Reynolds's exculpatory explanation simply is not plausible. Reynolds testified that after sending West and Roberts off to purchase more drugs, he fell asleep after a day binging on crack cocaine only to wake up to see a stabbed girlfriend. To protect West, Reynolds purportedly went to the crime scene to erase all evidence of her presence. In doing so, Reynolds says he stepped over his friend's body without calling the authorities and later attempted to set fire to the home. As recognized by the ACCA, in *Doyle*, there was little direct, inculpatory evidence that pointed to the defendant, and it is simply implausible that the defendant was framed.

[21] The ACCA presumed that, because Doyle's response did not actually conflict with his trial testimony, the Supreme Court construed this response as silence for the purposes of analysis. *Id.* (citing *Anderson*, 447 U.S. at 406 n.2) (providing that with respect to the responses in *Doyle*, "[i]n any event, neither the inquiry nor the exclamation quoted above contradicted the defendant's later trial testimony").

Reynolds complains about the prosecution's inquiries into his failure to come forward at "any time," the *Doyle* Court specifically declined to address the constitutionality of any such reference. Rather, the *Doyle* Court recognized that its ruling, if taken to the extremes, could impermissibly allow a defendant to tailor his exculpatory story to the State's case against him -- which is what the prosecution in Reynolds argued when impeaching him on his prior inconsistent statements. *See Doyle*, 426 U.S. 619 n.7 (citing *Fitzpatrick v. United States*, 178 U.S. 304, 315 (1900)). Thus, the ACCA's decision was not an unreasonable application of *Doyle*.

(2) *Anderson v. Charles*

Similarly, the ACCA did not unreasonably apply *Anderson v. Charles*, 447 U.S. 404 (1980). *See Reynolds I*, 114 So. 3d at 132-33. In *Anderson*, the defendant testified and offered an explanation at trial that conflicted with his post-*Miranda* statement to police. *Anderson*, 447 U.S. at 405-406. As the ACCA recognized, the issue in *Anderson* related to a series of questions "[d]uring [the prosecutor's] cross-examination [that] challeng[ed the defendant's] credibility based on [his] failure to tell the detective the same story that he told at trial." *Anderson*, 447 U.S. at 404-05.

The *Anderson* Court began by evaluating *Doyle*. The Court acknowledged that "*Doyle* . . . held that the Due Process Clause of the Fourteenth Amendment prohibits impeachment on the basis of a defendant's silence following *Miranda* warnings." *Id.* at 406. The *Anderson* Court explained that the "two defendants [in *Doyle*] made no postarrest statements about their involvement in the crime" but the prosecutor "asked the defendants why they had not told the [exculpatory] story . . . upon arrest." *Id.* at 407. The Court reasoned that "such impeachment was fundamentally unfair because *Miranda* warnings inform a person of his right to remain silent and

assure him, at least implicitly, that his silence will not be used against him." *Id.* at 407-08 (citing *Doyle* 426 U.S. at 618-19; *Jenkins*, 447 U.S. at 239-40).

The ACCA correctly recognized that the Supreme Court distinguished *Anderson* from *Doyle*. *Reynolds I*, 114 So. 3d at 133. In *Anderson*, the Court clarified *Doyle*'s application.

> *Doyle* bars the use against a criminal defendant of silence maintained after receipt of governmental assurances. But *Doyle* does not apply to cross-examination that merely inquiries into prior inconsistent statements. Such questioning makes no unfair use of silence because a defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent. As to the subject matter of his statements, the defendant has not remained silent at all.

Anderson, 447 U.S. at 408 (citing *United States v. Agee*, 597 F.2d 350, 354-56 (3d Cir) (en banc), *cert. denied*, 442 U.S. 944 (1979); *United States v. Mireles*, 570 F.2d 1287, 1291-93 (5th Cir. 1978); *United States v. Goldman*, 563 F.2d 501, 503-04 (1st Cir. 1977), *cert. denied*, 434 U.S. 1067 (1978)).

After setting the channel markers erected by *Doyle*, the *Anderson* Court reviewed the Sixth Circuit's decision. While the court of appeals applied *Doyle* to "bar questions that concerned the . . . failure to tell the police the story . . . recounted at trial," the *Anderson* Court expressly rejected that rationale. *Id.* As the Supreme Court explained, the exchange, when "taken as a whole, does not refe[r] to the exercise of [the defendant's] right to remain silent; rather [it asks] . . . why, if [his trial testimony] were true he didn't tell the officer that he stole the decedent's car from the tire store parking lot instead of telling him that he took it from the street." *Id.* at 408-09. The Court reasoned that "any ambiguity in the prosecutor's . . . questioning was quickly resolved by explicit reference to . . . testimony, which the jury heard only a few hours before." *Id.* at 409. And, the Court concluded that the prosecutor's questions "were not designed to draw meaning from silence, but to elicit an explanation for a prior inconsistent statement." *Id.* While explaining that "[the] two inconsistent descriptions of events may be said to involve 'silence' insofar as [they] omit[] facts

included in the other version[,]" the Supreme Court noted that *Doyle* simply does not mandate "such formalistic understanding of 'silence,'" and, therefore, declined to extend *Doyle* to the prosecutor's cross-examination in *Anderson*. *Anderson*, 447 U.S. at 409.

Consistent with the reasoning in *Anderson*, here, the ACCA did not "neatly bifurcate" its evaluation of the cross-examination. Rather, the ACCA assessed the contested cross-examination and closing arguments "as a whole." *See Reynolds I*, 114 So. 3d at 126-33, 139; *see also id.* at 126 (explaining that the prosecutor's questions and comments "cannot be considered in the abstract but [rather] . . . in the context in which they occurred"), quoting *Brown v. State*, 11 So. 3d 866, 9090 (Ala. Crim. App. 2007) (internal quotation omitted).

The ACCA's evaluation, like that in *Anderson*, concluded that the prosecutor was attempting to impeach Reynolds through his prior inconsistent statements to police. *See generally Reynolds I*, 114 So. 3d at 126-33, 139. The ACCA reasonably determined that "[t]he questions were not designed to draw meaning from silence but to elicit an explanation for a prior inconsistent statement." *See Anderson*, 447 U.S. at 409. As a result, Reynolds has not shown that the ACCA unreasonably applied *Anderson*.

(3) *Jenkins v. Anderson*

Reynolds next argues that the ACCA's reliance on *Jenkins v. Anderson*, 447 U.S. 231 (1980), "to find that the prosecutor's comments on . . . Reynolds's post-*Miranda* silence did not violate federal law . . . was unreasonable." (Doc. # 1 at 54). Reynolds alleges that *Jenkins* is inapplicable because the Supreme Court "noted that impeachment with post-*Miranda* silence would be unconstitutional." (*Id.*) (citing *Jenkins*, 447 U.S. at 240). In support, Reynolds contends that, unlike the comments and questions at issue in this matter, *Jenkins* involved a prosecutor's comments on a defendant's pre-arrest silence when no *Miranda* warnings were provided. (*Id.*).

Relying on this distinction, Reynolds (somewhat circularly) contends that the Supreme Court's "emphasis on the difference between pre- and post-*Miranda* silence, [indicates the ACCA]'s reliance on *Jenkins* . . . was unreasonable[,]" presumably because (again) Reynolds maintains his purported silence violated *Doyle*. (*Id.*).

But Reynolds's argument misconstrues the ACCA's analysis of *Jenkins*. There, the defendant testified at trial that he had killed the victim but claimed it was in self-defense. *See Jenkins*, 447 U.S. at 233. On cross-examination, the prosecutor questioned why the defendant did not go to the police or tell others that he acted in self-defense. *Jenkins*, 447 U.S. at 233-34. The court held that the prosecutor's use of the defendant's pre-arrest silence was not unconstitutional generally (nor a violation of *Doyle* specifically). *Id.* at 238, 240.

In doing so, the court placed significant emphasis on the "petitioner['s] [failure] . . . to remain silent throughout the criminal proceedings[,]" and pointed to the defendant "voluntarily [taking] the witness stand." *Id.* at 235. The *Jenkins* Court explained that "[i]t has long been held that a defendant who takes the stand in his own behalf cannot then claim the privilege against cross-examination on matters *reasonably related to the subject matter of direct examination*." *Id.* at 236 n.3 (emphasis added). Further, the Supreme Court reasoned:

> Use of such impeachment on cross-examination allows prosecutors to test the credibility of witnesses by asking them to explain prior inconsistent statements and acts. … Once a defendant decides to testify, "[t]he interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination."

Id. at 238, quoting *Brown v. United States*, 356 U.S. 148, 156 (1958).

Reynolds fails to demonstrate how the ACCA's application of *Jenkins* was objectively unreasonable. The ACCA recognized that *Jenkins* applied to pre-arrest cases but found that its reasoning was nonetheless relevant to the facts of Reynolds's case. More specifically, neither the

defendant in *Jenkins* nor Reynolds remained silent throughout the criminal proceedings; "instead, [they] voluntarily took the witness stand in [their] own defense." *See Reynolds I*, 114 So. 3d at 135-36. Reynolds was impeached based upon the differences between his pre-trial statements and his trial testimony. Jenkins was impeached based upon the difference in his testimony he acted in self-defense and his pre-*Miranda* failure to report the need to defend himself. Reynolds has not satisfied his burden under 28 U.S.C. § 2254(d)(1).[22]

d. Alternatively, Reynolds Has Failed to Show that the ACCA Was Unreasonable in Concluding that Any *Doyle* Error Was Harmless

Reynolds has not pointed to any Supreme Court decision that establishes the ACCA unreasonably determined Reynolds's *Doyle* claim. To the contrary, a reasonable jurist could find that the purpose of the prosecutor's comments and line of questioning was to impeach Reynolds's prior testimony with the inconsistent statements that Reynolds provided to police. Accordingly, Reynolds's federal habeas relief on this claim is due to be denied.

In the alternative, were the court to assume a *Doyle* violation, Reynolds has not demonstrated that the ACCA was unreasonable in rejecting his claim because any assumed error was harmless. Reynolds contends that where "evidence of guilt is not overwhelming" a *Doyle* violation could not be harmless beyond reasonable doubt. (Doc. # 31 at 46) (citing *United States v. Jenkins*, 499 F. Supp. 2d at 1279-80).

[22] The additional cases that Reynolds cites do not satisfy his burden under AEDPA. For example, in *United States v. Canterbury*, 985 F.2d 483 (10th Cir. 1993), the Tenth Circuit held that the defendant's "partial silence [did] not preclude him from claiming a violation of his due process rights under *Doyle*." *Canterbury*, 985 F.2d at 486. However, the decision in *Canterbury* turned on "whether the cross-examination was designed to impeach the defendant's trial testimony calling attention to prior inconsistent statements, or instead, was designed to suggest an inference of guilt from the defendant's post-arrest silence." *Id.* at 486. The *Canterbury* court found that the cross-examination in question violated *Doyle* where the prosecution's questions were not "designed to point out inconsistencies between Canterbury's trial testimony and his statements at the time of arrest[,]" because "[his] post-arrest statements [were] not inconsistent with his entrapment defense." *Id.* at 486. But, in Reynolds's case, his statement to police directly contradicted his trial testimony. Also, and in any event, even if *Canterbury* were not distinguishable, it is not controlling here. *See Carey v. Musladin*, 549 U.S. 70, 74 (2006).

However, the Eleventh Circuit has repeatedly held that a prosecutor's reference to a defendant's post-*Miranda* silence is harmless when such error occurs during a trial in which the State's evidence is otherwise overwhelming. *See United States v. Miller*, 255 F.3d 1282, 1285-86 (11th Cir. 2001) (citing *United States v. Gabay*, 923 F.2d 1536 1541 (11th Cir. 1991). (*See also* Doc. # 21 at 42). As determined by the Supreme Court, owing to the deferential review at this state, the standard for establishing harmlessness for purposes of habeas review is even less exacting than that required on direct review. *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993). For the purposes of habeas relief, error is harmless unless it had a "substantial and injurious effect or influence in determining the jury's verdict." *Id.*

Reynolds's trial record confirms, as observed by the ACCA, that the State presented overwhelming evidence of Reynolds's guilt. The evidence includes: eyewitness testimony by West (Vol. 8 at 37-76); pieces from Reynolds's prescription eyeglasses (on which Melinda Martin's DNA was found) in the room where the bodies of Melinda and Savanah Martin were located, and the broken remains of the eyeglasses found during a consensual search of Reynolds's room at his father's home (*see* Vol. 9 at 32-34, 40-41); testimony identifying the murder weapons and placing them in Reynolds's hands (*see* Vol. 8 at 100-01, 115-16, 190); a DNA mixture of blood found on the handle of the gasoline can that forensic tests later confirmed was consistent with the blood of both Melinda Martin and Reynolds (*see* Vol. 10 at 175-76); and forensic testimony identifying Reynolds's bloody footprint at the scene of the murders (*see* Vol. 10 at 201-02). Coupled with the logical inconsistencies imbedded in Reynolds's testimony, this evidence was overwhelming and supports the conclusion that the ACCA's decision was not objectively unreasonable.

For the above stated reasons, Reynolds's *Doyle* claim is due to be denied.

2. Alleged Pervasive Prosecutorial Misconduct

Reynolds next claims that prosecutorial misconduct deprived him of his constitutional rights to due process, a fair trial, a reliable verdict, and equal protection in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (Docs. # 1 at 48, 58-67; 31 at 50). Reynolds's "other prosecutorial misconduct" claim includes seven allegations. Reynolds claims that the prosecution: (1) encouraged the jury to rely on improper evidence (Docs. # 1 at 59; 31 at 64-66); (2) improperly bolstered the State's case against him (Docs. # 1 at 59-60; 31 at 62-64); (3) inflamed the passions of the jury (Docs. # 1 at 60-61; 31 at 55-58); (4) misstated the law to the jurors (Docs. # 1 at 61-63; 31 at 51-55); (5) introduced improper victim impact evidence during the guilt phase (Docs. # 1 at 63-64; 31 at 58-62); (6) improperly elicited hearsay testimony from key witnesses (Docs. # 1 at 64-65; 31 at 66-69); and, (7) improperly presented evidence of sexual assault and rape. (Docs. # 1 at 65-66; 31 69-72).

Reynolds alleges that "these tactics, individually and cumulatively, 'so infected [his] trial with unfairness as to make the resulting conviction a denial of due process.'"[23] (Doc. # 1 at 58, quoting *Darden v. Wainwright*, 477 U.S. 168, 181 (1986)). Reynolds seeks relief under § 2254, arguing that "the [ACCA's] rejection of [his] prosecutorial misconduct claim was contrary to, and an unreasonable application of, clearly established Supreme Court precedent." (Doc. # 1 at 58-59).

To the extent Reynolds presented the following arguments to the state court, the ACCA rejected each claim after applying the appropriate standard of review. *Reynolds I*, 114 So. 3d at 140-46. The ACCA explained the standard of review as follows:

[23] The court addresses each of Reynolds's arguments individually and cumulatively to determine the viability of each claim (and all the claims in the aggregate). *See Morris v. Sec'y, Dep't of Corr.*, 677 F.3d 117, 1132 (11th Cir. 2012) (recognizing where individual claims of error or prejudice are without merit, a cumulative claim must fail because "we have nothing to accumulate").

> "In reviewing allegedly improper prosecutorial argument, we must first determine if the argument was, in fact, improper. If we determine that the argument was improper, the test for review is not whether the comments influenced the jury, but whether they might have influenced the jury in arriving at its verdict."
>
> > "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 (1986), quoting *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974). Comments made by the prosecutor must be evaluated in the context of the whole trial. … Prosecutorial misconduct is subject to a harmless error analysis."
> …
>
> > "While this failure to object does not preclude review in a capital case, *it does weigh against any claim of prejudice*. . . . This court has concluded that the failure to object to improper prosecutorial arguments . . . should be weighed as a part of our evaluation of the claim on the merits because of its suggestion that the defense did not consider the comments to be particularly harmful. *Johnson v. Wainwright*, 778 F.2d 623, 629 n.6 (11th Cir. 1985), *cert. denied*, 484 U.S. 872 (1987)."

Reynolds I, 114 So. 3d at 140-41, quoting *Vanpelt v. State*, 74 So. 3d 32, 81 (Ala. Crim. App. 2009) (internal citations omitted).

On federal habeas review, courts must ascertain "whether the prosecutor's comments '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*, 416 U.S. at 643. A prosecutor's comments do not rise to this level merely by being "offensive" or "improper"; indeed, "it is not enough that the prosecutors' remarks were undesirable or even universally condemned." *Id.* at 180-81 (internal quotations omitted). The standard of review is the "narrow one of due process, and not the broad exercise of supervisory power." *Donnelly*, 416 U.S. at 642. When applying this standard, a court must look at the context surrounding the prosecutor's remarks. *See Cargill v. Turpin*, 120 F.3d 1366, 1379 (11th Cir. 1997). The Supreme Court gave us this explanation:

> Inappropriate prosecutorial comments, standing alone, would not justify a reviewing court to reverse a criminal conviction obtained in an otherwise fair proceeding. . . . [T]he remarks must be examined within the context of the trial to determine whether the prosecutor's behavior amounted to prejudicial error. In other

> words, the Court must consider the probable effect the prosecutor's response would have on the jury's ability to judge the evidence fairly.

United States v. Young, 470 U.S. 1, 11-12 (1985). Moreover, when determining whether a statement is sufficiently egregious to deprive a defendant of due process, the court considers factors such as: "(1) whether the remarks were isolated, ambiguous, or unintentional; (2) whether there was a contemporaneous objection by defense counsel; (3) the trial court's instructions; and (4) the weight of aggravating and mitigating factors." *Land v. Allen*, 573 F.3d 1211, 1219-20 (11th Cir. 2009) (citing *Romine*, 253 F.3d at 1369–70). Notably, "isolated or ambiguous or unintentional remarks must be viewed with lenity." *Brooks v. Kemp*, 762 F.2d 1383, 1403 (11th Cir. 1985) (en banc), *vacated on other grounds by* 478 U.S. 1016 (1986), *reinstated by* 809 F.2d 700 (11th Cir. 1987) (en banc) ("A permissible argument, no matter how 'prejudicial' or 'persuasive,' can never be unconstitutional."); *see Spivey v. Head*, 207 F.3d 1263, 1276 (11th Cir. 2000) ("Proper arguments, regardless of their impact on the outcome of the case, do not render a trial unfair.")

For the reasons provided below, the court concludes that Reynolds's prosecutorial misconduct claims are without merit, individually and cumulatively. Accordingly, those claims are due to be denied.

a. Alleged Prosecutorial Misconduct: Encouraging Improper Evidence

Reynolds claims that the prosecution encouraged the jury to rely on improper evidence through Chad Martin's testimony. (Doc. # 1 at 59). Reynolds alleges that the error occurred because the prosecutor had knowledge that the trial court would not allow Martin's previous purported confession into evidence. (*Id*. at 59).

For the reasons explained below, the court concludes that (1) Reynolds failed to exhaust this particular prosecutorial misconduct claim (based on the prosecution's knowledge that Martin's

prior inconsistent statement would not be entered into evidence), (2) Reynolds abandoned the argument that the prosecution improperly bolstered Martin's credibility through prior consistent statements, and, in any event, (3) the ACCA's decision was not contrary to clearly established federal law or based on an unreasonable determination of the facts.

(1) Background

(a) Reynolds's Brief to the ACCA

On direct appeal, Reynolds's included three pertinent sections in his state court brief: (1) "The Trial Court Erred in Refusing to Allow Mr. Reynolds to Present Evidence That Chad Martin Confessed to the Crime," (2) "The State Improperly Bolstered the Credibility of Its Own Witnesses by Presenting Evidence of Prior Consistent Statements and Polygraph Tests," and (3) "The Prosecutor Encouraged the Jury to Rely on Improper Evidence in Considering Chad Martin's Testimony" (Vol. 19 at 38-63, 113-14). In the first section, Reynolds describes the purported facts surrounding Martin's confession to police and the legal arguments on how the trial court erred by not allowing the prior inconsistent statement. (Vol. 19 at 38-51). In the second section, Reynolds details the prosecution's alleged error in asking Martin questions that bolstered his testimony through prior consistent statements. And, in the third section, Reynolds claims it was improper for the prosecutor to have Martin identify his mother and testify to her because that testimony tended to bolster Martin's credibility and elicit a response from his mother. (Vol. 19 at 113-14). Reynolds did not make these arguments in the Rule 32 court; therefore, Reynolds's earlier brief on direct appeal to the ACCA contains the entirety of Reynolds's analysis on these claims in the state court.

(b) The ACCA's Decision

The ACCA addressed each issue as it was presented by Reynolds's in his state court brief. The ACCA explained at length why the trial court did not abuse its discretion when it declined to

admit Martin's purported confession and the accompanying police report for impeachment purposes. *Reynolds I,* 114 So.3d at 92-103. Additionally, the ACCA held that the trial court did not commit plain error when it denied admitting the same evidence for substantive purposes.[24] *Id*.

Regarding the claim that the prosecution improperly bolstered Martin's credibility with prior consistent statements, the ACCA concluded that the argument was without merit. *Id.* at 104. The ACCA explained that the prosecution "did not introduce into evidence *any* of the content of Chad Martin's oral or written statements—inculpatory or exculpatory." *Id.* (emphasis in original). The ACCA, citing *McElroy's Alabama Evidence,* also found no plain error existed in the prosecution's questions that elicited "the fact that [Martin] had been questioned at length by the police and subsequently excluded as [a] suspect[]" because it was "apparent from the record that the defense intended to elicit testimony that [Martin] was originally a suspect."[25] *Id.* at 105-06.

As to the last issue, the ACCA did not condone the prosecution's question asking Martin if he "[c]an [] sit right there in that witness stand and look [his mother] in the eye and tell her whether [he] had anything to do with killing [Charles Martin]?" *Id.* at 106-07. The ACCA suggested that the question was rhetorical and, at most, the question asked for a yes-or-no answer, rather than Martin's response "Momma, I didn't kill him." *Id.* Ultimately, the ACCA was not convinced that the prosecution attempted to encourage the jury to rely on matters not in evidence. And, in the context of the entire trial, it concluded Martin's response did not so infect the trial with

[24] Because Reynolds does not present this claim in his federal habeas petition, it is unnecessary for the court to detail the ACCA's rationale for rejecting it.

[25] The ACCA also detailed Reynolds's claim that the prosecution improperly bolstered the credibility of witness John Langley. But, as Langley's testimony is not addressed by Reynolds in his petition on this issue, the court need not address that issue and instead focuses on the portion of the ACCA's decision regarding Martin.

unfairness as to make the resulting conviction a denial of Reynolds's right to due process. Therefore, the ACCA found no plain error in the prosecutor's actions. *Id.* at 107.

(c) Reynolds's Federal Habeas Petition and Reply

In his petition to this court, Reynolds presented the argument that "the prosecutor encouraged the jury to rely on improper evidence in considering State witness Chad Martin's testimony." (Doc. # 1 at 59). Reynolds cited to the prosecution's questions directing Martin to identify his mother in the courtroom and being able to tell her that he did not commit the murders (as well as Martin's initial denial of the crimes and admitting to a drug problem). (*Id.*) In the same paragraph of his petition, Reynolds argued that it was improper for the prosecution to introduce this testimony in light of the prosecution's knowledge that the trial court would not admit evidence of Martin's prior confession. (*Id.*) Reynolds's reply brief provides more detail into the prosecution's alleged error and claims that the ACCA's decision was an unreasonable determination of the trial record as well as contrary to *Holmes v. South Carolina*, 547 U.S. 319, 324-31 (2006). (Doc. # 31 at 64-66). In short, Reynolds's argument in his petition is that the prosecution's line-of-questioning that directed Martin to deny committing the murders was improper because the prosecution knew about Martin's alleged confession and that it would not be admitted into evidence.

(d) Comparison of Reynolds's State Court Brief & Federal Habeas Petition

There are two key differences between Reynolds's state brief and his federal habeas petition. First, Reynolds's petition claims that it was improper for the prosecution to direct Martin to testify directly to his mother because the prosecution had knowledge that Martin's prior inconsistent statement was excluded from evidence. On the other hand, in his state brief, Reynolds made two distinct arguments (contained in two wholly separate sections): (1) regarding Martin's

alleged prior confession, Reynolds argued that it was improper for the *trial court* to exclude Martin's prior inconsistent statement; and (2) regarding Martin testifying directly to his mother, Reynolds claimed that the *prosecution* improperly bolstered Martin's credibility. Thus, Reynolds did not exhaust the claim that the prosecutor acted improperly based on the prosecution's knowledge that the trial court excluded Martin's prior inconsistent statement.

Second, in his federal habeas petition, although Reynolds asserted a general argument that "the prosecutor encouraged the jury to rely on improper evidence in considering State witness Chad Martin's testimony," Reynolds failed to cite any instance of the prosecution using Martin's prior consistent statements. As a result, Reynolds also abandoned this claim in his federal habeas petition.

(2) Prior Inconsistent Statement

(a) Reynolds Did Not Exhaust the Prosecutorial Misconduct Claim Based on the Prosecutor's Knowledge that Martin's Prior Inconsistent Statement Was Excluded From Trial

To satisfy the exhaustion requirement, a petitioner must first provide the state court "a meaningful opportunity to consider [the] allegations of legal error." *Vasquez v. Hillery*, 474 U.S. 254, 257 (1986). Although a federal court should afford a petitioner some "flexibility in determining whether [the petitioner has] met [the exhaustion] requirement," *Cummings v. Dugger*, 862 F.2d 1504, 1507 (11th Cir. 1989), "[i]t 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, 6 (1982) (citations omitted); *see also Picard v. Connor*, 404 U.S. 270, 278 (1971). Ultimately, a petitioner satisfies the exhaustion requirement when "the reasonable reader would understand [the] claim's particular legal basis and specific factual foundation to be

the same as it was presented in state court." *Kelley v. Sec. for Dept. of Corrections*, 377 F.3d 1317, 1344-45 (11th Cir. 2004).

The substance of Reynolds's claim presented to the ACCA is significantly different from his federal habeas claim. In his state court brief, Reynolds argued that the *trial court* erred by not admitting evidence of Martin's purported confession. However, Reynolds did not assert in the state courts a claim of *prosecutorial misconduct* based on the prosecutor's knowledge that Martin's purported confession would not be allowed into evidence. As a result, Reynolds did not afford the ACCA any opportunity to (1) analyze the factual basis of the prosecutor's knowledge at the time of questioning Martin or (2) decide the legal issue of prosecutorial misconduct based on such knowledge. The reasonable reader would not understand a claim accusing the trial court of error as being the same as accusing the prosecutor of misconduct. Therefore, Reynolds did not exhaust his claim that the prosecutor encouraged the jury to rely on improper evidence based on the prosecutor's knowledge that Martin's purported confession would not be admitted into evidence.[26]

Reynolds has not offered any evidence (nor any arguments) to overcome this procedural default by way of cause and prejudice or fundamental miscarriage of justice. *See Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *Frady*, 456 U.S. at 170 (finding that a habeas petitioner must show "not merely that the errors . . . created a possibility of prejudice, but that … [it] infect[ed] his entire trial with [constitutional] error"); *see also Edwards v. Carpenter*, 529 U.S. 446, 451 (2000). Accordingly, this claim is outside the scope of federal habeas review and, therefore, denied.

[26] The court notes that the record appears to lack proof of the prosecutor's knowledge that Martin's purported confession would not be admitted into evidence at the time that the prosecutor questioned Martin. As explained by the ACCA, at the beginning of the trial, the circuit court ruled "until [Martin] testified at trial, neither party could refer to Martin's previous oral or written statements." *Reynolds I*, 114 So. 3d at 93. But the trial court did not definitely exclude Martin's prior statements until after the prosecution's direct examination of Martin. *Id.* at 95-97.

(b) Alternatively, Even Assuming the Claim is Not Exhausted and Even Assuming the Prosecutor Acted Improperly, Any Presumed Error Was Harmless

"A prosecutor's improper comments will be held to violate the Constitution 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. But here, Reynolds's trial record confirms that the State presented overwhelming evidence of Reynolds's guilt. The evidence included: eyewitness testimony by West (Vol. 8 at 37-76); pieces from Reynolds's prescription eyeglasses, on which Melinda Martin's DNA was found, in the room where the bodies of Melinda and Savanah Martin were located, and the broken remains of the eyeglasses found during a consensual search of Reynolds's room at his father's home (*See* Vol. 9 at 32-34, 40-41); testimony identifying the murder weapons and placing them in Reynolds's hands (*see* Vol. 8 at 100-01, 115-16, 190); a DNA mixture of blood found on the handle of the gasoline can that forensic tests later confirmed was consistent with the blood of both Melinda Martin and Reynolds (*see* Vol. 10 at 175-76); and, forensic testimony identifying Reynolds's bloody footprint at the scene of the murders (*see* Vol. 10 at 201-02). As a result, any presumed prosecutorial misconduct resulting from the prosecutor's knowledge of Martin's purported confession being excluded from trial was harmless. Accordingly, this claim is due to be denied.

(3) Prior Consistent Statement

It is well-established that "[a] party abandons all issues on appeal that he or she does not 'plainly and prominently' raise in his or her initial brief." *United States v. Krasnow*, 484 F. App'x 427, 429 (11th Cir. 2012), quoting *United States v. Jernigan*, 341 F.3d 1273, 1283 n.8 (11th Cir. 2003). Under this claim in his petition, Reynolds fails to assert (much less cite to any portion of the record to support such an assertion) that the prosecution bolstered Martin's credibility with

prior consistent statements. As a result, Reynolds abandoned this claim from his state court brief, and is not due relief under this theory.

(4) The ACCA's Decision Regarding the Prosecution's Line of Questioning That Directed Martin to Identify His Mother Was Not Based on an Unreasonable Determination of the Facts Nor Was It Contrary to Clearly Established Federal Law

In his federal habeas reply, and for the first time, Reynolds cites *Holmes v. South Carolina* in support of his prosecutorial misconduct claim. Even if this argument were properly before the court (and it is not), it is not persuasive. In *Holmes*, the Supreme Court held that a state court's interpretation of an evidentiary rule violated a criminal defendant's right to a meaningful defense. *Holmes*, 547 U.S. at 319, 331. But this holding has no application to a prosecutorial misconduct claim. Instead, *Holmes* points to an error of the state court. As this is the only case that Reynolds has cited to support this claim, he has failed to meet his burden that the ACCA's decision is contrary to clearly established federal law.

Reynolds also has failed to prove that the ACCA's decision was based on an unreasonable determination of the facts. As noted by the ACCA, the prosecutor's line-of-questioning is not one to be condoned. However, in the context of the entire trial, the prosecutor's question did not "'so infect[] the trial with unfairness as to make the resulting conviction a denial of due process." This court agrees with the ACCA's determination.

(5) Conclusion

Reynolds failed to exhaust his claim that the prosecutor acted with impropriety based on the prosecution's supposed knowledge that the trial court would exclude Martin's alleged prior inconsistent statements. Reynolds abandoned his state court claim that the prosecutor improperly used prior consistent statements to bolster Martin's credibility. And, Reynolds failed to meet his

burden of proof under § 2254(d) to prove that the ACCA's decision was either based on an unreasonable determination of the facts or contrary to clearly established federal law. Accordingly, this claim is due to be denied.

b. Alleged Prosecutorial Misconduct: Bolstering Evidence

Reynolds next argues that the prosecutor in his case impermissibly bolstered the State's evidence (1) by vouching for West's testimony and (2) by vouching for the propriety of a capital verdict. (*See* Docs. # 1 at 58-60; 31 at 62-64). For the reasons provided below, the court disagrees.

(1) Alleged Vouching for West

Reynolds argued that during the prosecution's opening statement, the prosecutor improperly vouched for the character of its key witness, West. (*See* Doc. # 1 at 58-59 (citing Vol. 7 at 188-90). Reynolds contends that this "bolstering was impermissible and incredibly prejudicial" and directs the court's attention to *United States v. Eyster*, 948 F.2d 1196 (11th Cir. 1991). (*See* Doc. # 1 at 59).

(a) ACCA's Decision

Reynolds presented this same claim to the ACCA on direct appeal. *Reynolds I*, 114 So. 3d at 143. The ACCA rejected it.

> In a[n] allegation of improper vouching, Reynolds refers this Court to three pages of the prosecutor's opening argument. We have reviewed the alleged improper comments in the context of the opening argument, and we find no plain error. Contrary to Reynolds's interpretation, the prosecutor was not improperly vouching for the credibility of State's witness, Adrian West. Instead, the prosecutor was simply outlining what he expected the evidence to prove.

Id. (internal citations omitted).

(b) Section 2254(d)(2)

In support of his claim that the prosecutor improperly bolstered West's testimony, Reynolds offers only a few factual recitations alongside multiple conclusory and/or speculative

statements. Reynolds contends that the following segment of the prosecutor's opening statement evinces the prosecutor's intent to create a battle of credibility between Reynolds and West:

> Marcie West is a young lady who had been involved with Michael for a while. She had come a ways [(sic)] in her life, gone through some changes, had been working for a lawyer, getting addicted to drugs, being involved with Reynolds. A former relationship was abusive. She got involved with Reynolds. She tried to make a life with him. But her addiction carried her to 706 Tidmore Bend in a car with Michael Reynolds the night of – or the early morning hours of May 25th.

(Doc. # 31 at 63) (citing Vol. 7 at 188-89). Reynolds claims that the prosecutor's opening statement improperly bolstered West's credibility by distancing West "as far as possible" from her involvement in the Martins' deaths. (*Id.*). Reynolds pointed to another segment of the prosecutor's opening statement in support of his argument:

> Now, she will tell you they were a little different. She liked Friends, watching the Friends TV show. His favorite move was Gladiator. He watched it over and over. There is nothing wrong with the movie. That was his favorite one. He watched it over and over.
>
> . . .
>
> And we are not going to say that Marcie didn't make any mistakes that night. She did. She took the telephone when he told her to take it. He sent her out of that house with that knife. And I think she will always question and always blame herself – she will blame herself for the fact that that child was alive when she left that house. She feels like there was some kind of way maybe she could have – but when he told her to take that telephone she thought that was so the child could not call 911, so Savannah could not call 911.

(Doc. # 31 at 63-64) (citing Vol. 7 at 188-90). As explained below, the court concludes that Reynolds's improper bolstering argument is unpersuasive.

Under § 2254, the burden of proof is on the petitioner "to establish his right to habeas relief,'" and to do so "he must prove all facts necessary to show a constitutional violation." *Blankenship v. Hall*, 542 F.3d 1253, 1270 (11th Cir. 2008). To carry this burden, "a petitioner must state specific, particularized facts which entitle him or her to habeas corpus relief for each ground

specified. These facts must consist of sufficient detail to enable the court to determine, *from the face of the petition alone*, whether the petition merits further habeas corpus review." *Adams v. Armontrout*, 897 F.2d 332, 333-34 (8th Cir. 1990) (emphasis added) (providing "general reference to the transcripts, case records, and briefs on appeal patently fails to comply with Rule 2(c)"). Merely providing a few citations to the record, strung together with conclusory allegations and ambiguous references to case law, whether pleaded in prior briefs on appeal or not, is insufficient to overcome the heightened pleading requirement of Rule 2(c). *See* Rule 2(c) of the *Rules Governing Section 2254 Cases in the U.S. District Courts; see also* Advisory Committee Note to Rule 4 of the *Rules Governing 2254 Cases in the U.S. District Courts*.

In his petition, Reynolds makes no attempt to develop this argument beyond a citation to *Eyster*, which is followed by a short parenthetical. (Doc. # 1 at 59). In his reply, Reynolds claims that "[t]he State essentially vouched for the character and credibility of West over that of Reynolds" followed by another blanket assertion that "[t]he bolstering of witnesses is impermissible, *see Eyster*, 948 F.2d at 1206-07, and was highly prejudicial against Reynolds in a case where the State admittedly juxtaposed the credibility of West against that of Reynolds." (Doc. # 31 at 64). Simply put, Reynolds failed to meet his heightened pleading requirement, much less his burden of proof.

Alternatively (and even assuming Reynolds met the heightened pleading standard, which he did not), the claim would still fail because Reynolds did not meet his burden under § 2254(d)(2). The ACCA's decision was not based on an unreasonable determination of the facts. The ACCA determined that the comments in the prosecutor's opening statement were based on what the prosecution expected the evidence to show and, therefore, did not constitute improper argument.

"[T]he need to examine the entire context of the judicial proceeding" is of "primary importance." *Brooks v. Kemp*, 762 F.2d 1383, 1403 (11th Cir. 1985) (*en banc*), vacated on other grounds by 478 U.S. 1016 (1986), reinstated by 809 F.2d 700 (11th Cir. 1987) (*en banc*). "[I]t is not [the court's] duty to ask whether a particular remark was unfair; we are concerned with whether it rendered the entire trial unfair. In this regard, isolated or ambiguous or unintentional remarks must be viewed with lenity." *Id.* Moreover, "[a] permissible argument, no matter how 'prejudicial' or 'persuasive,' can never be unconstitutional." *Id.*; *see also Romine*, 253 F.3d at 1366; *Spivey v. Head*, 207 F.3d 1263, 1276 (11th Cir. 2000).

There was nothing in the prosecution's opening statement that vouched for West's character or credibility. The only comparative statement he made about West and Reynolds related to their movie preferences. In fact, the prosecution addressed West's addiction and involvement in the crime. These statements were not "unfair" in any way to Reynolds. *See Brooks*, 762 F.2d at 1403. In other words, the state court record establishes that the comments did not "so infect the trial with an unfairness" as to deprive Reynolds of constitutional due process. When considered in light of the weight of the evidence, the arguments made by defense counsel, and the trial court's instructions to the jury, it is not in any way likely that the prosecutor's comments influenced the jury. *See Darden*, 477 U.S. at 182 (citing *United States v. Young*, 470 U.S. 1 (1985)). Therefore, Reynolds is not due relief under § 2254(d)(2).

(c) Section 2254(d)(1)

To the extent that Reynolds presents an argument under § 2254(d)(1) on this claim, it is unpersuasive. To begin, the only case that Reynolds cites in support of this claim is *United States v. Eyster*, 948 F.2d 1196 (11th Cir. 1991), which though decided by a panel in our circuit is not

controlling for the purposes of presenting "clearly established federal law, as determined by the Supreme Court of the United States." *See* 28 U.S.C. § 2254(d)(1).

However, even if *Eyster* were controlling, that decision is readily distinguishable from the circumstances of Reynolds's trial. In *Eyster*, the prosecutor (trying to rehabilitate a witness) fabricated a theory that suggested the witness's testimonial inconsistencies were easily explained due to a typographical error. *Eyster*, 948 F.2d at 1205-06. But the prosecutor's explanation was wholly unsupported by the record. *Id.* The court held that there was "a reasonable probability that but for the prosecutor's improper comments, the outcome of the proceeding would have been different." *Id.* at 1208. The court noted the lack of physical evidence tying the defendant to the crime, that the defendant was acquitted on every count except for the one that the contested witness testified at length about, and that "the government's reference to a typographical error was ultimately an outright falsehood designed to mitigate [the witness's] willful perjury, which the appellee conceded at oral argument." *Id.* This level of prosecutorial indiscretion (when combined with underwhelming evidence of guilt) distinguishes the *Eyster* trial from Reynolds's trial. But that is not the case here. As cataloged above, there was staggering evidence of Reynolds's guilt.

As a result, Reynolds failed to prove that the ACCA's decision was contrary to clearly established federal law, as determined by the Supreme Court. Relying on conclusory assertions and an undeveloped argument, Reynolds fails to show how the prosecutor's opening statement was "highly prejudicial" or "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *See Darden*, 477 U.S. at 181.

(d) The Trial Court's Jury Instruction Further Demonstrates that the Prosecution's Comments Did Not Cause Constitutional Error

Even assuming that the prosecutor made an improper statement (and, to be clear, he did not), the trial court clearly instructed the jurors that arguments made by the attorneys were not to be considered evidence and that the jury's decision was to be based on the evidence properly presented at trial. (*See* Vol. 12 at 85-86); *Johnson*, 256 F.3d at 1185 ("[I]mproper statements during argument can be cured by clear and accurate jury instructions."). Specifically, the trial court charged the jury that:

> statements of lawyers – the lawyers are permitted to argue the case. They are permit[ted] to draw reasonable inferences about the facts of the case. However, you are not governed by what the lawyers say. It is your responsibility to remember the evidence *as it came from the witness stand and base your verdict solely on the evidence.* Likewise, I've permitted the lawyers in large measure to say whatever they thought appropriate about the law. But if what the lawyers have said about the law differ in any respect to what I'm telling you about the law or what I have told you about the law, then you are to be governed by what I tell you about the law and not what the lawyers say.

(*Id.*) (emphasis added).

After a thorough evaluation of the record before the ACCA, this court easily concludes that the record establishes that the comments did not "so infect the trial with an unfairness" as to deprive Reynolds of constitutional due process. Furthermore, when considered with the weight of the evidence, the arguments made by defense counsel, Reynolds's testimony, and the trial court's instructions to the jury, it is not likely that the prosecutor's comments improperly influenced the jury's decision.

(e) Conclusion

The ACCA's decision regarding Reynolds's claim that the prosecutor bolstered the State's evidence was not contrary to, or an unreasonable application of, clearly established federal law.

See 28 U.S.C. § 2254(d)(1). And the ACCA's decision was not the result of an unreasonable determination of facts in light of the record before the state court. *See* 28 U.S.C. § 2254(d)(2). Thus, Reynolds's claim is due to be denied.

(2) Vouching for Capital Verdict

Reynolds also contends that the prosecution vouched for the propriety of a capital verdict. In support of this claim, Reynolds cites three of the prosecutor's statements:

- "[W]e feel very strongly, and we feel that you all – we also conclude beyond a reasonable doubt that based on clear, undisputed – reasonably undisputed evidence in this case – this is clearly a case of capital murder and nothing else." (Vol. 12 at 17).

- "[B]ecause anybody with any kind of sense would know that you're not going to buy that cock and bull story the guy got on the witness stand and tried to sell to you." (Vol. 12 at 17-18).

- "The only appropriate verdict is guilty of capital murder. Not anything less. If you are not going to convict him of capital murder, just let him go." (Vol. 12 at 32).

(Doc. # 1 at 60). The court analyzes this claim below.

(a) The ACCA's Decision

The ACCA rejected each of Reynolds's claims on plain-error review. *See Reynolds I*, 114 So. 3d at 141-43. Regarding the first statement, the ACCA reasoned:

> "'[I]t is not improper for [the prosecuting attorney] to argue or to express his opinion that [the] accused is guilty, where he states, or it is apparent, that such opinion is based solely on the evidence.' 23A C.J.S. Criminal Law § 1104, pp. 194-95 (1961). *Galloway v. State*, 484 So. 2d 1199, 1201 (Ala. Crim. App. 1986). 'In *Galloway*, a number of cases are cited in which the prosecuting attorney made comments stating his opinion that the appellant was guilty.'"

Reynolds I, 114 So. 3d at 141-42, quoting *Broadnax v. State*, 825 So. 2d 134, 183 (Ala. Crim. App. 2000).

Regarding the second comment, the ACCA analyzed the prosecutor's statement in context and explained "the prosecutor was merely replying to defense counsel's closing argument that the evidence established only that Reynolds was at the scene of the crimes to help cover up his girlfriend's presence at the scene of the triple-murder/robbery." *Id.* at 142. The ACCA determined that the prosecution was entitled to spotlight the defense's strategy and point to flaws in it; thus, the remarks at issue did not vouch for a capital verdict but "were part of the prosecutor's legitimate argument that the evidence did not support the defense's theory." *Id.*, quoting *Reeves v. State*, 807 So. 2d 18, 45-46 (Ala. Crim. App. 2000), *cert. denied*, 534 U.S. 1026 (2001) (internal quotations omitted).

And, regarding the third comment, the ACCA explained that "[t]he prosecutor's exhortation to the jury was based upon the evidence presented during the trial." *Id.* at 143. The ACCA recognized the principle that a prosecutor generally errs when "exhorting the jury to 'do what's right,' or to 'do its job,'" because that implies that, in doing so, a jury can only reach one verdict, "regardless of its duty to weigh the evidence and follow the court's instructions on the law." *Id.* at 142, quoting *McNair v. State*, 653 So. 2d 320, 339-40 (Ala. Crim. App. 1992), *aff'd*, 653 So. 2d 353 (Ala. 1994). However, as the ACCA emphasized, "it is not improper for a prosecutor to argue to the jury that a defendant is guilty or to urge the jury to find the defendant guilty of the crime charged so long as that argument is based on the evidence; in fact that is exactly what a prosecutor is supposed to do during closing argument." *Id.*, quoting *Morris v. State*, 60 So. 3d 326, 368 (Ala. Crim. App. 2010) (internal citations omitted).

(b) Analysis

This court's "inquiry is limited to whether the state court unreasonably applied a holding of the Supreme Court, and the Supreme Court has never held that a prosecutor's closing arguments

were so unfair as to violate the right of a defendant to due process." *Reese, v. Sec'y, Fla. Dep't of Corr*., 675 F.3d 1277, 1287 (11th Cir. 2012) (internal citations omitted). "A prosecutor's improper comments will be held to violate the Constitution only if they so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Parker v. Matthews*, 567 U.S. 37, 45 (2012), quoting *Darden*, 477 U.S. at 181. Additionally, "[p]roper arguments, regardless of their impact on the outcome of a case, do not render a trial unfair." *Spivey*, 207 F.3d at 1276. *See e.g.*, *Darden v. Wainwright*, 477 U.S. 168, 182-83 (1986) (reasoning that a prosecutor's closing argument did not render the defendant's trial fundamentally even though prosecutor said that the death sentence would be the only way to prevent a future similar act, the defendant was as an "animal," and the defendant should suffer a violent, graphic and grotesque death).

When the entire trial is put in context, Reynolds cannot show that the prosecutor's argument was improper nor that the prosecutor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." After reviewing the trial testimony and the ACCA's decision, the court concludes that the evidence supports both the prosecution's arguments and the ACCA's decision. In other words, Reynolds failed to demonstrate that the state court's decision was contrary to, or an unreasonable application of, clearly established federal law. In fact, Reynolds does not cite a single Supreme Court case in support of this issue in his petition. (*See* Doc. # 1 at 60). And, Reynolds failed to demonstrate that the ACCA's decision was based on an unreasonable determination of the facts considering the evidence presented in the state court proceeding. Accordingly, his claim is due to be denied.

c. Alleged Prosecutorial Misconduct: Inflaming Passions of Jury

Reynolds argues that "the prosecutor attempted to inflame the passions of the jury." (Doc. # 1 at 60-61) (citing Vol. 7 at 177-80, 185; Vol. 11 at 166-67). Reynolds challenges six statements

made by the prosecution. During the prosecution's opening statement, Reynolds contends that the prosecutor "told the jury it would witness 'the results of a massacre,' 'one of the most grisly crime scenes that has ever been witnessed in this county,' and a 'butcher[ing]' by . . . Reynolds, who the prosecutor referred to as the 'evil' that came knocking." (Doc. # 1 at 60) (citing Vol. 7 at 177-78, 80, 185). With respect to the prosecution's closing arguments, Reynolds contends the "prosecutor then pleaded with the jury to end 'his reign of terror' over the community by declaring Mr. Reynolds guilty," while asking that the jurors also to "'tell this community that his murders, his terror, this sadness . . . can stop today.'" (*Id.* at 60-61, quoting Vol. 11 at 166-67). Reynolds claims that "the [ACCA's] decision denying Reynolds relief notwithstanding the State's efforts to inflame the passions of the jury was contrary to Supreme Court precedent" set forth in three decisions. *Viereck v. United States*, 318 U.S. 236 (1943), *Bruton v. United States*, 391 U.S. 123 (1968), and *Berger*. (Doc. # 31 at 58).

(1) The ACCA's Decision

Reynolds raised this claim on direct appeal to the ACCA. The ACCA rejected the claim under plain error review because Reynolds failed to object to the allegedly "inflammatory" comments made by the prosecution during the State's opening and closing statements at trial. *See Reynolds I*, 114 So. 3d at 143. In addressing this claim, the ACCA relied on the rationale in *Floyd*:

> "We have carefully reviewed the prosecutor's entire closing argument during the penalty phase of Floyd's trial, paying particular attention to the context of the prosecutor's remarks quoted in Floyd's brief. Based on that review, it is clear that the prosecutor's remarks at the penalty phase of Floyd's trial were made in the heat of debate, were proper comments on facts in evidence, were in reply to various remarks made during defense counsel's closing argument, and were not improperly designed to inflame the passions of the jury. Therefore, no basis for reversal exists."

Reynolds I, 114 So. 3d at 143, quoting *Floyd v. State*, 190 So. 3d 940 (Ala. Crim. App. 2007), *rev'd on other grounds* 190 So. 3d 972 (Ala. 2012).

(2) Reynolds's Argument that the ACCA Failed to Address the Prosecution's Opening Statements is Without Merit and Does Not Provide Reynolds With an Independent Cause for Habeas Relief

Reynolds argues that the ACCA failed to address the prosecution's opening statements because the ACCA's rationale included the justification that the prosecutor's comments were made "in reply to remarks made during the counsel's closing argument." (Doc. # 1 at 61). But Reynolds reads this quote completely out of context. The contested phrase was only a portion of a larger block quote from a case that the ACCA used in its analysis. *See Reynolds I*, 114 So. 3d at 143. In fact, the ACCA noted that "Reynolds cites several portions of the prosecutor's *opening* and closing arguments." *Id.* (emphasis added).

Furthermore, a state court need not provide every explanation and rationale in support of its findings, or even address every claim. *See Harrington*, 562 U.S. at 98 (determining "[w]here a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief"); *Johnson*, 568 U.S. at 298 (providing that a state court's decision is an adjudication "on the merits" and entitled to AEDPA deference when it "addresses some but not all of a defendant's claims"); *see also Lee v. Comm'r, Ala. Dep't of Corr.*, 726 F.3d 1172, 1213 (11th Cir. 2013) (observing that Eleventh Circuit precedent "required that [the court] afford AEDPA deference even where the state court's decision is a summary adjudication or engages in only some evaluation because 'implicit findings' may be inferred from dispositive rulings" and collecting cases). In other words, Reynolds has the burden to prove that the ACCA's decision was contrary to, or an unreasonable application of, federal law: it is simply not enough for Reynolds to claim that the ACCA did not address an issue.

(3) Section 2254(d)(1)

Reynolds argues that "the [ACCA's] decision denying [him] relief notwithstanding the State's efforts to inflame the passions of the jury, was contrary to Supreme Court precedent set forth in *Viereck*, *Bruton*, and *Berger*, and was an unreasonable application of that law." (Doc. # 31 at 58). For the reasons provided below, the court concludes that the ACCA's decision was not contrary to, or an unreasonable application of, *Viereck*, *Bruton*, and *Berger*.[27]

(a) *Viereck v. United States*

Reynolds's reliance on *Viereck v. United States*, 318 U.S. 236 (1943) is misplaced because the portion of *Viereck* that he cites is not "controlling" for purposes of habeas review under § 2254(d)(1). Indeed, the language Reynolds cites in *Viereck* is dicta. (*See* Doc. # 31 at 56-57). To be sure, under § 2254(d)(1), "clearly established federal law" only applies to "holdings … of [Supreme] Court[] decisions." *Williams*, 529 U.S. at 412; *see also Carey v. Musladin*, 549 U.S. 70, 74 (2006).

In *Viereck*, the Court criticized a prosecutor's closing argument, but only speculated as to whether the closing argument constituted error. In fact, the Court expressly stated that its holding was not based on the prosecutor's comments. *See Viereck*, 318 U.S. at 237 ("The question decisive of petitioner's challenge to the validity of his conviction is whether the statute or any authorized regulation of the Secretary required the statement which *petitioner* omitted to make.") (emphasis added). Simply put, that language was dicta, which does not satisfy the "clearly established federal law" requirement under § 2254(d)(1). As a result, the court concludes that *Viereck* does not support Reynolds's argument under 28 U.S.C. § 2254(d)(1).

[27] Reynolds has actually failed to provide any Supreme Court authority regarding inflammatory comments delivered during opening statements that amount to prosecutorial misconduct. Thus, with respect to Reynolds's claims involving the prosecution's opening statement, Reynolds has not shown that the ACCA's decision was objectively unreasonable.

Alternatively, even if the referenced portion of *Viereck* amounts to clearly established federal law for the purposes of federal habeas relief (and, it does not) the closing argument in *Viereck* is materially distinguishable from the prosecutor's statements at Reynolds's trial. Reynolds attempts to equate the prosecutor's comments that Reynolds's case involved "'one of the most grisly crime scenes that has ever been witnessed in the county' and [the prosecutor's pleas] to the emotions of the jury to end Reynolds's 'reign of terror' over the community" with the *Viereck* prosecutor's emotionally manipulative closing. (Doc. # 31 at 57). However, this comparison is not at all warranted after considering the context of *Viereck*.

In *Viereck*, the petitioner was charged, during World War II, for three counts of failing to register as a 'political agent' of a foreign principal—Germany. *Viereck*, 318 U.S. at 238-41. Although the defendant's conviction was later overturned by the Supreme Court due to a statutory deficiency, the Court warned the federal prosecutor as to his future choice of words in closing arguments. *Id.* at 247-48. The court cautioned, "[a]t a time when passion and prejudice are heightened by emotions stirred by our participation in a great war, we do not doubt that these remarks addressed to the jury were highly prejudicial" in response to the following argument:

> "In closing, let me remind you, ladies and gentlemen, that this is war. This is war, harsh, cruel, murderous war. There are those who, right at this very moment, are plotting your death and my death; plotting our death and the death of our families because we have committed no other crime than that we do not agree with their ideas of persecution and concentration camps.
>
> "This is war. It is a fight to the death. The American people are relying upon you ladies and gentlemen for their protection against this sort of crime, just as much as they are relying upon the protection of the Men who man the guns in Bataan Peninsula, and everywhere else. They are relying upon you ladies and gentlemen for their protection. We are at war. You have a duty to perform here.
>
> "As a representative of your Government I am calling upon every one of you to do your duty."

Viereck, 318 U.S. at 247 & n.3.

The material facts of *Viereck* are distinguishable from the prosecutor's argument at Reynolds's trial. (*See* Doc. # 31 at 57). The prosecutor in Reynolds's trial did not say anything like "as a representative of your Government I am calling upon every one of you to do your duty." And the prosecutor in Reynolds's trial did not compare the jurors' role to soldiers actively fighting common enemy overseas. So, in addition to the point that *Viereck* is not a case that pronounced a holding about prosecutorial statements, the magnitude of disparity between the prosecutor's conduct in *Viereck* and the prosecutor's remarks at Reynolds's trial supports the conclusion that the ACCA's decision was not contrary to any warning in *Viereck*, in any event.

(b) *Bruton v. United States*

Reynolds relies on *Bruton* for the sole proposition that curative instructions cannot correct prejudicial effects at trial in every case. (*See* Doc. # 31 at 58) (citing *Bruton*, 391 U.S. at 129). That is no doubt true. But, the ACCA did not predicate its ruling on this claim on any curative instruction by the trial court. *See Reynolds I*, 114 So. 3d at 143. Additionally, as explained in more detail below, the fact that a curative instruction was not enough to cure the error in *Bruton* -- which involved the trial court allowing an inculpatory statement to be made by a codefendant in a joint trial -- does not equate to a reminder by the trial court to base any verdict on the evidence at Reynolds's trial. As a result, the ACCA's decision was not contrary to, or an unreasonable application of, *Bruton*.

(c) *Berger v. United States*

Reynolds also contends that the ACCA's decision was contrary to, and an unreasonable application of, *Berger*. (*See* Doc. # 31 at 55-58) (citing *Berger*, 295 U.S. at 88-89). *Reynolds I*, 114 So. 3d at 143. However, the prosecutorial conduct at issue in *Berger* is readily distinguishable

from the commentary that Reynolds argues improperly inflamed the passions of the jury at his trial. (*See id.*) (citing Vol. 7 at 177-78, 80; Vol. 11 at 166-67; Vol. 12 at 28).

In *Berger*, the Supreme Court reversed the defendant's conspiracy conviction because the record "clearly show[ed]" that the prosecuting attorney:

> was guilty of misstating the facts in his cross-examination of witnesses; of putting into the mouths of such witnesses things which they had not said; of suggesting by his questions that statements had been made to him personally out of court, in respect of which no proof was offered; of pretending to understand that a witness had said something which he had not said and persistently cross-examining the witness upon that basis; of assuming prejudicial facts not in evidence; of bullying and arguing with witnesses; and, in general, of conducting himself in a thoroughly indecorous and improper manner. *Berger*, 295 U.S. at 84.[28] The court continued by classifying the prosecutor's argument to the jury as "undignified and intemperate, containing improper insinuations and assertions calculated to mislead the jury."[29]

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[28] One example provided by the *Berger* court is the following exchange, which took place during the defendant's cross-examination:

> Q. Now Mr. Berger, do you remember yesterday when the court recessed for a few minutes and you saw me out in the hall; do you remember that? A. I do, Mr. Singer.
> Q. You talked to me out in the hall? A. I talked to you?
> Q. Yes. A. No.
> Q. You say you didn't say to me out in the hall yesterday, 'You wait until I take the stand and I will take care of you'? You didn't say that yesterday? A. No; I didn't, Mr. Singer; you are lying.
> Q. I am lying, you are right. You didn't say that at all? A. No.
> Q. You didn't speak to me out in the hall? A. I never did speak to you outside since this case started except the day I was in your office when you questioned me. "Q. I said yesterday. A. No, Mr. Singer.
> Q. Do you mean that seriously? A. I said no.
> Q. That never happened? A. No, Mr. Singer, it did not.
> Q. You did not say that to me? A. I did not.
> Q. Of course, I have just made that up? A. What do you want me to answer you?
> Q. I want you to tell me I am lying, is that so? . . .
>
> (No effort was later made to prove that any such statement had ever been made).

Berger, 295 U.S. at 84 n.*.

[29] Another example that the *Berger* court provided was an exchange where the prosecutor accused the witness of lying on the stand when she testified that she could not identify the defendant:

> Mrs. Goldie Goldstein takes the stand. She says she knows Jones, and you can bet your bottom dollar she knew Berger. She stood right where I am now and looked at him and was afraid to go over there, and when I waved my arm everybody started to holler, 'Don't point at him.' . . . I was examining a woman that I knew knew Berger and could identify him, she was standing right here looking at him, and I couldn't say, 'Isn't that the man?' Now, imagine that!

Berger, 295 U.S. at 86-87.

Id. at 85 (footnote added). The Court held that under "these circumstances prejudice to the cause of the accused is so highly probable that we are not justified in assuming its nonexistence." *Id.* at 89. The Court reached this conclusion because the prosecution's misconduct was not "slight or confined to a single instance, but … pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential." *Id.* at 89.

The prosecutor's conduct in Reynolds's trial is not even distantly comparable to the impropriety found in *Berger*. For example, the prosecutor at Reynolds's trial did not tell the jury to rely on the prosecutor's personal knowledge rather than the admitted evidence. Nor did the prosecutor at Reynolds's trial fabricate a conversation between himself and the defendant while cross-examining Reynolds. In the end, Reynolds has utterly failed to demonstrate that the prosecutor in his case "conduct[ed] himself in a thoroughly indecorous and improper manner." Therefore, the ACCA's decision is not contrary to, or an unreasonable application of, *Berger*.

(4) Conclusion

Other than making wholly conclusory allegations of prejudice, Reynolds has not offered any developed argument that the ACCA's decision was contrary to, or an unreasonable application of, clearly established federal law. Further, as explained elsewhere in the opinion, there is overwhelming evidence of Reynolds's guilt. Nothing in the record suggests that the outcome of Reynolds's trial was altered by the prosecutor's comments in opening or closing arguments. When considered with the weight of the evidence, the arguments made by defense counsel, Reynolds's testimony, and the trial court's instructions to the jury, the prosecutor's comments did not "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process." Therefore, this claim is due to be denied.

d. Alleged Prosecutorial Misconduct: Misstatement of Law to Jury

Reynolds next claims that the prosecutor misstated the law to the jury throughout trial regarding (1) reasonable doubt, (2) mitigating circumstances, (3) voluntary intoxication as a defense, and (4) limited consideration of mitigation evidence. (Docs. # 1 at 61-63; 31 at 51-55). Reynolds argues that the ACCA's "holding that the [prosecution's] misstatements of law did not result in reversible error was contrary to the Supreme Court's holdings in *Berger*, *Cage* [*v. Louisiana*, 498 U.S. 39 (1990)], *Sullivan* [*v. Louisiana*, 508 U.S. 275 (1993)], and *Bruton*."[30] (Doc. # 31 at 55) (internal citations omitted).

When evaluating a prosecutor's alleged improper remark, the relevant standard on habeas review to is whether "the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction [and sentence] a denial of due process.'" *Darden*, 477 U.S. at 181, quoting *Donnelly*, 416 U.S. 637 (1974). The Eleventh Circuit has cautioned that "[i]mproper prosecutorial arguments, especially misstatements of law, must be considered carefully, because 'while wrapped in the cloak of state authority [they] have a heightened impact on the jury.'" *Spivey*, 207 F.3d at 1263 (11th Cir. 2000), *cert. denied*, 531 U.S. 1053 (2000), quoting *Drake v. Kemp*, 762 F.2d 1449, 1459 (11th Cir. 1985) (alterations in *Spivey*). The Eleventh Circuit further provided:

> When assessing this type of claim, this Court examines the entire context of the judicial proceeding to determine if it was fundamentally unfair. Not every improper prosecutorial remark, therefore, renders the trial unfair. Improper arguments do, however, render the capital sentencing hearing fundamentally unfair and require reversal when there is a reasonable probability that they changed the outcome of the case. "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" Proper arguments, regardless of their impact on the outcome of the case, do not render a trial unfair.

[30] The court notes that the Supreme Court disapproved of its decision in *Cage v. Louisiana* when it re-established the appropriate standard of review for jury instructions as "reasonable likelihood" from *Boyde v. California*, 494 U.S. 370 (1990). *See Estelle v. McGuire*, 502 U.S. 62, 72 n.3 (1991).

Id. at 1275-76 (internal citations omitted). Moreover, "improper statements during argument can be cured by clear and accurate jury instructions." *Johnson*, 256 F.3d at 1185.

For the reasons explained below, the court concludes that the ACCA's decision was not contrary to, or an unreasonable application of, clearly established federal law.

(1) Reasonable Doubt

Reynolds asserted that the prosecution violated the principles in *Cage* when the prosecutor allegedly told prospective jurors the incorrect definition of reasonable doubt, describing it as "a doubt to which you have a reason, . . . a fair doubt, a substantial doubt." (Doc. # 1 at 61, quoting Vol. 6 at 42).

Reynolds raised this same claim before the ACCA on direct appeal. After noting that Reynolds "did not object on this basis at trial," the ACCA found no plain error. *Reynolds I*, 114 So. 3d at 143. The ACCA reasoned that "[t]he use of the terms 'substantial doubt,' 'fair doubt,' and 'doubt for which you have a reason,' to explain the concept of reasonable doubt is not improper." *Id.* (citing *Greenhill v. State*, 746 So. 2d 1064, 1069-71 (Ala. Crim. App. 1999); *Lee v. State*, 898 So. 2d 790, 841-42 (Ala. Crim. App. 2003), *cert. denied*, 898 So. 2d 874 (Ala.), *cert. denied*, 543 U.S. 924 (2004)). The ACCA further explained:

> "Our review of the state's voir dire examination leads us to conclude that the prosecutor provided his 'definition' of reasonable doubt to assist him in learning the venire members' opinions on the state's burden of proof. We do not find any plain error in this situation. Moreover, the trial court repeatedly instructed the jury that the comments and arguments of counsel were not the law and that they should follow only his instructions on the law. Thus, we find no plain error."

Reynolds I, 114 So. 3d at 144, quoting *Broadnax*, 825 So. 2d at 180.

Reynolds's federal habeas argument relies primarily on *Cage* and similar Supreme Court precedent concerning a *trial* court's jury instructions on the reasonable doubt standard. But, the ACCA's decision was not contrary to, or an unreasonable application of, *Cage* (or any other

Supreme Court precedent). In *Cage*, the Supreme Court reversed the defendant's conviction because the *trial court instructed* the jury to equate reasonable doubt with "grave uncertainty" and "an actual substantial doubt" and stated that the jurors needed to have a "moral certainty" that the defendant was guilty. *Cage*, 498 U.S. at 41.

Cage does not apply to Reynolds's case. The error in *Cage* was that the trial court improperly instructed the jury. But, here, Reynolds contends that the prosecution's misstatement of the law was improper. Reynolds's comparison to *Cage* is without merit because the prosecutor in Reynolds's case was not "instructing" the jury or acting as the "trial court."[31]

Reynolds nevertheless argues that *Cage*'s reasoning applies regardless of whether his claim involves a court's jury instruction or a misstatement of law by a prosecutor. In making this argument he relies on the Eleventh Circuit's decision in *United States v. Cordoba-Mosquera*, 212 F.3d 1194, 1198-99 (11th Cir. 2000). (Doc. # 31 at 53). But his reliance is misplaced.

In *Cordoba-Mosquera*, the court decided that the prosecution's closing argument did not amount to misconduct, reasoning that "[p]rosecutorial misconduct is a basis for reversing an appellant's conviction only if, in the context of the entire trial and in light of any curative instruction, the misconduct may have prejudiced the substantial rights of the accused." 212 F.3d

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[31] Reynolds also cites to a long list of cases involving jury instructions and misstatements of law, but the cases again involved instructions by a trial court.

> *See, e.g.*, *Yates v. Evatt*, 500 U.S. 391, 411 (1991) (holding unconstitutional *instructions* on burden-shifting could not be excused as harmless error); *Francis v. Franklin*, 471 U.S. 307, 325-26, 333 (1985) (finding constitutional infirmity in *jury instructions* [that shifted] burden of proof on element of the crime, notwithstanding curative instruction, was not harmless error); *Sandstrom v. State of Mont[ana]*, 442 U.S. 510, 525-27 (1979) (finding *jury instruction* on presumption of ordinary consequences of voluntary actions unconstitutional[ly] shifted burden from the state to prove every element of offense beyond a reasonable doubt).

(Doc. # 31 at 52-53) (emphasis added). Again, each of these cases concern the trial court's jury instructions rather than comments by a prosecutor.

at 1198, quoting *United States v. Reed*, 887 F.2d 1398, 1402 (11th Cir. 1989). Here, even if the prosecutor's comments were improper (they were not), in the context of the entire trial, they simply did not prejudice Reynolds's substantial rights. And, regardless, Reynolds has failed to reference any Supreme Court precedent for his assertion.

Alternatively, there is not a reasonable likelihood that the jurors understood the prosecution's explanation of "reasonable doubt" during voir dire in a manner that would allow a conviction based on a lower burden of proof than required by the Constitution. *See Icenhour v. Medlin*, 567 F. App'x 733, 737 (11th Cir. 2014) ("When reviewing the correctness of reasonable-doubt charges, the inquiry is 'whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on' a lower burden of proof than that required by the Constitution"), quoting *Johnson*, 256 F.3d at 1191. Here, the temporal disparity between the prosecution's comments during jury selection and the jury's verdict (after receiving final instructions from the trial court) would make a court's finding that such "a reasonable likelihood" would exist even more questionable. During the guilt phase of Reynolds's trial, the court charged the jury, in part, as follows:

> [S]tatements of lawyers – the lawyers are permitted to argue the case. They are permit[ted] to draw reasonable inferences about the facts of the case. However, you are not governed by what the lawyers say. It is your responsibility to remember the evidence as *it came from the witness stand and base your verdict solely on the evidence*. Likewise, I've permitted the lawyers in large measure to say whatever they thought appropriate about the law. But if what the lawyers have said about the law differ in any respect to what I'm telling you about the law or what I have told you about the law, then you are to be governed by what I tell you about the law and not what the lawyers say.

(Vol. 12 at 85-86) (emphasis added). These instructions clearly stated that the court has the sole authority to charge the jury with the law, that statements made by the attorneys are only to be treated as argument, and that evidence should come from the witness stand. Moreover, the trial

court's instructions correctly conveyed the concept of reasonable doubt to the jury at the guilt phase of trial.

Reynolds failed to show that the ACCA's decision was contrary to, or an unreasonable application of, *Cage* (or any other Supreme Court precedent). Accordingly, Reynolds's claim is due to be denied.

(2) Mitigating Circumstances

Reynolds maintains that the prosecutor "improperly told the jury that in order to vote for life [imprisonment], the mitigating factors would have to outweigh the aggravating factors." (Doc. # 1 at 62 (citing Vol. 6 at 37; Vol. 7 at 89; Vol. 13 at 116). Reynolds points to two of the prosecutor's statements made during the individual panels of voir dire and one statement made during the State's closing argument at the penalty-phase of trial. (*See id.*). In the first statement, the prosecution explained to the venire panel the nature of Alabama's bifurcated trials before asking if anyone was unable to sentence someone to the death penalty.

> [I]f you find him guilty beyond a reasonable doubt of capital murder, we will move into the second phase, which is the penalty phase. And in that phase you will be asked to weigh what we call the aggravating circumstances and the mitigating circumstances. And it's not a numerical way. . . .
>
> Now you may have two or three aggravating circumstances and one mitigating circumstance. If that one fact in your mind could outweigh those aggravating circumstances, even though there may be three – you're going to be asked to go into a weighing of three factors. . . .
>
> What I'm asking now is regardless of the aggravating circumstances, regardless of the facts, because of your personal beliefs and your personal philosophy, can you never sentence someone to the death penalty? That's what I'm asking for.

(Vol. 6 at 37-38). In the second statement, the prosecution explained the nature of Alabama's bifurcated trial and what the jury members should expect. The prosecution followed the explanation with the qualifying question – whether "any of [the individual jurors] unalterably dead

set against the imposition of the death penalty in any case?" (Vol. 7 at 89-90). The challenged commentary is as follows:

> And if you do find beyond a reasonable doubt that Michael Reynolds is guilty of capital murder, the case will then move into a second phase, and you will once again hear evidence of what we call aggravated circumstances. The state would present aggravated circumstances, circumstances that we feel justify and call for the death penalty in the case. And the defense will present evidence of what is called mitigating circumstances, circumstances that they feel – than can support as opposed to the death penalty a life without parole sentence, which means he would serve life in prison without the possibility of parole. They will present the mitigating circumstances. We will present what we call aggravating circumstances. It is not a numerical comparison, like if there are three aggravating circumstances and one mitigating. If you feel like mitigating circumstance is strong enough, that one could outweigh the three. Do all of you understand that?

(*Id.* at 88-89). The prosecutor's comment at issue from his closing argument during the penalty phase of trial is as follows:

> But what you have to do, ladies and gentlemen, I submit to you with all due respect, is decide whether those mitigating circumstances and factors that you heard in this case are such that they outweigh what you have already decided over here.

(Vol. 13 at 116). At trial, Reynolds made no objection to any of these comments.

(a) The ACCA's Decision

Reynolds presented this claim on direct appeal. The ACCA found "no plain error occurred, and [that] no basis for reversal exists regarding this claim," concluding that "[w]hatever misstatements the prosecutor made regarding the weighing of aggravating and mitigating circumstances did not so infect[] the trial with unfairness as to make the resulting conviction a denial of due process." *Reynolds I*, 114 So. 3d at 144, quoting *Vanpelt*, 74 So. 3d at 90 (internal quotations omitted). In support, the ACCA added, "[j]urors are presumed to follow the trial court's instructions." *Id.* The ACCA recognized that the trial court "charged the jury at the penalty phase that what the attorneys said was not evidence" and determined that the trial court "correctly

charged the jury on the weighing of the aggravating circumstances and mitigating circumstances." *Id.* (citing Vol. 13 at 131-32, 135-39, 145-46).

(b) Reynolds Failed to Properly Raise This Claim for Federal Habeas Review

In his petition, Reynolds argues that relief on this claim is appropriate because the prosecutor's explanation at voir dire and closing argument on the weight of mitigating and aggravating circumstances were "the exact opposite of Alabama law." (*See* Doc. # 1 at 62). In support, Reynolds notes, "Alabama law . . . specifies that the death penalty can only be applied when the aggravating circumstances outweigh the mitigating circumstances." (*Id.* (citing Ala. Code § 13A-5-46(e); *Ex parte Bryant*, 91 So. 2d 724, 726 (Ala. 2002)). But, as Respondent has answered, Reynolds "offers nothing to show how [the ACCA's] decision was objectively unreasonable." (Doc. # 21 at 47). The court concludes that Reynolds has not pointed to any controlling precedent that shows the ACCA's decision was contrary to, or an unreasonable application of, clearly established federal law. (*See* Docs. # 1 at 62; 31 at 51-52).

In his reply brief, Reynolds misinterprets Respondent's position, and presents a number of non-sequiturs and conclusory allegations that actually weaken rather than strengthen his argument. (*Compare* Doc. # 31 at 51-52, *with* Doc. # 21 at 47). Respondent has not argued that habeas relief is unavailable because Reynolds's counsel failed to object to any purported misstatements. Rather, Respondent has merely explained that, without objection from defense counsel at trial, the ACCA reviewed this claim for plain error. (*See id.*) (citing *Reynolds I*, 114 So. 3d at 144).[32]

[32] Reynolds attempted to rebut Respondent's argument by asserting a novel ineffective assistance of counsel claim. (*See* Doc. # 31 at 51-52). But Reynolds did not properly raise this ineffective assistance of counsel issue for purposes of federal habeas review. (*See* Doc. # 10 at 5, ¶ B(b) (notifying Reynolds that any argument not initially raised in his federal habeas petition, or with leave from the court for amendment, is waived); (*see also* Doc. # 11 at 2) (certifying that Reynolds raised every claim for federal habeas review in his federal habeas petition, (Doc. # 1), as initially filed with this court); *see United States v. Krasnow*, 484 F. App'x 427, 429 (11th Cir. 2012) ("Parties cannot raise new issues in reply briefs.") (citing *Timson v. Sampson*, 518 F.3d 870, 874 (11th Cir. 2008)). Accordingly, Reynolds has waived or abandoned any *Strickland* claim related to his counsel not objecting on this issue.

Regarding the underlying prosecutorial misconduct claim, "[a] party abandons all issues on appeal that he or she does not 'plainly and prominently' raise in his or her initial brief." *United States v. Krasnow*, 484 F. App'x 427, 429 (11th Cir. 2012), quoting *United States v. Jernigan*, 341 F.3d 1273, 1283 n.8 (11th Cir. 2003) (concluding an argument on appeal was abandoned when an appellant provided no argument on the issue, but instead conclusively alleges error of the lower court and finding that such argument is not properly raised in a reply brief absent discussion in any greater depth). This court need not address any "perfunctory and underdeveloped argument" that lacks legal authority or elaboration." *U.S. Steel Corp. v. Astrue*, 495 F.3d 1272, 1287 n.13 (11th Cir. 2007).

Reynolds has failed to meaningfully develop this claim in his petition and reply brief, which by rule results in the abandonment of the claim. In his petition, Reynolds asserted "[t]he prosecutor improperly told the jury … to vote for life, the mitigating factors would have to outweigh the aggravating factors." (Doc. # 1 at 62). However, Reynolds has not pointed to any grounds for federal relief; instead, he only cites an Alabama statute and state court case in support of the alleged error. (*Id.*) And, on reply, Reynolds failed to properly supplement this claim. (*See* Doc. # 31 at 50-72). Therefore, Reynolds waived or abandoned this claim.

(c) Alternatively, the ACCA's Decision Was Not Contrary to, or an Unreasonable Application of, Clearly Established Federal Law

Assuming without concluding that Reynolds provided the missing argument and precedent in support of this claim by generally averring that "misstatements of law" were not remedied by the trial court's curative instructions or jury instructions, Reynolds's argument still fails. (*See* Doc. # 31 at 54). In reply, Reynolds contends under the subheading "Misstatement of Reasonable Doubt Standard" that the "curative instructions given by the trial court did not alleviate the substantial

prejudice to Reynolds." (Doc. # 31 at 52, 54). To support this claim, Reynolds references *Bruton* and *Berger*. (*See* Doc. # 31 at 54-55). But, these cases do not support his argument under § 2254(d)(1).

(i) *Bruton v. United States*

In *Bruton*, the Supreme Court addressed whether "the conviction of a defendant at a joint trial should be set aside although the jury was instructed that a codefendant's confession inculpating the defendant had to be disregarded in determining [that defendant's] guilt or innocence." 391 U.S. at 123-24. The *Bruton* Court held that the trial court's curative instructions were insufficient. The Court provided "[d]espite the concededly clear instructions to the jury to disregard [the co-defendant's] inadmissible hearsay evidence *inculpating petitioner*, in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for the petitioner's constitutional right of cross-examination." *Id.* at 137 (emphasis added).

Unlike the situation in *Bruton*, Reynolds was not tried in the context of a joint trial where the court improperly admitted hearsay of a codefendant. *Bruton* is not instructive on Reynolds's claim that the prosecutor misstated the law on mitigating and aggravating circumstances during voir dire and during the penalty-phase closing arguments. Although the *Bruton* Court found in that case that the curative instructions were insufficient to remedy the deprivation of defendant's right to confront the accusing codefendant, the inadequacy of curative instructions in *Bruton* simply cannot be equated with the trial court instructions Reynolds challenges here. Reynolds has not acknowledged the multiple other corrective measures taken by the trial court. For example, the trial court drew attention to the prosecution's misstatement, instructed the sentencing jury multiple times regarding the jury's task of weighing aggravating and mitigating circumstances, and

described how an appropriate sentence would relate to each of the possible outcomes under Alabama law.

For these reasons, the ACCA's decision was not contrary to, or an unreasonable application of, *Bruton*. *See* 28 U.S.C. § 2254(d)(1); *see also Reynolds I*, 114 So. 3d at 114.

(ii) *Berger v. United States*

Reynolds's *Berger* argument fares no better. He argues that "similar to the defendant in *Berger*, the evidence of [his] guilt was not strong or overwhelming but rather rested [on] the credibility of witnesses and evidence equally opposed." (Doc. # 31 at 55) (citing *Berger*, 295 U.S. at 89). But, that is simply not a correct characterization of the evidence presented at Reynolds's trial.

In *Berger*, the Supreme Court found that the prosecutor misstated facts, falsified the prior statements of witnesses, suggested having personal knowledge of out-of-court conversations without any evidentiary offerings, badgered a witness on cross-examination regarding the fabricated statements, assumed prejudicial facts not in evidence, and generally "conduct[ed] himself in a thoroughly indecorous and improper manner." *Berger*, 295 U.S. at 84. The prosecutor's egregious conduct in *Berger* is not remotely comparable to the prosecution's purported misstatement in Reynolds's case about the proper procedure for the jury should use in weighing mitigating and aggravating circumstances. Another distinguishing characteristic here is that, unlike what occurred in *Berger*, during the sentencing phase, Reynolds's trial judge correctly charged the jury regarding mitigating circumstances and the weighing process numerous times and also alerted the jury to the fact that one of the attorneys had stated the incorrect legal standard. (*See* Vol. 13 at 131-35, 138-39, 143-48). The ACCA's decision is not contrary to *Berger*.

(d) Conclusion

Reynolds has not shown that the ACCA's decision concluding that "[w]hatever misstatements the prosecutor made regarding the weighing of aggravating and mitigating circumstances did not so infect[] the trial with unfairness as to make the resulting conviction [and sentence] a denial of due process" was contrary to, or an unreasonable application of, clearly established law.[33] *See Reynolds I*, 114 So. 3d at 144. Accordingly, Reynolds's claim is due to be denied.

(3) Voluntary Intoxication as a Defense

Reynolds next accuses the prosecution of "blatantly" lying to the jury when the prosecutor stated that "voluntary intoxication is never a defense." (Doc. # 1 at 62, quoting Vol. 12 at 19-20). The prosecutor's contested comment is as follows:

> Now another thing the Judge is going to charge you as far as the law is concerned is that – they are going to try to argue that maybe he was intoxicated, too intoxicated to know what he was doing. The Judge is going to tell you, we believe, that voluntary intoxication is never a defense. You can get yourself all drugged up and drunk and go out and kill somebody and get away with it or try to get off on manslaughter because of that. Voluntary. Now, if I force you down and force some drugs into you it's a different thing. But if you do it voluntarily, it[']s not a defense. So please listen for that.

(Vol. 12 at 19-20).

(a) The ACCA's Decision

Reynolds presented this claim on direct appeal. *See Reynolds I*, 114 So. 3d at 144-145. After recognizing that the trial court charged the jury as to the limited role of attorneys' statements at trial, the ACCA determined that "the circuit court correctly charged the jury that '[w]hile voluntary intoxication is never a defense to a criminal charge, it may negate the specific intent that

[33] Again, Reynolds has the burden to establish his right to federal habeas relief by proving all the facts required to show a constitutional violation. *See Romine*, 253 F.3d at 1357. But he has failed to provide this court with any facts that show the evidence of his guilt was not overwhelming.

is essential to an intentional killing and reduce it to other charges.'" *Id.*, quoting Vol. 12 at 63. "After reviewing the prosecutor's comment in the context of the entire trial," the ACCA determined that no plain error occurred and "no basis for reversal exist[ed]." *Id.* at 144-45. The court was "unpersuaded that the comment 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Id.*, quoting *Vanpelt*, 74 So. 3d at 81.

(b) Analysis

To the extent Reynolds argues this claim provides an independent cause for federal habeas relief, he has failed to sufficiently develop this argument using clearly established Supreme Court case law to support his argument. Reynolds makes this conclusory statement: "[a]llowing the jury to hear these misstatements was contrary to, and an unreasonable application of, clearly established Supreme Court law." But this conclusion, wholly unmoored to any supporting case law, is not enough to satisfy Reynolds's burden under § 2254. (*See* Doc. # 1 at 63).

Rather, Reynolds appears to rely on an alleged conflict between Alabama common law and statutory law. (*See* Doc. # 1 at 62) (citing Ala. Code § 13A-3-2(a); *Philley v. State*, 930 So. 2d 550, 562 (Ala. Crim. App. 2005)). But alleged conflict in a state court's interpretation of its law is not a proper theory for habeas relief under § 2254. *See Agan v. Vaughn*, 119 F.3d 1538, 1549 (11th Cir. 1997); *see also id.* (citing *Pulley v. Harris*, 465 U.S. 37, 41 (1984)) ("A federal court may not issue the writ on the basis of a perceived error of state law."); *Hays v. Alabama*, 85 F.3d 1492, 1500 (11th Cir. 1996), *cert. denied*, 520 U.S. 1123 (1997) ("Petitioner is due no relief on the grounds that Alabama has misinterpreted its own law."). Reynolds has not identified any other law in support of this claim to rebut the ACCA's decision that no plain error occurred. *Reynolds I*, 114 So. 3d at 144-45.

Alternatively, the ACCA's decision was clearly supported by the record that was before it at the time of its decision. Although Reynolds has accused the prosecutor of "lying" to the jury, the record does not reflect any intentional deception. Instead, a plain reading of the record shows the prosecutor gave an ambiguous explanation of voluntary intoxication. (*See* Vol. 12 at 19-20). *See also Donnelly*, 416 U.S. at 647 ("[A] court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.")

(c) Conclusion

The ACCA's decision was not based on an unreasonable determination of the facts. Nor was the ACCA's decision contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court. Thus, Reynolds's claim is due to be denied because it is underdeveloped and, in the alternative, without merit.

(4) Improper Limitation of Mitigation Evidence

Reynolds argues that the prosecution implied that Reynolds's "upbringing was not mitigating because it did not directly cause him to commit the crime." (Doc. # 1 at 62) (citing Vol. 13 at 9). Reynolds contends that "this was an erroneous statement on a crucial aspect of the law in [his] trial."[34] (*Id.*).

[34] The context surrounding the statement at issue -- made during the prosecutor's cross-examination of Reynolds's father at the penalty phase of trial -- is as follows:

> [PROSECUTOR]: Mr. Reynolds, you understand that this is the sentencing phase of this trial?
> [H. REYNOLDS]: Yeah.
> [PROSECUTOR]: The other issues have been determined. And one of the circumstances that they have offered – or will offer to the jury as to why this crime happened was the way [Reynolds] was raised. And you raised him; is that correct?
> [H. REYNOLDS]: Yeah.
> . . .
> [PROSECUTOR]: Do you feel like – you know, what – do you feel like that Michael had a bad life growing up?

(a) The ACCA's Decision

Reynolds raised this claim on direct appeal, and the ACCA rejected it. *See Reynolds I*, 114 So. 3d at 145.

> [D]efense counsel objected before the question was answered, and the circuit court sustained defense counsel's objection. Even so, as addressed above, the circuit court correctly charged the jury on the concept of aggravating and mitigating circumstances. In the context of the entire argument, we do not believe the prosecutor's question "so infected the trial with unfairness as to make the resulting conviction a denial of due process."

Id., quoting *Vanpelt*, 74 So. 3d at 47.

(b) Section 2254(d)(1)

Reynolds has failed to develop any argument that suggests that the ACCA's decision was contrary to clearly established federal law. Rather, Reynolds merely cites "generally" *Smith v. Texas*, 550 U.S. 297 (2007), and *Lockett v. Ohio*, 438 U.S. 586 (1978). As a result, Reynolds has likely waived this argument. However, even if Reynolds has properly presented this claim, he has not shown that the ACCA's decision was contrary to, or involved an unreasonable application of, clearly established Supreme Court precedent or that the decision was based on unreasonable factual findings. *See* 28 U.S.C. § 2254(d).

> [H. REYNOLDS]: Well not that bad. I mean, . . . I wasn't the best father in the world. I done the best I could with no more education than I had. I always made sure he rode the bus and went to Sunday school and everything until they moved out of the house.
> . . .
> [PROSECUTOR]: As far as you having to tell this jury this morning that if this crime got committed by him, that it was because of the way you raised him, you don't feel that way, do you?
> [DEFENSE COUNSEL]: Your Honor, I object to that question. Excuse me, Mr. Reynolds. We are not saying because of the way he was raised he committed this crime. We are offering it for mitigation to weigh the punishment. There is a distinction.
> THE COURT: Sustained. Move along.
> [PROSECUTOR]: That's all.

(Vol. 13 at 7-10).

(i) *Smith v. Texas*

In *Smith*, the court decided an issue of Texas criminal procedure. Under Texas law, "the jury verdict form provides special-issue questions to guide the jury in determining whether the death penalty should be imposed." *Smith*, 550 U.S. at 300. Before *Penry v. Lynaugh*, 492 U.S. 302 (1989), there were only three special-issue questions that concerned deliberateness, future dangerousness, and provocation. *Id.* at 300-01. The *Penry* Court concluded these three questions were not broad enough, so the Texas legislature eventually added a catchall special issue. *Id.* at 301. However, in the short time between *Penry* and legislature's actions, trial judge attempted to cure *Penry* error using a nullification charge. *Id.* The nullification charge instructed each juror that despite the correct answer to the special questions, if the mitigation evidence as a whole showed that the defendant did not deserve death, then the jury must answer one of the special-issue questions in the negative. *Id.* The trial at issue in *Smith* occurred during this interim period.

During his state collateral review, the defendant in *Smith* argued that the trial court's nullification charge did not sufficiently cure an issue he raised pretrial. *Id.* at 299-300. The Texas state appellate court denied the defendant relief, holding that he did not properly preserve the claim in his first state habeas petition. *Id.* at 300. The state appellate court explained that reversal on an instructional error required the defendant to show "egregious harm." *Id.*

In *Smith*, there were two issues presented to the Supreme Court of the United States. The first issue was whether the defendant properly preserved his objections to the special-issue questions. *Id.* at 312-15. The second issue was whether the defendant had to show egregious harm or only "some harm" to warrant relief from the instructional error. *Id.* at 315-16.

As this explanation shows, Reynolds has not provided any comparison of his case to *Smith*. Nor can he. Rather, he has merely cited the case. This court fails to see how an issue of Texas

criminal appellate procedure on reviewing a verdict form applies to alleged prosecutorial misconduct in an Alabama criminal trial. Therefore, the ACCA's decision is not contrary to *Smith*.

(ii) *Lockett v. Ohio*

In *Lockett*, the defendant challenged the constitutionality of a death penalty statute that "did not permit the sentencing judge to consider, as mitigating factors, [the defendant's] character, prior record, age, lack of specific intent to cause death, and [the defendant's] relatively minor part in the crime." *Lockett*, 438 U.S. at 597. The court held that the statute was unconstitutional because it did not "permit the type of individualized consideration of mitigating factors" as required by the Eighth and Fourteenth Amendments. *Id.* at 606.

The issue in *Lockett* bears no resemblance to Reynolds's claim of prosecutorial misconduct here. That is, even if the prosecutor's statement purported to limit what mitigating factors apply to sentencing, the trial court cured any error in its jury instructions given in Reynolds's trial. Therefore, the ACCA's decision that the prosecutor's comments did not so infect the trial as to deprive Reynolds of due process is not in any way contrary to *Lockett*.

(c) Conclusion

The court concludes that the ACCA's decision was not contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court. The court further concludes that Reynolds waived this argument, and, in the alternative, the argument is without merit. For these reasons, the claim is due to be denied.

(5) Cumulative Impact of Misstatements of Law

Reynolds contends that "allowing the jury to hear these misstatements was contrary to, and an unreasonable application of, clearly established Supreme Court law, [as they] rendered the trial

fundamentally unfair, and, thus violated [Reynolds's] constitutional due process rights." (Doc. # 1 at 63). The court disagrees.

Ultimately, a cumulative claim fails where individual claims of error or prejudice are without merit because there is nothing to accumulate. *See Morris*, 677 F.3d 117, 1132 (11th Cir. 2012). Here, the court concludes that Reynolds is not entitled to habeas relief on any of the individual prosecutorial misconduct claims. For similar reasons, he is not entitled to relief on his so-called cumulative claim.

e. Alleged Prosecutorial Misconduct: Victim Impact Evidence

Reynolds argues that the prosecutor introduced improper victim impact evidence during the trial's guilt-phase. (Docs. # 1 at 63-64; 31 at 58-62). Reynolds contends that the alleged improper victim impact evidence included: (1) implying "to the jury that the victims' families were parties" to the case; (2) discussing how the victims' families were affected by the murders; (3) commenting on "how old Savannah would have been at the time of trial"; (4) using "emotionally charged closing arguments" to obtain a guilty verdict based on juror sympathies; and (5) introducing fifty-three, autopsy photos with "close-range images" and crime-scene photos. (Doc. # 1 at 63).

Reynolds cites to several portions of the record in support of this argument, including the prosecution's comments during voir dire, opening statements, the prosecution's case-in-chief, and closing argument. (*Id.*); (Vol. 6 at 103-05, 122-23, 132, 195; Vol. 7 at 12, 20, 79, 176-77; Vol. 8 at 48; Vol. 9 at 165-66, 195-202; Vol. 10 at 3-53; Vol. 11 at 162-63, 166, 172; Vol. 12 at 16).

Reynolds claims that the ACCA's decision rejecting this claim involved an unreasonable application of Supreme Court precedent under *Viereck*, *Donnelly*, and *Darden*. (*See id.* at 64; Doc.

31 at 62). He also claims that the ACCA's decision was based on an unreasonable determination of the facts. (*Id.*).

(1) ACCA's Decision

Reynolds raised these claims individually on direct appeal, but the ACCA rejected them. *See Reynolds I*, 114 So. 3d at 146-48. The ACCA rejected Reynolds's argument that the "prosecution false[ly] indicated to the jury that the victims' families were parties to the case." *Id.* at 147. The ACCA concluded that "the prosecutor was explaining . . . the importance of the trial proceedings to Reynolds, the victims' family and the State." *Id.* at 147 (explaining that in *Henderson v. State*, 583 So. 2d 276, 278 (Ala. 1991), *aff'd*, *Ex parte Henderson*, 583 So. 2d 305 (Ala. 1991), *cert. denied*, 503 U.S. 908 (1992), the ACCA similarly found no plain error in the prosecutor's comments about "the importance of the case to the victim's family, the suffering of the family, [and] that he represented the family").

Next, the ACCA found no plain error occurred regarding Reynolds's allegation that during voir dire, opening statements, and in questioning a State's witness, "the prosecutor errantly focused the jury's attention . . . on how the crime affected the victims' families." *Id.* at 147, quoting Vol. 19 at 120 (citing in turn Vol. 6 at 194; Vol. 7 at 177; Vol. 8 at 48) (internal quotations omitted). After reviewing the allegedly improper comments in context, the ACCA determined that the comments did not "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process." *Id.* at 147-48, quoting *Vanpelt*, 74 So. 3d at 81 (quoting *Darden*, 477 U.S. at 181).

The ACCA also rejected Reynolds's argument that the "prosecutor's reference[s] in voir dire and closing argument regarding how old the victim Savannah Martin would have been at the time of trial were improper." *Id.* at 148 (citing Vol. 19 at 120) (citing in turn Vol. 7 at 177; Vol. 8 at 48). Finding that defense counsel "did not object to these alleged references on this basis at

trial." the ACCA held there was no plain error, particularly in light of "[t]he fact that Savannah would have been a teenager at the time of trial was an obvious fact to the jury." *Id.*

When addressing Reynolds's argument that the prosecutor "solicited a guilty verdict based on sympathy, not the evidence," the ACCA noted that on appeal that Reynolds "merely refer[red] . . . to various portions of the closing argument" without "specify[ing] which comments were egregious." *Id.* (citing Vol. 19 at 120 (citing in turn Vol. 11 at 162-63, 166, 172)). Nonetheless, the ACCA reviewed the comments "in context of the entire closing argument" and determined that, contrary to Reynolds's assertions, the prosecution's argument was not improperly designed to inflame the passions of the jury. *Id.*, quoting *Floyd v. State*, 190 So. 3d 940, 957 (Ala. Crim. App. 2007), *rev'd on other grounds by Ex parte Floyd*, 190 So. 3d 972 (Ala. 2012) (finding no basis for reversal exists where the record "is clear that the prosecutor's remarks at the guilt phase of [a defendant's] trial were made in the heat of debate, were proper comments on facts in evidence, were in reply to various remarks made during defense counsel's closing argument, and were not improperly designed to inflame the passions of the jury").

The ACCA also rejected Reynolds's argument that "autopsy photos of the victims" and other crime scene evidence "constituted improper impact evidence." *Id.* at 148 (citing Vol. 19 at 121-22). The ACCA held that there was "no abuse of discretion in the circuit court's admission of the evidence." *Id.* The ACCA determined that the autopsy and crime scene photos "did not constitute victim-impact evidence[,]" "[were] relevant to depict [both] the nature and extent of the injuries . . . suffered[,]" and "[were] neither unduly prejudicial nor inflammatory." *Id.* (internal quotations omitted), quoting *Billups v. State*, 86 So. 3d 1032 (Ala. Crim. App. 2009) (citing *Stallworth v. State*, 868 So. 2d 1128, 1151-52 (Ala. Crim. App. 2001)).

(2) Section 2254(d)(2)

After a thorough evaluation of the record, the court concludes that Reynolds's arguments miss the mark: the ACCA's decision is not contrary to *Donnelly*, *Darden*, or *Viereck*.

(a) *Donnelly v. DeChristoforo*

In *Donnelly v. DeChristoforo*, 416 U.S. 637 (1874), the Supreme Court held that an improper prosecutorial argument could reach the level of a federal constitutional violation if the remark "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.* at 643. But, in *Donnelly*, the Court determined that the prosecution's remark did not meet this standard. *Id.* Instead, the prosecutor's comment was "one moment in an extended trial," and was, in any event, ambiguous. *Id.* And, as the Court noted, the trial judge had clearly cautioned the jury to disregard the remark when it gave a curative jury instruction. *Id.* at 644-46.

To the extent Reynolds relies on *Donnelly*, his argument is without merit. *Donnelly* involved an improper prosecutorial closing argument, but the *Donnelly* Court determined that, in light of the entire trial, the remark did not infect the trial to such a degree as to deprive the defendant of due process. Similarly, here, to whatever extent the ACCA decided that the prosecutor's comments were improper, the ACCA evaluated the remarks in light of the entire trial and determined that the comments did not "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process." Therefore, the ACCA's decision was not contrary to *Donnelly*.

(b) *Darden v. Wainwright*

In *Darden v. Wainwright*, the Supreme Court rejected a claim that the prosecutor's closing argument denied the defendant a fair trial. 477 U.S. at 178-84. The prosecutor's closing argument contained numerous improper remarks that reflected the prosecutor's highly emotional reaction to both the defendant and the gruesome homicide at issue. *See id.* at 179-81, 179-80 nn.9-12. But the

court held that there was no constitutional violation. *Id.* at 181. Although the Supreme Court characterized the prosecutor's closing argument as "fully deserving the condemnation it received from every court to review it," it held that the misconduct did not deprive the defendant of a fair trial. *See id.* at 179, 183.

The *Darden* Court concluded that the trial "was not perfect – few are – but neither was it fundamentally unfair." *Id.* (internal quotations omitted). The Court noted that the prosecutor's argument "did not misstate or manipulate the evidence"; "did not implicate other specific rights of the accused"; and, "was invited by or [in] response[] to defense counsel's opening argument." *Id.* at 181-82. The trial judge instructed the jurors several times that counsel's arguments were not evidence and their decision was to be based only on the evidence. *Id.* And, the Court noted the "weight of the evidence [presented at trial] against petitioner was heavy." *Id.*

Reynolds has not shown that the ACCA's decision was contrary to *Darden*. Instead, *Darden* actually supports the ACCA's decision rejecting Reynolds's claims. In the context of Reynolds's entire trial, the alleged improper remarks "did not misstate or manipulate the evidence"; "did not implicate other specific rights of the accused"; "[m]uch of [the prosecutor's] objectionable content was invited by or [in] response[] to defense counsel's opening argument"; the trial judge instructed the jurors several times that their decision was to be based only on the evidence and that arguments of counsel were not evidence; and, the "weight of the evidence against [Reynolds] was heavy." *Darden* at 181-82; *Reynolds I*, 114 So. 3d at 146-48. Thus, the ACCA's decision was not contrary to *Darden*.

(c) *Viereck v. United States*

To the extent Reynolds relies on *Viereck* to demonstrate the ACCA's decision was objectively unreasonable, the court has already discussed why *Viereck* does not support such a

finding. *See* Part IV(B)(iii), *supra*. For these same reasons, the court concludes that the ACCA's decision rejecting Reynolds's "improper introduction of victim-impact evidence" claims is not objectively unreasonable. Thus, Reynolds's claim is due to be denied.

(3) Section 2254(d)(2)

To the extent Reynolds contends that the ACCA's decision was based on an unreasonable determination of facts in the record (*see* Doc. # 31 at 62), the court disagrees. Reynolds's sporadic references to the record within his petition (along with his failure to identify which specific factual findings he contends the ACCA unreasonably determined) do not satisfy AEDPA's requirements.[35] *Ward*, 592 F.3d 1144, 1177 (11th Cir. 2010); *see, e.g., Lee v. GDCP Warden*, 987 F.3d 1007, 1018 n.2 (11th Cir. 2021) (explaining that unless a petitioner "can[] show that the state court's decision 'was based on' the challenged findings, they provide no basis for federal habeas relief whether or not those findings were unreasonable"), quoting 28 U.S.C. § 2254(d)(2). Reynolds has not demonstrated that the ACCA unreasonably determined the facts in light of the evidence presented to the state court. Therefore, Reynolds's claim under § 2254(d)(2) fails.[36]

(4) Conclusion

Reynolds has failed to show he is entitled to relief under 28 U.S.C. § 2254(d). The court concludes that the ACCA's decision did not involve and unreasonable application of *Donnelly*, *Darden*, or *Viereck* (or any other Supreme Court decision for that matter). And the court concludes that the ACCA's decision was not based on an unreasonable determination of the facts of record

[35] (*See* Doc. # 31 at 59-62) (replying to the Respondent's complaint that Reynolds failed to point to specific facts within the record by editorializing and partially quoting from the record). The court notes that in reply, Reynolds has, for the first time, identified *specific* facts, beyond mere citations to the record. (*See id.*). However, upon the court's contextual review of the cited portions, the record does not demonstrate that the ACCA's decision relied on unreasonable determinations of the facts of record before the state court.

[36] Additionally, Reynolds did not seek to expand the habeas record or proffer evidence in an effort to meet § 2254(e)(1)'s clear and convincing standard on any state court factual determinations applicable to these prosecutorial misconduct allegations which he contends are unreasonable.

before the state court at the time of its decision. *See* 28 U.S.C. § 2254(d). Accordingly, this claim is due to be denied.

f. Alleged Prosecutorial Misconduct: Introduction of Hearsay

Reynolds argues that the prosecutor introduced hearsay statements made by "key" witnesses in violation of *Crawford v. Washington*, 541 U.S. 36 (2004). (*See* Doc. # 1 at 64). Reynolds alleges that the prosecution used West's testimony "in an attempt to bolster her testimony and excuse her involvement in the crime."[37] (*Id*.) Reynolds also contends that Chad Martin offered hearsay statements from Sergeant Mulkey, "an investigating officer at the crime scene." (*See id*.). Reynolds argues that the prosecution injected these statements "in an attempt to explain away [Chad Martin's] confession," and Reynolds asserts that the statements were "particularly prejudicial" as Mulkey had already testified but the State "had not elicited this information from [Mulkey] himself." (*Id*. at 65) (citing Vol. 9 at 95).

(1) Reynolds Failed to Exhaust This Claim

Before presenting a claim in a federal habeas proceeding, a petitioner must first present the claim to the appropriate state court and provide the state court "a meaningful opportunity to consider [the] allegations of legal error." *Vasquez v. Hillery*, 474 U.S. 254, 257 (1986). A petitioner

[37] Reynolds points to two portions of West's testimony:

> Q. Tell the Jury what happened?
>
> A. [Dino Harvey] pulled up, and I went back there. And he saw I was upset. And he asked if [Reynolds] had anything to do with what happened to [Charles Martin]. And I nodded yes. And he said for me to get the stuff. And I got the stuff, and we went and got rid of it.
>
> . . .
>
> A. [. . .] I went next door. And the police came back. And then Dino came back. And Dino told me that Michael was going to be getting out of jail.

(Vol. 8 at 91).

satisfies the exhaustion requirement when "the reasonable reader would understand [the] claim's particular legal basis and specific factual foundation to be the same as it was presented in state court." *Kelley v. Sec. for Dept. of Corrections*, 377 F.3d 1317, 1344-45 (11th Cir. 2004).

On direct appeal, Reynolds argued "[t]he *trial court* erroneously allowed hearsay statements by key witnesses." (Vol 19 at 125) (emphasis added). But, in his habeas petition, Reynolds has materially changed his argument. He now contends that "[t]he *prosecutor* also introduced hearsay statements by key witnesses." (Doc. # 1 at 64) (emphasis added). While these two claims have the same factual foundation -- the admission of hearsay -- they are separate and distinct legal arguments. A reasonable reader would not understand that the *legal* basis for each claim would be the same. Therefore, Reynolds failed to exhaust this argument related to the prosecution, and for that reason alone the claim is due to be denied.

(2) Section 2254(d)(2)

But, even assuming that Reynolds properly presented this claim to the ACCA, in assessing the underlying hearsay issue, the state court did not unreasonably apply clearly established federal law or base its decision on an unreasonable determination of the facts. *See Reynolds I*, 114 So. 3d at 108. The ACCA determined that the contested statements were not hearsay. *Id.* As the ACCA explained, the out-of-court statements were elicited "to explain the declarant's subsequent conduct" rather than proving the truth of the matter asserted. *Reynolds I*, 114 So. 3d at 108.

The ACCA's decision was supported by evidence in the record before it. Specifically, West's testimony provided context for how and why she disposed of some of the items taken from the crime scene. (*See* Vol. 8 at 91). Similarly, Martin's testimony offered background information that explained his emotional response and his knowledge of the locations of the bodies. (*See* Vol. 9 at 95). Reynolds has not demonstrated that the ACCA's decision was based on an unreasonable

determination of the factual record before the state court. Accordingly, Reynolds failed to meet his burden of proof. *See* 28 U.S.C. § 2254(d)(2).

(3) Section 2254(d)(1)

The ACCA's decision was not contrary to, or an unreasonable application of, *Crawford v. Washington*. In *Crawford*, the Supreme Court held that the Confrontation Clause prohibits the "admission of testimonial statements of a witness who [does] not appear at trial unless he [is] unavailable to testify, and the defendant [has] had a prior opportunity for cross-examination." *Crawford*, 541 U.S. at 53-54. The contested statements were not "testimonial" nor were they hearsay; instead, the statements were offered to show the effect on the listener. As a result, the ACCA's determination was not contrary to, or an unreasonable application of, *Crawford*. Moreover, the ACCA's decision was not contrary to *Darden*, 477 U.S. 168 (1986), or *Donnelly*, 416 U.S. 637 (1974). As the court has previously explained, *proper arguments* -- regardless of their impact on the outcome of the case -- do not render a trial unfair. *Spivey*, 207 F.3d at 1275-76 (internal citations omitted); *see also Romine*, 253 F.3d at 1366 ("[N]o matter how outcome-determinative it is a proper argument cannot render the proceedings fundamentally unfair and therefore cannot be the basis for a constitutional violation.")

(4) Conclusion

Reynolds did not exhaust this claim in state court. Alternatively, Reynolds has failed to demonstrate that the ACCA's decision was based on an unreasonable determination of the facts before the state court or that the ACCA's decision was contrary to clearly established federal law. For these reasons, this claim is denied.

g. Alleged Prosecutorial Misconduct: Evidence of Other Crime

Reynolds next argues that "the prosecutor inquired about [Dr. Craig's medical] examination of Melinda Martin for evidence of sexual assault or rape." (Doc. # 1 at 65-66).

Reynolds contends that it was improper for the prosecution to present nude autopsy photos of Melinda and Savannah Martin when they were clothed at the scene of the murders. (Doc. # 1 at 66). The ACCA held that neither the prosecution nor any State's witness suggested that the victims were raped or sexually assaulted. *Reynolds I*, 114 So. 3d at 92.

Reynolds argues that the ACCA's decision was based on an unreasonable determination of the facts. But the record reflects that Dr. Craig's testimony addressed the standardized procedures by which autopsies are performed rather than implying that Reynolds engaged in a sexual act with the female victims. *See Reynolds I*, 114 So. 3d at 91-92; (*See* Vol. 16 at 87, 89-90, 142). Additionally, Reynolds's argument that the prosecution insinuated sexual misconduct when introducing the *autopsy photos* of the two female victims defies common sense. An autopsy performed to determine the cause of death evaluates patent and latent injuries and requires the removal of soiled clothing. Reynolds has utterly failed to demonstrate that the ACCA's decision was based on any unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *See* 28 U.S.C. § 2254(d)(2). Rather, as the ACCA decided, the prosecution at no point submitted evidence of an offense other than one charged in the indictment. *Reynolds I*, 114 So. 3d at 92.

Reynolds also argues that the ACCA's decision was contrary to *Berger v. United States*. (Doc. # 1 at 66). In *Berger*, the court held that the prosecutor "was guilty of misstating the facts in his cross-examination of witnesses; of putting into the mouths of such witnesses things which they had not said; of suggesting by his questions that statements had been made to him personally out of court, in respect of which no proof was offered; of pretending to understand that a witness had said something which he had not said and persistently cross-examining the witness upon that basis; of assuming prejudicial facts not in evidence; of bullying and arguing with witnesses; and, in

general, of conducting himself in a thoroughly indecorous and improper manner." *Berger*, 295 U.S. at 84. Any such impropriety was wholly absent from Reynolds's trial. The ACCA's decision is clearly distinguishable from *Berger*. And, at a minimum, a fair-minded jurist could distinguish the cases. As a result, Reynolds fails to show that the ACCA's decision was contrary to clearly established federal law as determined by the Supreme Court of the United States.

The ACCA's decision was not based on an unreasonable determination of the facts before the state court. And the ACCA's decision was not contrary to clearly established federal law. Accordingly, this claim is due to be denied.

h. Claim: Cumulative-Impact of Alleged Prosecutorial Misconduct

Reynolds contends that the cumulative impact of the prosecutor's alleged errors denied him a fair trial. (Docs. # 1 at 66-67; 31 at 50-51). But a cumulative claim fails where each individual claim of error is without merit because there is nothing to accumulate. *See Morris*, 677 F.3d 117, 1132 (11th Cir. 2012). As the court explained above, Reynolds is not entitled to habeas relief on any of his individual allegations of prosecutorial misconduct. Thus, the court concludes that Reynolds's cumulative claim is due to be denied.

C. *Crawford*

Reynolds claims that the admission of deposition testimony of Dr. Adam Craig, the State's forensic pathologist, violated his right under *Crawford* to confront the witness. (Doc. # 1 at 140). Reynolds further contends that the trial court allowed the deposition into evidence over the defense's objection despite the State's refusal to turn over material evidence prior to the deposition. (Doc. # 31 at 112).

1. The ACCA's Decision

This argument was made by Reynolds on direct appeal, but the ACCA found it was without merit. *See Reynolds I*, 114 So. 3d at 89-91.

> Before trial, the parties agreed to depose Dr. Craig regarding the autopsy results and to use that deposition testimony at trial to introduce the autopsy results instead of presenting Dr. Craig as a witness at trial. *See*, Rule 16.6, Ala. R. Crim. P.; *see also* § 12-21-264, Ala. Code 1975. The deposition took place as scheduled at the Etowah County courthouse, and Reynolds was permitted to thoroughly examine Dr. Craig.
>
> Nevertheless, at a pretrial hearing when Reynolds informed the court that he had not been able to examine Dr. Craig regarding discovery material he purportedly did not have at the time of Dr. Craig's deposition, the court offered, at the State's expense, to allow Reynolds to supplement the deposition and/or to subpoena Dr. Craig for trial in order to address the discovery material. *See* § 12-21-283, Ala. Code 1975, "Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceeding." Despite many subsequent opportunities, Reynolds did not pursue either option offered by the court.
>
> When the State sought to introduce the autopsy results through Dr. Craig's deposition testimony, Reynolds's only objection was that the State had not demonstrated that Dr. Craig was unavailable for trial.

Reynolds I, 114 So. 3d at 90-91.[38]

The ACCA applied the invited-error doctrine and harmless-error analysis in the alternative. *Id*. at 90-91. Regarding invited error, the ACCA acknowledged the general rule that "[a party] will not be permitted to allege an error in the trial court proceedings which was invited by him or was a natural consequence of his own actions." *Id.* at 90. The ACCA noted that the doctrine applies in capital cases. *Id.* Under the invited-error doctrine, an appellate court reviews for plain error. *Id.* The ACCA assumed (but did not decide) that the trial court erred by allowing the deposition into

[38] The state court record before the ACCA shows that defense counsel *did*, in fact, possess the discovery information at the time of cross-examination, which supports the ACCA's federally reviewable conclusion. *See Harrington*, 562 U.S. at 98-100 (holding that to be entitled to AEDPA deference, a state court decision need not address every argument, nor even explain its reasoning as to its ruling on a federal constitutional claim).

evidence. *Id.* at 91. However, the ACCA concluded that "any error was the natural consequence of Reynolds's actions" and did "not rise to the level of plain error." *Id.*

Further, even to the extent that Reynolds was not responsible for the error, the ACCA recognized that "violations of the Confrontation Clause are subject [only] to harmless-error analysis" *Id.*, quoting *Smith v. State*, 898 So. 2d 907, 917 (Ala. Crim. App. 2004) (citing in turn *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986). The ACCA explained that West testified that Reynolds handed her two knives after she found him stabbing one of the victims. *Id.* Therefore, the ACCA held that any error was harmless because "it is equally possible if Reynolds had confronted Dr. Craig and Dr. Craig had agreed that two different knives were used to stab the victims, that that testimony could have strengthened the State's case." *Id.*

2. Section 2254(d)(1)

Reynolds claims that the ACCA's decision is contrary to, or an unreasonable application of, *Crawford* — along with *Mattox v. United States*, 156 U.S. 237 (1895), *Barber v. Page*, 390 U.S. 719 (1968), and *Coy v. Iowa*, 487 U.S. 1012 (1988).[39] (Doc. # 31 at 115). The court disagrees.

In *Crawford*, the Court reversed and remanded the petitioner's conviction because the trial court admitted an out-of-court statement without giving the petitioner an opportunity to cross-examine the declarant. 541 U.S. at 38. The Court held that the state court violated the petitioner's Sixth Amendment right to confront the witnesses against him and reasoned that the Framers of the Constitution "would not have allowed admission of testimonial statements of a witness who did

[39] In addition to explicitly arguing that the ACCA's decision was contrary to these four cases, Reynolds cites several other Supreme Court cases. *See Bullcoming v. New Mexico*, 564 U.S. 647 (2011); *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006); *Davis v. Alaska*, 415 U.S. 308 (1974); *Brookhart v. Janis*, 384 U.S. 1 (1966); *Glasser v. United States*, 315 U.S. 60 (1942); *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Mattox v. United States*, 156 U.S. 237 (1895). The court has reviewed each case and concludes that the ACCA's decision is not contrary to their holdings.

not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Id.* at 53-54.

The Supreme Court explained how these two necessary conditions -- unavailability and opportunity to cross-examine -- were consistent with its prior decisions in *Mattox* and *Barber*. In *Mattox*, the Court admitted a deceased witness's prior trial testimony because the defendant had a prior opportunity to cross-examine the witness. *Id.* at 57 (citing *Mattox*, 156 U.S. at 244). Relatedly, in *Barber*, the Court held that the witness's unavailability must be established in addition to a prior opportunity for cross-examination for the out-of-court testimony to be admissible. *Id*. (citing *Barber*, 390 U.S. at 722-725).

In *Coy*, the Court held that the statutorily sanctioned use of a large screen between the defendant and the testifying accusers violated the Confrontation Clause because this practice was not "firmly rooted," and no individualized findings had been made indicating that "these . . . witnesses needed special protection." 487 U.S. at 1014-15, 1021. The Court reasoned that "[t]he Confrontation Clause provides two types of protections for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination." *Id.* at 1017, quoting *Ritchie*, 480 U.S. 39, 51 (1987) (plurality opinion).

Crawford, *Mattox*, *Barber*, and *Coy* do not support Reynolds's claims.[40] Unlike those defendants, Reynolds stipulated to the admission of the out-of-court testimony. And, during the deposition, Reynolds actually faced and cross-examined the witness.[41]

The ACCA also assumed (without deciding) the existence of *Crawford* error and correctly observed that "[v]iolations of the Confrontation Clause are subject to harmless-error analysis."

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[40] Although it goes unmentioned by Reynolds, the Supreme Court's decision in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009) is notable. In that case, the court applied *Crawford* to forensic evidence, and concluded that "[a] witness's testimony against a defendant is . . . inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination." *Id.* at 309, quoting *Crawford*, 541 U.S. at 54. But the court also recognized that the rule would have little practical impact because defense counsel would often stipulate to the use of the out-of-court testimony. *See id.* at 328; *see also id.* at 325 n.10.

Such is the case here. As previously explained, both parties agreed that Dr. Craig was no longer living in or employed by the State of Alabama. (*See* Docs. # 1 at 140; 21 at 84-86; 31 at 113) (citing Vol. 1 at 105). So, to preserve Dr. Craig's testimony at trial, the State and Reynolds stipulated to a video deposition with the understanding that Dr. Craig's testimony would be used as substantive evidence during Reynolds's trial. (Vol. 1 at 105).

[41] Additionally, a review of the record before the state court supports the ACCA's conclusion that, if any error occurred, that error was self-inflicted. Not only did the trial court give Reynolds numerous opportunities to supplement the deposition and/or subpoena Dr. Craig, *see Reynolds I*, 114 So. 3d at 91, the record indicates Reynolds had knowledge of the two knives prior to Dr. Craig's September 7, 2006 deposition. In a pre-trial motion hearing on May 4, 2007, defense counsel confirmed it received West's statement on July 25, 2005. (Vol. 4 at 44). West's statement includes five references to "knives," implying multiple knives were used in the Martins' murders. (*See* Vol. 3 at 99-101). Specifically, West's statement provided:

> We awoke around 9 or 9:30 Sunday morning 5-25-03 and Michael was acting normal and was watching TV. Harold had gone to church and Michael and I were alone . . . . Michael had told me that the *knives* were under the truck, the clothes and purse were in a white bag . . . . Sometime later the police came and picked up Michael. After the police left I went to a neighbors to use the phone but I saw Dino pull into the back alley. I walked over to him and got into the car. . . . He asked me if Michael had anything to do with what happened at Chucks. I nodded and he told me to get the *knives* and clothes. [After burning the clothes and disposing of the phone base,] [w]e then rode to Noccalula Falls to get rid of the *knives* but there were people up there so we went to the junior college boat docks. Dino told me to put the *knives* up my sleeve and we walked out onto the dock. Dino stopped and talked to a black guy then came and threw the *knives* into the river.

(*Id.* at 100) (indicating the first reference to "knives" in the record was circled). In short, defense counsel had information suggesting multiple knives were used in the murders nearly a year and a half prior to the deposition of Dr. Craig on September 7, 2006. Accordingly, the record supports the ACCA's decision that *if* any error did occur, such error was invited and did not rise to the level which would substantially and injuriously effect Reynolds's substantive rights.

Additionally, to the extent Reynolds raised a claim alleging ineffective assistance of counsel in regard to this oversight in state habeas court, Reynolds has not raised this claim before the federal court. Accordingly, it is waived. (*See generally* Docs. # 10 at 4-5;11).

Reynolds I, 114 So. 3d at 91 (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)). In *Van Arsdall*, the Supreme Court held that:

> the constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to *Chapman* harmless-error analysis. The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

475 U.S. at 684.

The ACCA evaluated Reynolds's assertion "that had he been allowed to confront Dr. Craig at trial, he could have challenged Dr. Craig's conclusion that all victims were stabbed with the same or a similar weapon and at around the same time, and that this would have allowed him to undermine the State's theory that there was only one assailant." *Reynolds I*, 114 So. 3d at 91. However, utilizing the factors described in *Van Arsdall*, the ACCA "assumed that the damaging potential of the cross examination [was] fully realized" and concluded that the error was harmless. *Id.*

The ACCA's decision that there was no plain error under the invited-error doctrine -- and, in the alternative, that any assumed error was harmless -- was not contrary to, or an unreasonable application of, clearly established federal law. Therefore, Reynolds is due no relief on this claim.

D. Double-Counting

Reynolds argues that "double counting" aggravating circumstances at the guilt-phase and the sentencing-phase of his trial operated in a manner that failed to narrow the class of cases eligible for the death penalty in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendment

rights. (Doc. # 1 at 147-49).[42] This claim is without merit as there is simply no Supreme Court precedent establishing this principle against double counting.

During the guilt-phase of his trial, the jury found Reynolds guilty on all five counts of capital murder, including murder of two or more persons under § 13A-5-40(a)(10) within count one and murder during robbery in the first degree under § 13A-5-40(a)(2) within counts two, three, and five. (Vol. 12 at 163-64). The parties agreed that the verdict necessarily implied two aggravating factors had been proven beyond a reasonable doubt: (1) the capital offense was committed while Reynolds was engaged in a robbery pursuant to Ala. Code. § 13A-5-49(4) and (2) Reynolds intentionally caused the death of two or more persons by one act or pursuant to one scheme or course of conduct pursuant to Ala. Code. § 13A-5-49(9). (*See id.* at 167; Doc. # 1 at 148); *see also Reynolds I*, 114 So. 3d at 150-51.

Reynolds raised this claim on direct appeal. The ACCA noted that Reynolds failed to raise this objection at trial and rejected Reynolds's claim under plain-error review.[43] *Reynolds I*, 114 So. 3d at 157. The ACCA explained that it had previously rejected the same arguments in *Morris v. State*, 60 So. 3d 326 (Ala. Crim. App. 2010). *Id.*

In *Morris v. State*, the petitioner argued that Alabama's "capital-sentencing statute fail[ed] to narrow the universe of defendants eligible for the death penalty" and that "the death penalty is arbitrarily imposed because Alabama law allows the factor making certain offenses capital to also

[42] Although Reynolds cites only to the jury verdict and portions of the jury instructions during the guilt phase, this court may take judicial notice of its own records and the state record before it. *See United States v. Glover*, 179 F.3d 1300, 1302 n.5 (11th Cir. 1999; *Keith v. DeKalb County, Georgia*, 749 F.3d 1034, 1041 n.18 (11th Cir. 2014); *see also Grider v. Cook*, 522 F. App'x 544, 546 n.2 (11th Cir. 2013).

[43] "[W]hen a state appellate court applies plain-error review and in the course of doing so, reaches the merits of a federal claim and concludes there is no plain error, that decision is an adjudication 'on the merits' for purposes of § 2254(d) and thus AEDPA deference applies to it." *Lee v. Comm'r, Alabama Dep't of Corr.*, 726 F.3d 1172, 1210 (11th Cir. 2013).

serve as an aggravating circumstance in the case." 60 So. 3d at 380. The court observed that despite several appellants raising the same issue, Alabama's aggravating circumstances scheme "has consistently been upheld by Alabama appellate courts." *Id.*

The *Morris* court further explained that the United States Supreme Court in *Lowenfield v. Phelps*, 484 U.S. 231, 246 (1988), had previously addressed "[t]his precise ground of error, that this double-counting fails to narrow the class of death-eligible murderers," and found no constitutional violation. *Morris*, 60 So. 3d at 380. In *Lowenfield*, a Louisiana defendant was convicted of capital murder and found eligible for the death penalty because he had the specific intent to kill or inflict great bodily harm upon more than one person. *Lowenfield*, 484 U.S. at 243. The only aggravating factor found by the jury was also an element of the capital offense. *Id.* The *Lowenfield* Court reasoned that "the Louisiana scheme narrows the class of death-eligible murderers [at the guilt phase] and then at the sentencing phase allows for the consideration of mitigating circumstances and the exercise of discretion." *Id.* at 246. As the Court held, "[t]he Constitution requires no more." *Id.*

While Reynolds refers in passing to numerous Supreme Court decisions in support of his argument,[44] he fails to cite to any Supreme Court case that demonstrates that the ACCA's decision

[44] *Kansas v. Marsh*, 548 U.S. 163 (2006) (holding that the Eighth Amendment did not prohibit states from imposing the death penalty when mitigating and aggravating sentencing factors were found to be of equal weight); *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that the Eighth Amendment forbids the execution of the intellectually disabled); *Ring v. Arizona*, 536 U.S. 584 (2002) (holding that the Sixth Amendment requires a jury to find the aggravating factors necessary for imposing the death penalty); *Zant v. Stephens*, 462 U.S. 862 (1983) (holding that the subsequent invalidation of one of several statutory aggravating circumstances does not automatically require reversal of the death penalty where the State assures that a death sentence will be set aside if the invalidation of an aggravating circumstance makes the penalty arbitrary or capricious); *Gregg v. Georgia*, 428 U.S. 153 (1976) (holding that the imposition of the death penalty does not, under all circumstances, violate the Eighth and Fourteenth Amendments); *Jurek v. Texas* 428 U.S. 262 (1976) (holding that the sentencer's consideration of whether "the defendant would be a continuing threat to society" does not render the imposition of the death penalty arbitrary); *Furman v. Georgia*, 408 U.S. 238 (1972) (holding that carrying out the death penalty in three particular cases would constitute cruel and unusual punishment); *North Carolina v. Pearce*, 395 U.S. 711 (1969) (holding that neither the Double Jeopardy Clause nor the Equal Protection Clause imposes an absolute bar to a more severe sentence upon reconviction). (*See* Docs. # 1 at 147-49; 31 at 125-28).

was contrary to, or an unreasonable application of, clearly established federal law. In fact, conspicuously omitted from his briefing is *Jones v. United States*, 527 U.S. 373 (1999), in which the Supreme Court mentioned that it had "never before held that aggravating circumstances could be duplicative so as to render them constitutionally invalid." 527 U.S. at 398.

The ACCA's decision was not contrary to, or an unreasonable application, of federal law as determined by the Supreme Court of the United States – specifically the *Lowenfield* Court. At Reynolds's trial, the guilt-phase jury found him guilty of offenses that implied two aggravating factors beyond a reasonable doubt: (1) the capital offense was committed while Reynolds was engaged in a robbery pursuant to § 13A-5-49(4) and (2) Reynolds intentionally caused the death of two or more persons by one act or pursuant to one scheme or course of conduct pursuant to § 13A-5-49(9). Then, at the penalty phase, the jury weighed the mitigating circumstances against the aggravating circumstances, which allowed for the exercise of the jury's discretion based on the evidence presented. (*See* Vol. 13 at 140-45). As in *Lowenfield*, the Constitution requires no more here. Accordingly, this claim is due to be denied.[45]

E. Advisory Opinion

Reynolds next claims that the circuit court and the prosecutor diminished the jurors' sense of responsibility for their sentencing determination by referring to the jury's verdict during the penalty phase as an "advisory verdict" in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights. (Doc. # 1 at 149-50). Reynolds argues that these "repeated, incorrect directions to the jury . . . misled the jury as to its role in the sentencing process in a way that allow[ed] the jury to feel less responsible than it should [have] for the sentencing decision." (Doc. # 1 at 149)

[45] To the extent Reynolds argues a *Ring v. Arizona*, 536 U.S. 584 (2002) violation occurred, (Doc. # 31 at 127-28); (*see also* Docs. # 1 at 145-47; 31 at 139-43) (Reynold's federal habeas *Ring* claim), the court addresses this claim in Part IV(H), *infra*. For the reasons provided there, Reynolds is due no relief on this claim.

(internal quotation marks omitted). According to Reynolds, these statements clearly violated *Darden v. Wainright*, 477 U.S. 168, 183 n.15 (1986). (Doc. # 1 at 150).

The ACCA noted that Reynolds did not object to these comments at trial, and, thus, it reviewed this claim for plain error. *Reynolds I*, 114 So. 3d at 153. As the ACCA explained, "We have repeatedly stated that a trial court does not diminish the jury's role by stating that its verdict in the penalty phase is a recommendation or an advisory verdict." *Reynolds I*, 114 So. 3d at 153 (citing *Doster v. State*, 72 So. 3d 50, 104 (Ala. Crim. App. 2010) (citations omitted)). Thus, the ACCA denied Reynolds relief on this claim.

This court concludes that the ACCA's decision was not contrary to, or an unreasonable application of, clearly established federal law as determined in *Caldwell v. Mississippi*, 472 U.S. 320 (1985), *Darden*,[46] or any other Supreme Court case.

In *Caldwell*, the Supreme Court held that a judge during a trial's penalty phase may not impermissibly "minimize the jury's sense of responsibility for determining the appropriateness of death." 472 U.S. at 341. And, as explained a year later in *Darden*, "*Caldwell* is relevant only to certain types of comment—those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision." 477 U.S. at 185 n.15. In *Romano v. Oklahoma*, 512 U.S. 1 (1994), a case not cited by Reynolds, the Supreme Court added that to succeed on this type of claim, the petitioner must show that the comment was improper at the time it was made. *See* 512 U.S. at 9.

At the time of Reynolds's conviction and death sentence in 2007, Alabama law permitted trial courts to override a jury's recommendation of life imprisonment and impose the death penalty.

[46] While it is unclear whether the footnote cited from *Darden* amounts to clearly established federal law under § 2254(d)(1), for the sake of argument, the court treats it as doing so.

See Ala. Code § 13A-5-46 (2007). The language of the statute expressly provided that the jury's decision was "advisory." *Id.* Therefore, Reynolds's jury was never misled.[47] *See Darden*, 477 at U.S. at 185 n.15. Thus, neither the trial court's instructions nor the prosecution's remarks violated the *Caldwell* standard. To the contrary, the comments accurately described the role of the jury and judge during the penalty phase of trial as defined by Alabama law at the time of Reynolds's sentencing. *See Romano*, 512 U.S. at 9; *Davis*, 119 F.3d at 1482.

Accordingly, the court concludes that the ACCA's decision on this claim was not contrary to, or an unreasonable application of, clearly established Federal law. This claim is due to be denied.

F. Jury Instructions

Reynolds next contends that the trial court improperly instructed the jury, depriving him of due process, a fair trial, and reliable sentencing under the Fifth, Sixth, Eighth, and Fourteenth Amendments. (Doc. # 1 at 150-52). Reynolds argues that the trial court gave erroneous instructions (1) when it defined "reasonable doubt" during the guilt phase of his trial; (2) when it charged the jury on mitigating and aggravating circumstances during the penalty phase, and (3) when it failed to provide a mercy instruction during the penalty phase. (Doc. # 1 at 150-51).

Reynolds raised these claims on direct appeal, and the ACCA rejected them. *Reynolds I*, 114 So. 3d at 148-53. Because Reynolds failed to object at trial, pursuant to Alabama Rule of Appellate Procedure 45A, the ACCA reviewed these claims for plain error. *Reynolds I*, 114 So. 3d

[47] The statute was amended years after Reynold's sentencing. *See* S.B. 16, 2017 Leg., Reg. Sess. (Ala. 2017) (permitting a trial court to impose the death sentence only when a jury returned a verdict of death, and otherwise obligating the trial court to sentence the defendant to life imprisonment without parole); Ala. Code § 13A-5-47(a) (2017). And the Act directed that this change "shall not apply retroactively to any defendant who has previously been convicted of capital murder and sentenced to death prior to the effective date of this act [April 11, 2017]." S.B. 16, 2017 Leg., Reg. Sess. (Ala. 2017).

at 149-50. Reynolds argues that the ACCA's decision was contrary to and an unreasonable application of clearly established Supreme Court precedent in *California v. Brown*, 479 U.S. 538 (1987), *Mills v. Maryland*, 486 U.S. 367 (1988), and *McKoy v. North Carolina*, 494 U.S. 433 (1990), as well as *Cage v. Louisiana*, 498 U.S. 39, 41 (1990), and *Sullivan v. Louisiana*, 508 U.S. 275 (1993) on reply. (Docs. # 1 at 151-52; 31 at 139).[48]

1. The Instruction on Reasonable Doubt During the Guilt Phase of Reynolds's Trial

Reynolds alleges that during the guilt-phase of his trial the trial court improperly defined reasonable doubt as "a doubt to which you can assign a reason." (Doc. # 1 at 151). Reynolds contends that there exists a "reasonable likelihood" that the court's improper instruction permitted a conviction based on insufficient proof. (*Id.*).

In addressing this claim on direct appeal, the ACCA began by discussing the relevant standards of review and overarching principles relevant to its evaluation of Reynolds's claims of improper jury instructions at both phases of Reynolds's trial. *See Reynolds I*, 114 So. 3d at 148-49, 151. In doing so, the ACCA noted that Reynolds did not object to any of the alleged improper jury instructions at trial and explained that as a result the ACCA could only review these claims for plain error,[49] as provided by Rule 45A. *Reynolds I*, 114 So. 3d at 148, 150.

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[48] Reynolds also contends that the "conclusions of the state court flowed from unreasonable determinations of the facts in light of the evidence that it had before it." (Doc. # 1 at 152). However, Reynolds does not direct the court to any unreasonable determinations of fact. To set aside any doubt, the court notes that the ACCA's decision was not based on an unreasonable determination of the facts.

[49] For purposes of this court's federal habeas review, the Eleventh Circuit has held:

> [W]hen a state appellate court applies plain-error review and in the course of doing so, reaches the merits of a federal claim and concludes there is no plain error, that decision is an adjudication "on the merits" for purposes of [Section] 2254(d) and thus AEDPA deference applies to it. As the Sixth Circuit pointed out in *Fleming v. Metrish*, 556 F.3d 520 (6th Cir. 2009)], it would contravene the comity and federalism principles that underlie AEDPA if we were to ignore the state appellate court's work and review [an appellant's] *Batson* claim *de novo*. *[Fleming*, 556 F.3d] at 532. We decline to do so. The Alabama

> When reviewing a trial court's jury instructions, we must view them as a whole, not just in bits and pieces, and as a reasonable juror would have interpreted them. A trial court has broad discretion when formulating its jury instructions. When reviewing a trial court's instructions, the court's charge must be taken as a whole, and the portions challenged are not to be isolated therefrom or taken out of context, but rather considered together.

Reynolds I, 114 So. 3d at 149, quoting *Vanpelt v. State*, 74 So. 3d 32, 92 (Ala. Crim. App. 2009).

With these principles in mind, the ACCA evaluated the trial court's jury instruction. *See id.* Specifically, the ACCA provided:

> Reynolds maintains that the circuit court "improperly told the jury that a reasonable doubt that would entitle the defendant to an acquittal is a 'doubt to which you can assign a reason.'" Reynolds asserts that this instruction improperly permitted a conviction based upon insufficient proof. As we held in *Lee v. State*, 898 So. 2d [at] 842:
>
> > "Taken as a whole, the trial court's instructions in this case properly conveyed the concept of reasonable doubt to the jury and did not lessen the State's burden of proof. There is not a reasonable likelihood that the jury applied the instructions in a manner that would violate the appellant's constitutional rights. Therefore, we do not find that there was any plain error in this regard."

Reynolds I, 114 So. 3d at 149.

Reynolds contends that the ACCA's "decision allowing the circuit court to improperly instruct the jury as to the reasonable doubt standard directly contravenes the Supreme Court's mandates in *Cage*."[50] (Doc. # 31 at 139). He argues "a doubt to which you can assign a reason" implies a higher degree of doubt than reasonable doubt. (*Id.* at 138-39). After careful consideration,

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> appellate court's "substantive reasoning does not simply vanish" just because it applied plain-error review. *Id.* "Nor does AEDPA." *Id.*

Lee, 726 F.3d at 1210 (footnote omitted).

[50] For the first time, in his reply brief, Reynolds also contends that the ACCA's decision "directly contravenes the Supreme Court's mandates in . . . *Sullivan [v. Louisiana*, 508 U.S. 275 (1993)]." (Doc. # 31 at 139). In *Sullivan*, the Supreme Court held that a trial court's unconstitutional reasonable doubt instruction was a structural defect that required automatic reversal. *Sullivan* 508 U.S. at 277-80. *Sullivan* is about the appropriate remedy to be imposed when there is an error, not whether an error occurred in the first place. So, *Sullivan* is immaterial to the question of whether there was an error here.

and for the reasons discussed below, the court concludes that Reynolds's argument is without merit.

In *Cage*, the Supreme Court held that the trial court's instruction impermissibly suggested a higher degree of doubt than is required for acquittal under the reasonable doubt standard of *In re Winship*, 397 U.S. 358, 364 (1970). *Cage*, 498 U.S. at 39-40. The Supreme Court condemned the jury instructions for equating reasonable doubt with "such doubt as would give rise to a grave uncertainty," an "actual substantial doubt," and a doubt believed to a "moral certainty." *Id.* at 40 (emphasis removed).

> It is plain to us that the words "substantial" and "grave," as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard. When those statements are then considered with the reference to "moral certainty," rather than evidentiary certainty, it becomes clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause.

Id. at 41.

In this case, the ACCA referred to its decision in *Lee*. *See Reynolds I*, 114 So. 3d at 149 (citing *Lee*, 898 So. 2d at 842). In *Lee*, the court evaluated a similar claim of improper jury instructions, in which the trial court defined reasonable doubt as "a doubt for which you can assign a reason. It does not mean a doubt which arises from some mere whim or surmise or guess." 898 So. 2d at 841. After referencing *Cage*, the *Lee* court applied the proper standards for reviewing the constitutionality of such an instruction. *See id.* at 841-42.

The ACCA's review of the record from Reynolds's trial shows it assessed whether the trial court "conveyed the concept of reasonable doubt to the jury."[51] *See Lee*, 898 So. 2d at 842. And,

[51] The relevant portion of the court's instructions to the jury are as follows:

> Now, . . . [t]he burden of proof in this case as in all criminal cases is upon the State of Alabama. It is the duty of the State of Alabama to show the defendant's guilt beyond a reasonable doubt and to the exclusion of every other reasonable hypothesis. And unless the State of Alabama has done that

as the ACCA concluded, the trial court properly instructed the jury on the nature of reasonable doubt by stating that a conviction would require "an abiding conviction of the truth of the charge"

> in this case, it is your duty to find the defendant, Michael Wayne Reynolds, not guilty. . . . The defendant cannot be convicted unless the evidence is inconsistent with any reasonable theory of his innocence.
>
> I charge you, members of the jury, that if you have a reasonable doubt of the defendant's guilt growing out of the evidence or any part of it, you must acquit him. The defendant is presumed innocent and you must consider this presumption of innocence as evidence in the case just like the testimony that you hear and the physical evidence that you see or touch.
>
> When a defendant is placed on trial, charged with a crime, the law says that he is presumed to be innocent of the offense. The defendant enters into this Court with a presumption of innocence in his favor. And it is a fact which is to be considered as evidence and should not be disregarded. And this presumption of innocence remains with the defendant unless and until overcome by evidence which convinces the jury of the defendant's guilt beyond a reasonable doubt.
>
> Before the defendant can be convicted, the state must satisfy each and every member of the jury of his guilt. Unless also the state satisfies you of the defendant's guilt beyond a reasonable doubt and to a moral certainty, then the defendant is entitled to an acquittal.
>
> If after considering all of the evidence in this case you have abiding conviction of the truth of the charge, then you are convinced beyond a reasonable doubt and it would be your duty to find the defendant guilty.
>
> On the other hand, if after considering all of the evidence in this case your minds are left in such a condition that you cannot say that you have an abiding conviction to a moral certainty of the defendant's guilt, then you're not convinced beyond a reasonable doubt and the defendant would be entitled to acquittal.
>
> As to reasonable doubt, the burden of proof that is on the state is to prove the guilt of the defendant beyond a reasonable doubt. The phrase beyond a reasonable doubt is a somewhat subjective term . . . . Most people know intuitively what the law means when it says that the state has to prove the guilt of the defendant beyond a reasonable doubt. Is there a doubt either arising from evidence or from the lack of evidence as to any element of the offense that the state is charged? If there is, then the defendant is entitled to the benefit of that doubt. A reasonable doubt is not a forced or capricious doubt, and it is not necessary that the state prove the guilt of the defendant beyond all doubt but that it prove the guilt of the defendant beyond all reasonable doubt and to a moral certainty.
>
> A reasonable doubt is a doubt to which you can assign a reason. It's a doubt which reasonable and fair-minded persons would entertain after hearing all of the evidence or lack of evidence that you hear.
>
> If you find from the evidence that the state has proven any of the offenses that they have charged beyond a reasonable doubt, then it would be your duty to convict.
>
> If you find that they have not proven each element of the offense charged, then you should not convict but should return a verdict of not guilty.

(Vol. 12 at 73-77).

and "an abiding conviction to a moral certainty of the defendant's guilt" whereas an acquittal could be sustained if "reasonable and fair-minded persons [would entertain doubts of the defendant's guilt]." (Vol. 12 at 73-77); (*see also* Vol. 12, at 100, 103, 110, 119, 124-25, 127, 130, 1333, 137-39, 142) (instructions for each count of Reynolds's indictment). Under *Cage*, that is sufficient. In "[e]mphasizing the state's burden and the jury's obligation to focus on the evidence presented, the entire instruction establishes that it was not reasonably likely the jury applied the instruction in an unconstitutional manner." *Icenhour v. Medlin*, 567 F. App'x at 737 (11th Cir. 2014) (citing *Victor*, 511 U.S. at 5 and *Johnson*, 256 F.3d at 1190-94).

A fair-minded jurist could agree with the ACCA's decision that, "[t]aken as a whole, the trial court's instructions . . . properly conveyed the concept of reasonable doubt . . . [so that] [t]here is not a reasonable likelihood that the jury applied the instructions in a[n unconstitutional] manner." *Reynolds I*, 114 So. 3d at 149, quoting *Lee*, 898 So. 2d at 842. Thus, the ACCA's decision is not an unreasonable application of *Cage* nor is it contrary to clearly established federal law. Accordingly, this claim is due to be denied.

2. Instruction on Mitigating Circumstances During the Penalty Phase

Reynolds next alleges that the trial court was required to instruct the jurors that they could consider mitigating circumstances whether or not they all agreed on the existence of those particular circumstances. (Docs. # 1 at 150-51; 31 at 132-35).[52] Reynolds contends that in referring

[52] Reynolds provides no citations to support his claim that "[t]he Circuit Court limited the jury's consideration of relevant mitigating circumstances when it repeatedly referred to the jury as a single unit for consideration of aggravating and mitigating circumstances and then failed to provide an instruction that unanimity was not required for consideration of a mitigating circumstance." (Doc. # 31 at 132). However, the court can take judicial notice of its own records and the trial record before it. *Grider*, 522 F. App'x at 545 n.2 (11th Cir. 2013). The court notes that Reynolds provided citations to the trial court's allegedly offending conduct in his brief to the ACCA on direct appeal. (*See* Vol. 19 at 111) (citing Vol. 13 at 140-45).

to the jury as one unit — by saying "you" and "your" — the judge left the jurors with the mistaken impression that unanimity was required. (Docs. # 1 at 150-51; 31 at 134).

The ACCA rejected this claim on direct appeal. *Reynolds I*, 114 So. 3d at 151-52. Because Reynolds failed to object to the penalty phase jury instructions, the ACCA reviewed for plain error only under Rule 45A, Ala. R. App. P. *Id.* at 150. (*See, e.g.*, Vol. 13, Tab 32, TR. 2004).

> Reynolds contends that the circuit court's use of the words "you" and "your" during its jury charge in the penalty phase of the trial implied to the jury that the jury's findings as to the existence of any mitigating evidence had to be unanimous before the mitigating evidence could be considered. [(Vol. 19, Tab 40], at 90-91). This court addressed and rejected an identical argument in *Hall v. State*, 979 So. 2d 125, 165-67 (Ala. Crim. App. 2007) [*Hall II*]. Further we have reviewed the Court's entire charge in light of the principles addressed [in] *Hall* [*II*] and find "nothing in the instructions that would have suggested to the jurors, or given them the impression, that their findings concerning the existence of mitigating circumstances had to be unanimous" before those mitigating circumstances could be considered. *Hall* [*II*] at 165, quoting other cases. Accordingly, we find no error, plain or otherwise, in this regard.

Id. at 151-52 (some internal quotation marks omitted).

In rejecting this claim, the ACCA relied on its previous decision in *Hall II*. In that case, the ACCA denied the petitioner's claim that the trial court's use of the collective "you" during its penalty phase instructions violated *Mills* by "im[plying] to the jury that its findings as to mitigating evidence had to be unanimous." *Hall II*, 979 So. 2d at 165, quoting *Hall v. State*, 820 So. 2d 113, 144 (Ala. Crim. App. 1999) (*Hall I*). Like Reynolds, Hall failed to object to the challenged instruction at trial, so the ACCA reviewed this claim for plain error. *Id.*; *see Reynolds I*, 114 So. 3d at 150. The ACCA noted several decisions rejecting similar arguments "that the court erred by failing to instruct the jury that its findings as to mitigating circumstances did not have to be unanimous." *Hall II*, 979 So. 2d at 165-67.

The *Hall II* court specifically recognized that the Supreme Court in *Mills* "held that a sentence of death must be vacated where 'there is a substantial probability that reasonable jurors,

upon receiving the judge's instructions . . . well may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance.'" *See id*. at 165, quoting *Williams v. State*, 710 So. 2d 1276, 1307 (Ala. Crim. App. 1996), *aff'd*, 710 So. 2d 1350 (Ala. 1997), *cert. denied*, 524 U.S. 929 (1998), quoting in turn *Mills*, 486 U.S. at 384. The *Hall II* court, however, concluded that *Mills* was factually distinguishable. Unlike *Mills*, the jury was properly instructed that once a mitigating circumstance was offered:

> the State had the burden of disproving the factual existence of that circumstance by a preponderance of the evidence. No portion of the trial court's instructions suggested to the jury that its findings concerning mitigating circumstances had to be unanimous. Moreover, the trial court's instructions were in accordance with the *Alabama Proposed Pattern Jury Instructions for Use in the Guilt Stage of Capital Cases Tried under Act. No. 81-178*. After reviewing the trial court's instructions, we find that there was "no reasonable likelihood or probability that the jurors believed that they were required to agree unanimously on the existence of any particular mitigating circumstance." *Williams*, 710 So. 2d at 1307.

Hall II, 979 So. 2d at 166-67, quoting *Hall I*, 820 So. 2d at 144-46. Additionally, as the ACCA explained, the "[u]se of the word 'you,' without more, in relationship to a jury charge on mitigating evidence does not imply that the finding of a mitigating circumstance must be unanimous." *Id.* at 167, quoting *Kuenzel v. State*, 577 So. 2d 474 (Ala. Crim. App. 1990), *aff'd* 577 So. 3d 531 (Ala.), *cert. denied*, 502 U.S. 886 (1991).

With respect to this "without more" language, Reynolds contends that "the 'more' cautioned [about in *Hall II*] was present in the instructions to Reynolds's jury." (Doc. # 31 at 133). Moreover, Reynolds contends that the ACCA's decision was contrary to and an unreasonable application of *Mills v. Maryland*, 486 U.S. 367 (1988), and *McKoy v. North Carolina*, 494 U.S. 433 (1990).[53] (Docs. # 1 at 150-51; 31 at 135). This court disagrees.

[53] In addition to his multiple references to *Mills* and *McKoy* in support of this claim, Reynolds cites to a litany of other Supreme Court cases for the first time in his federal habeas reply brief. (*See* Doc. # 31 at 141-44). But, none

In *Mills*, the Supreme Court vacated a death penalty imposed by a jury due to a misleading jury form and accompanying instruction. 486 U.S. at 278, 384. One section of the form included instructions for finding an aggravating circumstance. *Id.* at 378. After reading the instructions on the form, the trial judge stressed the unanimity requirement for finding an aggravating circumstance. *Id.* The trial court then moved on to discuss another section of the form, which concerned mitigating circumstances and included similar language to the first section. *Id.* However, the trial court did not instruct the jury that there was no unanimity requirement for considering mitigating circumstances. *Id.* The court concluded that "there [was] a substantial probability that reasonable jurors . . . may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance." *Id.* at 384.

In *McKoy*, the Supreme Court held that North Carolina's statutory unanimity requirement was contrary to its decision in *Mills*. 494 U.S. at 444. The Court explained that an unanimity requirement impermissibly limited the jury's consideration of mitigation evidence by allowing one holdout juror to prevent the others from mulling over evidence that might have dictated a lesser sentence. *Id*. at 438 (citing *Mills*, 486 U.S. at 384, and *Lockett*, 438 U.S. 586).

Unlike in *Mills* or *McKoy*, the subject of unanimity was not mentioned in Reynolds's trial instructions. The trial court never gave an indication that unanimity was required with respect to either aggravating or mitigating circumstances. (*See* Vol. 13 at 131-52). As to aggravating circumstances, the trial judge explained, "So the three aggravating circumstances that the state says apply in this case, I'm telling you from a legal standpoint that you don't have to make that

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of these cases hold that a death sentence must be set aside as unconstitutional if the trial judge does not explicitly instruct the jury that mitigating circumstances are not required to be found unanimously. (*See id.*) (citing *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Lockett v. Ohio*, 438 U.S. 586 (1978); *House v. Tennessee*, 498 U.S. 912 (1990); *Boyde v. California*, 494 U.S. 370, 381 (1990)).

decision. I'm making it for you by telling you that those three aggravating circumstances exist." (*See id.* at 138). Suffice it to say that the jurors in Reynolds's case were never given the opportunity to draw an inference that because unanimity was required for aggravating circumstances, it also must be required for mitigating circumstances. Unanimity was never mentioned during the mitigating instructions. In short, the trial court never gave the jurors any impression that findings of a mitigating circumstance must be unanimous.

The trial court's instructions here were materially the same as those found constitutional in *Hall II* and other decisions. Reynolds has failed to establish that the ACCA's decision was contrary to, or an unreasonable application, of clearly established federal law. Thus, this claim is due to be denied.

3. Instruction Regarding Mercy During the Penalty Phase of Reynolds's Trial

Reynolds next argues that the trial court's penalty-phase charge "erroneously informed the jurors that they could not consider mercy in their sentencing verdict." (Doc. # 1 at 151) (citing *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Conner, J., concurring); *Drake v. Kemp*, 762 F.2d 1449, 1460 (11th Cir. 1985)). (*See also* Doc. # 31 at 135-37).

Reynolds's argument is not supported by the actual charge given by the trial court.

> Now, in your deliberation, ladies and gentlemen, do not let personal opinions outweigh the law. Weigh the aggravating and mitigating circumstances carefully and dispassionately. Do not be swayed by anger, sympathy, or prejudice or any type of passion or emotion. The weighing and comparing of aggravating and mitigating circumstances requires the exercise of sound judgment on your part. It is not a matter of unbridled discretion. A human life hangs in the [balance]. It is a matter of calm reflection, not for the indulgence of emotion.
>
> You are to weigh the aggravating and mitigating circumstances and honestly and rationally evaluate the two options before you in light of those circumstances.
>
> You are to use your common sense in the evaluation. Your verdict, as always, is based on the evidence.

(Vol. 13 at 147-48). The trial court never said that mercy could not be considered.

The ACCA rejected this claim on direct appeal. *See Reynolds I*, 114 So. 3d at 152-53. The ACCA's discussion focused on the overarching principles quoted above from *Vanpelt*, 74 So. 3d at 92, along with the court's holding in *Brown v. State*, 11 So. 3d 866, 921 (Ala. Crim. App. 2007), *aff'd*, 11 So. 3d 933 (Ala. 2008), *cert. denied*, 557 U.S. 938 (2009). *See Reynolds I*, 114 So. 3d at 152-53.

The ACCA observed that in *Brown v. State*, "the appellant . . . argued that 'the circuit court's instruction allowed the jury to believe that it could not consider mercy in determining its penalty-phase verdict.'" *Id*. at 152, quoting *Brown*, 11 So. 3d at 921. The ACCA recognized that under "well-settled" Alabama law, "[a] capital defendant is not automatically entitled to a mercy instruction," adding that "[t]he Alabama provisions for the imposition of capital punishment nowhere mentions mercy." *Id.*, quoting *Brown*, 11 So. 3d at 921 (internal quotation marks omitted). The ACCA also recognized that under *California v. Brown*, 479 U.S. 538, 539 (1987), "the United States Supreme Court held that 'an instruction informing jurors that they 'must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling' during the penalty phase of a capital murder trial [does not violate] the Eighth and Fourteenth Amendments to the United States Constitution.'" *Reynolds I*, 114 So. 3d at 152-53, quoting *Brown v. State*, 11 So. 3d at 921.

Reynolds contends that the trial court had a "constitutional obligation to instruct the jury specifically that mercy can form the basis for a life sentence" and that the trial court's failure to give that instruction violated clearly established Supreme Court precedent. (Doc. # 31 at 135). In support, Reynolds cites multiple cases; [54] however, these cases do not hold that a death sentence

[54] *McKoy v. North Carolina*, 494 U.S. 433 (1990); *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Mills v. Maryland*, 486 U.S. 367 (1988); *McClesky v. Kemp*, 481 U.S. 279 (1987); *California v. Brown*, 479 U.S. 538 (1987); *Caldwell*

must be set aside as unconstitutional if the trial judge does not explicitly instruct the sentencing jury that it may consider mercy in determining the appropriate sentence. Indeed, the Supreme Court's decision in *California v. Brown* makes clear no such instruction is necessary.

> In *California v. Brown*, the Court noted two prerequisites to a valid death sentence:
>
> > First, sentencers may not be given unbridled discretion in determining the fates of those charged with capital offenses. The Constitution instead requires that death penalty statutes be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion. Second, even though the sentencer's discretion must be restricted, the capital defendant generally must be allowed to introduce any relevant mitigating evidence regarding his character or record and any of the circumstances of the offense.

California v. Brown, 479 U.S. at 541 (internal citations and quotations omitted). The Court held that a charge instructing the jury "not [to] be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling" was constitutional. *Id.* at 543.

A trial judge is only required by the Eighth and Fourteenth Amendments to "clearly and explicitly instruct the jury about mitigating circumstances and the option to recommend against death." *Moore*, 809 F.2d at 731 (internal quotation marks omitted) (collecting cases). And, the trial judge in Reynolds's case clearly complied with this requirement.

> the defendant is allowed to offer mitigating circumstances as reasons why he should not be put to death. The law defines certain circumstances that it holds to be mitigating circumstances. . . . In this case the one I'm giving you from the statute states that the defendant has no significant history of prior criminal activity and in addition to any other relevant mitigating circumstances which the defendant offers as a basis for a sentence of life imprisonment without parole instead of death.
>
> Unlike aggravating circumstance, where you are limited to those in the statute, you may consider any circumstance which you reasonably believe to reflect favorable on the defendant as a reason why the defendant should not be put to death.

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v. Mississippi, 472 U.S. 320 (1985); *Lockett v. Ohio*, 438 U.S. 586 (1978); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Kennedy v. Herring*, 54 F.3d 678 (11th Cir. 1995); *Nelson v. Nagle*, 995 F.2d 1549 (11th Cir. 1993); *Moore v. Kemp*, 809 F.2d 702 (11th Cir. 1987); *Peek v. Kemp*, 784 F.2d 1479 (11th Cir. 1986); *Drake v. Kemp*, 762 F.2d 1449 (11th Cir. 1985). (*See* Docs. # 1 at 150-52; 31 at 131-32, 135-36).

> The defendant has the burden of injecting the issue if the factual existence of a mitigating circumstance is in question. This merely means that the defendant must show at least the possibility that the mitigating circumstance exists. Then the burden of proof is on the state to disprove the existence of a mitigating circumstance by a preponderance of the evidence. This means that unless the state shows that more likely than not the mitigating circumstance does not exist, you should consider the mitigating circumstance as established.

Vol. 13 at 143-45). Moreover, the trial court did not prevent defense counsel or defense mitigation witnesses from asking for mercy on Reynolds's behalf. To the contrary, mitigation witnesses and defense counsel pleaded for mercy before the sentencing jury. (*See generally* Vol. 12 at 197-98; Vol. 13 at 23, 32, 36, 41, 54-55, 123-27).

The ACCA's decision upholding the trial court's instruction was not contrary to clearly established federal law, nor was it an unreasonable application of clearly established federal law. This claim is due to be denied.

G. *Batson*

Reynolds claims that the trial court erred by failing to find, *sua sponte*, a *prima facie* case of a *Batson* violation (Doc. # 1 at 152-55). Reynolds argues that "the prosecutor's illegal removal of [African American] jurors from [his] jury violated his rights to a fair trial, equal protection, and reliable sentence as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States." (*Id.* at 155).

Reynolds presented his *Batson* claim to the ACCA on direct review. (*See* Vol. 19 at 127-29). The ACCA rejected the claim. That is, the ACCA held that the circuit court's failure to raise a *Batson* challenge *sua sponte* did not result in plain error. *Reynolds I*, 114 So. 2d at 86.

In *Batson v. Kentucky*, 476 U.S. 79 (1986), the Court created a three-part test to guide a trial court's review of peremptory strikes. "First, the defendant must make out a prima facie case by showing that the totality of the relevant facts gives rise to an inference of discriminatory

purpose. Second, once the defendant has made out a prima facie case, the burden shifts to the State to explain adequately the racial exclusion by offering permissible race-neutral justifications for the strikes. Third, if a race-neutral explanation is tendered, the trial court must then decide whether the opponent of the strike has proved purposeful racial discrimination." *Johnson v. California*, 545 U.S. 162, 168 (2005) (internal citations and quotations omitted).

The ACCA began by acknowledging the trial court's finding that "[a] jury was struck and sworn in this case, consisting of seven females, and five males. One of the male jurors was black, and all of the remaining jurors were white. There were no *Batson* challenges made by either side and no *Batson* violations occurred in the selection of the jury." *Reynolds I*, 114 So. 2d at 85, quoting Vol. II, C. 320, 327, 334, 341, 348. Because Reynolds failed to make a *Batson* objection at trial, the ACCA reviewed his claim for plain error. *Id.* Reynolds did not specify to the ACCA what he claimed was "unquestionable evidence of discrimination," and the ACCA noted that any so-called unquestionable evidence was not evident in the record. *Id.* at 85-86.

The ACCA next explained that, under plain error review of a *Batson*, "the record must raise an inference that the state . . . engaged in 'purposeful discrimination' in the exercise of its peremptory challenges." *Id.* at 86, quoting *Ex parte Walker*, 972 So. 3d 737, 742 (Ala. 2007), *cert. denied*, 552 U.S. 1088 (2007). However, Reynolds's only factual basis supporting this claim was that the State used peremptory strikes to remove nine of fourteen qualified African American venire members. *Id.* The ACCA concluded that this argument was unavailing because "Alabama courts have repeatedly held that numbers alone are not sufficient to establish a prima facie case of discrimination." *Id.*, quoting *Vanpelt*, 74 So. 3d at 53. Further, the ACCA "thoroughly reviewed the record and f[ound] no inference of purposeful discrimination by the State."[55] *Id.*

[55] The record before the ACCA indicates that the prosecution and defense each had thirty-six peremptory strikes. (Vol. 18 at 76). Each party's final strike served as an alternate juror. (*Id.*). The prosecution's final strike was

1. Reynolds Waived His *Batson* Claim

Reynolds waived this claim by not making a timely *Batson* objection and not "fairly presenting" this claim to the state courts. (Vol. 2 at 122, 129, 136, 143, 150). Evidence and arguments not presented to the trial court cannot later be relied on to prove that the trial court violated *Batson* and its progeny. *See United States v. Houston*, 456 F.3d 1328, 1338 (11th Cir. 2006) (refusing to consider defendant's *Batson* argument because it was not presented to the trial court); *see United States v. Rodriguez*, 917 F.2d 1286, 1288 n.4 (11th Cir. 1990), *vacated in part on reh'g*, 935 F.2d 294 (11th Cir. 1991) ("An inquiry into the government's exercise of its peremptory challenges is initiated by a . . . timely objection.").

"The failure to make a timely *Batson* objection results in the waiver of the claim." *United States v. Cashwell*, 950 F.2d 699 (11th Cir. 1992). In *Cashwell*, the Eleventh Circuit rejected the defendant's *Batson* claim after finding that the "record establishe[d] that Cashwell's trial lawyer made no objections of any kind during *voir dire*." *Id.*; *see also United States. v. Tate*, 586 F.3d 936, 943 (11th Cir. 2009) ("[A] defendant forfeits a *Batson* claim if he or she fails to object on this ground in the district court."). Following these cases, Alabama courts have held *Batson* challenges waived when not raised at trial. *See, e.g.*, *White v. State*, 179 So. 3d 170, 198 (Ala. Crim. App. 2013); *Russell v. State*, 272 So. 3d 1134, 1152-53 (Ala. Crim. App. 2017); *Gaston v. State*, 265

African American. (*Id.* at 73, 76, 78). Reynolds misleadingly omits the alternate jurors from his calculations. In fact, two of the fourteen potential jurors, or 14.3%, were African American. Given Reynolds's contention that, at the time of trial, African Americans comprised 14.5% of Etowah County and the ACCA's independent calculation that the "qualified" venire was 15.5% African American, (*see id.* at 73-76; *but cf.* Doc. # 1 at 153) (petitioner claiming, without substantiation, that the venire was 17.5% African American), Reynolds has failed to show that the ACCA's finding was objectively unreasonable.

The ACCA also noted that it was unable to review the jury questionnaires completed by the venire members. When the ACCA requested the production of those questionnaires, "pursuant to Rule 18.2(b), Ala. R. Crim. P., [the ACCA] was informed by the Etowah circuit clerk that the questionnaires had not been retained." *Reynolds I*, 114 So. 3d at 86 n. 6.

So. 3d 387, 414-15 (Ala. Crim. App. 2018); *see also, e.g.*, *Sheuing v. State*, 161 So. 3d 245, 298-305 (Ala. Crim. App. 2013) (Windom, P.J., concurring specially with opinion, joined by Joiner, J). Accordingly, the court concludes that Reynolds waived his *Batson* claim by failing to make an objection at trial.

2. In Any Event, Reynolds Cannot Succeed on His *Batson* Claim

Even if Reynolds has not waived his claim, he has failed to show that the ACCA's decision was contrary to, or an unreasonable application of, *Batson* and its progeny.[56] *See* 28 U.S.C. § 2254(d)(1). "A petitioner has the burden of establishing his right to federal habeas relief and of proving all facts necessary to show a constitutional violation." *Romine*, 253 F.3d at 1357 (internal citations omitted). Notably, the Supreme Court has emphasized the deference federal district courts must afford state court decisions on federal habeas review, particularly *Batson* claims:

> The trial court's determination is entitled to "great deference," . . . and "must be sustained unless it is clearly erroneous," *Snyder v. Louisiana*, 522 U.S. 472, 477 (2008).
>
> That is the standard on direct review. On federal habeas review, AEDPA, "imposes a highly deferential standard for evaluating state-court rulings" and "demands that state-court decision be given the benefit of the doubt." *Renico v. Lett*, 559 U.S. 766, 773 (2010) (internal quotation marks omitted).

Felkner v. Jackson, 562 U.S. 594, 598 (2011).

Reynolds relies on *Batson*, *Johnson v. California*, 545 U.S. 162 (2005), *Miller-El v. Dretke*, 545 U.S. 231 (2005), *Powers v. Ohio*, 499 U.S. 400 (1991), and *Edmonson v. Leesville Concrete*

[56] Reynolds does not specify which provision of § 2254 he uses to challenge the ACCA's determination. (*See generally* Docs. # 1 at 152-55; 31 at 143-47). The court infers from Reynolds's reply brief's heading — "Contrary to Supreme Court Precedent, the Circuit Court Failed to Find That the State Improperly Exercised its Peremptory Strikes in a Discriminatory Manner," (Doc. # 31 at 143) — and his failure to point to any specific facts which the ACCA unreasonably determined that Reynolds alleges error only under 28 U.S.C. § 2254(d)(1). Thus, Reynolds has abandoned any grounds available for relief under § 2254(d)(2). *See Romine*, 253 F.3d at 1357.

Co., 500 U.S. 614 (1991). (Docs. # 1 at 155; 31 at 146-47).[57] However, the ACCA's decision is not contrary to any of those decisions.

In *Batson*, the Supreme Court established the rule that a juror may not be struck due to race. In that case, the prosecution removed every African American venire member, to which the defense timely objected. 476 U.S. at 100. *Johnson*, decided after *Batson*, clarifies the level of scrutiny to be applied by the trial court during the first step of a *Batson* inquiry. *Johnson*, 545 U.S. at 168. In *Dretke*, the defense objected to the discriminatory strikes (the prosecution had excluded 91% of the eligible African American venire members). *Dretke*, 545 U.S. at 236, 241. The *Powers* court held that a criminal defendant has standing to raise the equal protection rights of a juror excluded from service in violation of *Batson*. 499 U.S. at 410. In *Powers*, the defendant objected during voir dire to the discriminatory peremptory strikes. *Id.* at 403. Finally, *Edmonson* extends the holdings in *Batson* and *Powers* to civil trials. *Edmondson*, 500 U.S. at 631.

Reynolds did not make a *Batson* objection at trial; therefore, his claim is materially distinguishable from the above cases that he relies upon. The ACCA's holding -- that Reynolds's reliance on numbers alone fails to satisfy *Batson*'s *prima facie* requirement -- is not contrary to, or an unreasonable application of, clearly established federal law. No Supreme Court case clearly calls that holding into question. Thus, Reynolds's *Batson* claim is due to be denied.

H. *Ring*

In *Ring v. Arizona*, 536 U.S. 584 (2002), the Supreme Court held that the Sixth Amendment's jury-trial guarantee requires that a jury, not a judge, find every fact that makes a defendant death-eligible beyond a reasonable doubt. 536 U.S. at 609. Reynolds contends that his

[57] Reynolds also cites *Miller El v. Cockrell*, 537 U.S. 322 (2003), *Snyder v. Louisiana*, 552 U.S. 472 (2008), *Rose v. Mitchell*, 443 U.S. 545 (1979), and *Coleman v. Thompson*, 501 U.S. 722 (1991). The court has reviewed these cases and concludes that the ACCA's decision is not contrary to their holdings. Reynolds also cites to several Alabama cases, but those cases do not speak to whether the ACCA's decision is contrary to clearly established federal law.

sentence "runs afoul of *Ring* because a jury never made the factual findings necessary to support the imposition of the death penalty" and that "[t]here is no basis for concluding that the aggravating circumstances in this case were found by a unanimous jury to exist beyond a reasonable doubt." (Doc. # 1 at 145).

The ACCA rejected this claim on direct appeal, providing:

> Initially, we note that two of the three aggravating circumstances – *i.e.*, that the murders were committed during a first-degree robbery, and that two or more people were killed pursuant to a common scheme or plan – were found to exist beyond a reasonable doubt based on the jury's unanimous verdicts in the guilt phase finding Reynolds guilty of five counts of capital murder. The third aggravating circumstance – that the murders were especially heinous, atrocious, or cruel when compared to other capital offenses – was stipulated to by the parties. Moreover, Reynolds did not object to the imposition of his sentence on these grounds. Accordingly, we review his allegations for plain error only. These same arguments have been addressed and decided adversely to Reynolds. *See Doster v. State*, 72 So. 3d 50 (Ala. Crim. App. 2010); *Sharifi v. State*, 993 So. 2d 907, 940-41 (Ala. Crim. App. 2008), *cert. denied*, 555 U.S. 1010 (2008); *Lewis v. State*, 24 So. 3d 480, 533-36 (Ala. Crim. App. 2006), *aff'd*, 24 So. 3d 540 (Ala. 2009), cert. denied, 558 U.S. 1078 (2009). Because the existence of the aggravating circumstances was found either by the jury's guilt-phase verdicts or by stipulation of the parties, Reynolds is due no relief on [this] claim.

Reynolds I, 114 So. 3d at 156-57 (parallel citations omitted).

Alabama law makes the death penalty available in a capital case whenever "at least one aggravating circumstance" exists. Ala. Code §13A-5-45(f). That a murder occurred during a robbery is an aggravating circumstance. *Id.*; § 13A-5-49(4). The jury convicted Reynolds of murder during a first-degree robbery at the guilt phase of his trial. Thus, every fact that made Reynolds eligible for the death penalty was found by a jury beyond a reasonable doubt at the conclusion of the guilt phase of his trial. That is exactly what *Ring* requires. Therefore, the ACCA's decision was not contrary to, or an unreasonable application of, clearly established federal law as provided by the *Ring* court. *See Lee v. Comm'r, Ala. Dep't Corr.*, 726 F.3d 1172 (11th Cir. 2013) ("the holding of *Ring* is narrow: the Sixth Amendment's guarantee of jury trials requires that the

finding of an aggravating circumstance that is necessary to imposition of the death penalty must be found by a jury. That occurred in [the petitioner's] case by virtue of the jury's capital robbery-murder verdict. *Ring* goes no further."). Accordingly, this claim is due to be denied.

I. Alabama's Capital Sentencing Process

In relation to his *Ring* claim, Reynolds also argues that Alabama's capital sentencing process, as defined in *Ex parte Waldrop*, 859 So. 2d 1181 (Ala. 2002), is unconstitutional. (Doc. # 1 at 146-47). In *Waldrop,* the Alabama Supreme Court held that a judge was able to constitutionally impose the death penalty when a guilt-phase jury found that a statutory aggravating circumstance existed by virtue of their unanimous verdict. 859 So. 2d at 1187-90. In that case, an Alabama jury convicted the defendant of (1) two counts of murder made capital because the murders were committed during a first-degree robbery and (2) one count of murder made capital because two or more persons were murdered during a single course of conduct. *Id.* at 1185. The jury recommended a sentence of life imprisonment without parole by a vote of ten to two. *Id.* Notwithstanding the jury's recommendation, the trial judge sentenced the defendant in *Waldrop* to death. *Id.*

The *Waldrop* court held that the defendant's death sentence did not violate *Ring* or *Apprendi v. New Jersey*, 530 U.S. 466 (2000), because he became death eligible upon the jury's guilt-phase finding that he committed murder during a first-degree robbery. *Waldrop*, 859 So. 2d at 188. The Alabama Supreme Court explained that "the findings reflected in the jury's [guilt-phase] verdict alone exposed Waldrop to a range of punishment that had as its maximum the death penalty[,]" and reasoned that, once exposed to the punishment of death by the jury's guilt-phase verdict, there was no constitutional problem with a judge choosing to impose the maximum penalty

authorized -- death -- notwithstanding a jury's penalty-phase recommendation to the contrary.[58] *Id*.

Reynolds argues that the ACCA's reliance on *Waldrop* "renders defendants convicted of some capital offenses automatically subject to the death penalty at the end of the first phase, while defendants convicted of other capital offenses cannot be sentenced to death without further jury fact-findings at the penalty phase." (Doc. # 1 at 146). Reynolds claims this "arbitrary distinction violates the requirements of the Due Process Clause and the Sixth, Eighth and Fourteenth Amendments to the United States Constitution," as well as the integrity of the jury's judgment. (*Id.* at 146-47). More specifically, Reynolds's habeas petition can be understood to assert that the state court's reliance on *Waldrop* was contrary to, and an unreasonable application of, *Simmons v. South Carolina*, 512 U.S. 154, 162 (1994) (plurality opinion), and *Adams v. Texas*, 448 U.S. 38, 46-47 (1980). (*Id.*). This argument is unpersuasive.[59]

First, Reynolds claims that, under *Simmons*, "due process entitles the defendant to inform the jury about the nature and consequences of that decision." (*Id.* at 146). Although Reynolds does not elaborate on this claim, the court infers that he contends that, under *Simmons*, he was entitled to inform the guilt-phase jury that a conviction for murder during a robbery, or two or more

[58] The court recognizes that Alabama amended its capital sentencing statute in 2017. *See* S.B. 16, 2017 Leg., Reg. Sess. (Ala. 2017). The 2017 amendment binds a court to a jury's life-sentence recommendation. *See* § 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.").

[59] Reynolds's habeas petition cites briefly to *Caldwell v. Mississippi*, 472 U.S. 320, 328-329 (1985). To the extent Reynolds contends the decision in *Caldwell* supports the proposition set forth in *Simmons* (Doc. # 1 at 146-47), Reynolds is misguided. *Caldwell* does no such thing. Notably, Reynolds provides the court with only a bare quotation, without any analysis or explanation, and does not apply (nor attempts to apply) *Caldwell* in support of his argument here. (*See id.* at 145-47).

Moreover, even assuming *Caldwell* stated and/or supported the proposition determined in *Simmons*, Reynolds's argument is still unsuccessful. As discussed below, the ACCA's decision did not contravene *Simmons*, and, thus, would not have contravened *Caldwell* either. The court notes that Reynolds raised a *Caldwell* claim in its proper context -- alleging the court's improper reduction of jury responsibility in sentencing -- which the court addressed above and found lacked merit. *See* Part IV(E), *supra*.

murders during a single course of conduct, would result in the availability of the death penalty. *Simmons* requires nothing of the sort.

Simmons held that where a defendant's future dangerousness is at issue in the penalty phase of a capital trial and the defendant is ineligible for parole under state law, "due process requires that the sentencing jury be informed that the defendant is parole ineligible." 512 U.S. at 156. A plurality of the court reached that conclusion based on the principle that due process "does not allow the execution of a person on the basis of information which he had no opportunity to deny or explain." *Id.* at 161 (internal quotation marks omitted). During the penalty phase of Simmons's capital trial, the state argued for the death penalty, in part, on the basis that the defendant "would pose a future danger to society if he was not executed" — despite the fact that the defendant was precluded from informing the jury that he was, in fact, ineligible for parole by nature of his capital conviction. *Id.* at 162. The plurality concluded that the defendant was denied due process because the state "succeeded in securing a death sentence on the ground, at least in part, of [Simmons's] future dangerousness, while at the same time concealing from the sentencing jury the true meaning of its noncapital sentencing alternative, namely, that life imprisonment meant life without parole." *Id.*

Simmons did not address the issue Reynolds raises in this case, namely whether due process entitled him to inform the jury at the *guilt* phase of his trial that a conviction for murder during a robbery would expose him to a maximum sentence of death. (*See* Doc. # 1 at 146-47). *Simmons* spoke to a defendant's right to inform the jury at the *penalty* phase of his trial that, by virtue of his capital conviction, he was not parole-eligible if sentenced to life imprisonment. This right was implicated by the prosecution's decision to argue that death was the *only* appropriate sentence because of the defendant's "potential" risk to the community. Both the court's plurality opinion

and Justice O'Connor's concurring opinion in *Simmons* recognized that the court's holding represented a narrow exception to the "broad proposition" espoused in other Supreme Court decisions: "that [federal courts] generally will defer to a State's determination as to what a jury should and should not be told about sentencing." *Id.* at 168; *see also id*. at 177 (O'Connor, J., concurring in the judgment).

Reynolds has not identified any clearly established Supreme Court precedent holding that a defendant has a constitutional right to inform a guilt-phase jury that a conviction for a particular offense will result in the defendant being death-eligible. Accordingly, Reynolds has failed to establish that the ACCA's decision was contrary to, or an unreasonable application of, *Simmons* or any other Supreme Court precedent.

Next, Reynolds argues that "the *Waldrop* decision undermines the reliability of the capital sentencing process and unfairly skews sentencing toward the imposition of the death penalty" in violation of *Adams v. Texas*, 448 U.S. 38 (1980). (Doc. # 1 at 147). Without any analysis, Reynolds conclusively states that "[s]uch proceedings are fundamentally incompatible with the requirements of the Due Process Clause and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in capital cases, and in conflict with Supreme Court precedent in *Ring*." (*Id.*).

In *Adams,* the Supreme Court held that Texas violated the Constitution, "when it excluded members of the venire from jury service because they were unable to take an oath that the mandatory penalty of death or imprisonment for life would not affect their deliberations on any issue of fact." 448 U.S. at 40 (internal quotation marks and alteration omitted). No jury-service oath is at issue in the present case, and Reynolds has completely failed to demonstrate how the ACCA's decision is either contrary to, or an unreasonable application of, *Adams, Ring,* or any other Supreme Court holding. Therefore, Reynolds is due no habeas relief on this claim.

J. Alabama's Method of Execution

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor *cruel and unusual punishment inflicted*." U.S. Const. amend. VIII. In Alabama, as of June 1, 2018, "a death sentence shall be imposed by lethal injection, unless the person sentenced to death affirmatively elects to be executed by electrocution and or nitrogen hypoxia." Ala. Code § 15-18-82.1 (2018). Reynolds argues that "Alabama's execution protocol poses a substantial risk of inflicting unnecessary pain" and that, under "evolving standards of decency," Alabama's method of execution "constitutes cruel and unusual punishment under the Eighth and Fourteenth Amendments." (Doc. # 1 at 157).

Reynolds's method-of-execution claim is inappropriate in a federal habeas petition. The appropriate vehicle for him to challenge method would be in a separate action under 42 U.S.C. § 1983. "Issues sounding in habeas are mutually exclusive from those sounding in a § 1983 action." *McNabb v. Comm'r, Ala. Dep't of Corr.*, 727 F.3d 1334, 1344 (11th Cir. 2013). This issue has been addressed by courts on multiple occasions.

For example, in *Hutcherson v. Riley*, 468 F.3d 750 (11th Cir. 2006), the Eleventh Circuit found that "[a]n inmate convicted and sentenced under state law may seek federal relief under two primary avenues": a petition for habeas corpus under § 2254 or a complaint under 42 U.S.C. §1983. *Hutcherson,* 468 F.3d at 75; *see also McNabb*, 727 F.3d at 1344. In *Hutcherson*, the Eleventh Circuit explained that, "[t]he line of demarcation between a § 1983 civil rights action and a § 2254 habeas claim is based on the effect of the claim on the inmate's conviction and/or sentence." *Hutcherson,* 468 F.3d at 754.

As further explained by the Eleventh Circuit:

> A claim is properly raised under § 1983 when "an inmate challenges the circumstances of his confinement but not the validity of his conviction and/or

> sentence." *Id.* (internal quotation marks omitted). By contrast, "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. 2001), *cert. denied*, [564] U.S. [1069] (2011).
>
> Usually, an inmate who challenges a state's method of execution is attacking *the means by which the State intends to execute [the inmate]*, which is a circumstance of his confinement. It *is not an attack on the validity of his conviction and/or sentence*. For that reason, '[a] § 1983 lawsuit, not a habeas proceeding, is the proper way to challenge lethal injection procedures." *Tompkins v. Sec'y, Dep't of Corr.*, 577 F.3d 1257, 1261 (11th Cir. 2009).

McNabb, 727 F.3d at 1344 (parallel citations omitted) (emphasis added). *See also Rivera v. Humphrey*, 2017 WL 6035017, at *3 (S.D. Ga. Dec. 6, 2017) ("Petitioner's claim challenges lethal-injection procedure, not the constitutionality of his conviction. Thus, it is not a cognizable habeas claim."); *James v. Culliver*, 2014 WL 4926718, at *149 (N.D. Ala. Sept. 30, 2014) ("[C]laims challenging lethal injection protocols as cruel and unusual punishments proscribed by the Eighth Amendment to the United States Constitution are properly brought in actions bottomed upon 42 U.S.C. § 1983, rather than as an independent claim within a *habeas* petition"), *aff'd sub nom. James v. Warden*, 957 F.3d 1184 (11th Cir. 2020); *King v. Chatman*, 2014 WL 1365415, at *3 (S.D. Ga. Apr. 7, 2014) ("By challenging the state's method of execution, Petitioner is challenging a circumstance of his confinement rather than attacking the validity of his conviction or sentence – thereby making his [§ 2254] claim non-cognizable."). Here, Reynolds plainly challenges the method of execution. This claim does not entitle Reynolds to habeas relief under § 2254.

Alternatively, as the ACCA recognized, such an attack is foreclosed by cases upholding the constitutionality of lethal injection. *See, e.g., Baze v. Rees*, 553 U.S. 35, 54-55 (2008); *DeYoung v. Owens*, 646 F.3d 1319, 1326-27 (11th Cir. 2011); *Reynolds I*, 114 So. 3d at 157-58. In *Baze*, the Supreme Court affirmed the denial of an action brought by a death row inmate claiming that Kentucky's use of a three-drug lethal injection execution protocol posed an

unacceptable risk of significant pain and, therefore, constituted cruel and unusual punishment proscribed by the Eighth Amendment. 553 U.S. at 63. The Court reasoned that, "[s]imply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of 'objectively intolerable risk of harm' that qualifies as cruel and unusual." *Baze*, 553 U.S. at 50.

In *Baze*, the Supreme Court also decided that an Eighth Amendment violation cannot be established by a showing of a marginally safer alternative to a method of execution, because such an approach would "transform courts into boards of inquiry charged with determining 'best practices' for executions, with each ruling supplanted by another round of litigation touting a new and improved methodology." *Id.* at 51. *See also Glossip v. Gross*, 576 U.S. 863, 867 (2015) (making clear that the standard set forth in *Baze*, governs "all Eighth Amendment method-of-execution claims");[60] *id.* at 877-78 (finding that, under *Baze* (in a §1983 claim), a prisoner must show a "feasible, readily implemented" alternative that "in fact significantly reduce[s] a substantial risk of severe pain.").

Together, *Baze and Glossip* confirm the Supreme Court's recognition that the Eighth Amendment "does not demand the avoidance of all risk of pain in carrying out executions." *Baze*, 553 U.S. at 47. *Baze* provides instead that the Constitution affords a "measure of deference to a State's choice of execution procedures" and does not authorize courts to serve as "boards of inquiry charged with determining 'best practices' for executions." *Id.* at 51 & n.2. The Eighth Amendment does not come into play unless the risk of pain associated with the State's method is "substantial

[60] The court recognizes that the ACCA's challenged decision on direct appeal pre-dates the *Glossip* decision. The court refers to *Glossip* not for any precedential purpose but rather to provide further insight into the Supreme Court's decision in *Baze*, on which the ACCA relied.

when compared to a known and available alternative." *Glossip*, 576 U.S. at 878 (citing *Baze*, 553 U.S. at 61).

Additionally, as the ACCA recognized in its decision, the Alabama Supreme Court has held that Alabama's method of performing lethal injection does not constitute cruel and unusual punishment. *Ex parte Belisle*, 11 So. 3d 323, 338-39 (Ala. 2008). In *Belisle*, the death-row inmate argued that the State of Alabama, which uses the same three-drug protocol as a majority of the states, lacked the procedures to guard against the "risk of unnecessary pain and suffering" that could result from the administration of these drugs. *Id.* at 338. The Alabama Supreme Court rejected the contention that the Alabama's lethal injection scheme violated the Eighth Amendment. *Id.* at 339. "'Simply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of "objectively intolerable risk of harm" that qualifies as cruel and unusual.'" *Id.*, quoting *Baze*, 553 U.S. at 50.

Even assuming for the sake of argument that Reynolds's cruel and unusual punishment claim was properly before the court in his *habeas* petition (and it is not), for the reasons discussed above, Reynolds has not shown that the ACCA's rejection of this claim is contrary to, or an unreasonable application of, clearly established federal law as established by the Supreme Court precedent. Therefore, Reynolds is due no federal habeas relief on this claim.

V. INEFFECTIVE ASSISTANCE OF COUNSEL

Reynolds argues that his trial counsel rendered ineffective legal representation during both the guilt and penalty phase of his capital murder trial. (*See* Doc. # 1 at 67; *see also* Vol. 24 at 146). *See Strickland v. Washington*, 466 U.S. 668 (1984). More specifically, Reynolds's *Strickland* claim is divided into the four segments of this capital litigation during which he alleges he was denied effective assistance of counsel: (1) at the guilt-phase of trial; (2) at the penalty phase of

trial; (3) at his sentencing hearing; and (4) in connection with his motion for a new trial. Reynolds's guilt-phase claim under *Strickland* is comprised of ten individual sub-claims, and Reynolds's penalty-phase *Strickland* claim is comprised of four subclaims.

Reynolds presented his *Strickland* claims for the first time to the Circuit Court of Etowah County in his amended Rule 32 petition. (*See generally* Vol. 24 at 146, 201; Vol. 25 at 3-17). The Rule 32 court dismissed Reynolds's *Strickland* claims on the pleadings, and Reynolds appealed that dismissal to the ACCA. (*See* Vol. 31 at 2-111; *see also* Vol. 25 at 162-202; Vol. 26 at 3-22). Upon review, the ACCA upheld the Rule 32 trial court's dismissal of Reynolds's *Strickland* claims, concluding these claims were "insufficiently pleaded under Rules 32.3 and 32.6(b), Ala. R. Crim. P., [or] without merit." (Vol. 33 at 175).

Reynolds contends that the ACCA's adjudication of his ineffective assistance claims was based on "an unreasonable determination of the facts and resulted in a decision that was both contrary to and an unreasonable application of clearly established Supreme Court precedent." (Doc. # 1 at 69-70).[61] After careful review, the court concludes Reynolds's ineffective assistance of counsel claims are individually and collectively without merit and are due to be denied.

A. Guilt Phase Claims of Ineffective Assistance

Reynolds contends that his trial counsel provided ineffective guilt-phase assistance in violation of *Strickland*. (Doc. # 1 at 70). He asserts that his appointed trial counsel provided constitutionally ineffective assistance of counsel because they failed to (1) take necessary steps to ensure Reynolds's participation in his own defense; (2) adequately investigate the case against him; (3) investigate decomposition evidence; (4) move for a change in venue; (5) conduct adequate

[61] In his introduction, Reynolds cites without any elaboration the following cases: *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v. Taylor*, 529 U.S. 362 (2000); *Rompilla v. Beard*, 545 U.S. 374 (2005); *Porter v. McCollum*, 538 U.S. 30 (2009); *Sears v. Upton*, 561 U.S. 945 (2010). (*See* Doc. # 1 at 70). The court will discuss these cases in its connection with Reynolds's *Strickland* subclaims.

voir dire; (6) object to racial discrimination in jury selection; (7) introduce a third-party's confession; (8) object to improper prosecutorial commentary and other improprieties; (9) examine a "key witness;" and (10) object to heightened security measures.

The court will address each of Reynolds's guilt-phase subclaims. However, before analyzing his individual claims, the court makes this observation: Reynolds continuously fails to specify which provisions of § 2254(d) that his petition -- and the discrete claims he presents within his petition -- rely on. Nevertheless, as explained below, the court concludes that Reynolds has failed to demonstrate that the ACCA's decision was contrary to, or involved an unreasonable application of, clearly established Supreme Court precedent. *See* 28 U.S.C. § 2254(d)(1). Nor has Reynolds demonstrated that the ACCA's decision rested on an unreasonable determination of the facts presented. *See* 28 U.S.C. § 2254(d)(2). The court addresses each of his sub-claims in detail below.

1. Meaningful Participation in His Own Defense

Reynolds contends that his trial counsel failed to develop an effective relationship with him. Reynolds contends that his attorneys were ineffective because they did not meet with him until six weeks after he was charged, failed to procure eyeglasses for him (despite knowing he had poor vision), and failed to properly advise him regarding his decision to testify in his own defense.

The ACCA affirmed the summary dismissal of this claim, explaining Reynolds "has not pleaded how he was prejudiced by counsel's actions." *Reynolds v. State*, Mem. Op. at 36 (Ala. Crim. App. Apr. 22, 2016). The ACCA concluded that Reynolds "failed to plead what evidence trial counsel were unable to uncover, what actions trial counsel were unable to take, or how the course of the investigation was altered to Reynolds's detriment based on their alleged ineffectiveness." *Id*. The ACCA also determined that Reynolds failed to plead how his allegedly

limited vision prejudiced him at trial. *Id*. Finally, the court held that Reynolds's allegation that his trial counsel failed to adequately advise him regarding his decision to testify was facially meritless. *Id.* He failed to plead "what advice should have been given to him or even whether he would have chosen not to testify had he been adequately advised by trial counsel," or "how trial counsel should have prepared him to testify or how his testimony would have been different had trial counsel adequately prepared him." *Id*.

To warrant federal habeas relief on this claim, Reynolds must demonstrate that the ACCA's decision that he failed to plead specific facts establishing prejudice under *Strickland* was objectively unreasonable or contrary to clearly established federal law. *See* 28 U.S.C. § 2254(d). He has not met this requirement.

As the Eleventh Circuit has instructed, when faced with a Rule 32 adjudication rejecting a particular claim due to insufficient pleading, a district court must "examine the reasonableness of the Court of Criminal Appeals' adjudication of the claims based upon the allegations contained in his" Rule 32 petition. *Borden v. Allen*, 646 F.3d 785, 816-17 (11th Cir. 2011); *see also Cullen,* 563 U.S. at 181-82 (2011) (holding "that review under [section] 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits"). Accordingly, the court addresses Reynolds's arguments as presented in his Rule 32 Amended petition.

The ACCA concluded that Reynolds had failed to demonstrate *Strickland* prejudice resulting from his trial counsel's purported failures to communicate with him. That conclusion was neither objectively unreasonable nor contrary to clearly established Supreme Court precedent. (*See* Vol. 33 at 135). The ACCA determined that Reynolds failed to plead "what evidence trial counsel were unable to uncover, what actions trial counsel were unable to take, or how the course of the

investigation was altered to Reynolds's detriment based on [counsel's] alleged ineffectiveness." (*Id.*).

Reynolds also failed to provide any specific facts in the Rule 32 court record concerning how he was prejudiced by this alleged lack of communication.[62] Reynolds argues that he did plead specific facts concerning his counsel's inaction or failure to advise him. (Doc. # 31 at 74). He did not. Reynolds failed to allege any facts concerning the information his counsel was unable to procure due to any alleged deficient communication, tardy communications, and/or breakdown in rapport. Nor has he explained what information was left undiscovered due to counsel's failure to meet with him more frequently.

Alternatively, Reynolds's claim fails because he has not pleaded or shown any prejudice. Reynolds is required to plead that, but for his counsel's deficiencies, there exists a reasonable probability he would not have been convicted of five counts of capital murder nor been sentenced to death. *See Ward*, 592 F.3d at 1177. Reynolds's claims are based on speculation and conjecture. He has not indicated that, but for his counsel's purportedly insufficient communications and their

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[62] Reynolds made a *pro se* motion requesting substitution of counsel on the day opening statements were set to begin, but the trial court denied that motion after hearing Reynolds's reasons on the record. (*Id.*).

Specifically, Reynolds's handwritten *pro se* "Motion to Remove Mr. Hart as [his] Attorney" states:

1. Mr. Hart has made it clear to me he doe's [sic] not believe me "inncent [sic]." So haw [sic] can he put on a fair defence? [sic]
2. Mr. Hart has heeled [sic] information from me that he had in his position [sic].
3. I have ask [sic] Mr. Hart to put in a motion and [he] has yet to do so.
4. A motion was filed by Mrs. Granger afther [sic] the court ask that she remove herself from this case. She agreed to do so. Mrs. Granger filed this motion while my attorney Mr. hart was on vacation he never objected to this even though I ask this motion not be filed.
5. I feel Mr. Hart has reveiled [sic] information to the state about my case.
6. I ask that Mr. Hart be removed from this case and that he be replaced and that my Attorney's be giving [sic] adequate time to prepair [sic] for my Defence [sic].

(Vol. 2 at 119). At most, Reynolds's motion indicates a lack of rapport with and trust in his defense counsel. *See Morris v. Slappy*, 461 U.S. 1, 13-14 (1983) ("[R]ejecting the claim that the Sixth Amendment guarantees 'a meaningful relationship between an accused and his counsel[,]'" as "[n]o court could possibly guarantee that a defendant will develop . . . rapport with his attorney – privately retained or provided by the public."). Further, the last-minute nature of the motion suggests intentional delay rather than an honest belief his counsel was ineffective.

supposedly lackluster relationship, some admissible (and reliable) exculpatory evidence would have been discovered and presented to the jury, and, on that basis, there is a reasonable probability of a different outcome.

Reynolds's argument that his counsel was ineffective for failing to procure him a pair of eyeglasses is equally unavailing. Reynolds alleged that defense counsel failed to provide him with a new pair of prescription eyeglasses, despite counsel's awareness of Reynolds's visual impairment and knowledge that Reynolds's prescription eyeglasses were broken and taken into the State's custody to be presented as evidence at Reynolds's trial. (Doc. # 31 at 74) (citing Vol. 11 at 98-99, 108); (Doc. # 1 at 71). Reynolds contends that, as a result, he suffered prejudice because he was unable to see exhibits and, more generally, participate meaningfully in his own defense at trial. (Doc. # 1 at 74) (citing Vol. 24 at 162-63) (citing in turn Vol. 11 at 98-99, 108).

As discussed above, the ACCA noted that Reynolds failed to plead "how his alleged limited vision prejudiced him at trial" and failed to demonstrate *Strickland* prejudice when relying on "a bare assertion that he was prejudiced and that there was a reasonable probability that the outcome would have been different." (Vol. 33 at 135) (citing *Hyde*, 950 So. 2d at 356). Moreover, Reynolds does not provide any precedential support for his argument. In any event, this claim is without merit as Reynolds has not shown (and the record does not support) that Reynolds's nearsightedness resulted in a denial of his ability to assist his counsel and meaningfully participate in his defense. (*See* Vol. 11 at 108-09) (explaining that while nearsighted, Reynolds "can see anything up close").

Similarly, Reynolds's contentions regarding his counsel's purported failure to discuss Reynolds's decision to testify and to prepare for such testimony are unavailing. He cannot show that the ACCA's holding that these claims were insufficiently pleaded was objectively unreasonable or contrary to Supreme Court precedent. (*Id.*). Reynolds did not plead what advice

should have been given to him, whether he would have chosen not to testify had he had been adequately advised, how trial counsel should have prepared him to testify, or how his testimony would have been different if he were adequately prepared. (Vol. 33 at 135) (citing *Hyde*, 950 So. 2d at 356). But, even if properly pleaded, Reynolds's claim would still fail for an alternative reason: he does not indicate how he was in any way prejudiced.

2. Investigation of the State's Case

Reynolds contends that trial counsel was ineffective for failing to adequately investigate the State's case. (Doc. # 1 at 74-75) (citing Vol. 24 at 166-68). In support, Reynolds points to counsel's alleged inability to procure potential impeachment evidence for trial by failing to hire a replacement investigator, failing to interview multiple State's witnesses, and failing to identify and interview the Martins' neighbors and other witnesses (including persons mentioned in witness statements to police). (*See id.*) (citing Vol. 24 at 166-68).

The ACCA determined that Reynolds's claim that trial counsel "failed to adequately investigate the State's case" was insufficiently pleaded and properly dismissed because (1) "most" of the individuals Reynolds alleged "could have been interviewed by trial counsel" were "unnamed" and (2) even when an individual was named Reynolds did not specifically "plead what counsel would have learned from a majority of the individuals had [they] been interviewed." (Vol. 33 at 140) (citing *Daniel v. State*, 86 So. 3d 405, 416-17 (Ala. Crim. App. 2011)) (holding that a petitioner insufficiently pleaded a *Strickland* claim regarding counsel's alleged failure to investigate where the petitioner did not plead the information to be uncovered or the names of witnesses to be interviewed). The ACCA similarly held that Reynolds's claim that "trial counsel failed to locate witnesses to corroborate" an allegedly threatening note written by Chad Martin to

Charles Martin was insufficiently pleaded because Reynolds "failed to plead the name of anyone who could, in fact, corroborate the existence of the note." (*Id.*).

With respect to Reynolds's claim that counsel failed to hire a replacement investigator, the ACCA determined that "Reynolds failed to plead how much of the investigation had been completed and what remained, and, more importantly, what a second investigator could have uncovered." (*Id.*). Further, to the extent Reynolds pleaded that his trial counsel should have investigated West's activities before and after the crime and the individuals named in her statement to police, the ACCA concluded that Reynolds "failed to plead what trial counsel would have learned had [such an] investigation taken place." (*Id.* at 140-41). Indeed, as the ACCA put it, "it is entirely possible that investigation into those lines of inquiry would have corroborated West's account." (*Id.* at 141). The ACCA also found similar pleading deficiencies with regard to Reynolds's claim that "trial counsel should have investigated the amount of drugs consumed by West and Reynolds prior to the crime and the effect that quantify of drugs would have had on them" because Reynolds "failed to plead the actual amount of drugs consumed or their effect." (*Id.*) (citing *Connally v. State*, 33 So. 3d 618, 622-23 (Ala. Crim. App. 2007)).

The ACCA recognized that "[i]n some limited instances . . . Reynolds pleaded what information could have been learned had a particular interview been conducted." (*Id.*). For instance, the ACCA acknowledged that Reynolds "pleaded that had trial counsel interviewed 'neighbors who lived near the scene of the crime,' trial counsel would have learned evidence that was [allegedly] inconsistent with West's testimony." (*Id.*, quoting Vol. 24 at 168-69). However, as the ACCA noted, Reynolds "failed to identify the neighbors by name." (*Id.*) (citing *Lee v. State*, 44 So. 3d 1145, 1158 (Ala. Crim. App. 2009)) (rejecting an ineffective assistance of counsel claim as insufficiently pleaded when petitioner failed to identify by name one of the state witnesses

counsel allegedly failed to investigate). The ACCA also recognized that Reynolds pleaded that "had counsel interviewed Reynolds's employer, they 'could have confirmed [his] assertion that he was paid the morning before the crime and did not need money.'" (*Id.*). However, as the ACCA observed, Reynolds "failed to identify Reynolds's employer[,]" and further observed that Reynolds couched the pleading in rank speculation. (*Id.*) (noting only that counsel may have determined Reynolds was paid before the murders) (citing *Lee*, 44 So. 3d at 1158).

The ACCA also discussed Reynolds's allegation that "counsel should have interviewed Mark Hopwood to learn that blood was not found on the floorboard of Sandra Roberts's car, which [is] where West testified[] she placed the knives." (*Id.*) The ACCA determined that Reynolds pleaded "[i]n conclusory fashion" that such an interview "would have undermined West's testimony" and "failed to plead how he was prejudiced by this failure to interview Hopwood." (*Id.*). In particular, the ACCA emphasized that Reynolds's generalized argument was insufficient because the record demonstrated that the "jury was made aware of the results of Hopwood's test." (*Id.*) (citing *Reynolds I*, 114 So. 3d at 114). That is correct. (*Id.*) ("During defense counsel's cross-examination of Hopwood, Hopwood testified that he had performed a chemical-screening test for the presence of blood in various places of the interior of the automobile that Reynolds and West used on the night of the murders, but that the test did not detect the presence of blood.").

None of Reynolds's failure-to-investigate claims were properly plead. Reynolds fails to articulate or cite to any "defect" in the ACCA's decision within his federal habeas petition. Reynolds has wholly failed to articulate how the ACCA's explanation was objectively unreasonable. More specifically, Reynolds has not articulated or cited to any "defect" in the ACCA's decision. Although Reynolds cites *Gregg v. Georgia*, 428 U.S. 153, 187 (1976), and *Rompilla v. Beard*, 545 U.S. at 374, 387 (2005), arguing the general propositions that counsel has

a duty to investigate. (*See* Doc. # 1 at 74-75), he has not provided any analysis as to why the ACCA's determination on this issue is contrary to *Gregg* or *Rompilla*. (*Id.*).

Reynolds has failed to properly plead this *Strickland* claim. *See* 28 U.S.C. § 2254 Rule 2(c) ("[h]abeas petitions must meet heightened pleading requirements."); *McFarland v. Scott*, 512 U.S. 849, 856 (1994) (citing 28 U.S.C. § 2254 Rule 2(c)). He has failed to meet the heightened requirements of habeas pleading. His petition did not provide specific facts explaining why his counsel's pretrial investigation was inadequate (*i.e.*, what specific information counsel would have found had they made what Reynolds contends would have been an adequate investigation). Nor has Reynolds adequately pleaded *Strickland* prejudice. He has not sufficiently alleged that but for his counsel's failure to have found such information, there exists a reasonable probability that introduction of the information would have changed the result of the trial. Further, Reynolds has not stated any specific facts identifying and detailing who the witnesses were that trial counsel failed to investigate, what specific mitigating evidence they would have provided, or how, absent that evidence Reynolds suffered actual prejudice at trial or in sentencing. Thus, Reynolds has failed to "state specific, particularized facts which entitle [him] habeas corpus relief" on this claim. *See Adams*, 897 F.2d at 334.

Finally, even if Reynolds had pleaded sufficient facts, his claim would still be unavailing. The cases Reynolds cites are not relevant. *Gregg* held that imposition of the death penalty was not necessarily cruel and unusual punishment. 428 U.S. 153. And *Rompilla* held that trial counsel was ineffective for failing to obtain materials that counsel had known the prosecution would probably use at the trial's sentencing phase. 545 U.S. at 389. Neither holding would be relevant here. This claim is due to be denied.

3. Investigation of Decomposition Evidence

Reynolds next argues that his trial counsel was constitutionally ineffective in failing to investigate and obtain additional analysis of decomposition evidence, which was identified by the State's expert witness, Dr. Craig. (Doc. # 1 at 75) (citing Vol. 17 at 192-94). In support, Reynolds argues that Dr. Craig's testimony -- recorded before trial -- revealed that "Savannah Martin had more advanced decomposition than her parents." (*See id.*) (citing Vol. 24 at 176-78). Reynolds claims that this indicates the possibility of Savannah's murder occurring first, and Reynolds argues that if this fact were proven true it would have been in direct conflict with West's testimony and timeline of events. (*Id.*). Reynolds further asserts that his trial counsel was aware of this discrepancy in decomposition evidence but did not investigate further or "search for a countervailing expert." (*Id.*) (citing Vol. 24 at 176-78).

Reynolds also alleges that "forensic evidence around West's timeline of events is untenable and developing this could have been a valuable tool for impeachment at trial" and for undermining the State's timeline of events. (*Id.*). Reynolds suggests that "[t]his evidence . . . *could have* refuted West's testimony that Savannah Martin was killed after her parents in order to eliminate a potential eyewitness." (*Id.* at 50) (emphasis added).

Reynolds initially raised this claim before the Rule 32 court, which dismissed it as insufficiently pleaded under Rules 32.3 and 32.6(b), Ala. R. Crim. P. (Vol. 33 at 149). The ACCA affirmed the Rule 32 court's dismissal of this claim because Reynolds failed to sufficiently plead this claim in his amended Rule 32 petition. The ACCA began its review of this claim by summarizing the actual content of Reynolds's pleadings. (*Id.* at 148-49). As the ACCA recognized, "Reynolds pleaded Dr. Craig testified that Savanah Martin's body showed early decompositional changes, . . . indicat[ing] that her body had progressed further into decomposition than her parents'

bodies." (*Id.*). But, this evidence does not make the point that Reynolds suggests. Dr. Craig clarified "that it was possible that their deaths had occurred at the same time, and that the discrepancy in decomposition was due to environmental factors[.]" (*Id.* at 149 n.8).

As the ACCA explained, Reynolds's claim was insufficiently pleaded because he failed to allege with specificity the following facts: "the name of any expert available to investigate and to testify on this issue," "what additional investigation the unnamed expert should have conducted," "what information trial counsel would have learned from the unspecified investigation," and "how trial counsel's failure to learn [this] information prejudiced him at trial." (*Id.* at 149) (citing *Daniel*, 86 So. 3d at 437-38). For these reasons, the ACCA determined that Reynolds's claim that his trial counsel was ineffective for failing to investigate or seek further expert testimony regarding West's timeline of event was insufficiently pleaded and properly denied by the Rule 32 court. (*Id.*).

After careful review, it is clear that this claim is based on speculation and conclusory arguments. Specifically, Reynolds has failed to describe how "additional analysis of [the] decomposition evidence" would have created a reasonable probability that his sentence would have been something less than death. But, even putting aside this defect, Reynolds also failed to show that the ACCA's adjudication of this claim was contrary to clearly established federal law or based on unreasonable facts.

Reynolds's habeas petition does not offer any rebuttal to the ACCA's catalog of pleading deficiencies, much less make an argument showing that the ACCA's factual determinations were objectively unreasonable. Further, Reynolds does not challenge the ACCA's decision on any other meritorious grounds.

To the extent Reynolds argues that the ACCA's decision was contrary to or involved an objectively unreasonable application of *Strickland*, he simply has not satisfied AEDPA's burden

of proof. Reynolds argues that "[i]n light of the particular forensic evidence in this case, and the fact that the case turned on the credibility of dueling eyewitness accounts," his "counsel's conduct fell below professional norms." (Doc. # 1 at 75-76). But he has not provided any specifics (or citation to the record) regarding what particular forensic evidence he is referencing. Consequently, Reynolds has not presented any argument sufficient to overcome AEDPA's doubly deferential treatment of the ACCA's adjudication and dismissal for insufficient pleading of Reynolds's *Strickland* claim.

Moreover, upon the court's independent review of Reynolds's Rule 32 pleadings and habeas petition, and in light of the record before the ACCA as a whole, the court concludes that Reynolds failed to plead with specificity a number of key points: who would provide expert testimony at his trial; what that testimony would be; what forensic tests should be performed to obtain this expert evidence; how that testimony would undermine West's testimony, along with the State's case; and how that testimony would have refuted, or even differed from, Dr. Craig's explanation that environmental factors can alter the speed of decomposition. *Reynolds v. State*, Mem. Op. at 49-50 (Ala. Crim. App. Apr. 22, 2016).

Reynolds also failed to specifically plead how this unknown, unspecified, potential expert-testimony, if introduced, would result in a reasonable probability that he would not have been sentenced to death in light of the overwhelming evidence against him. And, he failed to address what effect this unspecified "forensic expert" evidence would have had on the three statutory aggravating circumstances, the one statutory mitigating circumstance, and/or defense counsel's mitigation case that was presented at trial.

Reynolds did not properly allege cause or prejudice. This claim is due to be denied.

4. No Motion for Change in Venue

Reynolds claims that his trial counsel's failure to move for a change of venue amounted to ineffective assistance under *Strickland*. (Doc. # 1 at 76-78). In support, Reynolds contends that his counsel had a demonstrated awareness of the potential for prejudice and jury contamination due to "extensive" news coverage, "community outreach," and publicity that continued after the murders. (*See id*. at 76-77) (citing Vol. 24 at 170-71). Reynolds alleges that this publicity included information such as Reynolds's prior criminal activity and statements from the chief investigator that discussed the emotional difficulties innate in investigating the Martin family's murders. (*See id.* at 76) (citing Vol. 24 at 170-71). Reynolds also asserts that at the time of trial "Remember Savannah" signs were displayed on "several businesses near the courthouse." (*Id.* at 76, 78) (citing Vol. 24 at 170).

According to Reynolds, the news media publicized his criminal history to the jury pool "even though the State stipulated that Mr. Reynolds's criminal history was not significant and would not be introduced to the jury." (*Id.* at 78) (citing Vol. 24 at 170-71; Vol. 12 at 178). Reynolds alleges that, despite expressly requesting and receiving assurances from Ms. Granger that counsel would move for a change in trial venue, his trial counsel neglected to do so. (*See id.* at 76) (citing Vol. 24 at 170-71). Reynolds points to his trial counsel's motion to sequester the jury, which noted that the "case's notoriety" and the risk of exposure to prejudicial publicity. (*Id.*) (citing Vol. 24 at 170; Vol. 1 at 191). Based on this, Reynolds deduces that his counsel believed "that the publicity would negatively impact [his] trial" and claims that counsel's deficient actions in failing to move for a change of venue resulted in either actual or presumed prejudice. (*Id.*).

Reynolds raised this claim for the first time in his Rule 32 proceedings. The Rule 32 court rejected his claim because it was insufficiently pleaded under Rules 32.3, 32.6(b) and 32.7(d).[63] (Vol. 33 at 142-44). The ACCA affirmed the Rule 32 court's dismissal of Reynolds's claim, agreeing the claim was insufficiently pleaded. (*Id.* at 142, 146) (citing Ala. R. Crim. P. 32.3, 32.6(b), 32.7(d)). In explaining when a change of venue is appropriate, the ACCA noted:

> [A] change of venue must be granted only when it can be shown that the pretrial publicity has so 'pervasively saturated' the community as to make the 'court proceedings nothing more than a "hollow formality,"' *Hart v. State*, 612 So. 2d 520, 526-27 (Ala. Crim. App.), *aff'd*, 612 So. 2d 536 (Ala. 1992), *cert. denied*, 508 U.S. 953 (1993), citing *Rideau v. Louisiana*, 373 U.S. 723, 726 (1963), or when actual prejudice can be demonstrated. The burden of showing this saturation of the community or actual prejudice lies with . . . [Reynolds]. *Sheppard v. Maxwell*, 384 U.S. 333 (1966). [. . .] [T]o show community saturation, . . . [Reynolds] must show more than the fact 'that a case generates even widespread publicity.' *Thompson v. State*, 581 So. 2d 1216, 1233 (Ala. Crim. App. 1991), *cert. denied*, 502 U.S. 1030 (1992). '"Newspaper articles alone would not necessitate the change of a venue unless it was shown that the articles so affected the general citizenry through the insertion of such sensational, accusational or denunciatory statements, that a fair and impartial trial was impossible. *Patton v. State*, 21 So. 2d 844 (Ala. 1945)."' *Thompson v. State*, [581 So. 2d at 1233], quoting *McLaren v. State*, 353 So. 2d 24, 31 (Ala. Crim. App.), *cert. denied*, 353 So. 2d 35 (Ala. 1977). Furthermore, . . . for [Reynolds] to show prejudice, the '"proper manner for ascertaining whether adverse publicity may have biased the prospective jurors is through the voir dire

[63] As the Rule 32 court explained, "even assuming his allegations as true, Reynolds has failed to plead any facts that would show there was actual prejudice or presumed prejudice based on community saturation." (Vol. 25 at 185). Notably, in holding that Reynolds insufficiently pleaded presumed prejudice that only applies to rare, exceptional cases as the result of prejudicial publicity saturating the entire community as a whole, where Reynolds failed to plead "how . . . the news coverage was extreme" and did not provide any "reference[s] to sensational, inflammatory, slanted news coverage" within the articles referenced. (*See id.* at 185-86) (finding that with regard to Reynolds's complaint that the Gadsden Times article published his guilty-pleas to unrelated drug charges on May 31, 2004 – "three years before his trial" – Reynolds failed to plead how "this article [was] prejudicial, inflammatory, or slanted[,]" or what "information in this article was [not] a factual account of a public record) (citing Vol. 24 at 33). The Rule 32 court provided that "Reynolds . . . failed to plead facts that if true, would show how any of the four *Skilling* factors supported the existence of presumed prejudice[;]" adding that Reynolds never mentioned these "factors in his petition." (*Id.* at 84) (citing *Luong v. State*, No. 1121097, 2014 WL 983299, at *4 (Ala. March 14, 2014), citing in turn *Skilling v. United States*, 561 U.S. 358 (2010)).

The court recognizes that the ACCA's adjudication on the merits, affirming the Rule 32 court's summary dismissal of Reynolds's change of venue *Strickland* claim, is the controlling state court decision for purposes of this court's federal habeas review. However, to the extent Reynolds challenges the Rule 32 court's reference to *Skilling* factors in his brief and reply (*see* Docs. # 1 at 77-79; 31 at 82-83), the court will address that argument below.

> examination." *Anderson v. State*, 362 So. 2d 1296, 1299 (Ala. Crim. App. 1978).' *Ex parte Grayson*, 479 So. 3d 76, 80 (Ala. 1985), *cert. denied* 474 U.S. 865 (1985).

(Vol. 33 at 143, quoting *Oryang v. State*, 642 So. 2d 979, 983 (Ala. Crim. App. 1993)). The ACCA recognized that Reynolds pleaded the titles of several published newspaper articles that reported on the case, the victims, or Reynolds's criminal history. (*Id.* at 44). But, the ACCA reasoned that Reynolds failed to allege that "the articles were sensational, accusational, or denunciatory." (*Id.*) (citing *Oryang*, 642 So. 2d at 983).

Similarly, the ACCA explained that Reynolds's allegation that "dozens of potential jurors had knowledge of the murders" was insufficiently pleaded where Reynolds failed to "identify the jurors." (*Id.*) (citing *Washington v. State*, 95 So. 3d 26, 62-63 (Ala. Crim. App. 2012)). Recognizing that Reynolds properly pleaded the identity of three jurors, the ACCA nonetheless concluded that this claim still failed because Reynolds had not pleaded that those jurors were unable to be impartial due to the media coverage. (Vol. 33 at 144; Vol. 25 at 185).

Next, the ACCA held that Reynolds insufficiently pleaded his claim that "prejudice may be presumed[.]" (*Id.*). The ACCA explained that "'[p]rejudice is presumed from pretrial publicity when *pretrial publicity is sufficiently prejudicial and inflammatory and the prejudicial pretrial publicity saturated the community* where the trials were held.'" (Vol. 33 at 144, quoting *Coleman v. Kemp*, 778 F.2d 1487, 1490 (11th Cir. 1985)) (emphasis in original). However, as the ACCA correctly cautioned, "[p]rejudice is rarely presumed" and such a presumption is "reserved for only 'extreme situations.'" (*Id.*, quoting *Hunt*, 642 So. 3d at 1043, quoting in turn *Coleman*, 778 F.2d at 1537). The ACCA concluded that Reynolds's claim, as pleaded, did not demonstrate such an exceptional circumstance. Rather, the ACCA held that the handful of articles pleaded by Reynolds failed to show that prejudicial pretrial publicity saturated the community, even those that

publicized Reynolds's' past criminal conduct. (*Id.*) (citing *Hunt v. State*, 642 So. 2d 999, 1043 (Ala. Crim. App. 1993), quoting in turn *Coleman*, 778 F.2d at 1537).

Finally, the ACCA determined that Reynolds failed to plead sufficient facts showing that such a motion for new venue would have been meritorious. (*Id.*). As "[t]rial counsel cannot be held ineffective for failing to raise a meritless motion," the ACCA held that Reynolds failed to sufficiently plead facts that, if true, would satisfy *Strickland* deficiency or prejudice. (*Id.*) (citing *McNabb v. State*, 991 So. 3d 313, 327 (Ala. Crim. App. 2007); *Bearden v. State*, 825 So. 3d 868, 872 (Ala. Crim. App. 2001). So, the ACCA affirmed the Rule 32 court's dismissal. (*Id.*) (citing Ala. R. Crim. P. 32.7(d)).

Reynolds contends that habeas relief is appropriate under § 2254(d)(2) because the ACCA's decision relies on unreasonable factual determinations. (*See* Doc. # 31 at 74). The court disagrees. At best, Reynolds has made sporadic references to the record that fail to identify the specific factual findings he alleges were unreasonably determined. Therefore, to succeed on the merits, Reynolds must show that the ACCA's decision violated § 2254(d)(1). In his petition, Reynolds references *Irvin v. Dowd*, 366 U.S. 717 (1961); *Rideau v. Louisiana*, 373 U.S. 723 (1963); and *Skilling v. United States*, 561 U.S. 358 (2010).[64] (Doc. # 1 at 76-78). But, as the court explains below, the ACCA's decision is not contrary to these cases.

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[64] Reynolds also cites *Coleman v. Kemp*, 778 F.2d 1487 (11th Cir. 1985), and *Coleman v. Zant*, 708 F.2d 541 (11th Cir. 1983). (Doc. # 1 at 76). Again, section 2254(d)(1) requires that the ACCA's decision be contrary to the holding of a case from the Supreme Court of the United States. Nonetheless, the court notes that the Eleventh Circuit cases that Reynolds cites here do not adequately support his claim. *See Kemp*, 778 F.2d 1487, 1539 (holding that the petitioner made a sufficient *showing* of prejudicial publicity); *Zant*, 708 F.2d 541 (relying on *Irvin v Dowd* and *Rideau* for the legal framework and holding that an evidentiary hearing was needed)

Here, as the ACCA appropriately determined, in order to satisfy the prejudice prong of *Strickland*, Reynolds must establish that there is a reasonable probability that, but for his counsel's failure to move the court for a change of venue, the result of the proceeding would have been different. At minimum (and as discussed above), Reynolds was required to plead specific facts demonstrating that there is a reasonable probability that the trial court would have, or at least should have, granted a motion for change of venue if Reynolds's counsel had presented such a motion to the court. Reynolds utterly failed that burden. Accordingly, the ACCA properly determined that Reynolds did not plead

In *Irvin*, the court noted an extensive list of prejudicial publicity:

> [P]etitioner's first motion for a change of venue from Gibson County alleged that the awaited trial of petitioner had become the cause ce le bre of this small community—so much so that curbstone opinions, not only as to petitioner's guilt but even as to what punishment he should receive, were solicited and recorded on the public streets by a roving reporter, and later were broadcast over the local stations. A reading of the 46 exhibits which petitioner attached to his motion indicates that a barrage of newspaper headlines, articles, cartoons and pictures was unleashed against him during the six or seven months preceding his trial. The motion further alleged that the newspapers in which the stories appeared were delivered regularly to approximately 95% of the dwellings in Gibson County and that, in addition, the Evansville radio and TV stations, which likewise blanketed that county, also carried extensive newscasts covering the same incidents. These stories revealed the details of his background, including a reference to crimes committed when a juvenile, his convictions for arson almost 20 years previously, for burglary and by a court-martial on AWOL charges during the war. He was accused of being a parole violator. The headlines announced his police line-up identification, that he faced a lie detector test, had been placed at the scene of the crime and that the six murders were solved but petitioner refused to confess. Finally, they announced his confession to the six murders and the fact of his indictment for four of them in Indiana. They reported petitioner's offer to plead guilty if promised a 99-year sentence, but also the determination, on the other hand, of the prosecutor to secure the death penalty, and that petitioner had confessed to 24 burglaries (the modus operandi of these robberies was compared to that of the murders and the similarity noted). One story dramatically relayed the promise of a sheriff to devote his life to securing petitioner's execution by the State of Kentucky, where petitioner is alleged to have committed one of the six murders, if Indiana failed to do so. Another characterized petitioner as remorseless and without conscience but also as having been found sane by a court-appointed panel of doctors. In many of the stories petitioner was described as the 'confessed slayer of six,' a parole violator and fraudulent-check artist. Petitioner's court-appointed counsel was quoted as having received 'much criticism over being Irvin's counsel' and it was pointed out, by way of excusing the attorney, that he would be subject to disbarment should he refuse to represent Irvin. On the day before the trial the newspapers carried the story that Irvin had orally admitted the murder of Kerr (the victim in this case) as well as 'the robbery-murder of Mrs. Mary Holland; the murder of Mrs. Wilhelmina Sailer in Posey County, and the slaughter of three members of the Duncan family in Henderson County, Ky.'

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facts showing that his counsel's purported failure to move for a change in venue resulted in prejudice because Reynolds has not shown this motion would have had merit.

366 U.S. 717, 725-26. And, the Court noted that of the 430 venire members, the court excused 268 "for cause as having fixed opinions as to the guilt of petitioner." *Id.* at 727. In fact, eight of the selected jurors in *Irvin* revealed in voir dire that they thought the petitioner was guilty. *Id.* Here, as the ACCA explained, Reynolds did not plead facts (as to the amount of publicity or to the level of prejudice) comparable to those in *Irvin*.

In *Skilling*, the Supreme Court determined that a lower court appropriately denied a motion to change venue despite hundreds of publications about Enron's financial collapse that referred to the named defendant. *See Skilling*, 561 U.S. at 367-77. Moreover, the motion to change venue was denied despite the fact that the *Skilling* defendant offered *specific* evidence including not only copies of the "named" articles but also the statistical analyses of the composition of and "prejudicial permeation" of this reporting into the community's beliefs along with comparative analyses of other potential available venues. *See Skilling*, 561 U.S. at 369-71.

The *Skilling* Court noted that a change in venue was only necessary when the "conviction [was] obtained in a trial atmosphere that [was] utterly corrupted by press coverage." 561 U.S. at 380, quoting *Murphy v. Florida*, 421 U.S. 794, 798-799 (1975). Further, "[j]uror exposure to . . . news accounts of the crime . . . alone [does not] presumptively deprive[] the defendant of due process." *Id*. Here, Reynolds has not pleaded anything even remotely close to a "carnival atmosphere" or that his conviction was obtained in a trial atmosphere utterly corrupted by press coverage." Accordingly, Reynolds has not shown that the ACCA's decision was contrary to *Skilling*.[65]

[65] Reynolds also argues that the presence of signs on buildings near the courthouse in memory of Savannah tends to show media influence on the verdict as contemplated in *Skilling*. 561 U.S. at 383. But, in light of the overwhelming evidence presented against Reynolds, the signs near the courthouse had no prejudicial effect. Thus, the ACCA's decision is not contrary to *Skilling*.

In *Rideau*, the Supreme Court overturned a conviction due to manifest prejudice where the evidence demonstrated that three jurors likely watched a broadcast of the petitioner's confession to committing murder, kidnapping, and robbery. 373 U.S. at 725-727 (1963). Reynolds did not plead facts near that level of prejudice. Thus, a fair-minded jurist could conclude that the ACCA's decision is not contrary to *Rideau*. Accordingly, this claim is due to be denied, as Reynolds fails to prove that the ACCA's decision is contrary to, or an unreasonable application of, clearly established federal law.

5. Failure to Adequately Conduct *Voir Dire*

Reynolds claims that his counsel was ineffective for failing to conduct an adequate *voir dire*, which deprived him of a fair trial and impartial jury. (*See* Docs. # 1 at 79; 31 at 83-85). Reynolds asserts that "[c]ounsel's failure . . . was not a matter of strategy and [that it] fell below prevailing professional norms." (Doc. # 1 at 79) (citing *Strickland*, 466 U.S. at 690). Reynolds also contends that "where counsel failed to inquire if certain jurors could be impartial, ensure they understood mitigation, and life-qualify the panels, there is a reasonable probability that a different jury would have been selected and the result of the proceeding would have been different." (*Id.* at 79-80) (citing *Strickland*, 466 U.S. at 694).

Reynolds first raised this claim before the Rule 32 court, which summarily dismissed this claim under Alabama Rules of Criminal Procedure 32.3, 32.6(b), and 32.7(d) as insufficiently plead and, alternatively, "facially meritless."[66] (Vol. 25 at 186-88); (*see also*, Vol. 33 at 145). The ACCA affirmed the Rule 32 court's dismissal.

[66] In support of its alternative holding -- that Reynolds's claim was due to be dismissed under Rule 32.7(d), as this claim "[was] facially meritless and fail[ed] to state a material issue" (Vol. 25 at 188) -- the Circuit Court explained:

> Even accepting [Reynolds's] allegations as true, Reynolds has failed to plead a facially meritorious claim that, if true, would show trial counsel was deficient. "Generally, an attorney's actions during

> Reynolds pleaded that trial counsel failed to ask three of the four panels of prospective jurors "whether the fact that they, a close family member, or friend had been the victim of a crime would affect their ability to be impartial," and failed to ask any of the panels "whether the fact that they had a family member in law enforcement would affect their ability to be impartial." Reynolds also pleaded that trial counsel failed to adequately life-qualify the prospective jurors, relied on jury questionnaires without asking an adequate amount of follow-up questions, and failed to explain mitigation or the penalty phase.

(Vol. 33 at 145, quoting Vol. 24 at 172-73) (internal citation omitted).

The ACCA explained that "[b]eyond a bare allegation of prejudice, Reynolds failed to plead any facts to indicate that he was, in fact, prejudiced by trial counsel's failures to address the aforementioned issues in *voir dire*." (*Id.*). Further, "Reynolds failed to identify any jurors who were biased against him or that did not understand the penalty phase." (*Id.*) (citing *Washington v. State*, 95 So. 3d 26, 63-64 (Ala. Crim. App. 2012)).

Reynolds has failed to show that the ACCA's determination was objectively unreasonable. Moreover, Reynolds has not attempted to (nor could he) show that the ACCA's decision was based on any unreasonable determination of the facts. Accordingly, Reynolds is not due relief under § 2254(d)(2).

Nor was the ACCA's determination contrary to clearly established Supreme Court precedent. Reynolds references *Strickland* and *Morgan v. Illinois*, 504 U.S. 719 (1992), to support this claim. However, the ACCA's decision is not contrary to the decision in either case. *Strickland* involved penalty-phase evidence (not a *voir dire* challenge), and the *Strickland* Court reversed the lower court's determination that the petitioner received ineffective assistance of counsel. *See*

> *voir dire* are considered to be matters of trial strategy, which cannot be the basis of an ineffective assistance claim unless counsel's decision is . . . so ill chosen that it permeates the entire trial with obvious unfairness."

(*Id.*, quoting *Washington*, 95 So. 3d at 63-64 (Ala. Crim. App. 2012)).

generally Strickland, 466 U.S. 688. Accordingly, even if Reynolds's *voir dire* claim was substantively reviewed under *Strickland*, he could not demonstrate that the ACCA's decision was contrary to *Strickland*.

In *Morgan*, the trial court asked the questions during *voir dire*. 504 U.S. at 722-23. While the trial court asked the death-qualifying questions that the prosecution requested, it refused to ask venire members the life-qualifying question requested by the defense. *Id.* The Court recognized its previous holdings (1) that a juror must be removed for cause if he would not vote for capital punishment in any case and (2) that a juror who would automatically vote for the death penalty without weighing the aggravating and mitigating circumstances as instructed must also be removed for cause. *Id.* at 728-29. "If even one such juror [who would automatically vote for the death penalty] is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence." *Id.*at 729. The *Morgan* Court reasoned "[w]ere *voir dire* not available to lay bare the foundation of petitioner's challenge for cause against those prospective jurors who would *always* impose death following conviction, his right not to be tried by such jurors would be rendered as nugatory and meaningless as the State's right, in the absence of questioning, to strike those who would *never* do so. *Id.* at 733-34 (emphasis in original).

The facts surrounding the *voir dire* in Reynolds's case are much different than those in *Morgan*. Reynolds claims, without pointing to any record evidence, that a venire member selected for the petit jury indicated on a questionnaire "that death was the only just punishment if a defendant was found guilty of murder." (Doc. # 1 at 79).[67] First, as pleaded, that indication is not enough to disqualify the contested juror: the contested juror did not indicate that he could not put

[67] While Reynolds does not specify which juror in his federal habeas petition, Reynolds indicated that it was juror B.T. in his Rule 32 petition. (*Compare* Doc. # 1 at 79 *with* Vol. 24 at 173).

his personal feelings aside and, instead, follow the law regarding aggravating and mitigating circumstances as instructed. (Vol. 7 at 88-90, 92-93). Second, unlike *Morgan*, the trial court in Reynolds's case did not refuse him the ability to ask life-qualifying questions. In fact, after the process of weighing aggravating and mitigating circumstances at the penalty phase was explained to the venire-panel on which the contested juror participated, the venire-panel was asked life qualifying questions. (*Id.*). Therefore, Reynolds did not sufficiently plead, and, further, has not substantively shown that the ACCA's decision is contrary to *Morgan*.[68]

In sum (and as previously recognized), the ACCA concluded that "[b]eyond a bare allegation of prejudice, Reynolds failed to plead any facts to indicate that he was, in fact, *prejudiced* by trial counsel's failures to address the aforementioned issues in voir dire." (Vol. 33 at 145) (emphasis added). Similarly, here Reynolds fails to plead any facts to indicate that he suffered actual prejudice resulting from his trial counsel's alleged deficiencies during *voir dire*. (Doc. # 31 at 83-85). Merely asserting that prejudice has occurred is not adequate to plead a *Strickland* prejudice claim and does not satisfy the federal habeas fact-based pleading requirements under AEDPA. *See McFarland*, 512 U.S. at 856 (citing 28 U.S.C. § 2254 Rule 2(c)). Further, Reynolds has not shown that the ACCA's decision was based on an unreasonable determination of the facts or was contrary to clearly established federal law such that no fair-minded jurist could agree. Accordingly, this claim is due to be denied.

[68] Another distinguishing factor between Reynolds's case and *Morgan* is that the statutory framework in *Morgan* required a unanimous vote for the death penalty while in Reynolds's case only a ten-to-two vote was required. Reynolds fails to plead that a second (or third) juror was improperly disinclined from a death sentence. Moreover, Reynolds does not plead that the contested juror infected the petit jury's deliberations at the penalty phase.

6. Failure to Make a *Batson* Objection

Reynolds also claims that his trial counsel was constitutionally ineffective for failing to make a *Batson* objection in response to the State's alleged racially discriminatory peremptory strikes. (Doc. # 1 at 80-81). Reynolds contends that his counsel's failure was "objectively unreasonable" and resulted in "presume[ed] prejudice[]." (Docs. # 1 at 80; 31 at 85) (citing *Batson*, 476 U.S. at 79, 96-97).

The Rule 32 court dismissed the claim because it was insufficiently pleaded in violation of Rules 32.2 and 32.6(b). (*See* Vol. 33 at 147; Vol. 25 at 188-90). The ACCA affirmed the Rule 32 court's dismissal. (Vol. 33 at 147). The ACCA explained the three-step analysis a court must apply to decide whether a *Batson* violation occurred. (Vol. 33 at 146). The ACCA then noted:

> In the first step of the process, the step at issue here, "[t]he party alleging discriminatory use of a peremptory strike bears the burden of establishing a prima facie case of discrimination." *Ex parte Brooks*, 695 So. 2d 184, 190 (Ala. 1997). "In addition to showing that the State used peremptory challenges to remove members of a cognizable group . . . and relying upon the fact that peremptory strikes permit discrimination, a claimant also must show that these facts and any other relevant facts raise an inference that the prosecutor used his strikes in a discriminatory manner." *Madison v. State*, 718 So. 2d 90, 101 (Ala. Crim. App. 1997). "The facts and circumstances necessary to establish a prima facie case of purposeful discrimination in the jury selection process will, of course, vary from case to case, depending on the particular facts and circumstances involved." *Kidd v. State*, 649 So. 2d 1304, 1311 (Ala. Crim. App. 1994). While it is true the striking of one person for a racial reason is a violation of the principles of *Batson* and grounds for reversal, *see Williams v. State*, 548 So. 2d 501, 507 (Ala. Crim. App. 1988), it is equally true that "[m]erely showing that the challenged party struck one or more members of a particular race is not sufficient to establish a prima facie case." *Edwards v. State*, 628 So. 2d 1021, 1024 (Ala. Crim. App. 1993).

(*Id.* at 147, quoting *Carruth v. State*, 165 So. 3d 627, 638 (Ala. Crim. App. 2014), quoting in turn, *Lightfoot State*, 152 So. 3d 434, 438 (Ala. Crim. App. 2012), *rev'd on other grounds Ex parte Lightfoot*, 152 So. 3d 445, 438 (Ala. 2013)). The ACCA applied these principles.

> Reynolds argues that trial counsel were ineffective for failing to make a *Batson* motion. Reynolds pleaded that the State used its peremptory challenges to strike 9

> of the 14 eligible black prospective jurors and these prospective jurors were a heterogeneous group whose only shared characteristic was their race. In support of that assertion, Reynolds pleaded that four of the black prospective jurors who were struck provided little to no information during voir dire, while three white women who provided no information during voir dire served on the jury.

(*Id.*).

The ACCA held that Reynolds insufficiently pleaded his *Strickland/Batson* claim because he only "made a bare allegation that the eligible black prospective jurors who were struck by the State were a heterogenous group who shared only the characteristic of their race," and that Reynolds "failed to identify any of the jurors by name." (*Id.*) (citing *Carruth*, 165 So. 3d at 638). The ACCA also recognized that on direct appeal it had "thoroughly reviewed the record before [it] and f[ou]nd no inference of purposeful discrimination by the State." (*Id.* at 47 n.7, quoting *Reynolds*, 114 So. 3d at 86).

After careful review, the court concludes that the ACCA's decision did not involve an unreasonable application of *Strickland* or *Batson* and did not rely on an unreasonable determination of the facts before the Rule 32 court. *See* 28 U.S.C. § 2254(d). As explained in the substantive *Batson* section above, Reynolds has not shown that the State violated *Batson*. It follows that Reynolds has not shown that his counsel performed deficiently by not raising a *Batson* objection.

Further, as the ACCA held, Reynolds did not sufficiently plead this claim. The question framed within this *Strickland* claim is whether Reynolds's "petition contained sufficient facts that, if true, established an inference of racially discriminatory jury selection . . . [and], if true, established that counsel were deficient for failing to bring that to the attention of the trial court by raising a *Batson* challenge." (*See* Vol. 33 at 147, 174-75; Vol. 25 at 188-90). Notably, Reynolds's amended Rule 32 Petition made no mention of the ultimate composition of the jury selected, the

composition of the venire, or the number of peremptory strikes provided to the parties. As the ACCA points out, Reynolds also failed to disclose the identities of the venire-members allegedly struck by the State in a racially discriminatory manner. Aside from Reynolds's conclusory allegation that the African-American venire-members struck by the State were a heterogenous group, Reynolds pleaded no facts that support his claim. Reynolds also failed to identify the three white women who did not speak during *voir dire* and has not provided any additional factual comparison on which the court could reasonably rely when determining the reason for their selection, or otherwise.

The court concludes that the ACCA's decision did not violate either provision of § 2254(d). As explained above, there was no *Batson* violation and, thus, the accompanying *Strickland* claim is without merit. Accordingly, this claim is due to be denied.

7. Failure to Introduce Report of Chad Martin's Confession

Reynolds claims he received constitutionally ineffective assistance of counsel when his trial counsel failed to introduce Chad Martin's purportedly inculpatory statement into evidence. (*See* Doc. # 1 at 81) (citing Vol. 24 at 147-57). Reynolds asserts that his trial counsels' failure to introduce this statement into evidence amounted to constitutionally deficient performance and prejudiced his defense such that the outcome of his trial is unsound. (*Id*.) (citing *Strickland*, 466 U.S. at 688).

Reynolds alleges that his counsel were ineffective for failing to call at least one of five potential witnesses to testify about Chad Martin's May 25, 2003 statement to police. Reynolds complains that as a result of his counsel's failure to adequately investigate and prepare, counsel was unable to introduce allegedly confessionary statements offered to police investigators by Chad Martin, after Chad Martin testified that he could not remember the content of this statement and

after Captain Harbin was unable to authenticate the May 29, 2003 police report containing Chad Martin's purportedly inculpatory statements. (Doc. # 1 at 82).

Reynolds contends that counsel should have more thoroughly investigated and interviewed the "[f]ive people" who he claims were present for Chad Martin's confession and who could have potentially testified. (Doc. # 1 at 81) (citing Vol. 24 at 148). Reynolds asserts that "any one of [the five individuals] could have been approached [by counsel] to authenticate the typed statement provided by police." (*Id.*) (citing Vol. 24 at 148)). Reynolds argues that were this evidence introduced, his trial counsel would have been able to impeach Chad Martin's testimony that he had no involvement in the Martin family's murders or would have been able to use the statement as substantive evidence of third-party guilt. (*Id.*) (citing Vol. 24 at 147-57).

Reynolds contends that he suffered actual prejudice resulting from his counsel's failure to introduce this evidence because the jury was unable to hear Chad Martin's alleged inculpatory statements first hand. (*See id.* at 85). Reynolds asserts that "[e]vidence of a confession by a third party, either as impeachment or substantive evidence, would have cast substantial doubt on . . . Reynolds's guilt" because the evidence "directly contradicted . . . West's testimony and the State's theory of the case." (*Id.*) (citing *Strickland* 466 U.S. at 695).

The Rule 32 court summarily dismissed this claim as insufficiently pleaded under Rules 32.3 and 32.6(b). (Vol. 33 at 128; Vol. 25 at 166-70). The ACCA affirmed the Rule 32 court's dismissal, holding that Reynolds failed to plead facts sufficient to make a showing of *Strickland* error. (*See* Vol. 33 at 132). The ACCA summarized Reynolds's pleadings and provided a synopsis of the ACCA's findings of facts regarding Chad Martin on direct appeal before turning its analysis to this guilt-phase *Strickland* claim. (*See id.* at 126-27, quoting *Reynolds I*, 114 So. 3d at 92; *see also id.* at 128).

Next, the ACCA observed that while Reynolds alleged that five other people *could have* authenticated the report, Reynolds failed to plead facts "that would indicate that they could, in fact, do so." (*Id.* at 128-29) (citing *Hyde*, 950 So. 2d at 356). The ACCA explained that "Reynolds failed to plead what the testimony would be of any of the five named individuals that could authenticate the report." (*Id.*); (*see also* Vol. 25 at 167).

"More importantly," the ACCA held, "Reynolds failed to plead how Chad Martin's confession was consistent with the defense's theory of the case," given that Reynolds's strategy at trial suggested West's involvement in the murders and generally limited his own involvement to helping West "clean up" after the murders occurred. (*Id.*). The ACCA provided an example of such an inconsistency, recognizing that while "Chad Martin named several individuals that had allegedly participated in the murders, West was not mentioned during the statement." (*Id.*) (citing Vol. 18 at 9-11). The ACCA also noted that Captain Harbin's report of Chad Martin's statement actually implicated Reynolds in the murders and was *not exculpatory*. (*Id.* at 129-30; *see* Vol. 18 at 11). The ACCA further explained that Reynolds's testimony at trial about attempting to destroy evidence "[was] inconsistent with Chad Martin's statement," where Chad Martin "[s]pecifically . . . stated that it was he who had poured gasoline through the Martins' house, and that it was he who had retrieved the gas can from the trunk of Langley's vehicle." (*Id.*).

In short, the ACCA held that Reynolds "failed to plead sufficient facts to indicate that the five individuals could authenticate the report for impeachment purposes and failed to plead how Chad Martin's statement would have been consistent with his theory of the case." (*Id.* at 130); (*see id.* at 130-31) (citing *McWhorter v. State*, 142 So. 3d 1195, 1237 (Ala. Crim. App. 2011); *see Strickland*, 466 U.S. at 697 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will be so, that course should be followed")).

"[L]ikewise," the ACCA determined, "Reynolds's claim regarding trial counsel's failure to admit the confession as substantive evidence of third-party guilt must . . . fail[.]" (Vol. 33 at 131). For support, the ACCA looked to its decision on direct appeal, which concluded that Chad Martin's confession was not admissible because the report, which was hearsay, "did not have 'sufficient indica of reliability' to overcome the prohibition against providing third party's guilt by use of hearsay evidence." (*Id.*, quoting *Reynolds I*, 114 So. 3d at 102-03). The ACCA held that Reynolds failed to meet his heightened pleading burden under Rules 32.3 and 32.6(b) because Reynolds did not "plead specific facts indicating what the testimony would be of any of the five named individuals regarding the report." (*Id.*). The ACCA reasoned that Reynolds failed to provide documents indicating the identity of the "five people" who he alleges his counsel failed to call at trial, the degree of personal knowledge each of these five people possess, or what testimony each of these five individuals were able to offer. (*Id.*).

Reynolds is not due federal habeas relief on this claim because he has not shown that the ACCA's decision that Reynolds failed to demonstrate prejudice violated § 2254(d).[69] As Reynolds concedes, the jury heard Chad Martin's inculpatory statements through the testimony of Lieutenant Gary. At trial, Lieutenant Gary testified that Chad Martin made comments at the crime that referenced the location of the bodies of his deceased relatives and stated that he could smell gas on his hands, that he lost his sunglasses, and that he did not know where the cuts on his hands came from. (*See* Vol. 11 at 53-59). Also, the ACCA acknowledged the inconsistencies between

[69] For the first time, in his reply, Reynolds cites to *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) to support his argument that he "was prejudiced by the inability to use the confession or police report as substantive evidence of a third-party's guilt." (Doc. # 31 at 88). Even assuming this argument was not abandoned for failure to raise in his habeas petition, it is without merit. As discussed below, Chad Martin's purported "confession," if introduced into evidence, would not have resulted in the reasonable probability of a different result in Reynolds's trial, as this reported "confession" also contains information that directly conflicts with Reynolds's version of events on the night of the murders. Thus, Reynolds has not met his burden to sufficiently establish *Strickland* prejudice.

Chad Martin's confession and Reynolds's testimony at trial: to explain why his eyeglasses were found at the scene, Reynolds testified that he threw gas around the house to destroy evidence of West's purported involvement in the crime, but in the "confession," it was Martin who said that he spread the gasoline. In other words, the introduction of Chad Martin's "confession" would have negatively impacted the defense's theory of the case.

Strickland requires that Reynolds show his counsel's deficient performance and prejudice. And, section 2254(d)(1) review requires that Reynolds show that no fair-minded jurist could agree with the ACCA's decision that Reynolds insufficiently pleaded *Strickland* prejudice. As explained above, Reynolds has failed to make either showing. This claim is due to be denied.

8. Failure to Object to "Prejudicial" Bolstering

Reynolds claims that his trial counsel was constitutionally ineffective by failing to object to the State's allegedly "prejudicial" bolstering of state witnesses, Chad Martin and Langley. (Docs. # 1 at 85; 31 at 89). According to Reynolds, Langley was called by the State "as an alibi witness for Chad Martin." (Doc. # 1 at 85). During Langley's testimony, Reynolds alleges that the prosecutor improperly elicited testimony regarding Langley's initial status as a suspect and how the officers' suspicions were dispelled after "20-22 hours" of questioning and a polygraph test. (*Id.*). Similarly, Reynolds alleges that the prosecutor improperly "elicited testimony from [Chad] Martin that he offered to take a polygraph test" and that the prosecution prompted Chad Martin to testify directly to his mother in the crowd, "Momma. I didn't kill him." (*Id.*, quoting Vol. 9 at 107-09).

Reynolds contends that his trial counsel's failure to object "allowed the State to reinforce the jury's impression of Chad Martin's and . . . Langley's innocence." (*Id.*). Reynolds argues this was grossly inadequate "considering that counsel's defense depended on implicating Chad Martin

as the perpetrator of the crime[.]" (*Id.*). Reynolds further contends that the failure to object "cannot be considered 'strategy' and constituted an objectively unreasonable performance." (*Id.*, quoting *Strickland*, 466 U.S. at 690).

Reynolds also pleaded that counsel's failure to object here -- "in combination with counsel's failure to introduce Chad Martin's confession" -- created a "'probability sufficient to undermine confidence in the outcome of [his] trial.'" (Doc. # 1 at 86, quoting *Strickland*, 466 U.S. at 691). Thus, Reynolds asserts that "had the jury heard direct evidence of Chad Martin's confession, and in the absence of improperly bolstered testimony professing [Chad] Martin's and . . . Langley's innocence, 'there is a reasonable probability that [, but for counsel's errors,] the result of the proceeding would have been different.'" (*Id.*, quoting *Strickland*, 466 U.S. at 691).

The Rule 32 court summarily dismissed this claim as insufficiently pleaded under Alabama Rules of Criminal Procedure 32.3 and 32.6(b). (Vol. 33 at 131; *see* Vol. 25 at 171-73). The ACCA affirmed the Rule 32 court's dismissal, holding that Reynolds failed to specifically plead facts that, if true, would demonstrate *Strickland* prejudice. (Vol. 33 at 131, 173-74).

Reynolds has not shown that the ACCA's decision was based on an objectively unreasonable determination of facts or that the ACCA's decision was contrary to clearly established federal law. 28 U.S.C. §§ 2254(d). Further, Reynolds has not proffered a reason to call into question the ACCA's decision. He has not referenced any unreasonably determined fact on which the ACCA relied and failed to even cite any Supreme Court precedent demonstrating that the ACCA's determination was objectively unreasonable to the extent that no other fair-minded jurist could agree.

The court concludes that Reynolds conclusory allegations of prejudice within his federal habeas petition are insufficient to meet the heightened pleading requirements of 28 U.S.C. § 2254

Rule 2(c). *See* Rule 2(c) of the *Rules Governing Section 2254 Cases in the U.S. District Courts*. *See also* Advisory Committee Note to Rule 4 of the *Rules Governing 2254 Cases in the U.S. District Courts* ("Notice pleading is not sufficient [in habeas proceedings], for the petition is expected to state facts that point to a real possibility of constitutional error"), quoting *Aubut v. Maine*, 431 F.2d 688, 689 (1st Cir. 1970) (internal quotation marks omitted). And, in any event, there is overwhelming evidence of Reynolds's guilt, even if this were improper bolstering. In other words, there is simply nothing to suggest that absent this purported bolstering the outcome of Reynolds' trial would have been different. This claim is due to be denied.

9. Failure to Cross-Examine a "Key Witness" at Trial

Reynolds claims that his trial counsel was ineffective for "failing to ask any questions of prosecution witness Roger Dale." (Doc. # 1 at 87). According to Reynolds, Detective "Dale had been involved in multiple factors of the investigation … all of which, were open to cross-examination after his self-identification as the lead investigator." (*Id.*). Reynolds argues that his "[c]ounsel's failure to examine Dale was therefore unreasonable 'under prevailing professional norms' and not the result of any strategic consideration." (*Id.*, quoting *Strickland*, 466 U.S. at 688). Moreover, Reynolds argues that the failure to cross-examine Dale "on his investigation of Chad Martin abandoned any opportunity to create reasonable doubt as to . . . Reynolds's guilt and likely affected the outcome of Reynolds's case." (*Id.*, quoting *Strickland*, 466. U.S. at 695).

The Rule 32 court summarily dismissed this claim due to insufficient pleading under Alabama Rules of Criminal Procedure 32.3, 32.6(b). (*See* Vol. 33 at 149; Vol. 25 at 194-95). The ACCA affirmed the Rule 32 court's dismissal.

> Although Reynolds pleaded that trial counsel could have cross-examined Detective Dale on a number of issues, [Reynolds] specifically offered *only that he could have been cross-examined* about his investigation of Chad Martin as an alternative suspect. Reynolds *failed to plead specific questions* that trial counsel should have

> asked Detective Dale *and failed to plead any facts to indicate what Detective Dale's responses to those questions would have been*. Also, Reynolds failed to plead how he was prejudiced by trial counsel's failure to elicit from Detective Dale that Chad Martin was a suspect in light of the fact that this information was already before the jury.

(Vol. 33 at 149-50) (emphasis added).

Although it is unclear on which provision of § 2254(d) Reynolds now relies, he has not satisfied his burden under either provision. Reynolds has not shown that the ACCA's decision was based on an objectively unreasonable determination of facts or that the ACCA's decision was contrary to clearly established federal law. 28 U.S.C. §§ 2254(d). Further, Reynolds has failed to offer any reason to call into question the ACCA's decision. He has utterly failed to reference any unreasonably determined fact on which the ACCA relied and also failed to cite any Supreme Court precedent demonstrating that the ACCA's determination was objectively unreasonable to the extent that no other fair-minded jurist could agree.

Reynolds's argument is a bare allegation, which is wholly insufficient to show grounds for relief under *Strickland*, especially in light of AEDPA's heightened pleading requirements. And, in any event, there is overwhelming evidence of Reynolds's guilt. Even if Dale had been cross-examined, there is no indication that the outcome of the trial would have been different.

This claim is due to be denied.

10. Failure to Object to Courtroom Security Measures

Reynolds next argues that his counsel was ineffective for failing to object to heightened security measures in the courtroom. (*See* Doc. # 1 at 87) (citing Vol. 24 at 165). Reynolds contends that "no state interest" existed prior to the trial court's decision to implement heightened security, and that, regardless of the State's intent, his counsel failed to object to the use of the stun-belt and additional guards. (*Id.* at 88) (citing Vol. 24 at 165). As a result, Reynolds surmises that his

counsel's failure to object fell below an objective standard of reasonableness under *Strickland*. (*Id*.) (citing *Strickland*, 466 U.S. at 690).

Reynolds also asserts that the "inherently prejudicial" restraints created a chilling effect on Reynolds's ability "to participate in his own defense due to the presence of the belt restricting his movement and the 'interference' based on the positioning of the two uniformed officers flanking him for the duration of the trial." (*Id.* at 88-89) (citing *Deck v. Missouri*, 544 U.S. 622, 635 (2005). Thus, Reynolds concludes that he demonstrated that "there is a reasonable probability that counsel's failure to object to the stun-belt affected the outcome of his case and thus prejudiced the defense." (*Id.* at 89) (citing *Strickland*, 466 U.S. at 691).

The Rule 32 court dismissed this claim as insufficiently pleaded under Alabama Rules of Criminal Procedure 32.3 and 32.6(b) and found it was without merit. (Vol. 25 at 179-80; Vol. 33 at 136). The ACCA affirmed the Rule 32 court's dismissal, holding that Reynolds insufficiently pleaded that he had suffered *Strickland* prejudice because of his trial counsel's purported failure "to object to the heightened security in the courtroom." (Vol. 33 at 139, 174-75).

In particular, the ACCA criticized Reynolds's brief for failing to sufficiently plead whether the "stun-belt was visible [to the jurors]" or whether the jurors were otherwise "aware of [the belt's] existence." (*Id.* at 137). Similarly, the ACCA reasoned that Reynolds insufficiently pleaded *Strickland* prejudice because Reynolds did not plead whether "any jurors were aware that the officers [beside and behind him at trial] constituted extra security personnel[,]" or whether any of the "jurors drew any prejudicial inference from the officers' presence." (*Id.*). Further, the ACCA found conclusory Reynolds's argument that he suffered *Strickland* prejudice due to the alleged "chilling effect" these "additional security measures" had on Reynolds's ability to participate at

trial because he failed to specifically plead any actions he was prevented from taking or precisely how his ability to participate in his own defense was "hampered." (*Id.*).

Reynolds argues that habeas relief is proper under § 2254(d)(2) because the ACCA's decision allegedly contains unreasonable factual determinations. However, the court's review of Reynolds's Rule 32 pleadings before the ACCA and his federal petition show that Reynolds did does not substantiate this claim. Reynolds's sporadic references to the record within his petition (many of which circularly refer to his Rule 32 conclusory allegations) and his failure to identify which specific factual findings he contends the ACCA unreasonably determined (much less explain the significance of such a finding) fail to elevate this *Strickland* subclaim to a "highly probable" one. *Ward*, 592 F.3d at 1177; *see also Lee v. GDCP*, 987 F.3d at 1018 n.2 (explaining that unless a petitioner "can[] show that the state court's decision 'was based on' the challenged findings, they provide no basis for federal habeas relief whether or not those findings were unreasonable") Accordingly, Reynolds is not due relief under § 2254(d)(2).

Nor is Reynolds entitled to relief under § 2254(d)(1). Reynolds cites to multiple authorities within his federal habeas petition. *Deck v. Missouri*, 544 U.S. 622 (2005); *Estelle v. Williams*, 425 U.S. 501 (1976); *Holbrook v. Flynn*, 475 U.S. 560 (1986); *Illinois v. Allen*, 397 U.S. 337 (1970); and *Strickland*.[70] (*See* Doc. # 1 at 88-89). For the most part, Reynolds cites these cases for general

[70] As an initial matter, the court notes that Reynolds's reliance on *United States v. Durham*, 287 F.3d 1297 (11th Cir. 2002), and *United States v. Wilson*, 634 F. App'x 718, 732 (2015), is misplaced. The relevant inquiry in a § 2254 proceeding is whether the state's decision violated clearly established Supreme Court case law. *See* 28 U.S.C. § 2254(d)(1); *Lockyer*, 538 U.S. at 71-72. (*See* Doc. # 31 at 93).

Durham involved the direct appeal of a district court's denial of a motion to prohibit the use of a stun belt. *See Durham*, 287 F.3d at 1300. Thus, the legal principles announced in that case do not apply here. Furthermore, because *Durham* did not arise in the § 2254 context, the Eleventh Circuit did not address whether the defendant in *Durham* was prejudiced by the use of the stun-belt. In *Wilson*, like in *Durham*, there was a direct appeal from trial where the district court ordered additional security measures at trial including the use of leg shackles and stun-belts. *Wilson*, 634 F. App'x at 729. While not dispositive as *Wilson* arose in the § 2254 context (though not under AEDPA), the Eleventh Circuit did evaluate prejudice and determined that even if "the district court abused its discretion in instituting physical restraints such error would not be sufficiently prejudicial as to warrant a reversal of the . . . convictions[,] . . . because the clothing and table skirts covered the shackles and tasers, and . . . the jury could neither

propositions and provides little if any context or analysis relating them to his circumstances. (*See generally* Docs. # 1 at 88-89; 31 at 91-94). Nonetheless, the court will discuss each case.

In *Deck* the Supreme Court "h[e]ld that the Constitution forbids the use of *visible* shackles during the penalty phase, [just] as it forbids their use during the guilt phase, *unless* that use is 'justified by an essential state interest' -- such as courtroom security -- specific to the defendant on trial." 544 U.S. at 624 (emphasis added) (citing *Holbrook*, 475 U.S. at 568-69; *Allen*, 397 U.S. at 343-344). The Court observed that the defendant in *Deck* "was shackled with leg irons, handcuffs, and a belly chain." The Court also observed that, despite multiple objections by defense counsel, the shackling continued through the penalty phase where (upon renewed objection) he continued to remain before the jury in leg irons and a belly chain. *Id*. at 625. The Court explained that, because of the importance of the penalty phase and "[g]iven the presence of similarly weighty considerations" to those decided in the guilt phase, such as life and death, "courts cannot routinely place defendants in shackles or other physical restraints visible to the jury during the penalty phase of a capital proceeding." *Id.* at 632. The Court reasoned that "[t]he appearance of the offender during the penalty phase in shackles . . . almost inevitably affects adversely the jury's perception of the character of the defendant," which "inevitably undermines the jury's ability to weigh accurately all relevant considerations." *Id.* at 633.

Reynolds's reliance on *Estelle v. Williams* is also unavailing. In *Estelle*, the Supreme Court held that "the State cannot, consistent with the Fourteenth Amendment, compel an accused to stand trial before a jury *while dressed in identifiable prison clothes*." *Estelle*, 425 U.S. at 512-13

see nor hear the restraints." *Id.* at 734. Moreover, the Eleventh Circuit concluded that "[a]bsent any indication that the presence of the shackles and tasers contributed in any way to the verdict obtained, any error on the part of the district court in ordering these restraints as a security measure would be harmless beyond a reasonable doubt." *Id.* at 734. Reynolds is required to point to a Supreme Court case to support his claim. He has not. Indeed, he has not demonstrated that the ACCA's decision is even contrary to Eleventh Circuit case law.

(emphasis added). Reynolds's trial clothes are not at issue. Rather, to the extent Reynolds cites to *Estelle* in support of a claim of appearance before the jury, the ACCA recognized that Reynolds failed to plead that his stun-belt was visible to the jury and further failed to plead that any juror was aware that he was wearing a stun-belt.

Unlike the visible shackling discussed at length by the *Deck* Court or the practice of requiring a defendant to appear before a jury in prison-wear like in *Estelle*, Reynolds did not plead that his stun-belt was visible to the jury or that any juror at any time was even aware of its existence. Thus, Reynolds has not met his burden to show that the ACCA's decision was contrary to, or an unreasonable application of, *Deck* and *Estelle* such that no fair-minded jurist could agree with the ACCA.[71]

Reynolds's reliance on *Holbrook* is also misplaced. (Docs. # 1 at 89; 31 at 93). In *Holbrook*, the petitioner argued that the supplementation of the customary courtroom security force with four uniformed state troopers seated in the first row of the spectator section violated his right to a fair trial. *See* 475 U.S. at 567. The Court reasoned that "[w]hile shackling and prison clothes are unmistakable indications of the need to separate a defendant from the community at large, the presence of guards at a defendant's trial need not be interpreted as a sign that he is particularly dangerous or culpable" because "[j]urors may just as easily believe that the officers are there to guard against disruptions emanating from outside the courtroom or to ensure that tense courtroom exchanges do not erupt into violence[.]" The Court also recognized that the "jurors will not infer

[71] To the extent Reynolds cites to *Illinois v. Allen*, his reliance is misplaced. In *Allen*, the trial court removed the defendant from the courtroom after several outbursts that interrupted the trial. 397 U.S. at 339-41. The *Allen* Court recognized that there is not a single "formula for maintaining the appropriate courtroom atmosphere . . . [fitting for] all situations." *Id*. However, the Court also recognized "a number of constitutionally permissible ways for a trial judge to handle" an "obstreperous defendant." Here, Reynolds makes no showing that the trial court's actions fell outside of any of the acceptable methods noted in *Allen*. Therefore, Reynolds has not shown that the ACCA's determination was contrary to *Allen*.

anything at all from the presence of the guards." *Id.* at 569. The *Holbrook* court held that "[i]n view of the variety of ways in which such guards can be deployed," a case-by-case approach to prejudice (rather than presumption) is appropriate. *Id.*

Here, as the ACCA recognized, Reynolds failed to plead with any specificity whether the jury drew any prejudicial inference from the guards or even if the jury was aware of the two guard's presence at trial. For this reason, the ACCA determined that Reynolds failed to demonstrate *Strickland* prejudice as a result of his counsel's alleged failure to object, with respect to this claim. Reynolds has not shown that the ACCA's decision was contrary to, or an unreasonable application of, *Holbrook*.

In his reply brief, Reynolds also argues that the ACCA unreasonably applied *Strickland* by "arbitrarily enhancing" his burden of proof. He contends that, under *Strickland*, "[t]he test is whether counsel acted unreasonably and whether the failure to act prejudiced the defendant." 466 U.S. at 687; (Doc. # 31 at 91). Reynolds failed to present this argument in his federal habeas petition; as such, it has been waived and is not properly presented for the court's review. (*See* Docs. # 10 at 1, 5; 11 at 2). *See Al-Amin*, 2016 WL 10718765, at *17 ("Nor may parties . . . raise new issues in reply briefs. The same principles apply at the district court level.") (internal quotation marks and citation omitted).

But even putting aside his waiver of the claim, Reynolds's *Strickland* argument in his reply brief is without merit. Reynolds mistakenly equates his Rule 32 pleading burden with *Strickland*'s burden of proof. Nothing in the Rule 32 state court record indicates that the court required Reynolds to *prove* that, but for the acts constituting alleged ineffective assistance of counsel, there existed a reasonable probability that the result of his trial (or sentencing) would have been different. Rather, the Rule 32 court concluded that Reynolds had not met his heightened *pleading*

requirement. That is, even assuming every pleaded *specific, non-conclusory fact* to be true, Reynolds could not demonstrate that *Strickland* prejudice existed. *See, e.g.*, Ala. R. Crim. P. 32.3, 32.6(b), 32.7(d). Moreover, Reynolds failed to point to any evidence in support of this claim. Accordingly, this argument is without merit.

Based on what was before the ACCA at the time it ruled, the court concludes that its decision that Reynolds insufficiently pleaded *Strickland* prejudice was not based on an unreasonable determination of the facts or contrary to clearly established federal law. Reynolds's claim is due to be denied.

B. Penalty Phase Claims of Ineffective Assistance

Reynolds also contends that his trial counsel provided ineffective assistance during the penalty phase of the proceedings. (*See generally* Docs. # 1 at 89-133; 31 at 94-105). Reynolds divides this claim into four *Strickland* subclaims alleging that defense counsel: (1) "failed to conduct a reasonable mitigation investigation" (*see* Docs. # 1 at 90-113; 31 at 94-98); (2) "failed to present powerful and available mitigation evidence" (*see* Docs. # 1 at 113-28; 31 at 98-103); (3) "failed to prepare the penalty phase witnesses to testify" (*see* Docs. # 1 at 128-31; 31 at 103-04); and (4) "failed to introduce a confession to create residual doubt." (*See* Docs. # 1 at 131-33; 31 at 104-05).

After reviewing each subclaim, the court concludes that Reynolds is not entitled to relief under § 2254(d) for a number of reasons (*e.g.*, failure to adequately plead, failure to prove that the state court's decision was contrary to clearly established Federal law, and failure to prove that the state court's decision was based on an unreasonable determination of the facts presented).[72] The

[72] The court has addressed why Reynolds is not entitled to an evidentiary hearing on any *Strickland* claim. *See* Part III(B), *supra*.

court addresses the subclaims below and for the reasons provided below, concludes that each of Reynolds's penalty-phase *Strickland* claims are due to be denied.

1. Failure to Conduct a Reasonable Mitigation Investigation

Reynolds further divides this claim into two separate subparts: (1) "failure to obtain a mitigation expert and locate key records" (Doc. # 1 at 93-97) and (2) "failure to investigate organic brain damage, low IQ, mental health issues, substance abuse issues, and numerous witnesses who would have testified on his behalf." (Doc. # 1 at 97-113).

The Rule 32 court dismissed Reynolds's allegations of unreasonable mitigation investigation as insufficiently pleaded under Alabama Criminal Procedure Rules 32.3 and 32.6(b) and without merit under Rule 32.7(d).[73] (Vol. 25 at 198, 202). The Rule 32 court acknowledged the lengthy nature of this subclaim, but despite its "length," determined that Reynolds's allegations were "bare" and lacking in the "basic facts necessary" to state either the performance or prejudice prong of a sufficient *Strickland* claim. (*Id.* at 198-202).

The ACCA addressed each of Reynolds's arguments together, and affirmed the Rule 32 court's decision to dismiss "Reynolds's claim that [his] trial counsel were ineffective for failing to conduct an adequate mitigation investigation." (Vol. 33 at 152-55). The ACCA focused on Reynolds's failure "to specifically address the prejudice he suffered as a result of trial counsel's alleged failures." (Vol. 33 at 153-54) (citing *Strickland*, 466 U.S. at 697 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice … that course should be followed.")).

As the ACCA explained, "while Reynolds pleaded that trial counsel failed to investigate whether he suffered from a mental illness or organic brain damage, [Reynolds] failed to plead that

[73] The court described the pleading requirements of Rules 23.3 and 32.6(b) as well as the standard for summary dismissal under Rule 32.7(d) in the Standard of Review section above. *See* Part II(C), *supra*.

he actually suffered from a specific mental illness or organic brain damage." (*Id.*). The ACCA also listed the extensive number of mitigating circumstances found by the trial court; noted the existence of three aggravating factors; and explained that Reynolds's trial counsel presented "ample mitigation evidence … during the penalty phase." (*Id.* at 153-54, 153 n. 9). Also, the ACCA stated that "[m]uch of what Reynolds argue[d] should have been investigated would have been cumulative to what trial counsel actually presented." (*Id.* at 153). The ACCA concluded that Reynolds's "bare allegations of prejudice" were insufficient to establish prejudice under the *Strickland* standard. (*Id.* at 153-55). For the reasons explained below, the court concludes that Reynolds is not due relief on this claim.

a. Reynolds Did Not Properly Plead This Claim

Reynolds's claim fails to comply with Rule 2(c) of the Rules Governing Habeas Corpus Cases and is due to be denied because Reynolds has not articulated a sufficient claim under § 2254(d). "Habeas corpus petitions must meet heightened pleading requirements." *McFarland v. Scott*, 512 U.S. 849, 856 (1994). Further, 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*). Here, Reynolds does nothing more than sporadically argue the facts of his case, mention the holdings of several cases, and make the bare assertion that the ACCA's holding is contrary to several Supreme Court cases. He has not explained how he was prejudiced at his trial or how any Supreme Court cases support his arguments. Thus, Reynolds did not sufficiently plead this claim.

b. Section 2254(d)(1)

Even if Reynolds had sufficiently pleaded this claim, he has failed to show that the ACCA's decision is contrary to clearly established federal law. Reynolds asserts that the ACCA's decision was contrary to, or involved an unreasonable application of, clearly established law as set forth in *Porter*, *Ake*, *McWilliams*, *Wiggins*, and *Rompilla*.[74] But, his assertions are off the mark. Each of these cases are materially distinguishable from Reynolds's case, at least to the point where a fair-minded jurist could agree with the ACCA's decision.

(1) *Ake v. Oklahoma*, 470 U.S. 68 (1985); *McWilliams v. Dunn*, 137 S. Ct. 1790 (2017)

Reynolds invokes *Ake* for the proposition that "when a criminal defendant demonstrates that his mental state will be a significant issue at trial, an expert in psychiatry is one of the 'raw materials integral to the building of an effective defense.'" (Doc. # 1 at 98, quoting *Ake*, 470 U.S. at 77). Reynolds next states "[e]vidence that [he] suffers from brain damage is highly relevant to

[74] Reynolds cites several other Alabama and federal cases in support of this claim: *Porter v. Singletary*, 14 F.3d 554 (11th Cir. 1994); *Brownlee v. Haley*, 306 F.3d 1043 (11th Cir. 2002); *Dubose v. State*, 662 So. 3d 1189 (Ala. 1995); *Stevens v. Zant*, 968 F.2d 1076 (11th Cir. 1992); *Bolender v. Singletary*, 16 F.3d 1547 (11th Cir. 1994); *Hyde v. State*, 950 So. 2d 344 (Ala. Crim. App. 2006);); *Ferrell v. Hall*, 640 F.3d 1199 (11th Cir. 2011); *Baxter v. Thomas*, 45 F.3d 1501 (11th Cir. 1995); *Middleton v. Dugger*, 849 F.2d 491 (11th Cir. 1988); *Hardwick v. Sec'y, Fla. Dep't of Corr.*, 803 F.3d 541 (11th Cir. 2015); *Kirpatrick v. Whitley*, 992 F.3d 491 (5th Cir. 1993); and *Wilson v. Sirmons*, 536 F.3d 1064 (10th Cir. 2008), *opinion reinstated sub. nom. Wilson v. Workman*, 577 F.3d 1284 (10th Cir. 2009). However, these cases do not support Reynolds's burden under AEDPA. *See* § 2254(d)(1) (limiting habeas relief to decisions that are "contrary to, or involved an unreasonable application of, clearly established Federal law, *as determined by the Supreme Court of the United States*") (emphasis added); *Powell v. Allen*, 602 F.3d 1263, 1273 (11th Cir. 2010) ("AEDPA limits our review to whether the state court's determination that [petitioner] failed to plead sufficient facts in his Rule 32 petition to support a claim of ineffective assistance of counsel was contrary to or an unreasonable application of *Supreme Court precedent*.") (emphasis added). Regardless, the court has reviewed these cases and concludes that the ACCA's decision is not contrary to them.

Reynolds also relies on the American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (hereinafter "ABA Guidelines") in support of his *Strickland* claims. (Docs. # 1 at 90-91; 31 at 95-96). The Supreme Court has referred to the ABA Guidelines as appropriate standards for attorney conduct. *See, e.g.*, *Wiggins*, 539 U.S. at 524. However, the practitioner-focused advice and commentary are not examples of clearly established federal law under AEDPA. *See* § 2254(d)(1) (limiting habeas relief to decisions that are "contrary to, or involved an unreasonable application of, clearly established Federal law, *as determined by the Supreme Court of the United States*") (emphasis added).

the mitigating factor of his capacity 'to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.'" (*Id.*, quoting Ala. Code § 13A-5-51(6)). Later, Reynolds correctly cites *McWilliams* for the assertion that "*Ake* clearly established a right to 'a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.'" (*Id.* at 103, quoting *McWilliams*, 137 S. Ct. at 1791).

While *Ake* and *McWilliams* may help a petitioner prove the performance prong of a *Strickland* claim, they in no way support Reynolds's argument that the ACCA's decision -- that Reynolds failed to sufficiently plead prejudice in his state habeas complaint -- was contrary to clearly established Federal law. The *Ake* Court held "that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." 470 U.S. at 83. And *McWilliams* reiterates *Ake*'s holding. 137 S. Ct. at 1794. However, neither case supports an assertion that the ACCA's dismissal of Reynolds's claim for a lack of prejudice under *Strickland* was contrary to clearly established federal law.[75]

(2) *Williams v. Taylor*, 529 U.S. 362 (2000)[76]

Reynolds cites *Williams* in conjunction with the ABA guidelines and asserts that his counsel were ineffective because they "failed to conduct an investigation that would have

[75] Similarly, Reynolds's reliance on *Tennard v. Dretke*, 542 U.S. 274 (2004) fails. *Tennard* concerns a *Penry* violation. In *Penry*, the court held that "the sentencing body must be allowed to consider mental retardation as a mitigating circumstance in making the individualized determination whether death is the appropriate punishment in a particular case." *Penry v. Lynaugh*, 492 U.S. 302, 337-38, *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002). Again, while this holding may help a petitioner establish the performance prong of a *Strickland* violation, it does not indicate that Reynolds was prejudiced by the mitigation investigation.

[76] The opinion of the Court was delivered by Justice Stevens and Justice O'Connor. In Justice Stevens's opinion, he wrote for the Court as to parts I, III, and IV of his opinion (but parts II and V of his opinion did not garner a majority.).

uncovered extensive records graphically describing [petitioner's] nightmarish childhood" (Doc. # 1 at 91, quoting *Williams*, 529 U.S. at 395). But again, this statement goes to the performance portion of *Strickland*. Nevertheless, the court will recount the prejudice analysis in *Williams* to show that the ACCA's decision is not contrary to the Supreme Court's holding.

In *Williams*, a jury convicted the petitioner of robbery and capital murder after being presented with several pretrial confessions. *Williams*, 529 U.S. at 367-68. After considering the defendant's record of prior convictions and confessional statements, "the jury found a probability of future dangerousness and unanimously fixed [the petitioner's] punishment at death." *Id.* at 368, 370. The Supreme Court reasoned that the state supreme court's decision that there was no prejudice was unreasonable because "it failed to evaluate the totality of the available mitigation evidence — both that adduced at trial, and the evidence adduced in the habeas proceeding in reweighing it against the evidence in aggravation. *Id.* at 397-98 (citing *Clemons v. Mississippi*, 494 U.S. 738, 751-52 (1990)). The Supreme Court noted that the state court did not mention the mitigating evidence advanced at trial (petitioner turned himself in, expressed remorse, and cooperated with police). *Id.* at 398. The Supreme Court held that the state supreme court erred in its prejudice analysis when it did not combine the mitigating evidence at trial with the additional mitigating evidence in the petitioner's collateral habeas brief (petitioner's abusive childhood characterized by privation and the fact that petitioner was "borderline mentally retarded") against the aggravating factors.[77] *Id.* at 398.

[77] In part V of his opinion, Justice Stevens wrote:

> In our judgment, the state trial judge was correct both in his recognition of the established legal standard for determining counsel's effectiveness, and in his conclusion that the entire postconviction record, viewed as a whole and cumulative of mitigation evidence presented originally, raised "a reasonable probability that the result of the sentencing proceeding would have been different" if competent counsel had presented and explained the significance of all the available evidence. It follows that the Virginia Supreme Court rendered a "decision that was contrary to, or involved an unreasonable application of, clearly established Federal law." Williams' constitutional right to the

Unlike the facts involved in *Williams*, Reynolds's allegations of missing mitigating evidence (which mentioned only a *potential* for mental illness or organic brain damage) simply do not meaningfully counter the three aggravating factors that the trial court found the State had proven beyond a reasonable doubt in support of Reynolds's death sentence. Moreover, the aggravating factors in *Williams* were much less compelling than those found here. Reynolds murdered three victims as part of a robbery; inflicted upon them multiple stab wounds that prolonged their pain and suffering; and killed a defenseless child in an effort to prevent her from identifying him as her parents' killer. Consequently, the sentencing circumstances that supported a prejudice finding in *Williams* are substantially different from those here. The ACCA's decision was not contrary to clearly established federal law.

(3) *Wiggins v. Smith*, 539 U.S. 510 (2003)

Reynolds cites *Wiggins* for the principle that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigation unnecessary." (Doc. # 1 at 90, quoting *Wiggins*, 539 U.S. at 521). Reynolds also asserts that "*Strickland* requires that reasonable performance by capital defense counsel includes the thorough investigation into the client's background, life history, and mental health for 'all reasonably available mitigating evidence.'" (*Id.* at 113) (citing *Wiggins*, 529 U.S. at 524, 546; *Rompilla*, 545 U.S. at 374; *Porter*, 130 S. Ct. 447). But again, these two assertions speak to the performance prong of *Strickland*, not prejudice. Nevertheless, for completeness, the court will analyze the *Wiggins* Court's discussion.

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effective assistance of counsel as defined in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), was violated.

Williams, 529 U.S. 398-99. However, again, Justice Stevens did not write for the court in this portion of his opinion. Therefore, part V of Justice Steven's opinion does not constitute clearly established federal law, as determined by the Supreme Court.

In *Wiggins*, the Supreme Court reviewed prejudice without the benefit of a state court decision on the issue. *Wiggins*, 539 U.S. at 534. The Court noted that the petitioner's brief showed that he "experienced severe privation and abuse in the first six years of his life…suffered physical torment, sexual molestation, and repeated rape during his subsequent years in foster care… [and that] the time [petitioner] spent homeless, along with his diminished mental capacities, further augment his mitigation case." *Id.* at 535. However, the only significant mitigating factor that the sentencing jury heard was that the petitioner had no prior convictions. *Id.* at 537. The court also noted that the petitioner "d[id] not have a record of violent conduct that could have been introduced by the State to offset this powerful mitigating narrative." *Id.* at 537.

The Court compared *Wiggins* with *Williams v. Taylor* (discussed above) in terms of the total mitigating evidence versus the aggravating evidence. "[T]he mitigating evidence in [*Wiggins*] is stronger, and the State's evidence in support of the death penalty far weaker, than in *Williams*, where we found prejudice as the result of counsel's failure to investigate and present mitigating evidence." *Id.* at 537-38. And the Court held that the totality of available mitigation evidence "might well have influenced the jury's appraisal." *Id.* at 538 (citing *Williams*, 529 U.S. at 398).

The evidence that Reynolds alleges was omitted only refers to the "potential" of organic brain injury or mental illness. His allegations do not approach the specificity or powerfulness of the "petitioner's excruciating life history" presented in *Wiggins*. 539 U.S. at 537. Additionally, Reynolds's trial counsel developed and presented evidence of numerous aspects of his troubled background, including experiencing severe childhood neglect and abuse, witnessing domestic violence, enduring a "disjointed family" without parental love or bonding, growing up impoverished and in a filthy home, quitting school, developing serious alcohol dependence and addiction to crystal methamphetamine and cocaine, losing custody of his child, and the loss of jobs

because of his addictions. (Vol. 33, Tab 68, at 54-55 n.9). Consequently, the Supreme Court's *de novo* discussion of prejudice in *Wiggins* does not demonstrate that, in rejecting Reynolds's ineffective investigation allegations for lack of actionable prejudice, the ACCA unreasonably applied *Strickland*.

(4) *Rompilla v. Beard*, 545 U.S. 374 (2005)

Reynolds cites *Rompilla* for the proposition that "counsel has the duty 'to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction.'" (Doc. # 1 at 90) (citing *Rompilla*, 545 U.S. at 387). Reynolds contends that "there is a reasonable probability" the jury would not have sentenced him to death had his attorney presented a portion of the available mitigating evidence. (*Id.* at 93). The facts and legal principles set forth in *Rompilla* do not entitle Reynolds to relief under § 2254(d)(1).

In *Rompilla*, the Commonwealth proved three aggravating factors: "that the murder was committed in the course of another felony; that the murder was committed by torture; and that [the petitioner] had a significant history of felony convictions indicating the use or threat of violence." *Rompilla*, 545 U.S. at 378. On the mitigation side, the petitioner presented five family members as witnesses. They testified about residual doubt, mercy, and that the petitioner was a good man. The jury found two mitigating circumstances: "that [petitioner's] son had testified on his behalf and that rehabilitation was possible. *Id.* However, the jury found that the aggravating factors outweighed the mitigating factors, and it assigned death as the sentence. *Id.*

As in *Wiggins*, the state court on *Strickland* review did not address prejudice, so the Supreme Court reviewed the issue *de novo*. *Id.* at 390. The mitigating information that post-conviction counsel uncovered included:

> Rompilla's parents were both severe alcoholics who drank constantly. His mother drank during her pregnancy with Rompilla, and he and his brothers eventually developed serious drinking problems. His father, who had a vicious temper, frequently beat Rompilla's mother, leaving her bruised and black-eyed, and bragged about his cheating on her. His parents fought violently, and on at least one occasion his mother stabbed his father. He was abused by his father who beat him when he was young with his hands, fists, leather straps, belts and sticks. All of the children lived in terror. There were no expressions of parental love, affection or approval. Instead, he was subjected to yelling and verbal abuse. His father locked Rompilla and his brother Richard in a small wire mesh dog pen that was filthy and excrement filled. He had an isolated background, and was not allowed to visit other children or to speak to anyone on the phone. They had no indoor plumbing in the house, he slept in the attic with no heat, and the children were not given clothes and attended school in rags.

Id. at 391-92. Petitioner's post-conviction counsel also had him tested for mental deficiencies, and an expert found that petitioner "suffer[ed] from organic brain damage, an extreme mental disturbance significantly impairing several of his cognitive functions … likely caused by fetal alcohol syndrome." *Id.* at 392. Additionally, "[s]chool records showed [the petitioner's] IQ was in the mentally retarded range." *Id.* at 392. The court held that the totality of mitigation evidence undermined the confidence in the jury's sentence of death. *Id.* at 393.

The *Rompilla* Court concluded that the complete body of the undiscovered evidence "add[ed] up to a mitigation cause that b[ore] no relation to the few naked pleas for mercy actually put before the jury" and, as a result, undermined confidence in the death sentence. *Id.* at 393. The evidence presented during Reynolds's penalty phase is clearly distinguishable from *Rompilla*. Again, because Reynolds's allegations refer to only a few mitigating factors (all of which are minor) he cannot satisfy his burden under AEDPA to show that the ACCA's decision is contrary to *Rompilla* or an unreasonable application of *Strickland*.

(5) *Porter v. McCollum*, 558 U.S. 30 (2009)

Reynolds cites *Porter* for the proposition that (1) his counsel was ineffective for failing to present evidence of mental impairment (Doc. # 1 at 99, 101); (2) his "counsel was ineffective for

failing to uncover and present mental health evidence" (Doc. # 1 at 101); and (3) his counsel was ineffective for ignoring court-ordered psychiatrist evaluation (Doc. # 1 at 102-03).

In *Porter,* the petitioner "was convicted of two counts of first-degree murder for the shooting of his [ex-]girlfriend … and her boyfriend." 558 U.S. at 31. While the jury recommended the death sentence for both murders, the trial court concluded the death penalty was appropriate for the murder of his ex-girlfriend. *Id*. at 32. "The trial court found that the State had proved all four aggravating circumstances for the murder of [his ex-girlfriend]" and "no mitigating circumstances." *Id.* On direct appeal, the state supreme court upheld the death sentence, but it concluded that the prosecution only proved three aggravating circumstances. *Id.* at 33.

The petitioner sought post-conviction relief in state court, and one of his claims was that "his penalty-phase counsel failed to investigate and present mitigating evidence." *Id.* "Unlike the evidence presented during [the petitioner's] penalty hearing, which left the jury knowing hardly anything about him other than the facts of his crimes, the new evidence described his abusive childhood, his heroic military service and the trauma he suffered because of it, his long-term substance abuse, and his impaired mental health and mental capacity." *Id.* The trial judge "held that [the petitioner] had not been prejudiced by the failure to introduce any of that evidence." *Id.* at 36. The state supreme court affirmed the decision, but two justices dissented, "reasoning that counsel's failure to investigate and present mitigating evidence was especially harmful because of the divided vote affirming the sentence on direct appeal—even without the substantial mitigation that we now know existed—and because of the reversal of the heinous, atrocious, and cruel aggravating factor." *Id.* at 37-38 (internal quotations omitted).

When analyzing *Strickland*'s prejudice prong, the Supreme Court of the United States noted that "the judge and jury at [the petitioner's] original sentencing heard almost nothing that

would humanize Porter or allow them to accurately gauge his moral culpability." *Id.* at 41. Instead, the triers of fact "learned about [the petitioner's] turbulent relationship with [his ex-girlfriend], his crimes, and almost nothing else." *Id.* However, if the petitioner's trial counsel would have been effective, the trier of fact would have heard about the petitioner's:

> (1) . . . heroic military service in two of the most critical – and horrific – battles of the Korean War, (2) his struggles to regain normality upon his return from war, (3) his childhood history of physical abuse, and (4) his brain abnormality, difficulty reading and writing, and limited schooling.

Id. at 41.

The Court also reasoned that there was only one additional aggravating factor that stood through review. *Id.* at 41-42. The Court held that it was "unreasonable to discount to irrelevance the evidence of [the petitioner's] abusive childhood, especially when that kind of history may have particular salience for a jury evaluating [the petitioner's] behavior in his relationship with [his ex-girlfriend]." *Id.* at 43. The Court further concluded that it was "also unreasonable to conclude that [petitioner's] military service would be reduced to 'inconsequential proportions,' simply because the jury would also have learned that [the petitioner] went AWOL on more than one occasion," particularly in light of "[o]ur Nation['s] … long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines as [the petitioner] did." *Id*.

Reynold's reliance on *Porter* is misplaced. Unlike the double murder in *Porter*, which the Florida Supreme Court found was more consistent with a "'crime of passion,'" *Porter*, 558 U.S. at 33, quoting *Porter*, 564 So. 2d at 1063, the three murders in this case -- like those in *Strickland* -- were carried out for "pecuniary gain" and "to hinder law enforcement." *Strickland*, 466 U.S. at 674. Further, the omitted mitigating factors in Reynolds's case do not approach the level of impact as those in *Porter* would have. Unlike the defendant's counsel in *Porter*, who presented only

limited mitigation evidence and "did not even take the first step of interviewing witnesses or requesting records," 558 U.S. at 40, Reynolds presented extensive mitigation evidence about his environment, education, life, background, family history, and school history. (Vol. 33 at 153-54). So, the level of culpability of the defendant in *Porter* (*i.e.*, the aggravating circumstances of his crimes) was substantially less than Reynolds's. And, the extent of the mitigation evidence not offered on behalf of the defendant in *Porter* was much more significant than in Reynolds's case. Reynolds has not shown that the ACCA's decision is contrary to *Porter* such that no fair-minded jurist could agree.

(6) *Sears v. Upton*, 661 U.S. 945 (2010)

In *Sears*, a jury convicted the petitioner of "armed robbery and kidnaping with bodily injury (which also resulted in death)." *Id.* at 947. "During the penalty phase of [petitioner's] capital trial, his counsel presented evidence describing his childhood as stable, loving, and essentially without incident. … Counsel's mitigation theory, it seems, was calculated to portray the adverse impact of Sears' execution on his family and loved ones." *Id.* However, the State flipped the evidence in its favor, describing petitioner as "a person, privileged in every way, who has rejected every opportunity that was afforded him." *Id.* at 947-48. Ultimately, the jury sentenced petitioner to death. *Id.* at 947 n. 2.

The court detailed the mitigation evidence from the state postconviction evidentiary hearings as follows:

> [The petitioner's] home life, while filled with material comfort, was anything but tranquil: His parents had a physically abusive relationship and divorced when Sears was young; he suffered sexual abuse at the hands of an adolescent male cousin; his mother's "favorite word for referring to her sons was 'little mother fuckers,'"; and his father was "verbally abusive" and disciplined [the petitioner with age-inappropriate military-style drills[.] [The petitioner] struggled in school, demonstrating substantial behavior problems from a very young age. For example, [the petitioner] repeated the second grade and was referred to a local health center

> for evaluation at age nine[.] By the time [the petitioner] reached high school, he was "described as severely learning disabled and as severely behaviorally handicapped."
>
> Environmental factors aside, and more significantly, … [the petitioner] suffered "significant frontal lobe abnormalities." Two different psychological experts testified that [the petitioner] had substantial deficits in mental cognition and reasoning—i.e., "problems with planning, sequencing and impulse control," — as a result of several serious head injuries he suffered as a child, as well as drug and alcohol abuse. Regardless of the cause of his brain damage, his scores on at least two standardized assessment tests placed him at or below the first percentile in several categories of cognitive function, "making him among the most impaired individuals in the population in terms of ability to suppress competing impulses and conform behavior only to relevant stimuli." The assessment also revealed that [the petitioner's] "ability to organize his choices, assign them relative weight and select among them in a deliberate way is grossly impaired." From an etiological standpoint, one expert explained that [the petitioner's] "history is replete with multiple head trauma, substance abuse and traumatic experiences of the type expected" to lead to these significant impairments.

Id. at 948-49 (internal citations omitted).

The Supreme Court found the post-conviction court's assessment of *Strickland* prejudice problematic and articulated two key reasons for its concern:

> [T]he [state] court curtailed a more probing prejudice inquiry because it placed undue reliance on the assumed reasonableness of counsel's mitigation theory. The court's determination that counsel had conducted a constitutionally deficient mitigation investigation should have, at the very least, called into question the reasonableness of this theory. And more to the point, that a theory might be reasonable, in the abstract, does not obviate the need to analyze whether counsel's failure to conduct an adequate mitigation investigation before arriving at this particular theory prejudiced Sears. The "reasonableness" of counsel's theory was, at this stage in the inquiry, beside the point: Sears might be prejudiced by his counsel's failures, whether his haphazard choice was reasonable or not. . . .
>
> [M]ore fundamentally, the court failed to apply the proper prejudice inquiry. We have never limited the prejudice inquiry under *Strickland* to cases in which there was only "little or no mitigation evidence" presented. True, we have considered cases involving such circumstances, and we have explained that there is no prejudice when the new mitigating evidence "would barely have altered the sentencing profile presented" to the decisionmaker[.] But we also have found deficiency *and* prejudice in other cases in which counsel presented what could be described as a superficially reasonable mitigation theory during the penalty phase.

561 U.S. at 953-54 (internal citations and footnote omitted) (emphasis in original). Ultimately, the Court held that "[a] proper analysis of prejudice under *Strickland* would have taken into account the newly uncovered evidence of [the petitioner's] 'significant' mental and psychological impairments, along with the mitigation evidence introduced during [petitioner's] penalty phase trial…." *Id.* at 956.

Unlike *Sears*, the allegedly "additional" mitigating information that Reynolds asserts does not differ dramatically from the information that was actually presented to the sentencing jury. Further, Reynolds's references to possible mental health problems have limited mitigating value (for the reasons already described above). And, the aggravating factors in Reynolds's case are much stronger than those present in *Sears*, which involved a single killing. Because of these key differences, the Supreme Court's *de novo* remand in *Sears* does not support a finding that the ACCA's decision was contrary to clearly established federal law such that no fair-minded jurist could agree.

c. Section 2254(d)(2)

Reynolds also asserts that habeas relief is appropriate under § 2254(d)(2). He argues that the ACCA's decision contains unreasonable factual determinations. But, he has made only sporadic references to the record within his petition, many of which circularly refer to his Rule 32 allegations, and failed to identify which specific factual findings he contends the ACCA unreasonably determined. For these reasons, he has failed to establish that his *Strickland* penalty-phase subclaim is a "highly probable" one. *Ward v. Hall*, 592 F.3d 1144, 1177 (11th Cir. 2010); *see also Lee v. GDCP*, 987 F.3d at 1007, 1018 n.2 (explaining that unless a petitioner "can[] show that the state court's decision 'was based on' the challenged findings, they provide no basis for

federal habeas relief whether or not those findings were unreasonable," quoting 28 U.S.C. § 2254(d)(2).

In sum, Reynolds is not entitled to relief on this claim because it was insufficiently pleaded and, alternatively, Reynolds has not established that the ACCA's decision was contrary to clearly established federal law or based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

2. Counsel's Omission of "Powerful," "Readily-Available," and "Compelling" Mitigation Evidence

Reynolds further divides his second penalty-phase *Strickland* subclaim into three sub-subclaims: (1) "Counsel Presented an Incomplete and Misleading Depiction of Mr. Reynolds's Childhood" (Doc. # 1 at 114-23); (2) "Counsel Failed to Present the Impact of their Traumatic Childhood on Mr. Reynolds's Siblings" (Doc. # 1 at 124-25); and (3) "Counsel Failed to Present Evidence of Mr. Reynolds's Work Ethic, Good Character, And Love For Children." (Doc. # 1 at 125-28). Reynolds contends that his "counsel fail[ed] to present a wealth of readily available and compelling mitigating evidence" and instead only introduced "scattered fragments of [his] character and history" such that "the picture . . . presented to the jury and the judge was incomplete and misleading." (*Id.* at 114). Reynolds further posits that this failure amounted to an abdication of his counsel's duty to "'complet[e] the [jury's] picture of [his] . . . moral culpability'" and amounted to *Strickland* prejudice. (*Id.*, quoting *Wiggins*, 539 U.S. at 535; *Strickland*, 466 U.S. at 695).

a. The ACCA's Decision

The circuit court dismissed Reynolds's arguments related to this subclaim as inadequately pleaded under Rules 32.3 and 32.6(b) and without merit under Rule 32.7(d). (Vol. 33 at 156). The ACCA affirmed the circuit court. Regarding the first sub-subclaim, the ACCA reasoned that "what

Reynolds argues should have been presented would have been cumulative." (*Id.*). Further, the ACCA acknowledged that "[e]ven the evidence that Reynolds argues was not cumulative … does not, if true, entitle Reynolds to relief" because it would have had minimal mitigating value as none of the instances involved him being abused. (*Id.* at 156-57).

The ACCA distinguished Reynolds's arguments relating to the first sub-subclaim from *Williams v. Allen*, 542 F.3d 1326 (11th Cir. 2008), for two reasons. (*Id.* at 157). First, in *Williams*, counsel only presented one mitigation witness, as opposed to the seven family members who presented evidence during the penalty phase of Reynolds's trial. (*Id.*). Second, the *Williams* court noted that "the case [before it] was 'not highly aggravated,'" while here "Reynolds's murders involved 'three strong aggravating circumstances." (*Id.*) Further, the ACCA pointed out that Reynolds's age (thirty-one) at the time of the triple homicide "lessened the probability of prejudice" attributable to his traumatic childhood to a minimal value. (*Id.*) (citing *Callahan v. Campbell*, 427 F.3d 897, 937 (11th Cir. 2005); *Francis v. Dugger*, 908 F.2d 696, 703 (11th Cir. 1990). The ACCA also noted that Reynolds "ha[d] made [only] a bare allegation of prejudice without specifically pleading how he was prejudiced by trial counsel's failure to present this additional evidence." (Vol. 33 at 157). Thus, the ACCA concluded that this sub-subclaim was "insufficiently pleaded and without merit." (Vol. 33 at 158).

Regarding the second sub-subclaim, the ACCA concluded that Reynolds insufficiently pleaded this claim "because Reynolds failed to plead any facts to show how th[e] evidence would have been mitigating … or how he was prejudiced.". (Vol. 33 at 159). The ACCA reasoned that "whatever ill effects Reynolds's siblings have suffered as a result of their traumatic childhoods, only Reynolds has committed a heinous act of violence. (*Id.*) (citing *Grayson v. Thompson*, 257 F.3d 1194, 1227 (11th Cir. 2001).

As to the third sub-subclaim, the ACCA concluded that it was without merit. (*Id.* at 161). The ACCA reasoned that much of the testimony that Reynolds argues should have been presented would have been cumulative of the evidence that was actually presented during the penalty phase. (*Id.* at 160). The ACCA noted that "[m]ultiple witnesses testified that Reynolds was a good father and good with children, and Dr. Martin testified that Reynolds had done so well at work that he had been promoted to supervisor." (*Id.*). The ACCA rejected Reynolds's argument that this testimony would have been more compelling if it had come from non-family members because that assertion was not properly pleaded and because each individual that Reynolds contends would have presented this testimony were also susceptible to bias in favor of him. (*Id.*).

b. Section 2254(d)(1)-(2)

In his attempt to satisfy his AEDPA burden, Reynolds relies on several of the same cases that the court has already addressed, including *Wiggins* and *Strickland*.[78] (*See* Docs. # 1 at 114,

[78] Reynolds also references *Ferrell v. Hall* and *Kirpatrick v. Whitley*, as he did in relation to his first sub-subclaim, Again, these cases do not support Reynolds's arguments under AEDPA. *See* 28 U.S.C. § 2254(d)(1) (limiting habeas relief to decisions that are "contrary to, or involved an unreasonable application of, clearly established Federal law, *as determined by the Supreme Court of the United States*") (emphasis added); *Powell v. Allen*, 602 F.3d 1263, 1273 (11th Cir. 2010) ("AEDPA limits our review to whether the state court's determination that [petitioner] failed to plead sufficient facts in his Rule 32 petition to support a claim of ineffective assistance of counsel was contrary to or an unreasonable application of *Supreme Court precedent*.") (emphasis added). Regardless, and in any event, the court has reviewed these cases and concludes that the ACCA's decision is not contrary to them.

Reynolds also relies upon *Collier v. Turpin*, 177 F.3d 1184 (11th Cir. 1999) (cited in his reply brief), and *Williams v. Allen*, 542 F.3d 1326 (11th Cir. 2008). Once again, these are circuit court decisions so they do not support Reynolds's arguments under § 2254(d)(1). That is, they do not show that the ACCA's decision is contrary to clearly established federal law as determined by the Supreme Court of the United States. But, even if they did, Reynolds's reliance on *Collier* and *Williams* is off the mark.

As compared to *Collier*, Reynolds's trial counsel presented more than just "minimal" evidence of Reynolds's difficult upbringing. Reynolds's trial counsel also presented evidence of several positive aspects of his life, including that his son and other family members love him, his role as a good father and stepfather prior to his addiction, his efforts to "hold[] his disjoined family together," and his record of "no significant . . . prior criminal activity." (Vol. 33 at 154). Although Reynolds contends that his trial counsel critically omitted testimony from his ex-wife and former in-laws, *Collier* does not stand for the proposition that the penalty-phase jury must hear cumulative evidence. Additionally, a reasonable jurist could find that the aggravating factors in Reynolds's case were more severe than those in *Collier*, thus, substantially lessening the value of this cumulative mitigating evidence. The ACCA's decision is not contrary to the holding of *Collier*.

128; 31 at 99, 102). The court's prior analysis on why these decisions do not show that the ACCA unreasonably applied *Strickland*'s prejudice prong to Reynolds's ineffective investigation allegations applies with equal force to Reynolds's allegations that trial counsel unreasonably omitted powerful mitigating circumstances during the penalty phase. *See supra*, Section V(A)(2). So, there is no need for the court to repeat its analysis here. Thus, Reynolds fails to show that the ACCA's decision is contrary to clearly established federal law such that no fair-minded jurist could agree.

Also, for the same reasons as explained above, Reynolds has not established that the ACCA's decision was based on an unreasonable determination of the facts. Reynolds disagrees with the ACCA's ultimate decision, but he does not argue that the ACCA unreasonably determined any of the underlying facts. Accordingly, Reynolds is not due relief under § 2254(d) on this claim. Thus, this claim is due to be denied.

3. Counsels' Failure to Prepare the Penalty Phase Witnesses to Testify

In his third penalty-phase *Strickland* subclaim, Reynolds alleges that his trial counsel ineffectively prepared mitigation witnesses, including: his aunt Barbara Reynolds; his ex-wife's

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Also, this court agrees with the ACCA's conclusion that the sentencing circumstances in *Williams* are "distinguishable" from those in Reynolds's record. (*Id.*). The ACCA explained the *Williams* decision is different from Reynolds's case for two reasons. (Vol. 33 at 157). First, the ACCA observed that in *Williams* there was only one witness who testified about his abuse, and she wrongfully implied that the abuse was "mild." *Id.* But, at Reynolds's trial, seven witnesses testified about multiple instances of serious parental abuse and neglect that Reynolds experienced as a child. (*Id.*). Second, the ACCA observed that the trial court in *Williams* only found a single aggravating circumstance, but during Reynolds's penalty-phase the State proved "three strong aggravating circumstances." (Vol. 33 at 157) (internal quotation marks omitted); s*ee Williams*, 542 F.3d at 1330 (finding one of eight aggravating circumstances available under Alabama law and three mitigating circumstances). There is also a significant difference in the defendants' ages at the time of the crimes: Reynolds was thirty-one at the time of the triple murder and therefore was much further removed from childhood traumas than was nineteen-year-old Williams when he murdered one person. Given these differences, *Williams* does not provide support for Reynolds's contention that the ACCA unreasonably rejected his allegations of *Strickland* prejudice.

son Chaz Tankersly; his sister Christy Prosser; his brother-in-law Alan Prosser; and his father Harold Reynolds. (Doc. # 1 at 128-29).

The Rule 32 court dismissed this subclaim as insufficiently pleaded under Rules 32.2 and 32.6(b) and without merit under Rule 32.7(d). (Vol. 33 at 155). The ACCA affirmed that dismissal, concluding that Reynolds's allegations were insufficiently pleaded and without merit. (*Id.*). The ACCA criticized Reynolds's brief for failing to include facts "indicat[ing] what trial counsel should have done to prepare the mitigation witnesses or how their testimony during the penalty phase would have been different had they received the unspecified preparation." (*Id.* at 155) (citing *Boyd v. State*, 913 So. 2d 1113, 1138-39 (Ala. Crim. App. 2003)). The ACCA noted that Reynolds's *Strickland* claim regarding his father's testimony was "facially meritless." (*Id.*). As it explained:

> First, Harold Reynolds provided testimony that directly supported trial counsel's strategy of presenting Reynolds's difficult childhood -- he testified to being an alcoholic, to moving frequently when Reynolds was young, to a period of homelessness, to the involvement in prostitution by Reynolds's mother, to slapping his wife on multiple occasions, to the possibility that he choked his wife, and to Reynolds's dropping out of school. Second, while Harold Reynolds denied certain testimony provided by other mitigation witnesses, it is clear from the trial court's findings of mitigating factors in its sentencing order that these self-serving denials were given little to no weight.

(*Id.* at 155-56).[79]

Reynolds cites *Holladay v. Haley*, 209 F.3d 1243 (11th Cir. 2011), *Boyde v. California*, 494 U.S. 370 (1990), and *Strickland* in support of this subclaim. (Docs. # 1 at 129, 131; 31 at 104).

[79] Although the ACCA did not specifically mention Reynolds's allegations of prejudice with respect to this subclaim, the Rule 32 court did. (*See* Vol. 26 at 407) (concluding that "Reynolds fail[ed] to specifically plead how he was prejudiced by the failure to more adequately prepare the penalty phase witnesses" and that Reynolds's allegations about his father's compromised testimony did not "show either deficient performance or prejudice"). Under the look-through presumption, a "federal [habeas] court should 'look through' [an] unexplained decision to the last related state-court decision that does provide a relevant rationale . . . [and] then presume that the unexplained decision adopted the same reasoning." *Wilson v. Sellers*, __ U.S. __, 138 S. Ct. 1188, 1192 (2018). Consistent with this principle, the Rule 32 court's dismissal for insufficient pleading of prejudice becomes the merits-based decision to which AEDPA deference attaches with respect to *Strickland* prejudice.

And, he contends that the ACCA "unreasonabl[y] determined . . . facts in light of the record before it." (Doc. # 31 at 103). But, these arguments are each off the mark.

First, as the court has previously explained, Reynolds's reliance on *Strickland* does not adequately support his allegations of prejudice. Second, the Supreme Court's decision in *Boyde* addresses federal habeas claims unrelated to ineffective assistance of counsel. *See* 494 U.S. at 372 ("This case requires us to decide whether two California jury instructions used in the penalty phase of petitioner's capital murder trial and in other California capital cases before each was modified in 1983 and 1985, respectively, are consistent with the requirements of the Eighth Amendment."). Third, other than being a decision from the Eleventh Circuit, *see Carey v. Musladin*, 549 U.S. 70, 74 (2006), the *Holladay* court's opinion is inapposite to Reynolds's claims: *Holladay* does not speak to *Strickland* prejudice on the issue of witness preparation. *Holladay*, 209 F.3d at 1253-54. In *Holladay*, the Eleventh Circuit addressed several *Strickland* claims including one challenging the adequacy of counsel's preparation of the *defendant* to testify. But, the *Holladay* court did not factor *Strickland* prejudice into its decision on that claim, or even include a prejudice analysis in an alternative holding. *Holladay*, 209 F.3d at 1253-54. Fourth, for the reasons discussed above, Reynolds has not shown that the ACCA's decision was based on an unreasonable determination of the facts. Reynolds has failed to show that he is due relief under § 2254(d) and this claim is due to be denied.

4. Counsels' Failure to Introduce a Confession to Create Residual Doubt

In his fourth penalty-phase *Strickland* subclaim, Reynolds faults trial counsel for failing to introduce the purported confession of Chad Martin to create residual doubt about Reynolds's guilt. (Doc. # 1 at 131; Vol. 33 at 126). The circuit court dismissed this subclaim as inadequate under

Rules 32.3 and 32.6(b) and without merit under Rule 32.7(d). (Vol. 33 at 128). The ACCA affirmed the Rule 32 court's dismissal.

> Reynolds argues that the confession could have created residual doubt in the minds of the jury and sentencer. First, although capital defendants are allowed to present any relevant mitigating circumstances during the penalty phase, residual doubt is not a relevant mitigation circumstance. Trial counsel cannot be held ineffective for failing to offer irrelevant evidence. Further, with respect to prejudice on this claim, Reynolds merely pleaded that, had counsel [attempted to introduce Chad Martin's confession], there is a reasonable probability that the results of the penalty phase would have been different and Mr. Reynolds would not have been sentenced to death. Again, Reynolds pleaded a conclusion that he was prejudiced while failing to support that conclusion with specific facts. Accordingly, this claim is insufficiently pleaded.

(*Id*. at 131-32) (citations and internal quotation marks omitted).

Reynolds would be hard-pressed to argue that the failure to introduce this residual doubt evidence in the penalty phase was deficient. As the ACCA recognized in its decision, "although capital defendants are allowed to present any relevant mitigating circumstance during the penalty phase" under Alabama Code § 13A-5-52 (1975), "residual doubt is not a 'relevant mitigating circumstance." (*Id*. at 131, quoting *Ex parte Lewis*, 24 So. 3d 540, 543 (Ala. 2009)); citing *Franklin v. Lynaugh*, 487 U.S. 164, 188 (1988) (O'Connor, J., concurring); *Melson* v. *State*, 775 So. 2d 857, 899 (Ala. Crim. App. 1999), *aff'd*, 775 So. 2d 904 (Ala. 2000)) (internal quotation marks omitted). To this end, the ACCA reasoned that "[t]rial counsel cannot be held ineffective for failing to offer irrelevant evidence." (*Id.* at 132).

In any event, Reynolds cites to a variety of state and federal sources in his attempt to show deficient performance and prejudice, including Ala. Code § 13A-5-45(d) (1975); *Roberts v. State*, 735 So. 2d 1244 (Ala. Crim. App. 1977); *Pierre v. Walls*, 297 F.3d 617 (7th Cir. 2020); *Parker v. Sec'y, Fla. Dep't of Corr.*, 331 F.3d 764 (11th Cir. 2003); *Smith v. Wainwright*, 741 F.2d 1248 (11th Cir. 1984); *Ex parte Lewis*, 24 So. 3d 540 (Ala. 2009); *Chandler v. United States*, 218 F.3d

1305 (11th Cir. 2000); *Tarver v. Hopper*, 169 F.3d 710 (11th Cir. 1999), and *Wiggins*. (Docs. # 1 at 132; 31 at 104-05). Notably, *Wiggins* is the only Supreme Court decision Reynolds references in connection with this subclaim. But, *Wiggins* focused on a failure to investigate moral culpability, not residual doubt. Thus, *Wiggins* does not demonstrate that the ACCA's decision is contrary to clearly established federal law. And, again, the other cases cited by Reynolds do not show that the ACCA's decision are contrary to a holding of the Supreme Court of the United States.[80] *Carey v. Musladin*, 549 U.S. 70, 74 (2006).

To obtain habeas relief, an AEDPA petitioner must do much more than simply raise (or, as in this instance, restate) allegations which he believes reflect a valid constitutional claim. Instead, he must establish that one of § 2254(d)'s provisions, which are expressly reserved for correcting

[80] Nevertheless, the court also notes that the ACCA's decision is not even contrary to these non-Supreme Court cases. For example, *Smith* is distinguishable for several reasons. First, in *Smith* the Eleventh Circuit reviewed the record *de novo* and without the constraints of AEDPA. Second, the Eleventh Circuit did not grant Smith habeas relief but rather ordered the district court to conduct an evidentiary hearing and then determine whether habeas relief was appropriate. Third, unlike *Smith*, in which trial counsel's sentencing strategy lacked clarity but seemed to seek a life sentence based on residual or whimsical doubt, the strategy during the penalty phase of Reynolds's capital case was to present his life history and argue his lack of moral culpability, consistent with evidence presented during the guilt-phase of trial. (Vol. 12 at 184-88; Vol. 13 at 120-27). Fourth, even assuming that Chad Martin's confession was admissible at the mitigation stage, Reynolds has not alleged how the introduction of that confession into evidence would support a residual doubt sentencing strategy in light of the ACCA's finding that "[Reynolds's] testimony [was] inconsistent with Chad Martin's statement," (Vol. 33 at 130), that the report documenting the retracted confession "appeared to implicate Reynolds" (*Id.* at 129), and where the circuit court found that "the heart of trial counsel's [guilt-phase] strategy . . . focused on questioning Marcie West's version of events and suggesting that West and some other *unidentified* individual committed the murders," (Vol. 25 at 170-71) (emphasis added). Fifth, the record belies Reynolds's allegations that trial counsel unreasonably failed to use Chad Martin's confession to support a residual doubt theory during the penalty phase.

Also, the Eleventh Circuit in *Parker* held that, considering "the limited value of the mitigating evidence" and the inconsistencies it could lead to (including with the petitioner's alibi defense), "[counsel] was not deficient in focusing their time and energy on acquittal at trial and focusing their arguments at sentencing on residual doubt (instead of other forms of mitigation)." 331 F.3d at 788. In the alternative, the *Parker* court held that the petitioner could not prove prejudice where the aggravating factors were substantial and "the mitigating evidence [the petitioner] argue[d] should have been presented" was "relative[ly] weak. *Id.* at 788-89. These holdings support the ACCA's decision. They do not help Reynolds's position.

Finally, the Eleventh Circuit in *Chandler* recognized that a residual doubt strategy is oftentimes a reasonable approach when "the evidence of guilt [is] not overwhelming." 218 F.3d at 1320. But, in Reynolds's case (as the ACCA acknowledged), there was powerful evidence of Reynolds's guilt (and Chad Martin's confession would have contradicted Reynolds's theory of the case). The ACCA's decision is not contrary to *Chandler*.

egregious state court constitutional error, applies. Reynolds has not satisfied his burden of showing that the ACCA resolved his residual doubt subclaim contrary to clearly established federal law as determined by the Supreme Court of the United States under § 2254(d)(1) or that the ACCA's decision was based on an unreasonable determination of the facts in light of the State court record under § 2254(d)(2). This claim is due to be denied.[81]

C. Sentencing Hearing

Reynolds asserts that his trial counsel were ineffective during the sentencing hearing by "focus[ing] [] their efforts [on] withdraw[ing] from the case" instead of "conduct[ing] any additional investigation . . . or present[ing] any testimony." (Doc. # 1 at 133). Reynolds contends that "the same failures that occurred during the penalty phase occurred again at . . . sentencing, where . . . counsel made no presentation at all." (*Id.*).

The Rule 32 court dismissed this *Strickland* claim as inadequate under Rules 32.3 and 32.6(b). (Vol. 33 at 161). Likewise, the ACCA reasoned that "Reynolds did not plead any specific evidence trial counsel should have presented at the sentencing hearing" and merely incorporated his deficiently pleaded penalty-phase errors. (*Id.*). Thus, the ACCA concluded that "the circuit court did not err in dismissing this claim." (*Id*.) (citing Rule 32.7(d)).

[81] The court notes that Reynolds incorrectly contends in his reply that because, under Alabama law, "non-unanimity on a death verdict results in a life sentence, the prejudice inquiry is whether there is 'a reasonable probability that at least one juror would have struck a different balance.'" (Doc. # 31 at 105, quoting *Wiggins*, 539 U.S. at 537). The death penalty case that the Supreme Court reviewed in *Wiggins* was from Maryland, not Alabama. 539 U.S. at 514-15. *See* Ala. Code § 13A-5-46(f) (1975) ("The decision of the jury to recommend a sentence of death must be based on a vote of at least 10 jurors."). Moreover, at the time of Reynolds's sentencing hearing the penalty-phase jury verdict was only a recommendation and, at that time, state law permitted the trial court judge to "override" an advisory jury recommending life without the possibility of parole in favor of the death penalty. As previously noted, this practice does not reflect Alabama's current law, but the new law is not retroactive.

To satisfy his burden under § 2254(d)(1),[82] Reynolds cites several of the same cases that he raised in support of his penalty-phase *Strickland* claims. (*See* Docs. #1 at 133-34; 31 at 196). Because the court has already explained why those authorities (the Supreme Court's decision in *Wiggins*, *Williams*, and *Rompilla*, and the Eleventh Circuit's decision in *Williams*) do not show that Reynolds is entitled to habeas relief, there is no reason to revisit them here. The only remaining decision cited by Reynolds from the Supreme Court is *Gardener v. Florida*, 430 U.S. 349 (1977).[83]

[82] Reynolds contends that the ACCA's "resolution of this claim was contrary to, . . . an unreasonable application of, clearly established Supreme Court precedent[,] . . . [and] . . . flowed from unreasonable determinations of the facts in light of the evidence that it had before it." (Doc. # 1 at 135). But, as this court explained previously, the only conceivable way for Reynolds to obtain habeas relief on his penalty-phase *Strickland* allegations was by satisfying § 2254(d)(1). Consistent with that analysis, and in the absence of citations to the record that substantiate an unreasonable factual determination under § 2254(d)(2), the court similarly considers whether Reynolds has shown that the ACCA's decision is contrary to, or an unreasonable application, of federal law.

[83] Reynolds also cites *DeBruce v. Comm'r, Ala. Dep't of Corr.*, 758 F.3d 1263 (11th Cir. 2014), *Hardwick v. Crosby*, 320 F.3d 1127 (11th Cir. 2003), and *McDonald v. State*, 668 So. 2d 89 (Ala. Crim. App. 1995). Again, the court notes that it is Reynolds's burden to show that the ACCA's decision was contrary to federal law as determined by the Supreme Court of the United States. *See* 28 U.S.C.§ 2254(d)(1). Nonetheless, even putting that defect aside, the three additional cases that Reynolds cites to for this claim do not provide sufficient support under § 2254(d)(1).

DeBruce is unavailing for Reynolds. In *DeBruce*, the Eleventh Circuit decided that the defendant's counsel committed ineffective assistance of counsel regarding an inadequate mitigation investigation and concluded that sufficient prejudice could be presumed. 758 F.3d at 1265, 1279. The Eleventh Circuit reasoned in *DeBruce* that the state court unreasonably applied *Strickland* "[b]ecause no lawyer could reasonably have made a strategic decision to forego the pursuit of mitigation evidence based on the results of the pre-trial report governing competency to stand trial" or reasonably have chosen not "to question DeBruce and his mother about the[] overt contradictions" between the report and "his mother's account of DeBruce's childhood." *Id*. at 1274-75. However, the sentencing circumstances contemplated in *DeBruce* are substantially different from those at Reynolds sentencing hearing.

Therefore, *DeBruce* does not establish that the ACCA's decision in Reynolds's case was contrary to federal law as determined by the Supreme Court. As the ACCA explained, Reynolds's counsel provided extensive mitigation. (*See* Vol. 26 at 12). In sum, *DeBruce* does not bolster Reynolds's claim under § 2254(d)(1) because the evidence Reynolds now contends should have been presented would have been needlessly cumulative.

Nor does Reynolds's reliance on *Hardwick v. Crosby*, 320 F.3d 1127 (11th Cir. 2003) support his § 2254(d)(1) argument. In *Hardwick*, the Eleventh Circuit framed the *Strickland* inquiry as "whether an attorney who provided *no defense at the guilt or penalty phase* was ineffective in defending a young drug dealer, who was an alcoholic and drug abuser." 320 F.3d at 1130 (emphasis added). While the court denied the ineffective assistance of counsel claim at the guilt phase, the court granted relief based on the sentencing phase. *Id.*

Reynolds's reliance on *Hardwick* is also unfruitful. In contrast to the petitioner in *Hardwick*, Reynolds's lawyers *did* present mitigating evidence. Furthermore, *Hardwick* does not speak to Reynolds's allegation that his trial counsel was deficient for focusing on withdrawing from the case instead of presenting evidence of mitigation at the sentencing hearing. The ACCA's decision is not contrary to *Hardwick*.

Reynolds cites *Gardener* for the proposition that "sentencing is a critical stage of the criminal proceeding at which [the defendant] is entitled to the effective assistance of counsel." (Doc. #1 at 134, quoting *Gardener*, 430 U.S. at 358). While this statement is of course true, *Gardener* is a case about a defendant being sentenced to death on the basis of a presentence report that was not disclosed to his counsel. 430 U.S. at 361. Without access the to the presentence report, defendant's counsel could not help but be ineffective at sentencing. *See id.* at 359-61.[84] This fact situation is far afield from Reynolds's claim that his counsel did not prepare enough at the sentencing phase. (Doc. # 1 at 134). Therefore, *Gardener* does not establish that the ACCA's decision related to Reynolds's claims of ineffective assistance of counsel at the sentencing hearing is contrary to federal law such that no fair-minded jurist could agree with the ACCA's decision.

Reynolds has not shown that the ACCA's decision was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103. Further, Reynolds has not shown that the ACCA's decision on this claim was contrary to the Supreme Court's decisions in *Gardener Wiggins*, *Williams*, and *Rompilla*. Accordingly, the court concludes that Reynolds's ineffective assistance of counsel claim at the sentencing hearing is due to be denied.

McDonald v. State, 668 So. 2d 89 (Ala. Crim. App. 1995) is also unhelpful to Reynolds. Although that decision reviewed a *Strickland* sentencing hearing, the facts are significantly different from Reynolds's allegations. In *McDonald*, the defendant's counsel did not attend the defendant's sentencing hearing. *Id.* at 89, 93. Applying *Golden v. Newsome*, 755 F.2d 1478 (11th Cir. 1985), the ACCA found that counsel's complete absence from the sentencing hearing without a waiver from the defendant violated the Sixth Amendment. 668 So. 2d at 91. The constitutional violation recognized by *McDonald* and *Golden* is the *complete* absence of counsel at sentencing. Reynolds has not alleged that trial counsel failed to appear at his sentencing. The ACCA's decision is not contrary to *McDonald* or *Golden*.

[84] Actually, the *Gardner* decision speaks more to constitutional waiver rather than ineffective assistance of counsel. 430 U.S. at 61-62.

D. Motion for a New Trial

Reynolds also claims that the counsel appointed for his new trial motion were ineffective. (Doc. # 1 at 135-36). He contends that "[counsel] were appointed more than four months before filing an amended motion for a new trial yet they did not conduct an investigation, seek an evidentiary hearing, or even cite the record or applicable case law in support of this motion." (*Id.* at 135). In his petition, Reynolds refers to portions of the hearing transcript in which appointed counsel reported to the trial court that "they did not have a full and final transcript of the trial." (*Id.*). Reynolds also points out that "the trial transcript was not certified until March 31, 2008, more than six weeks after counsel argued the motion for new trial." (*Id.*). According to Reynolds, "[w]ithout such basic information, counsel could not have adequately moved for a new trial." (Doc. # 31 at 107).

The Rule 32 court dismissed this *Strickland* claim as inadequate under Rules 32.3 and 32.6(b). (Vol. 33 at 161-62). The ACCA determined that Reynolds had not pleaded "any specific claims that trial counsel could have raised in the motion for new trial, much less any that would have been meritorious." (Vol. 33 at 162) (citing *Daniel v. State*, 86 So. 3d 405, 440 (Ala. Crim. App. 2011) ("[Petitioner] failed to plead what argument counsel could have made that would have resulted in a different sentencing recommendation in this case or how he was prejudiced; thus, he failed to comply with Rule 32.6.")). Thus, the ACCA held that the "circuit court did not err in dismissing this claim." (*Id.*) (citing Rule 32.7(d)).

In an attempt to satisfy § 2254(d)(1),[85] Reynolds points to *Ferrell v. Hall*, 640 F.3d 1199 (11th Cir. 2011). (Docs. # 1 at 135-36; 31 at 107).[86] In *Ferrell*, the court held that the petitioner had a meritorious *Strickland* claim -- under both the performance and prejudice prong -- based on appellate counsel's mishandling of his motion for a new trial. 640 F.3d at 1236-40. The *Ferrell* court noted that the mitigating evidence presented at the hearing was "limited" and summarized the gaps left out by petitioner's counsel. *Id.* at 1239-40. As a result, the *Ferrell* court concluded that counsel's "fail[ure] to present significant mitigating evidence about the petitioner[s] upbringing and mental health'" made "the totality of mitigating evidence … very significant, when compared to the aggravators." *Id.* at 1240

However, the circumstances surrounding Reynolds's motion for a new trial are distinguishable from *Ferrell*. First, the alleged "neglect" by Reynolds's counsel does not compare to the magnitude of evidence that was readily available and potentially impactful in *Ferrell*. *See also Fugate v. Head*, 261 F.3d 1206, 1217 (11th Cir. 2001) ("Th[e Eleventh Circuit] and the Supreme Court have held repeatedly that the performance of counsel who fails to present any mitigating evidence whatsoever—even when such evidence was available—may nonetheless pass constitutional muster."). Even if the court assumed that counsel's performance was deficient (and to be clear the court does not make any such conclusion) unlike the petitioner in *Ferrell*, Reynolds

[85] Consistent with the court's prior discussion above, Reynolds's only conceivable avenue of AEDPA relief is § 2254(d)(1).

[86] Again, § 2254(d)(1) requires a state court's decision to be contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. Petitioner's lack of argument in support of this claim based on Supreme Court decisions (and lack of any explanation as to how Eleventh Circuit cases show the ACCA's decision is contrary to Supreme Court precedent) is reason enough to deny this claim. Nonetheless, the court details how *Ferrell* does not otherwise support Reynolds's argument under § 2254(d)(1). Additionally, Reynolds also cites to *Crawford v. Head*, 311 F.3d 1288 (11th Cir. 2002). But, it appears that Reynolds uses this case merely to note the standard required for counsel's performance to be found unreasonable: "no competent counsel would have taken the action." *Crawford v. Head*, 311 F.3d at 1297. As *Crawford v. Head* does not address a motion for new trial, the court declines to analyze that case further.

cannot show that there was a reasonable probability that the outcome of his motion for new trial would have been different. At a minimum, fair-minded jurists could disagree on whether the aggravating factors outweighed the mitigating evidence.

A successful AEDPA petitioner must show "the sort of 'extreme malfunction[s] in the state criminal justice syste[m]' that would permit federal court intervention" to remedy a serious constitutional violation. *Shinn*, 141 S. Ct. at 526, quoting *Richter*, 562 U.S. at 102. Reynolds's allegations and authorities do not establish such an error. Because Reynolds cannot show that the ACCA's decision on this claim was contrary to clearly established federal law as determined by the Supreme Court of the United States, this clam is due to be denied.

E. "Actual Conflict of Interest" Claim

Reynolds next claims that Ms. Patricia Granger who represented Reynolds during his pretrial preparations and plea negotiations, had an "actual conflict of interest." (*See* Docs. # 1 at 136-40; 31 at 108-12). Reynolds contends that this alleged "actual conflict of interest" rendered his representation "constitutionally ineffective under the Sixth Amendment."[87] (*See* Docs. # 1 at 136-38; 31 at 108-12).

[87] In his federal habeas petition, Reynolds contends that in addition to violating his Sixth Amendment right to effective counsel, the alleged "actual conflict of interest" violated his rights under the Eighth and Fourteenth Amendments. (*See* Doc. # 1 at 126). The court presumes Reynolds's reference to the Fourteenth Amendment is for the purpose of incorporation. To the extent Reynolds intended to seek habeas relief under the Fourteenth Amendment's Due Process Clause or under the Eighth Amendment, those arguments are procedurally barred from the court's review as Reynolds failed to make these claims in state court. *Medellin*, 544 U.S. at 666 (holding that a petitioner "can seek federal habeas relief only on claims that have been exhausted in state court"). In the alternative, these claims have been waived. "[M]ere recitation in a petition, unaccompanied by argument, in effect forces a judge to research and thus develop supporting arguments—hence litigate—on a petitioner's behalf. Federal judges cannot litigate on behalf of the parties before them, and it is for this reason that any claims in [Reynolds's] petition that were not argued in his brief are abandoned." *Blankenship*, 2007 WL 4404972, at *40 (citing *Burkhalter*, 966 F. Supp. at 1225 n.4; *GJR Investments, Inc*., 132 F.3d at 1369). And further, this claim is more appropriately evaluated under the Sixth Amendment's right to effective counsel rather than the Fourteenth Amendment's due process right or the Eighth Amendment right against cruel and unusual punishment.

The ACCA concluded that the claim was insufficiently pleaded under Rules 32.2 and 32.6(b). (*See* Vol. 33 at 134).[88] The ACCA noted that "Reynolds pleaded that Granger was appointed to represent him on June 3, 2003, and that Granger had an actual conflict of interest from February 1, 2007—the day she accepted a position as a part-time prosecutor for the City of Gadsden—until April 26, 2007— when she withdrew from his representation." (*Id.* at 132). Next, the ACCA acknowledged that Reynolds pleaded that "'[d]uring key months of preparation . . . [Granger] should have been interviewing City of Gadsden police officers, either to secure their presence as defense witnesses or to prepare to cross[-]examine them at trial, as the State had already furnished its witness list.'" (*Id.*, quoting Vol. 24 at 158). The ACCA also found that "Reynolds pleaded that Granger and her co-counsel did not interview officers involved in the investigation and that Granger engaged in attorney-client communications with Gadsden police officers that, according to Granger, 'require[d] the exchange of confidential information.'" (*Id.* at 33, quoting Vol. 24 at 158-59). The ACCA acknowledged that Reynolds had pleaded that he suffered prejudice "because Granger withdrew from representation less than six months prior to trial, which left replacement trial counsel an insufficient amount of time to prepare." (*Id.*).

After recognizing that the controlling authority for the purpose of analysis was *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980), the ACCA held that "Reynolds's claim that trial counsel were ineffective because [Granger] had a conflict of interest was insufficiently pleaded." (Vol. 33 at 133-34). In doing so, both the ACCA and the Rule 32 court recognized that "to demonstrate an

[88] "An Alabama court's consideration of the sufficiency of the pleadings concerning a federal constitutional claim in a Rule 32 petition necessarily entails a determination of the merits of the underlying claim." *Borden v. Allen*, 646 F.3d 785, 816 (11th Cir. 2011). It is not "a state procedural bar that [] preclude[s] [federal court] review." *Id.* A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fair-minded jurists could disagree' on the correctness of the state court's decision. *Harrington v. Richter*, 562 U.S. 86, 101 (2011), quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004).

actual conflict of interest, a defendant must be able to point to specific instances in the record which suggest an impairment or compromise of [Reynolds's] interests for the benefit of another party." (Vol. 25 at 174, quoting *Burden v. Zant*, 24 F.3d 1298, 1305 (11th Cir. 1994)) (internal quotation marks and citation omitted); *see Mers*, 701 F.2d at 1328 (explaining that the court "will not find an actual conflict unless appellants can point to specific instances in the record to suggest an actual conflict or impairment of their interests[,]" that "appellants 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 but harmful together[,]" and that "[i]f [counsel] does not make such a choice, the conflict remain[s] hypothetical").

Upon analyzing Reynolds's pleadings under this framework, the ACCA reasoned that Reynolds had "broadly asserted that Granger had a conflict that adversely affected her representation," but "failed to plead any specific facts supporting that conclusion." (Vol. 33 at 134). Further, the ACCA found that "Reynolds failed to plead with specificity any evidence he was unable to obtain or any interviews that replacement counsel was unable to perform." (*Id.*). The ACCA also found Reynolds's allegation that "Granger's alleged conflict prevented her from offering [him] candid advice" insufficiently pleaded, as Reynolds "failed to plead with specificity what advice should have been offered." (*Id.*). "In sum," the ACCA found that Reynolds failed to plead sufficient facts showing that "Granger 'was actively representing conflicting interests' or that [she] 'made a choice between possible alternative courses of action' in her representation of Reynolds." (*Id.*, quoting *M.S.*, 822 So. 2d at 453).

Here, Reynolds asserts that habeas relief is appropriate under § 2254(d)(2) because the ACCA made unreasonable factual determinations. His sporadic references to the record fail to

identify the specific factual findings he contends the ACCA unreasonably determined (much less explain the significance of any such finding). Therefore, Reynolds's "actual conflict of interest" claim is not "highly probable." *Ward*, 592 F.3d at 1177; *see also Lee*, 987 F.3d at 1018 n.2 (explaining that unless a petitioner "can[] show that the state court's decision 'was based on' the challenged findings, they provide no basis for federal habeas relief whether or not those findings were unreasonable," quoting 28 U.S.C. § 2254(d)(2). Thus, to overcome AEDPA's deferential standard, Reynolds must show that the ACCA unreasonably applied Supreme Court precedent under § 2254(d)(1). *See, e.g.*, *Shinn*, 141 S. Ct. at 523. Reynolds has not met this exacting standard.

Reynolds relies on several federal and Alabama cases in support of his actual conflict of interest claim, including *Strickland*, *Sullivan*, *Holloway v. Arkansas*, 435 U.S. 475, 490 (1978), *Burden*, *United States v. Khoury*, 901 F.2d 948 (11th Cir. 1990), and *LoConte v. Duggar*, 847 F.2d 745 (11th Cir. 1988). (*See* Doc. # 1 at 137-40). In his reply brief, Reynolds also cites *Wood v. Georgia*, 450 U.S. 261 (1981); *McConico v. State of Ala.*, 919 F.2d 1543 (11th Cir. 1990); and *M.S.* (*See* Doc. # 31 at 108-11). For the most part, Reynolds uses these decisions to highlight general propositions instead of applying their "actual conflict of interest" analyses to his claim.[89]

Nevertheless, the court turns to review of the relevant Supreme Court precedent, including *Strickland*, *Sullivan*, *Holloway*, and *Wood*, as well as the Eleventh Circuit's treatment of the *Sullivan* exception *at the time of Reynolds's trial*. As explained above, a petitioner claiming a Sixth Amendment violation based upon the ineffective assistance of counsel must allege that, but for his

[89] As explained numerous times, § 2254(d)(1) requires that the ACCA's decision be contrary to the holding of a case decided by the Supreme Court of the United States. Putting aside this critical defect, the court further notes that even the Eleventh Circuit cases that Reynolds cites do not adequately support his claim. *See Burden v. Zant*, 24 F.3d 1298 (11th Cir. 1994) (concerning a joint representation where the attorney reached a deal with the prosecution that one client would not be prosecuted in exchange for testimony against the other client); *McConico v. State of Alabama*, 919 F.2d 1543 (11th Cir. 1990) (finding an actual conflict where an attorney had to cross-examine one of his other clients); *United States v. Khoury*, 901 F.2d 948 (11th Cir. 1990) (regarding the joint representation of coindictees); *LoConte v. Dugger*, 847 F.2d 745 (11th Cir. 1988) (reasoning that, despite the joint representation, the conflict did not impact the appellant's decision to plead guilty).

counsel's conduct, he suffered actual prejudice. Thus, to warrant relief under *Strickland*, a defendant is usually required to show "a reasonable probability that but for counsel's unprofessional errors, the *result* of the proceeding would have been different." *Strickland*, 46 U.S. at 694 (emphasis added). However, where counsel's ineffectiveness stems from a conflict of interest, the Supreme Court has carved out a few exceptions "to assure vindication of the defendant's Sixth Amendment right to counsel." *Mickens v. Taylor*, 535 U.S. 162, 176 (2002); *see Dallas v. Warden*, 964 F.3d 1285, 1303 (11th Cir. 2020).

In *Holloway v. Arkansas*, a defendant's trial counsel made a timely request to the trial court, requesting to withdraw as defendant's counsel. 435 U.S. at 478-80. The attorney felt that he could not adequately represent the divergent interests of three codefendants. *Id.* Defense counsel's motions for the appointment of separate counsel, however, were denied without inquiry by the trial court. *Id.*

As the *Mickens* Court explained, "*Holloway* presumed . . . that the conflict, 'which [the defendant] and his counsel tried to avoid by timely objections to the joint representation,' undermined the adversarial process." *Mickens*, 535 U.S. at 168, quoting *Holloway*, 435 U.S. at 490. The *Mickens* Court further reasoned that this "presumption was justified because joint representation of conflicting interests is inherently suspect, and because counsel's conflicting obligations to multiple defendants 'effectively sea[ls] [the] lips on crucial matters' and make it difficult to measure the precise harm arising from counsel's errors." *Id.*, quoting *Holloway*, 435 U.S. at 489-90. Thus, the decision in *Holloway* "creates an automatic reversal rule *only* where defense counsel is forced to represent codefendants over his timely objection, unless the trial court has determined that there is no conflict." *Id.* (emphasis added) (citing *Holloway*, 435 U.S. at 488). Reynolds does not plead (and the record does not reflect) that Granger was "forced [by the trial

court] to represent codefendants [at trial] over her timely objection," as required for *Holloway* error. The *Holloway* decision lends no help to Reynolds.

In *Cuyler v. Sullivan*, the Court held that *Holloway*'s automatic reversal rule does not apply when counsel fails to make a timely objection. The Court reasoned that absent a timely objection to an alleged conflict of joint representation, "a reviewing court cannot presume that the possibility for conflict has resulted in ineffective assistance of counsel." 446 U.S. at 348-49; *see also Mickens*, 535 U.S. at 168-69 (summarizing *Sullivan*). Instead, "a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Sullivan*, 446 U.S. at 348; *see also Mickens*, 535 U.S. at 168-69 (explaining that *Sullivan* declined to extend the *Holloway* rule). *Sullivan* does not demonstrate that the ACCA's determination rejecting the claim that Granger's three-month-long *pretrial-representation* of Reynolds "adversely affected" his trial counsel's ability to interview those same officers (during the six-month period between Granger's withdrawal and the start of trial) is in any way contrary to clearly established federal law. In fact, before Reynolds's trial, the judge *sua sponte* questioned Granger's dual representation (*see* Vol. 3 at 202; Vol. 4 at 3-4), and she withdrew. Reynolds has not alleged any specific facts in the record demonstrating that Granger somehow prevented Reynolds's actual trial counsel from conducting these interviews.

The Supreme Court's rationale in *Wood v. Georgia*, 450 U.S. 261 (1981) further examines the "actual conflict of interest" standard. Here, the employer's attorney represented the employee defendants. *Id.* at 266. As summarized by the *Mickens* Court, "the employer's interest in establishing a favorable [] precedent . . . diverged from the [employees'] interest in obtaining leniency or paying lesser fines to avoid imprisonment." 535 U.S. at 169. This conflict "was sufficiently apparent at the time of the revocation hearing to impose upon the court a duty to inquire

further." *Wood*, 450 U.S. at 272. Moreover, the Court clarified that, as referenced in *Wood*, "'an actual conflict of interest' meant precisely a conflict *that affected counsel's performance*—as opposed to a mere theoretical division of loyalties." *Mickens*, 535 U.S. at 171 (emphasis in original).

Wood does not support Reynolds's claim that Granger's three-month, pre-trial, dual representation amounted to an "actual conflict of interest." Although the *Wood* Court did remand for further inquiry, it did so because of "the *possibility* of a conflict of interest was sufficiently apparent . . . to impose upon the court a duty to inquire further." *Wood*, 450 U.S. at 272 (emphasis in original). In contrast, Reynolds's trial court actually inquired about Granger's *possible* conflict of interest. Reynolds has not pointed to any specific fact in the record, much less a fact pattern even remotely analogous to *Wood*, to show that the ACCA's decision was objectively unreasonable. Nor has he even suggested now Granger's dual-representation for a period of approximately three months "actually [affected] the adequacy of [Reynolds's] representation" at trial, particularly where Granger withdrew as counsel six months prior to trial. (*See* Vol. 33 at 134). Thus, *Wood* does not help Reynolds here.

"An actual conflict for Sixth Amendment purposes is a conflict of interest that adversely affects counsel's performance." *Mickens*, 535 U.S. 162 at 172 n.5. As instructed by the Eleventh Circuit, and as recognized by both the ACCA and the Rule 32 court, a federal habeas petitioner claiming that a conflict of interest adversely affected his representation, is required to satisfy each of the following elements in a multi-part test. *First*, a petitioner "'must make a factual showing of inconsistent interests' or point to 'specific instances in the record' to suggest an actual impairment of his or her interests." *Quince v. Crosby*, 360 F.3d 1259, 1264 (11th Cir. 2004), quoting *Smith v. White*, 815 F.2d 1401, 1404 (11th Cir. 1987). *Second*, in order "[t]o prove adverse effect, a

defendant needs to demonstrate: (a) that the defense attorney could have pursued a plausible alternative strategy, (b) that this alternative strategy was reasonable, and (c) that the alternative strategy was not followed because it conflicted with the attorney's external loyalties." *Quince*, 360 F.3d at 1264-65 (11th Cir. 2004), quoting *Reynolds v. Chapman*, 253 F.3d 1337, 1343 (11th Cir. 2001).

Reynolds failed to show that the ACCA's decision concluding that Reynolds did not adequately plead an actual conflict of interest that affected counsel's representation was unreasonable or contrary to clearly established federal law, particularly as determined in *Holloway*, *Sullivan*, and *Wood*.[90] Granger, upon timely inquiry by the trial court, withdrew as Reynolds's counsel six-months before his trial started. And, as the state courts recognized, Reynolds has not pleaded specific instances in the record showing any adverse effects on him due to Granger's three-month stint of representation.

Thus, Reynolds has not met his burden under § 2254(d)(1) or § 2254(d)(2), and his claim is due to be denied.

F. Reynolds's Cumulative-Effect *Strickland* Claim

Reynolds argues that he is due federal habeas relief because of the cumulative effect of his counsel's errors, which he claims fundamentally impaired the fairness of his trial, sentencing, and motion for a new trial. (*See generally* Doc. # 1 at 67-70, 136).

The Eleventh Circuit's adjudication of a similar claim in *Hunt v. Commissioner, Alabama Department of Corrections*, 666 F.3d 708 (11th Cir. 2012) is instructive. In *Hunt*, a habeas petitioner complained that the ACCA "refused to consider whether the cumulative effect of counsel's alleged errors amounted to ineffective assistance of counsel, and in doing so,

[90] The ACCA's decision certainly is not contrary to *Burger v. Kemp*, which involved coindictees being represented by different attorneys in the same firm. *See* 483 U.S. at 783-88.

unreasonably applied clearly established federal law." *Id.* at 731. The Eleventh Circuit rejected the claim, saying that "[e]ven if [it] were to determine that clearly established federal law mandates a cumulative effect analysis of ineffective-assistance claims, Hunt would not be entitled to relief: he has not shown that in this case the cumulative effect of counsel's alleged errors amounted to ineffective assistance."[91] *Id.* at 731-32. The same is true here. Reynolds has failed to demonstrate that the actions or omissions of his trial counsel, regardless of whether they are considered individually or cumulatively, prejudiced him under *Strickland*. It is incumbent upon him to do so because,

> [u]nlike 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." [*Strickland* , 466 U.S.] at 689; *see also Bell v. Cone*, 535 U.S. 685, 702 (2002); *Lockhart v. Fretwell*, 506 U.S. 364, 372 (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.

Premo v. Moore, 562 U.S. 115, 131 (2011).

The fact that Reynolds's present habeas counsel may have tried this case differently in some way is not sufficient to satisfy *Strickland*. *See* 466 U.S. at 687. After careful review, the court concludes that Reynolds's "cumulative effect" claim does not satisfy the prejudice prong of *Strickland*, and that claim is due to be denied.

[91] Similarly, in *Borden v. Allen*, 646 F.3d 785 (11th Cir. 2011), the Eleventh Circuit addressed the question of whether "a claim of ineffective assistance of counsel may be based on the 'cumulative effect' of multiple non-prejudicial errors by counsel when no individual error standing alone would warrant a finding of prejudice under *Strickland*." *Id.* at 823. Because the petitioner in *Borden*, like Reynolds, had not sufficiently pleaded facts that would establish prejudice, regardless of whether the actions of the petitioner's attorneys were considered cumulatively, the circuit declined "to elaborate further on the concept of 'cumulative effect' for fear of issuing an advisory opinion on a hypothetical issue." *Id.*

VI. REYNOLDS'S CUMULATIVE-EFFECT "OF ALL ERRORS" CLAIM

Finally, Reynolds claims that the cumulative effect of the alleged errors he has claimed violated his federal constitutional rights (Doc. # 1 at 157-58). But, Reynolds has not satisfied his burden to show that the ACCA's decision rejecting that claim was either contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court. *See* 28 U.S.C. §2254(d). Nor has he shown that the ACCA's ruling is based on an unreasonable finding of fact in light of the record before the state court. *See* 28 U.S.C. § 2254(d)(2).

The ACCA rejected a portion of this claim on direct appeal, holding "the cumulative effect of the individually nonreversible errors did not affect Reynolds's substantial rights." *Reynolds I*, 114 So. 2d at 81, quoting *Sharifi v. State*, 993 So. 2d 907, 946-47 (Ala. Crim. App. 2008). For the reasons below, the court concludes that Reynolds is not due relief on this claim.

First, Reynolds's claim fails to comply with Rule 2(c) of the Rules Governing Habeas Corpus Cases and is due to be denied because Reynolds has not articulated a claim under 28 § U.S.C. 2254(d). "Habeas corpus petitions must meet heightened pleading requirements." *McFarland v. Scott*, 512 U.S. 849, 856 (1994) (citing 28 § 2254 Rule 2(c)). Reynolds failed to plead with any specificity why he is due relief under a cumulative effect theory. As the Supreme Court has explained:

> In ordinary civil proceedings, the governing Rule, Rule 8 of the Federal Rules of Civil Procedure requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Rule 2(c) of the Rules Governing Habeas Corpus Cases [however] requires a more detailed statement. The habeas rule instructs [a] petitioner to "specify all the grounds for relief available to [him]" and to "state the facts supporting each ground."

Mayle v. Felix, 545 U.S. 644, 649 (2005). Thus, to comply with Rule 2(c)'s pleading requirement, Reynolds must identify the relevant Supreme Court case, identify a ground for relief under § 2254(d), and allege facts supporting his § 2254(d) claim. *See, e.g.*, *Washington v. Crosby*, 324 F.3d

1263, 1265 (11th Cir. 2003) (affirming the denial of habeas relief because the petitioner failed to identify a relevant Supreme Court case).

Here, Reynolds has not specified a ground for relief under 28 U.S.C. § 2254(d).[92] Reynolds alleges the cumulative impact of all his alleged claims of error entitles him to a new trial, but this is not a valid ground for relief under § 2254(d). Moreover, Reynolds does not cite to either AEDPA provision within this claim or identify the relevant state courts' adjudication of these claims. Because Reynolds's claim is insufficiently pleaded, it is due to be summarily denied.

Alternatively, even if a cumulative error claim is cognizable (and even assuming that Reynolds sufficiently pleaded such a claim), no cumulative error occurred here. "None of the [petitioner's] individual claims of error or prejudice have any merit, and therefore [the court has] nothing to accumulate." *Morris v. Sec'y, Dep't of Corr.*, 677 F.3d 1117, 1132 (11th Cir. 2012); *see Spears v. Mullin*, 343 F.3d 1215, 1251 (10th Cir. 2003) ("the sum of various zeroes remains zero"). Because Reynolds has failed to establish that the ACCA's decision is not in violation of § 2254(d)(1) or § 2254(d)(2), his petition is due to be denied.

[92] In support of this claim, Reynolds cites *Ford v. Schofield*, 488 F. Supp. 2d 1258, 1368-69 (N.D. Ga. 2007) and *Conklin v. Schofield*, 366 F.3d 1191, 1210 (11th Cir. 2004). (*See* Doc. # 1 at 157-58). The court notes that, just as *Ford* recognized, there is no clearly established Supreme Court precedent requiring states to consider the cumulative effect of alleged constitutional errors to determine whether a defendant has received due process. 488 F. Supp. at 1368 (citing *Jenkins v. Byrd*, 103 F. Supp. 2d 1350, 1382 (S.D. Ga. 2000)). In *Conklin*, however, the Eleventh Circuit did quote a pre-AEDPA decision explaining that "[a] piecemeal review of each incident does not end our inquiry. We must consider the cumulative effect of these incidents and determine whether, viewing the trial as a whole, appellants received a fair trial as is their due under our Constitution." 366 F.3d at 1210, quoting *United States v. Blasco*, 702 F.2d 1315, 1329 (11th Cir. 1983); *see also Parle v. Runnels*, 505 F.3d 922, 928-29 (9th Cir.2007) (recognizing claim of cumulative error in federal habeas). *But see Fisher v. Angelone*, 163 F.3d 835 (4th Cir. 1998) (holding no cumulative error claims on federal habeas); *Moore v. Parker*, 425 F.3d 250 (6th Cir. 2005) (same); *Wainwright v. Lockhart*, 80 F.3d 1226 (8th Cir. 1996) (same). As these diverging opinions indicate, it is an open question as to whether Reynolds's cumulative error claim is even cognizable.

VII. CONCLUSION

For all these reasons, and after careful review, the court concludes that Reynolds's petition (Doc. # 1) and Motion Requesting Discovery and an Evidentiary Hearing (Doc. # 32) are due to be denied.

A separate order will be entered.

DONE and **ORDERED** this March 25, 2022.

R. DAVID PROCTOR
UNITED STATES DISTRICT JUDGE

FILED
2022 Mar-25 PM 01:04
U.S. DISTRICT COURT
N.D. OF ALABAMA

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

MICHAEL WAYNE REYNOLDS,	}	
	}	
Petitioner,	}	
	}	
v.	}	
	}	**Case No.: 4:18-cv-00236-RDP**
JEFFERSON S. DUNN, Commissioner, Alabama Department of Corrections	}	
	}	
Respondent.	}	

FINAL JUDGMENT

In accordance with the Memorandum Opinion entered contemporaneously herewith, and pursuant to Rule 58 of the Federal Rules of Civil Procedure, it is hereby **ORDERED**, **ADJUDGED**, and **DECREED** that the petition for writ of habeas corpus (Doc. # 1) is **DENIED**, the requests for an evidentiary hearing and discovery are **DENIED**, and the petition is **DISMISSED WITH PREJUDICE**.

This court may issue a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make such a showing, a "petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), or that "the issues presented were adequate to deserve encouragement to proceed further," *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). The court finds that Petitioner's claims do not satisfy either standard for granting a certificate for appealability. Therefore, the court **DENIES** a certificate of appealability with regard to those claims. 28 U.S.C. § 2253(c).

Costs of this action are taxed against Petitioner and in favor of Respondent.

DONE and **ORDERED** this March 25, 2022.

R. DAVID PROCTOR
UNITED STATES DISTRICT JUDGE

REL: 04/22/2016

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

Court of Criminal Appeals

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

MARY BECKER WINDOM
Presiding Judge
SAMUEL HENRY WELCH
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MEMORANDUM

On Return to Remand

CR-13-1907 Etowah Circuit Court CC-05-257.60

Michael Wayne Reynolds v. State of Alabama

WINDOM, Presiding Judge.

Michael Wayne Reynolds appeals the circuit court's dismissal in part and denial in part of his petition for postconviction relief filed pursuant to Rule 32, Ala. R. Crim. P., in which he attacked his October 2007 convictions on five counts of capital murder. See §§ 13A-5-40(a)(2), 13A-5-40(a)(10), and 13A-5-40(a)(15) Ala. Code 1975. By a vote of 12-0, the jury recommended that Reynolds be sentenced to death. The trial court accepted the jury's recommendation

and sentenced Reynolds to death for the five capital-murder convictions.

On October 1, 2010, this Court affirmed Reynolds's convictions and sentence of death. See Reynolds v. State, 114 So. 3d 61 (Ala. Crim. App. 2010). On December 14, 2012, the Alabama Supreme Court denied his petition for writ of certiorari and issued the certificate of judgment. Id. On October 7, 2013, the Supreme Court of the United States denied his petition for writ of certiorari. Reynolds v. Alabama, 134 S. Ct. 97 (2013).

On December 10, 2013, Reynolds, through counsel, filed this, his first, Rule 32 petition, in which he raised numerous claims of ineffective assistance of counsel in both the guilt and penalty phases of his trial and argued that the State withheld evidence favorable to the defense, in violation of Brady v. Maryland, 373 U.S. 83 (1963). On March 21, 2014, Reynolds filed an amended petition reasserting his existing claims and raising additional claims of ineffective assistance of counsel in both the guilt and penalty phases of his trial. On May 5, 2014, the State filed a motion to dismiss in which it argued Reynolds's claims were insufficiently pleaded under Rules 32.3 and 32.6(b), Ala. R. Crim. P., procedurally barred under Rules 32.2(a)(3), 32.2(a)(4), and 32.2(a)(5), Ala. R. Crim. P., and/or without merit. On May 22, 2014, Reynolds filed a response to the State's motion to dismiss. On June 17, 2014, the parties were directed to file proposed orders on or before July 31, 2014. On August 20, 2014, the circuit court issued an order dismissing Reynolds's petition. On September 12, 2014, Reynolds filed a postjudgment motion challenging the circuit court's order of dismissal.

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

> "The State presented evidence that in the early morning hours of Sunday, May 25, 2003, Charles Martin III, his wife, Melinda, and their 8-year-old daughter, Savannah, were stabbed to death in their house. Their bodies were doused with gasoline and set on fire. The crimes were discovered later that morning by Melinda's father, Jerry Veal. Melinda Martin's purse and a cordless telephone were missing

from the house.

"Adrian Marcella 'Marcie' West, who was Michael Reynolds's girlfriend at the time of the murders, testified at trial. She and Reynolds lived with Reynolds's father, Harold Reynolds, at the time of the crimes. West testified that on Saturday, May 24, 2003, Michael Reynolds installed a car stereo for Donald Harvey, who was also known as 'Dino,' in exchange for some cocaine. West and Reynolds used the cocaine; they also used crack cocaine several more times throughout that day and night.

"West testified that later that night or early on Sunday morning, she drove Michael Reynolds to the Martins' house in a vehicle that was owned by Harold Reynolds's girlfriend, Sandra Roberts. West said that Michael Reynolds and Charles Martin were good friends. Reynolds told West that they were going to the Martins' house 'to get some money,' and she assumed he meant that he was going to rob Charles Martin.

"When they arrived at the Martin residence, West parked the vehicle in the driveway, and Michael Reynolds got out. Reynolds told West to wait in the car. West said that Reynolds was not wearing any shoes, and that he was carrying a scabbard containing a dagger-style knife. She had seen the knife before at Harold Reynolds's residence. West testified that she was not alarmed that Reynolds had the knife with him because, she said, Reynolds sometimes traded various items for drugs or money.

"Reynolds went to the carport door and knocked. Charles Martin opened the door and waved at West, and then Martin and Reynolds went into the house.

"While West was waiting in the car, she heard Melinda Martin scream. West got out of the car and ran into the house. She saw Charles Martin lying on the kitchen floor and she heard Melinda Martin screaming in the back of the house. West went to the bedroom, where she saw Melinda Martin bent over

next to the bed as Michael Reynolds stabbed her. Savannah Martin was on the bed.

"West testified that she got between Reynolds and Melinda and tried to stop him from stabbing her. Reynolds accidentally stabbed West through the arm when she tried to intervene. West testified that Reynolds yelled at her and asked her what she was doing there. He told West to get the telephone and Melinda Martin's purse and to go wait in the car. Reynolds handed her two knives -- the knife that he had taken into the house, and a steak knife that West had not seen before.

"West grabbed the telephone and Melinda Martin's purse, and took the knives and left the bedroom. When she left the room, Melinda Martin was 'slouched over' at the end of the bed, and Savannah Martin was standing on the bed. West testified that she felt faint, so she leaned up against the wall in the hallway. She again felt faint when she crossed over Charles Martin's body in the kitchen, so she leaned against the kitchen counter. West left the house and went to the car.

"West opened the front passenger door and placed the items in the floorboard and then crawled to the driver's side of the vehicle -- the driver's door was damaged and did not open.

"West testified that Reynolds came to the car and told West not to leave, and then he grabbed the larger knife and went back into the house. Reynolds apparently returned to the car a second time and again told West not to leave. West testified that she was afraid, so she did not leave or call for help. At that time, West did not realize that she had been stabbed.

"West testified that when Reynolds returned to the car for the third time, he got in the vehicle and told her that she had been stabbed and that he should drive. West said that she did not allow Reynolds to drive because she feared that he was

going to take her somewhere and kill her. West could see the orange glow of a fire in the house.

"She drove back to Harold Reynolds's residence. When they arrived at Reynolds's house, Michael Reynolds told West to give her clothes to him and to take a shower. West stated that she saw Reynolds looking through Melinda Martin's purse. While West was taking a shower, Reynolds took a cloth and cleaned Sandra Roberts's car. After West showered, Reynolds bandaged her arm, using a first-aid kit they had in their bedroom. Reynolds told West that there was no blood in the car.

"Sandra Roberts testified that she was asleep in Harold Reynolds's bed when West and Michael Reynolds arrived back at the house. She testified that around 3:00 or 4:00 a.m. she was awakened when Reynolds placed her car keys on the night stand beside the bed. West and Reynolds then went to their bedroom. Roberts noticed that West was walking with her arms folded.

"Roberts got out of the bed and went into the kitchen and sat down at the kitchen table. A short time later, Michael Reynolds entered the kitchen and gave Roberts some money and told her to go buy some drugs. Roberts left and purchased some crack cocaine. West said that while Roberts was gone, Michael Reynolds took a shower and that is when she noticed blood on Reynolds's legs.

"When Roberts returned to the house, she and Michael Reynolds divided the crack cocaine. Roberts used her portion of the drugs while she was seated at the kitchen table, but Michael Reynolds took his and West's share of the crack to his bedroom.

"Roberts testified that a short time later, Michael Reynolds reentered the kitchen and propositioned her for sex, but she refused. Roberts said that Michael Reynolds wanted more drugs but, according to him, he could not get West to give him more money. Reynolds asked Roberts to talk to West.

Roberts agreed.

"When Roberts entered the bedroom, West was in the bed with the covers pulled up to her neck, staring at the ceiling. Roberts testified that West was acting strangely and that she was unable to engage West in any conversation. Roberts decided to leave and go to her house. As she was driving, she noticed a cordless telephone without the base on the backseat of her car. Roberts had never seen that telephone before.

"West and Michael Reynolds woke around 9:00 or 9:30 on that morning. West noticed that the eyeglasses Michael Reynolds had been wearing the night before were broken. When she pointed this out to Reynolds, he told her that the missing eyeglass piece would melt in the fire. West testified that Reynolds told her that the knives were under the truck and that their clothes and Melinda Martin's purse were in a white bag.

"Around 10:00 a.m. on Sunday May 25, Jerry Veal, Melinda Martin's father, drove by Charles and Melinda Martin's residence located on Tidmore Bend Road in Etowah County. Veal became concerned when he saw Melinda's vehicle parked in the driveway because Melinda regularly attended church services on Sunday mornings. Veal telephoned Melinda on his cell phone, but no one answered.

"Veal drove back to the Martin residence and parked his vehicle in the driveway. He got out and went to the carport door and knocked. When no one came to the door, Veal opened the carport door and found the kitchen in disarray—furniture had been moved around, the window treatments were partially torn down, and there was blood everywhere. Veal saw his son-in-law lying on the kitchen floor in a pool of blood.

"Veal returned to his car and told his wife, and she telephoned 911. While Jerry Veal was talking on the cell phone with the 911 dispatcher, he saw James

Mulkey, a retired Gadsden police officer, drive by the house. Veal was acquainted with Mulkey, so he stopped Mulkey and told him what he had seen.

"Mulkey instructed Veal to remain outside, and Mulkey went to the carport door. When Mulkey opened the carport door, he saw Charles Martin, who appeared to be dead, lying on the kitchen floor. Mulkey did not enter the residence at that time because he could detect the strong odor of gasoline and gunpowder.

"When the paramedics arrived, Mulkey and the paramedics entered the residence; they determined that Charles Martin was dead. Mulkey and the paramedics proceeded down the hallway to determine if anyone was in need of medical assistance. They discovered the bodies of Melinda Martin and Savannah Martin in a bedroom. The bedroom was in disarray and there was blood everywhere.

"The smell of gasoline was overpowering, so Mulkey opened the back door to the residence, and then he and the paramedics left through the back door of the house, being careful not to disturb the scene.

"Investigators arrived and processed the scene. During the investigation, a bloody partial footprint and a blood drop were discovered on the steps outside the carport door. Charles Martin was found lying on the floor in a pool of blood with a cigarette by his mouth. There were three bloody shoe prints on the kitchen floor. The kitchen chairs were knocked over, the kitchen blinds had been ripped or slashed, and there was blood spattered everywhere. A gasoline can was sitting on the floor beside Charles Martin's body, and exploded bottle rockets were scattered throughout the kitchen and into the living room.

"A utensil drawer in the kitchen was open, and there were blood droplets under the drawer. There were two sandwiches on a Styrofoam plate on the

kitchen counter by the stove, and one of the burners of the kitchen stove was lit. Investigators observed a spoon with gray material in it and a syringe located on the counter beside the stove. A basket of prescription drugs was also on the counter.

"Blood droplets were found on the hallway wall opposite the door to the bedroom where the bodies of Melinda and Savannah were discovered.

"Melinda Martin was found lying on the floor on the right side of the foot of the bed. She had slits in her clothing that were consistent with stab wounds. She was also wearing a back brace. A walking cane was found near her body. A telephone cord extended from the wall by the headboard of the bed to Melinda Martin's body, but no telephone was attached to the cord.

"Savannah Martin was lying on her back on the bed. She had been stabbed multiple times and had a prominent stab wound through her neck. A bloody hand print was discovered near Savannah's body on the fitted sheet; however, due to the soft surface, there was no ridge detail to the print.

"An investigator collected the wet, bloody comforter and bed linens and put them in a large paper bag in order to transport the bedding to the forensic laboratory for further testing. When the bedding was unpackaged and put up to dry later that day, a television remote and a temple piece to a pair of eyeglasses fell out of the bedding. Law-enforcement personnel were informed about the eyeglass piece.

"An autopsy of the victims confirmed that Melinda Martin died as a result of 24 stab wounds to her body. Charles Martin died as a result of 11 stab wounds to his body. Savannah Martin died as a result of 5 stab wounds to her body. All the victims had chemical burns to their bodies, and Chuck Martin also had thermal burns on his body.

None of the stab wounds to the victims was immediately fatal.

"West testified that as she and Reynolds were walking to a nearby convenience store later that same Sunday morning, Reynolds asked West if he had made the headlines, and he inquired whether West had seen Charles Martin's face. Later that day, the police arrested Michael Reynolds on an unrelated matter.

"That same afternoon, West saw Donald Harvey drive into the alley behind Reynolds's residence. West got into Harvey's car, and he asked her if Reynolds had anything to do with what happened to Charles Martin. West nodded in the affirmative. Although the evidence was conflicting regarding whose idea it was, West and Harvey agreed that they should get rid of the evidence from the crime scene.

"Harvey and West went to a gasoline service station and purchased some gasoline and drove to an area near Tuscaloosa Avenue. West threw the telephone base into the woods, and then Harvey doused the bag containing their clothes and the purse with gasoline and set the items on fire. West and Harvey threw the knives into the Coosa River from a pier at a boat launch located at Gadsden State Junior College.

"On the day the murders were discovered and in the days that followed, the police questioned several persons regarding their potential involvement in the murders and robbery, including Charles Martin's nephew, Chad Martin, and John Langley, who lived in the same neighborhood as the Martin family. The police ultimately ruled these individuals out as suspects.

"A few days after the discovery of the crimes, West talked with her former employer, who was an attorney, and told him what had happened. The attorney contacted the district attorney's office, and as a result, West subsequently gave the police

a statement regarding the crimes.

"Based on the information provided by West, the Gadsden police located and photographed the burn pile where West said the clothes and purse had been burned, and the police also recovered the telephone base in the woods a short distance from the burn pile. The phone base, the cordless phone found in Roberts's car, and the telephone cord lying across the floor in the room where the bodies of Melinda and Savannah Martin were found were all Uniden brand products.

"Gadsden police conducted a search of Harold Reynolds's residence. In the bedroom shared by Michael Reynolds and West, the police discovered a pair of prescription tinted eyeglasses. The glasses were broken -- the temple piece was missing, and one of the lenses was lying beside the glasses. The glasses were consistent with the prescription lenses and frames sold to Reynolds by a professional optician. The temple piece recovered from the bedding at the Martin house matched the temple piece still attached to the frame found at the Reynolds residence. A first-aid kit was also discovered in the bedroom.

"A scuba diver with the Etowah County Rescue Squad recovered an oriental-style scabbard from the Coosa River in the area where the knives had been discarded by West and Harvey. Sandra Roberts testified that the scabbard appeared to be the same scabbard she had previously seen at Reynolds's residence. West also testified that the scabbard was the one that she and Harvey had disposed of in the Coosa River.

"Photographs of Michael Reynolds's hands taken by the Gadsden police after his arrest showed bruising and flaking skin. West testified the bruising and flaking was not present at the time of the murders.

"A forensic examination of the interior of

Roberts's car did not indicate the presence of any blood. Forensic testing of the DNA extracted from the swab of the blood drop from the outside steps and the hallway at the Martin residence matched the DNA obtained from Adrian West. There was a mixture of DNA on the blood swabbed from the handle of the gasoline can. The primary contributor of that DNA was determined to be Savannah Martin, but neither Michael Reynolds nor Melinda Martin could be excluded as a contributor of the DNA. There was also a mixture of DNA from a swab of blood obtained from the lens of Michael Reynolds's glasses -- Melinda Martin's DNA was the primary component of that DNA mixture. The bloody footprint on the outside door-step matched a known ink print of Michael Reynolds's footprint.

"The shoe prints in the kitchen did not match any of the known samples submitted for comparison purposes, and a blood swab from the outside door frame did not match any of the known DNA samples."

"Michael Reynolds testified in his defense. He testified that he met Charles Martin in May 2002 and that he and Charles became good friends. Reynolds testified that Martin was one of the people authorized to take Reynolds's son home from school. Reynolds and his son even lived with Charles Martin for several months, at Martin's mother's residence.

"Reynolds said that he saw Martin several times a week up until the time Reynolds was arrested for a different offense. Reynolds testified that he had seen Melinda Martin a couple of times, but that he had never seen Savannah Martin. He testified that the last time he saw Martin alive was two or three weeks before the Martins were killed.

"Reynolds testified that at the time of the incident, he and Adrian West were living with his father at his father's residence. Reynolds said that on the morning of Saturday May 24, 2003, his 'boss' came by the residence and paid his father and him for a painting job they had completed the day

before. Later that morning, Donald Harvey came to the Reynolds residence and asked Michael Reynolds to install a car radio for him. Reynolds said that he installed the radio, and Harvey gave him a gram of cocaine in return.

"Reynolds said that between 9:00 and 10:00 p.m., Sandra Roberts came to the residence. Reynolds and West shared the last of their drugs with Roberts. Reynolds testified that he gave Roberts some money to get some more drugs. Reynolds explained that he had money to purchase the drugs because in addition to the money that he had received that morning for completing the painting job, West also had $500 that Reynolds's father had given her to hold in case Reynolds needed to post bond -- he testified that there was an outstanding warrant for his arrest at that time.

"Reynolds testified that Sandra Roberts left and went to buy more drugs. When she returned with the drugs, Reynolds, Roberts, and West used all of those drugs. Reynolds testified that some time later, Adrian West and Sandra Roberts left together in Sandra's car to go get more drugs. Reynolds testified that he instructed West to go with Roberts because he thought Roberts had cheated them out of drugs on the previous transaction.

"Reynolds testified that after Roberts and West had been gone for a couple of hours, he changed into a pair of shorts and a T-shirt, went to bed, and fell asleep. His father was passed out; he was intoxicated.

"Reynolds said that some time later, Adrian West woke him and told him that she was hurt. Reynolds got out of bed to attend to West. When Reynolds asked her how she was hurt, she told him that she had been stabbed. Reynolds then asked West how she had been stabbed, and she responded that 'Chuck was dead and she ... got stabbed trying to stop them from stabbing Chuck's wife.' (Vol. XI, R. 1567.) Reynolds testified that West did not tell him who

she was with at the time of the stabbings.

"Reynolds stated that he was concerned about her arm, so he bandaged it using a first-aid kit he had in the bedroom. He said that the wound was not bleeding very much but that it looked bad. After bandaging her arm, Reynolds instructed West to accompany him outside the house so that he could talk to her without fear of his father overhearing.

"Reynolds testified that when they got outside, he continued to question her about what happened, but West did not want to talk about it. Reynolds said that West was very worried, so he told her to get Sandra Roberts's car keys and she did.

"Reynolds said that they left in Roberts's car, and that West drove because Reynolds's license had been revoked. Reynolds was still dressed in the clothes he had on when he went to sleep, and, although he put on his glasses, he did not put on any shoes.

"They went to the Martin residence. He said that when they got to the residence, West slowed down in order to pull in the driveway; however, Reynolds said that because the lights were on in the house, he instructed her to keep driving. West drove to a nearby gas station, turned around, and then drove back to the Martin residence.

"When they got to the Martin residence, West asked Reynolds what he wanted her to do. He testified that he again instructed her to 'just drive.' (Vol. XI, R. 1571.) West began to drive back to Reynolds's residence. Reynolds testified that as they were traveling, West told him that she was scared, and she asked him what they were going to do. Reynolds said that as they neared his father's residence, he 'just knew [he] had to do something,' so he instructed West to again drive to the Martin residence. (Vol. XI, R. 1571.)

"Reynolds testified that when they arrived at the Martin residence that time, West drove the car into the driveway. The carport light was on. Reynolds got out of the car and told West to remain in the car. As Reynolds approached the carport door, he saw that the door was cracked open. Reynolds pushed the door open and saw Charles Martin lying on the floor. Reynolds said there was blood all around Martin so, he said, he knew at that point that West had told him the truth.

"He testified that he did not telephone the police; instead, he went inside, stepped over Charles Martin's body, and went to the Martins' bedroom. He explained that he went to that bedroom because West told him she had been hurt 'trying to stop them from stabbing Chuck's wife.' (Vol. XI, R. 1573.) Reynolds said that although the television was on in the bedroom, the bedroom lights were not on, so he did not see Melinda Martin's body when he first went into the room. Reynolds said that he tripped over Melinda Martin, who was lying in the floor between the bed and the doorway. When he tripped, his glasses fell off onto the bed, and he caught himself on the bed. Reynolds testified that he grabbed his glasses from the bed and stood up and that is when he saw Melinda Martin, who appeared to be dead. Reynolds testified that he never saw Savannah Martin.

"Reynolds said that he went back through the house and outside, stepping back over Charles Martin in the process. He gave West his glasses and told her to hold them. Reynolds then asked West to tell him everything that she had touched so that he could wipe it off, but West could not recall everything she had touched. Reynolds testified that he went back into the house, intent on wiping the surfaces off. Reynolds said that everything in the house was such a mess that he did not know where to start. He said that at that point, he looked and saw that one of the burners on the stove was lit, so he decided to burn the house down. Reynolds testified that he got the gasoline can that was located beside the

porch steps, and doused the rooms with gasoline.

"Reynolds said that when he got back to the kitchen, he got a napkin and lit it from the burner, and threw it on the gasoline trail. Reynolds then left the house and got in the car and told West to leave. As West drove back toward Harold Reynolds's residence, she asked Reynolds what was going to happen and he told her '[N]othing, I caught the place on fire.' (Vol. XI, R. 1576.)

"Reynolds testified that when they got back to Harold Reynolds's residence, they parked Sandra's car and went into the house. As they walked by his father's bedroom, Sandra Roberts asked them if they had 'anything,' meaning drugs. Reynolds told her they did not, and then he and West went to the bedroom they shared. Reynolds testified that at that point, he told West to give him some money and West gave him $20. He gave that money to Sandra Roberts and told her to go get some more drugs. He testified that he wanted to get Roberts out of the house. Reynolds said that he and West went into the bathroom, and he cleaned and rewrapped the injury on West's arm. In a few minutes, Roberts returned with more drugs.

"When Roberts returned with the drugs, Reynolds went into the kitchen and he and Roberts took some of the drugs. Reynolds prepared a syringe of the drugs for West and took it into their bedroom; however, West refused the drugs, saying she just wanted to go to sleep. Reynolds offered the drugs to Roberts, and when she declined to take the drugs, Reynolds used them. He then went back to sleep.

"Reynolds testified that later that morning while he and West were walking home from the convenience store, he again tried to question West about what had happened the night before. Reynolds said that West was acting strangely and that she told him that she did not want to think about it. He testified that at that point, he did not want to think about it either.

> "Reynolds said that shortly after they arrived back at his father's residence, the police arrived and arrested him and that he had been incarcerated since that time."

Reynolds, 114 So. 3d at 73-81 (footnote omitted).

Standard of Review

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

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

When it reviewed Reynolds's claims on direct appeal, this Court applied a plain-error standard of review and examined every issue regardless of whether the issue was preserved for appellate review. See Rule 45A, Ala. R. App. P. However, the plain-error standard does not apply when evaluating a ruling on a postconviction petition, even when the petitioner has been sentenced to death. See Ferguson v. State, 13 So. 3d 418, 424 (Ala. Crim. App. 2008); Waldrop v. State, 987 So. 2d 1186 (Ala. Crim. App. 2007); Hall v. State, 979 So. 2d 125 (Ala. Crim. App. 2007); Gaddy v. State, 952 So. 2d 1149 (Ala. Crim. App. 2006). "The standard of review this Court uses in evaluating the rulings made by the trial court is whether the trial court abused its discretion." Hunt v. State, 940 So. 2d 1041, 1049 (Ala. Crim. App. 2005) (citing Elliott v. State, 601 So. 2d 1118, 1119 (Ala. Crim. App. 1992)). However, "[t]he sufficiency of pleadings in a Rule 32 petition is a question of law. 'The standard of review for pure questions of law in criminal cases is de novo. Ex parte Key, 890 So. 2d 1056, 1059 (Ala. 2003).'" Ex parte Beckworth, [Ms. 1091780,

July 3, 2013] ___ So. 3d ___, ___ (Ala. 2013) (quoting Ex parte Lamb, 113 So. 3d 686, 689 (Ala. 2011)). Last, "[t]his Court may affirm the judgment of the circuit court for any reason, even if not for the reason stated by the circuit court." Acra v. State, 105 So. 3d 460, 464 (Ala. Crim. App. 2012).

With these principles in mind, this Court reviews the claims raised by Reynolds in his brief to this Court.

I.

Reynolds first raises several preliminary arguments related to the circuit court's dismissal of his petition. Specifically, Reynolds argues: a) that the circuit court's verbatim adoption of the State's proposed order indicates that the circuit court failed to conduct an impartial review; b) that the dismissal order is defective because it failed to rule on his pending discovery motions; c) that summary dismissal was inappropriate given that the judge who presided over Reynolds's petition did not preside over all the trial proceedings; and d) that the circuit court's dismissal order improperly adopts the State's prosecutorial zeal.

A.

Reynolds argues that the circuit court's verbatim adoption of the State's proposed order indicates that the circuit court failed to conduct an impartial review. Reynolds asserts that the circuit court changed only the case caption, signature block, font, and margins in adopting the State's proposed order. Further, Reynolds points to typographical errors and alleged substantive errors in the circuit court's order that he believes indicate that the order is not a product of the circuit court's independent judgment.

In Jackson v. State, 133 So. 3d 420 (Ala. Crim. App. 2009), this Court reaffirmed that a court may adopt a proposed order of the prevailing party so long as the findings of fact and conclusions of law are those of the court.

> "'[T]he general rule is that, where a trial court does in fact adopt the proposed order as its own, deference is owed to that

order in the same measure as any other order of the trial court. In Dobyne v. State, 805 So. 2d 733, 741 (Ala. Crim. App. 2000), the Court of Criminal Appeals stated:

> "'"'"While the practice of adopting the state's proposed findings and conclusions is subject to criticism, the general rule is that even when the court adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous."'"

"'805 So. 2d at 741 (quoting other cases; emphasis added). In McGahee v. State, 885 So. 2d 191, 229-30 (Ala. Crim. App. 2003), the Court of Criminal Appeals stated that "even when a trial court adopts verbatim a party's proposed order, the findings of fact and conclusions of law are those of the trial court and they may be reversed only if they are clearly erroneous." Cf. United States v. El Paso Natural Gas Co., 376 U.S. 651, 656, 84 S. Ct. 1044, 12 L. Ed. 2d 12 (1964) (expressing disapproval of the "mechanical" adoption of findings of fact prepared by a party, but stating that such findings are formally those of the trial judge and "are not to be rejected out-of-hand")."

"Ex parte Ingram, 51 So. 3d 1119, 1122-23 (Ala. 2010). The Supreme Court further stated in Ex parte Ingram that the general rule did not apply in Ingram's case because, it said, the court erroneously stated several times in the order that the facts were within the court's personal knowledge when, in fact, a different judge had presided over Ingram's trial, and that the errors in the order were so blatant that it was clear that the judge who signed the order did not read the State's proposed

order."

Jackson, 133 So. 3d at 466-67.

In his brief on appeal, Reynolds has directed this Court's attention to only six typographical errors shared by the State's proposed order and the circuit court's order of dismissal.[1] Cf. Ex parte Scott, [Ms. 1091275, March 18, 2011] ___ So. 3d ___, ___ (Ala. 2011) ("We do not consider the few typographical errors at issue here, by themselves, as sufficient evidence upon which to base a conclusion that the trial court's order is not a product of the trial court's independent judgment."); Spencer v. State, [Ms. CR-12-1837, Feb. 6, 2015] ___ So. 3d ___, ___ (Ala. Crim. App. 2015). The substantive error cited by Reynolds is that the State's proposed order, and in turn the circuit court's order of dismissal, stated that two knives were found, which was erroneous because the murder weapon or weapons were not recovered. (C. 388.)

The errors cited by Reynolds demonstrate only that the circuit court adopted the State's proposed order, which is not prohibited. See Jackson, 133 So. 3d at 466-67. Even the substantive error was unremarkable and failed to factor into the circuit court's dismissal of the claim at issue.

Again, "the general rule is that even when the court adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous." Dobyne, 805 So. 2d at 741 (citations and quotations omitted).[2]

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[1]These errors fell in the span of a 60-page order.

[2]This Court has recognized the practical reasons for allowing a lower court to adopt the State's proposed order in postconviction proceedings. "'"'The trial courts of this state are faced with an enormous volume of cases and few have the law clerks and other resources that would be available in a more perfect world to help craft more elegant trial court findings and legal reasoning.'"'" Jackson, 133 So. 3d at 469 (quoting Pruitt v. State, 903 N.E.2d 899, 939 (Ind. 2009), quoting in turn Saylor v. State, 765 N.E.2d 535, 565 (Ind. 2002), quoting in turn Prowell v. State, 741 N.E.2d 704, 708-09 (Ind. 2001)).

Here, Reynolds has failed to demonstrate that the circuit court's findings were clearly erroneous. This Court holds that the circuit court's order dismissing Reynolds's postconviction petition was the "product of the trial court's independent judgment." See Jackson, supra. For these reasons, this Court finds no reversible error in the circuit court's adoption of the State's proposed order.

B.

Reynolds argues that the dismissal order is defective because it failed to rule on his pending discovery motions.

> "There is no right to discovery in a postconviction proceeding. The Alabama Supreme Court in Ex parte Land, 775 So. 2d 847 (Ala. 2000), held that to be entitled to discovery in a collateral proceeding, the petitioner must first show good cause. The Court stated:
>
> > "'We agree with the Court of Criminal Appeals that "good cause" is the appropriate standard by which to judge postconviction discovery motions. In fact, other courts have adopted a similar "good-cause" or "good-reason" standard for the postconviction discovery process. See [State v.] Marshall, [148 N.J. 89, 690 A.2d 1 (1997)]; State v. Lewis, 656 So. 2d 1248 (Fla. 1994); People ex rel. Daley v. Fitzgerald, 123 Ill. 2d 175, 121 Ill. Dec. 937, 526 N.E.2d 131 (1988). As noted by the Illinois Supreme Court, the good-cause standard guards against potential abuse of the postconviction discovery process. See Fitzgerald, supra, 123 Ill. 2d at 183, 121 Ill. Dec. 937, 526 N.E.2d at 135. We also agree that New Jersey's Marshall case provides a good working framework for reviewing discovery motions and orders in capital cases. In addition, we are bound by our own rule that "an evidentiary hearing must be held on a [petition for postconviction relief] which is meritorious

> on its face, i.e., one which contains matters and allegations (such as ineffective assistance of counsel) which, if true, entitle the petitioner to relief." Ex parte Boatwright, 471 So. 2d 1257, 1258 (Ala. 1985)."

"775 So. 2d at 852."

Jackson, 133 So. 3d at 470-71. With a lone exception, which was addressed by the circuit court on remand, Reynolds's claims were insufficiently pleaded or procedurally barred. As such, he would not have been entitled to discovery on these claims in his postconviction proceedings. This Court finds no reversible error in the circuit court's failure to address Reynolds's pending discovery motions. See Hilgers v. Jefferson Cnty., 133 So. 3d 409, 417 (Ala. Civ. App. 2013) (finding no error in circuit court's failure to rule on a discovery motion before ruling on the motion for summary judgment as the discovery sought was not relevant to the resolution of the legal issue).

C.

Reynolds argues that summary dismissal was inappropriate given that the judge who presided over Reynolds's petition did not preside over all the trial proceedings. Reynolds's case was transferred to Judge William Allen Millican in August 2006. Although Judge Millican presided over Reynolds's trial, which commenced in October 2007, Reynolds asserts that Judge Millican was not presiding over Reynolds's case for a "significant amount of pretrial representation," which should have prevented him from obtaining "sufficient personal knowledge to enter a written order ... without an evidentiary hearing." (Reynolds's brief, at 16.) Quoting Boyd v. State, 913 So. 2d 1113, 1126 (Ala. Crim. App. 2003), Reynolds argues that Judge Millican could summarily dismiss his petition only if he had personal knowledge of the actual facts underlying the allegations in the petition.

Reynolds has misconstrued the holding of Boyd. While Boyd reaffirmed that a circuit court may summarily dismiss a claim if the circuit court "has personal knowledge of the actual facts underlying the allegations in the petition,"

Boyd, 913 So. 2d at 1126, nothing in Boyd limited the circuit court's authority to summarily dismiss a petition under Rule 32.7(d), Ala. R. Crim. P. Again, with a lone exception, Reynolds's claims were insufficiently pleaded or procedurally barred.[3] As such, this Court finds no reversible error in the circuit court's summary dismissal of Reynolds's petition despite not having presided over all the trial proceedings.

D.

Reynolds argues that the circuit court's dismissal order violated Ex parte Scott because it improperly adopted the State's prosecutorial zeal. Specifically, Reynolds argues that the "vast majority" of the State's proposed order, and, hence, the circuit court's dismissal order, is repeated "nearly verbatim" from the State's motion to dismiss. (Reynolds's brief, at 16.)

In addressing an identical claim in Mashburn v. State, 148 So. 3d 1094 (Ala. Crim. App. 2013), this Court held:

> "Mashburn argues that his case is similar to Ex parte Scott because, he says, the State's proposed order adopted by the circuit court tracks the language of the State's answer and motion to dismiss and, thus, 'is filled with language adversarial in nature.' (Mashburn's brief, p. 24.) However, Mashburn cites only a single word in the order that he believes is adversarial in nature, and we do not find this single word to be sufficient to indicate that the court's findings in the order were not the product of its own independent judgment. Likewise, although Mashburn is correct that the State's proposed order adopted by the circuit court included substantially similar language as the State's answer and motion to dismiss, the court adopted the State's proposed order, not the State's answer, unlike the case in Ex parte Scott, and we do not consider the similar language in the adopted order and the

[3]Significantly, Reynolds has not directed this Court's attention to any claim that was summarily dismissed based on the circuit court's personal knowledge.

> State's answer to be an indication that the court's order was not a product of the court's own independent judgment."

Mashburn, 148 So. 3d at 1112-13 (emphasis in original).

Similarly, Reynolds has not cited this Court to any specific language he finds to be adversarial in nature. Further, although the circuit court's dismissal order is substantially similar to the State's motion to dismiss, the circuit court "adopted the State's proposed order, not the State's answer, unlike the case in Ex parte Scott, and we do not consider the similar language in the adopted order and the State's answer to be an indication that the court's order was not a product of the court's own independent judgment." Id.

Reynolds also argues that the circuit court's dismissal order could not have been a product of the circuit court's independent judgment because it failed to consider his response to the State's motion to dismiss. As evidence, Reynolds argues that "other than its introductory and concluding paragraphs, [the dismissal order] makes no mention that such pleadings exist." (Reynolds's brief, at 17.) In other words, the circuit court's dismissal order does not mention Reynolds's response except for the instances in which it does. Reynolds's argument is assuredly true, but imparts little meaningful analysis. The circuit court explicitly stated that it had considered Reynolds's response to the State's motion to dismiss, and the record does not clearly establish otherwise.

This Court cannot say that the record clearly establishes that the dismissal order signed by the circuit court summarily dismissing Reynolds's petition was not the product of the circuit court's own independent judgment. As such, this Court finds no reversible error in the circuit court's adoption of the State's proposed order.

II.

Reynolds argues that the circuit court erred in dismissing his claims of ineffective assistance of counsel. Specifically, Reynolds argues that the circuit court: a) improperly raised his burden of pleading; b) erroneously

relied on prior appellate determinations; and c) summarily dismissed claims that were facially meritorious.

A.

Reynolds argues that the circuit court improperly raised his burden of pleading. Specifically, Reynolds argues that the circuit conflated his burden of pleading with his burden of proving, and that, at the pleading stage, "he was merely obligated to plead [his claims] with enough specificity to allow the State to respond." (Reynolds's brief, at 20.)

This appears to be a general allegation, and Reynolds has not directed this Court's attention to any specific instances in which the circuit court dismissed one of his claims based on a failure to prove the claim. In fact, a review of the dismissal order shows that the circuit court repeatedly dismissed claims based upon Reynolds's failure to sufficiently plead the claims. There is no evidence in the record to support Reynolds's argument that the circuit court conflated his burden of pleading with his burden of proving.

Additionally, Reynolds's argument that "he was merely obligated to plead [his claims] with enough specificity to allow the State to respond" misstates his burden of pleading. In Washington v. State, 95 So. 3d 26 (Ala. Crim. App. 2012), the appellant advanced an argument that his burden of pleading was akin to "notice pleading." Like Reynolds, the appellant in Washington argued that he "'only had to provide adequate notice of what he was alleging so that the State could understand and respond to his allegations.'" 95 So. 3d at 58 (quoting Washington's brief, at 54). This Court rejected that argument, stating:

> "Although postconviction proceedings are civil in nature, they are governed by the Alabama Rules of Criminal Procedure. See Rule 32.4, Ala. R. Crim. P. The 'notice pleading' requirements relative to civil cases do not apply to Rule 32 proceedings. 'Unlike the general requirements related to civil cases, the pleading requirements for postconviction petitions are more stringent ....' Daniel v. State, 86 So. 3d 405, 410–11 (Ala. Crim. App. 2011). Rule 32.6(b), Ala. R. Crim. P., requires that full facts be

> pleaded in the petition if the petition is to survive summary dismissal. See Daniel, supra. Thus, to satisfy the requirements for pleading as they relate to postconviction petitions, Washington was required to plead full facts to support each individual claim."

Washington, 95 So. 3d at 59. As such, this issue does not entitle Reynolds to any relief.

B.

Reynolds argues that the circuit court erroneously relied on prior appellate determinations in dismissing his petition. Specifically, Reynolds argues that the circuit court dismissed his claims "in part on this Court's prior rejection on direct appeal of certain related arguments under a 'plain error' standard." (Reynolds's brief, at 22.)

Reynolds is correct that "a determination on direct appeal that there has been no plain error does not automatically foreclose a determination of the existence of the prejudice required under Strickland to sustain a claim of ineffective assistance of counsel." Ex parte Taylor, 10 So. 3d 1075, 1078 (Ala. 2005). And, as Reynolds acknowledges in his brief, the circuit court also correctly stated the applicable law in its order of dismissal.

In the instances cited by Reynolds in his brief on appeal, the circuit court did not dismiss any of his claims of ineffective assistance of counsel solely because the underlying claim had been found on direct appeal not to constitute plain error. Instead, the circuit court noted this Court's holding on direct appeal after outlining several other pleading deficiencies in Reynolds's claims. As such, this issue does not entitle Reynolds to any relief.

C.

Reynolds argues that the circuit court summarily dismissed claims of ineffective assistance of counsel that were facially meritorious. When pleading claims of ineffective assistance of counsel, this Court has stated:

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

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

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

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

"The burden of pleading under Rule 32.3 and Rule 32.6(b) is a heavy one. Conclusions unsupported by specific facts will not satisfy the requirements of Rule 32.3 and Rule 32.6(b). The full factual basis for the claim must be included in the petition itself. If, assuming every factual allegation in a Rule 32 petition to be true, 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, 950 So. 2d at 356.

Moreover, the Alabama Supreme Court has stated:

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

Ex parte Hill, 591 So. 2d 462, 463 (Ala. 1991). "[A] circuit judge who has personal knowledge of the facts underlying an allegation of ineffective assistance of counsel may summarily deny that allegation based on the judge's personal knowledge of counsel's performance." Partain v. State, 47 So. 3d 282, 286 (Ala. Crim. App. 2008) (citing Ex parte Walker, 800 So. 2d 135 (Ala. 2000)). Here, the circuit judge who presided over Reynolds's postconviction proceedings was the same judge who presided over Reynolds's capital-murder trial and the same judge who sentenced Reynolds to death.

1.

Reynolds argues that trial counsel were ineffective in failing to introduce Chad Martin's confession, which was given to law enforcement during a statement on May 29, 2003. During the investigation into the murder of the Martin family, law enforcement interviewed Chad Martin, a nephew of Charles Martin. On direct appeal, this Court summarized the facts surrounding Chad Martin's confession as follows:

> "On May 25, 2003, during the hours following the discovery of the crimes, the police interviewed several people of interest -- including Charles Martin's 25-year-old nephew, Chad Martin, and Chad Martin's friend, John Langley. As addressed below, Chad Martin and John Langley were ultimately ruled

out as a suspects. Chad Martin testified for the State at trial and denied any participation in the crimes. John Langley also testified as a witness for the State, and his testimony corroborated Chad Martin's alibi. ...

"...

"[D]uring the May 25, 2003, police questioning, Chad Martin told the investigators two conflicting versions of his whereabouts at the time of the murders. In the first account Chad Martin denied any involvement in the crimes; in the second account Martin purportedly confessed to the crimes. After an investigation, the police excluded Chad Martin as a suspect. Several days later, Chad Martin recanted his confession in a third oral narrative to the police. By that time, Reynolds had already become the target of the investigation.

"Chad Martin's first narrative account to the police, in which he denied any involvement in the crimes, was reduced to a written statement and was signed by Martin. Martin's confession -- the second of the two oral accounts that he gave on the May 25 -- was not reduced to an official statement, but was subsequently documented in two police reports. The first police report purportedly documenting Chad Martin's confession was prepared and signed by Sgt. Dale Fincher, and dated May 25, 2003. Sgt. Fincher's May 25 police report was not introduced into evidence at trial because Fincher had moved out of state and did not testify at the trial. The second police report purportedly documenting Chad Martin's confession was dated May 29, 2003, and signed by Capt. Roy Harbin."

Reynolds, 114 So. 3d at 92 (footnotes omitted).

Reynolds attempted to admit evidence of Chad Martin's confession at trial through Chad Martin and Captain Harbin. Reynolds's attempt to admit the confession through Chad Martin failed because Chad Martin testified that he could not recall the content of his May 29 statement. Reynolds's attempt to

admit evidence of Chad Martin's confession through Captain Harbin, who had signed the report, failed because Captain Harbin could not authenticate the report -- Captain Harbin testified that he was not present for Chad Martin's entire statement to police, that he did not prepare the report of the statement, and that the report did not comport with his recollection of Chad Martin's statement.

Reynolds pleaded in his petition that trial counsel were ineffective because they failed to interview Captain Harbin prior to trial, from which they could have learned that Captain Harbin was not present for Chad Martin's confession, that Sergeant Fincher prepared the report of Chad Martin's May 29 statement, and that Captain Harbin could not authenticate the report. Reynolds further pleaded that trial counsel were ineffective for failing to call as witnesses five other individuals who could have testified to the contents of Chad Martin's May 29 statement -- Sergeant Fincher; Detective Mike Prater and Detective Michael Hooks, who, according to the report, were present during Chad Martin's statement; and Investigator Zack Johnson and District Attorney Jimmie Harp, who, according to the report, were present for a portion of Chad Martin's statement. Reynolds pleaded that but for trial counsel's failures, Chad Martin's confession would have been used as impeachment of Chad Martin's testimony and as substantive evidence of third-party guilt. Reynolds was prejudiced, he argued, in both the guilt and penalty phases, and that the prejudice was compounded by failing to object to the State's improper bolstering of exculpatory testimony from Chad Martin and Langley. The circuit court dismissed these claims as being insufficiently pleaded pursuant to Rules 32.3 and 32.6(b), Ala. R. Crim. P., and/or without merit.

Because Chad Martin effectively denied making the May 29 statement, trial counsel were required to authenticate the report of Chad Martin's statement to make the report admissible for impeachment purposes. See Advisory Committee Notes to Rule 613(b), Ala. R. Evid. ("Nothing in this rule abrogates the requirement that if the witness denies having made the statement then any extrinsic evidence of the prior inconsistent statement must be properly authenticated."). Reynolds pleaded in his petition the conclusion that five other individuals could have authenticated the report, but failed to plead specific facts that would indicate that they

could, in fact, do so. See Hyde, 950 So. 2d at 356 (recognizing that it is not the pleading of a conclusion that, if true, entitles a petitioner to relief, but rather the allegation of facts that, if true, entitle a petitioner to relief (quoting Boyd, 913 So. 2d at 1125, quoting in turn Lancaster v. State, 638 So. 2d 1370, 1373 (Ala. Crim. App. 1993))). For instance, Reynolds failed to plead what the testimony would be of any of the five named individuals that could authenticate the report. Reynolds's pleadings indicate that he has made the same error he claims trial counsel made -- Reynolds is assuming that their alleged presence during all or a portion of the May 29 statement would allow them to authenticate the report.

More importantly, Reynolds failed to plead how Chad Martin's confession would have been consistent with the defense's theory of the case. At trial, Reynolds attempted to implicate West in the murders while limiting his involvement to aiding West only after the murders had occurred. Although Chad Martin named several individuals that had allegedly participated in the murders, West was not mentioned during the statement.[4] In fact, Chad Martin appeared to implicate Reynolds. Captain Harbin's report states:

> "[Investigator Johnson] told him to settle down, stop yelling, sit up straight and tell who was with him and what happened. Chad [Martin] said he stabbed the little girl in the neck and [Investigator Johnson] told him to stop jerking everyone around and tell him who he was with. Chad [Martin] then said he was with a guy named Michael for the first time. [Investigator Johnson] said Michael who[?] Chad [Martin] replied 'I do not know his last name.' [Investigator Johnson] said was it Michael Reynolds? 'Dammit[.]' Chad [Martin] got very quiet. Then Chad [Martin] told [Investigator

[4]Captain Harbin's statement of Chad Martin's confession appears in the original trial record. (Trial C. 407-09.) This Court may take judicial notice of its own records. Hull v. State, 607 So. 2d 369, 371 n.1 (Ala. Crim. App. 1992) (citing Wadsworth v. State, 507 So. 2d 572, 573 (Ala. Crim. App. 1987)).

> Johnson], I have told you the truth but you won't listen. [Investigator Johnson] said was it Michael Reynolds? Then Chad [Martin] said I won't say anything else. I want a lawyer."

(Trial Supp. C. 409.) Further, in an apparent attempt to explain why a piece of his eyeglasses and a bloody footprint were found at the Martins' house, Reynolds testified to his attempt to destroy evidence that would implicate West. After entering the house and reviewing the scene,

> "Reynolds then asked West to tell him everything that she had touched so that he could wipe it off, but West could not recall everything she had touched. Reynolds testified that he went back into the house, intent on wiping the surfaces off. Reynolds said that everything in the house was such a mess that he did not know where to start. He said that at that point, he looked and saw that one of the burners on the stove was lit, so he decided to burn the house down. Reynolds testified that he got the gasoline can that was located beside the porch steps, and doused the rooms with gasoline.
>
> "Reynolds said that when he got back to the kitchen, he got a napkin and lit it from the burner, and threw it on the gasoline trail."

Reynolds, 114 So. 3d at 80. This testimony is inconsistent with Chad Martin's statement. Specifically, Chad Martin stated that it was he who had poured gasoline throughout the Martins' house, and that it was he who had retrieved the gas can from the trunk of Langley's vehicle.

Because Reynolds has failed to plead sufficient facts to indicate that the five individuals could authenticate the report for impeachment purposes and failed to plead how Chad Martin's statement would have been consistent with his theory of the case, he has failed to show that he was prejudiced by trial counsel's failure to thoroughly interview Captain Harbin prior to trial and failure to call the five individuals as witnesses. See McWhorter v. State, 142 So. 3d 1195, 1237 (Ala. Crim. App. 2011) (holding that the appellant failed to demonstrate error in the circuit court's findings because the

evidence appellant argued should have been offered would have been inconsistent with trial strategy); Strickland, 466 U.S. at 697 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.").

Reynolds's claim regarding trial counsel's failure to admit the confession as substantive evidence of third-party guilt must likewise fail. This Court held on direct appeal that the confession was not admissible because the report, which was hearsay, "did not have 'sufficient indicia of reliability' to overcome the prohibition against proving third party's guilt by use of hearsay evidence." Reynolds, 114 So. 3d at 102-03. Again, Reynolds's failed to plead specific facts indicating what the testimony would be of any of the five named individuals regarding the report. As such, he failed to plead specific facts indicating that their testimony would have provided the report with a "sufficient indicia of reliability" to make the report admissible as substantive evidence of third-party guilt. Consequently, he has failed to show that he was prejudiced by trial counsel's failure to offer Chad Martin's confession on this ground.

Reynolds's claim that trial counsel were ineffective for failing to object to the State's improper bolstering of Chad Martin and Langley is also insufficiently pleaded. Specifically, Reynolds has failed to plead specific facts that would indicate how he was prejudiced by trial counsel's failure. In fact, it appears that his conclusion that this failure prejudiced him is predicated on his claim of prejudice in the failure of trial counsel to have Chad Martin's confession admitted into evidence. See (C. 155.) In other words, Reynolds has based his claim of prejudice on a separate claim of prejudice that was insufficiently pleaded.

Finally, Reynolds argues that trial counsel were ineffective because trial counsel failed to offer Chad Martin's confession into evidence during the penalty phase. Specifically, Reynolds argues that the confession could have created residual doubt in the minds of the jury and sentencer. First, although capital defendants are allowed to present any "relevant mitigating circumstance" during the penalty phase, see § 13A-5-52, Ala. Code 1975, "residual doubt is not a "relevant mitigating circumstance.'" Ex parte Lewis, 24 So.

3d 540, 543 (Ala. 2009). Trial counsel cannot be held ineffective for failing to offer irrelevant evidence. See McNabb v. State, 991 So. 2d 313, 327 (Ala. Crim. App. 2007) ("Clearly 'counsel could not be ineffective for failing to raise a baseless objection.'" (quoting Bearden v. State, 825 So. 2d 868, 872 (Ala. Crim. App. 2001))). Further, with respect to prejudice on this claim, Reynolds pleaded merely that, "Had counsel [attempted to introduce Chad Martin's confession], there is a reasonable probability that the result of the penalty phase would have been different and Mr. Reynolds would not have been sentenced to death." (C. 154.) Again, Reynolds pleaded a conclusion that he was prejudiced while failing to support that conclusion with specific facts. Accordingly, this claim is insufficiently pleaded. See Hyde, 950 So. 2d at 356 (quoting Boyd, 913 So. 2d at 1125, quoting in turn Lancaster, 638 So. 2d at 1373).

Reynolds's claim that trial counsel were ineffective for failing to offer Chad Martin's confession were either insufficiently pleaded or without merit. As such, the circuit court did not err in dismissing these claims. See Rule 32.7(d), Ala. R. Crim. P.

2.

Reynolds argues that his former trial counsel, Patricia Granger, was ineffective for representing him while she had an actual conflict of interest. Reynolds pleaded that Granger was appointed to represent him on June 3, 2003, and that she had an actual conflict of interest from February 1, 2007 -- the day she accepted a position as a part-time prosecutor for the City of Gadsden -- until April 26, 2007, the date she withdrew from her representation. According to Reynolds, "[d]uring key months of preparation, ... [Granger] should have been interviewing City of Gadsden police officers, either to secure their appearance as defense witnesses or to prepare to cross[-]examine them at trial, as the State had already furnished its witness list." (C. 157.) Reynolds pleaded that Granger and her co-counsel did not interview officers involved in the investigation and that Granger engaged in attorney-client communications with Gadsden police officers that, according to Granger, "'require[d] the exchange of confidential information.'" (C. 157-58.) Reynolds was prejudiced, he pleaded, because Granger withdrew from

representation less than six months prior to trial, which left replacement trial counsel an insufficient amount of time to prepare. The circuit court dismissed this claim as being insufficiently pleaded pursuant to Rules 32.3 and 32.6(b), Ala. R. Crim. P.

> "'"[I]n order to establish a violation of the Sixth Amendment, ... [the appellant] must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." Cuyler v. Sullivan, 446 U.S. [335,] 348, 100 S. Ct. [1708,] 1718 [(1980)]. Accord Williams v. State, 574 So. 2d 876, 878 (Ala. Cr. App. 1990). To prove that an actual conflict adversely affected his counsel's performance, a defendant must make a factual showing "that his counsel actively represented conflicting interests," Cuyler v. Sullivan, 446 U.S. at 350, 100 S. Ct. at 1719, "'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."'" Barham v. United States, 724 F.2d 1529, 1532 (11th Cir.) (quoting United States v. Mers, 701 F.2d 1321, 1328 (11th Cir. 1983)), cert. denied, 467 U.S. 1230, 104 S. Ct. 2687, 81 L. Ed. 2d 882 (1984). Once a defendant makes a sufficient showing of an actual conflict that adversely affected counsel's performance, prejudice under Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) -- i.e, "that, but for counsel's unprofessional errors, the result of the proceeding would have been different" -- is presumed. Strickland, 466 U.S. at 694, 692, 104 S. Ct. at 2068, 2067. See United States v. Winkle, 722 F.2d 605, 610 (10th Cir. 1983); Williams v. State, 574 So. 2d at 878.'

"Molton[v. State], 651 So. 2d [663,] 668-69 [(Ala.

Crim. App. 1994)]."

M.S. v. State, 822 So. 2d 449, 453 (Ala. Crim. App. 2000).

Here, Reynolds broadly asserted that Granger had a conflict that adversely affected her representation while failing to plead any specific facts supporting that conclusion. For example, Reynolds failed to plead with specificity any evidence he was unable to obtain or any interviews that replacement counsel was unable to perform as a result of Granger's alleged three-month conflict. Additionally, Reynolds pleaded that Granger's alleged conflict prevented her from offering candid advice to him, but failed to plead with specificity what advice should have been offered. In sum, Reynolds has not pleaded sufficient facts to indicate that Granger "was actively representing conflicting interests" or that Granger "made a choice between possible alternative courses of action" in her representation of Reynolds. M.S., 822 So. 2d at 453 (citations and quotations omitted).

Reynolds's claim that trial counsel were ineffective because she had a conflict of interest was insufficiently pleaded. As such, the circuit court did not err in dismissing this claim. See Rule 32.7(d), Ala. R. Crim. P.

3.

Reynolds argues that trial counsel were ineffective for failing to visit with and advise him and for preventing him from assisting in his own defense. Reynolds pleaded that trial counsel waited over six weeks after appointment to meet with Reynolds, visited him slightly more than once a year while he awaited trial, and attempted to engage in written correspondence despite indications of his limited literacy. According to Reynolds, trial counsel failed to establish his trust, which led to his attempt to have them removed from representation prior to trial. Reynolds also pleaded that trial counsel failed to procure for him a pair of eyeglasses, and that his limited vision prevented him from meaningfully participating in his defense. Finally, Reynolds pleaded that trial counsel failed to adequately advise him regarding his decision to testify. The circuit court dismissed these claims as being insufficiently pleaded pursuant to Rules 32.3 and

32.6(b), Ala. R. Crim. P., and/or without merit.

Reynolds pleaded that trial counsel were ineffective for waiting six weeks to meet with him, for infrequently meeting with him while he awaited trial, and for engaging in written correspondence. However, Reynolds has not pleaded how he was prejudiced by counsel's actions. For example, Reynolds failed to plead what evidence trial counsel were unable to uncover, what actions trial counsel were unable to take, or how the course of the investigation was altered to Reynolds's detriment based on their alleged ineffectiveness. Consequently, he has failed to show that he was prejudiced by trial counsel's alleged failures in communicating with him. Hyde, 950 So. 2d at 356.

Reynolds's claim that trial counsel were ineffective for failing to procure for him a pair of eyeglasses is also insufficiently pleaded. Reynolds failed to plead with specificity how his alleged limited vision prejudiced him at trial; instead, Reynolds made a bare assertion that he was prejudiced and that there was a reasonable probability that the outcome would have been different. Hyde, 950 So. 2d at 356.

Finally, Reynolds claimed that trial counsel were ineffective for failing to adequately advise him regarding his decision to testify and for failing to prepare him to testify. Reynolds failed to plead, though, what advice should have been given to him or even whether he would have chosen not to testify had he been adequately advised by trial counsel. Also, Reynolds failed to plead how trial counsel should have prepared him to testify or how his testimony would have been different had trial counsel adequately prepared him. Consequently, he has failed to show that he was prejudiced by trial counsel's alleged inadequate advice regarding his right to testify. Hyde, 950 So. 2d at 356.

Reynolds's claim that trial counsel were ineffective for failing to visit with and advise him and for preventing him from assisting in his own defense is insufficiently pleaded. As such, the circuit court did not err in dismissing this claim. See Rule 32.7(d), Ala. R. Crim. P.

4.

Reynolds argues that trial counsel were ineffective because they failed to object to heightened security in the courtroom. Reynolds pleaded that he was required to wear a stun belt and to be flanked by uniformed officers for the duration of trial and that the security measures hampered his right to a fair trial and his ability to participate in his defense. The circuit court dismissed this claim as being insufficiently pleaded pursuant to Rules 32.3 and 32.6(b), Ala. R. Crim. P., and/or without merit.

Reynolds's claim regarding the use of a stun belt was properly dismissed because it was insufficiently pleaded. In Albarran v. State, 96 So. 3d 131 (Ala. Crim. App. 2011), this Court stated:

> "This Court has approved the use of a stun belt as a security measure in a capital-murder trial. See Hyde v. State, 13 So. 3d 997 (Ala. Crim. App. 2007); Belisle v. State, 11 So. 3d 256 (Ala. Crim. App. 2007); Snyder v. State, 893 So. 2d 488 (Ala. Crim. App. 2003). In Snyder, this Court upheld the use of a stun belt in Snyder's capital-murder trial after the court held a hearing on the issue and made a determination on the record that the use of the stun belt was appropriate. See also State v. Were, 118 Ohio St. 3d 448, 464, 890 N.E.2d 263, 283 (2008) ('A trial court can require the use of stun belts when the prosecution justifies their use on the record.'); Annot., Propriety and Prejudicial Effect of Gagging, Shackling, or Otherwise Physically Restraining Accused During Course of State Criminal Trial, 90 A.L.R.3d 17 (1979).
>
> "As the State of Florida stated when addressing a similar issue:
>
> > "'[The appellant] further argues that the jury was prejudiced because he had to wear a stun belt during trial and that the use of this stun belt implied his guilt. A trial judge has discretion when it comes to the issue of whether or not to restrain the

> defendant. See Elledge v. State, 408 So. 2d 1021, 1023 (Fla. 1981). The record clearly reflects that although the trial court found the belt necessary because of the magnitude of the case, it also found that Smith could not be prejudiced by its use because it was not visible to anyone, including the judge. It is true that while restraints are sometimes necessary, a defendant generally has the right to appear free from restraint while in front of the jury. See Illinois v. Allen, 397 U.S. 337, 344, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970). However, we have held that the use of a stun belt is allowed because it is less visible than the alternative of shackles. See Weaver v. State, 894 So. 2d 178, 195 (Fla. 2004). Because the stun belt was not visible, Smith appeared free from restraint and, as a result, he was not prejudiced.'
>
> "Smith v. State, 7 So. 3d 473, 493-94 (Fla. 2009)."

Albarran, 96 So. 3d at 155. In his petition, Reynolds failed to plead that the stun belt was visible or that the jurors were even aware of its existence. As such, Reynolds failed to plead how he was prejudiced by trial counsel's failure to object to the use of the stun belt. See Albarran, 96 So. 3d at 155 ("The record clearly reflects that although the trial court found the belt necessary because of the magnitude of the case, it also found that Smith could not be prejudiced by its use because it was not visible to anyone, including the judge." (quoting Smith, 7 So. 3d at 493-94)).

Reynolds's claim regarding the presence of two uniformed officers -- Reynolds pleaded that one officer sat behind him while the other sat beside him -- is also insufficiently pleaded. In Holbrook v. Flynn, 475 U.S. 560 (1986), the Supreme Court of the United States addressed the impact of additional courtroom security on a defendant's right to a fair trial:

> "The first issue to be considered here is thus

whether the conspicuous, or at least noticeable, deployment of security personnel in a courtroom during trial is the sort of inherently prejudicial practice that, like shackling, should be permitted only where justified by an essential state interest specific to each trial. We do not believe that it is.

"The chief feature that distinguishes the use of identifiable security officers from courtroom practices we might find inherently prejudicial is the wider range of inferences that a juror might reasonably draw from the officers' presence. While shackling and prison clothes are unmistakable indications of the need to separate a defendant from the community at large, the presence of guards at a defendant's trial need not be interpreted as a sign that he is particularly dangerous or culpable. Jurors may just as easily believe that the officers are there to guard against disruptions emanating from outside the courtroom or to ensure that tense courtroom exchanges do not erupt into violence. Indeed, it is entirely possible that jurors will not infer anything at all from the presence of the guards. If they are placed at some distance from the accused, security officers may well be perceived more as elements of an impressive drama than as reminders of the defendant's special status. Our society has become inured to the presence of armed guards in most public places; they are doubtless taken for granted so long as their numbers or weaponry do not suggest particular official concern or alarm. See Hardee v. Kuhlman, 581 F.2d 330, 332 (CA2 1978).

"To be sure, it is possible that the sight of a security force within the courtroom might under certain conditions 'create the impression in the minds of the jury that the defendant is dangerous or untrustworthy.' Kennedy v. Cardwell, 487 F.2d 101, 108 (CA6 1973), cert. denied, 416 U.S. 959, 94 S. Ct. 1976, 40 L. Ed. 2d 310 (1974). However, 'reason, principle, and common human experience,' [Estelle v.] Williams, [] 425 U.S. [501,] 504, 96 S.

> Ct. [1691,] 1693 [(1976)], counsel against a presumption that any use of identifiable security guards in the courtroom is inherently prejudicial. In view of the variety of ways in which such guards can be deployed, we believe that a case-by-case approach is more appropriate.

Holbrook, 475 U.S. at 568-569. In his petition, Reynolds failed to plead the total number of security personnel, that any jurors were aware that the officers constituted extra security personnel, or that any jurors drew any prejudicial inference from the officers' presence. Id. As such, Reynolds failed to plead how he was prejudiced by counsel's failure to object to the presence of the two uniformed officers who sat near him.

Reynolds also failed to plead with specific facts his claim that the additional security measures hampered his ability to participate in his defense. Reynolds merely concluded that the additional security measures had a "chilling effect on [his] ability to participate in his own defense," (C. 164), while failing to plead any specific actions he was unable to take.[5] As such, Reynolds failed to plead how he was prejudiced by counsel's failure to object to the additional security measures employed during his trial. Hyde, 950 So. 2d at 356.

Reynolds's claim that trial counsel were ineffective for failing to object to heightened security in the courtroom was insufficiently pleaded. As such, the circuit court did not err in dismissing this claim. See Rule 32.7(d), Ala. R. Crim. P.

5.

Reynolds argues that trial counsel were ineffective for failing to conduct an adequate investigation of the State's

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[5]On direct appeal, this Court held that "there is no evidence indicating that the belt interfered with Reynolds's right to confer with his counsel or that the jury was even aware that Reynolds was wearing a stun belt." Reynolds, 114 So. 3d at 82.

case. Reynolds pleaded that trial counsel failed to interview all the State's witnesses, failed to hire a second investigator after the first investigator quit without completing the investigation, and failed to contact any of the neighbors that lived near the crime scene. Reynolds also pleaded that trial counsel failed to investigate Marcie West and her activities leading up to and after the crime, as well as her offered motive that Reynolds intended to rob the Martins. Reynolds pleaded that trial counsel failed to locate witnesses who could corroborate that Chad Martin had written Chuck Martin a threatening note, and failed to investigate the individuals named in the statements to police made by Chad Martin and Langley. The circuit court dismissed this claim as being insufficiently pleaded pursuant to Rules 32.3 and 32.6(b), Ala. R. Crim. P.

Reynolds's claim that trial counsel were ineffective for failing to conduct an adequate investigation of the State's case was properly dismissed because it was insufficiently pleaded. Reynolds listed a number of individuals, most of them unnamed, that could have been interviewed by trial counsel, but failed to plead what counsel would have learned from a majority of the individuals had those individuals been interviewed. See Daniel v. State, 86 So. 3d 405, 416-17 (Ala. Crim. App. 2011) (recognizing that a claim that counsel failed to investigate is insufficiently pleaded where the petitioner fails to plead the information to be uncovered or the names of witnesses to be interviewed).

Reynolds's claim that trial counsel failed to locate witnesses to corroborate that Chad Martin had written Chuck Martin a threatening note was insufficiently pleaded because Reynolds failed to plead the name of anyone who could, in fact, corroborate the existence of the note. See Daniel, 86 So. 3d at 416. Reynolds also pleaded that trial counsel should have hired a second investigator after the first investigator quit without completing the investigation, but failed to plead how much of the investigation had been completed and what remained, and, more importantly, what a second investigator could have uncovered had one been hired. Id. Similarly, Reynolds pleaded that trial counsel should have investigated West's activities before and after the crime and the individuals named in her statement to police, but failed to plead what trial counsel would have learned had the

investigation taken place. Id. Given Reynolds's pleadings, it is entirely possible that investigation into those lines of inquiry would have corroborated West's account. Also, Reynolds pleaded that trial counsel should have investigated the amount of drugs consumed by West and Reynolds prior to the crime and the effect that quantity of drugs would have had on them, yet failed to plead the actual amount of drugs consumed or their effect. See Connally v. State, 33 So. 3d 618, 622-23 (Ala. Crim. App. 2007).

In some limited instances in this claim, Reynolds pleaded what information could have been learned had a particular interview been conducted. For instance, Reynolds pleaded that had trial counsel interviewed "neighbors who lived near the scene of the crime," trial counsel would have learned evidence that was, Reynolds argues, inconsistent with West's testimony. (C. 167-68.) Reynolds, however, failed to identify the neighbors by name. See Lee v. State, 44 So. 3d 1145, 1158 (Ala. Crim. App. 2009) ("Lee claimed that counsel was ineffective for failing to interview State witnesses. However, in this section of Lee's amended petition he failed to identify one witness by name."). Reynolds pleaded that had trial counsel interviewed Reynolds's employer, they "could have confirmed [his] assertion that he was paid the morning before the crime and did not need money." (C. 168.) This claim, though, failed to identify Reynolds's employer and asserted only the possibility that trial counsel "could have" confirmed Reynolds's employer paid Reynolds prior to the murders. See Lee, 44 So. 3d at 1158.

Finally, Reynolds pleaded that trial counsel should have interviewed Mark Hopwood to learn that blood was not found on the floorboard of Sandra Roberts's car, which was where West testified she placed the knives used by Reynolds. In conclusory fashion, Reynolds asserted that it would have undermined West's testimony. Reynolds failed, though, to plead how he was prejudiced by this failure to interview Hopwood, especially in light of the fact that the jury was made aware of the results of Hopwood's test. Reynolds, 114 So. 3d at 114 ("During defense counsel's cross-examination of Hopwood, Hopwood testified that he had performed a chemical-screening test for the presence of blood in various places of the interior of the automobile that Reynolds and West used on the night of the murders, but that the test did

not detect the presence of blood.").

Reynolds's claim that trial counsel were ineffective for failing to adequately investigate the State's case is insufficiently pleaded. As such, the circuit court did not err in dismissing this claim. See Rule 32.7(d), Ala. R. Crim. P.

6.

Reynolds argues that trial counsel were ineffective for failing to adequately challenge the State's case. Specifically, Reynolds argues that trial counsel: a) failed to move for a change of venue; b) failed to conduct adequate voir dire; c) failed to make a Batson[6] motion; d) failed to secure or fully depose forensic pathologist Dr. Adam Craig; e) failed to investigate or seek further expert testimony regarding West's timeline of events; f) failed to examine the chief investigating officer; and g) failed to make other necessary objections to preserve his rights.

a.

Reynolds argues that trial counsel were ineffective for failing to move for a change of venue. Reynolds pleaded that publicity was extensive, continued long after the murders, and revealed prejudicial information about Reynolds's involvement in other crimes, and that investigators commented to the media regarding the difficulty of the case. Reynolds pleaded that "dozens of potential jurors" stated that they were aware of the murders, knew the victims, or knew the defendant. (C. 171.) According to Reynolds, prejudice may be presumed, or, in the alternative, he was actually prejudiced by trial counsel's failure. The circuit court dismissed this claim as being insufficiently pleaded pursuant to Rules 32.3 and 32.6(b), Ala. R. Crim. P.

> "[A] change of venue must be granted only when it can be shown that the pretrial publicity has so 'pervasively saturated' the community as to make the 'court proceedings nothing more than a "hollow

[6]Batson v. Kentucky, 476 U.S. 79 (1986).

> formality,"' Hart v. State, 612 So. 2d 520, 526-27 (Ala. Cr. App.), affirmed, 612 So. 2d 536 (Ala. 1992), cert. denied, 508 U.S. 953, 113 S. Ct. 2450, 124 L. Ed. 2d 666 (1993), citing Rideau v. Louisiana, 373 U.S. 723, 726, 10 L. Ed. 2d 663, 83 S. Ct. 1417 [1419] (1963), or when actual prejudice can be demonstrated. The burden of showing this saturation of the community or actual prejudice lies with the appellant. Sheppard v. Maxwell, 384 U.S. 333, 16 L. Ed. 2d 600, 86 S. Ct. 1507 (1966). In order to show community saturation, the appellant must show more than the fact 'that a case generates even widespread publicity.' Thompson v. State, 581 So. 2d 1216, 1233 (Ala. Cr. App. 1991), cert. denied, 502 U.S. 1030, 112 S. Ct. 868, 116 L. Ed. 2d 774 (1992). '"Newspaper articles alone would not necessitate a change of venue unless it was shown that the articles so affected the general citizenry through the insertion of such sensational, accusational or denunciatory statements, that a fair and impartial trial was impossible. Patton v. State, 246 Ala. 639, 21 So. 2d 844 [1945]."' Thompson v. State, supra at 1233, quoting McLaren v. State, 353 So. 2d 24, 31 (Ala. Cr. App.), cert. denied, 353 So. 2d 35 (Ala. 1977). Furthermore, in order for a defendant to show prejudice, the '"proper manner for ascertaining whether adverse publicity may have biased the prospective jurors is through the voir dire examination." Anderson v. State, 362 So. 2d 1296, 1299 (Ala. Cr. App. 1978).' Ex parte Grayson, 479 So. 2d 76, 80 (Ala. 1985), cert. denied, 474 U.S. 865, 88 L. Ed. 2d 157, 106 S. Ct. 189 (1985)."

Oryang v. State, 642 So. 2d 979, 983 (Ala. Crim. App. 1993).

Here, Reynolds pleaded the titles of several published newspaper articles that reported on the case, the victims, or his criminal history, but made no allegation that the articles were "sensational, accusational or denunciatory." Oryang, 642 So. 2d at 983 (citations omitted). Reynolds's general claim that dozens of potential jurors had knowledge of the murders is insufficiently pleaded because it does not identify the jurors. See Washington v. State, 95 So. 3d 26, 62-63 (Ala.

Crim. App. 2012). Reynolds did identify three jurors who had stated in voir dire that they had read media reports about the murders; however, Reynolds failed to plead whether the media coverage had biased them against him.

Reynolds's claim that prejudice may be presumed was also insufficiently pleaded. "'Prejudice is presumed from pretrial publicity when pretrial publicity is sufficiently prejudicial and inflammatory and the prejudicial pretrial publicity saturated the community where the trials were held.' [Coleman v. Kemp,] 778 F.2d [1487,] 1490 [(11th Cir. 1985)] (emphasis added)." Hunt v. State, 642 So. 2d 999, 1043 (Ala. Crim. App. 1993). Prejudice is rarely presumed and "is reserved for only 'extreme situations.'" Hunt, 642 So. 2d at 1043 (quoting Coleman, 778 F.2d at 1537). The handful of articles pleaded by Reynolds, which were published over several years, were insufficient to show that "prejudicial pretrial publicity saturated the community." Hunt, 642 So. 2d at 1043 (quoting Coleman, 778 F.2d at 1490); see also Riley v. State, 166 So. 3d 705, 741 (Ala. Crim. App. 2013) ("Although one newspaper article specifically listed Riley's prior burglary conviction as well as the reversal of his previous capital-murder conviction, the mere fact that media coverage references a defendant's criminal history is not sufficient, by itself, to satisfy the presumed-prejudice standard.").

Reynolds has failed to plead sufficient facts to show that a motion for a change in venue would have been meritorious under either an actual- or presumed-prejudice standard. Trial counsel cannot be held ineffective for failing to raise a meritless motion. See McNabb v. State, 991 So. 2d 313, 327 (Ala. Crim. App. 2007) ("Clearly 'counsel could not be ineffective for failing to raise a baseless objection.'" (quoting Bearden v. State, 825 So. 2d 868, 872 (Ala. Crim. App. 2001))).

Reynolds's claim that trial counsel were ineffective for failing to move for a change of venue is insufficiently pleaded. As such, the circuit court did not err in dismissing this claim. See Rule 32.7(d), Ala. R. Crim. P.

b.

Reynolds argues that trial counsel were ineffective for

failing to conduct adequate voir dire. Reynolds pleaded that trial counsel failed to ask three of the four panels of prospective jurors "whether the fact that they, a close family member, or friend had been the victim of a crime would affect their ability to be impartial," and failed to ask any of the panels "whether the fact that they had a family member in law enforcement would affect their ability to be impartial." (C. 171-72.) Reynolds also pleaded that trial counsel failed to adequately life-qualify the prospective jurors, relied on jury questionnaires without asking an adequate amount of follow-up questions, and failed to explain mitigation or the penalty phase. The circuit court dismissed this claim as being insufficiently pleaded pursuant to Rules 32.3 and 32.6(b), Ala. R. Crim. P., and without merit.

Beyond a bare allegation of prejudice, Reynolds failed to plead any facts to indicate that he was, in fact, prejudiced by trial counsel's failures to address the aforementioned issues in voir dire. Additionally, Reynolds failed to identify any jurors who were biased against him or that did not understand the penalty phase. See Washington v. State, 95 So. 3d 26, 63-64 (Ala. Crim. App. 2012).

Reynolds's claim that trial counsel were ineffective for failing to conduct an adequate voir dire is insufficiently pleaded. As such, the circuit court did not err in dismissing this claim. See Rule 32.7(d), Ala. R. Crim. P.

c.

Reynolds argues that trial counsel were ineffective for failing to make a Batson motion. Reynolds pleaded that the State used its peremptory challenges to strike 9 of the 14 eligible black prospective jurors and that these prospective jurors were a heterogenous group whose only shared characteristic was their race. In support of that assertion, Reynolds pleaded that four of the black prospective jurors who were struck provided little to no information during voir dire, while three white women who provided no information during voir dire served on the jury. The circuit court dismissed this claim as being insufficiently pleaded pursuant to Rules 32.3 and 32.6(b), Ala. R. Crim. P.

"In evaluating a Batson claim, courts must follow a

three-step process. As the United States Supreme Court explained in Miller-El v. Cockrell, 537 U.S. 322, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003):

> "'First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race. [Batson v. Kentucky,] 476 U.S. [79,] 96-97 [(1986)]. Second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question. Id., at 97-98. Third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination. Id., at 98.'

"Furthermore, this Court has held:

> "'In the first step of the process, the step at issue here, "[t]he party alleging discriminatory use of a peremptory strike bears the burden of establishing a prima facie case of discrimination." Ex parte Brooks, 695 So. 2d 184, 190 (Ala. 1997). "In addition to showing that the State used peremptory challenges to remove members of a cognizable group ... and relying upon the fact that peremptory strikes permit discrimination, a claimant also must show that these facts and any other relevant facts raise an inference that the prosecutor used his strikes in a discriminatory manner." Madison v. State, 718 So. 2d 90, 101 (Ala. Crim. App. 1997). "The facts and circumstances necessary to establish a prima facie case of purposeful discrimination in the jury selection process will, of course, vary from case to case, depending on the particular facts and circumstances involved." Kidd v. State, 649 So. 2d 1304, 1311 (Ala. Crim. App. 1994). While it is true the striking of one person for a racial reason is a

> violation of the principles of Batson and grounds for reversal, see Williams v. State, 548 So. 2d 501, 507 (Ala. Crim. App. 1988), it is equally true that "[m]erely showing that the challenged party struck one or more members of a particular race is not sufficient to establish a prima facie case." Edwards v. State, 628 So. 2d 1021, 1024 (Ala. Crim. App. 1993).'
>
> "Lightfoot v. State, 152 So. 3d 434, 438 (Ala. Crim. App. 2012), reversed on other grounds by Ex parte Lightfoot, 152 So. 3d 445, 438 (Ala. 2013)."

Carruth v. State, 165 So. 3d 627, 638 (Ala. Crim. App. 2014).

Here, Reynolds made a bare allegation that the eligible black prospective jurors who were struck by the State were a heterogenous group who shared only the characteristic of their race. The only evidence of disparate treatment pleaded by Reynolds, which was unremarkable, failed to identify any of the jurors by name. See Carruth, 165 So. 3d at 638.[7]

Reynolds's claim that trial counsel were ineffective for failing to raise a Batson motion is insufficiently pleaded. As such, the circuit court did not err in dismissing this claim. See Rule 32.7(d), Ala. R. Crim. P.

d.

Reynolds argues that trial counsel were ineffective for failing to secure or fully depose forensic pathologist Dr. Adam Craig. Dr. Craig performed the autopsies on the victims and testified that their injuries were caused by the same knife or similar knives. Dr. Craig gave his testimony via deposition by stipulation of the parties. Reynolds pleaded that he received discovery from the State after Dr. Craig's

[7]This Court evaluated the substantive Batson claim on direct appeal. Although this Court's review was for plain error only, we flatly stated: "We have thoroughly reviewed the record before this Court and find no inference of purposeful discrimination by the State." Reynolds, 114 So. 3d at 86.

deposition that suggested the use of two dissimilar knives. The trial court and the State offered to make arrangements for trial counsel to further cross-examine Dr. Craig on the evidence, but trial counsel failed to pursue any recourse. Consequently, the jury did not hear Dr. Craig cross-examined with evidence that suggested the use of two dissimilar knives. The circuit court dismissed this claim as being insufficiently pleaded pursuant to Rules 32.3 and 32.6(b), Ala. R. Crim. P.

This claim is insufficiently pleaded on several fronts. For example, Reynolds failed to plead what questions he would have asked Dr. Craig about the dissimilar knives and what answers Dr. Craig would have provided. Also, Reynolds failed to plead how confronting Dr. Craig with this evidence would have undermined the State's theory of the case. As this Court stated on direct appeal:

> "[W]e believe that it is equally possible if Reynolds had confronted Dr. Craig and Dr. Craig had agreed that two different knives were used to stab the victims, that that testimony could have strengthened the State's case. As discussed in the facts portion of this opinion, Adrian West testified that Reynolds handed her two different knives after she found him stabbing Melinda Martin. She also testified that she subsequently disposed of the two knives."

Reynolds, 114 So. 3d at 91.

Reynolds's claim that trial counsel were ineffective for failing to secure or fully depose Dr. Craig is insufficiently pleaded. As such, the circuit court did not err in dismissing this claim. See Rule 32.7(d), Ala. R. Crim. P.

e.

Reynolds argues that trial counsel were ineffective for failing to investigate or seek further expert testimony regarding West's timeline of events. Reynolds pleaded that Dr. Craig testified that Savannah Martin's body showed early decompositional changes, which indicated that her body had progressed further into decomposition than her parents'

bodies.[8] This evidence, Reynolds argued, could have refuted West's testimony that Savannah Martin was killed after her parents in order to eliminate a potential eyewitness. The circuit court dismissed this claim as being insufficiently pleaded pursuant to Rules 32.3 and 32.6(b), Ala. R. Crim. P.

This claim is insufficiently pleaded because Reynolds failed to plead the name of any expert who was available to investigate and to testify on this issue, failed to plead specifically what additional investigation the unnamed expert should have conducted, failed to plead what information trial counsel would have learned from the unspecified investigation, and failed to plead how trial counsel's failure to learn that information prejudiced him at trial. See Daniel, 86 So. 3d at 437-38.

Reynolds's claim that trial counsel were ineffective for failing to investigate or seek further expert testimony regarding West's timeline of events is insufficiently pleaded. As such, the circuit court did not err in dismissing this claim. See Rule 32.7(d), Ala. R. Crim. P.

f.

Reynolds argues that trial counsel were ineffective for failing to cross-examine the chief investigating officer, Detective Roger Dale. Reynolds pleaded that trial counsel could have cross-examined Detective Dale on multiple facets of the investigation. The circuit court dismissed this claim as being insufficiently pleaded pursuant to Rules 32.3 and 32.6(b), Ala. R. Crim. P.

Although Reynolds pleaded that trial counsel could have cross-examined Detective Dale on a number of issues, he specifically offered only that he could have been cross-examined about his investigation of Chad Martin as an alternative suspect. Reynolds failed to plead specific questions that trial counsel should have asked Detective Dale, and failed to plead any facts to indicate what Detective

[8]Dr. Craig allowed, though, that it was possible that their deaths had occurred at the same time, and that the discrepancy in decomposition was due to environmental factors.

Dale's responses to those questions would have been. Also, Reynolds failed to plead how he was prejudiced by trial counsel's failure to elicit from Detective Dale that Chad Martin was a suspect in light of the fact that this information was already before the jury.

Reynolds's claim that trial counsel were ineffective for failing to examine Detective Dale is insufficiently pleaded. As such, the circuit court did not err in dismissing this claim. See Rule 32.7(d), Ala. R. Crim. P.

g.

Reynolds argues that trial counsel were ineffective for failing to make necessary objections to preserve his rights. Reynolds pleaded that trial counsel failed to object to the dismissal of 150 prospective jurors who were dismissed for failing to appear for jury duty; to the dismissal of those prospective jurors who indicated that they were over the age of 80, self-employed, or a full-time student; to the circuit clerk's commencing jury assembly with a prayer; to multiple instances of improper questioning by the State; to a misstatement by the State regarding voluntary intoxication during closing arguments; and to an assertion by the State that West had no pending charges against her. Reynolds also pleaded that trial counsel failed to renew previously-sustained objections to the State's leading questions and improper bolstering of West. The circuit court dismissed this claim as being insufficiently pleaded pursuant to Rules 32.3 and 32.6(b), Ala. R. Crim. P., and without merit.

Here, Reynolds failed to plead the specific grounds of objection trial counsel should have raised and failed to plead why the objections trial counsel should have raised would have been meritorious. Further, Reynolds failed to plead any prejudice suffered as a result of trial counsel's failure to raise the given objections. Hyde, 950 So. 2d at 356.

Reynolds's claim that trial counsel were ineffective for failing to make necessary objections to preserve his rights is insufficiently pleaded. As such, the circuit court did not err in dismissing this claim. See Rule 32.7(d), Ala. R. Crim. P.

Reynolds argues that trial counsel were ineffective during the penalty phase of trial. Specifically, Reynolds argues that trial counsel were ineffective: a) for failing to conduct an adequate mitigation investigation; b) for failing to prepare adequately for the penalty phase; c) for failing to present a picture of his childhood that was complete and was not misleading; d) for failing to present evidence of the impact his childhood had on his siblings; and e) for failing to present a complete picture of Reynolds's good character, work ethic, and love of children.

"Although Petitioner's claim is that his trial counsel should have done something more, we first look at what the lawyer[s] did in fact." Chandler v. United States, 218 F.3d 1305, 1320 (11th Cir. 2000). During the penalty phase, trial counsel presented the testimony of seven family members. Several family members testified to the transient nature of Reynolds's childhood and to the periods of homelessness he and his family had endured. Reynolds's sister Tammy Ellis testified that her family was subjected to violent acts of abuse by their father. His other sister, Christy Prosser, provided similar testimony but told the jury that Reynolds had always protected and cared for her. Much of Reynolds's difficult childhood was credited to the alcoholism and abuse of Harold Reynolds, Reynolds's father, although Reynolds's mother was far from perfect -- Reynolds's family members testified to her incarceration for robbery and involvement with prostitution. Barbara Reynolds, Reynolds's aunt, testified to the neglect and unsanitary living conditions suffered by Reynolds and his other siblings, and took personal responsibility for not doing more for the children when they were younger.

Reynolds was, for a time, able to rise above his difficult childhood. Reynolds's brother-in-law, stepson, and ex-wife testified that he was good with children and a good father. Jennifer Reynolds labeled Reynolds as a "wonderful" father, noting that it was the reason she gave him custody of their son during their divorce. (Trial R. 1893.) Jennifer Reynolds added that Reynolds was "a good worker," and Barbara Reynolds testified that Reynolds appeared "professional" on the last occasion she had seen Reynolds prior to the murders.

(Trial R. 1894, 1904.) Barbara Reynolds attributed Reynolds's deterioration as an adult to his struggle with substance abuse, which she stated was a common issue throughout Reynolds's family. Each of Reynolds's family members asked that Reynolds's life be spared.

Trial counsel also presented the testimony of Dr. J. Davis Martin, a mitigation specialist. Dr. Martin echoed the testimony of Reynolds's family members, calling his childhood "brutal, violent, impoverished, unstable." (Trial R. 1915.) Although Dr. Martin did not obtain Reynolds's childhood records, she testified that parental alcohol abuse and violence in the home "will set a child on a lifelong cycle of depressive disorders [and] certainly aggressive disorders." (Trial R. 1931-32.) Dr. Martin testified that Reynolds dropped out of school after the seventh grade and later was unable to pass General Educational Development tests ("GED"). Additionally, it was her opinion that Reynolds suffered from a learning disability. Dr. Martin also testified that Reynolds was introduced to alcohol, cigarettes, and marijuana at the age of 13; within two years, Reynolds had advanced to regular use of inhalants and amphetamines.

Dr. Martin testified that Reynolds began to improve his life after a 90-day commitment to the Department of Youth Services ("DYS"), where he received structure and attention. After his release, Reynolds was able to hold a job -- eventually becoming a supervisor -- and was an attentive father to his son. However, due to his addiction to crystal meth, Reynolds lost his job and custody of his son was transferred to one of Reynolds's sisters.

Dr. Martin advocated for Reynolds's life be spared, testifying that Reynolds could serve as a peer counselor. Dr. Martin described Reynolds as docile and non-aggressive, despite a childhood devoid of care or family structure.

a.

Reynolds argues that trial counsel were ineffective for failing to conduct an adequate mitigation investigation. Specifically, Reynolds argues that trial counsel were ineffective: i) in their retention of a mitigation specialist; ii) for failing to investigate indications of intellectual

deficits; iii) for failing to investigate mental illness; iv) for failing to investigate his personal and familial history of addiction; v) for failing to investigate evidence of organic brain damage; and vi) for failing to contact family members, friends, coworkers and employers willing to speak on his behalf. The circuit court dismissed this claim as being insufficiently pleaded pursuant to Rules 32.3 and 32.6(b), Ala. R. Crim. P., and without merit.

Much of what Reynolds argues should have been investigated would have been cumulative to what trial counsel actually presented. For example, Dr. Martin testified to Reynolds's difficulties with school and to her opinion that Reynolds suffered from a learning disability, Barbara Reynolds testified to her family's history of addiction, and several family members testified to Reynolds's difficult childhood and redeeming qualities. Daniel, 86 So. 3d at 429-30 ("[T]he failure to present additional mitigating evidence that is merely cumulative of that already presented does not rise to the level of a constitutional violation." (citations and quotations omitted)).

Further, this portion of Reynolds's petition is replete with pleading deficiencies. Most significant was his failure at any point in this claim to specifically address the prejudice he suffered as a result of trial counsel's alleged failures. For instance, while Reynolds pleaded that trial counsel failed to investigate whether he suffered from a mental illness or organic brain damage, he failed to plead that he actually suffered from a specific mental illness or organic brain damage. In other words, it is not clear from Reynolds's pleadings that further investigation would have uncovered additional mitigating evidence. In his petition, Reynolds made bare allegations of prejudice without specifically pleading how he was prejudiced, especially in light of the ample mitigation evidence presented during the penalty phase, the number of mitigating circumstances found by the trial court,[9] and the existence of three aggravating

[9]In its sentencing order, the trial court found the following mitigating circumstances: Reynolds's environment, education, life, background, family and school history; the love of Reynolds's family for him; the love of Reynolds's

factors. See Mashburn v. State, 148 So. 3d 1094, 1133 (Ala. Crim. App. 2013) ("'[C]laims of failure to investigate must show with specificity what information would have been obtained with investigation, and whether, assuming the evidence is admissible, its admission would have produced a different result.'" (quoting Thomas v. State, 766 So. 2d 860, 892 (Ala. Crim. App. 1998), citing in turn Nelson v. Hargett, 989 F.2d 847, 850 (5th Cir. 1993))); Hyde, 950 So. 2d at 356 ("A bare allegation that prejudice occurred without specific facts indicating how the petitioner was prejudiced is not sufficient."); see also Strickland, 466 U.S. at 697 ("If it is easier to dispose of an ineffectiveness claim on the ground of

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friends for him and Reynolds's love for his family and friends; that Reynolds experienced neglect and abuse as a child; that Reynolds had a history of drug abuse and addiction; that Reynolds experienced poverty as a child; that Reynolds's father was at times a brutal abusive alcoholic; that Reynolds's mother was not maternal, apparently did not bond with or nurture her children, and had health problems; that Reynolds was reared in a filthy home with hygiene and health issues; that Reynolds was homeless for a significant period of time during his childhood and had essentially been on his own since he was 13; that Reynolds was physically abused by his father as a small child and had little, if any, structure in his home; that Reynolds dropped out of school when he was in the seventh grade and received little, if any, formal education after dropping out; that Reynolds apparently witnessed his father physically abusing his mother and possibly other family members when he was a child; that Reynolds allegedly began abusing drugs and alcohol at age 13, later developed a serious drug dependency to crystal methamphetamine and cocaine, and that these addictions led to the loss of custody of his child, the loss of jobs and inevitable emotional issues that result from drug addictions and the consequences of drug addictions; that Reynolds has a child and family members who love him, that Reynolds has been described as "the glue" that holds his disjointed family together and that the imposition of the death penalty in this case would have a devastating effect on many members of this family; that Reynolds was a good father and stepfather at points in his life; and that Reynolds has no significant history of prior criminal activity. (Trial C. 324-25.)

lack of sufficient prejudice, which we expect will often be so, that course should be followed.").

Reynolds's claim that trial counsel were ineffective for failing to conduct an adequate mitigation investigation is insufficiently pleaded. As such, the circuit court did not err in dismissing this claim. See Rule 32.7(d), Ala. R. Crim. P.

b.

Reynolds argues that trial counsel were ineffective for failing to prepare adequately for the penalty phase. Reynolds pleaded that trial counsel either wholly failed to interview or conducted only brief interviews with multiple mitigation witnesses. As a result, many of Reynolds's witnesses did not understand the mitigation process and did not know what questions they would be asked. Reynolds also asserted that trial counsel failed to adequately interview Harold Reynolds. According to Reynolds, Harold Reynolds was drunk while he was testifying and his testimony undercut some of Reynolds's mitigation evidence. The circuit court dismissed this claim as being insufficiently pleaded pursuant to Rules 32.3 and 32.6(b), Ala. R. Crim. P., and without merit.

Reynolds generally pleaded that trial counsel failed to adequately prepare his mitigation witnesses, but failed to plead any specific facts to indicate what trial counsel should have done to prepare the mitigation witnesses or how their testimony during the penalty phase would have been different had they received the unspecified preparation. See Boyd, 913 So. 2d at 1138-39.

Reynolds's claim regarding his father's testimony is facially meritless. First, Harold Reynolds provided testimony that directly supported trial counsel's strategy of presenting Reynolds's difficult childhood -- he testified to being an alcoholic, to moving frequently when Reynolds was young, to a period of homelessness, to the involvement in prostitution by Reynolds's mother, to slapping his wife on multiple occasions, to the possibility that he choked his wife, and to Reynolds's dropping out of school. Second, while Harold Reynolds denied certain testimony provided by other mitigation witnesses, it is clear from the trial court's findings of mitigating factors

in its sentencing order that these self-serving denials were given little to no weight.

Reynolds's claim that trial counsel were ineffective for failing to conduct an adequate mitigation investigation is insufficiently pleaded and without merit. As such, the circuit court did not err in dismissing this claim. See Rule 32.7(d), Ala. R. Crim. P.

c.

Reynolds argues that trial counsel were ineffective for failing to present a picture of his childhood that was complete and was not misleading. Specifically, Reynolds argues trial counsel were ineffective for failing to present evidence that Reynolds: i) was exposed to constant and extreme violence; ii) was abused as a child; iii) was neglected as a child; and iv) was exposed to inappropriate sexual activity as a child. The circuit court dismissed this claim as being insufficiently pleaded pursuant to Rules 32.3 and 32.6(b), Ala. R. Crim. P., and without merit.

Here, Reynolds has pleaded a number of instances of abuse and neglect that he argues trial counsel should have presented during the penalty phase. However, as with his claim that trial counsel failed to conduct an adequate investigation, much of what Reynolds argues should have been presented would have been cumulative. The trial court's findings of mitigating factors in its sentencing order indicate that the trial court considered that Reynolds's childhood was brutal and that he was abused and neglected as a child. Reynolds has simply offered more evidence to show what trial counsel has already shown. Daniel, 86 So. 3d at 429–30 ("[T]he failure to present additional mitigating evidence that is merely cumulative of that already presented does not rise to the level of a constitutional violation." (citations and quotations omitted)).

Even the evidence that Reynolds argues was not cumulative -- that Reynolds was exposed to inappropriate sexual activity as a child -- does not, if true, entitle Reynolds to relief. As the circuit court correctly noted in its order of dismissal, the instances described in Reynolds's petition would have had minimal mitigating value as none of the

instances involved him being sexually abused.

Reynolds cited in his petition Williams v. Allen, 542 F.3d 1326 (11th Cir. 2008), for the proposition that, although trial counsel presented evidence that the petitioner had experienced abuse and neglect as a child, trial counsel were ineffective for failing to present a complete and accurate picture of that abuse and neglect. Williams is distinguishable from the instant case for two reasons. First, trial counsel in Williams presented one mitigation witness, the petitioner's mother, who provided a mild version of the abuse the petitioner had suffered, which stood in stark contrast to the evidence offered during his postconviction proceedings. In this case, trial counsel presented seven family members during the penalty phase, several of whom testified to the abuse and neglect suffered by Reynolds. Trial counsel also presented the testimony of Dr. Martin, who supported the testimony given by Reynolds's family members. Second, the court in Williams specifically cited that its finding of prejudice was supported because the case was "not highly aggravated." Williams, 542 F.3d at 1343. As the circuit court repeatedly noted in its order of dismissal, Reynolds's murders involved "three strong aggravating circumstances." (C. 413.)

Further lessening the possibility of prejudice is Reynolds's age -- 31 -- at the time he committed the murders. Reynolds was years removed from the instances of abuse and neglect he now argues should have been presented at the time he murdered the Martin family. As such, the value of this mitigation evidence is minimal. Callahan v. Campbell, 427 F.3d 897, 937 (11th Cir. 2005) (according little value to evidence of childhood abuse when petitioner was 35 years old at the time he committed murder); Francis v. Dugger, 908 F.2d 696, 703 (11th Cir.1990) (according little value to evidence of childhood abuse when petitioner was 31 years at the time he committed murder).

Moreover, Reynolds again has made a bare allegation of prejudice without specifically pleading how he was prejudiced by trial counsel's failure to present this additional evidence. Hyde, 950 So. 2d at 356 ("A bare allegation that prejudice occurred without specific facts indicating how the petitioner was prejudiced is not sufficient."); see also

Strickland, 466 U.S. at 697 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.").

Reynolds's claim that trial counsel were ineffective for failing to present a picture of his childhood that was complete and was not misleading is insufficiently pleaded and without merit. As such, the circuit court did not err in dismissing this claim. See Rule 32.7(d), Ala. R. Crim. P.

d.

Reynolds argues that trial counsel were ineffective for failing to present evidence of the impact his childhood had on his siblings. Reynolds pleaded that his siblings have had issues with addiction, that his brother is serving 24 years in prison for theft-related crimes and that his sisters suffer from depression and first gave birth as teenagers. Reynolds asserted that trial counsel's failure to present this evidence allowed the State to emphasize that Reynolds's siblings had not been as negatively impacted by their childhood home. The circuit court dismissed this claim as being insufficiently pleaded pursuant to Rules 32.3 and 32.6(b), Ala. R. Crim. P.

Initially, this Court notes that Reynolds's premise for this claim is not accurate. Reynolds cited to the cross-examination of Christy Prosser as support for his argument that the State emphasized that Reynolds's siblings had not been as negatively impacted by their childhood home as Reynolds had. On the contrary, the State limited its observation to Christy Prosser and Reynolds:

> "Q. What are you doing right now? You're in school?
>
> "A. I'm a college student, yes.
>
> "Q. And you testified about how good Michael was as a brother and how good he was as a father. So it sounds like -- And I have got to tell you. You look like you have done fine yourself. It seems like that whatever, you know, picture that they are painting about your daddy, it seems like from what your testimony is that

that didn't rub off on you and didn't rub off on Michael. Is that correct?

"A. Me, no. Michael, I can't answer that for him."

(Trial R. 1877; emphasis added.)

Additionally, even if the State had made the broader argument that Reynolds asserted in his petition, the argument would clearly be true and impossible for trial counsel to rebut. This is so because whatever ill effects Reynolds's siblings have suffered as a result of their traumatic childhoods, only Reynolds has committed a heinous act of violence. See Grayson v. Thompson, 257 F.3d 1194, 1227 (11th Cir. 2001) ("The fact that Grayson was the only child to commit such a heinous crime also may have undermined defense efforts to use his childhood in mitigation."). Further, undermining the character of Christy Prosser and Tammy Ellis seems to be a dubious strategy inasmuch as Reynolds was relying on their testimony to vouch for his redeeming qualities as a "wonderful father" and a "protector."[10] (Trial R. 1850, 1874.)

In any case, this claim is insufficiently pleaded because Reynolds failed to plead any facts to show how this evidence would have been mitigating for Reynolds or how he was prejudiced by trial counsel's failure to present this evidence. Hyde, 950 So. 2d at 356.

Reynolds's claim that trial counsel were ineffective for failing to present evidence of the impact his childhood had on his siblings is insufficiently pleaded. As such, the circuit court did not err in dismissing this claim. See Rule 32.7(d), Ala. R. Crim. P.

e.

Reynolds argues trial counsel were ineffective for failing to present a complete picture of Reynolds's good

[10]There was evidence presented during the penalty phase that Danny Reynolds was serving a prison sentence at that time.

character, work ethic, and love of children. Reynolds pleaded that there were many members of the community unrelated to Reynolds that were willing to testify to Reynolds's good character. For example, Brenda Boyle, Reynolds's former boss, would have testified that Reynolds was dependable, responsible, and caring, and Reverend Don Colvin, Reynolds's former boss and counselor, would have testified that Reynolds was a good worker and a good friend who had attempted to battle his substance abuse by attending rehabilitation. Reynolds pleaded that Regina Faulkner, Reynolds's ex-wife, would have testified that Reynolds was mellow and kind, and his former in-laws Lynda and Tom Tankersley would have testified that Reynolds was a hard worker, a good father, and good with children. The circuit court dismissed this claim as being insufficiently pleaded pursuant to Rules 32.3 and 32.6(b), Ala. R. Crim. P., and without merit.

Much of this testimony was cumulative to testimony presented during the penalty phase. Multiple witnesses testified that Reynolds was a good father and good with children, and Dr. Martin testified that Reynolds had done so well at work that he had been promoted to supervisor. Daniel, 86 So. 3d at 429-30 ("[T]he failure to present additional mitigating evidence that is merely cumulative of that already presented does not rise to the level of a constitutional violation." (citations and quotations omitted)).

Reynolds argues, though, that the evidence would have been more compelling had it come from non-family members, but pleaded no specific facts to support this assertion. See Bui v. State, 717 So. 2d 6, 22 (Ala. Crim. App. 1997) ("We cannot say that trial counsel's performance was deficient simply because he did not call every witnesses who conceivably may have been willing to testify at the sentencing phase of his trial." (citing State v. Tarver, 629 So. 2d 14, 21 (Ala. Crim. App. 1993))). Also, as the circuit court noted in its order of dismissal, all five individuals listed by Reynolds had personal connections to him, which would have made them susceptible to the same claim of bias the State levied against Reynolds's family members.[11]

[11]It is not clear from Reynolds's petition why mitigation testimony from one ex-wife, Regina Faulkner, would have been

Reynolds's claim that trial counsel were ineffective for failing to present a complete picture of Reynolds's good character, work ethic, and love of children is without merit. As such, the circuit court did not err in dismissing this claim. See Rule 32.7(d), Ala. R. Crim. P.

8.

Reynolds argues that trial counsel were ineffective during the sentencing hearing. Specifically, Reynolds pleaded that trial counsel did not present any additional evidence at the sentencing hearing and were focused instead on withdrawing from their representation of Reynolds. The circuit court dismissed this claim as being insufficiently pleaded pursuant to Rules 32.3 and 32.6(b), Ala. R. Crim. P.

Reynolds did not plead any specific evidence trial counsel should have presented at the sentencing hearing. Instead, Reynolds alleged that "all of the errors counsel committed in the penalty phase (incorporated herein by reference) were present in the sentencing hearing." (C. 212.)

As detailed above, Reynolds's claims that trial counsel were ineffective in the penalty phase were either insufficiently pleaded or without merit. As such, the circuit court did not err in dismissing this claim. See Rule 32.7(d), Ala. R. Crim. P.

9.

Reynolds argues that he received ineffective assistance of counsel during his motion for new trial.[12] Reynolds pleaded that trial counsel failed to support the motion for new trial with citations or case law and failed to investigate any claims or to seek an evidentiary hearing. The circuit court dismissed this claim as being insufficiently pleaded pursuant to Rules 32.3 and 32.6(b), Ala. R. Crim. P.

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more compelling than testimony from Jennifer Reynolds, his other ex-wife.

[12]Reynolds was appointed new counsel for his motion for new trial.

Reynolds failed to plead any specific claims that trial counsel could have raised in the motion for new trial, much less any that would have been meritorious. See Daniel, 86 So. 3d at 440 ("Daniel failed to plead what argument counsel could have made that would have resulted in a different sentencing recommendation in this case or how he was prejudiced; thus, he failed to comply with Rule 32.6, Ala. R. Crim. P.").

Reynolds's claim that he received ineffective assistance of counsel during his motion for new trial is insufficiently pleaded. As such, the circuit court did not err in dismissing this claim. See Rule 32.7(d), Ala. R. Crim. P.

10.

Reynolds argues that trial counsel's individual and cumulative errors rendered his conviction and sentence unreliable. Specifically, Reynolds pleaded that the State's evidence against him was weak, and that trial counsel were ineffective "when they failed to investigate, adequately challenge the State's case, impeach witnesses, rebut testimony, and put before the jury the fact that Chad Martin confessed to committing the crime." (C. 214.) Reynolds also pleaded that trial counsel were ineffective in the penalty phase because their investigation was inadequate and their presentation of mitigating evidence left the jury and sentencing judge an incomplete and inaccurate picture of Reynolds's background and character. The circuit court dismissed this claim as being insufficiently pleaded pursuant to Rules 32.3 and 32.6(b), Ala. R. Crim. P., and without merit.

The State argues that Reynolds failed to reassert this claim on appeal and that it has been abandoned. See Brownlee v. State, 666 So. 2d 91, 93 (Ala. Crim. App. 1995) (citations omitted). It appears, though, that Reynolds has attempted to reassert this claim in footnote 12 of his brief on appeal. Assuming that this claim is properly before this Court for review, we will address the merits of the claim.

> "As this Court explained in Taylor v. State, 157 So. 3d 131 (Ala. Crim. App. 2010):
>
> "'Taylor also contends that the

allegations offered in support of a claim of ineffective assistance of counsel must be considered cumulatively, and he cites Williams v. Taylor, 529 U.S. 362 [120 S. Ct. 1495, 146 L. Ed. 2d 389] (2000). However, this Court has noted: "Other states and federal courts are not in agreement as to whether the 'cumulative effect' analysis applies to Strickland claims'; this Court has also stated: "We can find no case where Alabama appellate courts have applied the cumulative-effect analysis to claims of ineffective assistance of counsel." Brooks v. State, 929 So. 2d 491, 514 (Ala. Crim. App. 2005), quoted in Scott v. State, [Ms. CR-06-2233, March 26, 2010] ___ So. 3d ___, ___ (Ala. Crim. App. 2010); see also McNabb v. State, 991 So. 2d 313, 332 (Ala. Crim. App. 2007); and Hunt v. State, 940 So. 2d 1041, 1071 (Ala. Crim. App. 2005). More to the point, however, is the fact that even when a cumulative-effect analysis is considered, only claims that are properly pleaded and not otherwise due to be summarily dismissed are considered in that analysis. 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 Taylor's obligation to plead each claim of ineffective assistance of counsel in compliance with the directives of Rule 32.'"

"157 So. 3d at 140 (emphasis added)."

Bryant v. State, 181 So. 3d 1087, 1104 (Ala. Crim. App. 2011).

Reynolds has not asserted any claims of ineffective assistance of counsel that are meritorious on their face. Consequently, he has not raised any claims that could be considered were a cumulative-effect analysis to be conducted.

Reynolds's claim that trial counsel's individual and cumulative errors rendered his conviction and sentence unreliable is without merit. As such, the circuit court did not err in dismissing this claim. See Rule 32.7(d), Ala. R. Crim. P.

III.

Reynolds argues that the State withheld favorable evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963). Specifically, Reynolds argues that the State withheld evidence: a) that Marcie West had made a deal with the State in return for her testimony at trial; b) that there was no blood found on the interior of Sandra Roberts's vehicle and that another vehicle was investigated; and c) that police notes of interviews with State witnesses contained exculpatory information.

> "To prove a Brady violation, a defendant must show that '"(1) the prosecution suppressed evidence; (2) the evidence was favorable to the defendant; and (3) the evidence was material to the issues at trial."' Johnson v. State, 612 So. 2d 1288, 1293 (Ala. Cr. App. 1992), quoting Stano v. Dugger, 901 F.2d 898, 899 (11th Cir. 1990), cert. denied, Stano v. Singletary, 516 U.S. 1122, 116 S. Ct. 932, 133 L. Ed. 2d 859 (1996). See Smith v. State, 675 So. 2d 100 (Ala. Cr. App. 1995). '"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."' Johnson, 612 So. 2d at 1293, quoting United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383, 87 L. Ed. 2d 481 (1985)."

Freeman v. State, 722 So. 2d 806, 810 (Ala. Crim. App. 1998).

A.

Reynolds argues that the State withheld evidence that West had made a deal with the State in return for her testimony at trial. See Giglio v. United States, 405 U.S. 150 (1972). Reynolds pleaded that on August 6, 2002, West was arrested for unlawful distribution of a controlled substance, second-degree unlawful possession of marijuana, and unlawful possession of drug paraphernalia. On June 3, 2003, soon after Reynolds's arrest, West was arrested on additional charges -- unlawful distribution of a controlled substance and first-degree hindering prosecution. Reynolds asserted that on June 4, 2003, charges were filed for her August 2002 arrest for the purpose of securing her testimony at trial. On April 26, 2005, trial counsel filed a motion requiring the State to disclose any incentives or agreements the State had made with its witnesses, which was granted by the trial court. The State, though, did not disclose any agreement with West. Further, Reynolds pleaded that West testified that she had not received a deal from the State in exchange for her testimony, and the State did not correct her. Following her testimony, West pleaded guilty to charges of distribution of a controlled substance and hindering prosecution, while the remaining charges were dismissed. West was sentenced to three years in prison on both charges, but, Reynolds asserted, West was released after serving six months following a recommendation of probation filed by the State. The circuit court dismissed this claim as being procedurally barred pursuant to Rules 32.2(a)(3) and 32.2(a)(5), Ala. R. Crim. P., and insufficiently pleaded pursuant to Rules 32.3 and 32.6(b), Ala. R. Crim. P.

On September 18, 2015, this Court held that Reynolds had sufficiently pleaded this Brady/Giglio claim and remanded the cause to the circuit court with instructions for it to allow Reynolds an opportunity to prove this claim and to disprove the procedural bars asserted by the State. Reynolds v. State, [Ms. CR-13-1907, Sept. 18. 2015] ___ So. 3d ___, ___ (Ala. Crim. App. 2015). This Court also instructed the circuit court to make specific findings of fact regarding its disposition of this claim. Id.

In compliance with this Court's opinion, the circuit court ordered the parties to submit evidence in the form of evidentiary submissions. See Rule 32.9, Ala. R. Crim. P. On November 12, 2015, the circuit court entered a detailed order denying relief.

On return to remand, Reynolds argues: 1) that the circuit court improperly restricted his time to gather evidence; 2) that the circuit court denied him access to basic discovery; and 3) that he proved his Brady/Giglio claim by a preponderance of the evidence.[13]

1.

Reynolds argues that the circuit court improperly restricted his time to gather evidence. In an opinion issued on September 18, 2015, this Court remanded the cause to the circuit court with instructions for it to allow Reynolds an opportunity to prove his Brady/Giglio claim and to disprove the procedural bars asserted by the State. In the opinion, this Court instructed the circuit court to "take all necessary action to see that the circuit clerk makes due return to this Court at the earliest time possible and within 56 days of the release of this opinion." Reynolds, ___ So. 3d at ___.

On September 23, 2015, the circuit court issued an order affording Reynolds 20 days to present the circuit court with any legal, competent, and relevant evidence supporting his claim. The State was afforded 20 days from the filing of Reynolds's evidence to present the circuit court with any rebuttal evidence. On October 5, 2015, Reynolds moved for a 30-day enlargement of time to file his evidence with the circuit court. That motion for an enlargement was denied on October 7, 2015.

> "As this Court explained in Loggins v. State, 771 So. 2d 1070 (Ala. Crim. App. 1999), aff'd, 771 So.

[13]Reynolds also argues that he proved that his Brady/Giglio claim is not subject to the procedural bars of Rule 32.2, Ala. R. Crim. P. Because this Court is addressing the merits of Reynolds's claim, we have not addressed whether Reynolds disproved the procedural bars asserted by the State.

2d 1093 (Ala. 2000):

> "'The trial court has broad discretion in granting a continuance when the basis for the motion is that counsel has not had sufficient time to prepare or to develop his defense. Godfrey v. State, 383 So. 2d 575, 577 (Ala. Cr. App.), cert. denied, 383 So. 2d 579 (Ala.), cert. denied, 449 U.S. 903, 101 S. Ct. 276, 66 L. Ed. 2d 134 (1980), citing Smith v. State, 282 Ala. 268, 210 So. 2d 826 (1968). "A motion for a continuance due to a lack of time for adequate preparation is a matter entirely and exclusively within the sound discretion of the trial court and its ruling will not be reversed on appeal absent a ... showing of abuse." Reynolds v. State, 539 So. 2d 428, 429 (Ala. Cr. App. 1988), cert. denied, 539 So. 2d 428 ([Ala.] 1988). Moreover, "[t]he reversal of a conviction because of the refusal of the trial judge to grant a continuance requires 'a positive demonstration of abuse of judicial discretion.' Clayton v. State, 45 Ala. App. 127, 129, 226 So. 2d 671, 672 (1969)." Beauregard v. State, 372 So. 2d 37, 43 (Ala. Cr. App.), writ denied, 372 So. 2d 44 (Ala. 1979) (emphasis added [in Loggins]).'
>
> "771 So. 2d at 1084. 'As a general rule, continuances are not favored,' In re R.F., 656 So. 2d 1237, 1238 (Ala. Civ. App. 1995), and '[o]nly rarely will [an] appellate court find an abuse of discretion' in the denial of a motion for a continuance. Latimer v. Enterprise Hosp., 505 So. 2d 375, 376 (Ala. 1987)."

Sullivan v. State, 939 So. 2d 58, 65-66 (Ala. Crim. App. 2006).

In Reynolds's motion for an enlargement of time, he argued that 20 days was insufficient for him to adequately investigate his claim and to prepare his submission to the

circuit court. Reynolds specifically cited as a justification for the enlargement his inability to review his or West's case files. Reynolds's brief on return to remand echoes that justification: "Because the State refused to acknowledge Mr. Reynolds's entitlement to its records, Mr. Reynolds sought more time to investigate any deal between Ms. West and the State." (Reynolds's brief on return to remand, at 20.) However, as a subsequent footnote in Reynolds's brief on return to remand acknowledges, the circuit court granted Reynolds access to "any and all" of the State's files pertaining to the prosecution of West. (Supp. C. 98.) Significantly, Reynolds has not directed this Court's attention to any specific evidence it was unable to attain and present due to the circuit court's denial of his motion for an enlargement of time. In other words, Reynolds has failed to show that he was prejudiced by the circuit court's ruling. As such, this issue does not entitle Reynolds to any relief. See T.D.M. v. State, 117 So. 3d 921, 930-31 (Ala. Crim. App. 2010), rev'd on other grounds, Ex parte T.D.M., 117 So. 3d 933 (Ala. 2011) (holding that the circuit court did not abuse its discretion in denying motion for continuance where there was no indication of prejudice suffered by appellant); Price v. State, 725 So. 2d 1003, 1061 (Ala. Crim. App. 1997) (holding that it was "'extremely improbable that the additional time for preparation requested by the defendant would have changed the result of the trial'" (quoting Fortenberry v. State, 545 So.2d 129, 139 (Ala. Crim. App. 1988))).

2.

Reynolds argues that the circuit court denied him access to basic discovery, which prevented him from having a full and fair opportunity to present evidence of his Brady/Giglio claim. Reynolds also argues that the circuit court curtailed this Court's remand by failing to hold an evidentiary hearing.

On September 25, 2015, Reynolds filed an extensive motion for discovery. (C. on Remand 44-57.) Reynolds's motion sought the State's case files concerning the investigation and prosecution of him as well as the case files for any and all prosecutions of West. On September 29, 2015, the circuit court denied Reynolds's motion, finding that it was overly broad. On October 6, 2015, Reynolds filed a motion for reconsideration. While maintaining his right to the documents

sought in the September 25 discovery request, Reynolds asked for a more limited discovery of documents that related to the prosecution of West and of interrogatories, which were focused on the State's prosecution of West. (C. on Remand 77-96.) On October 7, 2015, the circuit court granted Reynolds's motion in part, ordering the State to allow Reynolds access to any and all files held by the district attorney's office that pertained to the prosecution of West. (C. on Remand 98.)

> "When ascertaining whether discovery is warranted in a Rule 32 proceeding, the court must first determine whether the Rule 32 petitioner has shown good cause for disclosure of the requested materials. As the Alabama Supreme Court stated in Ex parte Land, 775 So. 2d 847 (Ala. 2000):
>
> > "'We agree with the Court of Criminal Appeals that "good cause" is the appropriate standard by which to judge postconviction discovery motions. In fact, other courts have adopted a similar "good-cause" or "good-reason" standard for the postconviction discovery process. See [State v.] Marshall, [148 N.J. 89, 690 A.2d 1, cert. denied, 522 U.S. 850 (1997)]; State v. Lewis, 656 So. 2d 1248 (Fla. 1994); People ex rel. Daley v. Fitzgerald, 123 Ill. 2d 175, 121 Ill. Dec. 937, 526 N.E.2d 131 (1988). As noted by the Illinois Supreme Court, the good-cause standard guards against potential abuse of the postconviction discovery process. See Fitzgerald, supra, 123 Ill. 2d at 183, 121 Ill. Dec. 937, 526 N.Ed.2d at 135 ....
> >
> > "'... By adopting this standard, we are only recognizing that a trial court, upon a petitioner's showing of good cause, may exercise its inherent authority to order discovery in a proceeding for postconviction relief. In addition, we caution that postconviction discovery does not provide a petitioner with a right to "fish" through official files and that it

> "is not a device for investigating possible claims, but a means of vindicating actual claims." People v. Gonzalez, 51 Cal. 3d 1179, 1260, 800 P.2d 1159, 1206, 275 Cal. Rptr. 729, 776 (1990), cert. denied, 502 U.S. 835, 112 S. Ct. 117, 116 L. Ed. 2d 85 (1991). Instead, in order to obtain discovery, a petitioner must allege facts that, if proved, would entitle him to relief.'
>
> "775 So. 2d at 852."

Jackson v. State, 910 So. 2d 797, 801 (Ala. Crim. App. 2005).

The circuit court's granting of limited discovery was reasonable. As the circuit court found, Reynolds's initial motion for discovery was overly broad. A sampling of the discovery initially requested includes all documents relating to: Reynolds's physical and mental condition at any time; any condition of Charles, Melinda, or Savannah Martin during the course of the investigation; the existence of any statutory or non-statutory mitigating factor or aggravating factor; and the juvenile and adult criminal and mental-health histories of Reynolds, Chad Martin, Langley, and any other witness who testified for the State at Reynolds's trial. This cause was remanded for the limited purpose of allowing Reynolds an opportunity to prove his Brady/Giglio claim and to disprove the procedural bars asserted by the State. Reynolds's initial motion for discovery sought information far beyond the scope of remand. "'[P]ostconviction discovery does not provide a petitioner with a right to "fish" through official files and ... it "is not a device for investigating possible claims, but a means of vindicating actual claims."'" Jackson, 910 So. 2d at 801 (quoting Ex parte Land, 775 So. 2d at 852, quoting in turn Gonzalez, 51 Cal. 3d at 1260, 800 P.2d at 1206, 275 Cal. Rptr. at 776). Reynolds has not shown good cause to warrant the extensive discovery sought in his initial motion for discovery. As such, the circuit court did not abuse its discretion in denying his initial motion for discovery.

The second motion for discovery focused on the prosecution of West, which was more reasonable in scope and relevant to Reynolds's claim. Reynolds argues, though, that

in addition to the circuit court's granting him access to any and all files held by the district attorney's office that pertained to the prosecution of West, the circuit court should have ordered the State to answer his interrogatories. (C. on Remand 89-94.)[14] Postconviction proceedings are governed by the Alabama Rules of Criminal Procedure, which do not, as Reynolds appears to suggest, afford him a right to propound interrogatories upon the State in postconviction proceedings. Further, Reynolds has not directed this Court's attention to any information sought in the interrogatories that could not have been ascertained through his access to any and all files held by the district attorney's office that pertained to the prosecution of West.

Finally, the circuit court did not abuse its discretion in failing to hold an evidentiary hearing. The circuit court's decision to accept evidentiary submissions in lieu of an evidentiary hearing was consistent with this Court's remand and Rule 32.9, Ala. R. Crim. P.

3.

Reynolds argues that he proved his Brady/Giglio claim by a preponderance of the evidence. Here, the circuit court was presented with disputed facts. "[W]here there are disputed facts in a postconviction proceeding and the circuit court resolves those disputed facts, '[t]he standard of review on appeal ... is whether the trial judge abused his discretion when he denied the petition.'" Boyd v. State, 913 So. 2d 1113, 1122 (Ala. Crim. App. 2003) (quoting Elliott v. State, 601 So. 2d 1118, 1119 (Ala. Crim. App. 1992)). After

[14]Reynolds also asserts that his "interrogatories [] were originally contemplated by the Circuit Court as a proper part of Mr. Reynolds's evidentiary submission." (Reynolds's brief on return to remand, at 22-23.) This is a distortion of the circuit court's order of September 23, 2015. Consistent with this Court's opinion and Rule 32.9, Ala. R. Crim. P., the circuit court elected to receive evidentiary submissions that "may include affidavits, written interrogatories, or depositions." (C. on Remand 42.) The circuit court did not specifically approve the interrogatories propounded to the State.

reviewing the parties' evidentiary submissions, the circuit court found:

> "There is nothing in the record that indicates there was an agreement between the prosecution and West. Just the contrary, on at least two (2) occasions, once by the defense and once by the prosecution, West denied any agreement. West's affidavit in the State's opposition to Defendant's claims denied any agreement. West's attorney, Jeff Montgomery, denied any knowledge of any agreement for West's testimony. Chief Deputy District Attorney Marcus Reid denied any agreement with West for her testimony. ... Furthermore, Judge David Kimberley's plea colloquy at West's guilty plea hearing indicates West's plea was a blind plea. ...
>
> "Defendant's counsel draw a comparison between the sentence given to West as opposed to the sentence given to Donald Harvey ..., who was also charged with hindering prosecution. West, who had no prior conviction, was sentenced by Judge David Kimberley while Harvey, who was an habitual offender and known to this Court, was sentenced by this Court. Both were blind pleas by different judges, a practice which has long since changed in this circuit. Now co-defendants are assigned to the same trial judge to assure sentencing will be uniform. ...
>
> "The sentence of West is found by this Court to be consistent with other sentences of similar character in this circuit, depending on the judge assigned the case.
>
> "The defendant relies only on the sentence that West received to establish that there was an agreement for her testimony. The State has presented affidavits from Chief Deputy District Attorney Marcus Reid; Jeff Montgomery, Attorney for Marcie West; Affidavit of Marcie West; Marcie West's testimony at trial; the colloquy with Judge David Kimberley, and the trial transcript, all of which indicate there was no agreement between West and the

> prosecution in exchange for West's testimony. Reynolds's claims are based on speculation and conjecture. The ruling on remand is replete with "if true" as to Reynolds's claims, which would entitle him to relief. This Court finds that Reynolds's claims are not true and further that the prosecution did not suppress evidence that was favorable to the Defendant. Further, this Court finds the Defendant did not prove his Brady/Giglio claim."

(C. on Remand 390-91.) The findings of the circuit court are supported by the record. See Hunt v. State, 940 So. 2d 1041, 1055 (Ala. Crim. App. 2005). As such, the circuit court did not err in denying this claim.

B.

Reynolds argues that the State withheld evidence that there was no blood found on the interior of Sandra Roberts's vehicle and that another vehicle was investigated. Specifically, Reynolds pleaded that forensic scientist Mark Hopwood examined the floorboard of Sandra Roberts's car, which was where West testified she placed the knives used by Reynolds, and found that there were no traces of blood. Reynolds also alleged that the State suppressed the fact that Hopwood examined a beige Oldsmobile Toronado automobile. The circuit court dismissed this claim as being procedurally barred pursuant to Rule 32.2(a)(4), Ala. R. Crim. P.

As Reynolds concedes in his brief on appeal, Reynolds argued on direct appeal that the State violated Brady by suppressing Hopwood's field notes. This Court held that "Reynolds has not shown that the State suppressed the evidence. The State apparently did not have the notes ...." Reynolds, 114 So. 3d at 114.

This claim is procedurally barred by Rule 32.2(a)(4), Ala. R. Crim. P., because it was raised and addressed on direct appeal. As such, the circuit court did not err in dismissing this claim. See Rule 32.7(d), Ala. R. Crim. P.

C.

Reynolds argues that the State withheld evidence that police notes of interviews with State witnesses contained exculpatory information. Specifically, Reynolds pleaded that the police notes of interviews with West, Chad Martin, and John Langley included a number of facts that could have been used for impeachment. The circuit court dismissed this claim as being procedurally barred pursuant to Rule 32.2(a)(4), Ala. R. Crim. P.

As Reynolds concedes in his brief on appeal, Reynolds argued on direct appeal that the State violated Brady by suppressing police notes of interviews. This Court held that "investigators' notes from the interviews are considered privileged work product and are not necessarily discoverable by Reynolds." Reynolds, 114 So. 3d at 112. (citing Rules 16.1(c)(1), 16.1(c)(2), 16.1(c)(1)(3), and 16.1(e), Ala. R. Crim. P., and Rogers v. State, 417 So. 2d 241, 247 (Ala. Crim. App. 1982)). Further, this Court reviewed the notes and held that "the notes do not appear to contain either any conflicting information that could have been useful for impeachment purposes or any exculpatory information as that term is contemplated by Brady and its progeny." Reynolds, 114 So. 3d at 113.

This claim is procedurally barred by Rule 32.2(a)(4), Ala. R. Crim. P., because it was raised and addressed on direct appeal. As such, the circuit court did not err in dismissing this claim. See Rule 32.7(d), Ala. R. Crim. P.

IV.

Rule 32.7(d), Ala. R. Crim. P., permits a circuit court to summarily dismiss a Rule 32 petition for, among other reasons, the preclusion grounds outlined in Rule 32.2, Ala. R. Crim. P.; the petitioner's failure to plead his petition with the factual specificity required under Rule 32.6(b), Ala. R. Crim. P.; the petitioner's failure to raise a material issue of fact or law; or the petitioner's failure to state a claim upon which relief may be granted. In other words, Rule 32.7(d) authorizes circuit courts to summarily dismiss a Rule 32 petition that is not "meritorious on its face." Cf. Duncan v. State, 925 So. 2d 245, 256 (Ala. Crim. App. 2005).

Here, aside from the claim addressed in Part III.A. of this memorandum opinion, Reynolds's claims were properly dismissed because the claims were insufficiently pleaded under Rules 32.3 and 32.6(b), Ala. R. Crim. P., were without merit, or were procedurally barred. McNabb v. State, 991 So. 2d 313, 333 (Ala. Crim. App. 2007) (reaffirming that this Court "may affirm the denial of a Rule 32 petition if the denial is correct for any reason"). Therefore, the circuit court did not err by dismissing these claims without an evidentiary hearing. Rule 32.7(d), Ala. R. Crim. P. The sole claim that was meritorious on its face was addressed by the circuit court on remand and denied. The record on remand supports the circuit court's judgment.

Accordingly, the judgment of the circuit court is affirmed.

AFFIRMED.

Kellum, Burke, and Joiner, JJ., concur. Welch, J., concurs in the result.

IN THE CIRCUIT COURT OF ETOWAH COUNTY, ALABAMA

MICHAEL WAYNE REYNOLDS,	*	
PETITIONER,	*	
VS.	*	CIVIL ACTION NO. CC-05-257.60-WAM
STATE OF ALABAMA,	*	
RESPONDENT,	*	

ORDER

This cause comes before the Court on Remand with instructions from the Alabama Court of Criminal Appeals to conduct further proceedings to:

1. Provide Reynolds an opportunity to disprove the procedural bars asserted by the State.
2. On Reynolds' Brady/Giglio claim that the prosecution failed to disclose that West testified pursuant to a deal in which she would receive favorable treatment on her pending charges in return for her testimony.

This Court has reviewed all relevant material by taking evidence in the form of Evidentiary Submissions, Rule 32.9, Alabama Rules of Criminal Procedure. The Court has reviewed the following:

1. All filings of the Defendant in support of his claims, save and except, Defendant's filing styled "Response in Further Support of Amended Petition under Ala.R.Crim.P. 32" filed with the Court on November 10, 2015. Said pleadings were not filed in compliance with the Order of the Court dated September 23, 2015. (Court's Ex. "4")

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Said pleadings are Order stricken from the record on remand. The Clerk of the Court is Ordered and Directed to remove said pleadings from the record on remand and place them under seal, pending further Orders of the Court.

2. All filings of the State in opposition to the Defendant's claims.

3. The Trial Transcript.

4. The eight (8) hearings in the twelve (12) months leading up to the trial pertaining to discovery and exculpatory evidence.

5. Transcript of the sentencing colloquy and sentencing order of Adrian Marcella West held before Judge David Kimberley. (Court's Exhibit "1")

6. Transcript of the sentencing colloquy and sentencing order of Donald Harvey held before Judge Wm. Allen Millican. (Court's Exhibit "2")

The Court makes the following findings:

On the Defendant's motion, the Court on May 12, 2005, required prosecution to make known any incentives or agreements made with witnesses who will testify in the case. The Court further ordered the Defendant's motion for discovery of prosecution files, records and information necessary to a fair trial is granted to the extent provided by Rule 16 of the Alabama Rules of Criminal Procedure and Ex Parte Monk.

In the twelve (12) months preceding the trial of this case this Court held eight (8) different hearings dealing with discovery issues. To ensure the Defendant was given all exculpatory evidence this Court performed an in camera inspection of the prosecution's file. Those portions of the prosecution's file, which were not provided to the Defendant, were placed under seal with the Clerk and by Order of this Court were filed as a supplement of the record on appeal.

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The Defendant at the May 4, 2007, hearing raised Brady v. Maryland, 373U.S.83(1963), issues pertaining to and requests for the statements of Adrian Marcella West, and the State was ordered to produce said records by this Court (T. p. 97, 98, 99).

This Court instructed the prosecution to turn their file over to the Court for in camera review (T. p. 100, 101, 102).

The Defendant received all exculpatory evidence in the prosecution's file.

The Defendant first sought to exclude the testimony of Adrian Marcella West by asserting a common law marriage and privilege. A hearing was held and no common law marriage was found.

Defendant's counsel argued to the Jury at trial as to West's motive for her testimony not being charged with capital murder, murder, assault, or attempted murder, implying motive for her testimony (T. p. 1010). West was specifically asked by Defense Counsel, "Have you made any deals with the District Attorney's Office for your testimony?" West responded, "No, sir." (T. p. 1011). When asked by the prosecution, "Have you made any kind of agreement with our office for your testimony," over objection of defense counsel, West again responded, "No, sir." (T.p. 1019).

There is nothing in the record that indicates there was an agreement between the prosecution and West. Just the contrary, on at least two (2) occasions, once by the defense and once by the prosecution, West denied any agreement. West's affidavit in the State's opposition to Defendant's claims denied any agreement. West's attorney, Jeff Montgomery, denied any knowledge of any agreement for West's testimony. Chief Deputy District Attorney Marcus Reid denied any agreement with West for her testimony. As a result of this showing, this matter is found to be precluded under the provisions of Rule 32.2(a)(2), A.R.Cr.P., due to the fact that such was raised and addressed at trial by the Defendant and decided adversely to him. Furthermore, Judge David Kimberley's plea colloquy at West's guilty plea hearing indicates West's plea was a blind plea. (State's Exhibit "2")

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Defendant's counsel draws a comparison between the sentence given to West as opposed to the sentence given to Donald Harvey (Court's Exhibit "3"), who was also charged with hindering prosecution. West, who had no prior conviction, was sentence by Judge David Kimberley while Harvey, who was an habitual offender and known to this Court, was sentenced by this Court. Both were blind pleas by different judges, a practice which has long since changed in this circuit. Now co-defendants are assigned to the same trial judge to assure sentencing will be uniform. (Court's Exhibit "1").

The sentence of West is found by this Court to be consistent with other sentences of similar character in this circuit, depending on the judge assigned the case.

The Defendant relies only on the sentence that West received to establish that there was an agreement for her testimony. The State has presented affidavits from Chief Deputy District Attorney Marcus Reid; Jeff Montgomery, Attorney for Marcie West; Affidavit of Marcie West; Marcie West's testimony at trial; the colloquy with Judge David Kimberley; and the trial transcript, all of which indicate there was no agreement between West and the prosecution in exchange for West's testimony.

Reynolds' claims are based on speculation and conjecture. The ruling on remand is replete with "if true" as to Reynolds' claims, which would entitle him to relief. This Court finds that Reynolds' claims are not true and further that the prosecution did not suppress evidence that was favorable to the Defendant. Further, this Court finds the Defendant did not prove his Brady/Giglio claim, Brady v. Maryland, 373U.S.83(1963), and Giglio v. United States, 405U.S.150(1972), by a preponderance of the evidence, Rule 32.3 A.R.Cr.P.; likewise, the Defendant could have raised this issue on direct appeal and failed to do so and is therefore procedurally barred, in accordance with the provisions of Rule 32.2(a)(5), A.R.Cr.P.

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Based upon all of the foregoing, and upon due consideration of the same, it is hereby ORDERED, ADJUDGED, DECREED AND DETERMINED BY THIS COURT as follows:

1. That, though provided an opportunity to disprove the procedural bars asserted by the State, the Defendant has utterly and completely failed to do so, by a preponderance of the evidence or any other legal standard.

2. That, as to the Brady/Giglio issue dealing with an alleged agreement with Witness Marcie West for her testimony, the Defendant has further failed to meet his burden as to proof of the same: and, indeed, this Court finds as a matter of fact and law that no such agreement ever existed.

Having now addressed the question posed to it by the Court of Criminal Appeals, this Court hereby directs the Circuit Clerk for the 16th Judicial Circuit to remand this Order with its findings and appropriate exhibits to the Court of Criminal Appeals. This Court further Orders said Clerk to serve a copy of the same upon the proper parties and make notation of the same.

DONE this the 12th day of November, 2015.

Wm. Allen Millican

WM. ALLEN MILLICAN
CIRCUIT JUDGE

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REL: 09/18/2015

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ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2014-2015

CR-13-1907

Michael Wayne Reynolds

v.

State of Alabama

Appeal from Etowah Circuit Court
(CC-05-257.60)

WINDOM, Presiding Judge.

Michael Wayne Reynolds appeals the circuit court's summary dismissal of his petition for postconviction relief filed pursuant to Rule 32, Ala. R. Crim. P., in which he attacked his October 2007 convictions on five counts of

return to remand due 56 days 11/13/15

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capital murder. See §§ 13A-5-40(a)(2), 13A-5-40(a)(10), and 13A-5-40(a)(15), Ala. Code 1975. By a vote of 12-0, the jury recommended that Reynolds be sentenced to death. The circuit court accepted the jury's recommendation and sentenced Reynolds to death for each of the five capital-murder convictions.

On October 1, 2010, this Court affirmed Reynolds's convictions and sentences of death. Reynolds v. State, 114 So. 3d 61 (Ala. Crim. App. 2010). On December 14, 2012, the Alabama Supreme Court denied his petition for writ of certiorari and issued a certificate of judgment. Id. On October 7, 2013, the Supreme Court of the United States denied Reynolds's petition for a writ of certiorari. Reynolds v. Alabama, ___ U.S. ___, 134 S. Ct. 97 (2013).

On December 10, 2013, Reynolds, through counsel, filed his Rule 32 petition, in which he raised numerous claims of ineffective assistance of counsel in both the guilt and penalty phases of his trial and argued that the State withheld evidence favorable to the defense, in violation of Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1972). On March 21, 2014, Reynolds filed an amended

petition reasserting his existing claims and raising additional claims of ineffective assistance of counsel in both the guilt and penalty phases of his trial.

On May 5, 2014, the State filed a motion to dismiss in which it argued that Reynolds's claims were insufficiently pleaded under Rules 32.3 and 32.6(b), Ala. R. Crim. P., procedurally barred under Rules 32.2(a)(3), 32.2(a)(4), and 32.2(a)(5), Ala. R. Crim. P., and/or without merit. On May 22, 2014, Reynolds filed a response to the State's motion to dismiss. On August 20, 2014, the circuit court issued an order dismissing Reynolds's petition. On September 12, 2014, Reynolds filed a postjudgment motion challenging the circuit court's order of dismissal.

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

> "The State presented evidence that in the early morning hours of Sunday, May 25, 2003, Charles Martin III, his wife, Melinda, and their 8-year-old daughter, Savannah, were stabbed to death in their house. Their bodies were doused with gasoline and set on fire. The crimes were discovered later that morning by Melinda's father, Jerry Veal. Melinda Martin's purse and a cordless telephone were missing from the house.
>
> "Adrian Marcella 'Marcie' West, who was Michael Reynolds's girlfriend at the time of the murders,

testified at trial. She and Reynolds lived with Reynolds's father, Harold Reynolds, at the time of the crimes. West testified that on Saturday, May 24, 2003, Michael Reynolds installed a car stereo for Donald Harvey, who was also known as 'Dino,' in exchange for some cocaine. West and Reynolds used the cocaine; they also used crack cocaine several more times throughout that day and night.

"West testified that later that night or early on Sunday morning, she drove Michael Reynolds to the Martins' house in a vehicle that was owned by Harold Reynolds's girlfriend, Sandra Roberts. West said that Michael Reynolds and Charles Martin were good friends. Reynolds told West that they were going to the Martins' house 'to get some money,' and she assumed he meant that he was going to rob Charles Martin.

"When they arrived at the Martin residence, West parked the vehicle in the driveway, and Michael Reynolds got out. Reynolds told West to wait in the car. West said that Reynolds was not wearing any shoes, and that he was carrying a scabbard containing a dagger-style knife. She had seen the knife before at Harold Reynolds's residence. West testified that she was not alarmed that Reynolds had the knife with him because, she said, Reynolds sometimes traded various items for drugs or money.

"Reynolds went to the carport door and knocked. Charles Martin opened the door and waved at West, and then Martin and Reynolds went into the house.

"While West was waiting in the car, she heard Melinda Martin scream. West got out of the car and ran into the house. She saw Charles Martin lying on the kitchen floor and she heard Melinda Martin screaming in the back of the house. West went to the bedroom, where she saw Melinda Martin bent over next to the bed as Michael Reynolds stabbed her. Savannah Martin was on the bed.

"West testified that she got between Reynolds and Melinda and tried to stop him from stabbing her. Reynolds accidentally stabbed West through the arm when she tried to intervene. West testified that Reynolds yelled at her and asked her what she was doing there. He told West to get the telephone and Melinda Martin's purse and to go wait in the car. Reynolds handed her two knives -- the knife that he had taken into the house, and a steak knife that West had not seen before.

"West grabbed the telephone and Melinda Martin's purse, and took the knives and left the bedroom. When she left the room, Melinda Martin was 'slouched over' at the end of the bed, and Savannah Martin was standing on the bed. West testified that she felt faint, so she leaned up against the wall in the hallway. She again felt faint when she crossed over Charles Martin's body in the kitchen, so she leaned against the kitchen counter. West left the house and went to the car.

"West opened the front passenger door and placed the items in the floorboard and then crawled to the driver's side of the vehicle -- the driver's door was damaged and did not open.

"West testified that Reynolds came to the car and told West not to leave, and then he grabbed the larger knife and went back into the house. Reynolds apparently returned to the car a second time and again told West not to leave. West testified that she was afraid, so she did not leave or call for help. At that time, West did not realize that she had been stabbed.

"West testified that when Reynolds returned to the car for the third time, he got in the vehicle and told her that she had been stabbed and that he should drive. West said that she did not allow Reynolds to drive because she feared that he was

going to take her somewhere and kill her. West could see the orange glow of a fire in the house.

"She drove back to Harold Reynolds's residence. When they arrived at Reynolds's house, Michael Reynolds told West to give her clothes to him and to take a shower. West stated that she saw Reynolds looking through Melinda Martin's purse. While West was taking a shower, Reynolds took a cloth and cleaned Sandra Roberts's car. After West showered, Reynolds bandaged her arm, using a first-aid kit they had in their bedroom. Reynolds told West that there was no blood in the car.

"Sandra Roberts testified that she was asleep in Harold Reynolds's bed when West and Michael Reynolds arrived back at the house. She testified that around 3:00 or 4:00 a.m. she was awakened when Reynolds placed her car keys on the night stand beside the bed. West and Reynolds then went to their bedroom. Roberts noticed that West was walking with her arms folded.

"Roberts got out of the bed and went into the kitchen and sat down at the kitchen table. A short time later, Michael Reynolds entered the kitchen and gave Roberts some money and told her to go buy some drugs. Roberts left and purchased some crack cocaine. West said that while Roberts was gone, Michael Reynolds took a shower and that is when she noticed blood on Reynolds's legs.

"When Roberts returned to the house, she and Michael Reynolds divided the crack cocaine. Roberts used her portion of the drugs while she was seated at the kitchen table, but Michael Reynolds took his and West's share of the crack to his bedroom.

"Roberts testified that a short time later, Michael Reynolds reentered the kitchen and propositioned her for sex, but she refused. Roberts said that Michael Reynolds wanted more drugs but,

according to him, he could not get West to give him more money. Reynolds asked Roberts to talk to West. Roberts agreed.

"When Roberts entered the bedroom, West was in the bed with the covers pulled up to her neck, staring at the ceiling. Roberts testified that West was acting strangely and that she was unable to engage West in any conversation. Roberts decided to leave and go to her house. As she was driving, she noticed a cordless telephone without the base on the backseat of her car. Roberts had never seen that telephone before.

"West and Michael Reynolds woke around 9:00 or 9:30 on that morning. West noticed that the eyeglasses Michael Reynolds had been wearing the night before were broken. When she pointed this out to Reynolds, he told her that the missing eyeglass piece would melt in the fire. West testified that Reynolds told her that the knives were under the truck and that their clothes and Melinda Martin's purse were in a white bag.

"Around 10:00 a.m. on Sunday May 25, Jerry Veal, Melinda Martin's father, drove by Charles and Melinda Martin's residence located on Tidmore Bend Road in Etowah County. Veal became concerned when he saw Melinda's vehicle parked in the driveway because Melinda regularly attended church services on Sunday mornings. Veal telephoned Melinda on his cell phone, but no one answered.

"Veal drove back to the Martin residence and parked his vehicle in the driveway. He got out and went to the carport door and knocked. When no one came to the door, Veal opened the carport door and found the kitchen in disarray -- furniture had been moved around, the window treatments were partially torn down, and there was blood everywhere. Veal saw his son-in-law lying on the kitchen floor in a pool of blood.

"Veal returned to his car and told his wife, and she telephoned 911. While Jerry Veal was talking on the cell phone with the 911 dispatcher, he saw James Mulkey, a retired Gadsden police officer, drive by the house. Veal was acquainted with Mulkey, so he stopped Mulkey and told him what he had seen.

"Mulkey instructed Veal to remain outside, and Mulkey went to the carport door. When Mulkey opened the carport door, he saw Charles Martin, who appeared to be dead, lying on the kitchen floor. Mulkey did not enter the residence at that time because he could detect the strong odor of gasoline and gunpowder.

"When the paramedics arrived, Mulkey and the paramedics entered the residence; they determined that Charles Martin was dead. Mulkey and the paramedics proceeded down the hallway to determine if anyone was in need of medical assistance. They discovered the bodies of Melinda Martin and Savannah Martin in a bedroom. The bedroom was in disarray and there was blood everywhere.

"The smell of gasoline was overpowering, so Mulkey opened the back door to the residence, and then he and the paramedics left through the back door of the house, being careful not to disturb the scene.

"Investigators arrived and processed the scene. During the investigation, a bloody partial footprint and a blood drop were discovered on the steps outside the carport door. Charles Martin was found lying on the floor in a pool of blood with a cigarette by his mouth. There were three bloody shoe prints on the kitchen floor. The kitchen chairs were knocked over, the kitchen blinds had been ripped or slashed, and there was blood spattered everywhere. A gasoline can was sitting on the floor beside Charles Martin's body, and exploded

bottle rockets were scattered throughout the kitchen and into the living room.

"A utensil drawer in the kitchen was open, and there were blood droplets under the drawer. There were two sandwiches on a Styrofoam plate on the kitchen counter by the stove, and one of the burners of the kitchen stove was lit. Investigators observed a spoon with gray material in it and a syringe located on the counter beside the stove. A basket of prescription drugs was also on the counter.

"Blood droplets were found on the hallway wall opposite the door to the bedroom where the bodies of Melinda and Savannah were discovered.

"Melinda Martin was found lying on the floor on the right side of the foot of the bed. She had slits in her clothing that were consistent with stab wounds. She was also wearing a back brace. A walking cane was found near her body. A telephone cord extended from the wall by the headboard of the bed to Melinda Martin's body, but no telephone was attached to the cord.

"Savannah Martin was lying on her back on the bed. She had been stabbed multiple times and had a prominent stab wound through her neck. A bloody hand print was discovered near Savannah's body on the fitted sheet; however, due to the soft surface, there was no ridge detail to the print.

"An investigator collected the wet, bloody comforter and bed linens and put them in a large paper bag in order to transport the bedding to the forensic laboratory for further testing. When the bedding was unpackaged and put up to dry later that day, a television remote and a temple piece to a pair of eyeglasses fell out of the bedding. Law-enforcement personnel were informed about the eyeglass piece.

"An autopsy of the victims confirmed that Melinda Martin died as a result of 24 stab wounds to her body. Charles Martin died as a result of 11 stab wounds to his body. Savannah Martin died as a result of 5 stab wounds to her body. All the victims had chemical burns to their bodies, and Chuck Martin also had thermal burns on his body. None of the stab wounds to the victims was immediately fatal.

"West testified that as she and Reynolds were walking to a nearby convenience store later that same Sunday morning, Reynolds asked West if he had made the headlines, and he inquired whether West had seen Charles Martin's face. Later that day, the police arrested Michael Reynolds on an unrelated matter.

"That same afternoon, West saw Donald Harvey drive into the alley behind Reynolds's residence. West got into Harvey's car, and he asked her if Reynolds had anything to do with what happened to Charles Martin. West nodded in the affirmative. Although the evidence was conflicting regarding whose idea it was, West and Harvey agreed that they should get rid of the evidence from the crime scene.

"Harvey and West went to a gasoline service station and purchased some gasoline and drove to an area near Tuscaloosa Avenue. West threw the telephone base into the woods, and then Harvey doused the bag containing their clothes and the purse with gasoline and set the items on fire. West and Harvey threw the knives into the Coosa River from a pier at a boat launch located at Gadsden State Junior College.

"On the day the murders were discovered and in the days that followed, the police questioned several persons regarding their potential involvement in the murders and robbery, including Charles Martin's nephew, Chad Martin, and John

Langley, who lived in the same neighborhood as the Martin family. The police ultimately ruled these individuals out as suspects.

"A few days after the discovery of the crimes, West talked with her former employer, who was an attorney, and told him what had happened. The attorney contacted the district attorney's office, and as a result, West subsequently gave the police a statement regarding the crimes.

"Based on the information provided by West, the Gadsden police located and photographed the burn pile where West said the clothes and purse had been burned, and the police also recovered the telephone base in the woods a short distance from the burn pile. The phone base, the cordless phone found in Roberts's car, and the telephone cord lying across the floor in the room where the bodies of Melinda and Savannah Martin were found were all Uniden brand products.

"Gadsden police conducted a search of Harold Reynolds's residence. In the bedroom shared by Michael Reynolds and West, the police discovered a pair of prescription tinted eyeglasses. The glasses were broken -- the temple piece was missing, and one of the lenses was lying beside the glasses. The glasses were consistent with the prescription lenses and frames sold to Reynolds by a professional optician. The temple piece recovered from the bedding at the Martin house matched the temple piece still attached to the frame found at the Reynolds residence. A first-aid kit was also discovered in the bedroom.

"A scuba diver with the Etowah County Rescue Squad recovered an oriental-style scabbard from the Coosa River in the area where the knives had been discarded by West and Harvey. Sandra Roberts testified that the scabbard appeared to be the same scabbard she had previously seen at Reynolds's

residence. West also testified that the scabbard was the one that she and Harvey had disposed of in the Coosa River.

"Photographs of Michael Reynolds's hands taken by the Gadsden police after his arrest showed bruising and flaking skin. West testified the bruising and flaking was not present at the time of the murders.

"A forensic examination of the interior of Roberts's car did not indicate the presence of any blood. Forensic testing of the DNA extracted from the swab of the blood drop from the outside steps and the hallway at the Martin residence matched the DNA obtained from Adrian West. There was a mixture of DNA on the blood swabbed from the handle of the gasoline can. The primary contributor of that DNA was determined to be Savannah Martin, but neither Michael Reynolds nor Melinda Martin could be excluded as a contributor of the DNA. There was also a mixture of DNA from a swab of blood obtained from the lens of Michael Reynolds's glasses -- Melinda Martin's DNA was the primary component of that DNA mixture. The bloody footprint on the outside door-step matched a known ink print of Michael Reynolds's footprint.

"The shoe prints in the kitchen did not match any of the known samples submitted for comparison purposes, and a blood swab from the outside door frame did not match any of the known DNA samples."

"Michael Reynolds testified in his defense. He testified that he met Charles Martin in May 2002 and that he and Charles became good friends. Reynolds testified that Martin was one of the people authorized to take Reynolds's son home from school. Reynolds and his son even lived with Charles Martin for several months, at Martin's mother's residence.

"Reynolds said that he saw Martin several times a week up until the time Reynolds was arrested for a different offense. Reynolds testified that he had seen Melinda Martin a couple of times, but that he had never seen Savannah Martin. He testified that the last time he saw Martin alive was two or three weeks before the Martins were killed.

"Reynolds testified that at the time of the incident, he and Adrian West were living with his father at his father's residence. Reynolds said that on the morning of Saturday May 24, 2003, his 'boss' came by the residence and paid his father and him for a painting job they had completed the day before. Later that morning, Donald Harvey came to the Reynolds residence and asked Michael Reynolds to install a car radio for him. Reynolds said that he installed the radio, and Harvey gave him a gram of cocaine in return.

"Reynolds said that between 9:00 and 10:00 p.m., Sandra Roberts came to the residence. Reynolds and West shared the last of their drugs with Roberts. Reynolds testified that he gave Roberts some money to get some more drugs. Reynolds explained that he had money to purchase the drugs because in addition to the money that he had received that morning for completing the painting job, West also had $500 that Reynolds's father had given her to hold in case Reynolds needed to post bond -- he testified that there was an outstanding warrant for his arrest at that time.

"Reynolds testified that Sandra Roberts left and went to buy more drugs. When she returned with the drugs, Reynolds, Roberts, and West used all of those drugs. Reynolds testified that some time later, Adrian West and Sandra Roberts left together in Sandra's car to go get more drugs. Reynolds testified that he instructed West to go with Roberts because he thought Roberts had cheated them out of drugs on the previous transaction.

"Reynolds testified that after Roberts and West had been gone for a couple of hours, he changed into a pair of shorts and a T-shirt, went to bed, and fell asleep. His father was passed out; he was intoxicated.

"Reynolds said that some time later, Adrian West woke him and told him that she was hurt. Reynolds got out of bed to attend to West. When Reynolds asked her how she was hurt, she told him that she had been stabbed. Reynolds then asked West how she had been stabbed, and she responded that 'Chuck was dead and she ... got stabbed trying to stop them from stabbing Chuck's wife.' (Vol. XI, R. 1567.) Reynolds testified that West did not tell him who she was with at the time of the stabbings.

"Reynolds stated that he was concerned about her arm, so he bandaged it using a first-aid kit he had in the bedroom. He said that the wound was not bleeding very much but that it looked bad. After bandaging her arm, Reynolds instructed West to accompany him outside the house so that he could talk to her without fear of his father overhearing.

"Reynolds testified that when they got outside, he continued to question her about what happened, but West did not want to talk about it. Reynolds said that West was very worried, so he told her to get Sandra Roberts's car keys and she did.

"Reynolds said that they left in Roberts's car, and that West drove because Reynolds's license had been revoked. Reynolds was still dressed in the clothes he had on when he went to sleep, and, although he put on his glasses, he did not put on any shoes.

"They went to the Martin residence. He said that when they got to the residence, West slowed down in order to pull in the driveway; however, Reynolds said that because the lights were on in the

house, he instructed her to keep driving. West drove to a nearby gas station, turned around, and then drove back to the Martin residence.

"When they got to the Martin residence, West asked Reynolds what he wanted her to do. He testified that he again instructed her to 'just drive.' (Vol. XI, R. 1571.) West began to drive back to Reynolds's residence. Reynolds testified that as they were traveling, West told him that she was scared, and she asked him what they were going to do. Reynolds said that as they neared his father's residence, he 'just knew [he] had to do something,' so he instructed West to again drive to the Martin residence. (Vol. XI, R. 1571.)

"Reynolds testified that when they arrived at the Martin residence that time, West drove the car into the driveway. The carport light was on. Reynolds got out of the car and told West to remain in the car. As Reynolds approached the carport door, he saw that the door was cracked open. Reynolds pushed the door open and saw Charles Martin lying on the floor. Reynolds said there was blood all around Martin so, he said, he knew at that point that West had told him the truth.

"He testified that he did not telephone the police; instead, he went inside, stepped over Charles Martin's body, and went to the Martins' bedroom. He explained that he went to that bedroom because West told him she had been hurt 'trying to stop them from stabbing Chuck's wife.' (Vol. XI, R. 1573.) Reynolds said that although the television was on in the bedroom, the bedroom lights were not on, so he did not see Melinda Martin's body when he first went into the room. Reynolds said that he tripped over Melinda Martin, who was lying in the floor between the bed and the doorway. When he tripped, his glasses fell off onto the bed, and he caught himself on the bed. Reynolds testified that he grabbed his glasses from the bed and stood up and

that is when he saw Melinda Martin, who appeared to be dead. Reynolds testified that he never saw Savannah Martin.

"Reynolds said that he went back through the house and outside, stepping back over Charles Martin in the process. He gave West his glasses and told her to hold them. Reynolds then asked West to tell him everything that she had touched so that he could wipe it off, but West could not recall everything she had touched. Reynolds testified that he went back into the house, intent on wiping the surfaces off. Reynolds said that everything in the house was such a mess that he did not know where to start. He said that at that point, he looked and saw that one of the burners on the stove was lit, so he decided to burn the house down. Reynolds testified that he got the gasoline can that was located beside the porch steps, and doused the rooms with gasoline.

"Reynolds said that when he got back to the kitchen, he got a napkin and lit it from the burner, and threw it on the gasoline trail. Reynolds then left the house and got in the car and told West to leave. As West drove back toward Harold Reynolds's residence, she asked Reynolds what was going to happen and he told her '[N]othing, I caught the place on fire.' (Vol. XI, R. 1576.)

"Reynolds testified that when they got back to Harold Reynolds's residence, they parked Sandra's car and went into the house. As they walked by his father's bedroom, Sandra Roberts asked them if they had 'anything,' meaning drugs. Reynolds told her they did not, and then he and West went to the bedroom they shared. Reynolds testified that at that point, he told West to give him some money and West gave him $20. He gave that money to Sandra Roberts and told her to go get some more drugs. He testified that he wanted to get Roberts out of the house. Reynolds said that he and West went into the bathroom, and he cleaned and rewrapped the injury on

West's arm. In a few minutes, Roberts returned with more drugs.

"When Roberts returned with the drugs, Reynolds went into the kitchen and he and Roberts took some of the drugs. Reynolds prepared a syringe of the drugs for West and took it into their bedroom; however, West refused the drugs, saying she just wanted to go to sleep. Reynolds offered the drugs to Roberts, and when she declined to take the drugs, Reynolds used them. He then went back to sleep.

"Reynolds testified that later that morning while he and West were walking home from the convenience store, he again tried to question West about what had happened the night before. Reynolds said that West was acting strangely and that she told him that she did not want to think about it. He testified that at that point, he did not want to think about it either.

"Reynolds said that shortly after they arrived back at his father's residence, the police arrived and arrested him and that he had been incarcerated since that time."

Reynolds, 114 So. 3d at 73-81 (footnote omitted).

Standard of Review

"The sufficiency of pleadings in a Rule 32 petition is a question of law. 'The standard of review for pure questions of law in criminal cases is de novo. Ex parte Key, 890 So. 2d 1056, 1059 (Ala. 2003).'" Ex parte Beckworth, [Ms. 1091780, July 3, 2013] ___ So. 3d ___, ___ (Ala. 2013) (quoting Ex parte Lamb, 113 So. 3d 686, 689 (Ala. 2011)).

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Analysis

On appeal, Reynolds argues, among other things, that the circuit court erroneously dismissed his claim that the State violated Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1972), by suppressing evidence indicating that Adrian Marcella "Marcie" West testified against Reynolds pursuant to a deal in which she would receive favorable treatment on charges pending against her. Specifically, Reynolds argues that the circuit court erroneously found that this claim was procedurally barred under Rules 32.2(a)(3) and (a)(5), Ala. R. Crim. P., because it could have been, but was not, raised at trial and on appeal. He also argues that the circuit court erroneously found that this claim was insufficiently pleaded under Rules 32.3 and 32.6(b), Ala. R. Crim. P. Reynolds contends that because this claim was not procedurally barred and was sufficiently pleaded, he was entitled to an opportunity to prove it at an evidentiary hearing.

In his amended Rule 32 petition, Reynolds detailed West's testimony against him. He also detailed his defense, i.e.,

that he went to the crime scene to destroy evidence of West's involvement in the murders. He later alleged the following:

> "The State in this case withheld information about a deal made with Marcie West in return for her testimony. At the time of Mr. Reynolds' arrest and trial, Marcie West had several criminal charges pending against her. On August 6, 2002, West was arrested for unlawful distribution of a controlled substance -- hydrocodone, unlawful possession of marijuana in the second degree and unlawful possession of drug paraphernalia. A few days after Mr. Reynolds' arrest, on June 3, 2003, West was arrested for unlawful distribution of a controlled substance -- hydrocodone and hindering prosecution in the first degree.
>
> "West faced significant jail time for these offenses. Unlawful distribution of a controlled substance is a class B felony punishable by up to twenty years of imprisonment. Ala. Code [1975,] §§ 13A-5-6, 13A-12-211. Hindering prosecution in the first degree is a class C felony punishable by up to ten years of imprisonment. Id. §§ 13A-5-6, 13A-10-43. Unlawful possession of marijuana in the second degree and unlawful possession of drug paraphernalia are class A misdemeanors punishable by one year of imprisonment. Id. §§ 13A-5-7, 13A-12-214, 13A-12-260.
>
> "Notably, although West was arrested for three drug offenses on August 6, 2002, charges were not filed in those cases until June 4, 2003, just days after the crime in this case occurred. After hiding for several days, West went to the police and signed an advice of rights form on May 28, 2003. (C. 495-96.) West's actual statement to the police is undated. (C. 497-99.) The drug charges were filed a week later to secure West's testimony at trial.

"On April 26, 2005, trial counsel filed a motion to require the prosecution to make known any incentives or agreements they had made with any witness who would give testimony in the case, and to disclose the record of all state witnesses. (C. 42-44.) On May 3, 2005, trial counsel filed a motion for discovery of prosecution files, records, and information necessary to a fair trial. (C. 54-62.) On May 10, 2005, the trial court granted both motions. (C. 64-65.) The State did not, however, disclose any facts relating to consideration offered to Marcie West in return for her testimony. At trial, West testified that she had received no deals from the State in return for her testimony. (R. 1011.) The State did not correct this false testimony.

"After West testified at trial, the State dismissed three of the pending drug charges against her. West pleaded guilty to one charge of distribution of a controlled substance and the charge of hindering prosecution. She was sentenced to three years' imprisonment for both. However, six months into her sentence, the State recommended that the balance of her sentence be suspended and she be placed on probation. After the State made this recommendation, West was immediately released from jail.

"Marcie West was the State's key witness against Mr. Reynolds. Her testimony was the only direct evidence presented by the State that Mr. Reynolds was the perpetrator of the murders rather than (as he testified) just another person present at the scene. The credibility of a key witness is 'an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to [that witness'] credibility and the jury was entitled to know of it.' Giglio [v. United States], 405 U.S. [150] 154-55 [(1972)]. The State's withholding of this evidence therefore violated Brady and Alabama law.

> 373 U.S. at 87; Savage v. State, 600 So. 2d 405, 408 (Ala. Crim. App. 1992) (reversing for State's failure to disclose prior statements by two witnesses because the 'failure of the State to supply the information directed the defense away from challenging the testimony of two key witnesses')."

(C. 216-17.)

In its motion to dismiss, the State argued that Reynolds's Brady claim relating to West was procedurally barred under Rules 32.2(a)(3) and (a)(5), Ala. R. Crim. P., because it was based on testimony elicited from West at trial -- defense counsel asked West whether she had been offered a deal and she denied that any deal had been offered to her. The State also argued that Reynolds's claim was insufficiently pleaded under Rules 32.3 and 32.6(b), Ala. R. Crim. P., because Reynolds "failed to plead any specific facts, other than pure speculation, that, if true, would establish that a deal actually existed between the prosecution and Marcie West or that West's testimony was false." (C. 310.) In response to the State's motion to dismiss, Reynolds asserted that his Brady claim was not procedurally barred because the facts underlying it were unknown to him and, thus, could not have

been raised at trial or on appeal. Specifically, Reynolds argued:

> "The earliest indication of the State's undisclosed deal, agreement or understanding with Marcie West was the State's recommendation that the balance of Ms. West's sentence be suspended after she pleaded guilty to distribution of a controlled substance and hindering prosecution. This recommendation occurred on November, 24, 2009, a full six months after Mr. Reynolds' appellate attorneys filed their reply brief in support of his appeal .... Similarly, the State's argument that 'there is no reason this claim could not have been raised at trial' because it is based on West's trial testimony (State's Motion at 88), is just as illogical and unsound. At the trial stage, Ms. West denied the existence of an agreement with the State and the State likewise disavowed such a deal and affirmatively represented that all Brady material had been provided to the defense. (C. 133, R. 121.) The State cannot now rely on the successful suppression or [denial] of an agreement with Ms. West at trial to prevent Mr. Reynolds from bringing a Brady claim in the current proceedings ...."

(C. 322-23.) Reynolds also asserted that he had pleaded his Brady claim with sufficient factual specificity to satisfy the requirements of Rules 32.3 and 32.6(b), Ala. R. Crim. P. The circuit court agreed with the State and dismissed Reynolds's claim on the grounds that it was procedurally barred under Rules 32.2(a)(3) and (a)(5), Ala. R. Crim. P., and that it was insufficiently pleaded under Rules 32.3 and 32.6(b), Ala. R. Crim. P.

Rule 32.3, Ala. R. Crim. P., provides:

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

Further, Rule 32.6(b), Ala. R. Crim. P., provides:

> "Each claim in 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."

This Court has stated the following concerning the scope of Rule 32.6(b), Ala. R. Crim. P.:

> "'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).

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In Brady v. Maryland, the United States Supreme Court held that "[t]he 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." 373 U.S. at 87.

> "A Brady violation occurs where: (1) the prosecution suppresses evidence; (2) the evidence is favorable to the defendant and (3) material to the issues at trial. Stano v. Dugger, 901 F.2d 898, 899 (11th Cir. 1990); Delap v. Dugger, 890 F.2d 285 (11th Cir. 1989); United States v. Blasco, 702 F.2d 1315, 1327 (11th Cir.), cert. denied, 464 U.S. 914, 104 S. Ct. 275, 276, 78 L. Ed. 2d 256 (1983); Ex parte Kennedy, 472 So. 2d 1106, 1110 (Ala.), cert. denied, 474 U.S. 975, 106 S. Ct. 340, 88 L. Ed. 2d 325 (1985). The Supreme Court of the United States in United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383, 87 L. Ed. 2d 481 (1985) (plurality opinion by Blackmun, J.), defined the standard of materiality required to show a Brady violation as follows: '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.' See also Pennsylvania v. Ritchie, 480 U.S. 39, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987); Stano v. Dugger, 901 F.2d at 899; Delap v. Dugger, 890 F.2d at 299; Coral v. State, 628 So. 2d 954 (Ala. Cr. App. 1992); Thompson v. State, 581 So. 2d 1216 (Ala. Cr. App. 1991), cert. denied, 502 U.S. 1030, 112 S. Ct. 868, 116 L. Ed. 2d 774 (1992).
>
> "The same standard of materiality and due process requirements apply whether the evidence is

> exculpatory or for impeachment purposes. United States v. Bagley; Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972); Ex parte Womack[, 435 So. 2d 766 (Ala. 1983)]. 'When the "reliability of a given witness may well be determinative of guilt or innocence," nondisclosure of evidence affecting credibility falls within the general rule.' Giglio, 405 U.S. at 154, 92 S. Ct. at 766 (quoting Napue v. Illinois, 360 U.S. 264, 269, 79 S. Ct. 1173, 1177, 3 L. Ed. 2d 1217 (1959)). In short, due process requires the prosecution to disclose material evidence, upon request by the defense, when that evidence would tend to exculpate the accused or to impeach the veracity of a critical state's witness."

Williams v. State, 710 So. 2d 1276, 1296-97 (Ala. Crim. App. 1996).

Thus, to sufficiently plead a Brady/Giglio claim, a petition must allege facts that, if true, would establish that the prosecution suppressed evidence that was favorable to the defendant and material. Cf. Rule 32.6(b), Ala. R. Crim. P.; Williams, 710 So. 2d at 1296-97. Additionally, "a Rule 32 petitioner has no burden to plead facts in his or her petition negating the preclusions in Rules 32.2(a)(3) and (a)(5) in order to sufficiently plead a [Brady] claim ...." Mashburn v. State, 148 So. 3d 1094, 1119 n.5 (Ala. Crim. App. 2013) (citing Ex parte Beckworth, [Ms. 1091780, July 3, 2013] ___ So. 3d ___, ___ (Ala. 2013)). Rather, the State has the

burden to plead any ground of preclusion it believes applies to bar review of a Brady claim. Ex parte Beckworth, ___ So. 3d at ___. However, once the State has pleaded a ground of preclusion, that ground is presumed to apply until the petitioner meets his "burden of disproving its existence by a preponderance of the evidence." Rule 32.3, Ala. R. Crim. P.

In his petition, Reynolds pleaded facts that, if true, would establish that the State violated Brady and Giglio. Reynolds detailed the importance of West's testimony to the State's case. Reynolds alleged facts that, if proven, would establish that the jury's determination regarding his guilt depended on weighing West's credibility against Reynolds's credibility. The facts contained in Reynolds's petition, if true, would show that West testified pursuant to a deal with the State for favorable treatment on multiple pending charges. He also alleged facts indicating that the State failed to disclose West's deal to defense counsel and that it failed to correct West's testimony that there had been no deal. Thus, Reynolds alleged facts that, if true, would establish that the State suppressed evidence that was favorable to the defendant. Williams, 710 So. 2d at 1296-97. He also alleged facts

indicating that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Ex parte Belisle, 11 So. 3d 323, 330-31 (Ala. 2008).

Consequently, Reynolds has pleaded a facially meritorious claim that the State violated Brady and Giglio by failing to disclose that West testified pursuant to a deal in which she would receive favorable treatment on her pending charges in return for her testimony. Because Reynolds pleaded a facially meritorious Brady/Giglio claim, he is entitled to an opportunity under Rule 32.9, Ala. R. Crim. P., to prove that claim. The State, however, pleaded that Reynolds's claim is procedurally barred because it could have been but was not raised at trial or on appeal. Rule 32.2(a)(3) and (a)(5), Ala. R. Crim. P. Thus, before Reynolds may be granted relief on his Brady/Giglio claim, he must present evidence both disproving those grounds of preclusion and proving his Brady/Giglio claim by a preponderance of the evidence. Rule 32.3, Ala. R. Crim. P.

Accordingly, this cause is remanded to the circuit court with instructions that it to conduct further proceedings on

Reynolds's Brady/Giglio claim.[1] The circuit court may order any discovery relating to this claim that it deems necessary to allow the parties to litigate Reynolds's claim. It must, however, provide Reynolds an opportunity to disprove the procedural bars asserted by the State and to prove his Brady/Giglio claim, and it must to provide the State an opportunity to present evidence in rebuttal. The circuit court may comply with this Court's remand instructions by conducting an evidentiary hearing or by taking evidence in the form of evidentiary submissions. Rule 32.9, Ala. R. Crim. P. Further, the circuit court shall make specific findings of fact regarding its disposal of Reynolds's claim.

Further, the circuit court is instructed to take all necessary action to see that the circuit clerk makes due return to this Court at the earliest time possible and within 56 days of the release of this opinion. The return to remand shall include the circuit court's written findings along with a transcript of the evidentiary hearing, if any, and all evidence taken by the court.

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[1]Reynolds raised multiple issues on appeal. This Court pretermits discussion of those issues.

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REMANDED WITH INSTRUCTIONS.

Welch, Kellum, Burke, and Joiner, JJ., concur.

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CIRCUIT COURT OF
ETOWAH COUNTY, ALABAMA
CASSANDRA JOHNSON, CLERK

IN THE CIRCUIT COURT OF ETOWAH COUNTY, ALABAMA

STATE OF ALABAMA	)	
	)	
V.	)	Case No.: CC-2005-000257.60
	)	
REYNOLDS MICHAEL WAYNE	)	
Defendant.	)	

Order Dismissing Reynolds's Amended Rule 32 Petition

This matter comes before this Court on the State's Motion to Dismiss the petitioner's, Michael Wayne Reynolds, amended Rule 32 petition. Having considered the Rule 32 petition presented to the Court, the evidence presented at trial including this Court's observations of trial and of trial counsel's performance, the record on direct appeal, the State of Alabama's answer and motion to dismiss, as well as Reynolds's response, the Court makes the following findings and hereby summarily DISMISSES Reynolds's amended Rule 32 petition.

LEGAL PRINCIPLES CONCERNING RULE 32

Rule 32.3, Ala. R. Crim. P., provides:

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

Further, Rule 32.6(b), Ala. R. Crim. P., states:

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

This "burden of pleading under Rule 32.3 and Rule 32.6(b) is a heavy one." McNabb v. State, 991 So. 2d 313, 318 (Ala. Crim. App. 2007). Accordingly, under Rules 32.3 and 32.6(b), "[t]he full factual basis for the claim must be included in the petition itself." McNabb, 991 So. 2d at 318.

Accordingly, Reynolds is not entitled to an evidentiary hearing unless he first meets the pleading requirements of Rule 32.3 and Rule 32.6(b) for "Rule 32.6(b) requires that the petition itself disclose the facts relied upon in seeking relief." Boyd v. State, 913 So. 2d 1113, 1125-26 (Ala. Crim. App. 2003) (emphasis in original). For, as the Court of Criminal Appeals has held, "it is not the pleading of a conclusion which, if true, entitle[s] the petitioner to relief." Boyd, 913 So. 2d at 1125. Instead, "[i]t 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." Id. (Emphasis in original.)

Furthermore, a circuit court also may summarily dismiss a claim on the merits in certain cases. For instance, "[w]here a simple reading of the petition for post-conviction relief shows that, assuming every allegation of the petition to be true, it is obviously without merit or is precluded, the circuit court [may] summarily dismiss that petition." Bryant v. State, CR–08–0405, 2011 WL 339585, at *6 (Ala. Crim. App, February 4, 2011). This is so because "[a]n

evidentiary hearing on a [Rule 32] petition is required only if the petition is 'meritorious on its face.'" Bracknell v. State, 883 So. 2d 724, 727 (Ala. Crim. App. 2003) (quoting Ex parte Boatwright, 471 So. 2d 1257, 1258-59 (Ala. 1985). The Alabama Supreme Court has stated that:

> "A petition for [postconviction relief] is 'meritorious on its face' only if it contains a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the facts relied upon (as opposed to a general statement concerning the nature and effect of those facts), sufficient to show that the petitioner is entitled to relief if those facts are true."

Ex parte Clisby, 501 So. 2d 483, 486 (Ala. 1986) (internal citations omitted)(emphasis in original). Thus, Reynolds is not automatically entitled to an evidentiary hearing on any of the allegations presented in his petition if, assuming his allegations as true, his claims are not "facially meritorious" or are "without merit" under the grounds stated within Ala. R. Crim. P. 32.7(d).

Finally, a claim may be dismissed on the merits where "a judge who presided over the trial or other proceeding and observed the conduct of the attorneys at the trial or other proceeding need not hold a hearing on the effectiveness of those attorneys based upon conduct that he observed." Boyd, 913 So. 2d at 1126 (quoting Ex parte Hill, 591 So. 2d 462, 463 (Ala. 1991)). Accordingly, in assessing Reynolds's claims in this case, "[i]f the circuit judge has personal knowledge of the actual facts underlying the allegations in the petition, he may deny the petition without further proceedings so long as he states the reasons for the denial in a written order." Id.

LEGAL PRINCIPLES CONCERNING RULE 32 PLEADING STANDARDS AS APPLIED TO CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL

In a Rule 32 proceeding, the petitioner has the burden of pleading "a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis for those grounds." Ala. R. Crim. P. 32.6(b), 32.3. Thus, the petitioner must include in his petition a full disclosure of the facts entitling him to relief under Strickland.

To sufficiently plead an allegation of ineffective assistance of counsel, a Rule 32 petitioner first "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)." Hyde v. State, 950 So. 2d 344, 355-56 (Ala. Crim. App. 2006). Further, a Rule 32 petitioner "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." Id. Critically, "[a] bare allegation that prejudice occurred without specific facts indicating how the petitioner was prejudiced is not sufficient." Id.

Moreover, "the claim of ineffective assistance of counsel is a general allegation that often consists of numerous specific subcategories. Each subcategory is an independent claim that must be sufficiently pleaded." Washington v. State, 95 So. 3d 26, 58 (Ala. Crim. App. 2012). Finally, if the petitioner fails to specifically plead facts that would, if true, establish both the deficient performance prong and the prejudice prong of Strickland, then summary dismissal is appropriate under Rule 32.6(b) and 32.7(d) of the Alabama Rules of Criminal Procedure. See Bracknell v. State, 883 So. 2d

724, 727-28 (Ala. Crim. App. 2003).

REYNOLDS'S GROUNDS FOR RELIEF

A. REYNOLDS'S CLAIM THAT HE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

In paragraphs 32-330 of his amended Rule 32 petition, Reynolds contends that he was denied effective assistance of trial counsel. Within this claim, Reynolds raises numerous sub-claims of ineffective assistance of counsel relating to trial counsel's performance during the guilt phase and the penalty phase. Each of these claims will be addressed individually below.

As an initial matter, paragraphs 32-34 are merely introductory in nature and fail to allege an actionable claim under Rule 32.1. Therefore, because these paragraphs are insufficiently pleaded and fail to state a claim, they are dismissed. Ala. R. Crim. P. 32.7(d).[1]

1. The claim that trial counsel failed to investigate and present evidence that another person confessed to committing the crime.

In paragraphs 35-71, Reynolds alleges that his trial counsel was ineffective for failing to call five other witnesses to testify about Chad Martin's purported May 25, 2003 statement after Captain Roy Harbin – who signed the May 29, 2003 report summarizing Martin's purported May 25, 2003 statement – could not authenticate it. Reynolds contends that his trial counsel should have called either Sergeant Dale Fincher, Detective Mike Prater, Detective Michael Hooks, Investigator Zack Johnson, or District Attorney Jimmie Harp to authenticate a written report of Chad Martin's May 25, 2003 statement. Reynolds further contends that this evidence could have been used to impeach Chad Martin's trial testimony or could have been used

as substantive evidence of third-party guilt. Finally, Reynolds alleges that his trial counsel was ineffective for failing to object to the prosecutor's bolstering of Chad Martin and John Langley's testimony. This claim is summarily dismissed for several reasons.

First, this claim is insufficiently pleaded. Ala. R. Crim. P. 32.3; 32.6(b). Reynolds has failed to plead basic facts necessary to provide a full factual basis for his claim. For example, Reynolds fails to plead any facts concerning what specific testimony these five other witnesses could have provided. In particular, Reynolds fails to plead any facts that, if true, would show how the other potential witnesses could have authenticated the written report of Chad Martin's statement. In fact, Reynolds fails to plead any facts at all about what these other witnesses would have testified to in regard to Chad Martin's purported May 25, 2003 statement. Although Reynolds now criticizes trial counsel for failing to learn that Captain Harbin could not authenticate the May 29, 2003 report because the report did not contain an accurate account of what Harbin had heard during the interview, Reynolds fails to plead any facts that, if true, would show that the other witnesses would have testified that the May 29, 2003 report was an accurate account of Martin's May 25, 2003 statement.

While Reynolds appears to assume that other witnesses could have authenticated the report, he fails to plead any specific facts concerning what these witnesses would have said. For instance, Reynolds alleges in a conclusory fashion that trial counsel should have called Sgt. Fincher – who typed but did not sign the report - to testify about Chad Martin's May 29, 2003

statement. (Pet. at 12.) But Reynolds fails to plead any facts whatsoever concerning what Sgt. Fincher's testimony about the report would have been, let alone plead facts that, if true, would show what Sgt. Fincher would have said that would have authenticated that the report was an accurate reflection of his May 25, 2003 interview with Chad Martin. Nor does Reynolds plead any facts concerning what any of the other four potential witnesses would have testified to about the report or what their recollections would have been about the substance of Chad Martin's May 25, 2003 statement in general. (Pet. at 13.) Reynolds's failure to plead specific facts in regard to Investigator Johnson and District Attorney Harp is particularly insufficient given that he admits that both Johnson and Harp were not present for all of Chad Martin's interview. (Pet. at 13.)

Accordingly, Reynolds has failed to plead a sufficient factual basis to support his contention that his trial counsel could have taken other measures to impeach Chad Martin's testimony. Reynolds has failed to plead any specific facts that, if true, would show what testimony these additional witnesses could have provided to authenticate the report of Chad Martin's statement or testify orally about Martin's statement.

Similarly, Reynolds had failed to plead facts that, if true, would show how the report of Chad Martin's statement could have been used as substantive evidence of guilt given that he has failed to plead any facts that, if true, would show how this report could have been authenticated or have been shown to have a sufficient "indicia of reliability." Dorsey v. State, 881 So. 2d 460, 496 (Ala. Crim. App. 2001). As the Court of Criminal Appeals held on

direct appeal, the purported May 29, 2003 report did not have a sufficient indicia of reliability to be introduced as substantive evidence of a third-party's guilt. Reynolds v. State, 114 So. 3d 61, 102-103 (Ala. Crim. App. 2010). Similarly here, Reynolds has failed to plead any additional facts or specific testimony that, if true, would show that the report had a sufficient basis of reliability to be admitted as substantive evidence.

Additionally, this claim is insufficiently pleaded because Reynolds has failed to plead any specific facts that, if true, would show a reasonable probability that the outcome of his trial would have been different had the report of Chad Martin's May 25, 2003 statement been admitted into evidence either for impeachment evidence or substantive evidence of guilt. Reynolds has failed to plead specific facts that, if true, would show that the admission of his statement – whether for impeachment purposes or substantive evidence – would have had a significant impact on his trial.

First, as the Court of Criminal Appeals noted, trial counsel was still able to present evidence tending to impeach Chad Martin's trial testimony. Reynolds, 114 So. 2d at 103. Specifically, trial counsel called Lt. Faye Gary to testify about inculpatory statements Martin made, namely his reference to where the bodies were located, that he lost his sunglasses, that he could smell gas on his hands, and that he did not know where the cuts on his hand came from. (R. 1506-1512.)

Second, the unique circumstances surrounding Martin's statements tended to reduce the reliability of any inculpatory portions of those statements. For example, Martin testified during trial that he was questioned

by police for nineteen hours, did not remember everything he told the officers, and that "[a]t one point I was just wanting for it to end. I said I'd tell them anything just to get out of there." Id. at 1158. Most importantly, Lt. Gary testified that law enforcement officers later learned that Chad Martin was aware of information such as the location of the bodies in the house as a result of receiving that information from responding officers at the crime scene. Id. at 1520.

Third, the value of Chad Martin's prior statements would not have been significant given the other evidence presented at trial. Specifically, Marcie West testified that she was present in the Martin house as Reynolds was in the process of committing the murders. Id. at 921-926. West also testified about the disposal, and the later retrieval, of physical evidence related to the murders such as the knife scabbard, phone, and eyeglasses that connected Reynolds, not Martin, to the crime. Id. at 923, 934-935, 943, 954. West did not testify that Chad Martin had any involvement in the murders or any events after the murders involving the disposal of physical evidence. Reynolds simply has failed to plead facts that, if true, would show how, in the face of this evidence, there was a reasonable probability the outcome of the guilt phase would have been different had Martin's prior statements been admitted during trial.

In fact, Reynolds fails to plead how the admission of Chad Martin's prior statement as either substantive or impeachment evidence would have been beneficial to his case or consistent with trial strategy. Notably, the heart of trial counsel's strategy did not solely center on implicating Chad Martin in

the crime but instead, focused on questioning Marcie West's version of events and suggesting that West and some other unidentified individual committed the murders. Id. at 849-853, 1627-1628. Therefore, given the evidence in the record, Reynolds has failed to plead a sufficient factual basis that, if true, would show prejudice or deficient performance under Strickland. Ala. R. Crim. P. 32.6(b).

Furthermore, to the extent that Reynolds contends that his trial counsel was ineffective for failing to move to admit Chad Martin's prior statements during the penalty phase in an effort to create residual doubt (Pet. at 16), this claim is facially meritless and fails to state a material issue. Ala. R. Crim. P. 32.7(d). "Residual doubt is not a mitigating circumstance." Ex parte Lewis, 24 So. 3d 540, 544 (Ala. 2009). Therefore, "capital defendants have no right to demand jury consideration of 'residual doubts' in the sentencing phase." Melson v. State, 775 So. 2d 857, 898 (Ala. Crim. App. 1999)(citing Franklin v. Lynaugh, 487 U.S. 164, 172–76 (1988)). Accordingly, trial counsel could not be ineffective for failing to introduce evidence to make a meritless argument. See Hooks v. State, 21 So. 3d 772, 785 (Ala. Crim. App. 2008)("An attorney's failure to raise a meritless argument ... cannot form the basis of a successful ineffective assistance of counsel claim because the result of the proceeding would not have been different had the attorney raised the issue."). Therefore, this claim is facially meritless. Ala. R. Crim. P. 32.7(d).

Finally, to the extent that Reynolds argues his trial counsel was ineffective for failing to object to the prosecutor's alleged bolstering of Chad Martin and John Langley's testimony by eliciting the fact that Martin was

offered, and Langley took, a polygraph test, this claim is dismissed because it is insufficiently pleaded. Ala. R. Crim. P.32.6(b). Reynolds has failed to plead sufficient facts that, if true, would show he was prejudiced. Reynolds's allegation is limited to merely reciting facts from the record. But Reynolds fails to cite any specific facts relating to prejudice.

Notably, the Court of Criminal Appeals already addressed this substantive issue on direct appeal and held that there was no plain error by the admission of this testimony. Reynolds, 114 So. 2d at 106. That court held that Reynolds's substantial rights were not violated where the references to the polygraph tests were simply passing comments and each witness was thoroughly cross-examined regarding their bias. Id.

Although a finding of no plain error on direct appeal does not automatically foreclose a finding of prejudice under Strickland, Ex parte Taylor, 10 So. 3d 1075 (Ala. 2005), Reynolds has failed to plead any additional facts in support of his claim or any facts that would call the Court of Criminal Appeals' holding into question. More importantly, Reynolds has failed to plead any specific facts that, if true, would show that his case is one of the rare cases "in which the application of the plain-error test and the prejudice prong of the Strickland test will result in different outcomes." Id. at 1078.

Instead, Reynolds has simply re-alleged the same facts he alleged unsuccessfully on direct appeal without specifically alleging how there was a reasonable probability that "the factfinder would have had a reasonable doubt respecting guilt," Strickland, 466 U.S. at 695, had his trial counsel objected to

these passing comments during Martin and Langley's testimony. Reynolds simply fails to plead any specific facts that, if true, would show how there was a reasonable probability his trial would have been different, even if his trial counsel had objected and if the objection would have been sustained. Therefore, because this claim, as well as his overall claim, is insufficiently pleaded, it is summarily dismissed. Ala. R. Crim. P. 32.7(d).

2. The claim that former trial counsel was ineffective for continuing to represent Reynolds for several months while trial counsel had an actual conflict of interest.

In paragraphs 72-76, Reynolds alleges that one of the attorneys initially appointed to represent him, Patricia Granger, had a conflict of interest. Reynolds contends that Granger had a conflict of interest from February 1, 2007 – the day she began work as a part-time City of Gadsden municipal court prosecutor – until April 27, 2007 – when Granger withdrew from her representation of Reynolds.

This claim is summarily dismissed because it is insufficiently pleaded. Ala. R. Crim. P. 32.3; 32.6(b). In order to establish a Sixth Amendment violation, a defendant must show "that an actual conflict of interest adversely affected his lawyer's performance." Cuyler v. Sullivan, 446 U.S. 335, 348 (1980). Reynolds has failed to plead any facts that, if true, would show either an "actual conflict of interest" or that the conflict "adversely affected" his representation.

Instead, Reynolds simply alleges in a conclusory fashion that because Granger's pre-trial representation overlapped with her employment with the City of Gadsden, that her representation was constitutionally ineffective. For

example, Reynolds fails to specifically plead how an actual conflict of interest actually existed. As the United States Supreme Court has held, "the possibility of conflict is insufficient to impugn a criminal conviction." Cuyler, 446 U.S. at 350 ("But until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance."). Furthermore, to demonstrate an actual conflict of interest, a defendant must "be able to point to specific instances in the record which suggest an impairment or compromise of his interests for the benefit of another party." Burden v. Zant, 24 F.3d 1298, 1305 (11th Cir. 1994).

Reynolds has failed to plead any specific facts that, if true, would show that Granger engaged in any specific actions that compromised his interests to the benefit of the City of Gadsden. Reynolds fails to allege any facts that, if true, would show that she discussed the case with any Gadsden Police Officers while she was employed as a part-time city attorney or that she exchanged any information of any kind. Reynolds also fails to plead or identify any action that Granger took that, if true, would show that she compromised Reynolds's interests or made a decision that benefited the Gadsden Police Department and was harmful to his representation. See United States v. Khoury, 901 F.2d 948, 968 (11th Cir. 1990)("a defendant must show that his lawyer made a choice between plausible courses of action, such as presenting arguments or evidence helpful to one client but harmless to the other."). In fact, Reynolds fails to specifically identify any action of any kind that would represent an actual conflict of interest. Moreover, the record

demonstrates that Granger did not represent Reynolds at trial and withdrew in April of 2007, nearly six months before his trial began in October of 2007. (C. 141.)

Additionally, Reynolds fails to plead any facts that, if true, would show that there was an adverse affect on his representation. Reynolds has failed to allege any specific act that his trial counsel was unable to perform or information counsel was unable to use as a result of Granger being employed by the City of Gadsden from February to April of 2007. Reynolds fails to specifically plead the name of any witnesses he was unable to present, any document or item of evidence he was unable to discover or present, or any motion or argument he was unable to make as a result of Granger's other employment. Instead, Reynolds alleges in a conclusory fashion that Granger's withdrawal caused "disruption" without specifically pleading facts that, if true, would show what specific adverse affects occurred. (Pet. at 20.) Simply alleging in a conclusory manner that Reynolds's co-counsel had not spent enough time working on his case does not sufficiently plead a facially meritorious claim, particularly given the fact that the trial was continued from April until October of 2007. Therefore, because this claim is insufficiently pleaded, it is summarily dismissed. Ala. R. Crim. P. 32.7(d).

3. The claim that trial counsel failed to visit with and advise Reynolds and prevented him from assisting with his own defense.

In paragraphs 77-93, Reynolds alleges that his trial counsel was ineffective for 1) failing to adequately visit with him or interview him, 2) failing to secure glasses so Reynolds could see what was happening in the

courtroom during trial, and 3) failing to adequately advise him and prepare him to testify in his own defense.

This claim is dismissed because it is insufficiently pleaded. Ala. R. Crim. P. 32.3; 32.6(b). First, in regard to his allegation that his trial counsel failed to adequately meet with him and interview him, Reynolds has failed to plead any specific facts that, if true, would establish either deficient performance or prejudice under Strickland. Reynolds fails to plead any facts that, if true, would show that trial counsel is required to meet with a client a specified number of times. Nor has Reynolds pleaded any specific facts that, if true, would show that trial counsel was unreasonable or deficient for communicating more extensively by mail rather than in person. Finally, Reynolds has failed to plead any facts that, if true, would show that trial counsel is deficient simply for failing to meet with the client as much as the client desires. Instead, Reynolds has alleged nothing but a bare allegation without pleading any facts that, if true, would show how trial counsel's representation was affected as a result of not meeting more frequently with Reynolds.

Likewise, Reynolds has failed to specifically plead any factual basis in support of prejudice. Ala. R. Crim. P. 32.6(b). Reynolds utterly fails to plead any specific facts concerning what actions trial counsel was not able to take or what information was not discovered based on the failure to meet with him more frequently. Reynolds fails to allege any specific action at trial that would have been different, let alone allege specific facts showing how there was a reasonable probability his trial would have been different, had his trial counsel

met with him more. For example, Reynolds complains that his trial counsel did not meet with him for over six weeks after he was arrested. (Pet. at 21.) Yet he completely fails to plead what actions his trial counsel was prevented from undertaking, how he was prevented from developing an adequate defense, or how this alleged delay specifically affected the outcome of his trial.

Alternatively, this claim is dismissed because it is facially meritless and fails to state a material issue. Ala. R. Crim. P. 32.7(d). As the Alabama Court of Criminal Appeals has held, "the Sixth Amendment does not guarantee 'rapport' or a 'meaningful relationship' between client and counsel." Washington v. State, 95 So. 3d 26, 62 (Ala. Crim. App. 2012)(affirming dismissal of claim that trial counsel was ineffective for failing to develop a relationship of trust with the defendant because the claim failed to state a material issue under Rule 32.7(d)). Therefore, for this additional reason, this claim is dismissed.

Second, in regard to his claim that his trial counsel failed to secure eyeglasses to wear during trial, this claim is also insufficiently pleaded. Ala. R. Crim. P. 32.6(b). This claim is nothing but a bare allegation. Reynolds fails to allege any specific factual basis that, if true, would show deficient performance or prejudice under Strickland.

Although he contends he was unable to participate in trial, Reynolds fails to allege any specific facts that, if true, would show what specific actions he was unable to take or what specific exhibits he was unable to see. Simply put, even assuming as true that Reynolds had difficulty seeing, he has failed

to plead how this negatively impacted his trial or affected the outcome of his trial. Notably, the only instance in the record where Reynolds contends he was unable to see an exhibit came during cross-examination when he evaded a question about the victim posed by the prosecutor because he claimed he could not see the exhibit. (R. 1601.) Reynolds completely fails to plead any facts that, if true, would show a reasonable probability that the outcome of his trial would have been different had he been provided glasses.

Third, in regard to his claim that his trial counsel failed to advise him and prepare him to testify in his behalf, this claim is insufficiently pleaded. Ala. R. Crim. P. 32.6(b). This claim is a bare allegation. Although he contends his trial counsel was deficient for not adequately advising him, Reynolds fails to plead facts concerning what advice trial counsel should have provided him or what specific legal opinion trial counsel should have given. Likewise, although he contends that his trial counsel did not go over questions the prosecutor might ask Reynolds on cross-examination, Reynolds fails to plead what specific questions his trial counsel should have discussed, nor does he specifically plead how his testimony would have been different had his trial counsel prepared him differently.

Moreover, Reynolds fails to specifically plead facts that, if true, would show how there was a reasonable probability that the outcome of his trial would have been different. Reynolds does not specifically plead facts that, if true, would show how his testimony would have been different or, more importantly, how there was a reasonable probability his trial would have been different had his testimony been different or had his trial counsel advised him

differently. See Lee v. State, 44 So. 3d 1145, 1170 (Ala. Crim. App. 2009)(holding that claim that trial counsel was ineffective for not consulting with the petitioner about his right to testify was insufficiently pleaded under Rule 32.6(b) where the petitioner failed to plead what testimony would have been elicited or how the testimony would have changed the trial court's sentencing determination). Finally, Reynolds fails to specifically plead that he would have decided not to testify had his trial counsel advised him differently. Reynolds has simply failed to plead any specific factual basis for either deficient performance or prejudice under Strickland. Therefore, because this entire claim is insufficiently pleaded, it is summarily dismissed. Ala. R. Crim. P. 32.7(d).

4. The claim that trial counsel failed to object to heightened security in the courtroom.

In paragraphs 94-100, Reynolds contends that his trial counsel was ineffective for failing to object to the use of a stun belt during trial and the presence of two uniformed officers near him during trial.

This claim is summarily dismissed because it is insufficiently pleaded. Ala. R. Crim. P. 32.6(b). This claim is a bare allegation and Reynolds has failed to plead any specific factual basis that, if true, would show either deficient performance or prejudice under Strickland.

Although Reynolds contends that the use of the stun belt had a chilling effect on his ability to participate in his own defense (Pet. at 26), he fails to plead any facts concerning how he was not able to participate or what specific actions he was not able to undertake in his defense as a result of wearing a stun belt. Moreover, Reynolds completely fails to plead any

specific factual basis for prejudice. Again, although he contends in a conclusory fashion that there was a reasonable probability that the outcome of his trial would have been different had his trial counsel objected to the use of the stun belt (Pet. at 27), he utterly fails to plead any facts that, if true, would show how an objection to a stun belt would have led to a reasonable probability of a different outcome during trial. Reynolds's concluory allegation is not sufficient to state a clear and specific basis for relief under Rule 32.6(b). See Hyde v. State, 950 So. 2d 344, 356 (Ala. Crim. App. 2006)("A bare allegation that prejudice occurred without specific facts indicating how the petitioner was prejudiced is not sufficient.").

Finally, the Alabama Court of Criminal Appeals rejected this substantive argument on direct appeal, holding that there was no plain error in requiring Reynolds to wear a stun belt. Reynolds, 114 So. 3d at 82. Specifically, that court held that "there is no evidence indicating that the belt interfered with Reynolds's right to confer with his counsel or that the jury was even aware that Reynolds was wearing a stun belt." Id. Here, Reynolds has likewise fails to plead any facts that, if true, would show that his ability to confer with counsel or participate in his defense was affected. Nor has he pleaded any facts that, if true, would show that the jury was even aware of the stun belt or that it was visible. Therefore, because this claim is insufficiently pleaded, it is summarily dismissed. Ala. R. Crim. P. 32.7(d).

5. The claim that trial counsel did not adequately investigate the capital murder charge.

In paragraphs 101-120, Reynolds contends that his trial counsel was ineffective for failing to investigate the State's case against him. Reynolds

contends that his trial counsel failed to interview all of the witnesses and failed to conduct an independent investigation of his case.

This claim is summarily dismissed because it is insufficiently pleaded. Ala. R. Crim. P. 32.6(b). This claim is a bare allegation. Reynolds's claim is limited to simply providing a laundry list of witnesses which he contends should have been interviewed without pleading specific facts concerning what information these witnesses had, what these witnesses would have said during the interviews, or what specific testimony these witnesses would have been given.

In fact, Reynolds fails to plead the names of many of the witnesses he contends should have been interviewed and investigated. For example, Reynolds alleges his trial counsel should have interviewed the neighbors who lived near the crime scene, employees of a gas station which Reynolds and Marcie West stopped by, and his employer. (Pet. at 28, 30.) Yet Reynolds fails to plead the names of these unidentified witnesses, let alone plead what specific facts or testimony these witnesses would have provided. See Daniel v. State, 86 So. 3d 405, 430 (Ala. Crim. App. 2011) (holding that "[t]o plead the claims sufficiently, [the petitioner] was required to identify the names of the witnesses he alleged should have been interviewed, to plead with specificity what admissible information those witnesses would have provided, and to allege how the result of the proceedings would have been affected by the additional testimony.")

To the extent that Reynolds listed some names of potential witnesses that he contends should have been interviewed, these allegations still fail to

meet the heavy pleading requirements of Rule 32.6(b) because he failed to specifically allege what these witnesses would have said and how the trial would have been affected by this additional information or testimony. See Daniel, 86 So. 3d at 430. For example, while Reynolds contends his trial counsel should have interviewed Donald Harvey, a man named Carl, a woman named Cathy, and Vanessa "Cookie" Pace (Pet. at 28), Reynolds completely fails to plead specific facts concerning what information these witnesses could have provided had they been interviewed, what testimony they would have given, and how this testimony would have been relevant during trial.

Likewise, Reynolds contends his trial counsel should have investigated both the amount of drugs he consumed the night of the murders and witnesses to authenticate a note purportedly authored by Chad Martin. (Pet. at 29.) Yet Reynolds fails to plead any facts concerning the actual amount of drugs he used or facts concerning how the note could have been authenticated. Simply alleging various names of people or avenues of investigation, without pleading the specific evidence or testimony that could have been presented at trial does not meet the heavy pleading burden of Rule 32.6(b).

Finally, Reynolds completely fails to plead any specific factual basis that, if true, would show a reasonable probability that the outcome of his trial would have been different had trial counsel conducted more of an investigation. Aside from failing to plead the specific evidence or testimony that should have been presented, Reynolds fails to specifically plead how any

of this unidentified evidence would have mattered, let alone lead to a reasonable probability of a different outcome. For example, Reynolds contends that had trial counsel interviewed unidentified neighbors who lived near the crime scene, they would have testified that they heard screaming and saw a car at the Martin's house between 3:00 and 3:45 a.m., which Reynolds contends would have been inconsistent with Marcie West's testimony that she and Reynolds went to the Martin's house at around 2:00 a.m. (Pet. at 29-30.)

But Reynolds fails to specifically plead how, even if true, this isolated fact would have led to a reasonable probability that "the factfinder would have had a reasonable doubt respecting guilt," Strickland, 466 U.S. at 695. Notably, trial counsel had spent considerable time attempting to impeach Marcie West's testimony and credibility during trial. Reynolds fails to specifically plead how the failure to pursue one more line of impeachment was prejudicial. See Daniel, 86 So. 3d at 428 ("Generally, failure to impeach a witness does not amount to ineffective assistance of counsel.").

Further, this testimony from the unidentified neighbors would not have constituted significant impeachment evidence. While the 3:00 to 3:45 a.m. time frame is different than an approximate 2:00 a.m. time frame, even if true, it does not suggest that the murders occurred at a completely different time of day. Instead, such testimony would have supported the conclusion that the murders took place at some point during the early morning hours at the Martin's house, which was consistent with Marcie West's testimony. Reynolds simply has failed to plead specific facts that, if true, would show

how further investigation would have led to a reasonable probability that the outcome of his trial would have been different. Therefore, because this claim is insufficiently pleaded, it is dismissed. Ala. R. Crim. P. 32.7(d).

6. The claim that trial counsel did not adequately investigate the State's case.

In paragraphs 121-157, Reynolds raises a variety of arguments concerning his trial counsel's representation during trial. Each of these sub-claims will be addressed individually below.

a. The claim that trial counsel failed to move for a change of venue.

Reynolds contends that his trial counsel was ineffective for not moving for a change of venue based on extensive and inflammatory pretrial publicity.

This claim is summarily dismissed because it is insufficiently pleaded. Ala. R. Crim. P. 32.6(b). Reynolds has failed to plead a facially meritorious claim because he has failed to plead clear and specific facts that, if true, would show that he was entitled to a change of venue. Thus, he has failed to sufficiently plead facts that, if true, would show that trial counsel was deficient for failing to make a meritless objection or that there was a reasonable probability the outcome of his trial would have been different had he objected.

In Alabama, "[i]n order to grant a motion for change of venue, the defendant must prove that there existed actual prejudice against the defendant or that the community was saturated with prejudicial publicity." Phillips v. State, 65 So. 3d 971, 1009 (Ala. Crim. App. 2010) (holding that the trial court did not abuse its discretion in denying the defendant's motion for

change of venue)(citing Ex parte Grayson, 479 So. 2d 76, 80 (Ala. 1985)). Critically, "[t]he mere fact that publicity and media attention were widespread is not sufficient to warrant a change of venue." Phillips, 65 So. 3d at 1010.

Here, even assuming his allegations as true, Reynolds has failed to plead any facts that would show there was either actual prejudice or presumed prejudice based on community saturation. Reynolds's entire claim is limited to bare allegations that media coverage of his case was extensive and that many jurors had heard about the case. (Pet. at 31-32.) But this is precisely the type of evidence Alabama courts have held "is not sufficient to warrant a change of venue." Phillips, 65 So. 3d at 1010.

Reynolds simply has failed to plead any facts that, if true, would show that any juror was actually prejudiced against him. Although he lists the names of certain jurors, he fails to specifically plead any factual basis to show that these jurors had any actual prejudice against him.

Moreover, Reynolds has failed to plead any specific facts that, if true, would show that the community was saturated with publicity such that prejudice was presumed. The presumptive prejudice standard is 'rarely' applicable, and is reserved for only 'extreme situations.'" Hunt v. State, 642 So. 2d 999, 1043 (Ala. Crim. App. 1993)(citing Coleman v. Kemp, 778 F.2d 1487, 1537 (11th Cir. 1985)). In fact, "'Publicity' and 'prejudice' are not the same thing" for "'Prejudicial' publicity usually must consist of much more than stating the charge, and of reportage of the pretrial and trial processes. Hunt, 642 So. 2d at 1043.

Here, Reynolds has failed to plead any facts that, if true, would show

how any of the news coverage in his case was extreme. Reynolds fails to plead any facts that, if true, would show any reference to sensational, inflammatory, or slanted news coverage. For example, Reynolds complains that the Gadsden Times reported on May 31, 2004 – three years before his trial – that Reynolds pled guilty to unrelated drug charges. (Pet. at 32.) But Reynolds fails to plead how any facts in this article were prejudicial, inflammatory, or slanted. Nor does he plead any facts that, if true, would show how the information in this article was anything but a factual account of a public record and fact that Reynolds pled guilty to other criminal charges several years before his trial began.

Finally, Reynolds has failed to plead facts that, if true, would show how any of the four Skilling factors supported the existence of presumed prejudice. See Luong v. State, No. 1121097, 2014 WL 983288, at *4 (Ala. March 14, 2014)(citing Skilling v. United States, 561 U.S. 358 (2010)). In fact, Reynolds fails to mention these factors at all in his petition. Therefore, because this claim is insufficiently pleaded, it is summarily dismissed. Ala. R. Crim. P. 32.7(d).

b. The claim that trial counsel failed to conduct an adequate voir dire.

In paragraphs 130-136, Reynolds contends that his trial counsel was ineffective during voir dire by failing to obtain necessary information from the jury.

This claim is summarily dismissed because it is insufficiently pleaded. Ala. R. Crim. P. 32.3; 32.6(b). Reynolds's claim is a bare allegation that simply lists categories of questions that he contends that his trial counsel

should have asked during voir dire without pleading specific facts concerning what information he would have learned had these questions been asked, what specific jurors would have responded, or how the result of voir dire would have been different.

For example, Reynolds complains that his trial counsel did not ask three of the four panels whether they would be affected by the fact that they had a close family member or friend who had been the victim of a crime. (Pet. at 33.) Yet Reynolds fails to specifically plead the name of any jurors who would have responded to such questioning or what the unidentified jurors' responses would have been. More importantly, Reynolds fails to plead any facts that, if true, would show that any jurors would have stated that their ability to be impartial would have been affected.

Likewise, Reynolds complains that his trial counsel failed to ask the venire whether any jurors who had family in law enforcement would not be able to be impartial. (Pet. at 34.) Yet Reynolds completely fails to plead the name of any juror who would have responded and what this unnamed juror would have said about their ability to be impartial.

Accordingly, Reynolds has failed to plead clear and specific facts that, if true, would show there was a reasonable probability that the outcome of his trial would have been different had his trial counsel asked additional questions during voir dire. Reynolds has failed to specifically plead what additional information he would have learned, nor has he specifically pleaded the names of specific jurors he would have struck had more questions been asked. Because this claim is insufficiently pleaded, it is summarily

dismissed. Ala. R. Crim. P. 32.7(d).

Alternatively, this claim is summarily dismissed because it is facially meritless and fails to state a material issue. Ala. R. Crim. P. 32.7(d). Even accepting his allegations as true, Reynolds has failed to plead a facially meritorious claim that, if true, would show trial counsel was deficient. "Generally, an attorney's actions during voir dire are considered to be matters of trial strategy, which cannot be the basis of an ineffective assistance claim unless counsel's decision is ... so ill chosen that it permeates the entire trial with obvious unfairness." Washington, 95 So. 3d at 64 (citations omitted). Therefore, because this claim is facially meritless, it is dismissed. Ala. R. Crim. P. 32.7(d).

c. The claim that trial counsel failed to make a Batson objection.

In paragraphs 137-141, Reynolds contends that his trial counsel was ineffective for failing to make a Batson objection where the prosecution struck nine of the fourteen potential black jurors.

This claim is dismissed because it is insufficiently pleaded. Ala. R. Crim. P. 32.6(b). In Batson v. Kentucky, 476 U.S. 79 (1986), the United States Supreme Court held that it was a violation of the Equal Protection Clause to strike a black prospective juror from a jury based solely on the juror's race. In evaluating a Batson claim at trial, courts normally follow a three-step process. However, in the context of an ineffective assistance of counsel claim raised in a Rule 32 petition, to meet the heavy pleading burden of Rules 32.3 and 32.6(b), a petitioner bears the burden of pleading specific facts that, if true, would "show not only that trial counsel should have raised a

Batson challenge, but also that the challenge would have been successful." Benjamin v. State, CR–10–1832, 2013 WL 6703490, at *4 (Ala. Crim. App. December 20, 2013)(citing Pierce v. State, 286 Ga. 194, 199 (2009)).

Here, Reynolds has failed to plead clear and specific facts that, if true, would show that even an inference of purposeful discrimination existed in his case, let alone, that a Batson objection, had it been raised, would have ultimately been successful. Thus, he has failed to plead a sufficient factual basis that, if true, would show that his trial counsel was deficient for failing to raise a Batson objection or that he was prejudiced.

For example, although he alleges that nine of the fourteen eligible black jurors were struck from the venire, he fails to specifically plead the names of the jurors who he contends were struck in a racially discriminatory manner. The failure to plead such basic facts fails to comply with Rule 32.6(b). See Carruth v. State, CR–12–0505, 2014 WL 994624, at *6 (Ala. Crim. App. March 14, 2014).

Reynolds also failed to plead other basic facts that, if true, would show that there were other factors, besides simply the number of blacks struck, that suggested an inference of discrimination. Notably, Reynolds's allegation is essentially limited to the fact that nine out of fourteen black jurors were struck by the State. But this bare allegation does not meet the pleading requirements of Rule 32.6(b) for "numbers alone are not sufficient to establish a prima face case of discrimination." Vanpelt v. State, 74 So. 3d 32, 53 (Ala. Crim. App. 2009). Although Reynolds alleges that the stuck black jurors were heterogeneous, this is a bare allegation. Reynolds merely asserts in a

conclusory fashion that the jurors were men and women of various ages without pleading any specific facts concerning the unidentified jurors' occupations or specific responses during voir dire that, if true, would suggest the jurors were heterogeneous.

Similarly, although Reynolds complains that certain jurors did not give any responses during voir dire, he fails to specifically plead the names of these jurors. Nor does he plead specific facts concerning what responses the other struck jurors gave and how these jurors' responses, or lack of responses, compared to the jury venire as a whole.

Finally, the Court of Criminal Appeals addressed this substantive issue on direct appeal on plain-error review and held that there was no inference of purposeful discrimination. Reynolds, 114 So. 3d at 85-86. While this holding does not automatically preclude relief here, Reynolds has failed to plead any additional facts that, if true, would call the Court of Criminal Appeals' decision into question or show how an inference of discrimination existed, let alone that a Batson objection would have been successful. Therefore, because this claim is insufficiently pleaded, it is dismissed. Ala. R. Crim. P. 32.7(d).

d. The claim that trial counsel failed to secure or fully depose the State's forensic pathologist.

In paragraphs 142-148, Reynolds contends that his trial counsel was ineffective for failing to secure the presence of Dr. Adam Craig, the forensic pathologist who conducted the autopsies of the Martins, at trial. Reynolds further contends that had Dr. Craig been presented at trial or through a supplemental deposition, trial counsel could have cross-examined Dr. Craig on the fact that two knives were found which Reynolds contends would have

cast doubt on Dr. Craig's opinion that the victims' wounds were caused by the same or similar type of knives.

This claim is summarily dismissed because it is insufficiently pleaded. Ala. R. Crim. P. 32.3; 32.6(b). Although Reynolds complains in a conclusory fashion that he was unable to cross-examine Dr. Craig during his deposition on certain topics, he completely fails to plead specific facts in support of this claim. For example, he fails to specifically plead what different questions he would have asked Dr. Craig, what specific testimony Dr. Craig would have given, and how this testimony would have supported his defense or would have contradicted the State's case.

Moreover, Reynolds has failed to specifically plead facts that, if true, would show prejudice under Strickland. Even assuming as true that two different knives were used to kill the victims and that Dr. Craig was questioned on this fact, Reynolds fails to plead clear and specific facts that, if true, would show how this would have helped his case, let alone show how there was a reasonable probability that the outcome of his trial would have been different.

Specifically, Reynolds fails to plead how the fact that two different knives were used in the murders would have shown that he did not still commit the murders of the Martin family. Notably, the fact that two knives were used in the murders was already presented to the jury through the testimony of Marcie West. And as the Court of Criminal Appeals noted, "it is equally possible if Reynolds had confronted Dr. Craig and Dr. Craig had agreed that two different knives were used to stab the victims, that that testimony could have strengthened the State's case. As discussed in the facts portion of this

opinion, Adrian West testified that Reynolds handed her two different knives after she found him stabbing Melinda Martin. She also testified that she subsequently disposed of the two knives." Reynolds, 114 So. 3d at 91.

Moreover, even assuming that two knives were used in the murders, this evidence would not have flatly contradicted Dr. Craig's testimony and would not have constituted significant impeachment evidence within the context of all the evidence presented during trial. While Dr. Craig testified that he thought that all of the wounds were caused by single-edged weapons because "most of the wounds had a sharp end and a blunted end," he also testified that some of the wounds "may not have shown that same configuration..." (Supp. R. 155-156.)

Finally, Reynolds has failed to specifically plead how additional questioning of Dr. Craig would have led to a reasonable probability that "the factfinder would have had a reasonable doubt respecting guilt," Strickland, 466 U.S. at 695, given the other overwhelming evidence of his guilt such as, among other things, Marcie West's testimony and the forensic DNA evidence tying Reynolds to the scene of the crime. Reynolds simply failed to plead a specific factual basis concerning what additional testimony he could have elicited from Dr. Craig or how this unidentified testimony would have impacted the prosecution's case. Therefore, because this claim is insufficiently pleaded, it is dismissed. Ala. R. Crim. P. 32.7(d).

e. The claim that trial counsel failed to investigate or seek expert testimony regarding Marcie West's timeline of events.

In paragraphs 149-152, Reynolds alleges that his trial counsel failed to

retain an expert or seek additional review of Dr. Craig's findings. Although Dr. Craig testified that the death of Savannah Martin could have occurred at the same time as Chuck and Melinda Martin, Reynolds claims that his trial counsel should have investigated further Dr. Craig's testimony that there were decompositional changes in Savannah's body which Reynolds alleges is consistent with Savannah's murder occurring before her parents' deaths.

This claim is dismissed because it is insufficiently pleaded. Ala. R. Crim. P. 32.3; 32.6(b). This claim is a bare allegation utterly devoid of a specific factual basis. Reynolds has completely failed to plead any specific facts concerning what specific investigative steps trial counsel should have taken. Although he contends that "further investigation and forensic examination" should have been undertaken (Pet. at 38), he fails to plead what specific investigation or examinations should have been done. Reynolds fails to plead the names of any witnesses trial counsel could have interviewed, what forensic tests could have been conducted, or what evidence could have been examined to further review Dr. Craig's testimony.

And to the extent that Reynolds contends an expert should have been retained, he completely fails to plead the name of an expert who could have been retained or what the unnamed expert's testimony would have been. Reynolds's failure to plead these basic facts does not comply with the heavy pleading standards of Rule 32.6(b). Alabama courts have continually held that a Rule 32 petitioner's failure to plead the name of an expert or identify that expert's testimony does not comply with the pleading requirements of Rule 32.6(b). See Daniel v. State, 86 So. 3d 405, 426 (Ala. Crim. App. 2011);

McNabb v. State, 991 So. 2d 313, 321-323 (Ala. Crim. App. 2007).

Finally, Reynolds has failed to plead any specific facts that, if true, support his bare allegation that this additional investigation could have revealed "potentially exculpatory" evidence. (Pet. at 37.) Even assuming his allegations as true, Reynolds fails to plead how the fact that there were decompositional changes in Savannah's body would have created a reasonable doubt that he murdered Savannah Martin. Reynolds has failed to plead specific facts that, if true, would show how this one, isolated fact would lead to a reasonable probability that the jury would have had reasonable doubt that he murdered Savannah Martin. Nor has he pleaded any facts that, if true, would show how this investigation into the decomposition of Savannah's body would have had any effect on the overwhelming evidence showing that he committed the capital murders of Chuck and Melinda Martin. Thus, Reynolds has failed to plead a sufficient factual basis that, if true, would show either deficient performance or prejudice under Strickland. Therefore, this claim is dismissed. Ala. R. Crim. P. 32.7(d).

f. The claim that trial counsel failed to examine the chief investigating officer responsible for his arrest and indictment.

In paragraphs 153-154, Reynolds alleges that his trial counsel was ineffective for failing to cross examine Roger Dale of the Gadsden Police Department.

This claim is dismissed because it is insufficiently pleaded. Ala. R.

Crim. P. 32.3; 32.6(b). Reynolds has failed to plead any specific facts in support of this claim. Most notably, Reynolds has failed to plead any specific facts concerning what Detective Dale's testimony would have been on cross-examination. While Reynolds lists certain topics that trial counsel could have asked Dale about, he fails to specifically plead what Dale would have testified to in regard to these topics.

Reynolds also failed to plead any specific facts that, if true, would show prejudice under Strickland. Reynolds fails to plead a sufficient factual basis that, if true, would show how there was a reasonable probability the outcome of his trial would have been different. Although Reynolds alleges that Det. Dale could have confirmed that Chad Martin was a suspect for a period of time at the beginning of the investigation, this fact was already elicited by trial counsel during the trial. Reynolds fails to specifically plead what additional facts about Chad Martin could have been elicited or how additional questioning would have made a difference. Thus, Reynolds has failed to plead clear and specific facts that, if true, would show either deficient performance or prejudice. Therefore, this claim is summarily dismissed. Ala. R. Crim. P. 32.7(d).

g. The claim that trial counsel failed to make other necessary objections to preserve his rights.

In paragraphs 155-157, Reynolds contends that his trial counsel was ineffective for failing to make adequate objections. Reynolds contends that his trial counsel should have objected during jury selection when jurors were excused outside the presence of the parties, failed to object to improper questioning by the state, failed to object to leading questions, and failed to

object to instances when the State allegedly bolstered witnesses. This claim is dismissed for several reasons.

First, this claim is insufficiently pleaded. Ala. R. Crim. P. 32.3; 32.6(b). Reynolds entirely fails to plead any specific facts that, if true, would show prejudice. In fact, Reynolds fails to plead a single sentence relating to prejudice. This failure alone renders this claim insufficient under Rule 32.6(b).

Reynolds also fails to specifically plead facts that, if true, would show deficient performance. Reynolds fails to specifically plead facts that, if true, would show what specific objections should have been made or how these objections would have been successful. For example, Reynolds fails to specifically plead what basis trial counsel would have had to object to the trial court's excusal of certain jurors. In regard to this substantive claim, the Court of Criminal Appeals noted on direct appeal, "Reynolds has not presented any specific instance in which the circuit court supposedly exceeded its discretion in excusing the potential jurors outside the presence of the parties." Reynolds, 114 So. 3d at 83. Similar to his failure to allege specific facts on direct appeal, here, Reynolds has failed to plead any specific facts that, if true, would show how the trial court exceeded its discretion that would have allowed trial counsel to make a meritorious objection.

Moreover, although he contends that the prosecution made improper arguments during closing arguments, Reynolds fails to specifically plead how the prosecution's arguments were improper and what meritorious basis trial counsel had to raise an objection. Finally, Reynolds fails to specifically

identify instances in the record where the prosecution led or bolstered witnesses to which trial counsel did not object. Because "[c]ounsel cannot be held ineffective for failing to raise an issue that has no merit," Dunaway v. State, CR-06-0996, 2009 WL 4980320, at *23 (Ala. Crim. App. December 18, 2009), Reynolds has failed to plead a sufficient factual basis in support of this claim and thus, it is dismissed. Ala. R. Crim. P. 32.7(d).

Alternatively, this claim is facially meritless and fails to state a material issue. Ala. R. Crim. P. 32.7(d). Reynolds's general claim that trial counsel was ineffective for failing to make objections is facially without merit. The "effectiveness of counsel does not lend itself to measurement by picking through the transcript and counting the places where objections might be made." Washington, 95 So. 3d at 66 (citations omitted). As the Court of Criminal Appeals has held, "decisions of when and how to raise objections are generally matters of trial strategy." Id. (Citations omitted.)

Finally, Reynolds's specific substantive objections to the trial court's actions during voir dire are also meritless on their face. A trial court has the authority to excuse potential jurors outside the presence of the parties and their counsel. See Ala. Code § 12-16-74. And the trial court's excusals for self-employment, age, and education status complied with Ala. Code § 12-16-63. As noted above, "[c]ounsel cannot be held ineffective for failing to raise an issue that has no merit." Dunaway, 2009 WL 4980320, at *23. Therefore, because these claims are also facially meritless, they are summarily dismissed. Ala. R. Crim. P. 32.7(d).

7. The claim that trial counsel failed to provide effective assistance of counsel during the penalty phase.

In paragraphs 158-321, Reynolds contends that his trial counsel was ineffective during the penalty phase. Within this claim, Reynolds raises several sub-claims, which will be addressed individually below.

a. The claim that trial counsel failed to conduct an adequate mitigation investigation.

In paragraphs 158-251, Reynolds alleges that his trial counsel failed to conduct an adequate mitigation investigation by failing to investigate various avenues of mitigation evidence.

This claim is summarily dismissed because it is insufficiently pleaded. Ala. R. Crim. P. 32.3; 32.6(b). Although Reynolds's claim is lengthy, it is still a bare allegation. Reynolds has failed to plead basic facts necessary to present a sufficient factual basis for his claim.

First, Reynolds has failed to plead specific facts that, if true, would show that trial counsel was deficient or unreasonable during the mitigation investigation. The basic gist of Reynolds's claim is that his trial counsel should have conducted more of an investigation. (Pet. at 41-59.)

However, this allegation does not allege a sufficient factual basis for relief in the context of a claim of ineffective assistance of counsel. This is so because in assessing the reasonableness of counsel's performance, what counsel actually did must first be examined. See Boyd v. State, 913 So. 2d 1113, 1131 (Ala. Crim. App. 2003), quoting Chandler v. United States, 218 F.3d 1305, 1320 (11th Cir. 2000) ("Although Petitioner's claim is that his trial counsel should have done something more, we first look at what the lawyer did in fact.").

Notably, Reynolds entirely fails to plead any facts that, if true, would show that trial counsel's actual investigation was insufficient, other than alleging in a conclusory fashion that trial counsel should have done more. This basic pleading deficiency does not comply with the heavy pleading burden of Rule 32.6(b).

Moreover, Reynolds's failure to specifically plead how his trial counsel's investigation was unreasonable is especially problematic given that the face of the record demonstrates that trial counsel did conduct an adequate mitigation investigation. Trial counsel called eight witnesses to testify during the penalty phase – seven fact witnesses consisting of Reynolds's family members and an expert mitigation specialist. (R. 1845-1956.) This testimony provided the jury with powerful details about Reynolds's life.

First, the jury heard about the difficulties, instability and poverty surrounding Reynolds's immediate family. Specifically, the jury heard how Reynolds's father was an alcoholic and was violent towards his mother, that Reynolds's father was mean to him and his brothers and aggressively beat them with a belt, that the family moved around a great deal to avoid creditors and at one time had to live in a car, that Reynolds's mother was not nurturing and was in jail during part of Reynolds's childhood, and that the family lived in filthy conditions and even a homeless shelter for a time. (R. 1845-1850, 1895-1907, 1912-1938.)

Second, the jury heard about specific instances of abuse directed towards Reynolds. Testimony was presented that his father cut him with a knife and that his father kicked him down steps when he was two years old, which

broke his collarbone and later caused an infection. Id. at 1871, 1897-1898.

Third, the jury heard about Reynolds's substance abuse and other difficulties. Specifically, the jury heard that Reynolds dropped out of school at the 7th grade and did not get a GED. The jury also heard that Reynolds was introduced to drugs and alcohol at age 13. Id. at 1920-1922.

Fourth, the jury heard that, despite Reynolds's troubled background, he was a good and loving father. Multiple witnesses testified that he was a loving father, that he did not do drugs around his children, that he was a great brother who protected his siblings, that he was not violent like his father, and that he was the glue that held that family together. Id. at 1850, 1874-1875, 1888-1889, 1893, 1933-1934.

Reynolds completely fails to plead any facts concerning the mitigation evidence that trial counsel investigated and presented during the penalty phase. Reynolds fails to plead any facts that, if true, would show his trial counsel's investigation was unreasonable given the strong mitigating evidence noted above. Accordingly, Reynolds's failure to plead a sufficient factual basis in this manner does not comply with Rule 32.6(b).

Second, Reynolds has failed to plead facts that, if true, would show that he was prejudiced by his trial counsel's investigation. Specifically, Reynolds has failed to plead clear and specific facts that, if true, would show that "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." Strickland, 466 U.S. at 695.

Although Reynolds lists various categories of evidence his trial counsel

should have investigated, Reynolds's failure to plead basic facts concerning prejudice permeates this entire claim. In particular, Reynolds fails to plead any specific facts concerning the strength of the aggravating factors or how, even assuming this additional mitigation investigation was conducted and this additional evidence was presented along with the mitigation evidence presented at trial, there was a reasonable probability the aggravating circumstances would not have still outweighed the mitigating circumstances.

Here, there were three strong aggravating circumstances. Two of the aggravating circumstances – that the capital offense was committed during the course of a robbery and that Reynolds intentionally caused the death of two or more persons pursuant to one scheme or course of conduct, see Ala. Code § 13A–5–49 (4) and (9) – were established by the jury's guilt phase verdicts. (C. 344.) Moreover, this court found that the evidence was "clearly sufficient to establish" the third aggravating circumstance – that the capital offense was especially heinous, atrocious, and cruel, see Ala. Code § 13A–5–49 (8). Id. Specifically, this court noted the excessive number of wounds to each victim and the murder of Savannah Martin, which this court found was "an apparent afterthought, a brutal execution to prevent her from identifying her parent's killer..." Id. at 344-345.

Reynolds simply fails to plead any specific facts concerning these strong aggravating circumstances or how additional investigation would have led to a reasonable probability of a different outcome. Instead, Reynolds merely raises bare allegations of prejudice throughout this claim. (Pet. at 47, 51, 54, 56, 59.) But "[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). Therefore, because Reynolds has failed to plead a sufficient factual basis for prejudice, this entire claim is summarily dismissed. Ala. R. Crim. P. 32.7(d).

Furthermore, in addition to Reynolds's overall pleading deficiency in this claim, each category of evidence that he contends his trial counsel should have investigated contains its own pleading deficiencies. In each claim, Reynolds fails to plead specific facts that, if true, would show prejudice. These pleading failures are addressed below.

The claim regarding the retention of a mitigation specialist (paragraphs 159-172):

Although Reynolds contends his trial counsel failed to supervise the investigation of mitigation specialist Dr. J. Davis Martin, Reynolds fails to plead facts concerning what specific information his trial counsel could have learned or presented during the penalty phase from further investigation. Instead, Reynolds simply raises a laundry list of areas that could have been investigated without pleading what specific information or evidence would have been discovered, let alone how it would have been helpful during the penalty phase.

For example, Reynolds complains that his trial counsel failed to contact former teachers, school administrators, and employers to interview or obtain records. (Pet. at 42.) But he fails to specifically plead the names of these potential witnesses, nor does he plead specific facts concerning what information these unidentified witnesses would have provided or what their specific testimony would have been during trial.

Likewise, although Reynolds contends his trial counsel was ineffective for failing to follow up with a preliminary investigation into his drug treatment and learning disabilities, he fails to plead facts concerning what specific actions took place during his drug rehabilitation, when this rehabilitation took place and how long he was in treatment, how facts about his alleged drug treatment would have been mitigating, and what specific learning disabilities he had that trial counsel should have further investigated.

The claim regarding his indications of intellectual deficits (paragraphs 173-191):

Again, Reynolds alleges that his trial counsel failed to interview teachers or administrators and failed to obtain school records and employment records, yet he fails to plead specific facts concerning what testimony these witnesses could have provided or what evidence could have been presented from additional documentation. Although Reynolds contends that some of his school records would have shown that he was in special education classes and that he had an IQ of 85, he fails to specifically plead how this information would have led to a reasonable probability that he would not have been sentenced to death given that evidence about his intellectual and educational difficulties was already presented during trial. See Stallworth v. State, 2013 WL 5966914, at *15 (Ala. Crim. App. November 8, 2013)("The withholding of cumulative testimony will not ordinarily satisfy the prejudice component of a claim of ineffective assistance of counsel.")

Notably, testimony was presented that Reynolds dropped out of school during the 7th grade, did not get a GED, and that it was believed that he had a learning disability. (R. 1920, 1925.) Reynolds fails to plead how he was

prejudiced by the failure to present more evidence of his educational and intellectual difficulties, along with all the other evidence Reynolds alleges should have been presented, particularly given the existence of three strong aggravating circumstances.

The claim regarding investigation of a mental illness (paragraphs 193-215):

Although Reynolds alleges that his trial counsel was ineffective for failing to investigate whether he had a history of mental illness, he completely fails to allege a specific mental illness, disease, or disorder from which he suffered. Instead, Reynolds alleges in a general, conclusory fashion that he acted in a manic behavior, was irrational, engaged in risk-taking, was quiet and withdrawn, and was "different" growing up. (Pet. at 49.) But Reynolds completely fails to plead how these anecdotal comments about his life would have constituted mitigating evidence, nor does he plead that he was ever diagnosed with a specific mental illness or disease. See Washington, 95 So. 3d at 60 ("We agree with the circuit court that this claim lacked specificity because Washington failed to plead what mental illness counsel could or would have discovered had counsel investigated his mental health. Rule 32.6(b), Ala. R. Crim. P.") Likewise, Reynolds's allegation that his trial counsel should have investigated his family's history of mental illness is insufficiently pleaded given that Reynolds has failed to plead any facts that, if true, would show how he was impacted by his family's mental health or that he had specific mental health issues that were related to other family

members.

Finally, Reynolds's claim that he was prejudiced because the trial court found that the statutory mitigating circumstances set out in Section 13A-5-51 (2) and (6) did not exist is nothing but a bare allegation. (Pet. at 51.) As noted above, Reynolds has failed to plead any facts that, if true, would show he suffered from an extreme mental or emotional disturbance at the time of crime or that his capacity to appreciate the criminality of his conduct or conform his actions to the law was substantially impaired.

The claim regarding his personal and familial history of addiction and substance abuse (paragraphs 216-228):

Reynolds fails to plead specific facts concerning what efforts he took to overcome his drug addiction other than alleging in a conclusory fashion that he checked into drug treatment programs in the weeks and months before the murders. Yet he fails to specifically plead facts that, if true, would show how these facts were mitigating or how he was prejudiced by failing to present this evidence given the extensive evidence of his continual drug use since childhood and his own testimony that he was using drugs in the days immediately leading up to the murders.

Reynolds's allegation that he had a family history of addiction is also insufficiently pleaded. Reynolds merely lists family members that he contends had addictions without pleading specific facts about each family members' addiction or from what addiction they suffered. Nor does he specifically plead how this additional investigation would have revealed information that was not cumulative of what was already presented during trial given that testimony was presented about the multi-generational alcohol

abuse in his family. (R. 1910, 1922-1926.) Finally, Reynolds fails to plead any specific facts that, if true, would show that his substance abuse was based on genetic factors. Reynolds fails to allege any scientific data or diagnosis that would support this bare assertion.

The claim regarding evidence of organic brain damage (paragraphs 229-239):

Reynolds's allegation that his trial counsel failed to investigate whether he suffered from any brain damage as a result of his history of head trauma or his exposure to hazardous chemicals during his employment with various industrial services is also insufficiently pleaded. Reynolds fails to plead any facts that, if true, would show that he actually suffered from any brain damage. Reynolds does not specifically plead any injury or impairment from which he suffers or any diagnosis he has received. Nor does he specifically plead the name of an expert who could have been retained or what his unidentified expert's testimony would have been. As pleaded, this claim is nothing but a bare allegation.

The claim that trial counsel failed to contact family members, friends, coworkers, and employers to testify on his behalf (paragraphs 240-251):

Finally, Reynolds's claim that his trial counsel failed to investigate other witnesses to testify during the penalty phase is insufficiently pleaded. For example, Reynolds contends that his trial counsel should have interviewed his uncles and cousins to learn more information about the mental illness, alcoholism, and drug abuse in his family. Yet Reynolds fails to plead what specific facts about these issues the additional family members could have provided. Nor does he specifically plead how this additional testimony would

not have been cumulative of what was presented during trial. See Stallworth, 2013 WL 5966914, at *15; see also Payne v. Allen, 539 F.3d 1297, 1317 (11th Cir. 2008)("The mere fact that the family members could have presented more thorough and graphic detail about the physical abuse Payne suffered and witnessed and his early substance abuse does not render counsel's performance ineffective.").

Further, Reynolds alleges that his trial counsel should have investigated his close friends who could have testified that he had a good work ethic, that he was a loving father, and that he had a troubled background. (Pet. at 58-59.) Yet Reynolds again fails to specifically plead how he was prejudiced by failing to present additional witness to testify about these subjects. See Hunt, 940 So. 2d at 1067–68 ("Prejudicial ineffective assistance of counsel under Strickland cannot be established on the general claim that additional witnesses should have been called in mitigation."). Reynolds has failed to plead how any additional information from these witnesses would not have been cumulative to the information about his background that was already presented during trial. See Stallworth, 2013 WL 5966914, at *15.

Accordingly, as noted above, in regard to all of the categories of evidence that Reynolds now contends his trial counsel was ineffective for failing to investigate, Reynolds has failed to plead basis facts concerning what specific evidence could have been discovered and presented during trial. Furthermore, a review of Reynolds's allegations shows that the majority of the additional evidence that he contends should have been investigated and presented was substantially similar to the evidence trial counsel presented

during trial. See Stallworth, 2013 WL 5966914, at *21 (holding claim properly dismissed "[g]iven the extensive evidence counsel presented in mitigation, a large portion of which was cumulative to the mitigating evidence Stallworth pleaded should have been presented..."). Reynolds has failed to plead specific facts that, if true, involve substantially different facts than what was presented during trial. Id. at 20 ("In order to establish prejudice, the new evidence that a [postconviction] petitioner presents must differ in a substantial way—in strength and subject matter—from the evidence actually presented at sentencing.") (citing

Foust v. Houk, 655 F.3d 524, 539 (6th Cir. 2011)). Therefore, because Reynolds has failed to plead a sufficient factual basis for this claim, it is dismissed. Ala. R. Crim. P. 32.7(d).

b. The claim that trial counsel failed to adequately prepare for the penalty phase.

In paragraphs 252-263, Reynolds contends that his trial counsel was ineffective for failing to adequately prepare the witnesses that were called for the penalty phase. This claim is summarily dismissed for several reasons.

First, this claim is insufficiently pleaded. Ala. R. Crim. P. 32.3; 32.6(b). Reynolds fails to plead specific facts concerning what additional or different testimony the penalty phase witnesses could have given had trial counsel more adequately prepared. Although Reynolds complains that his trial counsel did not adequately interview and prepare Barbara Reynolds, Chaz Tankersley, Christy Prosser, and Alan Prosser, he fails to plead any facts that, if true, would show what specific testimony these witnesses could have provided. Nor does he specifically plead how such unidentified testimony

would have been relevant to his mitigation case or would have supported additional mitigating circumstances. Finally, Reynolds fails to specifically plead how he was prejudiced by the failure to more adequately prepare the penalty phase witnesses. Thus, because this claim is insufficiently pleaded it is dismissed.

Second, to the extent that Reynolds contends that his trial counsel was ineffective for allowing Harold Reynolds, his father, to testify, this claim is facially meritless and fails to state a material issue. Ala. R. Crim. P. 32.7(d). Even accepting his allegations as true, Reynolds has failed to plead a facially meritorious claim that, if true, would show either deficient performance or prejudice.

Even assuming as true Reynolds's allegations that his father was suffering dementia and was intoxicated around the time of trial, the record demonstrates that trial counsel's decision to call Harold Reynolds as a witness was consistent trial counsel's strategy to highlight the difficult childhood Reynolds faced. Contrary to Reynolds's claim in his petition, Harold Reynolds admitted slapping his wife and later admitted that the fact that he slapped his wife resulted in the Reynolds family being kicked out of a mission house in which they were staying. (R. 1855, 1863-1864.) Harold Reynolds also admitted that he and his family moved around a lot, that they had to live out of their car for a certain period of time, and that he drank a lot during Reynolds's childhood. (R. 1856-1857.) Although Reynolds complains that Harold Reynolds undercut other mitigation evidence based on the fact that he claimed Reynolds's childhood was "not that bad", even assuming this

evidence as true, the record is clear that Harold Reynolds's testimony supported the notion that Reynolds had a difficult and troubled childhood. Even assuming his allegation as true, Reynolds has failed to plead facts that would show how trial counsel was objectively unreasonable for calling his father as a witness in support of this strategy, even if his father was not a perfect witness.

Moreover, even assuming his allegations as true, Reynolds has failed to plead a set of facts that, if true, would show prejudice. See Stallworth, 2013 WL 5966914, at *20 ("A trial court may summarily dismiss a post-conviction petition [on a claim of ineffective assistance of counsel] when it is clear upon the face of the petition itself or the exhibits or material from prior proceedings that there are no facts upon which the petitioner could prevail."). Although Reynolds complains that his father denied cutting him with a knife and incorrectly stated that Reynolds earned a GED, other witnesses later verified both the incident in which Harold Reynolds cut Reynolds and the fact that Reynolds did not earn a GED. (R. 1871, 1920.)

Further, even assuming his allegations as true, Reynolds fails to plead any facts that, if true, would show a reasonable probability the outcome of his trial would have been different had his father not testified. No new or substantially stronger mitigation testimony would have been presented had his father not testified, nor would his father's testimony (or lack of testimony) have affected the strong aggravating circumstances present in his case. Nor does Reynolds specifically allege that his father engaged in any outbursts or made specific comments that damaged his case. Even assuming that Harold

Reynolds made certain incorrect statements, these isolated instances did not damage or refute the overall mitigating evidence that trial counsel presented. And even assuming Reynolds's allegations as true, whether or not Harold Reynolds testified had no effect whatsoever on the strength of the aggravating circumstances. Therefore, even assuming his allegations as true, Reynolds has failed to sufficiently plead a factual basis that, if true, would show prejudice. Because this claim is facially without merit, it is dismissed. Ala. R. Crim. P. 32.7(d).

c. The claim that trial counsel presented an incomplete and misleading picture of his childhood.

In paragraphs 264-308, Reynolds contends that his trial counsel failed to present a complete picture of his troubled childhood. Reynolds contends that his trial counsel should have presented additional evidence of the extreme violence in his family history in regard to the fact that his father and uncles routinely got drunk and fought each other and other people. Reynolds also contends that his trial counsel could have presented additional evidence that he was frequently whipped with a belt or hickory switch, that his mother did not nurture him, and that his family home was extremely filthy. Finally, Reynolds contends that his trial counsel should have presented evidence of inappropriate sexual activity in his home, namely that his parents played strip poker in the home, that his father took him to an X-rated movie, and that his parents engaged in extra-marital affairs.

This claim is summarily dismissed because it is facially meritless and fails to state a material issue. Ala. R. Crim. P. 32.7(d). Even assuming his allegations as true, Reynolds has failed to plead a claim that, if true, would

show a reasonable probability that the outcome of his trial would have been different.

First, on its face, the majority of the additional evidence that Reynolds contends should have been presented was cumulative of what was presented during trial. The trial record demonstrates that trial counsel presented extensive evidence on the exact topics that Reynolds now contends should have been presented. Specifically, evidence was presented that Reynolds's father was an alcoholic (R. 1847, 1857, 1868, 1926), fought with and abused his wife (R. 1847, 1855, 1868, 1921), whipped the children with belts (R. 1847), and specifically targeted Reynolds for abuse (R. 1871, 1897-1898, 1916.) Testimony was also presented that Reynolds was neglected and was not nurtured by his mother (R. 1902, 1918), that his home environment was filthy (R. 1899), and evidence of the sexual dysfunction of the family was presented through testimony about Reynolds's mother's involvement in a whorehouse (R. 1859).

This evidence is precisely the type of evidence that Reynolds now contends should have been presented. But on its face, Reynolds's allegation cannot establish prejudice because this additional evidence would have been cumulative. Thus, he has failed to plead a facially meritorious claim. See Stallworth, 2013 WL 5966914, at *15 ("The withholding of cumulative testimony will not ordinarily satisfy the prejudice component of a claim of ineffective assistance of counsel."). Reynolds fails to plead any facts that would have been substantially different than what was presented during trial. For example, where Reynolds presented substantial evidence of his father's

physical abuse of his mother, presenting more evidence that his father got in fights with Reynolds's uncles would have not been compelling and simply cumulative of the evidence presented at trial. (Pet. at 62-65.)

Similarly, although trial counsel did not specifically present evidence about a strip poker game or the fact that Reynolds's father took him to an X-rated movie, trial counsel did present testimony concerning abnormal sexual activities involving his mother's work in a whorehouse. Even assuming these additional allegations as true, none of this additional testimony would have offered any substantially different or compelling testimony, particularly where none of it involved any sexual abuse directed toward Reynolds personally. Given the large amount of evidence that was presented through eight witnesses, Reynolds simply has failed to plead how he was prejudiced by the failure to present more witnesses to give more examples of the same type of evidence. See Payne, 539 F.3d at 1317 ("The mere fact that the family members could have presented more thorough and graphic detail about the physical abuse Payne suffered and witnessed and his early substance abuse does not render counsel's performance ineffective.").

Second, even accepting his allegations as true, none of this additional evidence consisted of any compelling or substantial mitigating evidence. None of this additional evidence consists of the type of extreme abuse and deprivation found in cases such as Wiggins v. Smith, 539 U.S. 510 (2003), where the defendant suffered severe physical and sexual abuse at the hands of his alcoholic mother and various foster parents throughout his childhood.

Id. at 516. Even assuming his allegations as true, while this additional evidence would have only confirmed what was already presented at trial - that Reynolds had a difficult childhood – none of it constituted extreme evidence of neglect or abuse. See Windom v. Secretary, Dept. of Corrections, 578 F.3d 1227, 1249, 1250 (11th. Cir. 2009) (holding that evidence that defendant was physically abused by father and behaved erratically in the weeks leading up to the shootings, though evidence of a "dysfunctional" background, "was not so adverse or atrocious as to create a reasonable probability that it would 'have influenced the [trial judge]'s appraisal of [the defendant]'s moral culpability.'")(quoting Wiggins, 539 U.S. at 538).

Furthermore, additional evidence of Reynolds's childhood would not have been particularly compelling in this case where Reynolds was thirty years old at the time of the crime. For as several courts have held, "evidence concerning a middle aged murderer's childhood poverty, abuse and background would have been entitled to little, if any, mitigating weight." Miller v. State, 99 So. 3d 349, 410 (Ala. Crim. App. 2011); citing Callahan v. Campbell, 427 F.3d 897, 937–38 (11th Cir. 2005) (value of evidence regarding childhood abuse 'minimal' where defendant was thirty-five when he committed crime); Gilreath v. Head, 234 F.3d 547, 551 n. 10 (11th Cir. 2000) (petitioner not prejudiced when his attorney failed to present evidence concerning his abusive and difficult childhood where petitioner was forty years old when he committed the offense).

Third, even accepting his allegations as true, Reynolds has failed to plead a claim that, if true, would establish prejudice because there was no

"reasonable probability that, absent the errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Strickland, 466 U.S. at 695. Reynolds's case is not a case with weak aggravating circumstances. As noted numerous times above, this crime was brutal and horrific and the evidence established three strong aggravating circumstances. Reynolds fails to plead any facts that, if true, would show that the strength of these aggravating circumstances would have been different. And even assuming his allegations as true, there is no reasonable probability that the presentation of cumulative mitigation evidence, even when considered with the mitigation evidence presented at trial, would have altered the weighing process given the strong aggravating circumstances in this case. Therefore, because this claim is facially without merit and fails to state a material issue, it is dismissed. Ala. R. Crim. P. 32.7(d).

d. The claim that trial counsel failed to present evidence about the negative impact Reynolds's childhood had on all of his siblings.

In paragraphs 309-314, Reynolds alleges that his trial counsel should have presented evidence of his siblings' struggles with the law, their alcohol and drug addiction, and their relationship problems. Reynolds contends that this information could have countered the prosecution's line of questioning during the cross-examination of Christy Prosser that his other siblings had not been negatively affected by their childhood home.

This claim is summarily dismissed because it is insufficiently pleaded. Ala. R. Crim. P. 32.3; 32.6(b). First, Reynolds has failed to specifically plead

facts that, if true, would show deficient performance. The basis of Reynolds's allegation is that his trial counsel should have presented additional evidence to counter testimony elicited by the prosecution during cross-examination. Yet Reynolds fails to specifically plead how trial counsel was unreasonable for failing to anticipate specific questions the prosecutor asked during cross-examination.

Second, Reynolds has failed to specifically plead facts that, if true, would show prejudice. Although he contends his siblings had struggles with things such as drugs and alcohol, he fails to plead specific facts showing how these struggles were related to, or caused by, their childhood. Instead, Reynolds simply alleges these bare conclusions without any specific factual basis to support these allegations.

Reynolds also fails to specifically plead how this additional evidence would have been mitigating. The presentation of additional evidence that he and his siblings had struggles with the law, drugs, and alcohol can be a double-edged sword. See Washington, 95 So. 2d at 52 ("Evidence of a defendant's drug addiction to a jury is often a 'two-edged sword': while providing a mitigating factor, such details may alienate the jury and offer little reason to lessen the sentence.")(citing Pace v. McNeil, 556 F.3d 1211, 1224 (11th Cir. 2009)); McWhorter v. State, CR–09–1129, 2011 WL 4511231, at *46 (Ala. Crim. App. September 30, 2011)("Evidence of a difficult childhood has been characterized as a 'double-edged' sword.").

Reynolds fails to plead what additional mitigating circumstances could have been established or strengthened by this evidence given that the jury

could have interpreted such testimony as evidence that Reynolds and his family were simply lawless and brought much of their difficulty on themselves through their inappropriate behavior. Nor has Reynolds specifically pleaded how he was prejudiced by the failure to present this potentially dangerous evidence simply to respond to a relatively minor segment of the prosecutor's cross-examination of Christy Prosser. Therefore, because this claim is insufficiently pleaded, it is dismissed. Ala. R. Crim. P. 32.7(d).

e. The claim that trial counsel failed to develop or present a complete picture of Reynolds's good character, work ethic, and love for children.

In paragraphs 315-321, Reynolds contends that his trial counsel was ineffective for failing to present witnesses who were unrelated to him, such as friends and employers, who would have testified that he was a good worker, was a good father, that he had a difficult childhood, and that the crime was out of character for him.

This claim is summarily dismissed because it is facially meritless and fails to state a material issue. Ala. R. Crim. P. 32.7(d). Even assuming his allegations as true, Reynolds has failed to plead a claim that would show either deficient performance or prejudice.

Evan assuming as true what Reynolds's alleges these witnesses would have testified to during the penalty phase, this testimony would have been cumulative of what was presented during trial. As noted above, numerous witnesses testified about Reynolds's difficult childhood and about the fact that he was a good father. Thus, even assuming his allegations as true, Reynolds has failed to plead a facially meritorious claim. See Stallworth, 2013 WL

5966914, at *21 ("Given the extensive evidence counsel presented in mitigation, a large portion of which was cumulative to the mitigating evidence Stallworth pleaded should have been presented, this claim was properly dismissed because Stallworth failed to state a claim upon which relief could be granted.").

Although none of Reynolds's former employers testified during the penalty phase, Reynolds has failed to plead how generic testimony that he was a dependable and responsible worker would have been compelling or would have added any substantially different mitigating evidence. Reynolds fails to plead any specific facts relating to specific information about his employment that would have been compelling. Nor does he specifically plead how calling witnesses who were not related to him, but still had personal connections to him, would have added credibility to his family members' testimony. Accordingly, because this claim is facially without merit, it is dismissed. Ala. R. Crim. P. 32.7(d).

8. The claim that trial counsel was ineffective during the sentencing hearing.

In paragraphs 322-325, Reynolds alleges that his trial counsel was ineffective during the sentencing hearing by not presenting any additional witnesses.

This claim is dismissed because it is insufficiently pleaded. Ala. R. Crim. P. 32.3; 32.6(b). This claim is a bare allegation. Reynolds fails to specifically plead the names of witnesses who should have been called to testify during the sentencing hearing or the specific facts that would have been presented. Although he generally refers back to his claims of ineffective

assistance of counsel during the penalty phase, Reynolds completely fails to plead what additional mitigating evidence could have been presented or what specific facts could have been presented that would not have been cumulative of what was presented during trial. Nor does he plead what specific additional investigative steps trial counsel should have taken during the time between the penalty phase and the sentencing hearing. Thus, Reynolds has failed to plead a specific factual basis to show deficient performance. Moreover, Reynolds has failed to specifically plead facts that, if true, would show "the sentencer ...would have concluded that the balance of aggravating and mitigating circumstances did not warrant death" had additional evidence been investigated and presented during the sentencing hearing. Strickland, 466 U.S. at 695. Therefore, because this claim is insufficiently pleaded, it is dismissed. Ala. R. Crim. P. 32.7(d).

9. The claim that trial counsel was ineffective during the motion for new trial.

In paragraph 326, Reynolds alleges his trial counsel was ineffective during the motion for new trial.

This claim is insufficiently pleaded and is dismissed. Ala. R. Crim. P. 32.3; 32.6(b). Reynolds's claim is a bare allegation without any supporting facts. Reynolds completely fails to plead any specific facts concerning what alternative, meritorious arguments his counsel should have made during the motion for new trial. Nor does he plead any facts that, if true, would show how he was prejudiced by his counsel's performance during the motion for new trial. Therefore, because this claim is insufficiently pleaded, it is dismissed. Ala. R. Crim. P. 32.7(d).

10. The claim that trial counsel's individual and cumulative errors rendered his conviction and sentence unreliable.

This claim is dismissed because it fails to state a material issue. Ala. R. Crim. P. 32.7(d). As the Alabama Court of Criminal Appeals has held "[o]ther states and federal courts are not in agreement as to whether the 'cumulative effect' analysis applies to Strickland claims; this Court has also stated: 'We can find no case where Alabama appellate courts have applied the cumulative-effect analysis to claims of ineffective assistance of counsel.'" Mashburn v. State, CR–11–0321, 2013 WL 3589300, at *16 (Ala. Crim. App. July 12, 2013)(citations omitted). Therefore, because this claim is facially meritless, it is dismissed. Ala. R. Crim. P. 32.7(d).

Alternatively, this claim is summarily dismissed because it is insufficiently pleaded. Ala. R. Crim. P. 32.6(b). Reynolds utterly fails to plead any specific facts in support of this claim. Reynolds has failed to plead any facts that, if true, would establish deficient performance or prejudice under Strickland. Notably, Reynolds has failed to plead a sufficient factual basis for a single claim of ineffective assistance of counsel. See Mashburn, 2013 WL 3589300, at *16 ("even when a cumulative-effect analysis is considered, only claims that are properly pleaded and not otherwise due to be summarily dismissed are considered in that analysis."). Thus, because this claim is also insufficiently pleaded, it is dismissed. Ala. R. Crim. P. 32.7(d).

B. Reynolds's claim that the state withheld favorable evidence from the defense.

In paragraphs 331-350, Reynolds contends that the State withheld the following evidence: 1) that the prosecution offered Marcie West a deal for her

testimony; 2) that no blood was found on the interior of Sandra Roberts's car and that another car had been tested, and 3) interview notes from the statements of Chad Martin and John Langley. This Court dismisses this claim for several reasons.

This claim is procedurally barred. In regard to his claim concerning Marcie West, this claim is procedurally barred because it could have been, but was not, raised at trial and on appeal. Ala. R. Crim. P. 32.2(a)(3) and (5). As Reynolds admits in his petition, this claim is based on, and arises from, testimony that was elicited from West during trial. There is no reason this claim could not have been raised at trial or on appeal. Further, in regard to the claims concerning the testing of blood evidence and the interview notes, these claims are procedurally barred because they were raised and addressed on appeal. Ala. R. Crim. P. 32.2(a)(4); see Reynolds, 114 So. 3d at 111-115.

Alternatively, even if these claims were not procedurally barred, they are dismissed because they are insufficiently pleaded and fail to state a material issue. Ala. R. Crim. P. 32.6(b); 32.7(d). For example, Reynolds has failed to plead any specific factual basis, other than pure speculation, that, if true, would establish that a deal actually existed between the prosecution and Marcie West or that West's testimony was false. Moreover, the Court of Criminal Appeals reviewed Reynolds's claims concerning the investigation of blood evidence and the notes of the Martin and Langley interviews and held that there was no Brady violation. Reynolds, 114 So. 3d at 111-115. Therefore, this claim is summarily dismissed. Ala. R. Crim. P.

32.7(d).

CONCLUSION

This Court has reviewed each of Petitioner Reynolds's claims and found that they are all due to be dismissed. It is, hereby, ORDERED, ADJUDGED, and DECREED that Reynolds's amended Rule 32 petition is hereby DISMISSED. It is further ORDERED that Reynolds shall have forty-two days from the filing of this Order in the Etowah County Circuit Clerk's Office to file his notice of appeal

[1] References to the record are as follows: "(R. _)" shall refer to the court reporter's trial transcript; "(C. _)" shall refer to the circuit clerk's record on direct appeal; "(Supp. C. _)" shall refer to the first supplemental record completed on May 16, 2008' and "(Supp. C. 2nd _)" shall refer to the second supplemental record completed on October 30, 2008.

DONE this 20th day of August, 2014.

/s/ W. ALLEN MILLICAN
CIRCUIT JUDGE

114 So.3d 61
Court of Criminal Appeals of Alabama.

Michael Wayne REYNOLDS
v.
STATE of Alabama.

CR–07–0443.
|
Oct. 1, 2010.
|
Rehearing Denied Dec. 10, 2010.
|
Certiorari Denied Dec. 14, 2012
Alabama Supreme Court 1100326.

Synopsis
Background: Defendant was convicted in the Circuit Court, Etowah County, Nos. CC–05–257.01, CC–05–257.02, CC–05–257.03, CC–05–257.04, and CC–05–257.05, William A. Millican, J., of five counts of capital murder in connection with stabbing deaths and robbery of family, and defendant was sentenced to death. Defendant appealed.

Holdings: The Court of Criminal Appeals, Kellum, J., held that:

[1] trial court's requiring defendant to wear a stun belt throughout his trial was not plain error;

[2] alleged cumulative errors of trial court did not deny defendant a fair trial;

[3] no inference of purposeful discrimination by the State under *Batson* existed;

[4] police report was not sufficiently authenticated to be admitted through testimony of police officer;

[5] defendant was not prejudiced by exclusion of police report; and

[6] error in trial court's failure to address existence or nonexistence of each aggravating circumstance and each statutory mitigating factor in sentencing did not rise to level of plain error.

Affirmed.

West Headnotes (100)

[1] **Criminal Law**
Course and conduct of trial in general

Trial court's requiring defendant to wear a stun belt throughout his trial was not plain error in capital-murder prosecution regarding stabbing deaths and robbery of family, where there was no evidence that belt interfered with defendant's right to confer with his counsel or that the jury was even aware that defendant was wearing a stun belt. Rules App.Proc., Rule 45A.

2 Cases that cite this headnote

[2] **Criminal Law**
Summoning and impaneling jury

Trial court's excusal of approximately 150 summoned jurors outside the presence of the parties was not plain error in capital-murder prosecution; trial court had specific statutory right to excuse the jurors outside the presence of parties and their counsel, and defendant did not present any specific instances in which the trial court exceeded its discretion in excusing the potential jurors. Code 1975, § 12–16–74; Rules App.Proc., Rule 45A.

Cases that cite this headnote

[3] **Criminal Law**
Summoning and impaneling jury

Trial court's informing jurors of the reasons they might be excused from service was not plain error in capital-murder prosecution, where 21 of 48 jurors who sought to be excused for reasons mentioned by trial court were in fact excused.

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Code 1975, § 12–16–63; Rules App.Proc., Rule 45A.

Cases that cite this headnote

[4] **Criminal Law**
Competency of jurors and challenges

Trial court's granting of State's for-cause challenges to allow removal of 10 veniremembers was not plain error in capital-murder prosecution, where the 10 veniremembers indicated during voir dire that they were opposed to the death penalty. Rules App.Proc., Rule 45A.

Cases that cite this headnote

[5] **Criminal Law**
Authority or discretion of court to permit separation

Trial court acted within its discretion in refusing defendant's request to sequester jury in capital-murder prosecution arising out of stabbing deaths and robbery of family; trial court provided adequate instructions to jury, and defendant did not specify what prejudicial matters the jury might have been exposed to, nor how defendant was prejudiced by refusal of request.

Cases that cite this headnote

[6] **Criminal Law**
Grounds in general

Alleged cumulative errors of trial court did not deny defendant a right to a fair trial in capital-murder prosecution; no error, plain or otherwise, was found with regard to the alleged accumulated errors, and cumulative effect of any nonreversible errors did not affect defendant's substantial rights at trial. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[7] **Criminal Law**
Competency of jurors and challenges

No inference of purposeful discrimination by the State, under *Batson*, existed, and thus trial court did not commit plain error in concluding that no violation of *Batson* occurred in capital-murder prosecution, even if State used 9 of its peremptory 14 strikes to remove African-American veniremembers; numbers alone were not sufficient to establish a prima facie case of discrimination, and defendant did not present further grounds in support of discrimination allegation.

1 Cases that cite this headnote

[8] **Criminal Law**
Competency of jurors and challenges

For plain error to exist in the *Batson* context, the record must raise an inference that the state or the defendant engaged in purposeful discrimination in the exercise of its peremptory challenges.

Cases that cite this headnote

[9] **Criminal Law**
Particular Cases
Criminal Law
Time for motion

Trial court acted within its discretion in denying defendant's motion to remove his lead counsel in capital-murder prosecution, where defendant had many opportunities to move the court for substitution of lead counsel but did not do so until after the trial began, and defendant did not establish that any conflict or lack of

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communication between defendant and counsel would have prevented the preparation of an adequate defense. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[10] **Criminal Law**
Indigence

An indigent defendant who cannot afford to retain an attorney has an absolute right to have counsel appointed by the court in all criminal proceedings in which representation by counsel is constitutionally required. U.S.C.A. Const.Amend. 5; Const. Art. 1, § 6; Code 1975, § 15–12–21; Rules Crim.Proc., Rule 6.1.

Cases that cite this headnote

[11] **Criminal Law**
Indigence
Criminal Law
Choice of appointed counsel

While an indigent defendant may have the right to be represented by counsel, he has no absolute right to be represented by any particular counsel or by counsel of his choice. U.S.C.A. Const.Amends. 5, 6.

Cases that cite this headnote

[12] **Criminal Law**
Choice of appointed counsel

The Sixth Amendment does not guarantee a defendant a meaningful relationship, rapport, or even confidence in court-appointed counsel. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[13] **Criminal Law**
Discretion of court

The decision whether to remove an appointed counsel and appoint another counsel for defendant is within the sound discretion of the trial court.

Cases that cite this headnote

[14] **Criminal Law**
Choice of Counsel

The right to choose counsel may not be subverted to obstruct the orderly procedure in the court or to interfere with the fair administration of justice. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[15] **Criminal Law**
Conflict of Interest
Criminal Law
Discharge by Accused

In order to prevail on a motion for substitution of counsel, the accused must show a demonstrated conflict of interest or the existence of an irreconcilable conflict so great that it has resulted in a total lack of communication that will prevent the preparation of an adequate defense. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[16] **Criminal Law**
Standard of Effective Assistance in General
Criminal Law
Plea

A defendant is entitled to counsel capable of

rendering competent, meaningful assistance in the preparation and trial of the pending charges, including appropriate evaluation and advice with reference to a plea of guilty. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[17] **Criminal Law**
Adequacy of Representation

A defendant is not entitled to an attorney who agrees with the defendant's personal view of the prevailing law or the equities of the prosecutor's case. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[18] **Criminal Law**
Adequacy of Representation
Criminal Law
Strategy and tactics in general

A defendant is entitled to an attorney who will consider the defendant's views and seek to accommodate all reasonable requests with respect to trial preparation and trial tactics. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[19] **Criminal Law**
Adequacy of Representation

A defendant is entitled to an appointment of an attorney with whom he can communicate reasonably, but has no right to an attorney who will docilely do as he is told. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[20] **Criminal Law**
Adequacy of Representation

Every defendant is entitled to the assistance of counsel dedicated to the proposition, and capable of assuring that, the prosecution's case shall be presented in conformity with the Constitution, rules of evidence, and all other controlling rules and practices; no defendant has a right to more. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[21] **Criminal Law**
Admission of evidence

Any error in admission of deposition testimony of forensic pathologist that was given before State had provided defense with information that murder victim may have been stabbed with two different knives was invited error in capital-murder prosecution arising out of stabbing of family, where trial court offered, at State's expense, to allow defendant to supplement the deposition and subpoena pathologist for trial in order to address the new information, but defendant did not pursue either option offered by the court.

Cases that cite this headnote

[22] **Criminal Law**
Error committed or invited by party complaining in general

A party cannot assume inconsistent positions in the trial and appellate courts and, as a general rule, will not be permitted to allege an error in the trial court proceedings which was invited by him or was a natural consequence of his own actions.

Cases that cite this headnote

[23] **Criminal Law**
Error committed or invited by party complaining in general

An invited error is waived, unless it rises to the level of plain error.

Cases that cite this headnote

[24] **Criminal Law**
Opinion evidence

Admission of deposition testimony of forensic pathologist, which was given before State had provided defense with discovery information that murder victim may have been stabbed with two different knives, was not prejudicial to defendant, and thus any error in testimony's admission was not plain error in capital-murder prosecution arising out of stabbing death of family, where, if pathologist had agreed that two different knives were used to stab the victims, such testimony might have strengthened State's case.

Cases that cite this headnote

[25] **Criminal Law**
Conduct Not Amounting to Crime, or Evidence Merely Suggestive of Crime

Medical examiner's deposition testimony did not amount to improper evidence of sexual assault and rape in capital-murder prosecution in which neither of those offenses was charged in the indictment, where examiner simply testified to the standard tests that are performed in an autopsy and neither the prosecutor, the examiner, nor any of the physical evidence suggested that the murder victims were raped or sexually assaulted.

Cases that cite this headnote

[26] **Criminal Law**
Other Misconduct as Evidence of Offense Charged in General

Under the general exclusionary rule, evidence of an offense other than the offense charged in the indictment is not admissible at trial on a specific charged offense.

Cases that cite this headnote

[27] **Witnesses**
Necessity of Laying Foundation
Witnesses
Admission or denial by witness of making of inconsistent statements

When a witness, on cross-examination, denies having made a statement out of court which is inconsistent with the witness's testimony on direct examination, the only available move for the impeaching party is to bring on extrinsic proof—either in the form of writing, tape recording or impeaching witness who can testify as to the prior inconsistent statement; before such extrinsic evidence may be elicited, however, it is the general rule that the impeaching party must lay a proper predicate by asking the witness being impeached whether such a statement was made, specifying with reasonable certainty the time, the place, the person to whom such supposed statement was made, and the substance of the statement. Rules of Evid., Rule 613.

Cases that cite this headnote

[28] **Witnesses**
Cross-examination as to inconsistent statements

Defendant was not improperly restricted from giving witness opportunity to admit or deny prior statement in which witness allegedly confessed to police officer that he committed

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murders with which defendant was charged in capital-murder prosecution, where defendant was allowed to ask witness whether he remembered making a statement to the police officer and witness responded that, although he recalled making a statement, he could not recall to whom he made the statement. Rules of Evid., Rule 613.

Cases that cite this headnote

[29] **Criminal Law**
Public records in general

Police report allegedly containing witness's confession to murders charged against defendant was not sufficiently authenticated to be admitted through testimony of police officer in capital-murder prosecution, even though police officer admitted that he signed report, where police officer testified that he did not prepare the report and that the report did not accurately reflect his recollection of the conversation with witness, and defendant did not secure presence of author of report to testify at trial to authenticate report. Code 1975, § 12–21–283; Rules of Evid., Rule 104(a).

Cases that cite this headnote

[30] **Criminal Law**
Public or Official Acts, Proceedings, Records, and Certificates

Police report allegedly containing witness's confession to murders charged against defendant did not have sufficient indicia of reliability to be admissible as hearsay substantive evidence of witness's guilt in capital-murder prosecution, where confession was subsequently determined to be unreliable, report was prepared by an officer who did not testify, and report was signed by officer's supervisor, who neither heard the confession nor would attest to the accuracy of the statements in the report.

Cases that cite this headnote

[31] **Criminal Law**
Curing error by other evidence of same fact
Criminal Law
Prior or subsequent admission of same evidence

Defendant was not prejudiced by exclusion of police report allegedly containing witness's confession to murders charged against defendant in capital-murder prosecution at which witness testified and denied that he committed murders, where trial court emphasized that defendant could question police officer regarding inconsistencies between witness's trial testimony and what he heard witness say during interrogation but defendant declined to call police officer as witness, and defendant did call another police officer to testify to inculpatory statements that witness made to her.

Cases that cite this headnote

[32] **Criminal Law**
Presentation of evidence

Prosecutor's introduction of prior statement of witness to police, regarding the time that another witness returned to testifying witness's house after discovering that victims had been murdered, was not plain error in capital-murder prosecution, where witness testified on direct and cross-examination that other witness came to house around 8:00 or 8:30 in the morning, in contrast to witness's prior statement to police giving the relevant time as 10:30 in the morning. Rules of Evid., Rule 607; Rules App.Proc., Rule 45A.

Cases that cite this headnote

[33] **Criminal Law**
Presentation of evidence

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Prosecutor's direct examination questioning of witnesses as to their initial status, and later exclusion, as suspects in crimes with which defendant was charged was not improper bolstering of witnesses' testimony, and thus was not plain error in capital-murder prosecution; prosecutor was attempting to anticipate and diffuse the subject of the witnesses' questioning as suspects and one witness's purported confession. Rules App.Proc., Rule 45A.

Cases that cite this headnote

[34] **Criminal Law**
Presentation of evidence

Any error in State's eliciting of statements from witnesses that they either took or offered to take a polygraph test was not plain error in capital-murder prosecution arising out of stabbing death of family; witnesses each testified without objection that they had told the truth, and each witness was also thoroughly cross-examined by the defendant regarding possible bias. Rules App.Proc., Rule 45A.

Cases that cite this headnote

[35] **Criminal Law**
Presentation of evidence

Any prosecutorial misconduct in prosecutor's question to witness, asking if he could sit in witness stand and look his mother in the eye and tell her whether he had anything to do with killing victim, following which witness professed his innocence to his mother, who was sitting in courtroom, was not plain error in capital-murder prosecution; prosecutor's question was essentially rhetorical and at most called for a "yes" or "no" answer rather than a direct statement to witness's mother. Rules App.Proc., Rule 45A.

Cases that cite this headnote

[36] **Criminal Law**
Evidence as to information acted on

Statements of State's witnesses as to what another witness told them, tending to exonerate that witness's alleged confession to crimes with which defendant was charged, were not hearsay, and thus admission of statements was not plain error in capital-murder prosecution; each statement was elicited to explain the declarant's subsequent conduct rather than to prove the truth of the matter asserted. Rules of Evid., Rule 801(c).

Cases that cite this headnote

[37] **Criminal Law**
Necessity of ruling on objection or motion

In the absence of a ruling, a request for a ruling, or an objection to the court's failure to rule, there is nothing preserved for appellate review.

1 Cases that cite this headnote

[38] **Criminal Law**
Witnesses

Trial court's refusal to allow defendant to question witness regarding threatening note left on murder victim's door and supposed report naming witness as person who may have left the note was not plain error in capital-murder prosecution in which defendant desired to use the note to establish witness's motive for the murder, where defendant was allowed wide latitude in cross-examining witness regarding his prior conflicts with victim, defendant offered no proof that witness had in fact left the note, and defendant did not establish that if such a report existed, it would meet admissibility requirements.

Cases that cite this headnote

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[39] **Witnesses**
Competency of Impeaching Evidence

Documents purporting to establish that defendant's partner signed loan application as defendant's spouse and transcript from pretrial hearing to determine whether partner was defendant's common-law wife for purposes of marital-communications privilege were not admissible in capital-murder trial to show partner's alleged bias against defendant, though defendant claimed that partner lied during pretrial hearing regarding the capacity in which she signed loan application because she was biased against defendant and wanted to ensure that her trial testimony would not be excluded under marital-communications privilege, where partner merely testified that she did not remember in what capacity she had signed the application. Rules of Evid., Rule 616.

Cases that cite this headnote

[40] **Criminal Law**
Reports, memoranda or notes

State was not required to produce investigators' interview notes with witnesses who testified in defendant's capital-murder prosecution, where notes did not appear to contain either any conflicting information that could have been useful for impeachment purposes or any exculpatory information. Rules Crim.Proc., Rule 16.1(f).

Cases that cite this headnote

[41] **Constitutional Law**
Evidence

A *Brady* due-process violation occurs where: (1) the prosecution suppresses evidence; (2) the evidence is favorable to the defendant and (3) material to the issues at trial; 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, and a reasonable probability is a probability sufficient to undermine confidence in the outcome. U.S.C.A. Const.Amend. 14.

1 Cases that cite this headnote

[42] **Constitutional Law**
Evidence
Constitutional Law
Witnesses
Criminal Law
Materiality and probable effect of information in general

The same standard of materiality and due-process requirements apply whether evidence wrongly undisclosed by prosecution is exculpatory or for impeachment purposes. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[43] **Constitutional Law**
Witnesses

When the reliability of a given witness may well be determinative of guilt or innocence, prosecutorial nondisclosure of evidence affecting credibility falls within the general rule defining standard of materiality required to show a due-process violation. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[44] **Constitutional Law**
Evidence
Constitutional Law
Witnesses

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Due process requires the prosecution to disclose material evidence, upon request by the defense, when that evidence would tend to exculpate the accused or to impeach the veracity of a critical state's witness. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[45] **Criminal Law**
Discovery and disclosure; transcripts of prior proceedings

Even if defendant was entitled to forensic scientist's field notes regarding blood test on interior of vehicle allegedly used on night of murders, defendant was not prejudiced by lack of access to the notes for purposes of capital-murder prosecution, where witness testified to same effect as forensic scientist's conclusion that no blood was detected in vehicle, and defendant used the forensic scientist's conclusion that no blood was detected in the vehicle to defendant's advantage during closing argument.

Cases that cite this headnote

[46] **Criminal Law**
Discovery and disclosure; transcripts of prior proceedings

Prejudice caused by the late disclosure is a prerequisite for a reversal on issue of evidence withheld by prosecution.

Cases that cite this headnote

[47] **Criminal Law**
Chain of custody

The purpose for requiring that the chain of custody be shown is to establish to a reasonable probability that there has been no tampering with the evidence.

3 Cases that cite this headnote

[48] **Criminal Law**
Chain of custody

Chain-of-custody evidence need not negate the remotest possibility of substitution, alteration, or tampering of evidence, but instead must prove to a reasonable probability that the item is the same as it was at the beginning of the chain.

2 Cases that cite this headnote

[49] **Criminal Law**
Foundation or authentication in general

State properly authenticated by proof of an adequate chain of custody DNA test results and footprint analysis, as used in capital-murder prosecution arising out of stabbing death of family, where there was testimony regarding how the various test samples were collected, sealed, and maintained.

Cases that cite this headnote

[50] **Criminal Law**
Accomplices Within Rules of Evidence

Defendant's girlfriend was not an accomplice in murder, and thus girlfriend's testimony was not required to be corroborated when testifying against defendant in capital-murder prosecution arising out of robbery and murder of family, even though girlfriend was apparently present at murder scene with defendant and may have assisted defendant, where girlfriend testified that she engaged in such actions because she was in fear for her life, she did not aid or abet defendant in robbery, and girlfriend testified that defendant stabbed her in the arm when she tried

to intervene.

Cases that cite this headnote

[51] **Criminal Law**
Sufficiency of evidence

Even if defendant's girlfriend was an accomplice to murder and robbery of family, trial court's finding that girlfriend's testimony regarding defendant's commission of robbery was sufficiently corroborated was not plain error in capital-murder prosecution, even though girlfriend was apparently present at murder scene with defendant and may have assisted defendant, where there was other evidence to connect defendant to stolen items and to corroborate girlfriend's testimony that defendant murdered the victims during a robbery. Rules App.Proc., Rule 45A.

Cases that cite this headnote

[52] **Criminal Law**
Objections and disposition thereof

Whether there has been a communication with a juror and whether it has caused prejudice are questions of fact to be determined by the trial court in the exercise of sound discretion.

Cases that cite this headnote

[53] **Criminal Law**
Issues related to jury trial

Extent of circuit court's inquiry into alleged juror misconduct involving purported improper contact between jurors and victims' family members was not so insufficient as to constitute plain error in capital-murder prosecution, where circuit court conducted a hearing to investigate allegations, 2 jurors at issue were present at hearing as well as the other 10 jurors, circuit court individually questioned the 2 jurors at the hearing, defense counsel was able to question the jurors, court individually instructed remaining jurors to ensure that court instructions were followed, and all jurors indicated they did not engage in any improper contact with victims' family. Rules App.Proc., Rule 45A.

Cases that cite this headnote

[54] **Criminal Law**
Objections and disposition thereof

Extent of circuit court's inquiry into alleged juror misconduct involving purported wink by police-officer witness at jury member was not error in capital-murder prosecution, where circuit court conducted a hearing to investigate allegation, juror at issue testified that she did not know police officer and that police officer did not wink at her, and evidence suggested that police officer might have winked at someone else behind juror.

Cases that cite this headnote

[55] **Criminal Law**
Statements as to Facts and Arguments

The prosecutor's questions and comments cannot be considered in the abstract but must be considered in the context in which they occurred.

Cases that cite this headnote

[56] **Criminal Law**
Particular statements, arguments, and comments

Although defendant's failure to object at trial to prosecutor's alleged improper comment on defendant's post-*Miranda* silence does not preclude appellate court from reviewing the

issue, it will, nevertheless, weigh against any claim of prejudice that defendant makes on appeal.

Cases that cite this headnote

[57] **Constitutional Law**
Silence
Criminal Law
Cross-examination
Criminal Law
Silence during or subsequent to arrest

Prosecutor's questioning of defendant on apparent statements to police was not improper comment on defendant's post-*Miranda* silence in capital-murder prosecution and could be used to impeach defendant without a due-process violation, even though no statement from defendant was admitted into evidence, where there was direct evidence from defendant that he made two statements and that those statements were inconsistent with defendant's trial testimony, and introduction into evidence of the actual statements would have weighed against defendant. U.S.C.A. Const.Amends. 5, 14.

Cases that cite this headnote

[58] **Witnesses**
Cross-Examination to Discredit Witness or Disparage Testimony in General

Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Rules of Evid., Rule 611(b).

Cases that cite this headnote

[59] **Witnesses**
Cross-Examination to Discredit Witness or Disparage Testimony in General

Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness's story to test the witness's perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, that is, discredit, the witness. Rules of Evid., Rule 611(b).

Cases that cite this headnote

[60] **Criminal Law**
Cross-examination
Witnesses
Control and discretion of court

The latitude and extent of cross-examination, of necessity, is a matter within the sound discretion of the trial court, and, in the absence of prejudicial abuse, it is not reviewable on appeal.

1 Cases that cite this headnote

[61] **Witnesses**
Cross-Examination to Show Interest or Bias

Where a witness's testimony is of major importance and is strongly adverse to the party against whom he has testified, the usual discretion of a trial court has a narrow range, and it generally is required to allow proof of any important fact indicating bias of the witness.

1 Cases that cite this headnote

[62] **Witnesses**
Interest as Ground of Impeachment in General

In the discharge of its fact-finding functions, the jury's search for the truth includes the paramount right to consider a witness's motivation, and any evidence testing his interest,

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bias, or prejudice so as to illustrate or impeach the accuracy of his testimony is a competent, material, and relevant subject of cross-examination, and the jury's right to be given such evidence is, of itself, part of the fact-finding process.

Cases that cite this headnote

[63] **Witnesses**
Testimony of accused in criminal prosecution

When the accused takes the stand to testify in his own behalf, he does so in a dual capacity: (1) as the accused and (2) as a witness.

Cases that cite this headnote

[64] **Witnesses**
Right to impeach witness in general

In his capacity as a witness, a defendant's credibility may be impeached in the same way or ways in which the credibility of any other witness may be impeached. Rules of Evid., Rule 611(b).

Cases that cite this headnote

[65] **Witnesses**
Right to impeach
Witnesses
Former Accusation or Conviction of Crime
Witnesses
Accused in criminal prosecution

A defendant, who testifies for himself as a witness, may be impeached in the same manner as other witnesses, by showing that he has been convicted of a crime involving moral turpitude, or that he has made contradictory statements, or that he is a person of bad character. Rules of Evid., Rule 611(b).

Cases that cite this headnote

[66] **Constitutional Law**
Prosecutor
Constitutional Law
Silence
Criminal Law
Cross-examination
Criminal Law
Silence during or subsequent to arrest

Prosecutor's line of questioning of defendant on cross-examination and related statements in closing argument regarding why defendant did not come forward with his exculpatory story at any time before trial was not an improper use of post-*Miranda* silence or a due-process violation in capital-murder prosecution; defendant admitted on cross-examination that after his arrest he told police that he had no knowledge of the crimes but that he wished he had told the truth when he first talked to police, and defendant admitted that he regretted not coming forward much earlier with his exculpatory version of the facts. U.S.C.A. Const.Amends. 5, 14.

Cases that cite this headnote

[67] **Criminal Law**
Particular statements, arguments, and comments

Prosecutor's closing-argument comments that evidence was clear and reasonably undisputed and that case was clearly a case of capital murder were not plain error in prosecution arising out of stabbing death of family; prosecutor could express opinion that defendant was guilty when the opinion was based solely on the evidence. Rules App.Proc., Rule 45A.

Cases that cite this headnote

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[68] **Criminal Law**
Particular statements, arguments, and comments

Prosecutor's rebuttal closing-argument comment that "anybody with any kind of sense would know that you're not going to buy that cock and bull story the guy got on the witness stand and tried to sell to you" was not plain error in capital-murder prosecution; prosecutor was not vouching for strength of State's case but was merely replying to defense counsel's closing argument that the evidence established only that defendant was at the scene of the crimes to help cover up his girlfriend's presence there. Rules App.Proc., Rule 45A.

Cases that cite this headnote

[69] **Criminal Law**
Statements as to Facts and Arguments

The prosecution is entitled to spotlight the defense's strategy, and a prosecutor's remarks during closing argument pointing out the flaws in the defense's theory of the case do not constitute improper argument.

Cases that cite this headnote

[70] **Criminal Law**
Inferences from and Effect of Evidence

During closing argument, the prosecutor, as well as defense counsel, has a right to present his impressions from the evidence, if reasonable, and may argue every legitimate inference.

Cases that cite this headnote

[71] **Criminal Law**
Particular statements, arguments, and comments

Prosecutor's closing-argument comment that "[t]he only appropriate verdict is guilty of capital murder. Not anything less. If you are not going to convict him of capital murder, just let him go" was not plain error in prosecution arising out of stabbing death of family; prosecutor's exhortation was based upon evidence presented during the trial. Rules App.Proc., Rule 45A.

Cases that cite this headnote

[72] **Criminal Law**
Comments to jurors as to duties and obligations

Generally, the prosecutor is in error by exhorting the jury to do what's right, or to do its job, if that exhortation implies that, in order to do so, it can only reach a certain verdict, regardless of its duty to weigh the evidence and follow the court's instructions on the law.

Cases that cite this headnote

[73] **Criminal Law**
Inferences from and Effect of Evidence

It is not improper for a prosecutor to argue to the jury that a defendant is guilty or to urge the jury to find the defendant guilty of the crime charged so long as that argument is based on the evidence; in fact, that is exactly what a prosecutor is supposed to do during closing argument.

Cases that cite this headnote

[74] **Criminal Law**
Particular statements, arguments, and comments

Prosecutor's description of reasonable doubt to the prospective jurors during voir dire as "a

doubt to which you have a reason, is a fair doubt, a substantial doubt" was not plain error; use of terms "substantial doubt," "fair doubt," and "doubt for which you have a reason" to explain the concept of reasonable doubt was permissible.

Cases that cite this headnote

[75] **Constitutional Law**
Death penalty cases
Criminal Law
Particular statements, arguments, and comments

Any misstatements made by prosecutor during voir dire at guilt phase regarding the weighing of aggravating and mitigating circumstances did not result in due process violation or plain error in capital-murder prosecution, where circuit court charged jury at penalty phase that what attorneys said was not evidence, and circuit court correctly charged jury on weighing of circumstances. U.S.C.A. Const.Amend. 14; Rules App.Proc., Rule 45A.

1 Cases that cite this headnote

[76] **Criminal Law**
Custody and conduct of jury

Jurors are presumed to follow the trial court's instructions.

Cases that cite this headnote

[77] **Constitutional Law**
Prosecutor
Criminal Law
Particular statements, arguments, and comments

Any misstatements made by prosecutor during closing argument regarding the law on voluntary intoxication as a defense did not result in due-process violation or plain error at guilt phase in capital-murder prosecution, where circuit court charged jury at penalty phase that what attorneys said was not evidence, and circuit court correctly charged jury on voluntary intoxication. U.S.C.A. Const.Amend. 14; Rules App.Proc., Rule 45A.

1 Cases that cite this headnote

[78] **Constitutional Law**
Proceedings
Sentencing and Punishment
Arguments and conduct of counsel

Any error in prosecutor's alleged insinuation, during cross-examination of defense witness in penalty phase of capital-murder trial, that defendant's upbringing was not mitigating because it did not directly cause him to commit crime was not a due-process violation; defendant objected before question was answered, objection was sustained, and court correctly charged jury on concept of aggravating and mitigating circumstances. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[79] **Criminal Law**
Summoning and impaneling jury

Prosecutor's statement to jury during voir dire that trial would require two phases did not improperly destroy defendant's presumption of innocence in capital-murder prosecution and was not plain error; statement simply explained bifurcated nature of state's capital-murder proceedings and was relevant to questions regarding veniremembers' beliefs about death penalty. Rules App.Proc., Rule 45A.

1 Cases that cite this headnote

[80] **Criminal Law**
Particular statements, arguments, and comments

Prosecutor's comments in opening argument and during voir dire were not plain error in capital-murder prosecution, despite contention that comments improperly implied that prosecution was representing victims' families; prosecutor was simply explaining to veniremembers the importance of the trial proceedings to the defendant, the victims' family, and the State. Rules App.Proc., Rule 45A.

1 Cases that cite this headnote

[81] **Criminal Law**
Particular statements, arguments, and comments

Prosecutor's references in voir dire and closing argument regarding how old child murder victim would have been at the time of the trial were not plain error in capital-murder prosecution; fact that victim would have been a teenager at time of trial was an obvious fact to jury. Rules App.Proc., Rule 45A.

Cases that cite this headnote

[82] **Criminal Law**
Evidence calculated to create prejudice against or sympathy for accused
Criminal Law
Particular Objects
Criminal Law
Purpose of admission
Criminal Law
Photographs arousing passion or prejudice; gruesomeness
Criminal Law
Special types of photographs; enlargements, motion and sound pictures, X-rays

Admission of autopsy photographs of murder victims, video of crime scene, and bloody sheet during guilt phase of capital-murder trial was not improper admission of victim-impact evidence; evidence was relevant to depict the nature and extent of injuries victims suffered and was neither unduly prejudicial nor inflammatory.

Cases that cite this headnote

[83] **Criminal Law**
Construction and Effect of Charge as a Whole
Criminal Law
Instructions

When reviewing a trial court's jury instructions, appellate court must view them as a whole, not in bits and pieces, and as a reasonable juror would have interpreted them.

1 Cases that cite this headnote

[84] **Criminal Law**
Form and Language in General

A trial court has broad discretion when formulating its jury instructions.

1 Cases that cite this headnote

[85] **Criminal Law**
Elements of offense and defenses

Jury instruction given in guilt phase of capital murder trial that jury did not have to go through each and every element for every count because the results would be the same for indictment counts two, three, and five was not plain error in murder and robbery prosecution arising out of stabbing deaths of family; in context of entire charge, circuit court was simply explaining that the robbery component of charge was the same for each count and that the difference between the three counts was the victim of the murder

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rather than instructing the jury that the State did not have to prove the robbery component in the above counts. Rules App.Proc., Rule 45A.

Cases that cite this headnote

[86] **Criminal Law**
Reasonable doubt
Criminal Law
Evidence and witnesses

Circuit court's instruction to jury during guilt phase of capital-murder prosecution that reasonable doubt was "doubt to which you can assign a reason" was not plain error; taken as a whole, instructions properly conveyed concept of reasonable doubt and did not lessen State's burden of proof. Rules App.Proc., Rule 45A.

1 Cases that cite this headnote

[87] **Criminal Law**
Interest or bias

Circuit court's jury instructions during guilt phase, which discussed defendant's interest in verdict, did not improperly invade the province of the jury in capital-murder prosecution, where instructions did not mandate that jury consider defendant's interest in outcome of case.

2 Cases that cite this headnote

[88] **Criminal Law**
Reasonable or rational basis

A defendant is entitled to a jury charge on a lesser-included offense only if there is any reasonable theory from the evidence to support the charge.

Cases that cite this headnote

[89] **Criminal Law**
Effect of defendant's objection or defense inconsistent with lesser charge
Homicide
Manslaughter
Homicide
Intoxication

Jury instructions on intoxication and manslaughter are not required in a murder prosecution when they would be inconsistent with the defense strategy.

Cases that cite this headnote

[90] **Criminal Law**
Failure to instruct in general

Evidence did not support jury instruction for manslaughter as lesser-included offense of capital murder, and thus circuit court's failure to give such instruction was not plain error in prosecution arising out of stabbing deaths and robbery of family, where defendant's defense was not related to manslaughter and there was simply no evidence indicating that defendant recklessly caused the death of the victims or killed them in a sudden heat of passion. Code 1975, § 13A–6–3(a)(1, 2); Rules App.Proc., Rule 45A.

Cases that cite this headnote

[91] **Sentencing and Punishment**
Presentation and reservation in lower court of grounds of review

Jury instruction during penalty phase of capital-murder trial stating that by virtue of the verdict, testimony, and evidence in the case, an evidentiary and factual basis existed for aggravating circumstance that offense was especially heinous, atrocious, or cruel was not

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plain error, where instruction was consistent with the parties' agreement. Code 1975, § 13A–5–49(8); Rules App.Proc., Rule 45A.

1 Cases that cite this headnote

[92] **Sentencing and Punishment**
Instructions

Circuit court's use of the words "you" and "your" during its jury charge in penalty phase of capital-murder trial did not improperly imply to jury that jury's findings as to existence of any mitigating evidence had to be unanimous before the mitigating evidence could be considered; charge reviewed as a whole did not suggest that conclusion to jurors.

1 Cases that cite this headnote

[93] **Sentencing and Punishment**
Instructions

Circuit court's charge to jury in penalty phase of capital-murder prosecution did not improperly lead jury to believe it could not consider mercy, despite instructions to weigh the circumstances dispassionately and not to indulge emotion; defendant was not entitled to a mercy instruction.

Cases that cite this headnote

[94] **Sentencing and Punishment**
Presentation and reservation in lower court of grounds of review

Circuit court and prosecutor's statement that jury's verdict in penalty phase of capital-murder trial was an advisory verdict did not improperly diminish jurors' sense of responsibility for sentencing determination and thus was not plain error in prosecution arising out of stabbing deaths of family. Rules App.Proc., Rule 45A.

Cases that cite this headnote

[95] **Sentencing and Punishment**
Mental illness or disorder
Sentencing and Punishment
Emotional distress or disturbance
Sentencing and Punishment
Intoxication or drug impairment at time of offense

Circuit court did not abuse its discretion in finding that statutory mitigating circumstances regarding mental or emotional disturbance and capacity did not apply in capital-murder prosecution, despite defendant's contention that he was under influence of drugs on day of murders, where trial court considered all evidence offered in mitigation. Code 1975, § 13A–5–51(2, 6).

Cases that cite this headnote

[96] **Sentencing and Punishment**
Manner and effect of weighing or considering factors

Circuit court properly weighed aggravating circumstances and mitigating factors in penalty phase of capital-murder prosecution, where court found that mitigating circumstances were insufficient to outweigh aggravating circumstances. Code 1975, § 13A–5–47(e).

4 Cases that cite this headnote

[97] **Jury**
Death penalty

Defendant's death sentence was not required to be vacated for failure of every fact that could increase maximum penalty to death to have been found by jury to exist beyond reasonable doubt

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in capital-murder prosecution, where existence of the applicable aggravating circumstances were found either by the jury's guilt-phase verdicts or by stipulation of the parties. Code 1975, §§ 13A–5–45(e), 13A–5–49(8, 9).

Cases that cite this headnote

[98] **Sentencing and Punishment**
Proceedings in general

Court would reject defendant's argument that evolving standards of decency rendered defendant's sentence of lethal injection unconstitutional as cruel and unusual punishment in capital-murder prosecution, where defendant's entire argument was merely a conclusory allegation. U.S.C.A. Const.Amend. 8.

Cases that cite this headnote

[99] **Sentencing and Punishment**
Presentation and reservation in lower court of grounds of review

Error in circuit court's failure to address existence or nonexistence of each aggravating circumstance and each statutory mitigating factor did not rise to level of plain error in penalty phase of capital-murder prosecution arising out of stabbing deaths of family during robbery, where circuit court stated that it had considered all mitigating evidence, defendant did not assert the existence of the two mitigating circumstances for which specific findings were not made, and evidence did not support a finding of the existence of either of the two omitted mitigating circumstances. Code 1975, §§ 13A–5–47(d), 13A–5–49, 13A–5–51; Rules App.Proc., Rule 45A.

1 Cases that cite this headnote

[100] **Sentencing and Punishment**
Killing while committing other offense or in course of criminal conduct
Sentencing and Punishment
More than one killing in same transaction or scheme
Sentencing and Punishment
Age

Death was appropriate sentence in capital-murder prosecution arising out of stabbing deaths and robbery of family; sentence was not imposed under influence of passion, prejudice, or any other arbitrary factor, weighing of aggravating and mitigating circumstances supported sentence, and sentence was imposed pursuant to conviction of three counts of murder during course of robbery, one count of murdering two or more persons by one act, and the murder of a person who was less than 14 years of age. Code 1975, § 13A–5–53(b).

1 Cases that cite this headnote

Attorneys and Law Firms

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Troy King, atty. gen., and James H. Rutter III and Pamela Lynn Casey, asst. attys. gen., for appellee.

Opinion

KELLUM, Judge.

In March 2005, an Etowah County grand jury returned an indictment against the appellant, Michael Wayne Reynolds, charging him with five counts of capital murder in connection with the deaths of Charles James Martin III, Melinda Martin, and the Martins' eight-year-old daughter, Savannah Martin. The murders were made capital because: (1) two or more persons were killed by one act or pursuant to one scheme or course of conduct, see § 13A–5–40(a)(10), Code of Alabama 1975 (count I of the indictment); (2) the murder of Charles Martin III was committed during the course of a first-degree robbery, see § 13A–5–40(a)(2), Code of Alabama 1975 (count II of the indictment); (3) the murder

of Melinda Martin was committed during the course of a first-degree robbery, see § 13A–5–40(a)(2), Code of Alabama 1975 (count III of the indictment); (4) Savannah Martin was less than 14 years of age when she was murdered, see § 13A–5–40(a)(15), Code of Alabama 1975 (count IV of the indictment); and (5) the murder of Savannah Martin was committed during the course of a first-degree robbery, see § 13A–5–40(a)(2), Code of Alabama 1975 (count V of the indictment).

Following a trial by jury, Reynolds was convicted of all five counts of capital murder, as charged in the indictment. The jury recommended, by a vote of 12–0, that Reynolds be sentenced to death. The circuit court accepted the jury's recommendation and sentenced Reynolds to death for the five capital-murder convictions.

Reynolds filed a timely motion for new trial, which was denied by operation of law.[1] This appeal followed.

***74** *Facts of the Crimes*

The State presented evidence that in the early morning hours of Sunday, May 25, 2003, Charles Martin III, his wife, Melinda, and their 8–year–old daughter, Savannah, were stabbed to death in their house. Their bodies were doused with gasoline and set on fire. The crimes were discovered later that morning by Melinda's father, Jerry Veal. Melinda Martin's purse and a cordless telephone were missing from the house.

Adrian Marcella "Marcie" West, who was Michael Reynolds's girlfriend at the time of the murders, testified at trial. She and Reynolds lived with Reynolds's father, Harold Reynolds, at the time of the crimes. West testified that on Saturday, May 24, 2003, Michael Reynolds installed a car stereo for Donald Harvey, who was also known as "Dino," in exchange for some cocaine. West and Reynolds used the cocaine; they also used crack cocaine several more times throughout that day and night.

West testified that later that night or early on Sunday morning, she drove Michael Reynolds to the Martins' house in a vehicle that was owned by Harold Reynolds's girlfriend, Sandra Roberts. West said that Michael Reynolds and Charles Martin were good friends. Reynolds told West that they were going to the Martins' house "to get some money," and she assumed he meant that he was going to rob Charles Martin.

When they arrived at the Martin residence, West parked the vehicle in the driveway, and Michael Reynolds got out. Reynolds told West to wait in the car. West said that Reynolds was not wearing any shoes, and that he was carrying a scabbard containing a dagger-style knife. She had seen the knife before at Harold Reynolds's residence. West testified that she was not alarmed that Reynolds had the knife with him because, she said, Reynolds sometimes traded various items for drugs or money.

Reynolds went to the carport door and knocked. Charles Martin opened the door and waved at West, and then Martin and Reynolds went into the house.

While West was waiting in the car, she heard Melinda Martin scream. West got out of the car and ran into the house. She saw Charles Martin lying on the kitchen floor and she heard Melinda Martin screaming in the back of the house. West went to the bedroom, where she saw Melinda Martin bent over next to the bed as Michael Reynolds stabbed her. Savannah Martin was on the bed.

West testified that she got between Reynolds and Melinda and tried to stop him from stabbing her. Reynolds accidentally stabbed West through the arm when she tried to intervene. West testified that Reynolds yelled at her and asked her what she was doing there. He told West to get the telephone and Melinda Martin's purse and to go wait in the car. Reynolds handed her two knives—the knife that he had taken into the house, and a steak knife that West had not seen before.

West grabbed the telephone and Melinda Martin's purse, and took the knives and left the bedroom. When she left the room, Melinda Martin was "slouched over" at the end of the bed, and Savannah Martin was standing on the bed. West testified that she felt faint, so she leaned up against the wall in the hallway. She again felt faint when she crossed over Charles Martin's body in the kitchen, so she leaned against the kitchen counter. West left the house and went to the car.

West opened the front passenger door and placed the items in the floorboard and then crawled to the driver's side of the ***75** vehicle—the driver's door was damaged and did not open.

West testified that Reynolds came to the car and told West not to leave, and then he grabbed the larger knife and went back into the house. Reynolds apparently returned to the car a second time and again told West not to leave. West testified that she was afraid, so she did not leave or call for help. At that time, West did not realize that she had been stabbed.

West testified that when Reynolds returned to the car for

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the third time, he got in the vehicle and told her that she had been stabbed and that he should drive. West said that she did not allow Reynolds to drive because she feared that he was going to take her somewhere and kill her. West could see the orange glow of a fire in the house.

She drove back to Harold Reynolds's residence. When they arrived at Reynolds's house, Michael Reynolds told West to give her clothes to him and to take a shower. West stated that she saw Reynolds looking through Melinda Martin's purse. While West was taking a shower, Reynolds took a cloth and cleaned Sandra Roberts's car. After West showered, Reynolds bandaged her arm, using a first-aid kit they had in their bedroom. Reynolds told West that there was no blood in the car.

Sandra Roberts testified that she was asleep in Harold Reynolds's bed when West and Michael Reynolds arrived back at the house. She testified that around 3:00 or 4:00 a.m. she was awakened when Reynolds placed her car keys on the night stand beside the bed. West and Reynolds then went to their bedroom. Roberts noticed that West was walking with her arms folded.

Roberts got out of the bed and went into the kitchen and sat down at the kitchen table. A short time later, Michael Reynolds entered the kitchen and gave Roberts some money and told her to go buy some drugs. Roberts left and purchased some crack cocaine. West said that while Roberts was gone, Michael Reynolds took a shower and that is when she noticed blood on Reynolds's legs.

When Roberts returned to the house, she and Michael Reynolds divided the crack cocaine. Roberts used her portion of the drugs while she was seated at the kitchen table, but Michael Reynolds took his and West's share of the crack to his bedroom.

Roberts testified that a short time later, Michael Reynolds reentered the kitchen and propositioned her for sex, but she refused. Roberts said that Michael Reynolds wanted more drugs but, according to him, he could not get West to give him more money. Reynolds asked Roberts to talk to West. Roberts agreed.

When Roberts entered the bedroom, West was in the bed with the covers pulled up to her neck, staring at the ceiling. Roberts testified that West was acting strangely and that she was unable to engage West in any conversation. Roberts decided to leave and go to her house. As she was driving, she noticed a cordless telephone without the base on the backseat of her car. Roberts had never seen that telephone before.

West and Michael Reynolds woke around 9:00 or 9:30 on that morning. West noticed that the eyeglasses Michael Reynolds had been wearing the night before were broken. When she pointed this out to Reynolds, he told her that the missing eyeglass piece would melt in the fire. West testified that Reynolds told her that the knives were under the truck and that their clothes and Melinda Martin's purse were in a white bag.

***76** Around 10:00 a.m. on Sunday May 25, Jerry Veal, Melinda Martin's father, drove by Charles and Melinda Martin's residence located on Tidmore Bend Road in Etowah County. Veal became concerned when he saw Melinda's vehicle parked in the driveway because Melinda regularly attended church services on Sunday mornings. Veal telephoned Melinda on his cell phone, but no one answered.

Veal drove back to the Martin residence and parked his vehicle in the driveway. He got out and went to the carport door and knocked. When no one came to the door, Veal opened the carport door and found the kitchen in disarray—furniture had been moved around, the window treatments were partially torn down, and there was blood everywhere. Veal saw his son-in-law lying on the kitchen floor in a pool of blood.

Veal returned to his car and told his wife, and she telephoned 911. While Jerry Veal was talking on the cell phone with the 911 dispatcher, he saw James Mulkey, a retired Gadsden police officer, drive by the house. Veal was acquainted with Mulkey, so he stopped Mulkey and told him what he had seen.

Mulkey instructed Veal to remain outside, and Mulkey went to the carport door. When Mulkey opened the carport door, he saw Charles Martin, who appeared to be dead, lying on the kitchen floor. Mulkey did not enter the residence at that time because he could detect the strong odor of gasoline and gunpowder.

When the paramedics arrived, Mulkey and the paramedics entered the residence; they determined that Charles Martin was dead. Mulkey and the paramedics proceeded down the hallway to determine if anyone was in need of medical assistance. They discovered the bodies of Melinda Martin and Savannah Martin in a bedroom. The bedroom was in disarray and there was blood everywhere.

The smell of gasoline was overpowering, so Mulkey opened the back door to the residence, and then he and the paramedics left through the back door of the house, being careful not to disturb the scene.

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Investigators arrived and processed the scene. During the investigation, a bloody partial footprint and a blood drop were discovered on the steps outside the carport door. Charles Martin was found lying on the floor in a pool of blood with a cigarette by his mouth. There were three bloody shoe prints on the kitchen floor. The kitchen chairs were knocked over, the kitchen blinds had been ripped or slashed, and there was blood spattered everywhere. A gasoline can was sitting on the floor beside Charles Martin's body, and exploded bottle rockets were scattered throughout the kitchen and into the living room.

A utensil drawer in the kitchen was open, and there were blood droplets under the drawer. There were two sandwiches on a Styrofoam plate on the kitchen counter by the stove, and one of the burners of the kitchen stove was lit. Investigators observed a spoon with gray material in it and a syringe located on the counter beside the stove. A basket of prescription drugs was also on the counter.

Blood droplets were found on the hallway wall opposite the door to the bedroom where the bodies of Melinda and Savannah were discovered.

Melinda Martin was found lying on the floor on the right side of the foot of the bed. She had slits in her clothing that were consistent with stab wounds. She was also wearing a back brace. A walking cane was found near her body. A telephone cord extended from the wall by the headboard of the bed to Melinda Martin's ***77** body, but no telephone was attached to the cord.

Savannah Martin was lying on her back on the bed. She had been stabbed multiple times and had a prominent stab wound through her neck. A bloody hand print was discovered near Savannah's body on the fitted sheet; however, due to the soft surface, there was no ridge detail to the print.

An investigator collected the wet, bloody comforter and bed linens and put them in a large paper bag in order to transport the bedding to the forensic laboratory for further testing. When the bedding was unpackaged and put up to dry later that day, a television remote and a temple piece to a pair of eyeglasses fell out of the bedding. Law-enforcement personnel were informed about the eyeglass piece.

An autopsy of the victims confirmed that Melinda Martin died as a result of 24 stab wounds to her body. Charles Martin died as a result of 11 stab wounds to his body. Savannah Martin died as a result of 5 stab wounds to her body. All the victims had chemical burns to their bodies, and Chuck Martin also had thermal burns on his body. None of the stab wounds to the victims was immediately fatal.

West testified that as she and Reynolds were walking to a nearby convenience store later that same Sunday morning, Reynolds asked West if he had made the headlines, and he inquired whether West had seen Charles Martin's face. Later that day, the police arrested Michael Reynolds on an unrelated matter.

That same afternoon, West saw Donald Harvey drive into the alley behind Reynolds's residence. West got into Harvey's car, and he asked her if Reynolds had anything to do with what happened to Charles Martin. West nodded in the affirmative. Although the evidence was conflicting regarding whose idea it was, West and Harvey agreed that they should get rid of the evidence from the crime scene.

Harvey and West went to a gasoline service station and purchased some gasoline and drove to an area near Tuscaloosa Avenue. West threw the telephone base into the woods, and then Harvey doused the bag containing their clothes and the purse with gasoline and set the items on fire. West and Harvey threw the knives into the Coosa River from a pier at a boat launch located at Gadsden State Junior College.

On the day the murders were discovered and in the days that followed, the police questioned several persons regarding their potential involvement in the murders and robbery, including Charles Martin's nephew, Chad Martin, and John Langley, who lived in the same neighborhood as the Martin family. The police ultimately ruled these individuals out as suspects.[2]

A few days after the discovery of the crimes, West talked with her former employer, who was an attorney, and told him what had happened. The attorney contacted the district attorney's office, and as a result, West subsequently gave the police a statement regarding the crimes.

Based on the information provided by West, the Gadsden police located and photographed the burn pile where West said the clothes and purse had been burned, and the police also recovered the telephone base in the woods a short distance from the burn pile. The phone base, the cordless phone found in Roberts's car, and the telephone cord lying across the floor in the room where the bodies of Melinda and ***78** Savannah Martin were found were all Uniden brand products.

Gadsden police conducted a search of Harold Reynolds's residence. In the bedroom shared by Michael Reynolds

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and West, the police discovered a pair of prescription tinted eyeglasses. The glasses were broken—the temple piece was missing, and one of the lenses was lying beside the glasses. The glasses were consistent with the prescription lenses and frames sold to Reynolds by a professional optician. The temple piece recovered from the bedding at the Martin house matched the temple piece still attached to the frame found at the Reynolds residence. A first-aid kit was also discovered in the bedroom.

A scuba diver with the Etowah County Rescue Squad recovered an oriental-style scabbard from the Coosa River in the area where the knives had been discarded by West and Harvey. Sandra Roberts testified that the scabbard appeared to be the same scabbard she had previously seen at Reynolds's residence. West also testified that the scabbard was the one that she and Harvey had disposed of in the Coosa River.

Photographs of Michael Reynolds's hands taken by the Gadsden police after his arrest showed bruising and flaking skin. West testified the bruising and flaking was not present at the time of the murders.

A forensic examination of the interior of Roberts's car did not indicate the presence of any blood. Forensic testing of the DNA extracted from the swab of the blood drop from the outside steps and the hallway at the Martin residence matched the DNA obtained from Adrian West. There was a mixture of DNA on the blood swabbed from the handle of the gasoline can. The primary contributor of that DNA was determined to be Savannah Martin, but neither Michael Reynolds nor Melinda Martin could be excluded as a contributor of the DNA. There was also a mixture of DNA from a swab of blood obtained from the lens of Michael Reynolds's glasses—Melinda Martin's DNA was the primary component of that DNA mixture. The bloody footprint on the outside door-step matched a known ink print of Michael Reynolds's footprint.

The shoe prints in the kitchen did not match any of the known samples submitted for comparison purposes, and a blood swab from the outside door frame did not match any of the known DNA samples.

Michael Reynolds testified in his defense. He testified that he met Charles Martin in May 2002 and that he and Charles became good friends. Reynolds testified that Martin was one of the people authorized to take Reynolds's son home from school. Reynolds and his son even lived with Charles Martin for several months, at Martin's mother's residence.

Reynolds said that he saw Martin several times a week up until the time Reynolds was arrested for a different offense. Reynolds testified that he had seen Melinda Martin a couple of times, but that he had never seen Savannah Martin. He testified that the last time he saw Martin alive was two or three weeks before the Martins were killed.

Reynolds testified that at the time of the incident, he and Adrian West were living with his father at his father's residence. Reynolds said that on the morning of Saturday May 24, 2003, his "boss" came by the residence and paid his father and him for a painting job they had completed the day before. Later that morning, Donald Harvey came to the Reynolds residence and asked Michael Reynolds to install a car radio for him. Reynolds said that he installed the radio, and Harvey gave him a gram of cocaine in return.

***79** Reynolds said that between 9:00 and 10:00 p.m., Sandra Roberts came to the residence. Reynolds and West shared the last of their drugs with Roberts. Reynolds testified that he gave Roberts some money to get some more drugs. Reynolds explained that he had money to purchase the drugs because in addition to the money that he had received that morning for completing the painting job, West also had $500 that Reynolds's father had given her to hold in case Reynolds needed to post bond—he testified that there was an outstanding warrant for his arrest at that time.

Reynolds testified that Sandra Roberts left and went to buy more drugs. When she returned with the drugs, Reynolds, Roberts, and West used all of those drugs. Reynolds testified that some time later, Adrian West and Sandra Roberts left together in Sandra's car to go get more drugs. Reynolds testified that he instructed West to go with Roberts because he thought Roberts had cheated them out of drugs on the previous transaction.

Reynolds testified that after Roberts and West had been gone for a couple of hours, he changed into a pair of shorts and a T-shirt, went to bed, and fell asleep. His father was passed out; he was intoxicated.

Reynolds said that some time later, Adrian West woke him and told him that she was hurt. Reynolds got out of bed to attend to West. When Reynolds asked her how she was hurt, she told him that she had been stabbed. Reynolds then asked West how she had been stabbed, and she responded that "Chuck was dead and she ... got stabbed trying to stop them from stabbing Chuck's wife." (Vol. XI, R. 1567.) Reynolds testified that West did not tell him who she was with at the time of the stabbings.

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Reynolds stated that he was concerned about her arm, so he bandaged it using a first-aid kit he had in the bedroom. He said that the wound was not bleeding very much but that it looked bad. After bandaging her arm, Reynolds instructed West to accompany him outside the house so that he could talk to her without fear of his father overhearing.

Reynolds testified that when they got outside, he continued to question her about what happened, but West did not want to talk about it. Reynolds said that West was very worried, so he told her to get Sandra Roberts's car keys and she did.

Reynolds said that they left in Roberts's car, and that West drove because Reynolds's license had been revoked. Reynolds was still dressed in the clothes he had on when he went to sleep, and, although he put on his glasses, he did not put on any shoes.

They went to the Martin residence. He said that when they got to the residence, West slowed down in order to pull in the driveway; however, Reynolds said that because the lights were on in the house, he instructed her to keep driving. West drove to a nearby gas station, turned around, and then drove back to the Martin residence.

When they got to the Martin residence, West asked Reynolds what he wanted her to do. He testified that he again instructed her to "just drive." (Vol. XI, R. 1571.) West began to drive back to Reynolds's residence. Reynolds testified that as they were traveling, West told him that she was scared, and she asked him what they were going to do. Reynolds said that as they neared his father's residence, he "just knew [he] had to do something," so he instructed West to again drive to the Martin residence. (Vol. XI, R. 1571.)

Reynolds testified that when they arrived at the Martin residence that time, West drove the car into the driveway. ***80** The carport light was on. Reynolds got out of the car and told West to remain in the car. As Reynolds approached the carport door, he saw that the door was cracked open. Reynolds pushed the door open and saw Charles Martin lying on the floor. Reynolds said there was blood all around Martin so, he said, he knew at that point that West had told him the truth.

He testified that he did not telephone the police; instead, he went inside, stepped over Charles Martin's body, and went to the Martins' bedroom. He explained that he went to that bedroom because West told him she had been hurt "trying to stop them from stabbing Chuck's wife." (Vol. XI, R. 1573.) Reynolds said that although the television was on in the bedroom, the bedroom lights were not on, so he did not see Melinda Martin's body when he first went into the room. Reynolds said that he tripped over Melinda Martin, who was lying in the floor between the bed and the doorway. When he tripped, his glasses fell off onto the bed, and he caught himself on the bed. Reynolds testified that he grabbed his glasses from the bed and stood up and that is when he saw Melinda Martin, who appeared to be dead. Reynolds testified that he never saw Savannah Martin.

Reynolds said that he went back through the house and outside, stepping back over Charles Martin in the process. He gave West his glasses and told her to hold them. Reynolds then asked West to tell him everything that she had touched so that he could wipe it off, but West could not recall everything she had touched. Reynolds testified that he went back into the house, intent on wiping the surfaces off. Reynolds said that everything in the house was such a mess that he did not know where to start. He said that at that point, he looked and saw that one of the burners on the stove was lit, so he decided to burn the house down. Reynolds testified that he got the gasoline can that was located beside the porch steps, and doused the rooms with gasoline.

Reynolds said that when he got back to the kitchen, he got a napkin and lit it from the burner, and threw it on the gasoline trail. Reynolds then left the house and got in the car and told West to leave. As West drove back toward Harold Reynolds's residence, she asked Reynolds what was going to happen and he told her "[N]othing, I caught the place on fire." (Vol. XI, R. 1576.)

Reynolds testified that when they got back to Harold Reynolds's residence, they parked Sandra's car and went into the house. As they walked by his father's bedroom, Sandra Roberts asked them if they had "anything," meaning drugs. Reynolds told her they did not, and then he and West went to the bedroom they shared. Reynolds testified that at that point, he told West to give him some money and West gave him $20. He gave that money to Sandra Roberts and told her to go get some more drugs. He testified that he wanted to get Roberts out of the house. Reynolds said that he and West went into the bathroom, and he cleaned and rewrapped the injury on West's arm. In a few minutes, Roberts returned with more drugs.

When Roberts returned with the drugs, Reynolds went into the kitchen and he and Roberts took some of the drugs. Reynolds prepared a syringe of the drugs for West and took it into their bedroom; however, West refused the

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drugs, saying she just wanted to go to sleep. Reynolds offered the drugs to Roberts, and when she declined to take the drugs, Reynolds used them. He then went back to sleep.

Reynolds testified that later that morning while he and West were walking home from the convenience store, he again tried ***81** to question West about what had happened the night before. Reynolds said that West was acting strangely and that she told him that she did not want to think about it. He testified that at that point, he did not want to think about it either.

Reynolds said that shortly after they arrived back at his father's residence, the police arrived and arrested him and that he had been incarcerated since that time.

After both sides had rested and the circuit court had instructed the jury on the law applicable to Reynolds's case, the jury returned a verdict finding Reynolds guilty of five counts of capital murder, as charged in the indictment.

During the penalty phase of Reynolds's trial, the State resubmitted all the evidence it had introduced during the guilt phase. Apparently, for strategic reasons, defense counsel stipulated to the presence of the aggravating factor that the capital offenses were especially heinous, atrocious, or cruel compared to other capital offenses. See § 13A–5–49(8), Ala.Code 1975. With regard to the statutory mitigating factors, the State agreed that Reynolds had no significant history of prior criminal activity.[3] See § 13A–5–51(1), Ala.Code 1975.

Reynolds presented several witnesses who testified to the neglect and abuse Reynolds witnessed and endured from his father and mother during his developing years and who testified that Reynolds was introduced to drugs and crime at an early age. Reynolds also presented evidence indicating that he had overcome many of the hardships that he endured as a child and that he managed to create a fairly stable professional and social life until he began using the drug crystal methamphetamine.

After both sides had rested and the circuit court had instructed the jury on the law applicable to the penalty phase proceeding, the jury returned a verdict, by a vote of 12–0, sentencing Reynolds to death. The circuit court accepted the jury's recommendation and sentenced Reynolds to death for the five capital-murder convictions.

Standard of Review

In every case in which the death penalty is imposed, this Court must review the record for any plain error, i.e., for any defect in the proceedings, whether or not the defect was brought to the attention of the trial court. Rule 45A, Ala.R.App.P., provides:

> "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 *Hall v. State,* 820 So.2d 113, 121–22 (Ala.Crim.App.1999), aff'd, 820 So.2d 152 (Ala.2001):

> "The standard of review in reviewing a claim under the plain-error doctrine is stricter than the standard used in reviewing an issue that was properly raised in the trial court or on appeal. As the United States Supreme Court stated in *United States v. Young,* 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985), the plain-error doctrine applies ***82** only if the error is 'particularly egregious' and if it 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.' See *Ex parte Price,* 725 So.2d 1063 (Ala.1998), cert. denied, 526 U.S. 1133, 119 S.Ct. 1809, 143 L.Ed.2d 1012 (1999); *Burgess v. State,* 723 So.2d 742 (Ala.Cr.App.1997), aff'd, 723 So.2d 770 (Ala.1998), cert. denied, 526 U.S. 1052, 119 S.Ct. 1360, 143 L.Ed.2d 521 (1999); *Johnson v. State,* 620 So.2d 679, 701 (Ala.Cr.App.1992), rev'd on other grounds, 620 So.2d 709 (Ala.1993), on remand, 620 So.2d 714 (Ala.Cr.App.), cert. denied, 510 U.S. 905, 114 S.Ct. 285, 126 L.Ed.2d 235 (1993)."

Although Reynolds's failure to object at trial will not preclude this Court from reviewing an issue, it will, nevertheless, weigh against any claim of prejudice he makes on appeal. See *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).

Guilt–Phase Issues

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I.

[1] Reynolds maintains that the circuit court "improperly ordered [him] to wear a stun belt throughout his trial." Specifically, Reynolds argues that the "trial court's decision improperly and needlessly deprived [him] of his rights to due process, a fair trial, and to participate in his own defense." (Reynolds's brief, Issue VII, at 69–71.)

Reynolds did not object to the use of the stun belt. Accordingly, we will review his claim for plain error only. Rule 45A, Ala.R.App.P.

The record does not indicate who ordered Reynolds to wear the stun belt—whether it was required by the Court or by the sheriff's department. However, there is no evidence indicating that the belt interfered with Reynolds's right to confer with his counsel or that the jury was even aware that Reynolds was wearing a stun belt. We have reviewed the record and, as we did in *Belisle v. State,* 11 So.3d 256 (Ala.Crim.App.2007), aff'd, 11 So.3d 323 (Ala.2008), cert. denied, 557 U.S. 939, 129 S.Ct. 2865, 174 L.Ed.2d 582 (2009), we find no plain error. Rule 45A, Ala.R.App.P.

II.

[2] Reynolds argues that the circuit court committed a number of errors during the jury-selection process. (Reynolds's brief, Issue XX, at pp. 108–10.) These will be addressed individually below.

A.

Reynolds contends, in a one-sentence argument, that the circuit court "erroneously excused at least 150 of the summoned jurors outside the presence of the parties, in violation of [his] Sixth Amendment right to be present and to a fair trial by an impartial jury." (Reynolds's brief, at 108.)

The record indicates that when the venire was first assembled, during the circuit court's general instructions regarding the proceedings, the court stated:

> "But here is kind of the way it works: We sent out four hundred jury summons. You will look around. There are not four hundred people in this room. Of those four hundred, about one hundred and fifty of them have already been excused...."

(Vol. V, R. 327.) The court then continued with its general introduction to the proceedings.

Reynolds did not object to the circuit court's excusing the potential jurors outside his or his counsel's presence. Accordingly, we review this assertion for plain error only. Rule 45A, Ala.R.App.P.

> ***83** "Section 12–16–74, Ala.Code 1975, specifically gives a trial court the right to excuse potential jurors outside the presence of the parties and their counsel. No error, much less plain error, occurred here."

Dorsey v. State, 881 So.2d 460, 482 (Ala.Crim.App.2001), aff'd in part, rev'd in part on unrelated ground, 881 So.2d 533 (Ala.2003). Reynolds has not presented any specific instance in which the circuit court supposedly exceeded its discretion in excusing the potential jurors outside the presence of the parties, and we find no error, plain or otherwise.

B.

[3] Reynolds alleges, in a one-paragraph argument, that the circuit court erred to reversal because, he claims, the Court "*directed* that all self-employed persons, individuals over the age of 80, and full-time students would be *automatically* removed from the jury venire." (Reynolds's brief, at 108.) (Emphasis added.)

Reynolds did not object on this ground at trial. In fact, defense counsel indicated that they were satisfied with the proceeding. (Vol. V, R. 401.) Accordingly, we review this contention for plain error only. Rule 45A, Ala.R.App.P.

Section 12–16–63, Ala.Code 1975, provides, in relevant part:

> "(a) The court, upon the request of a prospective juror pursuant to this section, shall determine on the basis of information provided during an interview with the prospective juror or based on other competent evidence whether the prospective juror should be excused from jury service.

"(b) A person who is not disqualified for jury service may apply to be excused from jury service by the court only upon a showing of undue or extreme physical or financial hardship, a mental or physical condition that incapacitates the person, or public necessity....

"(1) ....

"(2) For purposes of this article, undue or extreme physical or financial hardship is limited to any of the following circumstances in which an individual would:

"(a) Be required to abandon a person under his or her personal care or supervision due to the impossibility of obtaining an appropriate substitute caregiver during the period of participation in the jury pool or on the jury.

"(b) Incur costs that would have a substantial adverse impact on the payment of the individual's necessary daily living expenses or on those for whom he or she provides the principal means of support.

"(c) Suffer physical hardship that would result in illness or disease.

"(3) Undue or extreme physical or financial hardship does not exist solely based on the fact that a prospective juror will be required to be absent from his or her place of employment."

The record indicates that during the jury assembly, the court informed the prospective jurors that there were generally four reasons that the court would accept in order to excuse a prospective juror from service: (1) a verifiable medical condition that precluded the prospective juror from serving; (2) persons who were over the age of 80 years; (3) full-time students; and (4) self-employed persons. (Vol. V, R. 329–30.) After the general qualification of the prospective jurors, the circuit court interviewed the prospective jurors who sought to be excused. (Vol. V, R. 362–402.) Of the 48 jurors who were interviewed in this process, the circuit court granted 21 of the requests to be excused. (Vol. V. R. 362–402.) Those 21 jurors ***84** were excused for reasons encompassed in § 12–16–63, Ala.Code 1975.

The circuit court did not abuse its discretion, and we find no error, plain or otherwise, in this regard. See *Turner v. State,* 924 So.2d 737, 752–53 (Ala.Crim.App.2002); *Boyd v. State,* 715 So.2d 825, 843 (Ala.Crim.App.1997).

C.

[4] In a one-sentence argument, Reynolds contends that the circuit court erred to reversal in removing 10 veniremembers based on the veniremembers' opposition to the death penalty.

First we note that Reynolds objected to the circuit court's granting of the State's challenges for cause for only 2 of the 10 prospective jurors, Z.B. (Vol. 6, 533) and F.G. (Vol. VI, R. 600.)[4] Thus, we will review Reynolds's allegations regarding the remainder of the challenges for plain error only. Rule 45A, Ala.R.App.P.

We have reviewed the voir dire conducted by the circuit court of each of the 10 prospective jurors:

1. Z.B.—(Vol. VI, R. 487, 492, 512–15.)

2. F.G.—(Vol. VI, R. 550, 554–55, 600.)

3. N.M.—(Vol. VI, R. 638; Vol. VII, 664, 692.)

4. S.O.—(Vol. VI, R. 640; Vol. VII, 664, 689–91.)

5. J.M.—(Vol. VI, R. 639, Vol. VII, 683–84.)

6. J.R.—(Vol. VI, R. 640, Vol. VII, R. 685.)

7. J.M.—(Vol. VII, R. 705–07.)

8. M.W.—(Vol. VII, R. 765–67.)

9. O.H.—(Vol. VII, R. 768–69.)

10. E.F.T.—(Vol. VII, R. 772–73.)

Because of these jurors' opposition to the death penalty, we find no error in the circuit court's granting of the challenges for cause with regard to the 10 prospective jurors. See *Bryant v. State,* 951 So.2d 732, 737–39 (Ala.Crim.App.2003), for a thorough discussion of the pertinent law regarding appellate review of a trial court's granting of a challenge for cause.

D.

In a related vein, Reynolds argues that the "pre-trial death qualification violated [his] constitutional right to an impartial guilty-phase jury." (Reynolds's brief, at 109.) As best we can determine, Reynolds did not object on this basis at trial, and we find no plain error. This Court has previously addressed and rejected this assertion. See *Dotch v. State*, 67 So.3d 936 (Ala.Crim.App.2010.)

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E.

[5] Reynolds asserts that the circuit court erred in refusing his request to sequester the jury. (Reynolds's brief, at 109.)

> " 'Even in a capital case there is no requirement that a court sequester the jurors during the trial. The decision to grant or deny a motion to sequester the jury during trial is within the sound discretion of the trial court. See *Centobie v. State,* 861 So.2d 1111 (Ala.Crim.App.2001).' *Belisle v. State,* 11 So.3d 256, 279 (Ala.Crim.App.2007). See also *Brown v. State,* 11 So.3d 866, 885 (Ala.Crim.App.2007) (holding that there is no requirement that the jury be sequestered)."

Vanpelt v. State, 74 So.3d 32 (Ala.Crim.App.2009.)

In support of his assertion, Reynolds alleges that "there is a substantial likelihood that [he] was prejudiced by the jury's exposure to highly prejudicial matters." ***85** (Reynolds's brief, at 109–10.) However, Reynolds does not specify what those "highly prejudicial matters" were, or how he was purportedly prejudiced by them.

> "What [Reynolds] has presented to this Court is only bare allegations of prejudice that, he says, resulted from the trial court's failure to sequester the jury; he offers no concrete factual basis to support these claims. We will not base error on speculation and conjecture. In deciding to allow the jury to separate, the trial court in this case did so with great caution, providing adequate instructions to the jury. Therefore, we conclude that the trial court did not abuse its discretion when it permitted the jury to separate."

Broadnax v. State, 825 So.2d 134, 155–56 (Ala.Crim.App.2000).

F.

[6] Finally, Reynolds argues, in effect, a violation of the cumulative-error rule. Specifically, he maintains that "[i]ndividually or collectively, the aforementioned errors of the trial court denied [him] his right to a fair trial by a fair and impartial jury...." (Reynolds's brief, at 110.) The Alabama Supreme Court has set forth the cumulative-error rule as follows: "[W]hile, under the facts of a particular case, no single error among multiple errors may be sufficiently prejudicial to require reversal under Rule 45, if the accumulated errors have 'probably injuriously affected substantial rights of the parties,' then the cumulative effect of the errors may require reversal." *Ex parte Woods,* 789 So.2d 941, 942–43 n. 1 (Ala.2001) (quoting Rule 45, Ala.R.App.P.). As previously discussed, we found no error, plain or otherwise, with regard to Reynolds's allegations of error in Parts II–A through II–E. Likewise, after applying the cumulative-error standard set out in *Ex parte Woods,* supra, to Reynolds's allegation of cumulative error, we have scrupulously reviewed the record and find no evidence indicating that the cumulative effect of any of the aforementioned nonreversible errors in this case affected Reynolds's substantial rights at trial.

III.

[7] Reynolds, who is Caucasian, asserts that because the State used its peremptory strikes to remove 9 of the 14 African–American jury veniremembers, the circuit court erred in concluding that there were no violations of *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

Because Reynolds did not make a *Batson* objection at trial, we review this claim under the plain-error standard. In the circuit court's written sentencing order, the court specifically found:

> "A jury was struck and sworn in this case, consisting of seven (7) females and five (5) males. One of the male jurors was black, and all of the remaining jurors were white. There were no *Batson* challenges made by either side and no *Batson* violations occurred in the selection of the jury."

(Vol. II, C. 320, 327, 334, 341, 348.)[5]

Reynolds now argues that "[g]iven the unquestionable evidence of discrimination in this case, the trial court's failure to find a prima facie case of discrimination and to

require the prosecutor to state reasons for his strikes was erroneous." (Reynolds's brief, at 106–07.) Reynolds does not specify ***86** what that "unquestionable evidence" was, and it is not evident to this Court.

[8] With regard to *Batson* claims:

> " ' " ' For plain error to exist in the *Batson* context, the record must raise an inference that the state [or the defendant] engaged in "purposeful discrimination" in the exercise of its peremptory challenges. See *Ex parte Watkins,* 509 So.2d 1074 (Ala.), cert. denied, 484 U.S. 918, 108 S.Ct. 269, 98 L.Ed.2d 226 (1987).' " ' "

"*Smith v. State,* 756 So.2d 892, 915 (Ala.Crim.App.1998), aff'd, 756 So.2d 957 (Ala.2000) (quoting *Rieber v. State,* 663 So.2d 985, 991 (Ala.Crim.App.1994), quoting in turn other cases)."

Ex parte Walker, 972 So.2d 737, 742 (Ala.2007), cert. denied, 552 U.S. 1077, 128 S.Ct. 806, 169 L.Ed.2d 608 (2007).

The only ground Reynolds offers in support of his allegation is that the State used 9 of its 14 strikes to remove African–American veniremembers. "Alabama courts have repeatedly held that numbers alone are not sufficient to establish a prima face case of discrimination." *Vanpelt v. State,* 74 So.3d 32, 53 (Ala.Crim.App.2009). We have thoroughly reviewed the record before this Court and find no inference of purposeful discrimination by the State.[6] Thus, there is no plain error in this regard.

IV.

[9] Reynolds contends that the circuit court erred in denying his written motion to remove his lead counsel. Specifically, he maintains that he and his lead counsel had an "irreconcilable conflict that caused a breakdown in their communication and impaired [lead counsel's] preparation for [his] defense." (Reynolds's brief, Issue VIII, at 71–75.)

The record reflects that after the voir dire of the veniremembers, Reynolds presented the circuit court with a handwritten motion to remove his lead counsel. The motion was read into the record. (Vol. VII, R. 789–91.) In the motion, Reynolds asserted that he was entitled the removal of his lead counsel because, he claimed: (1) lead counsel did not believe that he was innocent; (2) lead counsel withheld information from him; (3) lead counsel did not file a motion that Reynolds had requested counsel to file; (4) lead counsel did not object to a motion that Reynolds had requested that his previous co-defense counsel not file; and, (5) lead counsel disclosed vital information about his case to the State. (Vol. VII, 790–91.) Reynolds concluded by asking the circuit court to remove his lead counsel and to replace lead counsel with another appointed attorney. Reynolds also requested that the trial be continued in order to give that newly appointed cocounsel adequate time to prepare. (Vol. VII, R. 771.)

***87** The State responded that lead defense counsel had worked tirelessly with the co-defense counsel. The State indicated that it had no objection to lead counsel's being removed, provided that the trial proceed with Reynolds being represented by his two remaining appointed defense counsel. The prosecutor also emphatically denied that Reynolds's lead counsel had disclosed any confidential information to the State.

When the circuit court gave lead defense counsel an opportunity to reply, counsel stated that the claims in Reynolds's motion were so vague that counsel could not adequately respond. (Vol. VII, R. 793.) Thereafter, the circuit court noted:

> "THE COURT: Well, treating this as a motion by the defendant and from what I have observed in the case, you have done everything that you need to do or could possibly do, and you have adamantly championed your client's position. You have filed appropriate motions. You have argued motions to the Court. I find no shortcomings in your skills as an attorney. You have practiced before me on many, many occasions. And I have seen nothing inappropriate on your behalf in this case so far. So this would be denied."

(Vol. VII, R. 793.)

However, before making a final ruling, the circuit court gave Reynolds an opportunity to argue his motion before the court. Reynolds argued:

> "Sunday October 14th, [lead defense counsel] came to see me here in the jail. He had information on a motion that he had in his possession that we had a hearing on,

and I asked [lead defense counsel] why he didn't show that motion in Court that day. He said he didn't know.

"[Lead defense counsel] has made several comments about him not believing in my innocence. He made a comment to me on the 14th again when he came to see me that I found not appropriate. [Lead defense counsel] said he—I asked him how many cases he has handled as a defense on a capital cases, murder cases. And he said he has handled quite a few and has always been on the losing end except when he was a prosecutor and [he] had a good little laugh about that.

"The motion in this—[lead defense counsel] also knew that this Court has took my case off another judge's docket. .... I didn't have any idea about this until [lead defense counsel] revealed this in a hearing and after we had done set a court date. I asked for a change of venue at the beginning for [lead defense counsel] to put a motion in at the beginning of this case. He has failed to do so.

"My rights were violated—I explained this to [lead defense counsel] by [the district attorney] when they were questioning me on this before I was ever charged on this. My constitutional rights were violated. [Lead defense counsel] doesn't even think this is an issue, that the constitutional rights were within reason. I feel it does. Nothing else, Your Honor."

(Vol. VII, R. 794–95.)

[10] [11] [12] [13] [14] [15] [16] [17] [18] [19] [20] The court asked Reynolds whether he had an issue with proceeding with the trial while being represented by his two other appointed counsel. Reynolds indicated that he would not be satisfied with that option because, he argued, the other two counsel had not prepared to represent him on the entire case, those counsel had not had sufficient time to prepare to try the case without the assistance of lead counsel, and neither of the cocounsel had ever tried a capital case. (Vol. VII, R. 797–98.) The circuit court denied Reynolds's motion to remove lead counsel.

***88** " ' "An indigent defendant who cannot afford to retain an attorney has an absolute right to have counsel appointed by the Court in all criminal proceedings in which representation by counsel is constitutionally required. *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Strickland v. State,* 280 Ala. 31, 189 So.2d 771 (1965); U.S. Const. amend. V and XIV; Art. I, Ala. Const.1901, § 6; Ala.Code 1975, § 15–12–21; Ala. R.Crim. P. 6.1. While an indigent defendant may have the right to be represented by counsel, he has no absolute right to be represented by any particular counsel or by counsel of his choice. *Briggs v. State,* 549 So.2d 155 (Ala.Cr.App.1989). The essential aim of the Sixth Amendment is to guarantee an effective advocate, not counsel preferred by the defendant. *Wheat v. United States,* 486 U.S. 153, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988). The Sixth Amendment does not guarantee a defendant a meaningful relationship, rapport, or even confidence in court-appointed counsel. *Morris v. Slappy,* 461 U.S. 1, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983); *Siers v. Ryan,* 773 F.2d 37 (3d Cir.1985), cert. denied, 490 U.S. 1025, 109 S.Ct. 1758, 104 L.Ed.2d 194 (1989)."

" '*Snell v. State,* 723 So.2d 105, 107 (Ala.Crim.App.1998).'

" ' " ' "[T]he decision whether to remove an appointed counsel and appoint another counsel for defendant is within the sound discretion of the trial court.' *Crawford v. State,* 479 So.2d 1349, 1355 (Ala.Cr.App.1985). See also, *Tudhope v. State,* 364 So.2d 708 (Ala.Cr.App.1978).... The right to choose counsel may not be subverted to obstruct the orderly procedure in the court or to interfere with the fair administration of justice. *United States v. Sexton,* 473 F.2d 512 (5th Cir.1973)."

" '*Briggs v. State,* 549 So.2d 155, 160 (Ala.Crim.App.1989).

" ' "In order to prevail on a motion for substitution of counsel, the accused must show a demonstrated conflict of interest or the existence of an irreconcilable conflict so great that it has resulted in a total lack of communication that will prevent the preparation of an adequate defense." *Snell v. State,* supra, at 107.'

"*Baker v. State,* 906 So.2d 210, 226 (Ala.Crim.App.2001).

"....

"... As this Court noted in *Cox v. State,* 489 So.2d 612 (Ala.Crim.App.1985):

" ' "A defendant is entitled to counsel capable of rendering competent, meaningful assistance in the preparation and trial of the pending charges, including appropriate evaluation and advice with reference to a plea of guilty. A defendant is not entitled to an attorney who agrees with the defendant's personal view of the prevailing law or the equities of the prosecutor's case. A defendant

> is entitled to an attorney who will consider the defendant's views and seek to accommodate all reasonable requests with respect to trial preparation and trial tactics. A defendant is entitled to an appointment of an attorney with whom he can communicate reasonably, but has no right to an attorney who will docilely do as he is told. Every defendant is entitled to the assistance ***89** of counsel dedicated to the proposition, and capable of assuring that, the prosecution's case shall be presented in conformity with the Constitution, rules of evidence and all other controlling rules and practices. No defendant has a right to more." *United States v. Moore,* 706 F.2d 538, 540 (5th Cir.), cert. denied, 464 U.S. 859, 104 S.Ct. 183, 78 L.Ed.2d 163 (1983).'

"489 So.2d at 622...."

Gavin v. State, 891 So.2d 907, 941–43 (Ala.Crim.App.2003), cert. denied, 891 So.2d 998 (Ala.2004); 543 U.S. 1123, 125 S.Ct. 1054, 160 L.Ed.2d 1073 (2005)(emphasis deleted).

Although Reynolds had many opportunities to move the court for substitution of lead counsel, he did not do so until after the trial began. Substitution of counsel at that late date would have "obstruct[ed] the orderly procedure in the court [and] ... interfered with the fair administration of justice." *Gavin,* 891 So.2d at 941. See also *Robinson v. State,* 581 So.2d 1197, 1200 (Ala.Crim.App.1990). Furthermore, Reynolds has not established that his lead "counsel had a conflict of interest or that there was a 'total lack of communication' between his counsel and him that would have prevented the preparation of an adequate defense." *Gavin,* 891 So.2d at 942. Accordingly, we find no abuse of discretion in the circuit court's denial of Reynolds's motion to remove his lead counsel.

V.

[21] Reynolds argues that the circuit court erred by allowing the State to present the deposition testimony of the forensic pathologist who performed the autopsy. (Reynolds's brief, Issue IV, at 42–51; Reynolds's reply brief, Issue IV, at 35–40.)

The State introduced the results of the autopsies through the videotaped deposition of Dr. Adam Craig, the forensic pathologist who performed the autopsies. Reynolds claims that at the time of Dr. Craig's deposition, the State had not yet provided the defense with "crucial discovery information," namely, the possibility that two different knives may have been used to stab the victims. Reynolds maintains that because he did not have that information at the time of Dr. Craig's deposition, he was unable to question Dr. Craig about the possibility of two different knives being used in the murders. Thus, Reynolds argues, admission of the autopsy results through Dr. Craig's deposition testimony in lieu of Dr. Craig's actual appearance as a witness at trial violated his rights under the Confrontation Clause and the United States Supreme Court's holding in *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

The Confrontation Clause of the Sixth Amendment states that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him" U.S. Const. Amend. VI. In *Crawford v. Washington,* 541 U.S. at 53–54, the United States Supreme Court held that the Confrontation Clause prohibits the "admission of testimonial statements of a witness who [does] not appear at trial unless he [is] unavailable to testify, and the defendant [has] had a prior opportunity for cross-examination."

Reynolds argues on appeal that although he may have consented to the deposition of Dr. Craig and the use of that deposition testimony at trial, he did not waive his right to confront Dr. Craig about discovery information that he received after the deposition. Reynolds argues that the use of the deposition testimony to introduce the autopsy results violates *Crawford* because the State did not establish that Dr. Craig was unavailable for trial and because he ***90** did not have a prior opportunity to cross-examine Dr. Craig about the discovery materials he received after the deposition.

[22] [23] The State contends that if error did occur in the use of the deposition testimony, it was invited by Reynolds. Under the facts of this case, we agree.

> " ' " ' " ' "A party cannot assume inconsistent positions in the trial and appellate courts and, as a general rule, will not be permitted to allege an error in the trial court proceedings which was invited by him or was a natural consequence of his own actions." ' " *Slaton v. State,* 680 So.2d 879, 900 (Ala.Crim.App.1995), aff'd, 680 So.2d 909 (Ala.1996), cert. denied, 519 U.S. 1079, 117 S.Ct. 742, 136 L.Ed.2d 680 (1997), quoting *Campbell v. State,* 570 So.2d 1276, 1282 (Ala.Crim.App.1990). As we have said in applying the invited-error doctrine, " 'It would be a sad commentary upon the vitality of the judicial process if an accused could render it impotent by his own choice.' " *Murrell v. State,* 377 So.2d

1102, 1105 (Ala.Crim.App.), cert. denied, 377 So.2d 1108 (Ala.1979), quoting *Aldridge v. State,* 278 Ala. 470, 474, 179 So.2d 51, 54 (1965). "The invited error rule has been applied equally in capital cases and noncapital cases." *Rogers v. State,* 630 So.2d 78, 84 (Ala.Crim.App.1991), rev'd on other grounds, 630 So.2d 88 (Ala.1992), aff'd on remand, sub nom. *Musgrove v. State,* 638 So.2d 1347 (Ala.Crim.App.1992), aff'd, 638 So.2d 1360 (Ala.1993), cert. denied, 513 U.S. 845, 115 S.Ct. 136, 130 L.Ed.2d 78 (1994).'

" ' "*Perkins v. State,* 808 So.2d 1041 (Ala.Crim.App.1999), aff'd, 808 So.2d 1143 (Ala.2001). ' "An invited error is waived, unless it rises to the level of plain error." ' *Williams v. State,* 710 So.2d 1276, 1316 (Ala.Crim.App.1996), aff'd, 710 So.2d 1350 (Ala.1997), cert. denied, 524 U.S. 929, 118 S.Ct. 2325, 141 L.Ed.2d 699 (1998), quoting *Ex parte Bankhead,* 585 So.2d 112, 126 (Ala.1991). '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, 209 (Ala.Crim.App.1998), aff'd, 778 So.2d 237 (Ala.2000), cert. denied, 532 U.S. 907, 121 S.Ct. 1233, 149 L.Ed.2d 142 (2001)."

" '*McNabb v. State,* 887 So.2d 929, 892–93 [982–83] (Ala.Crim.App.2001).'

"*Clark v. State,* 896 So.2d 584, 640–41 (Ala.Crim.App.2000) (opinion on return to remand and on application for rehearing).

" 'The United States Supreme Court has stated that the plain error doctrine should be used in those situations that " 'seriously affect the fairness, integrity or public reputation of judicial proceedings....' " *United States v. Young,* 470 U.S. 1, 15, 105 S.Ct. 1038, 1046, 84 L.Ed.2d 1 (1985), quoting *United States v. Atkinson,* 297 U.S. 157, 160, 56 S.Ct. 391, 392, 80 L.Ed. 555 (1936).'

"*Knight v. State,* 675 So.2d 487, 496 (Ala.Crim.App. 1995)."

Ex parte Sharp, [Ms. 1080959, December 4, 2009] —— So.3d ——, —— (Ala.2009).

Before trial, the parties agreed to depose Dr. Craig regarding the autopsy results and to use that deposition testimony at trial to introduce the autopsy results instead of presenting Dr. Craig as a witness ***91** at trial.[7] See, Rule 16.6, Ala. R.Crim. P.; see also § 12–21–264, Ala.Code 1975. The deposition took place as scheduled at the Etowah County courthouse, and Reynolds was permitted to thoroughly examine Dr. Craig.

Nevertheless, at a pretrial hearing when Reynolds informed the court that he had not been able to examine Dr. Craig regarding discovery material he purportedly did not have at the time of Dr. Craig's deposition, the court offered, at the State's expense, to allow Reynolds to supplement the deposition and/or to subpoena Dr. Craig for trial in order to address the discovery material. (Vol. 1, C. 139; Vol. IV, R. 57–68.) See § 12–21–283, Ala.Code 1975, "Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceeding." Despite many subsequent opportunities, Reynolds did not pursue either option offered by the court. (Vol. IV, R. 104; 110–112; Vol. V, R. 441).

When the State sought to introduce the autopsy results through Dr. Craig's deposition testimony, Reynolds's only objection was that the State had not demonstrated that Dr. Craig was unavailable for trial. (Vol. IX, R. 1212–1218.)

[24] Assuming, without deciding, that the circuit court erred by allowing into evidence the autopsy results through Dr. Craig's deposition testimony, any error was the natural consequence of Reynolds's actions. Moreover, even if allowing the deposition testimony into evidence was error, it does not rise to the level of plain error. "[V]iolations of the Confrontation Clause are subject to harmless-error analysis. *Delaware v. Van Arsdall,* 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)." *Smith v. State,* 898 So.2d 907, 917 (Ala.Crim.App.2004).

Reynolds argues that he was prejudiced by the circuit court's allowing the autopsy results in through the deposition of Dr. Craig. In support of this claim, Reynolds alleges that had he been allowed to confront Dr. Craig at trial, he could have challenged Dr. Craig's conclusion that all the victims were stabbed with the same or a similar weapon and at around the same time, and that this would have enabled him to undermine the State's theory that there was only one assailant.

However, we believe that it is equally possible if Reynolds had confronted Dr. Craig and Dr. Craig had agreed that two different knives were used to stab the victims, that that testimony could have strengthened the State's case. As discussed in the facts portion of this opinion, Adrian West testified that Reynolds handed her two different knives after she found him stabbing Melinda

Martin. She also testified that she subsequently disposed of the two knives.

Accordingly, if any error occurred, it did not probably injuriously affect Reynolds's substantial rights. Rule 45A, Ala.R.App.P.

VI.

[25] Reynolds argues that the prosecutor impermissibly presented evidence of offenses not charged in the indictment. (Reynolds's Brief, Issue XV, at 101–02.) Specifically, Reynolds contends that the State improperly introduced "evidence of sexual assault and rape during the deposition testimony of the medical examiner, Dr. Adam Craig," even though neither offense was charged in the indictment. Despite Reynolds's insinuation otherwise, ***92** Reynolds did not object on this basis when the deposition testimony was offered at trial. Therefore, we review his argument for plain error only. Rule 45A.

[26] We recognize that "[u]nder the general exclusionary rule, evidence of an offense other than the offense charged in the indictment is not admissible at trial on a specific charged offense." *Krumm v. City of Robertsdale,* 648 So.2d 651, 652 (Ala.Crim.App.1994.) However, in the portion of Dr. Craig's deposition testimony cited by Reynolds, Dr. Craig was testifying to the standard tests that are performed in an autopsy. Neither the prosecutor, the State's witness, nor any of the physical evidence suggested that the victims were raped or sexually assaulted. Accordingly, there is simply no merit to this assertion.

VII.

On May 25, 2003, during the hours following the discovery of the crimes, the police interviewed several people of interest—including Charles Martin's 25–year–old nephew, Chad Martin, and Chad Martin's friend, John Langley. As addressed below, Chad Martin and John Langley were ultimately ruled out as a suspects. Chad Martin testified for the State at trial and denied any participation in the crimes. John Langley also testified as a witness for the State, and his testimony corroborated Chad Martin's alibi. Reynolds raises a number of issues related to their testimony. These will be addressed separately below.

A.

Reynolds argues that the circuit court "erred in refusing to allow [him] to present evidence that Chad Martin confessed to the crime[s]." (Reynolds's brief, Issue II, at 17.)

The inference from the record is that during the May 25, 2003, police questioning, Chad Martin told the investigators two conflicting versions of his whereabouts at the time of the murders. In the first account Chad Martin denied any involvement in the crimes; in the second account Martin purportedly confessed to the crimes. After an investigation, the police excluded Chad Martin as a suspect. Several days later, Chad Martin recanted his confession in a third oral narrative to the police. By that time, Reynolds had already become the target of the investigation.

Chad Martin's first narrative account to the police, in which he denied any involvement in the crimes, was reduced to a written statement and was signed by Martin. Martin's confession—the second of the two oral accounts that he gave on the May 25—was not reduced to an official statement, but was subsequently documented in two police reports. The first police report purportedly documenting Chad Martin's confession was prepared and signed by Sgt. Dale Fincher, and dated May 25, 2003. Sgt. Fincher's May 25 police report was not introduced into evidence at trial because Fincher had moved out of state and did not testify at the trial.[8] The second police report purportedly documenting Chad Martin's confession was dated May 29, 2003, and signed by Capt. Roy Harbin. For reasons that will be addressed below after a hearing at trial the circuit court ruled that the May 29 police report signed by Capt. Harbin could not be used to impeach Chad Martin's trial testimony.

***93** Reynolds now argues on appeal that the circuit court's ruling regarding the May 29 report effectively prevented him from presenting evidence showing that Chad Martin confessed to the crimes. (Reynolds's brief, Issue II, at 17–30; Reynolds's reply brief, Issue II, at 13–30.) Reynolds contends that the May 29 report purportedly documenting Chad Martin's confession was admissible for both impeachment purposes and as substantive evidence tending to prove that someone else had committed the crimes. Although the relevant facts are complicated and often confusing, a knowledge of these facts is necessary in order to see that Reynolds has mischaracterized the circuit court's ruling.

The State filed a written pretrial motion in limine to prevent the defense from mentioning any "alleged statements" made by Chad Martin regarding the events surrounding the deaths of the victims. (Vol. 1, C. 188.) In support of its motion, the State argued that such "statements" were hearsay and were unreliable. (Vol. 1, C. 188.)

At the beginning of the trial, the circuit court considered arguments regarding the State's motion in limine. During the hearing, one of Reynolds's defense counsel stated:

> "I would also anticipate—we have the one—we do have one statement signed by Chad Martin. We also have some statements signed by some investigating officers. Two of those three officers are available. And I would anticipate talking about those statement; maybe possibly asking Mr. Martin about them through those officers. They signed them, and he supposedly made these verbal statements to them. They are very pertinent to the crime."

(Vol. V, R. 434–45.)

The circuit court ruled that until Chad Martin testified at trial, neither party could refer to Martin's previous oral or written statements. However, the circuit court indicated that at the appropriate time, it would be willing to consider arguments from counsel regarding the admissibility of the statements for impeachment purposes. (Vol. V, R. 433–36.) Both parties indicated that they were satisfied with the circuit court's ruling. (Vol. V, R. 436.)

Chad Martin testified for the State. During direct examination, Martin testified that he was very close to his uncle, Charles Martin, and that he considered him to be like a brother. (Vol. IX, R. 1139–40.) Chad Martin said that he also had a good relationship with Martin's wife and daughter. (Vol. IX, R. 1139–40.) Martin testified that he had nothing to do with the murders and robbery of the Martin family. (Vol. IX, R. 1140–41.)

Chad Martin testified that he spent Saturday afternoon through the following Sunday morning of the murders doing construction work at John Langley's house, which was located in the same neighborhood as the Martin house.[9] (Vol. IX, R. 1141–43.) Martin testified that he and Langley took drugs during their time together and that at one point they left Langley's house to get more drugs. (Vol. IX, R. 1141–43.) Martin said that at various times, other people were also at Langley's house. (Vol. IX, R. 1143.)

Martin testified that the only time that he was out of Langley's sight was when he went to Langley's garage to work on Langley's lawnmower. (Vol. IX, R. 1143–44.) According to Martin, the back door to ***94** Langley's house was open during that time, and Langley knew where he was. (Vol. IX, R. 1144.)

Langley drove Chad Martin home sometime early Sunday morning because Martin thought he had to go to work later that morning. (Vol. IX, R. 1144–45.) Martin testified that his employer telephoned him around 6:00 a.m. and told him that he did not have to work that day because it was going to rain. (Vol. IX, R. 1144.) Martin took a shower, went to a friend's house, and then returned to John Langley's house. (Vol. IX, R. 1145.)

Martin testified that as he was on the way to Langley's house, he saw a fire truck and police vehicles at the Martin residence. (Vol. IX, R. 1145–46.) When Chad Martin got to Langley's house, he told Langley what he had seen at the Martin residence and expressed his concern about Charles Martin. (Vol. IX, R. 1145–46.) Chad Martin testified that Charles Martin had been depressed and that he was concerned that Martin might have committed suicide. (Vol. IX, R. 1145.)

Chad Martin drove back to the Martin residence and parked the car he was driving behind the fence in the Martins' backyard. (Vol. IX, R. 1146.) Martin testified that a police officer approached him and told him that he could not be there and that he could not be with the family. (Vol. IX, R. 1146.) Martin recognized Sgt. James Mulkey standing nearby and engaged him in a conversation. (Vol. IX, R. 1147)

Martin testified that Sgt. Mulkey told him that Charles Martin was dead and that Mulkey also told him where Charles Martin's body was found. (Vol. IX, R. 1148–49.) Sgt. Mulkey then asked Chad Martin for the names of Martin's wife and daughter. (Vol. IX, R. 1148.) Chad Martin testified that when Sgt. Mulkey asked him for Chad's niece's name, he became so upset that he collapsed. (Vol. IX, R. 1148)

Although not clear from his testimony, it appears that Chad Martin left the scene for a short time, and during that time he ingested substantial amounts of crystal methamphetamine, Prozac, and cocaine. (Vol. IX, R. 1150–51.) Martin claimed that he was actually trying to kill himself because he was so distraught over the

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Martins' deaths. (Vol. IX, R. 1151.)

Chad Martin testified that when he returned to the scene, some of the other family members where there and that is when he heard police officers talking about the details of the crimes. (R. 1148–49.) Martin instigated a conversation with Lt. Faye Gary while he was on the scene. (Vol. IX, R. 1149.) Chad Martin testified that although he did not recall the details of his conversation with Lt. Gary, he did not tell Lt. Gary that he had overheard the other police officers discussing the details of the crimes. (Vol. IX, R. 1149–50.) Chad Martin was taken to the police station for questioning. (Vol. IX, R. 1149.)

Martin testified that while he was at the police station, he was under the influence of the drugs and that he was also suffering from sleep deprivation because of his drug abuse. (Vol. IX, R. 1151.) Martin was questioned for many hours by the police. (Vol. IX, R. 1151–52.) Around 8:40 p.m., Chad Martin signed a written statement that had been prepared by one of the officers in which Martin apparently denied any participation in the crimes.[10] (Vol. IX, R. 1152–58.)

Martin testified that the police nevertheless continued to interrogate him, and after ***95** 18 or 19 hours of questioning, he decided that he would "tell them anything just to get out of there." (Vol. IX, R. 1158.) Martin testified that he did not remember what he told the investigators at that point; however, the inference from the record is that at that time Martin apparently confessed to being involved in the crimes. (Vol. IX, R. 1160.)

Although Martin purportedly confessed to the crimes, after further investigation, the police ultimately excluded Chad Martin as a suspect.[11] (Vol. IX, R. 1158–60.) Martin testified that several days later, he contacted a lawyer who accompanied him to the police station, and he gave another narrative in which he recanted his confession. When Martin recanted his confession, he apparently told the police the same version of events he gave in his first statement, and to which he testified at trial. (Vol. IX, R. 1160–61.)

After the prosecutor completed his direct examination of Chad Martin, the prosecutor intimated that he might later offer Chad Martin's exculpatory statements into evidence. Defense counsel responded that counsel had no objection to the admission of Chad Martin's exculpatory statement, provided the court also admit Martin's inculpatory version of events that he told to the investigators during the questioning. The circuit court indicated that the discussion was premature at that point in the trial. (Vol. IX, R. 1162.)

During cross-examination, defense counsel asked Chad Martin about whether he had made a statement to Lt. Faye Gary. Martin responded that he had but that he did not recall what he had said. Defense counsel then questioned Martin about specific incriminating statements that Chad Martin supposedly made to Lt. Gary by asking a series of questions like, "Did you tell Ms. Gary that 'You knew this sounded crazy but it was like you were seeing this through Chuck's eyes?' and "Did you tell Ms. Gary that ... 'I could see Savannah's eyes and I could hear her screaming for help?' " (Vol. IX, R. 1185–87.) For the most part, Martin could not recall what he told Gary because, he said, he was under the influence of drugs at the time he made the incriminating statement. (Vol. IX, R. 1185.) Martin clarified that the only reason he remembered what he said in his first statement—the exculpatory statement that he signed—was because he had read the statement before trial. (Vol. IX, R. 1185–86.)

Defense counsel then asked Martin whether he remembered making a statement to Capt. Roy Harbin. (Vol. IX, R. 1187.) Martin responded that, although he recalled making a statement, he could not recall to whom he made the statement. At that point, the prosecutor requested a sidebar conference. (Vol. IX, R. 1187.)

Outside the hearing of the jury, the prosecutor asserted that defense counsel should not be allowed to "back-door" the contents of the May 29 report signed by Capt. Harbin by asking Martin line-by-line questions from the report like counsel had done when questioning Martin about his statements to Lt. Gary. (Vol. IX, R. 1187–89.) Defense counsel responded that because the confession was an oral statement made by Martin to the investigators, counsel needed to introduce the contents of statement through Martin's testimony. (Vol. IX, R. 1189.) The prosecutor replied: "[I]f Chad testifies he doesn't remember giving the statement to Roy Harbin and doesn't remember anything in it, the proper method is for him to call Roy Harbin and say 'Did he do it and what did he ***96** say?' " (Vol. IX, R. 1189–90.) The Court agreed, and instructed defense counsel that if Martin did not remember what he told the investigator, defense counsel could not elicit the contents of the report by questioning Martin line-by-line regarding the details of the report. (Vol. IX, R. 1187–91.)

When defense counsel resumed cross-examination, Martin reiterated that he did not remember to whom he had made the inculpatory oral statement, so defense counsel ended its cross-examination of Martin. (Vol. IX, R. 1191–93.)

Later in the trial, after the State rested and before the

defense's presentation of its case, the prosecutor informed the Court that he had learned that defense counsel intended to introduce the May 29 police report that was signed by Capt. Roy Harbin, which supposedly documented Martin's confession. The State moved the Court for an order in limine prohibiting the introduction or mention of the May 29 police report. (Vol. XI, R. 1474.) A hearing was conducted outside the presence of the jury. (Vol. XI, R. 1474–1503.)

During the hearing, the State elicited testimony from Capt. Roy Harbin that in May 2003, he was the head of the detective division and that he supervised several investigators who were involved in the investigation of the Martin murders and robbery. (Vol. XI, R. 1475–76.) When the prosecutor showed Harbin the May 29, 2003, police report, which was labeled Defendant's Exhibit 10, Capt. Harbin admitted that although he had signed the report, he did not prepare or type the report—that was done by Sgt. Fincher—and he had not even read a completed version of the report until a few days before trial. (Vol. XI, R. 1476–79.) Capt. Harbin testified that he was not present during the entire interview with Chad Martin because he was also monitoring interviews with other suspects. Capt. Harbin stated that the May 29 police report did not contain an accurate version of what he had heard during the interview with Chad Martin.

Defense counsel cross-examined Capt. Harbin at length regarding why he would sign a report purporting to be his rendition of Martin's confession when he had not read the report, when he was not present for the entire interview with Chad Martin, and when he could not recall what Martin had said during the interview. (Vol. XI, R. 1481–92.) In response to questions propounded by defense counsel, Capt. Harbin conceded, "Detective Fincher put the paper on my desk ... [and] I signed it." (Vol. XI, R. 1490.)

During the State's redirect examination, Capt. Harbin confirmed that at the time he signed the May 29 report, Reynolds was the primary suspect in the crimes and was already in custody. (Vol. XI, R. 1493–95.) After the State's redirect, the following colloquy occurred:

> "THE COURT: And this document that I'm looking at, it's my understanding that you were not aware of the contents of this document until approximately three or four days ago?
>
> "[CAPT. HARBIN]: I may have glanced over it, Your Honor. But the first time I read it thoroughly was three or four days ago.
>
> "THE COURT: You did not read it prior to signing this document.
>
> "[CAPT. HARBIN]: I could have looked over it. I won't say that I didn't look over it. But I didn't read it thoroughly, no, sir.
>
> "THE COURT: *And this document is not an accurate statement of the facts as you understood them to be at the time of this interview?*
>
> "[CAPT. HARBIN]: *No, sir.*
>
> "THE COURT: *And you did not prepare this document?*
>
> ***97** "[CAPT. HARBIN]: *I did not.*
>
> "....
> "THE COURT: The document is out."[12]

(Vol. XI. R. 1498–99.) (Emphasis added.)

The court was careful to clarify its ruling, stating:

> "[Defense counsel], you can call Detective Harbin and you can ask him anything that you think that's appropriate in regard to this case. I'm not in any way limiting you in your questioning of that particular witness. Just the document itself is not in. You can ask him whatever you think is appropriate, any inconsistencies, just not the document."

(Vol. XI, R. 1502–03.)

Toward the end of the defense's case, the court indicated that it was under the impression that the defense was going to call Capt. Roy Harbin as a witness. The following then occurred:

> "[DEFENSE COUNSEL]: He's not any good to me.
>
> "....
>
> "THE COURT: Okay.... You do not want to call Captain Harbin. I want you to understand that I am not in any way precluding you from examining him and going into anything you want to about his inconsistencies or whatever.
>
> "[DEFENSE COUNSEL]: I understand. It doesn't help me at this point.

"[PROSECUTOR]: I think you ruled the other day, anybody that is not here, anybody they have not called—anybody that is not here was trial strategy on their part.

"THE COURT: Yea.

"[THE PROSECUTOR]: It wasn't anybody we couldn't get.

"[THE COURT]: Okay. I just want to make sure everybody is aware of that.

"[DEFENSE COUNSEL]: I understand."

(Vol. XI, R. 1540–41.)

1. *Impeachment Evidence*

[27] As stated above, Reynolds now argues that the circuit court's ruling regarding the inadmissibility of the May 29 report precluded him from impeaching Chad Martin's trial testimony with extrinsic evidence of Martin's prior inconsistent statement.

"When a witness, on cross-examination, denies having made a statement out of court which is inconsistent with the witness' testimony on direct examination, the only available move for the impeaching party is to bring on extrinsic proof—either in the form of writing, tape recording or impeaching witness who can testify as to the prior inconsistent statement. Before such extrinsic evidence may be elicited, however, it is the general rule that the impeaching party must lay a proper predicate by asking the witness being impeached whether such a statement was made, specifying with reasonable certainty the time, the place, the person to whom such supposed statement was made and the substance of the statement. The witness likewise must be given an opportunity to admit or deny having made the statement. This foundational requirement is continued under the Alabama Rules of Evidence:

" '*Rule 613. Prior Statements of Witnesses.*

***98** " '....

" '*(b) Extrinsic evidence or prior inconsistent statement of witness.* Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness has been confronted with the circumstances of the statement with sufficient particularity to enable the witness to identify the statement and is afforded an opportunity to admit or deny having made it....' "

Charles W. Gamble and Robert J. Goodwin, *McElroy's Alabama Evidence* § 157.01(1)(b) (6th ed. 2009) (footnotes omitted).

[28] Reynolds maintains that the circuit court's "restriction on the cross-examination ... prevented [him] from confronting [Chad Martin] with his prior statement, and also denied [Chad Martin] the opportunity to admit or deny the statement." (Reynolds's brief, Issue II(A)(1), at 20–22.)

It is clear from our review of the record that Chad Martin understood which of his prior statements defense counsel was referring to when counsel asked him if he had made a statement to Capt. Harbin. Under the facts of this case, Martin was "confronted with the circumstances of the statement with sufficient particularity to enable the [him] to identify the statement." Furthermore, Martin's failure to recall what he said during the conversation with the investigators was tantamount to a denial that he made the statement for purposes of introducing the prior conflicting statement through an impeaching witness. See *Walker v. State,* 581 So.2d 570 (Ala.Crim.App.1991). Accordingly, contrary to Reynolds's contention, the circuit court did not prevent Reynolds from establishing the proper predicate to impeach Chad Martin's trial testimony with extrinsic evidence of a prior inconsistent statement.

[29] Reynolds argues that he should have been allowed to introduce the May 29 police report through the testimony of Capt. Harbin. (Reynolds's brief, Issue II(A)(2), at 22–27.) He argues that because Capt. Harbin admitted that he signed the report, the report was sufficiently authenticated. We disagree.

> "Nothing in this rule [Rule 613, Ala.R.Crim.P.] abrogates the requirement that if the witness denies having made the statement then any extrinsic evidence of the prior inconsistent statement must be properly authenticated."

Advisory Committee Notes to Rule 613, Ala. R. Evid.

Furthermore,

"The question of authenticity or proper identification is, in the first instance, for the trial judge as a preliminary matter. See Ala.R.Evid. 104(a). The required foundational showing must consist of evidence

> 'sufficient to support a finding that the matter in question is what its proponent claims."

Advisory Committee Notes to Rule 901, Ala.R.Evid.

Here, although Capt. Harbin admitted that he signed the report, Capt. Harbin testified that he did not prepare the report and that the report did not accurately reflect his recollection of the conversation. Furthermore, the defense did not secure the presence of Sgt. Fincher, the author of the report, to testify at trial in order to authenticate the report. See, § 12–21–283, Ala.Code 1975, "Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceeding." The evidence simply did not support the conclusion that the report was what it was claimed to be: Capt. Harbin's written rendition of what he heard Chad Martin say during the police interrogation. Accordingly, we find no abuse of discretion in the circuit court's ruling.

***99** 2. *Substantive Evidence of Third-party Guilt*

Reynolds also contends that the May 29 report should have been admitted as substantive evidence of the guilt of a third party. (Reynolds's brief, Issue II(c), at 27–30.) Reynolds did not move to admit the report on this basis at trial; accordingly, we will review his assertion for plain error only. Rule 45A, Ala.R.App.P.

In the capital-murder case of *Dorsey v. State,* 881 So.2d 460 (Ala.Crim.App.2001), aff'd in part, rev'd in part on other grounds, 881 So.2d 533 (Ala.2003), Dorsey sought to present evidence that a third party had confessed to the murders that Dorsey was charged with committing. Specifically, Dorsey sought to call a prison inmate, Gary Wayne Henderson, as a defense witness to testify that another inmate, Johnny Likely, had told Henderson that Likely and "two white boys" had committed the murders that Dorsey was accused of committing. 881 So.2d at 491.

During a discussion at trial about presenting Henderson's testimony, Dorsey's defense counsel informed the court that Likely had not responded to the defense's subpoena and was unavailable for trial. Defense counsel argued that Henderson should be allowed to testify at trial regarding what Likely had told him because, counsel maintained, Likely's statement to Henderson was admissible as an excited-utterance exception to the hearsay rule and as a statement against penal interest. 881 So.2d at 491.

The court immediately issued an attachment for Likely, and, sometime later, Likely was brought to the courthouse to testify. After some investigation, Dorsey's defense counsel determined that if Likely testified, Likely was going to deny any involvement in the murders, and Likely was going to deny telling Henderson that he committed the crimes. The court ruled that if Likely denied the statements, then Henderson's "testimony as to what Likely told him would be admissible for impeachment purposes and not as substantive evidence of another person's guilt." 881 So.2d at 492–93. After the court made its ruling, defense counsel declined to call either Henderson or Likely as witnesses.

On appeal, Dorsey argued, in essence, that the trial court's ruling prevented him from presenting evidence in his defense. We disagreed:

> "The trial court, when ruling on the admissibility of the hearsay evidence, applied the law as it existed at the time of trial. Traditionally, Alabama courts had held that hearsay evidence concerning a third party's guilt is not admissible. See C. Gamble, *McElroy's Alabama Evidence*, § 48.01(4) (5th ed. 1996). See also *Griffin v. State,* 790 So.2d 267 (Ala.Crim.App.1999), rev'd, 790 So.2d 351 (Ala.2000).
>
> "After Dorsey was convicted, the Alabama Supreme Court in *Ex parte Griffin,* supra, recognized that there may be situations when hearsay evidence of a third party's guilt is admissible against a claim that it violates the hearsay rule. The Supreme Court, relying on the United States Supreme Court's holding in *Chambers v. Mississippi,* supra, held that an accused's 'constitutional rights [in that case] supersede[d] the hearsay rule in the Alabama Rules of Evidence.' 790 So.2d at 355.
>
> "In *Ex parte Griffin,* the accused sought to introduce evidence that a third party had pleaded guilty to the crime for which Griffin was charged, that the plea was taken in an Alabama court under oath, and that this individual had served four years in prison for the crime for which Griffin was on trial. The Alabama Supreme Court, when holding that this evidence was admissible, stated:
>
> > ***100** " 'The United States Supreme Court has held that a defendant has a right to put on a defense and that that right includes the opportunity to present evidence proving that another person committed the offense for which he has been charged. See *Chambers v. Mississippi,* 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); *Washington v. Texas,* 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). However, this right is not absolute; instead, the trial court will have to consider the admissibility of such

evidence in conjunction with other legitimate interests involved in the trial process. *Chambers,* 410 U.S. at 295, 93 S.Ct. 1038; see also *Guam v. Ignacio,* 10 F.3d 608 (9th Cir.1993). As a result, the trial court is presented with a balancing test in order to determine whether the evidence of a third party's culpability is properly admissible:

> " ' "The court must weigh the defendant's 'strong interest in presenting exculpatory evidence' against the state's interest 'in promoting reliable trials, particularly in preventing the injection of collateral issues into the trial through unsupported speculation about the guilt of another party.' "

" '*United States v. Johnson,* 904 F.Supp. 1303, 1311 (M.D.Ala.1995) (citations omitted). In weighing those interests, the federal courts have required the defendant to show that the evidence he is offering is probative and not merely speculation that would confuse the jury:

> " ' "To satisfy this balancing test, there must be 'some showing of a nexus between the other party and the particular crime with which a defendant is charged.' Of course, this nexus must be substantial—that is, probative—and not tenuous or merely speculative."

" '*Id.* (citations omitted).

" 'Like the federal courts, Alabama courts have long recognized the right of a defendant to prove his innocence by presenting evidence that another person actually committed the crime. See *Ex parte Walker,* 623 So.2d 281 (Ala.1992); *Thomas v. State,* 539 So.2d 375 (Ala.Crim.App.1988); *Green v. State,* 258 Ala. 471, 64 So.2d 84 (1953); *Underwood v. State,* 239 Ala. 29, 193 So. 155 (1939); *Orr v. State,* 225 Ala. 642, 144 So. 867 (1932); *Houston v. State,* 208 Ala. 660, 95 So. 145 (1923); *Tennison v. State,* 183 Ala. 1, 62 So. 780 (1913); *McGehee v. State,* 171 Ala. 19, 55 So. 159 (1911); *McDonald v. State,* 165 Ala. 85, 51 So. 629 (1910). In addition, Alabama courts have also recognized the danger in confusing the jury with mere speculation concerning the guilt of a third party:

> " ' "It generally is agreed that the defense, in disproving the accused's own guilt, may prove that another person committed the crime for which the accused is being prosecuted.... The problem which arises in the application of this general rule, however, is the degree of strength that must be possessed by the exculpatory evidence to render it admissible. The task of determining the weight that must be possessed by such evidence of another's guilt is a difficult one."

" 'Charles W. Gamble, *McElroy's Alabama Evidence* § 48.01 (5th ed. 1996). To remove this difficulty, this Court has set out a test intended to ensure that any evidence offered for this purpose is admissible only when it is probative and not merely speculative. ***101** Three elements must exist before this evidence can be ruled admissible: (1) the evidence "must relate to the 'res gestae' of the crime"; (2) the evidence must exclude the accused as a perpetrator of the offense; and (3) the evidence "would have to be admissible if the third party was on trial." See *Ex parte Walker,* 623 So.2d at 284, and *Thomas,* 539 So.2d at 394–96.

" '....

" 'The State makes an additional argument as to Embry's guilty plea. It apparently argues in its brief that, even if the evidence of the plea passes the three-pronged test, at Griffin's trial Embry's plea is still hearsay that does not fall within any exception. Professor Gamble has stated:

> " ' "The accused cannot ... prove the guilt of another by the use of hearsay statements. This hearsay ban constitutes the major barrier to exculpatory evidence, particularly in the form of a third party's confession to the crime with which the accused is charged. Such a statement could surmount a hearsay objection if it qualifies under some hearsay exception."

" '*McElroy's Alabama Evidence*, § 48.01(1). However, Gamble also notes that a situation could arise where "an accused's constitutional right to present his defense would dictate admission of evidence suggesting another's guilt," *Id.* The United States Supreme Court has encountered such a situation, where the defendant's due-process rights conflicted with the rules of evidence. In *Chambers,* the Court stated: "In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." 410 U.S. at 302, 93 S.Ct. 1038.

" '....

" '[W]e follow the United States Supreme Court's holding in *Chambers* and hold that Griffin's constitutional rights supersede the hearsay rule in the

> Alabama Rules of Evidence. However, in doing so, we note that not in every case will the defendant's right to present his defense supersede the hearsay rule; it will supersede that rule only in those cases that, as indicated by the first two elements of the test stated above, have a probative alternative theory of culpability and not an alternative theory that is merely speculative and meant only to confuse the jury.'

"790 So.2d at 353–55. (Emphasis added.)

"Other courts, like the Alabama Supreme Court in *Griffin*, have recognized that the main concern when applying the *Chambers* holding is whether the hearsay evidence has a 'sufficient indicia of reliability.' See *Card v. Dugger,* 911 F.2d 1494 (11th Cir.1990) (noting that the *Chambers* Court cited four facts that made the hearsay statements reliable: '(1) the time of the declaration and the party to whom the declaration was made; (2) the existence of corroborating evidence in the case; (3) the extent of which the declaration is really against a declarant's penal interest; and (4) the availability of the declarant as a witness, that is, whether the state could cross-examine him regarding his statements.' 911 F.2d at 1515); *Turner v. State,* 267 Ga. 149, 476 S.E.2d 252 (1996) ('must have "particularized guarantees of trustworthiness," that is, it must be "coupled with circumstances which attribute verity to it." ' 476 S.E.2d at 258); ***102** *Davis v. State,* 194 Ga.App. 482, 391 S.E.2d 124 (1990) ('In those cases in which the United States Supreme Court has ruled the confession of a third party to be admissible as an exception to hearsay, the Court found strong indicia of reliability of the out-of-court statement. In *Chambers,* the third-party declarant had made three separate admissions of guilt to three different people, the statements bore persuasive assurances of trustworthiness and the declarant was available for cross-examination by the State so that his demeanor and responses could be weighed by the jury. In *Green v. Georgia,* 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979), the Supreme Court held that, pursuant to the Due Process Clause of the Fourteenth Amendment, testimony concerning the confession of a codefendant should have been admitted in the sentencing phase of trial because it was relevant and because of its reliability'); *Alderman v. Zant,* 22 F.3d 1541 (11th Cir.), cert. denied, 513 U.S. 1061, 115 S.Ct. 673, 130 L.Ed.2d 606 (1994) ('It is generally true that a defendant must be permitted to introduce any mitigating evidence at the sentencing phase of a capital case if the evidence relates to the defendant's character, record or the circumstances of the particular offense.... However, a judge still retains the discretion to exclude otherwise inadmissible evidence which it determines lacks considerable assurances of trustworthiness. *Chambers,* 410 U.S. at 300, 93 S.Ct. at 1048.' 22 F.3d at 1557); *Jones v. State,* 709 So.2d 512 (Fla.1998) ('[U]nlike the confessions in *Chambers*, the alleged confessions in this case lack indicia of trustworthiness.... The confessions were not made prior to the original trial in circumstances indicating trustworthiness, such as spontaneously to a close acquaintance as in *Chambers,* or to his own counsel or the police shortly after the crime, ... but were made to a variety of inmates with whom [the witness] served prison time.' 709 So.2d at 525).

"....

"Here, we do not have the situation that was presented in *Griffin.* In *Griffin,* the evidence that was introduced had a high degree of reliability. There is absolutely no indicia of reliability in a statement made by one inmate to another inmate. The facts of this case are distinguishable from those presented in *Griffin;* thus, *Griffin* does not mandate a reversal in this case. There is absolutely no evidence in the record that the statements bore such a degree of reliability that we would depart from the long-standing rule regarding the exclusion of hearsay evidence. In fact, Likely, when questioned about the statement he was said to have made to Henderson, told investigators that he did not make the statement. Likely was prepared to testify, but defense counsel did not want him to testify. Defense counsel knew that if Likely denied the statement then Henderson's testimony as to what Likely told him was admissible only for impeachment purposes and not as substantive evidence of another person's guilt. The trial court did not err in excluding this evidence."

881 So.2d at 493–96.

[30] With the above law in mind, we turn to Reynolds's assertion. The evidence that Reynolds claims should have been admitted as substantive evidence of a third party's guilt was a police report supposedly documenting Chad Martin's confession—a confession subsequently determined to be unreliable—prepared by an officer who did not testify and signed by the officer's supervisor, who neither heard the confession nor would attest to the accuracy of the statements in the report. Under these unusual facts, the May 29 ***103** police report simply did not have "sufficient indicia of reliability" to overcome the prohibition against proving third party's guilt by use of hearsay evidence.

[31] In any event, the circuit court's ruling regarding the inadmissibility of the May 29 police report did not prevent Reynolds from effectively presenting his defense.

The circuit court emphasized that Reynolds could question Capt. Harbin regarding inconsistencies between Chad Martin's trial testimony and what he heard Martin say during the interrogation, but Reynolds declined to call Capt. Harbin as a witness. Furthermore, Reynolds did call Lt. Gary to testify to the inculpatory statements that Martin made to her.

Lt. Gary testified that she first spoke with Chad Martin on May 25, 2003, at the scene of the crimes. She said that Chad approached her and began to talk about where the Martins' bodies were found in the house. (Vol. XI, R. 1506–07.) He also told her that he had lost a pair of his sunglasses. (Vol. XI, R. 1507.) Lt. Gary testified that Martin was very upset. (Vol. XI, R. 1508.) Lt. Gary stated that Martin's statements made her suspicious, so she told Sgt. Fincher what Martin had told her. (Vol. XI, R. 1508.)

She testified that she later spoke with Chad Martin again when the detectives brought Martin to her office during a break in their interview. (Vol. XI, R. 1510.) Lt. Gary testified that Martin was visibly upset at that time and that he was sobbing. (Vol. XI, R. 1512.) Lt. Gary testified:

> "I was telling him everything was going to be okay, just calm down. And then he said Ms. Gary, you know—something to the effect that this may seem or sound crazy to you, but it's—it's as if I'm seeing this through—I believe it was Chuck's eyes. And he said it was like he could smell the gas on his hands and he didn't know where the cuts came from. And then he said that I know that I couldn't hurt Savannah. I just—I know I couldn't hurt Savannah. And he said he told them the truth but they didn't believe him. Then he went on to say something about a phone call that he had made that was going to probably make him look bad. And I asked him why do you say that, what did you say. And he said something to the effect about the message that [Charles Martin] had on the phone, something about him sounding dead or something, you know, on the message.
>
> "....
>
> "[I]t seems like he said he—something about her [Savannah] screaming. Yeah, that was in the conversation. Something about he could hear her screaming don't hurt me or something to that effect.
>
> "....
>
> "... [H]e was talking about a message that he had left Chuck on the phone, that the message that he left—something about he needed to change the message because he sounded dead. And he said I know that is going to look bad for me."

(Vol. XI, R. 1512–14.)

Under these circumstances, we can find no plain error in the exclusion of the May 29 police report as substantive evidence of a third party's guilt.

B.

Reynolds argues that his convictions are due to be reversed because, he claims, the prosecutor improperly bolstered the credibility of its witnesses Chad Martin and John Langley by presenting evidence of their prior *consistent* statements, and by introducing evidence that they either had taken a polygraph test or had offered to ***104** take a polygraph test. (Reynolds's brief, Issue III, pp. 30–42, Reynolds's reply brief, Issue III, at 30–35.)

1. *Reynolds's Bolstering Claim*

First, as to Reynolds's claim regarding Chad Martin, we note that contrary to Reynolds's assertion, the State did not introduce into evidence *any* of the content of Chad Martin's oral or written statements—inculpatory or exculpatory. (See our discussion in part A of this issue.) Thus, Reynolds's assertion that the State introduced into evidence Chad Martin's prior *consistent* statement in order to bolster his trial testimony is without merit.

John Langley, Chad Martin's friend and a neighbor of the Martins, testified during the State's case-in-chief. He testified, in essence, that Chad Martin spent Saturday through Sunday morning of the crimes at Langley's house doing construction work and taking drugs. Langley's testimony tended to corroborate Chad Martin's trial testimony.

During direct examination, Langley testified that Chad Martin left Langley's house and returned on Sunday morning around 8:00 or 8:30, and that Martin was very upset. (Vol. IX, R. 1116–17.) As discussed in the facts portion of this opinion, the crimes were not discovered until approximately 10:00 on that Sunday morning. Defense counsel seized upon this time discrepancy and cross-examined Langley regarding the discrepancy. Langley again testified that Chad Martin came to his house around 8:00 or 8:30 that Sunday morning. He testified that at that time Martin told him that he had seen

police and fire officials at the Martin residence and that Martin was upset and concerned that Charles Martin might have killed himself and his wife. (Vol. IX, R. 1122–23.)

During the State's redirect examination of Langley, the State sought to introduce Langley's statement that he made to the police during his interrogation, which was marked State's Exhibit 62. In Langley's statement he told the police that Chad Martin returned to his house on Sunday morning around 10:30 and that Martin was very upset because had seen fire trucks and police vehicles at the Martins' house. (IV, R. 1127–28.)

The defense objected to the admission of the statement on the grounds that it was being offered to improperly bolster the witness's testimony. (Vol. IX, R. 1128–29.) A discussion ensued outside the presence of the jury, during which the following occurred:

> "[THE COURT]: [Defense counsel], clearly from the testimony I have heard the bodies weren't discovered until around 10:00 o'clock, correct?
>
> "[DEFENSE COUNSEL]: Yes, sir, that is correct.
>
> "THE COURT: On the way to church. And you did question him about this statement and you questioned him about the time.
>
> "[DEFENSE COUNSEL]: Sure.
>
> "[THE COURT]: And if what he has testified to is inconsistent with this statement and the statement says otherwise, I think that will be very damaging to the state.
>
> "[DEFENSE COUNSEL]: *We won't object.*"

(Vol. IX, R. 1132–33.) (Emphasis added.)

State's Exhibit 62 was offered and admitted into evidence without further object ion. (Vol. IX, R. 1133–35.) During the State's redirect examination, Langley confirmed that State's Exhibit 62 was his statement to the police. Upon the request of the prosecutor, Langley then read the portion of his statement where he wrote that Martin returned to his house at 10:30 ***105** on the morning the crimes were discovered. (Vol. IX, R. 1135.) Langley agreed that the time in his police statement was inconsistent with what he testified to during trial. (Vol. IX, R. 1135.)

Although Reynolds did initially object to the introduction of Langley's statement on the grounds that it was offered to bolster his trial testimony, Reynolds, in essence, withdrew that objection. Thus, we will review Reynolds's contention that the statement was offered for the purpose of bolstering the testimony for plain error only. Rule 45A, Ala.R.App.P.

"Rule 607, Ala.R.Evid., provides:

> "The credibility of a witness may be attacked by any party, including the party calling the witness."

Further,

> "Rule 607 authorizes a party to bring against his own witness all weapons from the arsenal of impeachment that historically were reserved generally for opposing witnesses.... *One may, for example, impeach his own witness by showing that the witness made a statement or performed an act that is inconsistent with the witness' present testimony....* Inconsistencies, whether in the form of statements or acts, likewise could be used to impeach one's own witness."

McElroy's Alabama Evidence § 165.01(6)(a) (footnotes omitted; emphasis added). Even before the implementation of Rule 607, Ala.R.Evid., a party could correct or contradict the testimony of one's own witness. See *Fortenberry v. State,* 545 So.2d 129, 137–38 (Ala.Crim.App.1988), aff'd, 545 So.2d 145 (Ala.1989); *Bell v. State,* 466 So.2d 167, 173 (Ala.Crim.App.1985).

[32] The inference from the record is that the prosecutor introduced Langley's statement to the police in order to correct Langley's statement at trial that Chad returned to his house at 8:30 a.m. on the Sunday morning the crimes were discovered. We are not persuaded that the prosecutor introduced this statement in order to improperly bolster Langley's trial testimony. Thus, we find no plain error in the admission into evidence of State's Exhibit 62, Langley's statement to the police.

[33] Likewise, we find no plain error in the prosecutor's soliciting from John Langley and Chad Martin testimony that they were initially considered to be suspects in the crimes, that they were questioned by the police at length, and that they were then excluded as suspects. (Reynolds's brief, at 37–38.) At no point during this line of questioning did Reynolds object to the questions on the grounds that the prosecutor was attempting to elicit that

testimony in order to bolster the witnesses' trial testimony.

> "There is a general principle that one may not bolster the credibility of his own witness before that credibility has been attacked by the opponent. However, this traditional preclusion has been held inapplicable to preclude a calling party from anticipating such an attack and diffusing bias impeachment by himself bringing out the bias-revealing matter on direct."

McElroy's Alabama Evidence § 149.01(15) (footnotes omitted).

Furthermore:

> "[A] party may not bolster the credibility of his own witness until it first has been attacked. This principle, however, in no way precludes a party from diffusing the impact of possible impeachment by bringing out the impeaching information on direct. A witness' inconsistent statement, for example, may be brought out on direct so as to diffuse the prejudicial ***106** impact such information would have if first brought out by the opponent."

McElroy's Alabama Evidence § 116.01(2).

It is apparent from the record that the defense intended to elicit testimony that Chad Martin and John Langley were originally suspects in the crimes and that Chad Martin purportedly confessed to the crimes. By eliciting the fact that both men had been questioned at length by the police and subsequently excluded as suspects, the State was attempting to anticipate and diffuse the matter on direct. Under the facts of this case, we do not agree that the prosecutor was attempting to improperly bolster the credibility of the witnesses by the line of questions referenced by Reynolds. Accordingly, we do not find that the prosecutor's questions in this regard amounted to plain error. Rule 45A, Ala.R.App.P.

2. *Polygraph Evidence*

[34] Reynolds also contends that the prosecutor committed reversible error when the prosecutor elicited from John Langley testimony that he took a polygraph test and that Chad Martin offered to take a polygraph test. (Reynolds's brief, III(B), at 38–42.) Reynolds did not object to the questions that elicited these responses, nor did he move to exclude the witnesses' answers. (Vol. IX, R. 1117–18; 1160.) Therefore we review this allegation for plain error only.

Assuming, without deciding, that it was error for the prosecutor to elicit the statements regarding the polygraph test, see *A.G. v. State,* 989 So.2d 1167, 1177 (Ala.Crim.App.2007), under the facts of this case we do not believe such error would amount to plain error. Rule 45A, Ala. R.App. P. The witnesses each testified without objection that they had told the truth. Each witness was also thoroughly cross-examined by defense counsel regarding his possible bias. It is unlikely that the passing reference to the polygraph tests by each witness in light of their remaining testimony "probably adversely affected" Reynolds's "substantial rights." See *Daniels v. State,* 650 So.2d 544, 556–57 (Ala.Crim.App.1994), cert. denied, 514 U.S. 1024, 115 S.Ct. 1375, 131 L.Ed.2d 230 (1995); *Logue v. State,* 529 So.2d 1064, 1067 (Ala.Crim.App.1988).

C.

[35] Reynolds contends that the prosecutor "encouraged the jury to rely on improper evidence in considering Chad Martin's testimony." (Reynolds's brief, Issue XIII(A), at 92–93.) We disagree.

Toward the end of the State's direct examination of Chad Martin, the following occurred:

> "Q. [PROSECUTOR]: Chad, one more time. Did you have anything to do with [Charles Martin's] death?
>
> "A. No, I did not.
>
> "....
>
> "Q. [PROSECUTOR]: Chad, do you know some of these folks sitting out here?
>
> "A. Yes, I do. It's my family.
>
> "Q. [PROSECUTOR]: The second lady from the left there, who is she?

"A. That would be my mother.

"Q. [PROSECUTOR]: She's the lady that raised you; isn't she?

"A. Yes, sir.

"Q. Can you sit right there in that witness stand and look that lady right there in the eye and tell her whether you had anything to do with killing [Charles Martin]?

"[CHAD MARTIN]: Momma, I didn't kill him.

"[THE PROSECUTOR]: That's all.

***107** "THE COURT: Your witness."

(Vol. IX, R. 1161–62.)

Reynolds did not object to the prosecutor's question on the grounds now asserted on appeal. Thus, his allegation of prosecutorial misconduct with regard to this incident will be reviewed for plain error only. Rule 45A, Ala.R.App.P.

Reynolds argues that "the prosecutor improperly bolstered the credibility of Chad Martin by asking the jury to rely on Chad Martin's assurances to his mother as a basis for crediting Chad Martin's statements." (Reynolds's brief at p. 92.)

Although perhaps this distinction is subtle, the prosecutor did not specifically ask Chad Martin to profess his innocence to his mother; rather, it appears that the prosecutor was essentially asking a rhetorical question. At most, the question called for a "yes" or "no" answer, not for Martin to make a direct statement to his mother. We are not convinced that the prosecutor was improperly attempting to encourage the jury to base its verdict on matters not in evidence. Nevertheless, although we do not condone the question, viewing the allegedly improper question in the context of the entire trial, as we are bound to do, see *Robitaille v. State,* 971 So.2d 43, 61–63 (Ala.Crim.App.2005), cert. denied, 552 U.S. 990, 128 S.Ct. 490, 169 L.Ed.2d 339 (2007),[13] we are not persuaded that the prosecutor's question that precipitated Chad Martin's response " 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' " *Robitaille,* 971 So.2d at 62 (citations omitted). Martin had already testified several times, without objection, that he did not commit the crimes.

Accordingly, we find no plain error in this assertion of prosecutorial misconduct.

VIII.

[36] Reynolds argues that the circuit court erroneously allowed the State to elicit hearsay testimony from witnesses Adrian West and Chad Martin. (Reynolds's brief, Issue XVIII, at 104–06.) First, Reynolds alleges that the State, in an effort to bolster West's testimony and "excuse her involvement in the crime," was improperly allowed to elicit the following testimony from West:

> "And he [Donald Harvey, aka, Dino], asked me if Michael had anything to do with what happened to Chuck [Charles Martin]. And I nodded yes. And he said for me to get the stuff. And I got the stuff, and we went and got rid of it."

(Vol. VIII, R. 944.)

> "And Dino told me that Michael was going to be getting out of jail."

(Vol. VIII, R. 944.)

Reynolds did not object to the first alleged instance of improper hearsay. When Reynolds objected to the second purportedly improper statement, the State responded that the testimony was not being offered for the truth of the matter asserted but was instead being offered to establish West's subsequent conduct. (Vol. VIII, R. 945.) The circuit court did not rule on his objection, but simply told the prosecutor to "Go ahead." (Vol. VIII, R. 945.) Accordingly, we will review these claims under the plain-error standard.

Reynolds contends that "[i]n an effort to exonerate Chad Martin's confession, the State directly solicited hearsay testimony from the witness [Martin] about what one of the investigating officers told him at the ***108** crime scene." (Reynolds's brief, at 105.) In the portion of the record cited by Reynolds, Chad Martin testified that when he arrived at the Martins' residence the morning the crimes were discovered, he saw Sgt. Mulkey and engaged him in a conversation. When the State asked Chad what Sgt. Mulkey told him, the defense objected on the grounds that the question called for hearsay. (Vol. IX, R. 1147.)

The State responded that the testimony was not elicited for the truth of the matter asserted but rather to explain Chad Martin's subsequent actions. (Vol. IX, R. 1147.)

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The defense then argued that "[i]f they allege Sgt. Mulkey told him something, the State should have asked Sgt. Mulkey himself." (Vol. IX, R. 1147–48.) The court stated "Fine," and then the court instructed the State to ask its next question. (Vol. IX, R. 1148.) The State again asked Chad Martin what Sgt. Mulkey had told him and Chad testified, without objection, that Sgt. Mulkey told him that Charles Martin was dead and that when Sgt. Mulkey asked him for names of Charles Martin's wife and daughter, he collapsed. (Vol. IX, R. 1148.)

[37] As discussed, Reynolds did not object to the first allegedly improper comment by West and, although he did object to the other supposed hearsay testimony, he did not obtain an adverse ruling. " 'In the absence of a ruling, a request for a ruling or an objection to the court's failure to rule, there is nothing preserved for appellate review.' " *Johnson v. State,* 542 So.2d 341, 345 (Ala.Crim.App.1989) (citations omitted). Nevertheless, we find no error, plain or otherwise, in the admission of the testimony.

> "Rule 801(c), Ala.R.Evid., states:
>
> " ' "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.'
>
> "....' "[The hearsay rule] does not exclude extrajudicial utterances offered merely to prove the fact of the making or delivery thereof, or to explain subsequent conduct of a hearer." ' *Ashford v. State,* 472 So.2d 717, 719 (Ala.Crim.App.1985), quoting 22A C.J.S. *Criminal Law* § 718 (1961)."

Robitaille v. State, 971 So.2d 43, 57 (Ala.Crim.App.2005), cert. denied, 552 U.S. 990, 128 S.Ct. 490, 169 L.Ed.2d 339 (2007).

Neither statement was offered to prove the truth of the matter asserted; rather, each statement was elicited to explain the declarant's subsequent conduct. Accordingly, no error occurred.

IX.

Reynolds alleges that the circuit court erroneously prohibited him from impeaching the testimony of two State's witnesses. (Reynolds's brief, Issue XI, at 83–87.) First, Reynolds contends that he should have been allowed to question Chad Martin regarding whether Martin had a motive to kill the victims. (Reynolds's brief, Issue XI (A), at 84–85.) Second, Reynolds asserts that he was incorrectly prohibited from questioning Adrian West regarding her possible bias against Reynolds. (Reynolds's brief, Issue XI(B), at 85–87.) These allegations will be addressed separately below.

A.

[38] At trial, Reynolds's counsel cross-examined Chad Martin regarding alleged conflicts Martin had with Charles Martin. During that line of questioning, defense counsel asked whether Chad Martin had ever left a note on Charles Martin's door threatening to stab him. Defense counsel then stated, "If there were a report somewhere that somebody had done that and ***109** you were a suspect in that, you are saying...." (Vol. IX, R. 1179–80.) Before defense counsel could finish the question, the State objected, and a discussion ensued between the court and the respective parties.

In support of its objection, the State argued that the defense was attempting to improperly suggest that Chad Martin had a motive to kill Charles Martin without having any evidence to substantiate the suggestion. Defense counsel conceded that it did not have a "report" naming Chad Martin as a suspect in leaving Martin a threatening note, but defense counsel maintained that its supposition regarding Chad Martin's leaving the threatening note was based upon discovery material provided by the State, in particular, a statement by one of the Martins' relatives to a detective. (Vol. IX, R. 1181–82.)

The circuit court instructed the parties to "move along"; thus, by implication, the court sustained the State's objection to Reynolds's further questions regarding the note. (Vol. IX, R. 1182.)

Reynolds did not make any offer of proof as to how the extrinsic evidence would have established Chad Martin's motive for murder. Accordingly, we will review his assertion for plain error only. Rule 45A, Ala.R.App.P; Rule 103(a)(2), Ala.R.Evid.; and *Jennings v. State,* 513 So.2d 91 (Ala.Crim.App.1987).

We have stated:

> " 'Alabama courts have long recognized the right of a defendant to prove his innocence by presenting evidence that another person actually committed the crime. See *Ex parte Walker,* 623 So.2d 281 (Ala.1992); *Thomas v. State,* 539 So.2d 375

(Ala.Crim.App.1988); *Green v. State,* 258 Ala. 471, 64 So.2d 84 (1953); *Underwood v. State,* 239 Ala. 29, 193 So. 155 (1939); *Orr v. State,* 225 Ala. 642, 144 So. 867 (1932); *Houston v. State,* 208 Ala. 660, 95 So. 145 (1923); *Tennison v. State,* 183 Ala. 1, 62 So. 780 (1913); *McGehee v. State,* 171 Ala. 19, 55 So. 159 (1911); *McDonald v. State,* 165 Ala. 85, 51 So. 629 (1910). In addition, Alabama courts have also recognized the danger in confusing the jury with mere speculation concerning the guilt of a third party:

> " ' "It generally is agreed that the defense, in disproving the accused's own guilt, may prove that another person committed the crime for which the accused is being prosecuted.... The problem which arises in the application of this general rule, however, is the degree of strength that must be possessed by the exculpatory evidence to render it admissible. The task of determining the weight that must be possessed by such evidence of another's guilt is a difficult one."
>
> " 'Charles W. Gamble, *McElroy's Alabama Evidence* § 48.01(1) (5th ed. 1996). To remove this difficulty, this Court has set out a test intended to ensure that any evidence offered for this purpose is admissible only when it is probative and not merely speculative. Three elements must exist before this evidence can be ruled admissible: (1) the evidence "must relate to the 'res gestae' of the crime"; (2) the evidence must exclude the accused as a perpetrator of the offense; and (3) the evidence "would have to be admissible if the third party was on trial." See *Ex parte Walker,* 623 So.2d at 284, and *Thomas,* 539 So.2d at 394–96.'

"*Ex parte Griffin,* 790 So.2d 351, 354–55 (Ala.2000)."

***110** *Gobble v. State,* 104 So.3d 920, 963 (Ala.Crim.App.2010). See also *Snyder v. State,* 893 So.2d 488, 534–37 (Ala.Crim.App.2003), cert. denied, 893 So.2d 563 (Ala.2004), cert. denied, 544 U.S. 1062, 125 S.Ct. 2512, 161 L.Ed.2d 1113 (2005).

Reynolds was allowed wide latitude in cross-examining Chad Martin regarding his prior conflicts with victim Charles Martin. The circuit court did not abuse its discretion in refusing to allow further questioning about a threatening note Chad Martin denied leaving on Charles Martin's door. Other than a vague reference to a hearsay statement contained within an unspecified report, Reynolds offered no proof that Chad Martin had in fact left such a threatening note. Furthermore, assuming that Reynolds proved that such a report existed, he still did not establish that it would have met the three-pronged requirements set forth in *Griffin* as addressed in *Gobble* and *Snyder,* supra.

Based upon the information provided to the circuit court, " '[T]he tendency of this evidence to mislead the jury substantially outweighed its probative value in the case.' " *Snyder,* 893 So.2d at 537. Accordingly, we find no plain error in the circuit court's ruling.

B.

[39] Reynolds also argues that the circuit court erred in ruling that he could not impeach the testimony of Adrian West with evidence of bias. (Reynolds's brief, Issue XI(B), at 85–87.) We disagree.

Before trial, a hearing was conducted to determine whether West was Reynolds's common-law wife and whether the use of information she provided to investigators and her testimony at trial would violate the marital-communication privilege. (Vol. 1, C. 147–48; R. Vol. IV, R. 209–Vol. V, R. 256.) During that hearing, Reynolds's counsel sought to establish that West was Reynolds's common-law wife by eliciting testimony from West that she had signed a 2002 tax return and an advance loan application against the tax return as Reynolds's spouse. However, because the documents had been electronically filed by a commercial tax preparer, there was no signature line, and, at the time of the hearing, West had not yet signed an authorization form permitting the tax preparer to release the paperwork purportedly bearing her signature.

During questioning by defense counsel at the pretrial hearing, West admitted that she had given written authorization for the tax preparer to electronically file the tax return; however, she testified that she did not recall signing either the tax form or the advance loan application as Reynolds's spouse. For a variety of reasons, the circuit court ultimately ruled that West was not Reynolds's common-law wife. (Vol. I, C. 165–66.)

During the trial, defense counsel filed a motion in limine seeking the court's permission to introduce the transcript from the pretrial hearing and the 2002 tax documents, which defense counsel had obtained after the hearing that purportedly bore West's signature in the capacity as Reynolds's spouse. (Vol. II, C. 216–17; Second Supplement, Vol. III, C. 410–13.) The circuit court addressed Reynolds's motion in limine before West testified. (Vol. VIII, R. 902–10.) In support of the motion,

Reynolds's counsel argued that the purpose of introducing the transcript from the hearing and the tax documents was to establish that West lied during the hearing when she testified that she had not signed an application for an advance loan as Reynolds's spouse. Defense counsel alleged that West lied in the hearing because she was biased against Reynolds and because she wanted to ensure that her ***111** trial testimony would not be excluded under the marital-communications privilege.

After further discussion, the circuit court denied Reynolds's motion because, it found, West did not specifically deny that she had signed the papers as Reynolds's spouse; rather, West testified at the hearing that she could not recall how she signed the paperwork.

Rule 616, Ala.R.Evid, provides:

> "A party may attack the credibility of a witness by presenting evidence that the witness has a bias or a prejudice for or against a party to the case or that the witness has an interest in the case."

In this regard:

> "Any acts, statements or relationships offered under Rule 616 must be relevant to bias. It ordinarily lies within the discretionary power to allow or disallow proof of specific facts which tend to show the witness' bias or the extent thereof. The party alleging error on appeal in this regard must show an abuse of discretion on the part of the trial court."

McElroy's Alabama Evidence § 149.01(2)(a) (footnotes omitted).

The proffered documents do not establish bias. As noted, West testified at the pretrial hearing that she could not recall in what capacity she had signed the proffered documents. Furthermore, documents bearing her signature in the capacity of Reynolds's spouse do not establish that she lied in order to be able testify against him at trial. Reynolds has not established that the circuit court abused its discretion by its ruling.

X.

Reynolds contends that his convictions are due to be reversed because, he claims, the State failed to provide the defense with "critical evidence" in violation of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and Alabama caselaw. (Reynolds's brief, Issue V, at 51–59.)

A.

Reynolds argues that the State improperly failed to provide the defense with notes made by investigators during their interviews with State's witnesses Adrian West and John Langley and defense witness Donald Harvey. Reynolds maintains that he was entitled to the interview notes because the notes allegedly contain impeachment evidence. (Reynolds's brief, at 57–59.)

Although Reynolds interchanges the terms "statements" and "interview notes" in various points in his argument, we note that for discovery purposes these terms are different:

> "In *Cooks v. State,* 50 Ala.App. 49, 276 So.2d 634, cert. denied 290 Ala. 363, 276 So.2d 640, it was held:
>
> " '*The first requisite necessary to secure for inspection production of a "statement" of a witness for use on cross examination of the witness is that the statement must be one in writing prepared by him or prepared by another at his instance and signed by him or otherwise authenticated by him.* In the instant case there was nothing to indicate by query of the witness by the defense or otherwise that the witness had given to any officer a written statement signed or authenticated by her. There was not laid in the evidence any showing that any statement made by the witness to officers before trial differed in any respect from statements made to the jury during trial. See *Bellew v. State of Mississippi,* 238 Miss. 734, 106 So.2d 146, cited with approval in the *Mabry* case, supra. Neither was there any such showing of inconsistency ***112** in testimony given by the witness at a preliminary hearing previously held and the testimony given by her on the trial before the jury. There is no showing that the statement requested, if any, was of such nature that without it the defendant's trial would be fundamentally unfair. The production for inspection of any such statement as above defined lies within the sound discretion of the court and we find no abuse of that discretion in the

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ruling here made. See *Annotation, Right of Defendant in Criminal Case to Inspection of Statement of Prosecution's Witness for Purpose of Cross Examination or Impeachment,* 7 A.L.R.3d, pp. 181, 217, 219, 213 citing the *Mabry* case, supra, and the authorities therein noted.'

"After a review of the evidence adduced at the hearing on appellant's motion for a new trial, we are clear to the conclusion that the unsigned notes in question did not amount to a statement as defined in *Cooks,* supra, *but merely represented the work product of a county investigator's interview of a prospective witness, and as such were not subject to appellant's motion to produce. Mabry v. State,* 40 Ala.App. 129, 110 So.2d 250; *Thigpen v. State,* 49 Ala.App. 233, 270 So.2d 666; *Fortenberry v. State,* 55 Ala.App. 1, 312 So.2d 573; and *Cooks*, supra."

Maness v. State, 57 Ala.App. 431, 435, 329 So.2d 120, 123–124 (Ala.Crim.App.1976).

[40] Reynolds does not actually claim that the State failed to provide *statements* from the three witnesses; rather, Reynolds argues that the State should have also produced the investigators' interview notes with West, Langley, and Harvey because, he asserts, those notes purportedly contain impeachment evidence. We disagree.

As discussed in *Maness,* supra, the investigators' notes from the interviews are considered privileged work product and are not necessarily discoverable by Reynolds. See Rule 16.1(c)(1)-(3) and 16.1(e), Ala.R.Crim.P. See also *Rogers v. State,* 417 So.2d 241, 247 (Ala.Crim.App.1982.) ("[O]riginal notes [of investigator] are considered work product and as such a defendant has no right to their production.").

[41] [42] [43] [44] However, Rule 16.1(f), Ala.R.Crim.P., provides that "[n]othing in this Rule 16.1 shall be construed to limit the discovery of exculpatory material or other material to which a defendant is entitled under constitutional provisions or other provisions of law."

" 'In *Brady [v. Maryland*], 373 U.S. [83,] 87, 83 S.Ct. [1194] 1196–97 [(1963)], the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." A *Brady* violation occurs where: (1) the prosecution suppresses evidence; (2) the evidence is favorable to the defendant and (3) material to the issues at trial. *Stano v. Dugger,* 901 F.2d 898, 899 (11th Cir.1990); *Delap v. Dugger,* 890 F.2d 285 (11th Cir.1989); *United States v. Blasco,* 702 F.2d 1315, 1327 (11th Cir.), cert. denied, 464 U.S. 914, 104 S.Ct. 275, 276, 78 L.Ed.2d 256 (1983); *Ex parte Kennedy,* 472 So.2d 1106, 1110 (Ala.), cert. denied, 474 U.S. 975, 106 S.Ct. 340, 88 L.Ed.2d 325 (1985). The Supreme Court of the United States in *United States v. Bagley,* 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985) (plurality opinion by Blackmun, J.), defined the standard of materiality required to show a ***113** *Brady* violation as follows: "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." See also *Pennsylvania v. Ritchie,* 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987); *Stano v. Dugger,* 901 F.2d at 899; *Delap v. Dugger,* 890 F.2d at 299; *Coral v. State,* 628 So.2d 954 (Ala.Cr.App.1992); *Thompson v. State,* 581 So.2d 1216 (Ala.Cr.App.1991), cert. denied, 502 U.S. 1030, 112 S.Ct. 868, 116 L.Ed.2d 774 (1992).

" 'The same standard of materiality and due process requirements apply whether the evidence is exculpatory or for impeachment purposes. *United States v. Bagley; Giglio v. United States,* 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); *Ex parte Womack[,* 435 So.2d 766 (Ala.1983)]. "When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within the general rule." *Giglio,* 405 U.S. at 154, 92 S.Ct. at 766 (quoting *Napue v. Illinois,* 360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959)). In short, due process requires the prosecution to disclose material evidence, upon request by the defense, when that evidence would tend to exculpate the accused or to impeach the veracity of a critical state's witness.'

"*Williams v. State,* 710 So.2d 1276, 1296–97 (Ala.Crim.App.1996)."

Giles v. State, 906 So.2d 963, 973–974 (Ala.Crim.App.2004), overruled on other grounds, *Ex parte Jenkins,* 972 So.2d 159 (Ala.2005).

Reynolds claims that,

"[h]ad these statements [investigators notes] been turned over to defense counsel, it is clear that counsel would have not only

> been able to effectively cross-examine two key State witnesses, but that it would have been able to discredit the State's theory of the crime in a way that would render [him] not guilty of capital murder."

(Reynolds's brief, at 58.) Reynolds does not specify how the notes in question were exculpatory or what portion of the notes were inconsistent with the witnesses' trial testimony.

The record on appeal has been supplemented with the portion of the State's file that was placed under seal at trial for purposes of appellate review. (First Supplemental Record, C. 87–182.) This supplemental record includes the notes from the interviews conducted with West, Langley, and Harvey. (First Supplemental Record, C. 156–64, 167–71, 172–73, 178.) This Court has reviewed the notes from the investigators' interviews with the three witnesses.

Despite Reynolds's contention to the contrary, it is not clear how these additional notes could have been used to impeach the three witnesses' trial testimony. Although these notes may contain more or less detail than the witnesses' trial statements, the notes do not appear to contain either any conflicting information that could have been useful for impeachment purposes or any exculpatory information as that term is contemplated by *Brady* and its progeny. Accordingly, Reynolds is due no relief on this claim.

B.

Likewise, Reynolds is due no relief on his assertion that the State withheld field ***114** notes prepared by Mark Hopwood, a forensic scientist who participated in the investigation of the crimes. (Reynolds's brief, at 53–56.) During defense counsel's cross-examination of Hopwood, Hopwood testified that he had performed a chemical-screening test for the presence of blood in various places of the interior of the automobile that Reynolds and West used on the night of the murders, but that the test did not detect the presence of blood. (Vol. X, R. 1329–30.)

Defense counsel requested a sidebar conference and informed the court that although the defense had requested certified copies of the Department of Forensic Sciences' reports, the defense did not receive a copy of Hopwood's report regarding the testing of the vehicle. The defense maintained that it was not previously aware of the test performed by Hopwood on the interior of the vehicle. (Vol. X, R. 1331–32.) A discussion ensued during which the State indicated that it did not have any such report, but that if possible it would obtain a copy and provide it the defense to determine if further action was necessary. (Vol. X., R. 1333.)

Later, during the defense counsel's re-cross-examination of Hopwood, the following occurred:

> "Q. [DEFENSE COUNSEL]: Did you bring a specific report with you today that has the fact that you tested the car that they have stipulated was Sandra Roberts, or is that just in notes.
> "A. I have my notes, and then you have—you should have DNA reports on the results for the towel that I sent down.[14]
>
> "Q. [DEFENSE COUNSEL]: But you don't have—
>
> "A. I mean, I have field notes.
>
> "Q. [DEFENSE COUNSEL]: You don't have an individual report for that car?
>
> "A. No."

(Vol. X., R. 1346–47.)

As evidenced from the above excerpt, Hopwood apparently did not reduce his field notes regarding the testing of the vehicle to an official report, and, as discussed previously, Reynolds was not necessarily entitled to Hopwood's field/investigative notes. In this case, Reynolds has not overcome the privilege against disclosure of the State's work product.

Reynolds has not shown that the State suppressed the evidence. The State apparently did not have the notes, and the notes are not part of the record placed under seal for appellate review. See *Vanpelt v. State,* 74 So.3d 32, 56 (Ala.Crim.App.2009) ("Although Rule 16.1 and the circuit court's order required the State to disclose reports of tests made, there is no indication that [the investigator] made a report of his comparison. Nothing in the circuit court's discovery order or in Rule 16.1, Ala. R.Crim. P., required the State to create a report of comparisons made during an investigation.").

[45] Furthermore, even assuming, for the sake of argument, that Reynolds was entitled to Hopwood's field notes regarding the test on the interior of the vehicle, Reynolds has not demonstrated that had he been provided the notes

"there is a reasonable probability that ... the result of the proceeding would have been different." *Giles,* 906 So.2d at 973.

[46] As we have stated:

> ***115** "We find no error in the admission of this testimony. There is no evidence that the prosecutor deliberately withheld any evidence from the appellant. There is no indication that the belated discovery of this oral statement prejudiced the appellant. Prejudice caused by the late disclosure is a 'prerequisite for a reversal on this issue.' *Pettway,* 607 So.2d at 332. See *Stewart v. State,* 601 So.2d 491, 499 (Ala.Cr.App.1992); *Robinson v. State,* 577 So.2d 928, 930 (Ala.Cr.App.1990); *Brown v. State,* 545 So.2d 106, 114–15 (Ala.Cr.App.1988), affirmed, 545 So.2d 122 (Ala.), cert. denied, 493 U.S. 900, 110 S.Ct. 257, 107 L.Ed.2d 206 (1989). See also *DeBruce v. State,* 651 So.2d 599, 622 (Ala.Cr.App.1993) (' "Tardy disclosure of *Brady* material is generally not reversible error unless the defendant can show that he was denied a fair trial." ... A delay in disclosing *Brady* material requires reversal only if the "lateness of the disclosure so prejudiced appellant's preparation or presentation of his defense that he was prevented from receiving his constitutionally guaranteed fair trial." '). There is no probability that the jury would have resolved the appellant's case differently had the State disclosed the oral statement on a timely basis."

Taylor v. State, 666 So.2d 36, 54 (Ala.Crim.App.1994). See also *Smith v. State,* 79 So.3d 671 (Ala.Crim.App.2010.)

Adrian West had already testified to this same fact when Hopwood testified that no blood was detected in the vehicle, and defense counsel was able to argue to Reynolds's advantage in its closing statement to the jury the fact that no blood was detected in the vehicle. (Vol. XI, R. 1644, 1650.) Accordingly, Reynolds has not established the requisite prejudice to justify a reversal of his convictions.

XI.

Reynolds argues that his convictions are due to be reversed because, he alleges, the State was improperly allowed to introduce DNA test results and the results of a footprint analysis without establishing a proper chain of custody. (Reynolds's brief, Issue VI, at 59–69.) Specifically, Reynolds contends that the State's DNA expert witness should not have been allowed to testify regarding the results of DNA tests because, he alleges, the State did not establish a sufficient chain of custody for either the known samples that were used for comparison purposes or for the swabs of blood obtained from the scene of the crime that were compared to the known samples. (Reynolds's brief, at 59–65.) Reynolds also argues that the State was improperly allowed to introduce the results of a footprint analysis because, he claims, the State did not establish a sufficient chain of custody for the known samples. (Reynolds's brief, at 65–69.)

An understanding of what transpired at trial is helpful to the resolution of this issue.

Mark Hopwood, a forensic scientist with the Alabama Department of Forensic Sciences, helped investigate and process the crime scene. Hopwood photographed a blood drop located on the top step outside the carport door as well as a bloody, partial footprint on the steps. (Vol. IX, R. 1246–50; Vol. X, R. 1280–81.) Hopwood subsequently swabbed the blood drop (State's Exhibit 26) and footprint. (Vol. X, R. 1278–1280.) Hopwood also swabbed the blood on the handle of the gasoline can found beside Charles Martin's body (State's Exhibit 27) and blood droplets on the wall opposite the entrance to the bedroom where the bodies of Melinda and Savannah Martin were discovered. (State's Exhibit 24.) (Vol. X, R. 1285, 1287–88.)

***116** Hopwood testified that the swabs were packaged individually, labeled, and then sealed with his initials. (Vol. X, R. 1280, 1297, 1301–03.) Hopwood testified that he personally delivered the samples to the Birmingham division of the Alabama Department of Forensic Sciences for DNA testing. (Vol. X, R. 1297.) Hopwood testified that the Birmingham division would have records to verify that he delivered the samples. (Vol. X, R. 1297.)

State's Exhibit 24 (the swab of the blood droplets on the hallway wall), State's Exhibit 26 (a swab of the blood drop on the doorstep), and State's Exhibits 27 (the blood swab from the handle of the gasoline can) were all admitted into evidence without objection. (Vol. X, R. 1301–03.)

Hopwood identified State's Exhibit 185 as the known inked footprints of seven original suspects: Chad Martin, John Langley, Michael Reynolds, Donald Harvey, Adrian West, and two other suspects. (Vol. X, R. 1304–06.) He testified that he received these known prints from the Gadsden Police Department. (Vol. X, R. 1304–06.) Hopwood also identified State's Exhibits 186, 187, and 188 as the known inked footprints of the three victims that

he received from the forensic pathologist who performed the autopsy. (Vol. X, R. 1304–05.) State's Exhibits 185–188 were admitted into evidence without objection. (Vol. X, R. 1305–06.)

Hopwood retained the photographs of the unknown bloody footprint, as well as the known inked footprints depicted in State's Exhibits 185–188, until he was requested to send them to Shannon Fitzgerald, the latent print examiner with the Alabama Bureau of Investigation. (Vol. X, R. 1282, 1304–05.)

Chris Crow, a crime-scene technician with the Gadsden Police Department, testified that during the course of his investigation, he and his "unit" were required to collect various biological samples from persons of interest for comparison purposes. (Vol. X, R. 1363.) Specifically, he testified that he or someone in his unit collected the following samples:

> 1. Two oral swabs from Adrian West (State's Exhibit 21);
>
> 2. Two oral swabs from John Langley (State's Exhibit 7);
>
> 3. Multiple head hairs from John Langley (State's Exhibit 4);
>
> 4. Fingernail scrapings from Chad Martin (State's Exhibit 12);
>
> 5. Two oral swabs from Chad Martin (State's Exhibit 5);
>
> 6. Multiple head hairs from Chad Martin (State's Exhibit 6);
>
> 7. Multiple head hairs from Adrian West (State's Exhibit 20);
>
> 8. Oral swabs from Donald Harvey (State's Exhibit 17).

(Vol. 10, R. 1364–65.)

Crow testified in some detail about the procedures used to collect and secure the various samples. (Vol. X, R. 1366–67.) Crow stated that each of the exhibits bore his or the collecting officer's initials and that the exhibits appeared to have been secured and packaged in the customary manner for transportation to the Department of Forensic Sciences for comparison to items obtained from the scene of the crimes. (Vol. X, R. 1365–66.) He testified that the samples were sent to the State laboratory for testing and returned to the Gadsden Police Department after testing and that packaging on the various exhibits documented the chain of custody. (Vol. X, R. 1367–71.) All eight exhibits were admitted into evidence without objection. (Vol. X, R. 1367–71.)

Crow testified that he also collected two oral swabs from Reynolds (State's Exhibit 189) and some hairs from Reynolds's head ***117** (State's Exhibit 190). (Vol. X, R. 1371–74.) Crow verified that these samples were secured and packaged in the same manner as the other previously discussed exhibits and that Reynolds's samples were also sent to the State laboratory for analysis. (Vol. X, R. 1371–74.) Reynolds's samples were also admitted without objection. (Vol. X, R. 1373–74.)

Forensic biologist, Carl Mauterer, of the Alabama Department of Forensic Sciences, testified as the State's DNA expert.[15] He identified State's Exhibit 24 as the swab of a red/brown stain obtained from the hallway wall in the Martins' residence, State's Exhibit 26 as a swab of a red/brown stain from the outside steps of the Martins' residence, and State's Exhibit 27 as a red/brown stain obtained from the handle of the gasoline can.[16] (Vol. X, R. 1407–10.) He also identified several known biological samples that were obtained from the five original suspects: Reynolds, Adrian West, Chad Martin, John Langley, and Donald Harvey.[17] Mauterer also received for comparison purposes, blood-standard cards from the autopsies of the three victims. (Vol. X, R. 1412.) Mauterer testified that each exhibit had been labeled with a case number assigned from the Alabama Department of Forensic Sciences, and that the exhibits had been initialed by him. (Vol. X, R. 1407–11.)

Mauterer testified that the DNA profile extracted from the blood swabs from the doorstep and hallway matched the DNA profile from the known sample obtained from Adrian West. (Vol. X, R. 1420–21.) Mauterer testified that the swab obtained from the gasoline can handle tested positive for the presence of blood and that it contained a mixture of DNA traits. (Vol. X, R. 1421–22.) He testified that the primary contributor to the DNA on the handle was victim Savannah Martin but that Michael Reynolds and Melinda Martin could not be excluded as contributors of the DNA. (Vol. X, R. 1421–22, 1430.) However, Charles Martin, Chad Martin, Adrian West, John Langley, and Donald Harvey were excluded as contributors to the DNA extracted from the swab of the handle of the gasoline can. (Vol. X, R. 1443–44.) Mauterer also testified regarding the results of the DNA population-frequency statics with regard to the above matches. (Vol. X, R. 1420–1424.)

Shannon Fitzgerald, a latent print examiner with the

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Alabama Bureau of Investigation, identified State's Exhibit 191 as two photographs of the same bloody footprint. (Vol. X, R. 1452.) State's Exhibit 191 was admitted into evidence without objection. (Vol. X, R. 1453.) Fitzgerald testified that he received State's Exhibit 191—the inked footprints from the three victims, and the inked footprints from the seven original suspects—packaged in a sealed envelope, from Mark Hopwood on ***118** July 11, 2007. (Vol. X, R. 1452–53.) Fitzgerald testified that after performing a comparison of the unidentified footprint to the known inked footprints he had received from Hopwood, he concluded that the unknown footprint from the crime scene matched the known inked footprint of Michael Reynolds's left foot. (Vol. X, R. 1453–55.)

Reynolds now challenges the admissibility of the testimony regarding the DNA test results and footprint analysis on the ground that various samples used to perform the tests were not properly authenticated based on the State's failure to establish an adequate chain of custody as to the test samples. We have stated:

> "In *Ex parte Slaton,* 680 So.2d 909 (Ala.1996), cert. denied, 519 U.S. 1079, 117 S.Ct. 742, 136 L.Ed.2d 680 (1997), the Alabama Supreme Court discussed the requirements for establishing the chain of custody:
>
> > " 'Ex parte Holton, 590 So.2d 918 (Ala.1991), sets forth the legal analysis to be applied in determining if a proper chain of custody has been established:
> >
> > > " ' "The chain of custody is composed of 'links.' A 'link' is anyone who handled the item. The State must identify each link from the time the item was seized. In order to show a proper chain of custody, the record must show each link and also the following with regard to each link's possession of the item: '(1) [the] receipt of the item; (2) [the] ultimate disposition of the item, i.e., transfer, destruction, or retention; and (3) [the] safeguarding and handling of the item between receipt and disposition.' Imwinklereid, *The Identification of Original, Real Evidence*, 61 Mil.L.Rev. 145, 159 (1973).
> > >
> > > " ' "If the State or any other proponent of demonstrative evidence, fails to identify a link or fails to show for the record any one of the three criteria as to each link, the result is a 'missing' link, and the item is inadmissible. If, however, the State has shown each link and has shown all three criteria as to each link, but has done so with circumstantial evidence, as opposed to the direct testimony of the 'link,' as to one or more criteria or as to one or more links, the result is a 'weak' link. When the link is 'weak,' question of credibility and weight is presented, not one of admissibility."
> >
> > " '590 So.2d at 920. While each link in the chain of custody must be identified, it is not necessary that each link testify in order to prove a complete chain of custody. *Harrison v. State,* 650 So.2d 603 (Ala.Crim.App.1994).'
>
> "680 So.2d at 918. ' "In order to establish a proper chain, the State must show to a 'reasonable probability that the object is in the same condition as, and not substantially different from, its condition at the commencement of the chain.' " ' *Ingram v. State,* 779 So.2d 1225, 1254 (Ala.Crim.App.1999) (quoting *Ex parte Holton,* 590 So.2d at 919–20 (citation omitted in *Holton*)), aff'd, 779 So.2d 1283 (Ala.2000), cert. denied, 531 U.S. 1193, 121 S.Ct. 1194, 149 L.Ed.2d 109 (2001). '[E]vidence that an item has been sealed is adequate circumstantial evidence to establish the handling and safeguarding of the item.' *Lane v. State,* 644 So.2d 1318, 1321 (Ala.Crim.App.1994); see also *Ingram v. State,* 779 So.2d at 1254. Additionally, ' "[c]hain of custody requirements do not apply with the same force to items of evidence which are unique and identifiable in themselves." ' *Ex parte Scott,* 728 So.2d 172, 182 (Ala.1998) (quoting ***119** *Magwood v. State,* 494 So.2d 124, 144 (Ala.Crim.App.1985), aff'd, 494 So.2d 154 (Ala.), cert. denied, 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986)), cert. denied, 528 U.S. 831, 120 S.Ct. 87 (1999).
>
> "....
>
> > " 'Physical evidence connected with or collected in the investigation of a crime shall not be excluded from consideration by a jury or court due to a failure to prove the chain of custody of the evidence. Whenever a witness in a criminal trial identifies a physical piece of evidence connected with or collected in the investigation of a crime, the evidence shall be submitted to the jury or court for whatever weight the jury or court may deem proper. The trial court in its charge to the jury shall explain any break in the chain of custody concerning the physical evidence.'
>
> "§ 12–21–13, Ala.Code 1975. Therefore, any question as to the adequacy of the safeguarding and handling of the evidence did not go to its admissibility. Rather, it went to the weight the jury would assign to the evidence."

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Martin v. State, 931 So.2d 736, 748–49 (Ala.Crim.App.2003), aff'd in part, rev'd in part on unrelated ground, 931 So.2d 759 (Ala.2004.)

[47] [48] "Additionally,

> " ' " ' "The purpose for requiring that the chain of custody be shown is to establish to a reasonable probability that there has been no tampering with the evidence." *Ex parte Jones,* 592 So.2d 210, 212 (Ala.1991); *Harrell v. State,* 608 So.2d 434, 437 (Ala.Cr.App.1992); *Smith v. State,* 583 So.2d 990 (Ala.Cr.App.1991), cert. denied, 583 So.2d 993 (Ala.1991). Moreover, the evidence need not negate the remotest possibility of substitution, alteration, or tampering, but instead must prove to a reasonable probability that the item is the same as it was at the beginning of the chain. *Harrell,* at 437; *Ex parte Williams,* 548 So.2d 518 (Ala.1989). Evidence has been held correctly admitted even when the chain of custody has a weak or missing link. *Gordon v. State,* 587 So.2d 427, 433 (Ala.Cr.App.1990), rev'd, 587 So.2d 434 (Ala.), on remand, 587 So.2d 435 (Ala.Cr.App.), appeal after remand, 591 So.2d 149 (Ala.Cr.App.1991); *Shute v. State,* 469 So.2d 670, 674 (Ala.Cr.App.1984).' " ' "

Broadnax v. State, 825 So.2d 134, 170 (Ala.Crim.App.2000).

[49] With these principles in mind, we turn to Reynolds's specific allegations.

Reynolds cites *Brooks v. State,* 33 So.3d 1262 (Ala.Crim.App.2007), and *Ex parte Phillips,* 962 So.2d 159 (Ala.2006), which is addressed in *Brooks*, in support of his allegation that the circuit court erroneously allowed into evidence testimony regarding the DNA and footprint analysis.

In *Brooks,* the defendant was convicted of two counts of first-degree sodomy and one count of first-degree sexual abuse involving his eight-year-old stepdaughter, H.F. On appeal to this Court, Brooks argued that the circuit court abused its discretion in allowing the State to introduce, over his objection, test results that indicated that H.F. had Type 1 herpes—the same type herpes Brooks had. On appeal, Brooks argued that the State failed to establish a sufficient chain of custody regarding the vaginal swabs and blood drawn from H.F. and the blood drawn from him.

We agreed that the chain of custody with regard to the samples was insufficient. We found:

> ***120** "In this case the chain of custody for the vaginal swab and the blood sample taken from H.F. is totally lacking. In regard to the vaginal swab, the record shows that Dr. Burchfield took a sample, put it in a tube, and sent it to Quest Diagnostics. There is no testimony concerning the method used to safeguard the sample after it was collected and sent to the lab. Neither is there any testimony as to how the samples were transported from Dr. Burchfield's office to the lab for testing. Indeed, no individuals in the chain of custody, other than Dr. Burchfield, are identified. We do not know the individual who accepted the sample at the lab or the individual who conducted the tests on the samples. We do not know whether the samples were received at the lab in the same condition as when they were sealed and transported. The record is totally devoid of the requisite chain of custody for these samples. We have no means of determining whether the integrity of the samples was protected from the time they were collected until they were tested at the lab. There is even less testimony on the chain of custody for the blood sample. There are many missing links in the chain of custody for both the vaginal swab and the blood sample."

33 So.3d at 1272.

We then determined that the error in the admission of the testimony regarding the test results on the samples was not harmless under the facts of the case. We reasoned:

> "[T]he Alabama Supreme Court in *Ex parte Phillips,* 962 So.2d 159 (Ala.2006), addressed whether the erroneous admission of test results based on missing links in the chain of custody for the samples used for the test was harmless error, given the victim's testimony that the defendant had sexually abused her. The *Phillips* Court, reversing this Court's holding that the error was harmless, noted that 'overwhelming evidence of guilt does not render prejudicial error harmless.' 962 So.2d at 165. The Supreme Court then

wrote:

> " 'Had the evidence of the chlamydial infections been excluded, the jury would have been provided essentially with the opposing versions of D.M. and Phillips, and if it had found his version to be more credible, or even if it found itself unable in the final analysis to determine who was telling the truth, it might have found itself unable to agree that Phillips was guilty beyond a reasonable doubt; it then could have returned a verdict of not guilty or perhaps have been deadlocked, necessitating a mistrial. Accordingly, we cannot ignore the probable effect on the jury of the inadmissible evidence of the chlamydial infections of both D.M. and her mother.'
>
> "962 So.2d at 165.
>
> "As the Alabama Supreme Court cautioned in *Phillips*, we cannot 'ignore the probable effect' on the jury of the erroneous admission of the extremely prejudicial test results. This is especially true in this case given that Brooks's first trial ended in a mistrial, after this same evidence was admitted, because the jurors were unable to reach a unanimous verdict on the sodomy charges."

33 So.3d at 1276–77.

Unlike the defendant in *Brooks,* Reynolds did not object to the admission of the testimony regarding the DNA test results or the footprint analysis.[18] We have reviewed ***121** the evidence in light of the law set forth above, and we find that in contrast to the situation in *Brooks,* the State did present sufficient evidence that "the integrity of the samples was protected from the time they were collected until they were tested at the lab." *Brooks*, supra. See also, *Ex parte Mills,* 62 So.3d 574, 587 (Ala.2010) (finding no plain error in the admission of several tangible items of evidence as well as forensic-testing results regarding those items because there was no indication that the items had been tampered with or altered and Mills made no ' "showing of ill will, bad faith, evil motivation, or some evidence of tampering," ' quoting *Lee v. State,* 898 So.2d 790, 847–48 (Ala.Crim.App.2001)). As set forth above, there was testimony elicited regarding how the various test samples were collected, sealed, and maintained. "Even if the State failed to provide a textbook chain of custody," *Floyd v. State,* [Ms. CR–05–0935, September 28, 2007] ——So.3d ——, —— (Ala.Crim.App.2007), we find there was sufficient evidence that the items were properly authenticated by proof of an adequate chain of custody.

XII.

Reynolds argues that the evidence was insufficient to sustain his convictions for robbery-murderer under counts II, III, and V, because, he contends, Adrian West was an accomplice to the robbery and her testimony implicating him in the robbery was not sufficiently corroborated as required by § 12–21–222, Ala.Code 1975. (Reynolds's brief, Issue X, at 79–83.) Specifically, Reynolds maintains that "without Ms. West's testimony, there was no connection between [him] and the items alleged to have been stolen." (Reynolds's brief, at 80.) In a related vein, Reynolds also alleges that the circuit court erred in refusing to give his requested jury charge addressing the necessity of corroborating an accomplice's testimony. (Reynolds's brief, at pp. 82–83.)

Although Reynolds did object to the circuit court's refusal to give his requested jury charge on accomplice corroboration, he did not move for a judgment of acquittal on the ground that the accomplice's testimony had not been sufficiently corroborated.[19] Accordingly, we will review his challenge to the sufficiency of the evidence on this ground for plain error only. Rule 45A, Ala. R.App. P. See *Marks v. State,* 20 So.3d 166, 172 (Ala.Crim.App.2008).

Section 12–21–222, Ala.Code 1975, provides:

> "A conviction of a felony cannot be had on the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense, and such corroborative evidence, if it merely shows the commission of the offense or the circumstances thereof, is not sufficient."

We have held:

> "For this section [12–21–222, Ala.Code 1975,] to apply, it must clearly appear that the witness in question is an accomplice. *Steele v. State,* 512 So.2d 142 (Ala.Cr.App.), cert. denied, 512 So.2d 142 (Ala.1987). The defendant bears the burden of showing that the witness was an accomplice before § 12–22–222 can be invoked. *Miller v. State,* 518 So.2d 801 (Ala.Cr.App.1987), cert. denied, 518 So.2d 801 (Ala.1988).
>
> "An accomplice is defined as 'an associate in crime; a partner or partaker in guilt.' ***122** *Darden v. State,* 12 Ala.App. 165, 167, 68 So. 550, 551 (1915). 'The test

> for determining whether a witness is an accomplice is whether he or she could have been indicted and convicted for the offense charged, either as principal or accessory.' *Russell v. State,* 365 So.2d 343, 346 (Ala.Cr.App.1978). *Where a person's participation in a crime or cooperation with the defendant is motivated by fear, he is not an accomplice. Curry v. State,* 502 So.2d 836, 842 (Ala.Cr.App.1986), cert. denied, 502 So.2d 836 (Ala.1987)."

Gordon v. State, 611 So.2d 453, 455 (Ala.Crim.App.1992). (Emphasis added.)

[50] The State maintains that Adrian West was not an accomplice and that, therefore, there was no requirement that her testimony be corroborated.[20] Under the facts of this case, we agree. As addressed in detail in the facts portion of this opinion, Adrian West testified that she took Melinda Martin's pursue and the Martin's telephone because she was in fear for her life. Although West's testimony was conflicting as to whether she knew that Reynolds planned to rob the Martins when she drove him to their house, she did not "aid or abet" Reynolds in the commission of the robbery. Indeed, West testified that Reynolds stabbed her in the arm when she tried to intervene. See § 13A–2–23 Ala.Code 1975.

[51] Even assuming, without deciding, that West was an accomplice, we find no plain error in the circuit court's denial of Reynolds's motion for a judgment of acquittal because West's testimony regarding Reynolds's commission of the robbery was sufficiently corroborated. See *Green v. State,* 61 So.3d 386, 395 (Ala.Crim.App.2010), for a thorough discussion of the applicable law regarding the sufficiency of corroborating evidence.

As discussed, West said that Reynolds ordered her to take Melinda Martin's purse and the Martins' cordless telephone, and then to "get out." Fearing for her life, West complied. She put the telephone and the purse in Sandra Roberts's automobile, which she and Reynolds had borrowed earlier that night. Neither the telephone nor the purse were found in the Martins' house during the investigation. West told the police that when they arrived back at Reynolds's father's house, Reynolds got money out of Melinda Martins's purse to purchase drugs. Sandra Roberts confirmed that after Reynolds and West returned to the Reynolds's residence, Reynolds gave her money to purchase drugs. Sandra Roberts also testified that she later discovered the cordless telephone in her automobile.

West testified that she and Donald Harvey disposed of the base for the telephone in a wooded area near where they burned the clothes and Martin's purse. The investigators found the burn pile and recovered the telephone base in the area described by West. Both the telephone base and the cordless receiver were the same brand as the telephone cord found lying across the bedroom floor where the bodies of Melinda and Savannah Martin were discovered.

Accordingly, we find that there was sufficient corroborating evidence to connect Reynolds to the stolen items and to corroborate West's testimony that Reynolds murdered the victims during a robbery. Accordingly, we find no plain error in the circuit court's denial of the motion for a judgment of acquittal on the ground that the purported accomplice's testimony regarding the robbery was not sufficiently corroborated. Furthermore, because West's testimony was sufficiently corroborated, any error that occurred in ***123** the circuit court's refusal to give Reynolds's requested jury charge regarding the necessity of corroborating accomplice testimony was harmless. *Gavin v. State,* 891 So.2d 907, 975 n. 30 (Ala.Crim.App.2003), cert. denied, 891 So.2d 998 (Ala.2004), cert. denied, 543 U.S. 1123, 125 S.Ct. 1054, 160 L.Ed.2d 1073 (2005).

XIII.

Reynolds asserts that the circuit court failed to conduct a reasonable inquiry into two instances of possible juror misconduct. (Reynolds's brief, Issue IX, at 75–79.) The first alleged instance of juror misconduct involved purported improper contact between one or more jurors and members of the victims' family during the trial. The second alleged instance of improper contact occurred when defense witness Lt. Faye Gary supposedly winked at a juror as Lt. Gary was leaving the witness stand.

[52] Before addressing each allegation separately below, we will set forth the applicable law.

> " ' "Whether there has been a communication with a juror and whether it has caused prejudice are questions of fact to be determined by the trial court in the exercise of sound discretion." ' *Burgess v. State,* 827 So.2d 134, 157 (Ala.Cr.App.1998), quoting *Gaffney v. State,* 342 So.2d 403, 404 (Ala.Cr.App.1976), cert. denied, 342 So.2d 404 (Ala.1977). In discussing claims involving alleged juror misconduct, we said the following in *Sistrunk v. State,* 596 So.2d 644 (Ala.Cr.App.1992):
>
> > " ' "In the absence of any showing to the contrary, we must assume that the trial judge was satisfied

as to the nature of the conversation which passed between the witness and the juror, and upon this basis decided that the appellant was not prejudiced thereby. Whether there has been a communication with a juror and whether it has caused prejudice are questions of fact to be determined by the trial court in the exercise of sound discretion. *Gaffney v. State,* Ala. Cr. App., 342 So.2d 403, [1976], cert. denied, Ala., 342 So.2d 404 (197[7]). This ruling will not be disturbed in the absence of a showing of abuse of discretion."

" '*Cox v. State,* 394 So.2d 103, 105–06 (Ala.Cr.App.1981).

" 'In *Holland v. State,* 588 So.2d 543 (Ala.Cr.App.1991), a case involving alleged juror contamination, this court reversed because the trial court undertook no inquiry into the circumstances of the alleged improper communication. We observed that

" ' "... In cases involving juror misconduct, a trial court generally will not be held to have abused its discretion 'where the trial court investigates the circumstances under which the remark was made, its substance, and determines that the rights of the appellant were not prejudiced by the remark.' *Bascom v. State,* 344 So.2d 218, 222 (Ala.Cr.App.1977). However, the trial judge has a duty to conduct a 'reasonable investigation of irregularities claimed to have been committed' before he concludes that the rights of the accused have not been compromised. *Phillips v. State,* 462 So.2d 981, 990 (Ala.Cr.App.1984)."

" '*Holland [v. State*], 588 So.2d [543,] 546 [(Ala.Cr.App.1991)]. What constitutes a "reasonable investigation of irregularities claimed to have been committed" will necessarily differ in each case. A significant part of the discretion enjoyed by the trial court in this area lies in determining the scope of the investigation that should be conducted.

***124** " ' "... A full evidentiary hearing at which witnesses and jurors can be examined and cross examined is not required. *Tillman [v. United States*], 406 F.2d [930][at] 938 [(5th Cir.1969), vacated on other grounds, 395 U.S. 830, 89 S.Ct. 2143, 23 L.Ed.2d 742 (1969)]. The trial judge need not examine the juror to determine if that juror admits to being prejudiced before granting a mistrial."

" '*Woods v. State,* 367 So.2d 974, 980 (Ala.Cr.App.), reversed on other grounds, 367 So.2d 982 (Ala.1978), partially quoted in *Cox v. State,* 394 So.2d 103, 105 (Ala.Cr.App.1981). As long as the court makes an inquiry that is reasonable under the circumstances, an appellate court should not reverse simply because it might have conducted a different or a more extensive inquiry. Generally, where the judge polls the jury and each juror indicates that there has been no improper communication, that is sufficient. See *Ham v. State,* 540 So.2d 805, 810 (Ala.Cr.App.1988); *Ex parte Weeks,* 456 So.2d 404, 407 (Ala.1984), cert. denied, 471 U.S. 1030, 105 S.Ct. 2051, 85 L.Ed.2d 324 (1985). There is no absolute requirement that a juror alleged to have received an improper communication be examined apart from the other jurors. See *Smith v. State,* 432 So.2d 550 (Ala.Cr.App.1983), and *Hopkins v. State,* 429 So.2d 1146, 1152 (Ala.Cr.App.1983) (wherein the jury was questioned together as a group).

" ' " '[W]hen the trial judge acts promptly to investigate the circumstances surrounding the making of an inherently prejudicial remark [to] a veniremember, determining specifically whether the remark was made and whether the remark had a prejudicial effect on those who, ultimately selected to serve as jurors, heard it, there is no error in the denial of a motion for mistrial based on jury contamination." *Holland v. State,* 588 So.2d at 548.'

"596 So.2d at 648–49."

Gamble v. State, 791 So.2d 409, 432–33 (Ala.Crim.App.2000). See also, *Taylor v. State,* 808 So.2d 1148, 1173–74 (Ala.Crim.App.2000), aff'd, 808 So.2d 1215 (Ala.2001), cert. denied, *Taylor v. Alabama,* 534 U.S. 1086, 122 S.Ct. 824, 151 L.Ed.2d 705 (2002).

A.

[53] On October 25, 2007, three days after the penalty phase of the jury trial concluded, defense counsel filed a written motion with the circuit court requesting the court to conduct a "reasonable inquiry" into allegations that one or more of the jurors might have had improper contact with the victims' family members on the first and the last day of the trial. (Vol. I–II, C. 198–213.) Defense counsel attached affidavits from three of Reynolds's family members, who stated that they had witnessed the improper contact, as well as affidavits from two of his defense counsel who had spoken with his relatives

regarding the improper contact.

On October 31, 2007, the circuit court conducted a hearing to investigate the allegations in Reynolds's motion. (Vol. XIII, R. 2009–47.) The 2 jurors who were the subject of Reynolds's motion were present at the hearing, as well as the other 10 jurors—the court had requested the remaining jurors to attend the hearing out of an abundance of caution.

During the hearing, the circuit court individually questioned the two jurors who allegedly had contact with the victims' family. Defense counsel also questioned ***125** the two jurors. (Vol. XIII, R. 2013–17; 2021–23.) Both jurors testified that they had not had contact with the victims' family members.

After the 2 jurors were examined, the court individually questioned each of the remaining 10 jurors to ensure that the jurors had in fact followed the court's instructions and that there had been no inappropriate contact between the jurors and victims' family members. (Vol. XIII, R. 2026–2047.) All 10 jurors indicated that they had followed the court's instructions and that they did not engage in any improper contact with the victims' family members. The court did not allow Reynolds's counsel to question the 10 jurors because those jurors were not the subject of Reynolds's motion.

At the conclusion of the hearing, the following occurred:

> "[DEFENSE COUNSEL]: I think Your Honor has conducted a reasonable investigation and asked the jurors. And at this point I cannot point to anything from these jurors that would support juror misconduct at this point.
>
> "THE COURT: Based on the testimony of these various parties, the Court makes a finding that no improper communication has occurred."

(Vol. XIII, R. 2047.)

As evidenced from the above, Reynolds agreed that the circuit court had conducted a reasonable investigation and that there was no evidence of juror misconduct. Thus, his allegation of error is subject to plain-error review only. Rule 45A, Ala.R.App.P. We have reviewed the record in light of the principles addressed in *Gamble,* supra, and we find no error, plain or otherwise, in the extent of the court's inquiry into the alleged juror misconduct or in the court's conclusion that the evidence did not support a finding of juror misconduct. Thus, Reynolds is due no relief on this allegation.

B.

[54] During the defense's case at the guilt phase of the trial, one of Reynolds's defense counsel informed the circuit court that an attorney, who practiced before the court and who was in the audience, had told defense counsel that he had observed Lt. Faye Gary wink at a juror as Lt. Gary left the witness stand following her testimony in the defense's case.[21] (Vol. XI, R. 1541.) When the court asked the attorney what he had seen, the attorney stated that he saw Lt. Gary wink at *either* "the juror on the end right there" or "PJ," who was the court's investigator.[22] (XI, R. 1541–42.) The State countered that the person Lt. Gary gestured to was Roger Dale, a Gadsden police investigator. (Vol. XI, R. 1543; R. 1472.) The court then conducted a hearing on the matter.

During the hearing, the attorney testified that as Lt. Gary left the witness stand, Gary "winked over in the direction of the last juror, and the juror—she gave her the heads up like she saw her and said 'Hey.' " (Vol. XI, R. 1546.) In response to questions propounded by the State, the attorney admitted that it was possible that Lt. Gary was gesturing to her co-worker Detective Roger Dale who, from the inference ***126** in the record, was sitting near that end of the jury box. (Vol. XI, R. 1546–47.)

The Court then conducted an examination of the juror Lt. Gary supposedly winked at. (Vol. XI, R. 1548–1449.) The juror testified that she did not know Lt. Faye Gary and that Lt. Gary did not wink at her. (Vol. XI, R. 1548–49.) The juror stated that she thought Lt. Gary might have winked at "somebody over there behind" her. (Vol. XI, R. 1548–49.)

After the examinations of the attorney and pertinent juror, the court found no evidence of inappropriate conduct between Gary and the juror. (Vol. XI, R. 1549.) Reynolds did not object to the manner of the court's inquiry into the matter, nor did he object to the court's findings.

Applying the principles discussed in *Gamble,* supra, to the facts pertaining to this issue, we find no error, plain or otherwise, in the extent of the court's inquiry into the alleged juror misconduct or in the court's conclusion that the evidence did not support a finding of juror misconduct. Reynolds is due no relief on this allegation.

XIV.

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Reynolds contends that his capital-murder convictions must be reversed because, he claims, the prosecutor improperly impeached his trial testimony with his post-*Miranda*[23] silence, in violation of *Doyle v. Ohio,* 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), and its progeny. (Reynolds's brief, Issue I, at 7–17, Reynolds's reply brief, Issue I, at pp. 1–12.)

[55] The prosecutor's questions and comments cannot be considered in the abstract but must be considered in the context in which they occurred. *Brown v. State,* 11 So.3d 866, 909 (Ala.Crim.App.2007), aff'd, 11 So.3d 933 (Ala.2008), cert. denied, 557 U.S. 938, 129 S.Ct. 2864, 174 L.Ed.2d 582 (2009). Accordingly, before addressing Reynolds's contention, we will address the context in which the questions/comments occurred.

During the State's case, Gadsden Police Investigator Scott Lumpkin testified regarding his involvement in the investigation. During defense counsel's cross-examination of Lumpkin, the following occurred:

> "Q. [DEFENSE COUNSEL]: And you picked up Michael Reynolds [on] Sunday, is that right, May 25th [the day the murders were discovered]?
>
> "A. [LUMPKIN]: He was picked up Sunday. I wasn't present.
>
> "Q: [DEFENSE COUNSEL]: Oh, you didn't pick him up?
>
> "A. [LUMPKIN]: No sir.
>
> "Q. [DEFENSE COUNSEL]: Did you talk to him Sunday?
>
> "A. [LUMPKIN]: No, Sir."

(Vol. IX, R. 1230.)

There was no other testimony in the State's case regarding the circumstances of Reynolds's arrest.

As addressed in detail in the facts portion of this opinion, Reynolds claimed on direct examination that he had nothing to do with the robbery and murders of the victims. Although Reynolds did not deny being at the Martin residence after the crimes, he testified that he went there only to cover up any evidence indicating that his girlfriend was present when the crimes took place.

On direct examination, defense counsel asked Reynolds whether he contacted the police after he found his friend Charles Martin lying in a pool of blood on the floor. (Vol. XI, R. 1572.) Reynolds admitted that he did not call the police; instead, he ***127** went inside the house, stepped over the bloody body of Charles Martin and walked to the back of the house, where he discovered Melinda Martin lying in a bloody heap in the bedroom. Reynolds testified that after he determined that he could not thoroughly wipe down all the surfaces in the house, he decided to douse Charles and Melinda Martin's bodies and the interior of their house with gasoline, light the gasoline, and then leave the scene.

During the State's cross-examination of Reynolds, the prosecutor probed Reynolds's version of what happened in the hours before the murder. Specifically, the prosecutor questioned Reynolds about his claim that Adrian West and Sandra Roberts had left the Reynolds's house together to go get more drugs. During this line of questioning, the following exchange occurred:

> "Q. [PROSECUTOR]: So you put Marcie [Adrian West] in it and you put Sandra [Roberts] in it together; is that right?
>
> "A. [REYNOLDS]: Yes.
>
> "Q. [PROSECUTOR]: And you also put Dino [Donald Harvey] in your story; is that right?
>
> "A. [REYNOLDS]: That's where I told them to go get the drugs.
>
> "Q. [PROSECUTOR]: So Dino [Donald Harvey] is in the picture and Sandra is in the picture. *Right after this happened you were interviewed by the police, weren't you?*
>
> "A. [REYNOLDS]: *That morning, the next morning.*
>
> "Q. [PROSECUTOR]: *And you made a statement to them, did you not?*
>
> "A. [REYNOLDS]: *Yes. I don't know about a statement. They talked to me and asked me some questions, and I answered a few.*
>
> "Q. [PROSECUTOR]: *You answered those questions, right?*
>
> "A. [REYNOLDS]: *I answered some, yes.*
>
> "Q. [PROSECUTOR]: And you told them that Marcie [Adrian West] had left and come back and said that [Charles Martin] was dead?
>
> "A. [REYNOLDS]: *No, I didn't tell them that.*

"Q. [PROSECUTOR]: Oh, you didn't tell them that. And you told them that you saw Melinda's body on the floor and you fell across it?

"A. [REYNOLDS]: *No.*

"Q. [PROSECUTOR]: Well, you told them that you took some gasoline and doused these folks' bodies and tried to set them on fire that night, didn't you?

"A. [REYNOLDS]: *No. But I wish I did.*

"Q. [PROSECUTOR]: You wish you had. You wish you had made up this story then, right?

"A. [REYNOLDS]: *No.*

"Q. [PROSECUTOR]: No. You had to wait until you had all the pieces of your puzzle to make your story up, didn't you?

"A. [REYNOLDS]: No.

"Q. [PROSECUTOR]: You waited—have you ever told anybody—has anybody, your lawyers or you or anybody else—

"[DEFENSE COUNSEL]: I object Your Honor.

"Q. [PROSECUTOR]:—ever told this story—

"[DEFENSE COUNSEL]: I object.

"THE COURT: One at a time.

"[DEFENSE COUNSEL]: He cannot reveal the attorney-client privilege.

***128** "Q. [PROSECUTOR]: I'm not talking about privilege. I wasn't asking about privileged information.

"THE COURT: Sustained as to the issue of what he told his lawyer. Rephrase your question.

"Q. [PROSECUTOR]: I wasn't asking you what you told your lawyer. I was asking you what you told the police or anybody else about what happened that night. You had to have all the pieces of your puzzle together first, didn't you?

"A. [REYNOLDS]: I don't understand.

"Q. [PROSECUTOR]: Have you ever directed anybody or have you personally ever told that story that we heard in this courtroom Tuesday, for the first time, to anybody else any time—

[DEFENSE COUNSEL]: Your Honor, I object to that question. He has got the right to remain silent.

[PROSECUTOR]: Not to your lawyer.

"A. [REYNOLDS]: After I was incarcerated.

"[DEFENSE COUNSEL]: Excuse me, Michael. Your Honor, I ask for a ruling on my objection. I think that question he asked is objectionable, because Mr. Reynolds has a right to remain silent. He doesn't have to tell this Court or anybody—

"[PROSECUTOR]: He doesn't have a right to remain silent. He is on the stand.

"THE COURT: Ask your next question.

"Q. [PROSECUTOR]: You could have solved this whole crime, couldn't you?

"A. [REYNOLDS]: *I should have told them at the beginning of this what happened.*"

(Vol. XI, 1589–92.)(Emphasis added.)

The cross-examination continued, and the following occurred:

"Q. [PROSECUTOR]: The gas can that you picked up and used that night that's got Savannah's blood mixed on that handle—

"A. [REYNOLDS]: I did fall on the bed that she was on, they said.

"Q. [PROSECUTOR]: Another piece of the puzzle that you filled in for us, sir. We appreciate that.

"A. [REYNOLDS]: You're welcome.

"Q. [PROSECUTOR]: And you didn't have that piece until all the evidence came in, did you? Did you?

"A. [REYNOLDS]: It's the truth.

"Q. [PROSECUTOR]: Let me ask you something. *The first time the police talked to you about this, you didn't know anything about it; is that right?*

"A. [REYNOLDS]: *That's right.*

"Q. [PROSECUTOR]: Then you find out, well, [Adrian West] has told what happened. So didn't you conclude then that I have got to put [West] in it some kind of way, right? That's what you thought, didn't you?

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"A. [REYNOLDS]: No.

"Q. [PROSECUTOR]: I have got to bring [Adrian West] in the picture because her blood is over there?

"A. [REYNOLDS]: No

"Q. [PROSECUTOR]: And the district attorney has already told my lawyers that they have got her blood on the scene. So you know [Adrian West] is there, right, right? You knew that, didn't you?

"A. [REYNOLDS]: I knew she was saying this and telling me this to begin ***129** with, what they told me after I asked for an attorney. They never come back and talked to me again about it.

"Q. [PROSECUTOR]: I'm not asking about your lawyer. Listen to me.

"A. [REYNOLDS]: Okay.

"Q. [PROSECUTOR]: You knew that [Adrian West] could have been proven to be on that scene; am I right about that?

"A. [REYNOLDS]: Yes, that's correct.

"Q. [PROSECUTOR]: And you knew, didn't you—once you found out about what Sandra [Roberts] had to say, you knew you had to put her in the picture some kind of way to try to dirty her up too, didn't you?

"A. [REYNOLDS]: She was at my dad's house. She was my dad's girlfriend.

"Q. [PROSECUTOR]: And you know what she was saying about what happened that night. So she had to be in the picture. She had to be guilty of something. So she leaves with [Adrian West]; isn't that right? That's the other part of your lie, right. Your story. I'm sorry."

(R. Vol. XI, R. 1595–97.)(Emphasis added.)

The prosecutor continued to cross-examine Reynolds as to how his version of what happened dovetailed with the State's evidence, during which the following transpired:

"Q. [PROSECUTOR]: Don't you have any pity, any sense of loss for this so called good friend of yours, Chuck, lying on the floor bleeding out his life when you walked through there?

"A. [REYNOLDS]: Yes. *That's why I don't understand why I'm on trial here and not the people who did it.*

"Q. [PROSECUTOR]: And who was that again?

"A. [REYNOLDS]: *I don't believe I can say nothing about that*.

"Q. [PROSECUTOR]: You don't know—you said that [Adrian West] came back and told you she was trying to help somebody when she got stabbed, according to you.

"A. [REYNOLDS]: Yes.

"Q. [PROSECUTOR]: So she hadn't even committed a crime, right? All she did was try to help somebody.

"A. [REYNOLDS]: That's what she said.

"Q. [PROSECUTOR]: And all she has told you is she was trying to help somebody and you're going over there trying to burn up a house?

"A. [REYNOLDS]: I was going to protect her.

"Q. [PROSECUTOR]: Protect her from what?

"A. [REYNOLDS]: She was in the house.

"Q. [PROSECUTOR]: She hadn't done anything according to you."

(Vol. XI, R. 1597–98.)(Emphasis added.)

A short time later in the cross-examination, the prosecutor showed Reynolds a picture of Charles Martin's body and the following exchange took place:

"Q. [PROSECUTOR]: Is that the way he looked the last time you saw him?

"A. [REYNOLDS]: I believe so.

"Q. [PROSECUTOR]: And you did that to him too, didn't you.

"A. [REYNOLDS]: No, I didn't.

"Q. [PROSECUTOR]: Why don't you feel sorry?

"A. [REYNOLDS]: I do. *I have been in jail four and a half years, sitting in jail cell. And it's been—it's weighed heavy. I shouldn't have never* ***130** *—he was my friend, and I tried to cover it up.* I done lost my son and my family and them."

(Vol. XI, R. 1603.)

The following colloquy occurred toward the end of the

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cross-examination:

"Q. [PROSECUTOR]: Mr. Reynolds, you are asking this jury to believe this story today; is that right?

"A. [REYNOLDS]: It's the truth.

"Q. [PROSECUTOR]: You are a truthful person, right? You tell the truth?

"A. [REYNOLDS]: I do.

"....

"Q. [PROSECUTOR]: ... You are saying that [Adrian West] told you that somebody else did it but she never did tell you who, right?

"A. [REYNOLDS]: She said she was trying to stop them.

"Q. [PROSECUTOR]: Trying to stop them, whoever they are?

"A. [REYNOLDS]: Yes.

"Q. [PROSECUTOR]: And you never got her to tell you who it was?

"A. [REYNOLDS]: No. She was distraught out there. She told me she didn't even want to think about it.

"Q. [PROSECUTOR]: Uh-huh. *And you didn't feel any need to tell the police that in your interview?*

"A. [REYNOLDS]: *I was protecting her.* I went as far as trying to burn it down. I mean—

"....

"Q. [PROSECUTOR]: That's what you thought; I would just burn the house down?

"A. [REYNOLDS]: Yes.

"Q. [PROSECUTOR]: Rather than trying to find the ones that really did it.

"A. [REYNOLDS]: Instead of trying to wipe it down.

" '....

"Q. [PROSECUTOR]: *You say you just wish you had told the truth?*

"A. [REYNOLDS]: *I should have.*

"Q. [PROSECUTOR]: *You've thought about that more than once, right?*

"A. [REYNOLDS]: *A lot.*

"Q. [PROSECUTOR]: *How many times over the last four years have you thought about that?*

"A. [REYNOLDS]: *A whole lot.*

"Q. [PROSECUTOR]: The first time you have done it is in this courtroom; is that right?

"A. [REYNOLDS]: I have talked to my attorney about it.

"Q. [PROSECUTOR]: I don't mean with your attorneys. The first time you have come to any authorities since—

"A. [REYNOLDS]: *Yes. This is the first time since this happened, since I asked for an attorney that the district attorney or the police or anybody has ever asked me.*

"[PROSECUTOR]: That's all."

(Vol. XI, 1605–09.)(Emphasis added.)

Defense counsel argued during a portion of the closing argument that the jury's decision turned solely on a credibility question as between Adrian West and Reynolds. Specifically, defense counsel argued:

> "[N]one of the other testimony or the evidence they put on disputes what Mr. Reynolds has told you. None of it. None of it points to him and says that can't be true. You're a liar because of this and this and this, because of this doctor or this DNA expert or because of this fingerprint guy. None of it. None ***131** of it. You would think a day and a half of that evidence would show something."

(Vol. XII, R. 1665–66.)

During the State's rebuttal, the prosecutor argued:

"[Adrian West] told you what happened out there. And what that man did: He sat over there in jail. He came up with a story that you and I heard for the first time Tuesday.

"The evidence dribbles in as it always does in an

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> investigation like this. You know you have got a killing. *He is questioned for the first time about these killings. He didn't know nothing about it. He is questioned a second time. Didn't know nothing about it.* Well, of course, he is not questioned again. He is charged. But all they would have had to do was somebody had to call [Investigator] Roger Dale there or call us up, '[H]ey, listen, we have got all the facts. We can tell you exactly what happened. Just like [Adrian West] did. A couple of days after the killing she came in and told us what happened.' *We didn't hear from this man except for him to say '[N]o, I wasn't there[;] I don't know nothing about it*.' "

(Vol. XII, R. 1674.) (Emphasis added.)

After closing arguments, the circuit court charged the jury on the applicable law and submitted the case to the jury for deliberation. During deliberations, the jury submitted a written question to the court, and the following discussion occurred:

> "THE COURT: All right, gentlemen.... Question: 'Did Michael Reynolds make a statement to the police after being questioned and was it submitted as evidence and available for our review?'
>
> "I have no idea.
>
> "[PROSECUTOR]: *Judge, that was a—he made a statement, and I questioned him about it, and he responded that he made a statement is my understanding.*"

(Vol. 12, R. 1806–07.) The discussion continued, and the court and the respective parties ultimately decided to answer the jurors' question as follows: "No written statement made by the defendant was offered into evidence; you have to remember the testimony." (Vol. 12, R. 1807–12.) This answer was provided to the jury.[24]

The "statement" to which the parties referred was actually a set of handwritten interview notes made by the investigators during their questioning of Reynolds. The first notes are dated May 26, 2003, and indicate that Reynolds was advised of his rights. (First Supplemental Record, C. 174–76.) During that interview Reynolds apparently told investigators that he was not at the Martins' residence on the night of the crimes and that he did not kill the Martins or know who did. Reynolds said that he did not know where the Uniden brand telephone found in Sandra Roberts's car came from. He also said that Chad Martin stole drugs from Charles Martin on previous occasions and that Charles Martin knew about it. Reynolds told the investigators that when Charles Martin used drugs, he was slow and could be "taken." In this same conversation, Reynolds described the black bag where Charles Martin kept his prescription drugs, and Reynolds described in some detail how Charles Martin "cooked" his drugs on the stove. In other interview notes, Reynolds admitted that he had used drugs with Charles Martin, and he again denied committing the crimes or being at the Martin residence on the night of the crimes. (First ***132** Supplemental Record, C. 179, 155, respectively.)

Reynolds argues on appeal that "on twenty-one different occasions during cross-examination and closing arguments, the prosecutor ... commented on [his] post-*Miranda* silence by drawing attention to the fact that [he] did not disclose his subsequent exculpatory [trial] explanation to the State before trial," in violation of *Doyle v. Ohio,* 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), and its progeny. (Reynolds's reply brief, at 2.) The State contends that there was no *Doyle* violation because, it argues, the prosecutor permissibly impeached Reynolds's trial testimony with his prior existing inconsistent statements.

[56] First, we note that despite Reynolds's claims that the prosecutor improperly commented 21 times on Reynolds's post-*Miranda* silence, defense counsel objected only once on this particular ground during the purportedly improper line of questioning. Although Reynolds's failure to object at trial will not preclude this Court from reviewing the issue, it will, nevertheless, weigh against any claim of prejudice he makes on appeal. See *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).

In *Doyle,* the United States Supreme Court granted certiorari to address the question:

> "[W]hether a state prosecutor may seek to impeach a defendant's exculpatory story, told for the first time at trial, by cross-examining the defendant about his failure to have told the story after receiving *Miranda [v. Arizona,* 384 U.S. 436 (1966)] warnings *at the time of his arrest?* "

426 U.S at 611 (footnote omitted; emphasis added). The Court held that "the use for impeachment purposes of petitioners' *silence, at the time of arrest and after receiving* Miranda *warnings,* violated the Due Process Clause of the Fourteenth Amendment." *Doyle,* 426 U.S. at

619–20 (footnote omitted; emphasis added).

Although the Supreme Court found that the prosecutor's use of the defendant's post-*Miranda* silence for impeachment purposes violated due process, the Court acknowledged the importance of impeachment cross-examination to the prosecution:

> "We recognize, of course, that unless prosecutors are allowed wide leeway in the scope of impeachment cross-examination some defendants would be able to frustrate the truth-seeking function of a trial by presenting tailored defense insulated from effective challenge. See generally *Fitzpatrick v. United States,* 178 U.S. 304, 315, 20 S.Ct. 944, 948, 44 L.Ed. 1078 (1900).
>
> "....
>
> "It goes almost without saying that the fact of post-arrest silence could be used by the prosecution to contradict a defendant who testifies to an exculpatory version of events and claims to have told the police the same version upon arrest. In that situation the fact of earlier silence would not be used to impeach the exculpatory story, but rather to challenge the defendant's testimony as to his behavior following arrest. Cf. *United States v. Fairchild,* 505 F.2d 1378, 1383 (C.A.5 1975)."

426 U.S. at 619, 620, n. 7 and n. 11.

In the post-*Doyle* case of *Anderson v. Charles,* 447 U.S. 404, 100 S.Ct. 2180, 65 L.Ed.2d 222 (1980), Anderson was arrested while driving a stolen car that belonged to a murder victim. Anderson was apprised of his *Miranda* rights and was interviewed ***133** shortly after his arrest. In the interview, Anderson told the detective how he came to possess the murder victim's car. At trial, Anderson testified in his defense and told a different version of how he come to possess the car. During cross-examination, the prosecutor asked Anderson a series of questions challenging Anderson's credibility based on his failure to tell the detective the same story that he told at trial.

The Court found that no *Doyle* violation occurred. The Court reasoned:

> "*Doyle* bars the use against a criminal defendant of silence maintained after receipt of governmental assurances. *But Doyle does not apply to cross-examination that merely inquires into prior inconsistent statements. Such questioning makes no unfair use of silence because a defendant who voluntarily speaks after receiving* Miranda *warnings has not been induced to remain silent. As to the subject matter of his statements, the defendant has not remained silent at all.* See *United States v. Agee,* 597 F.2d 350, 354–356(CA3) (en banc), cert. denied, 442 U.S. 944, 99 S.Ct. 2889, 61 L.Ed.2d 315 (1979); *United States v. Mireles,* 570 F.2d 1287, 1291–1293 (C.A.5 1978); *United States v. Goldman,* 563 F.2d 501, 503–504 (C.A.1 1977), cert. denied, 434 U.S. 1067, 98 S.Ct. 1245, 55 L.Ed.2d 768 (1978).
>
> "In this case, the Court of Appeals recognized that the respondent could be questioned about prior statements inconsistent with his trial testimony. The court therefore approved the 'latter portion of the above quoted cross-examination....' 610 F.2d, at 421. But the Court of Appeals found that 'the earlier portion of the exchange' concerned the 'separate issu[e]' of the respondent's 'failure to tell arresting officers the same story he told the jury.' *Ibid.* In the court's view, these questions were unconstitutional inquiries about post arrest silence. Thus, the Court of Appeals divided the cross-examination into two parts. It then applied *Doyle* to bar questions that concerned the respondent's failure to tell the police the story he recounted at trial.
>
> "*We do not believe that the cross-examination in this case can be bifurcated so neatly.* The quoted colloquy, taken as a whole, does 'not refe[r] to the [respondent's] exercise of his right to remain silent; rather [it asks] the [respondent] why, if [his trial testimony] were true, he didn't tell the officer that he stole the decedent's car from the tire store parking lot instead of telling him that he took it from the street.' 58 Mich.App., at 381, 227 N.W.2d, at 354. Any ambiguity in the prosecutor's initial questioning was quickly resolved by explicit reference to Detective LeVanseler's testimony, which the jury had heard only a few hours before. *The questions were not designed to draw meaning from silence, but to elicit an explanation for a prior inconsistent statement.*
>
> "We conclude that *Doyle* does not apply to the facts of this case. Each of two inconsistent descriptions of events may be said to involve 'silence' insofar as it omits facts included in the other version. But *Doyle* does not require any such formalistic understanding of 'silence,' and we find no reason to adopt such a view in this case."

447 U.S. at 408–09 (emphasis added).

[57] With the above principles in mind, we turn to the present case. It is clear from the our review of the record that when the prosecutor questioned Reynolds regarding what Reynolds told the police after his arrest, the

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prosecutor's intent was to impeach the credibility of Reynolds's ***134** trial testimony by contrasting his trial testimony with his prior inconsistent statements to the investigators. Reynolds contends that because he admitted to making only a "few statements" and that because those statements are not in the record, the prosecutor's questions were akin to commenting on his post-*Miranda* silence and thus do not fall under *Anderson,* supra. He relies on *Doyle,* supra, and *Edwards v. State,* 502 So.2d 846 (Ala.Crim.App.1986), in support of his assertion.

We disagree. This case is factually distinguishable from both *Doyle* and *Edwards.* In *Doyle,* one defendant remained silent after arrest and the other defendant, Doyle, responded to a question by saying, "What's this all about?" and when told why he was arrested, he responded, "[Y]ou got to be crazy" or "I don't know what you are talking about." 426 U.S. at 623–24. That response was construed to be silence for the purposes of analysis, presumably because it did not actually contradict Doyle's trial testimony. See *Anderson,* 447 U.S. at 408 n. 2.

In *Edwards,* after evidence was introduced that Edwards had invoked his right to silence following his arrest and *Miranda* warnings, the prosecutor cross-examined Edwards regarding a statement Edwards had purportedly made to the authorities. Edwards denied making such a statement. On appeal, Edwards argued that the trial court erred in allowing the State to question him regarding the invocation of his right to remain silent. This Court held that the prosecutor's comments constituted reversible error. We reasoned:

> "In the present case, there is an indication in the record that the prosecutor may have been attempting to use a prior inconsistent statement made by the appellant to the arresting officer after he had claimed his right to remain silent; those facts would have brought this case under the holding of *Anderson v. Charles,* 447 U.S. 404, 100 S.Ct. 2180, 65 L.Ed.2d 222 (1980).
>
> "....
>
> "Any indication ... that the prosecutor intended to impeach the appellant by the introduction of a prior inconsistent statement, is not upheld by the record. Such a statement was never introduced into evidence, *nor was there any testimony regarding such a statement by Sergeant Boone, the appellant, or any other witness.* Thus, the *Anderson* holding is inapplicable to this case. See also *Bradley v. State,* 494 So.2d 750 (Ala.Cr.App.1985), aff'd, 494 So.2d 772 (Ala.1986)."

Edwards, 502 So.2d at 851–52.

In this case, although the statements themselves were not admitted into evidence, there was *direct evidence from Reynolds* that he made two statements and that those statements were inconsistent with Reynolds's trial testimony, unlike the fact situation in *Edwards* and *Doyle*. Further, although the written statements were not admitted into evidence, we fail to see how this harmed Reynolds. The Alabama Rules of Evidence do not require the admission into evidence of written prior inconsistent statements:

> "The historic rule was that the witness must be alerted as to the particulars (time, place and person) of an inconsistent statement before being asked on cross about the statement itself. Much criticism arose as to this predicate requirement's constituting a needless impediment to effective cross-examination. This resulted in its abandonment under the following provision of the Alabama Rules of Evidence:
>
> " 'Rule 613. *Prior Statement of Witnesses*
>
> ***135** " '(a) *Examining witness concerning prior statement*. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.'
>
> "The party who called the witness shall, of course, be made privy to the contents of the statement upon request for the purpose of rehabilitating the witness on redirect."

McElroy's Alabama Evidence § 157.01(a) (footnotes omitted).

Here, the defense did not request to be shown the statements. Furthermore, the prosecutor did elicit, without objection, testimony that Reynolds was arrested the day the murders were discovered, that upon his arrest he answered questions propounded by the investigators, and that those answers were inconsistent with his exculpatory trial testimony. Moreover, defense counsel did not assert that this evidentiary foundation was insufficient.

Perhaps most significantly, the introduction into evidence of the actual statements to the investigators in which Reynolds denied any knowledge of the crimes would have only solidified for the jury the disparity between Reynolds's trial testimony and his previous statements. Accordingly, we find no error, plain or otherwise, in the prosecutor's use of Reynolds's prior inconsistent

statements to impeach his exculpatory trial testimony. The prosecution's questions do not constitute a *Doyle* violation because "[s]uch questioning makes no unfair use of silence because a defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent. As to the subject matter of his statements, the defendant has not remained silent at all." *Anderson,* 447 U.S. 404, 408. See also *Gobble v. State,* 104 So.2d 920, 945 (Ala.Crim.App.2010).

Likewise, we find no error in the prosecutor's line of questions regarding why Reynolds did not come forward with his exculpatory story at any time before trial. In *Doyle,* supra, although the Court did find that a prosecutor's use of post-*Miranda* silence to impeach a defendant's trial testimony violated the defendant's due-process rights, the Court specifically declined to address the constitutionality of the prosecutor's inquiry as to why neither defendant had told his exculpatory story at any time before trial. See, 426 U.S. at 616 n. 6.

In the post-*Doyle* case of *Jenkins v. Anderson,* 447 U.S. 231, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980), the United States Supreme Court held that a prosecutor's use of defendant's pre-arrest silence to impeach the defendant's trial testimony did not violate the Fifth or Fourteenth Amendment to the Constitution. The Supreme Court's reasoning in reaching that result is particularly relevant to the facts of this case:

> "During the cross-examination, the prosecutor questioned the petitioner about his actions after the stabbing:
>
> " 'Q. And I suppose you waited for the Police to tell them what happened?
>
> " 'A. No, I didn't.
>
> " 'Q. You didn't?
>
> " 'A. No.
>
> " 'Q. I see.
>
> " 'And how long was it after this day that you were arrested, or that you were taken into custody?' *Id.,* at 33.
>
> "After some discussion of the date on which petitioner surrendered, the prosecutor continued:
>
> ***136** " 'Q. When was the first time that you reported the things that you have told us in Court today to anybody?
>
> " 'A. Two days after it happened.
>
> " 'Q. And who did you report it to?
>
> " 'A. To my probation officer.
>
> " 'Q. Well, apart from him?
>
> " 'A. No one.
>
> " 'Q. Who?
>
> "'A. No one but my—
>
> " 'Q. (Interposing) Did you ever go to a Police Officer or to anyone else?
>
> " 'A. No, I didn't.
>
> " 'Q. As a matter of fact, it was two weeks later, wasn't it?
>
> " 'A. Yes.' *Id.,* at 34.
>
> "In closing argument to the jury, the prosecutor again referred to the petitioner's prearrest silence. The prosecutor noted that petitioner had 'waited two weeks, according to the testimony—at least two weeks before he did anything about surrendering himself or reporting [the stabbing] to anybody.' *Id.,* at 43. The prosecutor contended that the petitioner had committed murder in retaliation for the robbery the night before.
>
> "....
>
> "At trial the prosecutor attempted to impeach the petitioner's credibility by suggesting that the petitioner would have spoken out if he had killed in self-defense. The petitioner contends that the prosecutor's actions violated the Fifth Amendment as applied to the States through the Fourteenth Amendment. The Fifth Amendment guarantees an accused the right to remain silent during his criminal trial and prevents the prosecution for commenting on the silence of a defendant who asserts the right. *Griffin v. California,* 380 U.S. 609, 614 [85 S.Ct. 1229, 14 L.Ed.2d 106] (1965). *In this case, of course, the petitioner did not remain silent throughout the criminal proceedings. Instead, he voluntarily took the witness stand in his own defense.*
>
> "This Court's decision in *Raffel v. United States,* 271 U.S. 494 (1926), recognized that the Fifth Amendment is not violated when a defendant who testifies in his own defense is impeached with his prior silence. The defendant in *Raffel* was tried twice. At the first trial, a

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Government agent testified that Raffel earlier had made an inculpatory statement. The defendant did not testify. After the first trial ended in deadlock the agent repeated his testimony at the second trial, and Raffel took the stand to deny making such a statement. Cross-examination revealed that Raffel had not testified at the first trial. *Id.,* at 495, n. [1]. The Court held that inquiry into prior silence was proper because '[t]he immunity from giving testimony is one which the defendant may waive by offering himself as a witness.... When he takes the stand in his own behalf, he does so as any other witness, and within the limits of the appropriate rules he may be cross-examined....' *Id.,* at 496–497. Thus, the *Raffel* Court concluded that the defendant was 'subject to cross-examination impeaching his credibility just like any other witness.' *Grunewald v. United States,* 353 U.S. 391, 420 (1957).

"It can be argued that a person facing arrest will not remain silent if his failure to speak later can be used to impeach him. But the Constitution does not forbid 'every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights.' *Chaffin v. Stynchcombe,* 412 U.S. 17, 30 (1973). *See Corbitt v.* ***137** *New Jersey,* 439 U.S. 212, 218, and n. 8 (1978). The ' "threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved." ' *Chaffin v. Stynchcombe, supra,* 412 U.S., at 32 quoting *Crampton v. Ohio,* decided with *McGautha v. California,* 402 U.S. 183, 213 (1971). The *Raffel* Court explicitly rejected the contention that the possibility of impeachment by prior silence is an impermissible burden upon the exercise of Fifth Amendment rights. 'We are unable to see that the rule that [an accused who] testified ... must testify fully, adds in any substantial manner to the inescapable embarrassment which the accused must experience in determining whether he shall testify or not.' 271 U.S., at 499.

"This Court similarly defined the scope of the Fifth Amendment protection in *Harris v. New York,* 401 U.S. 222 (1971). There the Court held that a statement taken in violation of *Miranda v. Arizona,* 384 U.S. 436 (1966), may be used to impeach a defendant's credibility. Rejecting the contention that such impeachment violates the Fifth Amendment, the Court said:

> " 'Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury.... Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process.' 401 U.S., at 225.

"See also *Oregon v. Hass,* 420 U.S. 714, 721–723 (1975); *Walder v. United States,* 347 U.S. 62, 65 (1954).

"In determining whether a constitutional right has been burdened impermissibly, it also is appropriate to consider the legitimacy of the challenged governmental practice. See *Chaffin v. Stynchcombe,* supra, 412 U.S., at 32, and n. 20. Attempted impeachment on cross-examination of a defendant, the practice at issue here, may enhance the reliability of the criminal process. Use of such impeachment on cross-examination allows prosecutors to test the credibility of witnesses by asking them to explain prior inconsistent statements and acts. A defendant may decide not to take the witness stand because of the risk of cross-examination. But this is a choice of litigation tactics. Once a defendant decides to testify, '[t]he interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination.' *Brown v. United States,* 356 U.S. 148 (1958).

"Thus, impeachment follows the defendant's own decision to cast aside his cloak of silence and advances the truth-finding function of the criminal trial. We conclude that the Fifth Amendment is not violated by the use of prearrest silence to impeach a criminal defendant's credibility."

447 U.S. at 233–38.

In a footnote in *Jenkins,* the Court noted:

"In *Crampton v. Ohio,* [402 U.S. 183 (1971),] the Court considered a claim that a murder defendant's right to remain silent was burdened unconstitutionally ***138** because he could not argue for mitigation of punishment without risking incrimination on the question of guilt. The Court recognized that a defendant who speaks in his own defense cannot avoid testifying fully.

> " 'It has long been held that a defendant who takes the stand in his own behalf cannot then claim the privilege against cross-examination on matters reasonably related to the subject matter of his direct examination. See, e.g., *Brown v. Walker,* 161 U.S. 591, 597–598 (1896); *Fitzpatrick v. United States,*

> 178 U.S. 304, 314–316 (1900); *Brown v. United States,* 356 U.S. 148 (1958). It is not thought overly harsh in such situations to require that the determination whether to waive the privilege take into account the matters which may be brought out on cross-examination. It is also generally recognized that a defendant who takes the stand in his own behalf may be impeached by proof of prior convictions or the like. See *Spencer v. Texas,* 385 U.S. [554, 561,] (1967); cf. *Michelson v. United States,* 335 U.S. 469 (1948); but cf. *Luck v. United States,* 121 U.S.App.D.C. 151 348 F.2d 763 (1965); *United States v. Palumbo,* 401 F.2d 270 (CA2 1968).' 402 U.S. at 215.

447 U.S. at 237 n. 3.

In *Jenkins,* the Supreme Court concluded by noting:

> "Our decision today does not force any state court to allow impeachment through the use of prearrest silence. *Each jurisdiction remains free to formulate evidentiary rules defining the situations in which silence is viewed as more probative then prejudicial.* We merely conclude that the use of pre arrest silence to impeach a defendant's credibility does not violate the Constitution."

447 U.S. at 240–41.

In Alabama, Rule 611(b), Ala.R.Evid., provides:

> "The right to cross-examine a witness extends to any matter relevant to any issue and to matters affecting the credibility of the witness...."

Accordingly,

> "Pursuant to Rule 611(b) cross-examination generally is not limited in scope to the matters brought out on the witness' direct examination. Rather, the cross-examiner may ask questions that are relevant to: (1) any material issue in the case, and (2) the witness's credibility. In addition, even if the cross-examiner propounds a question that is not otherwise relevant to either a material issue in the case or the witness' credibility, the question may be permissible if it is relevant to a matter brought out by the adverse party during direct examination of the witness."

McElroy's Alabama Evidence § 136.01(1) (footnotes omitted).

[58] [59] [60] [61] [62] [63] [64] [65] Furthermore,

> "Adverse parties in both civil and criminal cases are entitled to conduct a thorough and sifting cross-examination which includes wide latitude for testing a witness' credibility. It is equally well established, however, that this entitlement is not absolute, and that the latitude and extent of such cross-examination rests largely within the sound discretion of the trial court which is reversible only if abused to the prejudice of the complaining party. On appeal the party claiming that the trial judge has abused discretion in this regard bears the burden of persuasion."

***139** *McElroy's Alabama Evidence* § 136.01(2) (footnotes omitted).

> " 'As the United States Supreme Court stated in *Davis v. Alaska,* 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974):
>
> > " ' "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness."
>
> " '415 U.S. at 316, 94 S.Ct. 1105. " 'The latitude and extent of cross-examination, of necessity, is a matter within the sound discretion of the trial court, and, in the absence of prejudicial abuse, it is not reviewable on appeal.' *Turner v. State,* 289 Ala. 97, 100, 265

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So.2d 883 (1972).” *Ashurst v. State,* 462 So.2d 999, 1008–09 (Ala.Crim.App.1984).’

“*Marshall v. State,* 20 So.3d 830, 835 (Ala.Crim.App.2008). ‘Where a witness’ testimony is of major importance and is strongly adverse to the party against whom he has testified, the usual discretion of a trial court has a narrow range, and it generally is required to allow proof of any important fact indicating bias of the witness.’ *Proctor v. State,* 331 So.2d 828, 830 (Ala.Crim.App.1976).

> “ ‘In the discharge of its fact finding functions the jury’s search for the truth includes the paramount right to consider a witness’s motivation, and any evidence testing “his interest, bias or prejudice” so as to “illustrate or impeach the accuracy of his testimony” is a competent, material and relevant subject of cross-examination, and the jury’s right to be given such evidence is, of itself, part of the fact finding process. *Green v. State,* [258 Ala. 471, 64 So.2d 84 (1953)].’

“*Ex parte Brooks,* 393 So.2d 486, 487–88 (Ala.1980).

> “ ‘ “[W]hen the accused takes the stand to testify in his own behalf, he does so in a dual capacity—(1) as the accused and (2) as a witness. In his capacity as a witness his credibility may be impeached in the same way or ways in which the credibility of any other witness may be impeached. *Stone v. State,* 208 Ala. 50, 93 So. 706 [(1922)]; *Pitts v. State,* 261 Ala. 314, 74 So.2d 232 [(1954)]. ‘A defendant, who testifies for himself as a witness, may be impeached in the same manner as other witnesses, by showing that he has been convicted of a crime involving moral turpitude, or that he has made contradictory statements, or that he is a person of bad character.’ ” ‘

“*Fisher v. State,* 57 Ala.App. 310, 328 So.2d 311, 317 (Ala.Crim.App.1976), quoting *Chambers v. State,* 264 Ala. 8, 10, 84 So.2d 342, 343–44 (1955).”

Gobble, 104 So.3d at 953.

[66] As discussed above, Reynolds testified during direct examination that he was not present when the crimes occurred and that he had nothing to do with the crimes. He testified that he went to the scene only to protect his girlfriend who, he claimed, although present, did not participate in the crimes. Reynolds further testified on direct that rather than calling the police after discovering that the Martins had been murdered, he tried to burn the bodies and the house in order to cover ***140** crimes that some other undisclosed persons supposedly committed.

On cross-examination, Reynolds admitted that after his arrest he told the police that he had no knowledge of the crimes but that he wished that he had told the truth when he first talked to the police. He expressed confusion as to why he was being prosecuted for the crimes instead of the people who supposedly committed the crimes. Reynolds intimated that he even knew who committed the robbery and murders, but he declined to reveal their identity when asked to do so by the prosecutor during cross-examination. Finally, Reynolds testified that he had been incarcerated for over four years before trial and that during that time he regretted not telling his version of what had happened.

Given the particular facts of this case, together with Reynolds’s admission that he regretted not coming forward much earlier with his exculpatory version of the facts, we find no basis for reversal in either the prosecutor’s cross-examination questions or his comments during closing argument.

XV.

Reynolds argues that alleged prosecutorial misconduct undermined the reliability of jury’s verdicts finding him guilty of capital murder and the resulting death sentence. (Reynolds’s brief, Issue XIII, at 92–98).[25]

Before addressing his individual claims, we set forth the applicable law regarding appellate review of prosecutorial comments.

> “In *Belisle v. State,* 11 So.3d 256 (Ala.Crim.App.2007), this court reiterated the principles applied when reviewing a prosecutor’s alleged improper comment as follows:
>
> > “ ‘ “ ‘In reviewing allegedly improper prosecutorial argument, we must first determine if the argument was, in fact, improper. If we determine that the argument was improper, the test for review is not whether the comments influenced the jury, but whether they might have influenced the jury in arriving at its verdict.’ *Smith v. State,* 698 So.2d 189, 202–03 (Ala.Cr.App.1996), aff’d, 698 So.2d 219 (Ala.1997), cert. denied, 522 U.S. 957, 118 S.Ct. 385, 139 L.Ed.2d 300 (1997) (citations omitted); *Bush v. State,* 695 So.2d 70, 131 (Ala.Cr.App.1995), aff’d, 695 So.2d 138 (Ala.1997), cert. denied, 522 U.S. 969, 118 S.Ct.

418, 139 L.Ed.2d 320 (1997) (citations omitted). '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), cert. denied, 503 U.S. 974, 112 S.Ct. 1594, 118 L.Ed.2d 310 (1992). 'Prosecutorial misconduct is subject to a harmless error analysis.' *Bush v. State,* 695 So.2d at 131 (citations omitted); *Smith v. State,* 698 So.2d at 203 (citations omitted)."

***141** " '*Simmons v. State,* 797 So.2d 1134, 1161–62 (Ala.Crim.App.1999) (opinion on return to remand). We must view the challenged arguments in the context of the entire trial and not in the abstract. See *Duren v. State,* 590 So.2d 360 (Ala.Crim.App.1990); *Whitlow v. State,* 509 So.2d 252 (Ala.Crim.App.1987). It is proper for a prosecutor to argue any legitimate inference that may be drawn from the evidence. See *Snyder v. State,* 893 So.2d 488 (Ala.Crim.App.2003).'

"11 So.3d at 302.

" ' " ' 'While this failure to object does not preclude review in a capital case, *it does weigh against any claim of prejudice.*' *Ex parte Kennedy,* 472 So.2d [1106,] at 1111 [(Ala.1985)] (emphasis in original). 'This court has concluded that the failure to object to improper prosecutorial arguments ... should be weighed as part of our evaluation of the claim on the merits because of its suggestion that the defense did not consider the comments in question to be particularly harmful.' *Johnson v. Wainwright,* 778 F.2d 623, 629 n. 6 (11th Cir.1985), cert. denied, 484 U.S. 872, 108 S.Ct. 201, 98 L.Ed.2d 152 (1987)." '

"*Ex parte Windsor,* 683 So.2d 1042, 1061 (Ala.1996) (quoting *Kuenzel v. State,* 577 So.2d 474, 489 (Ala.Crim.App.1990))."

Vanpelt v. State, 74 So.3d 32, 81 (Ala.Crim.App.2009).

With the aforementioned principles in mind, we turn to Reynolds's specific allegations.

A.

Reynolds contends that the "prosecutor encouraged the jury to rely on improper evidence in considering Chad Martin's testimony." (Reynolds's brief, at 92–93.) This assertion was addressed in Part VII of this Court's opinion and found to lack merit.

B.

Reynolds claims that the prosecutor improperly vouched for the strength of the State's case in the prosecutor's closing argument during the guilt phase of the trial. (Reynolds's brief, at 93–94.) In a footnote to his argument, Reynolds quotes three allegedly improper comments from the record.

1.

[67] First, Reynolds argues that the prosecutor improperly vouched for the strength of the State's case during the State's rebuttal closing argument when the prosecutor stated: "We feel very strongly, and we feel that you all—we also conclude beyond a reasonable doubt that based on clear, undisputed—reasonably undisputed evidence in this case—this is clearly a case of capital murder and nothing else." (Vol. 12, R. 1670.)

Reynolds did not object to this purportedly improper comment, and we find no plain error in the comment. Rule 45A, Ala.R.App.P.

" ' " ' '[I]t is not improper for [the prosecuting attorney] to argue or to express his opinion that [the] accused is guilty, where he states, or it is apparent, that such opinion is based solely on the evidence.' 23A C.J.S. Criminal Law § 1104, pp. 194–95 (1961)." *Galloway v. State,* 484 So.2d 1199, 1201 (Ala.Cr.App.1986). In *Galloway*, a number of cases are cited in which the prosecuting attorney made comments stating his opinion that the appellant was guilty.'

"*Henderson v. State,* 584 So.2d 841, 857 (Ala.Cr.App.1988), remanded on other grounds, 584 So.2d 862 (Ala.1991)."

***142** *Broadnax v. State,* 825 So.2d 134, 183 (Ala.Crim.App.2000).

2.

[68] Second, Reynolds argues that the prosecutor improperly vouched for the strength of the State's case when the prosecutor argued in his rebuttal argument, "because anybody with any kind of sense would know that you're not going to buy that cock and bull story the guy got on the witness stand and tried to sell to you.' " (Vol. XII, R. 1670–71.)

[69] [70] Reynolds did not object to this comment, and we find no plain error. Rule 45A, Ala.R.App.P.

> "The prosecution is entitled to 'spotlight the defense's strategy,' and a prosecutor's remarks during closing argument pointing out the flaws in the defense's theory of the case do not constitute improper argument. 'During closing argument, the prosecutor, as well as defense counsel, has a right to present his impressions from the evidence, if reasonable, and may argue every legitimate inference.' *Rutledge v. State,* 523 So.2d 1087, 1100 (Ala.Crim.App.1987) (citation omitted), rev'd on other grounds, 523 So.2d 1118 (Ala.1988). The remarks complained of by the appellant were part of the prosecutor's legitimate argument that the evidence did not support the defense's theory that the robbery of Johnson was a 'mere afterthought.' We find no error here, plain or otherwise."

Reeves v. State, 807 So.2d 18, 45–46 (Ala.Crim.App.2000), cert. denied, 534 U.S. 1026, 122 S.Ct. 558, 151 L.Ed.2d 433 (2001).

We have carefully reviewed the comment in the context in which it occurred. Contrary to Reynolds's allegation, we do not believe that the prosecutor was vouching for the strength of the State's case by the comment. Rather, it appears that the prosecutor was merely replying to defense counsel's closing argument that the evidence established only that Reynolds was at the scene of the crimes to help cover up his girlfriend's presence at the scene of the triple-murder/robbery.

3.

[71] [72] [73] Likewise, we find no plain error in the prosecutor's comment: "The only appropriate verdict is guilty of capital murder. Not anything less. If you are not going to convict him of capital murder, just let him go." (Vol. XII, R. 1685.)

> " ' "Generally, the prosecutor is in error by exhorting the jury to 'do what's right,' or to 'do its job,' if that exhortation 'impl[ies] that, in order to do so, it can only reach a certain verdict, regardless of its duty to weigh the evidence and follow the court's instructions on the law.' " *McNair v. State,* 653 So.2d 320, 339–40 (Ala.Crim.App.1992), aff'd, 653 So.2d 353 (Ala.1994), quoting *Arthur v. State,* 575 So.2d 1165, 1185 (Ala.Crim.App.1990). *However,* it is not improper for a prosecutor to argue to the jury that a defendant is guilty or to urge the jury to find the defendant guilty of the crime charged so long as that argument is based on the evidence; in fact that is exactly what a prosecutor is supposed to do during closing argument. See *Galloway v. State,* 484 So.2d 1199 (Ala.Crim.App.1986), and the authorities cited therein. See also *Broadnax v. State,* 825 So.2d 134, 183 (Ala.Crim.App.2000), aff'd, 825 So.2d 233 (Ala.2001), and *Melson v. State,* 775 So.2d 857, 889–90 (Ala.Crim.App.1999), aff'd, 775 So.2d 904 (Ala.2000)."

Morris v. State, 60 So.3d 326, 368 (Ala.Crim.App.2010), quoting *Minor v. State,* 914 So.2d 372, 420 (Ala.Crim.App.2004).

***143** The prosecutor's exhortation to the jury was based upon the evidence presented during the trial.

4.

In a fourth allegation of improper vouching, Reynolds refers this Court to three pages of the prosecutor's opening argument. (Reynolds's brief at 94, citing Vol. VII, R. 841–43.) We have reviewed the alleged improper comments in the context of the opening argument, and we find no plain error. Rule 45A, Ala. R.App. P. Contrary to Reynolds's interpretation, the prosecutor was not improperly vouching for the credibility of State's witness, Adrian West. Instead, the prosecutor was simply outlining what he expected the evidence to prove. See *Baker v. State,* 906 So.2d 210, 266–67 (Ala.Crim.App.2001), rev'd on other grounds, *Ex parte Baker,* 906 So.2d 277 (Ala.2004).

C.

Reynolds cites several portions of the prosecutor's opening and closing arguments at the guilt phase of the trial as support for his allegation that "throughout the trial

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the prosecutor sought to inflame the jury's passions." (Reynolds's brief, at 94–95.)[26]

> "We have carefully reviewed the prosecutor's entire closing argument during the penalty phase of Floyd's trial, paying particular attention to the context of the prosecutor's remarks quoted in Floyd's brief. Based on that review, it is clear that the prosecutor's remarks at the penalty phase of Floyd's trial were made in the heat of debate, were proper comments on facts in evidence, were in reply to various remarks made during defense counsel's closing argument, and were not improperly designed to inflame the passions of the jury. Therefore, no basis for reversal exists."
> *Floyd v. State,* [Ms. CR–05–0935, September 28, 2007] —— So.3d ——, —— (Ala.Crim.App.2007). Based upon the rationale in *Floyd*, we find no plain error in the prosecutor's comments.

D.

Reynolds contends that the prosecutor improperly belittled him during cross-examination of him at the guilt phase of the trial. (Reynolds's brief, at 95.) The prosecutor's cross-examination of Reynolds was addressed in part XIV of this opinion and found to lack merit.

E.

Reynolds argues that the prosecutor misstated the law at various points in the trial. (Reynolds's brief, at 95–97.)

1.

[74] First, Reynolds alleges that the prosecutor incorrectly defined reasonable doubt to the prospective jurors during voir dire of the venire panels when the prosecutor defined reasonable doubt, in part, as follows: " '[A] doubt to which you have a reason, is a fair doubt, a substantial doubt.' " (Reynolds's brief, at 95–96, citing R. 495, 496, 564, 656, and 747.)

Reynolds did not object on this basis at trial, and we find no plain error. The use of the terms "substantial doubt," "fair doubt," and "doubt for which you have a reason," to explain the concept of reasonable doubt is not improper. See *Greenhill v. State,* 746 So.2d 1064, 1069–71 (Ala.Crim.App.1999); *Lee v. State,* 898 So.2d 790, 841–42 (Ala.Crim.App.2003), cert. denied ***144** , 898 So.2d 874 (Ala.), cert. denied, 543 U.S. 924, 125 S.Ct. 309, 160 L.Ed.2d 222 (2004). Furthermore:

> "Our review of the state's voir dire examination leads us to conclude that the prosecutor provided his 'definition' of reasonable doubt to assist him in learning the veniremembers' opinions on the state's burden of proof. We do not find any plain error in this situation. Moreover, the trial court repeatedly instructed the jury that the comments and arguments of counsel were not the law and that they should follow only his instructions on the law. Thus, we find no plain error."

Broadnax v. State, 825 So.2d at 180.

2.

[75] Second, Reynolds maintains that the prosecutor "improperly directed the jury that in order to vote for life [imprisonment], the mitigating factors would have to outweigh the aggravating factors." (Reynolds's brief, at 96.) In support of this allegation, Reynolds cites two statements made by the prosecutor during the voir dire of the individual venire panels at the guilt phase of the trial and a comment made during the prosecutor's closing argument at the penalty phase of the trial. (Vol. VI, R. 490, VII, R. 742; Vol. XIII, R. 1969.)

[76] Reynolds did not object to these allegedly improper comments; thus, we review them for plain error only. Rule 45A, Ala.R.App.P. Whatever misstatements the prosecutor made regarding the weighing of aggravating and mitigating circumstances did not " 'so infect[ ] the trial with unfairness as to make the resulting conviction a denial of due process.' " *Vanpelt,* 74 So.3d at 90. The circuit court charged the jury at the penalty phase that what the attorneys said was not evidence. (Vol. XIII, R. 1984–85, 88–92.) Further, the circuit court correctly charged the jury on the weighing of the aggravating circumstances and the mitigating circumstances. (Vol. XIII, R. 1998–99.) Jurors are presumed to follow the trial court's instructions. See *Irvin v. State,* 940 So.2d 331, 352 (Ala.Crim.App.2005) (citing *Taylor v. State,* 666 So.2d

36, 70 (Ala.Crim.App.), on return to remand, 666 So.2d 71 (Ala.Crim.App.1994), aff'd, 666 So.2d 73 (Ala.1995), cert. denied, 516 U.S. 1120, 116 S.Ct. 928, 133 L.Ed.2d 856 (1996)). No plain error occurred, and no basis for reversal exists regarding this claim.

3.

[77] Reynolds avers that during the prosecutor's rebuttal closing argument at the guilt phase of the trial, the prosecutor misstated the law on the concept of "voluntary intoxication" when the prosecutor stated that, " 'voluntary intoxication is never a defense.' " (Reynolds's brief, at 96, citing Vol. XII, R. 1672.) Reynolds did not object to this comment; thus, we review the comment for plain error only. Rule 45A, Ala.R.App.P.

As stated above, the circuit court charged the jury that what the attorneys stated was not evidence. Furthermore, the circuit court correctly charged the jury that "[w]hile voluntary intoxication is never a defense to a criminal charge, it may negate the specific intent that is essential to an intentional killing and reduce it to other charges." (Vol. XII, R. 1716.) See § 13A–3–2, Ala.Code 1975. See also *Flowers v. State,* 922 So.2d 938, 953–54 (Ala.Crim.App.2005.), cert. denied, 546 U.S. 1177, 126 S.Ct. 1347, 164 L.Ed.2d 60 (2006). Again, jurors are presumed to follow the trial court's instructions.

After reviewing the prosecutor's comment in the context of the entire trial, we are not persuaded that the comment " 'so infected the trial with unfairness as to ***145** make the resulting conviction a denial of due process.' " *Vanpelt,* 74 So.3d at 81. No plain error occurred, and no basis for reversal exists.

4.

[78] Reynolds alleges that during the cross-examination of a defense witness in the penalty phase of the trial, the "prosecutor incorrectly and improperly insinuated that [Reynolds's] upbringing was not mitigating because it did not directly cause him to commit the crime." (Reynolds's brief, at p. 96, citing Vol. XIII, R. 1862.)

During the prosecutor's cross-examination of Michael Reynolds's father, Harold Reynolds, at the penalty phase of the trial, the following exchange occurred:

> "Q. [PROSECUTOR]: As far as you having to tell this jury this morning that if this crime got committed by him, that it was because of the way you raised him, you don't feel that way, do you?
>
> "[DEFENSE COUNSEL]: Your Honor, I object to that question. Excuse me, Mr. Reynolds. We are not saying because of the way he was raised he committed this crime. We are offering it for mitigation to weigh the punishment. There is a distinction.
>
> "THE COURT: Sustained. Move along.
>
> "THE PROSECUTOR: That's all."

(Vol. XIII, R. 1862–63.)

As evidenced by the above excerpt, defense counsel objected before the question was answered, and the circuit court sustained defense counsel's objection. Even so, as addressed above, the circuit court correctly charged the jury on the concept of aggravating and mitigating circumstances. In the context of the entire argument, we do not believe that the prosecutor's question "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Vanpelt*, 74 So.3d at 47.

F.

In a one-paragraph argument, Reynolds suggests that his convictions are due to be reversed because the "prosecutor imposed leading questions throughout the trial." (Reynolds's brief, at 97.) He then refers this Court to 21 places in the record where this "egregious" conduct supposedly occurred.[27]

Reynolds objected to only 3 of the 21 cited instances of the prosecutor's purportedly leading questions. On two of those three instances, the circuit court instructed the prosecutor not to lead the witness. (R. 915, 951.) Defense counsel did not move to strike the answers. On the third instance, the Court did not rule on the defense counsel's objection; thus, there was no adverse ruling from the Court to appeal. (R. 1078.)

As to the remaining 18 allegedly improper questions, as we said in *Broadnax,* "[b]ecause of the way this issue is presented in his brief to this Court, we seriously question [Reynolds's] sincerity in making this argument." 825 So.2d at 170. His string citation to numerous pages from the record does not meet the requirements of Rule

28(a)(10), Ala.R.App.P. Likewise, Reynolds does not specify which questions were allegedly improper, or how he was prejudiced by the improper questions. We will not create Reynolds's argument for him. *Egbuonu v. State,* 993 So.2d 35, 38–39 (Ala.Crim.App.2007). Nevertheless, our plain-error review necessarily encompassed the pages referenced by Reynolds, ***146** and we find no plain error in the prosecutor's questions. *Lee v. State,* 898 So.2d 790, 827 (Ala.Crim.App.2001)

G.

[79] Reynolds alleges that "the prosecutor implied to the jury that [he] was guilty of capital murder by telling it that the trial would require two phases." (Reynolds's brief, at 97, citing Vol. VI, R. 570–71, Vol. VII, R. 662.)

There is no merit to this contention. In the portion of the record cited by Reynolds, the prosecutor was simply explaining the bifurcated nature of Alabama capital-murder proceedings as codified in § 13A–5–43, Ala.Code 1975. Reynolds did not object to the prosecutor's comments, and we find no plain error. Rule 45A, Ala.R.App.P. The prosecutor's "explanation was relevant to the ... questions regarding the veniremember's beliefs about the death penalty and whether or not they could follow the law as it was explained to them in determining whether to impose the death penalty" and the comments "did not destroy [Reynolds's] presumption of innocence." *Lee,* 898 So.2d at 834.

XVI.

Reynolds argues that the State improperly introduced victim-impact evidence to the jury during the guilt phase of the trial. (Reynolds's brief, Issue XIV, at 98–101.)

In *Ex parte Rieber,* 663 So.2d 999 (Ala.1995), cert. denied, 516 U.S. 995, 116 S.Ct. 531, 133 L.Ed.2d 437 (1995), the Alabama Supreme Court addressed a claim that the prosecution had improperly injected victim-impact evidence during the guilt phase of the trial. In rejecting this claim, the Supreme Court reasoned:

> "We agree with Rieber that Mr. Craig's testimony concerning Ms. Craig's children, their ages, and the status of their custody after the murder was not relevant with respect to the question of his guilt or innocence and, therefore, that it was inadmissible in the guilt phase of the trial. The only issue before the jury during the guilt phase of the trial was whether Rieber had robbed and killed Ms. Craig. However, in *Ex parte Crymes,* 630 So.2d 125 (Ala.1993), a plurality of this Court held in a capital murder case in which the defendant was sentenced to life-imprisonment without parole that a judgment of conviction can be upheld if the record conclusively shows that the admission of the victim impact evidence during the guilt phase of the trial did not affect the outcome of the trial or otherwise prejudice a substantial right of the defendant. See, also, *Giles v. State,* 632 So.2d 568 (Ala.Crim.App.1992), aff'd, 632 So.2d 577 (Ala.1993), cert. denied, 512 U.S. 1213, 114 S.Ct. 2694, 129 L.Ed.2d 825 (1994); *Ex parte Parker,* 610 So.2d 1181 (Ala.1992), cert. denied, 509 U.S. 929, 113 S.Ct. 3053, 125 L.Ed.2d 737 (1993); *Lawhorn v. State,* supra; *Hooks v. State,* 534 So.2d 329 (Ala.Crim.App.1987), aff'd, 534 So.2d 371 (Ala.1988), cert. denied, 488 U.S. 1050, 109 S.Ct. 883, 102 L.Ed.2d 1005 (1989); and *Ex parte Whisenhant,* supra, applying a harmless error analysis in death penalty cases. Our review of the record indicates that Rieber's attorneys did not object to Mr. Craig's brief references to Ms. Craig's children or ask him any questions on cross-examination. The trial court clearly instructed the jury that it had to determine, based on all of the evidence, whether Rieber had robbed and killed Ms. Craig. The jury was instructed that it could not find Rieber guilty unless the prosecutor had established his guilt beyond a reasonable doubt. The jury was also instructed not to let sympathy or prejudice affect its ***147** verdict. We caution prosecutors that the

> introduction of victim impact evidence during the guilt phase of a capital murder trial can result in reversible error if the record indicates that it probably distracted the jury and kept it from performing its duty of determining the guilt or innocence of the defendant based on the admissible evidence and the applicable law. However, after examining the record in its entirety, we conclude that the aforementioned portions of Mr. Craig's testimony, although they should not have been permitted, did not operate to deny Rieber a fair trial. It is presumed that jurors do not leave their common sense at the courthouse door. It would elevate form over substance for us to hold, based on the record before us, that Rieber did not receive a fair trial simply because the jurors were told what they probably had already suspected—that Ms. Craig was not a 'human island,' but a unique individual whose murder had inevitably had a profound impact on her children, spouse, parents, friends, or dependents (paraphrasing a portion of Justice Souter's opinion concurring in the judgment in *Payne v. Tennessee,* 501 U.S. 808, 838, 111 S.Ct. 2597, 2615, 115 L.Ed.2d 720 (1991))."

663 So.2d at 1005–06.

Mindful of the above and the previously discussed law applicable to allegedly improper prosecutorial comments discussed in issue XV, we turn to Reynolds's specific allegations.

A.

[80] In a two-sentence argument, Reynolds asserts that the "prosecution falsely indicated to the jury that the victims' families were parties to this case and that the prosecution was representing them against [him]." (Reynolds's brief, at 98.) In support of his argument, he refers this Court to 10 instances in the record where this supposedly occurred.[28]

We have reviewed the portions of the record cited by Reynolds. One statement occurred during opening argument; the remaining comments occurred during the prosecutor's voir dire of the individual jury panels. Reynolds did not object to any of the allegedly improper comments, and we find no plain error. Rule 45A, Ala.R.App.P. In the cited portions of the record, the prosecutor was explaining to the veniremembers the importance of the trial proceedings to Reynolds, the victims' family, and the State. See *Henderson v. State,* 583 So.2d 276, 287 (Ala.Crim.App.1990), aff'd, *Ex parte Henderson,* 583 So.2d 305 (Ala.1991), cert. denied, 503 U.S. 908, 112 S.Ct. 1268, 117 L.Ed.2d 496 (1992)(finding no plain error in the prosecutor's mentioning at the guilt phase "the importance of the case to the victim's family, the suffering of the family, [and] that he represented the family....").

B.

Likewise, we find no plain error in Reynolds's allegation that during voir dire, opening statement, and a question propounded to a State's witness "the prosecutor errantly focused the jury's attention in the guilt phase on how the crime affected the victims' families." (Reynolds's brief, at 99, citing Vol. VI, R. 647; Vol. VII, 830; Vol. IX, R. 901, respectively.)

Reynolds did not object to any of the allegedly improper comments. We have reviewed the comments in the context in ***148** which they occurred, and we do not find that the comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Vanpelt,* 74 So.3d at 81.

C.

[81] Reynolds argues that the prosecutor's references in voir dire and closing argument regarding how old the victim Savannah Martin would have been at the time of the trial were improper. (Reynolds's brief at 99, citing Vol. VII, R. 732; Vol. XI, R. 1619; Vol. XII, R. 1669, respectively.) Reynolds did not object to these alleged references on this basis at trial, and we find no plain error. The fact that Savannah would have been a teenager at the time of trial was an obvious fact to the jury. "We cannot reasonably conclude that the prosecutor's comments in

this particular case, when considered in the context of the entire trial, were so prejudicial as to call into question the correctness of the verdict." *Ex parte Rieber,* 663 So.2d at 1014.

D.

In a one-paragraph argument, Reynolds contends that portions of the prosecutor's closing argument were improper because the argument solicited a guilty verdict based upon sympathy, not the evidence. (Reynolds's brief, at 99, citing Vol. XI, R. 1615, 1616, 1619, 1625.) As he has done with so many other issues, Reynolds merely refers this Court to various portions of the closing argument. He does not even specify which comments were egregious. We have reviewed the comments in the context of the entire closing argument and do not find that the argument was "improperly designed to inflame the passions of the jury." *Floyd v. State,* —— So.3d at ——.

E.

[82] Reynolds also argues that the prosecutor improperly introduced autopsy photographs of the victims, a video of the crime scene, and a fitted sheet from the victims' bed that contained dried blood. (Reynolds's brief, at 100–01.) He maintains that the evidence was inadmissible because it was cumulative and because it constituted improper victim-impact evidence.

We find no abuse of discretion in the circuit court's admission of the evidence. Contrary to Reynolds's claim, the aforementioned evidence did not constitute victim-impact evidence, as that term is normally interpreted. Further, the evidence was "relevant to depict the nature and extent of the injuries the victims suffered and the crime scene[ ]" and was "neither unduly prejudicial nor inflammatory." *Billups v. State,* 86 So.3d 1032 (Ala.Crim.App.2009). See also *Stallworth v. State,* 868 So.2d 1128, 1151–1152 (Ala.Crim.App.2001.)

XVII.

[83] [84] Reynolds contends that the circuit court committed several errors in its jury instructions in the guilt phase of the trial.[29] (Reynolds's brief, Issue XII.) Reynolds did not object to any of the alleged errors at trial. Accordingly, we will review his assertions for plain error only. Rule 45A, Ala. R.App. P.

> " 'When reviewing a trial court's jury instructions, we must view them as a whole, not in bits and pieces, and as a reasonable juror would have interpreted ***149** them.' *Johnson v. State,* 820 So.2d 842, 874 (Ala.Crim.App.2000).
>
> > " 'A trial court has broad discretion when formulating its jury instructions. See *Williams v. State,* 611 So.2d 1119, 1123 (Ala.Cr.App.1992). When reviewing a trial court's instructions, " 'the court's charge must be taken as a whole, and the portions challenged are not to be isolated therefrom or taken out of context, but rather considered together.' " *Self v. State,* 620 So.2d 110, 113 (Ala.Cr.App.1992) (quoting *Porter v. State,* 520 So.2d 235, 237 (Ala.Cr.App.1987)); see also *Beard v. State,* 612 So.2d 1335 (Ala.Cr.App.1992); *Alexander v. State,* 601 So.2d 1130 (Ala.Cr.App.1992).'
>
> "*Williams v. State,* 795 So.2d 753, 780 (Ala.Crim.App.1999)."
>
> *Vanpelt,* 74 So.3d at 92.

With these principles in mind, we turn to Reynolds's specific allegations of error.

A.

[85] Reynolds contends that the circuit court erred to reversal when it charged the jury during the guilt phase of the trial that the jury " 'did not have to go through each and every element' for each count because the results would be the same for counts two, three and five." (Reynolds's brief, Issue XII(A), at 87–88.) Reynolds argues that these instructions improperly reduced the State's burden of proof with regard to the elements of the robbery/murder charges.

Contrary to Reynolds's contention, when the instructions are reviewed in the context of the entire charge, it is clear that the circuit court's instructions did not relieve the State of its burden of proving each element of the capital offenses charged in counts II, III, and V of the indictment. Those counts charged Reynolds with the capital offense of murder committed during the course of a robbery. See § 13A–5–40(a)(2), Ala.Code 1975. During the portion of the charge cited by Reynolds, the circuit court was simply

explaining that the robbery component of the charge was the same for each count; the difference between the three counts was the victim of the murder. The Court was *not* instructing the jury that the State did not have to prove the robbery component of the robbery/homicide charged in counts II, III, and V of the indictment.

B.

[86] Reynolds maintains that the circuit court "improperly told the jury that a reasonable doubt that would entitle the defendant to an acquittal is a 'doubt to which you can assign a reason.' " (Reynolds's brief, Issue XII(B), at 88–89.) Reynolds asserts that this instruction improperly permitted a conviction based upon insufficient proof. As we held in *Lee v. State,* 898 So.2d 790, 842 (Ala.Crim.App.2001), cert. denied, 898 So.2d 874 (Ala.), cert. denied, 543 U.S. 924, 125 S.Ct. 309, 160 L.Ed.2d 222 (2004):

> "Taken as a whole, the trial court's instructions in this case properly conveyed the concept of reasonable doubt to the jury and did not lessen the State's burden of proof. There is not a reasonable likelihood that the jury applied the instructions in a manner that would violate the appellant's constitutional rights. Therefore, we do not find that there was any plain error in this regard."

C.

[87] Reynolds argues that the circuit court's instructions during the guilt phase "unduly emphasized the defendant's interest in the outcome of the case ... and as such improperly invaded the province of ***150** the jury." (Reynolds's brief, Issue XII(C), at 89.) Reynolds is due no relief on this claim.

The circuit court appropriately charged the jury, in pertinent part:

> "Ladies and gentlemen, the defendant may testify as a witness on his own behalf, which he did in this case. And when he does so, you *may* consider the testimony of the defendant along with all the other evidence in light of the facts that he is the defendant and the interest he has in your verdict. This is to be taken into consideration together with all of the other evidence or lack of evidence."

(Vol. XII, R. 1793–94.) (Emphasis added.) The circuit court's instructions did not *mandate* that the jury consider Reynolds's interest in the outcome of the case; thus, the Court's instructions did not invade the province of the jury. *Phillips v. State,* 606 So.2d 170, 170–71 (Ala.Crim.App.1991).

D.

[88] [89] [90] Reynolds alleges that the circuit court incorrectly failed to charge the jury on the offense of manslaughter as a lesser-included offense. (Reynolds's brief, Issue XII(D), at 89–90.) Reynolds argues that "although the trial court gave the jury an intoxication instruction, it failed to instruct the jury on the corresponding lesser-included offense of manslaughter." (Reynolds's brief, at 89.)

> "A defendant is entitled to a charge on a lesser-included offense only if there is any reasonable theory from the evidence to support the charge. *Ex parte Smith,* 756 So.2d 957, 963 (Ala.2000). '[I]nstructions on intoxication and manslaughter are not required when they would be inconsistent with the defense strategy.' *Maples v. State,* 758 So.2d at 23."

Pilley v. State, 930 So.2d 550, 562 (Ala.Crim.App.2005).

Reynolds's defense was that he was not present during the murders or the robbery and that he only went to the scene of the crimes to attempt to help hide any evidence indicating that his girlfriend may have been involved in the crimes. There was simply no evidence indicating that Reynolds recklessly caused the death of the victims or that he killed the victims while acting in a "sudden heat of passion caused by provocation recognized by law and, before a reasonable time for the passion to cool and for reason to reassert itself." § 13A–6–3(a)(1) and (2), Ala.Code 1975. Thus, we find no plain error in the circuit court's not charging the jury on the offense of manslaughter as a lesser-included offense.

Penalty–Phase Issues

XVIII.

Reynolds contends that the circuit court improperly instructed the jury during the penalty phase of the trial. Because Reynolds did not object to any of the alleged improper instructions, we review his allegations for plain error only. Rule 45A, Ala.R.App.P. Mindful of the applicable law set forth in *Vanpelt*, 74 So.3d 64 at, in Part XVII, we will now review each of Reynolds's purported instances of error.

A.

Reynolds alleges that the circuit court improperly instructed the jury during the penalty phase that it did not have to determine whether the aggravating circumstances existed because the court had already made that determination. (Reynolds's Brief, Issue XII(A), at p. 88.)

The record indicates that at the beginning of the penalty phase of the trial, the parties agreed that by virtue of the jury's guilty verdicts, the following two aggravating factors had been proven beyond a ***151** reasonable doubt: (1) that the capital offense was committed while Reynolds was engaged in a robbery, see § 13A–5–49(4), Ala.Code 1975; and (2) that Reynolds intentionally caused the death of two or more persons by one act or pursuant to one scheme or course of conduct, see § 13A–5–49(9), Ala.Code 1975. See also, § 13A–5–45(e), Ala.Code 1975. It further appears that for strategic reasons, the defense stipulated that a third aggravating factor was proven beyond a reasonable doubt by the evidence presented at trial: that "[t]he capital offense was especially heinous, atrocious, or cruel compared other capital offenses," see § 13A–5–49(8), Ala.Code 1975. The State agreed to the existence of the statutory mitigating circumstance that Reynolds had no significant prior criminal history, see § 13A–5–51, Ala.Code 1975. (Vol. XII, R. 1820–24, 1830–31.)

The State introduced into evidence at the penalty phase of the trial all the evidence presented during the guilt phase of the trial. The circuit court adopted the jury's five guilty verdicts for purposes of the penalty phase. (Vol. XII, R. 1841–44.)

During its charge, the circuit court instructed the jury that the aggravating circumstance that the murder was committed during a robbery and that two or more persons were murdered by one act or pursuant to one scheme or course of conduct had been proven beyond a reasonable doubt by the jury's guilty verdicts for those offenses during the guilt phase of the trial. Section § 13A–5–45(e), Ala.Code 1975, provides: "[A]ny aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentence hearing." The circuit court's instructions in this regard were a correct statement of law. See *Calhoun v. State,* 932 So.2d 923, 973–74 (Ala.Crim.App.2005).

[91] As previously noted, for strategic reasons, the defense also stipulated to the existence of the statutory aggravating factor that the offense was especially heinous, atrocious or cruel when compared to other capital offenses. Pursuant to defense counsel's suggestion, the circuit court did not specifically inform the jury that the defense had "stipulated" to the existence of this aggravating circumstance; rather, the Court instructed the jury that by virtue of "the verdict, the testimony and the evidence that in this case an evidentiary and factual basis exists for that aggravating circumstance." (Vol. XIII, R. 1960–61; 1989–91.) The court's instruction was consistent with the parties' agreement. The practice of instructing the jury on a stipulation by the parties as to the existence of an aggravating circumstance has been approved by this Court. See *Stewart v. State,* 730 So.2d 1203, 1227–29 (Ala.Crim.App.1996).

Accordingly, in light of these facts, we find no plain error. Rule 45A, Ala.R.App.P.

B.

[92] Reynolds contends that the circuit court's use of the words "you" and "your" during its jury charge in the penalty phase of the trial implied to the jury that the jury's findings as to the existence of any mitigating evidence had to be unanimous before the mitigating evidence could be considered. (Reynolds's brief, Issue XII(E), at 90–91.) This Court addressed and rejected an identical argument in *Hall v. State,* 979 So.2d 125, 165–67 (Ala.Crim.App.2007). Further we have reviewed the Court's entire charge in light of the principles addressed *Hall* and find " ' "nothing in the instructions that would have suggested to the jurors, or given them the ***152** impression, that their findings concerning the existence of mitigating circumstances had to be unanimous" ' " before those mitigating circumstances could be considered. *Hall,*

979 So.2d at 165 (quoting other cases). Accordingly, we find no error, plain or otherwise, in this regard.

C.

[93] Last, Reynolds argues that the circuit court's charge to the jury in the penalty phase was incorrect because, he asserts, the charge "allowed the jury to believe that it could not consider mercy." (Reynolds's brief, Issue XII(F), at 91.) The Court charged the jury, in relevant part:

> "Now, in your deliberation, ... do not let personal opinions outweigh the law. Weigh the aggravating and mitigating circumstances carefully and dispassionately. Do not be swayed by anger, sympathy or prejudice or any type of passion or emotion. The weighing and comparing of aggravating and mitigating circumstances requires the exercise of sound judgment on your part. It is not a matter of unbridled discretion. A human life hangs in the [balance]. It is a matter of calm reflection, not for the indulgence of emotion."

(Vol. XIII, R. 2000–01.)

In *Brown v. State,* 11 So.3d 866, 921 (Ala.Crim.App.2007), aff'd, 11 So.3d 933 (Ala.2008), cert. denied, 557 U.S. 938, 129 S.Ct. 2864, 174 L.Ed.2d 582 (2009), the appellant also argued that "the circuit court's instruction allowed the jury to believe that it could not consider mercy in determining its penalty-phase verdict." We held:

> " 'Contrary to Perkins's contention, it is well settled in Alabama that "[a] capital defendant is not automatically entitled to a mercy instruction." *Boyd v. State,* 715 So.2d 825, 846 (Ala.Cr.App.1997), aff'd, 715 So.2d 852 (Ala.), cert. denied, 525 U.S. 968, 119 S.Ct. 416, 142 L.Ed.2d 338 (1998). See also, *Taylor v. State,* 666 So.2d 36 (Ala.Cr.App.1994), aff'd, 666 So.2d 73 (Ala.1995), cert. denied, 516 U.S. 1120, 116 S.Ct. 928, 133 L.Ed.2d 856 (1996); *Rieber v. State,* 663 So.2d 985 (Ala.Cr.App.1994) aff'd, 663 So.2d 999 (Ala.), cert. denied, 516 U.S. 995, 116 S.Ct. 531, 133 L.Ed.2d 437 (1995). In *Kuenzel v. State,* 577 So.2d 474, 495 (Ala.Cr.App.1990), aff'd, 577 So.2d 531 (Ala.), cert. denied, 502 U.S. 886, 112 S.Ct. 242, 116 L.Ed.2d 197 (1991), this court stated that "[t]he Alabama provisions for the imposition of capital punishment nowhere mention mercy." Here, the trial court instructed the jury that its verdict should be based only on the evidence presented and the law as instructed by the court. The jury was instructed that it "must avoid any influence of passion, prejudice or any other arbitrary factor." (R. 3007–08.) In *California v. Brown,* 479 U.S. 538, 539, 107 S.Ct. 837, 838, 93 L.Ed.2d 934 (1987), the United States Supreme Court held that "an instruction informing jurors that they 'must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling' during the penalty phase of a capital murder trial [does not violate] the Eighth and Fourteenth Amendments to the United States Constitution.'
>
> "*Perkins v. State,* 808 So.2d 1041, 1134–35 (Ala.Crim.App.1999), vacated on other grounds, *Perkins v. Alabama,* 536 U.S. 953, 122 S.Ct. 2653, 153 L.Ed.2d 830 (2002). For the above reasons, we find no plain error."

11 So.3d at 921. See also, *Vanpelt,* 74 So.3d at 93.

***153** Accordingly, for the reasons set forth above, we find no plain error with regard to the court's instruction.

XIX.

[94] Reynolds argues that the circuit court and the prosecutor improperly diminished the jurors' "sense of responsibility for their sentencing determination" by stating that the jury's verdict in the penalty phase was an advisory verdict. (Reynolds's brief, Issue XVII, at 104.) Reynolds did not object to these allegedly improper comments at trial. Thus, we review his argument for plain error only. Rule 45A, Ala.R.App.P.

> " 'We have repeatedly stated that a trial court does not diminish the jury's role by stating that its verdict in the penalty phase is a recommendation or an advisory verdict. *Taylor v. State,* 666 So.2d 36 (Ala.Cr.App.1994), on remand, 666 So.2d 71 (Ala.Cr.App.1994), aff'd, 666 So.2d 73 (Ala.1995), cert. denied, 516 U.S. 1120, 116 S.Ct. 928, 133 L.Ed.2d 856 (1996); *Burton v. State,* 651 So.2d 641 (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); *White v. State,* 587 So.2d 1218 (Ala.Cr.App.1990), aff'd, 587 So.2d 1236 (Ala.1991), cert. denied, 502 U.S. 1076, 112 S.Ct. 979, 117 L.Ed.2d 142 (1992).'

"*Smith v. State,* 795 So.2d 788, 837 (Ala.Crim.App.2000)."

Doster v. State, 72 So.3d 50, 104 (Ala.Crim.App.2010). Reynolds is due no relief on this claim.

XX.

[95] Reynolds argues that because of the evidence of his drug use on the day of the murders, the circuit court erroneously refused, without any explanation, to consider and find the following statutory mitigating circumstances: that "[t]he capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance" and that "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired." See § 13A–5–51(2) and (6), Ala.Code 1975, respectively. (Reynolds's brief, Issue XVI(B), at 102–04).

The circuit court's sentencing order provided, in relevant part:

"The Court in determining, considering and weighing mitigating circumstances in this case reviewed all statutory mitigating circumstances and also considered all of the mitigating factors charged to the jury in the penalty phase of the trial, and the additional mitigating circumstances offered by the Defendant on October 22, 2007 and December 6, 2007, and those offered at trial. The Court also considered the contents of the 'Defendant's Motion for Court to Consider Attached Exhibits As Additional Mitigation Evidence at the Sentencing Docket on December 6, 2007' and all exhibits attached thereto as substantive submissions in support of the mitigating circumstances presented by the Defendant.

"The Court finds no evidence that the Defendant was acting under the influence of extreme mental or emotional disturbance or that he lacked the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law."

(Vol. II, C. 324, 331, 338, 345, 352.)[30]

Pursuant to § 13A–5–47(d), the circuit court considered all the mitigating evidence ***154** presented, but the Court did not find the existence of the statutory mitigating circumstances set forth in § 13A–5–51(2) and (6), Ala.Code 1975. Section 13A–5–47(d), Ala.Code, does not require the court to enter an "explanation" as to why it did not find the existence of a particular statutory mitigating circumstance.

Furthermore, as we wrote in *Beckworth v. State,* 946 So.2d 490 (Ala.Crim.App.2005), cert. denied, 549 U.S. 1120, 127 S.Ct. 936, 166 L.Ed.2d 717 (2007):

"In *Simmons [v. State,* 797 So.2d 1134 (Ala.Crim.App.2000)], we addressed whether the trial court had erred when it found that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was not substantially impaired and that the § 13A–5–51(6) mitigating circumstance did not exist. We stated:

" 'Conflicting evidence was presented on Simmons's mental health and his ability to appreciate the criminality of his conduct. Consequently, the determination of the existence of this mitigating factor was within the discretion of the trial court. Based on the record before us, we cannot conclude that the trial court erred in not finding the existence of this mitigating circumstance.'

"797 So.2d at 1183.

"We further noted in *Simmons* the well-established principle that a trial court is required to consider all evidence offered in mitigation, but that whether the evidence is found to be mitigating is within the trial judge's discretion. 797 So.2d at 1181–82. See also *Waldrop v. State,* 859 So.2d 1138, 1149 (Ala.Crim.App.2000), aff'd, 859 So.2d 1181 (Ala.2002)."

946 So.2d at 529.

We find no abuse of discretion in the circuit court's finding that neither of the mitigating circumstances set forth in § 13A–5–51(2) and (6), Ala.Code 1975, existed.

XXI.

[96] Reynolds argues that the circuit court improperly weighed the aggravating circumstances and the mitigating circumstances; therefore, he contends, his sentence of death should be reversed. (Reynolds's brief, Issue XVI(A) at 102.) In support of his assertion, he cites the portion of

the circuit court's sentencing order in which the court wrote: "It is the opinion of this Court that the mitigating circumstances heretofore enumerated are insufficient to outweigh the aggravating circumstances." (Vol. II, C. 325, 333, 340, 347, 354.)

Section 13A–5–47(e), Ala.Code 1975, provides, in relevant part:

> "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...."

In *Melson v. State,* 775 So.2d 857 (Ala.Crim.App.1999), aff'd, 775 So.2d 904 (Ala.2000), cert. denied, 532 U.S. 907, 121 S.Ct. 1233, 149 L.Ed.2d 141 (2001), this Court addressed and rejected a claim that the circuit court committed reversible error when it used similar language in its sentencing order. We wrote:

> "Melson argues that the trial court's statement 'improperly created and applied a presumption of death' to his case. ***155** (Melson's brief, p. 10.) Initially we note that Melson is presenting this claim for the first time on appeal; thus, our review is for plain error. Rule 45A, Ala. R.App. P.
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> "Melson's claim has been addressed and rejected by this court in *Weaver v. State,* 678 So.2d 260 (Ala.Cr.App.1995), rev'd on other grounds, 678 So.2d 284 (Ala.1996); *Taylor v. State,* 666 So.2d 36 (Ala.Cr.App.1994), aff'd, 666 So.2d 73 (Ala.1995), cert. denied, 516 U.S. 1120, 116 S.Ct. 928, 133 L.Ed.2d 856 (1996); and *Fortenberry v. State,* 545 So.2d 129 (Ala.Cr.App.1988), aff'd, 545 So.2d 145 (Ala.1989), cert. denied, 495 U.S. 911, 110 S.Ct. 1937, 109 L.Ed.2d 300 (1990). As we stated in *Weaver*:
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> " 'The appellant contends that a statement made in the trial court's sentencing order was error. In the order, the trial court stated, "It is the opinion of the Court that the mitigating circumstances heretofore enumerated are insufficient to outweigh the aggravating circumstances." (R. 121.) While this portion of the trial court's order is technically defective, this court in *Fortenberry v. State,* 545 So.2d 129 (Ala.Crim.App.1988), aff'd, 545 So.2d 145 (1989), cert. denied, 495 U.S. 911, 110 S.Ct. 1937, 109 L.Ed.2d 300 (1990), held that this error was "not so egregious or substantial as to require a new sentencing order." " 'As long as the trial judge properly exercises his discretion and the facts indicating the death penalty are "so clear and convincing that virtually no reasonable person could differ," a harmless error analysis can be used.' *Baldwin v. State,* 456 So.2d 117, 126 (Ala.Cr.App.1983), affirmed, *Ex parte Baldwin,* 456 So.2d 129, 140 (Ala.1984), cert. denied, 469 U.S. 1085, 105 S.Ct. 589, 83 L.Ed.2d 699 (1984), aff'd, 472 U.S. 372, 105 S.Ct. 2727, 86 L.Ed.2d 300 (1985)." *Fortenberry.*
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> " 'Here, the trial court considered two aggravating circumstances and found that they were sufficient to support the sentence of death. It is clear that the trial court did not fail to consider any statutory or nonstatutory mitigating circumstances and properly engaged in a weighing and balancing process of the aggravating and mitigating circumstances in this case. We find that the facts indicating the death penalty in this case are clear and convincing and that no reasonable person would differ in their opinion. The error in the trial court's sentencing order was correct without injury. *Fortenberry, Taylor v. State,* 666 So.2d 36[, 70–71] (Ala.Crim.App.1994).'
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> "678 So.2d at 283.
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> "In this case, the trial court considered only one aggravating circumstance, that the murder was committed during the course of a robbery, and found that this aggravating circumstance was sufficient to support a death sentence. It is clear in this case, as in *Weaver,* supra, that the trial court 'did not fail to consider any statutory or nonstatutory mitigating circumstances and properly engaged in a weighing and balancing process of the aggravating and mitigating circumstances in this case.' *Id.* at 283. We have no difficulty concluding that 'the facts indicating the death penalty in this case are clear and convincing and that no reasonable person would differ in their opinion.' *Id.* Thus, the 'technical' error in the trial court's sentencing order was error without injury.
>
> "We point out that during the penalty phase of the trial before the jury, the trial court correctly instructed the jury ***156** on the proper method of weighing the aggravating and mitigating circumstances. Throughout its instructions, the trial court repeatedly informed the jury that the aggravating circumstance must outweigh the mitigating circumstances in order for the jury to recommend the death penalty. (R. 2134, 2140, 2141.) 'Trial judges are presumed to follow their 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) (citing *Ex parte Harrell,* 470 So.2d 1309, 1318 (Ala.1985)).' *Stewart v. State,* 730

> So.2d 1203, 1212 (Ala.Cr.App.1997), aff'd, 730 So.2d 1246 (Ala.1999). We find that the trial court properly considered and weighed the aggravating and mitigating circumstances in sentencing Melson to death."

775 So.2d at 901–02.

We have carefully reviewed the sentencing proceedings, and, based upon the rationale in *Melson,* we reject Reynolds's claim that the circuit court improperly weighed the aggravating and mitigating circumstances in determining that the appropriate sentence was death.

XXII.

[97] Reynolds also argues that his "death sentence must be vacated in light of *Ring v. Arizona* [536 U.S. 584 (2002).]" (Reynolds's brief, Issue XXI, at 110–12.) In *Ring,* the United States Supreme Court held that its earlier decision in *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), applied to death-penalty cases; thus, any fact that could increase the maximum penalty to death must be presented to a jury and must be found by the jury to exist beyond a reasonable doubt.

First, Reynolds maintains that his death sentence cannot be imposed because the jury did not make the specific finding that it unanimously found the existence of the aggravating circumstances beyond a reasonable doubt, nor did the jury make finding that the aggravating circumstances outweighed the mitigating circumstances. Second, in a related vein, Reynolds contends that because Alabama law does not require juries to make findings regarding the existence of aggravating and mitigating circumstances, there is no way to verify whether the jury actually unanimously found the existence of an aggravating circumstance beyond a reasonable doubt. Third, Reynolds alleges that his death sentence cannot be imposed because the jury was informed that its sentence was a recommendation. (Reynolds's brief, Issue XXI, at 110–12.)

Initially, we note that two of the three aggravating circumstances—i.e., that the murders were committed during a first-degree robbery, and that two or more people were killed pursuant to a common scheme or plan—were found to exist beyond a reasonable doubt based on the jury's unanimous verdicts in the guilt phase finding Reynolds guilty of five counts of capital murder. The third aggravating circumstance—that the murders were especially heinous, atrocious, or cruel when compared to other capital offenses—was stipulated to by the parties. Moreover, Reynolds did not object to the imposition of his sentence on these grounds. Accordingly, we review his allegations for plain error only. These same arguments have been addressed and decided adversely to Reynolds. See *Doster v. State,* 72 So.3d 50 (Ala.Crim.App.2010); *Sharifi v. State,* 993 So.2d 907, 940–41 (Ala.Crim.App.2008), cert. denied, 555 U.S. 1010, 129 S.Ct. 491, 172 L.Ed.2d 386 (2008); *Lewis v. State,* 24 So.3d 480, 533–36 (Ala.Crim.App.2006), aff'd, 24 So.3d 540 (Ala.2009), ***157** cert. denied, 558 U.S. 1078, 130 S.Ct. 796, 175 L.Ed.2d 562 (2009). Because the existence of the aggravating circumstances was found either by the jury's guilt-phase verdicts or by stipulation of the parties, Reynolds is due no relief on these claims.[31]

XXIII.

Reynolds argues that the circuit court "erred in double-counting aggravating circumstances in the penalty phase" of the trial. (Reynolds's brief, Issue XXII, at 112–13.) Specifically, he argues:

> "[T]he use of these charges both as aggravation in the first phase *and* as aggravators in the penalty phase failed to narrow the class of cases eligible for the death penalty, resulting in the arbitrary imposition of the death penalty ... and subjected [him] to two punishments as a result of being convicted of a single criminal charge."

(Reynolds's brief, Issue XXII, at 112–13.)

Reynolds did not object the proceeding on this basis at trial, and we find no plain error. Rule 45A, Ala.R.App.P. These same assertions have been previously considered and rejected by this Court. See *Morris v. State,* 60 So.3d 326 (Ala.Crim.App.2010).

XXIV.

[98] In a one-paragraph argument, Reynolds maintains that "evolving standards of decency have rendered lethal injection unconstitutional" as cruel and unusual punishment. (Reynolds's Brief, Issue XXIII, at 113–14.)

In *Vanpelt v. State,* 74 So.3d at 89, we wrote:

> "Vanpelt next argues that evolving standards of decency have rendered Alabama's method of execution—lethal injection—unconstitutional. (Vanpelt's Brief at 119.)
>
> "This court notes that Vanpelt's entire argument consists of one paragraph and completely fails to offer any argument regarding current standards of decency. In fact, the only sentence contained in Vanpelt's argument that appears to relate to lethal injection is his conclusory allegation that '[e]volving standards of decency have rendered lethal injection unconstitutional.' (Vanpelt's Brief at 119.) Additionally, this court, in *Saunders v. State,* [10 So.3d 53 (Ala.Crim.App.2007)] held that 'lethal injection does not constitute per se cruel and unusual punishment. See e.g., *McNabb v. State,* 991 So.2d 313 (Ala.Crim.App.2007), and cases cited therein.' 10 So.3d 53, 111 (Ala.Crim.App.2007); see also *Baze v. Rees,* 553 U.S. 35, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008) (holding that lethal injection does not violate the Eighth Amendment); *Ex parte Belisle,* 11 So.3d 323, 339 (Ala.2008) (holding that lethal injection is not unconstitutional).
>
> "Because Vanpelt has failed to offer this court any basis upon which to hold that lethal injection is unconstitutional ***158** and because Vanpelt's claim has been rejected by the United States Supreme Court, the Alabama Supreme Court, and this court, he is not entitled to any relief."

For the reasons set forth above, Reynolds is due no relief on this allegation.

XXV.

Reynolds contends that the cumulative effect of the errors affected his substantial rights and warrants a new trial. (Reynolds's brief, Issue XIII, at 97–98; Issue XXIV, at 114.)

> " 'The Alabama Supreme Court has set forth the cumulative-error rule as follows: "[W]hile, under the facts of a particular case, no single error among multiple errors may be sufficiently prejudicial to require reversal under Rule 45, if the accumulated errors have 'probably injuriously affected substantial rights of the parties,' then the cumulative effect of the errors may require reversal." *Ex parte Woods,* 789 So.2d 941, 942–43 n. 1 (Ala.2001) (quoting Rule 45, Ala.R.App.P.). Applying this standard to Lewis's allegation of cumulative error, we have scrupulously reviewed the record and find no evidence that the cumulative effect of any of the individually nonreversible errors in this case affected Lewis's substantial rights at trial.'
>
> "*Lewis v. State,* [24 So.3d 480, 538 (Ala.Crim.App.2006)]."

Sharifi v. State, 993 So.2d 907, 946–47 (Ala.Crim.App.2008). We find that the cumulative effect of the individually nonreversible errors did not affect Reynolds's substantial rights.

XXVI.

As required by § 13A–5–53, Ala.Code 1975, we will now address the propriety of Reynolds's death sentence.

Reynolds was convicted of five counts of capital murder: (1) the murder of two or more persons by one act or pursuant to one scheme or course of conduct, see § 13A–5–40(a)(10), Ala.Code 1975; (2) the murder of Charles Martin III, during the course of a first-degree robbery, see § 13A–5–40(a)(2), Ala.Code 1975; (3) the murder of Melinda Martin during the course of a first-degree robbery, see § 13A–5–40(a)(2), Ala.Code 1975; (4) the murder of Savannah Martin, who was less than 14 years old when she was murdered, see § 13A–5–40(a)(15), Ala.Code 1975; and (5) the murder of Savannah Martin during the course of a first-degree robbery, see § 13A–5–40(a)(2), Ala.Code 1975. The jury, by a vote of 12–0, recommended that Reynolds be sentenced to death.

Pursuant to § 13A–5–53(a), Ala.Code 1975, we have reviewed the sentencing proceedings, and we find no error adversely affecting Reynolds's substantial rights occurred during the sentencing proceedings. In its sentencing order, the circuit court found the existence of three aggravating circumstances: (1) that the capital offense was committed while Reynolds was engaged in a robbery in the first degree, see § 13A–5–49(4), Ala.Code 1975; (2) that the capital offense was especially heinous, atrocious, or cruel when compared to other capital offense, see § 13A–5–49(8), Ala.Code 1975;[32] and (3) that Reynolds intentionally ***159** caused the death of two or more persons by one act or pursuant to one scheme or course of conduct, see § 13A–5–49(9), Ala.Code 1975. The circuit court found the existence of one statutory

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mitigating circumstance: that Reynolds had no significant history of prior criminal activity, see § 13A–5–51(1), Ala.Code 1975.

We note that § 13A–5–47(d), Ala.Code 1975, provides, in pertinent part, that "the trial court shall enter specific written findings concerning the existence or nonexistence of each aggravating circumstance enumerated in Section 13A–5–49, each mitigating circumstance enumerated in Section 13A–5–51, and any additional mitigating circumstances offered pursuant to Section 13A–5–52."

We have carefully reviewed the circuit court's sentencing order. The court's order does not contain specific written findings concerning the existence or nonexistence of *each* aggravating circumstance and *each* mitigating circumstance. Instead, the court's order sets out only the three aggravating circumstances it found to apply to Reynolds's case: the two aggravating circumstances established by the jury's guilt-phase verdicts and the aggravating circumstance stipulated to by the parties. Further, although the circuit court made specific findings regarding the nonexistence of the statutory mitigating circumstances set forth in § 13A–5–51(2), (3), (5), and (6), Ala.Code 1975, the circuit court neglected to address the existence or nonexistence of the statutory mitigating factors set forth in § 13A–5–51(4) and (7),[33] Ala.Code 1975.

Although the circuit court's findings with regard to the aggravating circumstances and the mitigating circumstances are technically deficient, remand is not necessary in this case. Indeed, in several cases where the circuit court's sentencing order made specific written findings only as to the aggravating circumstances it found to exist, we held that the court's failure to make specific findings as to the aggravating circumstances enumerated in § 13A–5–49, Ala.Code 1975, it did not find to exist constituted harmless error. See, e.g., *Pilley v. State,* 930 So.2d 550, 568 (Ala.Crim.App.2005); *Gavin v. State,* 891 So.2d 907, 995 (Ala.Crim.App.2003), cert. denied, 891 So.2d 998 (Ala.2004); *Stewart v. State,* 730 So.2d 1203, 1219 (Ala.Crim.App.1996), aff'd, 730 So.2d 1246 (Ala.1999); *Fortenberry v. State,* 545 So.2d 129 (Ala.Crim.App.1988), aff'd, 545 So.2d 145 (Ala.1989), cert. denied, 495 U.S. 911, 110 S.Ct. 1937, 109 L.Ed.2d 300 (1990).

Nothing in the record indicates that the circuit court refused or failed to consider any aggravating circumstances. Indeed, as noted above, the aggravating circumstances found to apply in this case were the two aggravating circumstances established by the jury's verdicts in the guilt phase of Reynolds's trial and the heinous, atrocious, or cruel aggravating circumstance to which the parties stipulated. Because the circuit court's findings regarding the aggravating circumstances it found to exist in this case are sufficient for this ***160** Court to carry out its appellate review, a remand for the entry of a new sentencing order is unnecessary. See *Slaton v. State,* 680 So.2d 879, 907 (Ala.Crim.App.1995), aff'd, 680 So.2d 909 (Ala.1996), cert. denied, 519 U.S. 1079, 117 S.Ct. 742, 136 L.Ed.2d 680 (1997).

Likewise, a remand is not warranted based on the technical deficiency with regard to the trial court's lack of specific findings as to the existence or nonexistence of two statutory mitigating circumstances. As we stated in *Beckworth v. State,* 946 So.2d 490 (Ala.Crim.App.2005), cert. denied, 549 U.S. 1120, 127 S.Ct. 936, 166 L.Ed.2d 717 (2007):

> "In a recent case presenting similar circumstances, we held that, although technically deficient, the sentencing order did not require a remand. *Pilley v. State,* 930 So.2d 550 (Ala.Crim.App.2005). The trial court in *Pilley* failed to mention two statutory mitigating circumstances. Although this Court determined that a remand was not possible because the circuit judge who tried the case was no longer on the bench, we further stated:
>
> > " 'Given these unique circumstances, we do not find it to be in the interests of judicial economy to remand this case for a new sentencing order, in light of the fact that the trial judge found the existence of no mitigating circumstances at Pilley's first trial and because Pilley presented no evidence in support of any of the statutory mitigating circumstances enumerated in § 13A–5–51, Ala.Code 1975. Moreover, given that no evidence in the record supports the existence of the two mitigating circumstances the circuit court failed to address, we find the court's omission of these two mitigating circumstances to be harmless.'
>
> "930 So.2d at 569.
>
> "In this case, although the trial judge has not retired from the bench, we find the trial court's technical defect in failing to mention the § 13A–5–51(1) mitigating circumstance constitutes harmless error and does not rise to the level of plain error requiring a remand. Plain error is error that 'has or probably has adversely affected the substantial right of the appellant.' Rule 45A, Ala.R.App. P. Because the trial court considered all of the proffered mitigation, because it found as an aggravating circumstance that Beckworth was under a sentence of imprisonment

> when he committed this crime, and because there was no support in the record for this mitigating circumstance, it cannot reasonably be argued that the trial court's failure to state that it did not find this mitigating circumstance to exist has or probably has adversely affected his substantial rights. While we do not wish to be understood as condoning a trial court's failure to comply strictly with the requirements of § 13A–5–47, Ala.Code 1975, we hold here that the failure to do so does not rise to the level of plain error."

946 So.2d at 534.

[99] Here, the circuit court stated that it had considered all the mitigating evidence presented at the various stages of the proceedings. Furthermore, Reynolds did not assert the existence of the two mitigating circumstances, and the evidence in the record does not support a finding of the existence of either of the two omitted mitigating circumstances. Accordingly, the circuit court's omission of these two mitigating circumstances from its order does not rise to the level of plain error. Rule 45A, Ala.R.App.P.

The circuit court found the following regarding the existence of nonstatutory mitigating circumstances:

> ***161** "[T]he Court finds and considers as mitigating circumstances in the Defendant's behalf evidence presented of the Defendant's environment, education, life, background, family, and school history; the love of the Defendant's family for the Defendant, the love of the Defendant's friends for the Defendant and the Defendant's love for his family and friends. The Court also finds and considers as a mitigating circumstances that the Defendant experienced neglect and abuse as a child and had a history of drug abuse and addiction. The Court has considered as a mitigating circumstances the poverty experienced by the Defendant as a child; the fact that his father was at times a brutal abusive alcoholic; the fact that the Defendant's mother was not 'maternal,' apparently did not bond with or nurture her children, and had health problems; the fact that the Defendant was reared in a filthy home with hygiene and health issues; the fact that the Defendant was homeless for a significant period of time during his childhood and has essentially been 'on his own' since about age thirteen (13); the fact that the Defendant was physically abused by his father as a small child and had little, if any, structure in his home; the fact that the Defendant dropped out of school when he was in the 7th grade and has received little, if any, formal education since that time; the fact that the Defendant apparently witnessed his father physically abusing his mother and possibly other family members when he was a child; as well as the fact that the Defendant allegedly began abusing drugs and alcohol at age thirteen (13) and later developed a serious drug dependency to crystal methamphetamine and cocaine and that these addictions led to the loss of custody of his child, the loss of jobs and inevitable emotional issues that result from drug addictions and the consequences of drug addictions. The Court has also seriously considered, as mitigating factors, the fact that the Defendant does have a child and family members who love him, that he has been described as 'the glue' that holds his disjoined family together and that the imposition of the death penalty in this case would have a devastating effect on many members of this family. The Court has also considered the fact that the Defendant was a good father and stepfather at points in his life."

(Vol. II, R. 324–25.)

Pursuant to § 13A–5–53(a), this Court has reviewed the record, and we determine that the circuit court's findings regarding the aggravating and mitigating circumstances are supported by the evidence.

Because we find no error adversely affecting Reynolds's rights was made in the sentence proceedings and that the

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circuit court's findings concerning the aggravating circumstances and the mitigating circumstances are supported by the evidence, we shall now proceed to review the propriety of the decision that death was the proper sentence.

[100] In determining whether death is the appropriate sentence, this Court will specifically address each of the factors enumerated in § 13A–5–53(b), Ala.Code 1975:

The record reflects that Reynolds's sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor. See § 13A–5–53(b)(1), Ala.Code 1975.

After an independent weighing of the aggravating and mitigating circumstances, we agree that death is the proper sentence. See § 13A–5–53(b)(2), Ala.Code 1975.

***162** Section 13A–5–53(b)(3), Ala.Code 1975, requires this Court to determine whether Reynolds's death sentence is disproportionate or excessive when compared to the penalties imposed in similar cases. Reynolds was convicted of three counts of murder during the course of a robbery, one count of the murdering two or more persons by one act or pursuant to one scheme or course of conduct, and the murder of a person who was less than 14 years of age. See §§ 13A–5–40(a)(2), (10), and (15), Ala.Code 1975.

Considering the crime committed and Reynolds, we find that the sentence of death is neither excessive nor disproportionate to the penalty imposed in similar cases. " ' "In fact, two-thirds of the death sentences imposed in Alabama involve cases of robbery/murder." ' " *Stallworth v. State,* 868 So.2d 1128, 1188 (Ala.Crim.App.2001); *Fortenberry v. State,* 545 So.2d at 145 (murder of two or more persons); *Minor v. State,* 914 So.2d 372, 446 (Ala.Crim.App.2004), cert. denied, 548 U.S. 925, 126 S.Ct. 2977, 165 L.Ed.2d 987 (2006)(murder of a child less than 14 years of age).

Finally, as required by Rule 45A, Ala.R.App., we have thoroughly examined the record for any error that may have adversely affected Reynolds's substantial rights with respect to Reynolds's capital-murder convictions and his sentence of death, whether or not brought to our attention or to the attention of the circuit court. We find no plain error or defect in the proceedings.

Based upon the foregoing, Reynolds's capital-murder convictions and his sentence of death are affirmed.

AFFIRMED.

WISE, P.J., and WELCH, WINDOM, and MAIN, JJ., concur.

All Citations

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Footnotes

1 Reynolds was sentenced on December 6, 2007. Appellate counsel filed a timely motion for a new trial on December 21, 2007. On February 11, 2008, appellate counsel filed an amendment to the motion for a new trial. On February 15, 2008, the circuit court conducted a hearing on the motion for a new trial and subsequently denied the motion by written order on February 19, 2008. However, the record contains no indication that the motion was continued in conformity with Rule 24.4, Ala. R.Crim. P.; thus, the motion for new trial was deemed denied by operation of law on February 4, 2008 (60 days from the date Reynolds was sentenced). Therefore, all proceedings in the circuit court relating to the motion for a new trial subsequent to February 4, 2008, are moot.

2 The facts surrounding the interrogation of those suspects and the resulting statements given by the suspects is addressed in Part VII of this opinion.

3 The record indicates that Reynolds had been convicted of a number of felony offenses that he had committed before the crimes in this case; however, because Reynolds was not convicted for those crimes until after the offenses in the present case had been committed, the State agreed not to dispute the presence of the statutory mitigating factor that Reynolds had no significant history of prior criminal activity.

4 In an effort to protect the anonymity of the challenged jurors, we have used their initials.

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5 The circuit court entered a written sentencing order for each conviction; however, only one death sentence was imposed.

6 The record indicates that each of the veniremembers completed a juror questionnaire that was used in the voir dire of the prospective jurors. (Vol. V, R. 399.) As in *Walker,* supra, those questionnaires were not included in the appellate record. However, when this Court requested the questionnaires, pursuant to Rule 18.2(b), Ala. R.Crim. P., we were informed by the Etowah circuit clerk that the questionnaires had not been retained. Accordingly, the questionnaires are not available for this Court's consideration in evaluating this issue. Cf. *Ex parte Sharp,* [Ms. 1080959, December 4, 2009] —— So.3d —— (Ala.2009) (The Alabama Supreme Court requested and received questionnaires that were not in the record, and after reviewing questionnaires and record, found that the record raised an inference of discrimination and reversed the judgment of this Court and remanded the case to this Court for it to order further proceedings consistent with its opinion).

7 The parties agreed to depose Dr. Craig and to use that deposition testimony in lieu of his live testimony because Dr. Craig was no longer employed by the State of Alabama and no longer resided in Alabama. (Vol. 1, C. 104–05.)

8 Before trial, the prosecutor offered to assist in securing Fincher's presence at trial; however, the defense indicated that Fincher was not a critical witness to its case. (Vol. V, R. 442–43.)

9 John Langley's testimony corroborated Chad Martin's testimony with regard to what transpired while Chad Martin was at his residence.

10 The statement, which was referred to as both State's Exhibit 63 and Defense's Exhibit 2, was not introduced into evidence by either party. (Vol. IX, R. 1152–56.)

11 The police determined that Chad Martin knew details of the crime because of what he had overheard while at the scene of the crimes. (Vol. XI, R. 1519–1521.)

12 Although the circuit court ruled that the May 29 police report (Defendant's Exhibit 10) could not be used as extrinsic evidence to impeach Chad Martin's trial testimony, the circuit court made the report part of the record on appeal. (Vol. XI, R. 1499–1502; Second Supplemental Record on Appeal, Vol. 3, C. 407–10.)

13 The applicable law regarding prosecutorial misconduct is addressed in more detail in Part XV of this opinion.

14 The DNA profile from the bloodstain on a towel found in the car matched a DNA profile from an Alabama prisoner in the Department of Forensic Sciences' DNA data base. (Vol. X, R. 1439–41.) The towel apparently had no relation to this case.

15 As best we can determine, Reynolds did not object to the general admissibility of the DNA evidence; nevertheless, the circuit court conducted a hearing outside the presence of the jury to determine the admissibility of the DNA evidence. (Vol. X, R. 1387–1401.) See § 36–18–30, Ala.Code 1975.

16 During the State's questioning of Mauterer, the State incorrectly referred to State's Exhibit 27 as State's Exhibit 29. There does not appear to be any question that the both the State and Mauterer were referring to State's Exhibit 27 in this exchange. (Vol. X, R. 1410.)

17 Mauterer testified that he received fingernail scrapings (State's Exhibit 12) and oral swabs (State's Exhibit 5) obtained from Chad Martin, oral swabs obtained from John Langley (State's Exhibit 7), Marcie West (State's Exhibit 21), and Donald Harvey (State's Exhibit 17.) Mauterer also received oral swabs (State's Exhibit 189), and head hairs obtained from Reynolds (State's Exhibit 190). (Vol. X, R. 1408–11.)

18 Brooks's insufficient "chain of predicate" objection was determined to be sufficient to preserve his challenge to the chain of custody. 33 So.3d at 1271 n. 2.

19 At the close of the State's case, Reynolds moved for a judgment of acquittal on the ground that the State failed to prove a prima facie case because, he alleged, the State's evidence did not establish the offense of intentional murder. (Vol. XI, R. 1470, 1473.)

20 Adrian West was charged with hindering the prosecution. (Vol. VIII, R. 1010–11.)

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21 Reynolds's counsel initially told the court that two attorneys who were in the audience told him that they had witnessed the occurrence; however, the remainder of the discussion focused on only one of the attorneys. There was no further mention of the other attorney or any other audience member who might have witnessed the occurrence.

22 The person referred to as "PJ" was subsequently referred to as Mr. Pruitt, who was introduced as the court's investigator at the beginning of the trial. (Vol. 5, R. 443.)

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

24 Second Supplemental Record, Vol. 3, C. 414.

25 For the sake of clarity, this Court has grouped all the guilt-phase issues together and all the penalty-phase issues together; however, because of the manner in which Reynolds intertwined the two phases in this argument, this portion of the opinion does include some discussion of penalty-phase matters.

26 In support of his contention, Reynolds cites portions of the prosecutor's argument from pages 830, 831, 838, and 1219–20 of the record on appeal; however, our review of the record indicates that the last purportedly improper quote was found on pages 1619–20, *not* on pages 1219–20 as set out in Reynolds's brief.

27 Reynolds cites the following pages from the record on appeal: 915, 951, 1078, 1493–94, 1256, 1260, 1262, 1266, 1270, 1273, 1275, 1281–84, 1289, 1304, 1352, 1354, 1357–58, 1367, 1384–85, 1394, 1412.

28 Reynolds cites the following pages from the record: 483, 556, 557–58, 575–76, 585, 648, 665, 673, 732, 829.

29 Reynolds also alleges that the circuit court committed several errors in its penalty-phase instructions. These allegations are addressed in the portion of this opinion addressing the penalty-phase issues.

30 As previously noted, the circuit court prepared written sentencing orders for each of the five convictions. Reynolds received only one sentence of death for the five convictions.

31 Reynolds also challenges the constitutionality of the Alabama Supreme Court's decision in *Ex parte Waldrop,* 859 So.2d 1181 (Ala.2002). He claims that the decision "impermissibly eased the State's burden of proving that the death penalty is appropriate by ensuring that the jury was unaware that its guilt-innocence phase finding authorized the trial judge to impose the death penalty without additional process," and that the *Waldrop* decision "undermines the reliability of the capital sentencing process and unfairly skews sentencing toward the imposition of the death penalty." (Reynolds's brief, at 111–12.) "However, this Court is bound by the decisions of the Alabama Supreme Court and has no authority to reverse or modify those decisions. *See* § 12–3–16, Ala.Code 1975." *Doster,* supra, 72 So.3d at 101 n. 13.

32 Although the parties stipulated to the existence of the heinous, atrocious, or cruel aggravating circumstance, the circuit court nevertheless made specific findings of fact explaining why this aggravating circumstance was applicable, as required by *Ex parte Kyzer,* 399 So.2d 330, 334 (Ala.1981). This Court has approved the application of this aggravating circumstance when the testimony established that the victims were stabbed multiple times and that they had suffered before their deaths. See *Price v. State,* 725 So.2d at 1062; *Barbour v. State,* 673 So.2d 461, 471 (Ala.Crim.App.1994), aff'd, 673 So.2d 473 (Ala.1995), cert. denied, 518 U.S. 1020, 116 S.Ct. 2556, 135 L.Ed.2d 1074 (1996); *Hallford v. State,* 548 So.2d 526, 546 (Ala.Crim.App. 1988), aff'd, 548 So.2d 547 (Ala.1989), cert. denied, 493 U.S. 945, 110 S.Ct. 354, 107 L.Ed.2d 342 (1989).

33 13A–5–51(4) provides: "The defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor." Section 13A–5–51(7) provides: "The age of the defendant at the time of the crime."

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Proposed Legislation

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part VI. Particular Proceedings
Chapter 153. Habeas Corpus (Refs & Annos)

28 U.S.C.A. § 2254

§ 2254. State custody; remedies in Federal courts [Statutory Text & Notes of Decisions subdivisions I to XIV]

Currentness

<Notes of Decisions for 28 USCA § 2254 are displayed in multiple documents.>

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(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--

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(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.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

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(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 967; Pub.L. 89-711, § 2, Nov. 2, 1966, 80 Stat. 1105; Pub.L. 104-132, Title I, § 104, Apr. 24, 1996, 110 Stat. 1218.)

Notes of Decisions (8794)

28 U.S.C.A. § 2254, 28 USCA § 2254
Current through P.L. 119-1. Some statute sections may be more current, see credits for details.

End of Document

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Code of Alabama
Alabama Rules of Court
Alabama Rules of Criminal Procedure
Rule 32. Post-Conviction Remedies (Refs & Annos)

ARCrP Rule 32.9

Rule 32.9. Evidentiary Hearing

Currentness

(a) Hearing. 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. When facilities are available, the court may in its discretion order that any evidentiary hearing be held at the place of petitioner's confinement, giving at least seven (7) days' notice to the officer in charge of the confinement facility. A verbatim record of the hearing shall be made.

(b) Testimony of Petitioner. The petitioner may be called to testify at the hearing by the court or by either party.

(c) Decision. If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the conviction, sentence, or detention; to any further proceedings, including a new trial; and to any other matters that may be necessary and proper.

(d) Findings of Fact. The court shall make specific findings of fact relating to each material issue of fact presented.

Alabama Rules of Crim. Proc., Rule 32.9, AL R RCRP Rule 32.9
Current with amendments received through January 1, 2025.

End of Document

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CC03-381.01

State of Alabama
Unified Judicial System
Form C-62A Rev. 7/2000

ATTORNEY'S FEE DECLARATION
(Adult)
[For Work Performed On or After 10/1/2000]

County Code: 28

Case Number: 381.01 CC-03-001.01-DAK
Jurisdiction Year Case Suffix

Mark Appropriate Court:
- ☒ Circuit Court of ETOWAH County
- ☐ District Court of _____ County
- ☐ Municipal Court of _____
- ☐ Alabama Court of Criminal Appeals
- ☐ Alabama Court of Civil Appeals
- ☐ Supreme Court of Alabama

Indicate If Original Charge is: / **Limits**
- Capital Case (or charge carrying sentence of life without parole) ☐ (No Limit) CC
- Class A Felony ☐ ($3,500) FA
- Class B Felony ☐ ($2,500) FB
- Class C Felony ☒ ($1,500) FC
- Other ☐ ($1,000) OT
- Appeal ☐ ($2,000) AP
- Petition for Writ of Certiorari ☐ ($2,000) WC
- Post-Conviction/Habeas Corpus ☐ ($1,000) PC

Attorney Name (Please type or print): JEFFREY P. MONTGOMERY

721347350-00
Social Security Number or FEIN

STYLE OF CASE: ☐ STATE OF ALABAMA
☐ MUNICIPALITY OF _____ v. ADRIAN MARCY WEST
Defendant

CHARGE: UDCS

Companion case numbers and charges or convictions: _____

The undersigned attorney declares that on (date) 08/20/02, the Honorable WILLIAM D. RUSSELL, Judge, appointed the undersigned to represent the above-named defendant or appellant, and on (date) 01/13/09 the case was heard by the Honorable DAVID A. KIMBERLY, Judge. The case was disposed of by DEFENDANT ENTERED A PLEA
(Plea of guilty, conviction, acquittal, affirmance, reversal, cert. denied)

(1) In-Court Appearance (Trial Level or Post-Conviction Proceeding)	Total Hours 5.75	x $ 60.00	per hour =	$405.00
(2) Out-of-Court Preparation (Trial Level or Post-Conviction Proceeding)	Total Hours 34.55	x $ 40.00	per hour =	$1,382.00
(3) Preparation (Appellate Level)	Total Hours _____	x $ 60.00	per hour =	
(4) Extraordinary Expenses (If approved in advance by court)				$42.31
(5) Overhead Expenses (If approved in advance by court)	Total Hours 39.70	x $ 30	Per hour =	$1,191.00
	TOTAL CLAIM OF ATTORNEY			$3,021.31

NOTICE TO ATTORNEY: Complete this form. Attach a copy of a complete itemization of (1) in-court appearances; (2) out-of-court preparation; (3) preparation for appeals; (4) extraordinary expenses; and/or (5) overhead expenses reflecting the date of actions and amount of time involved in each activity. Make a copy of same for the court's record and a copy for your records.

The undersigned attorney further declares that the above claim is true and correct and represents the services actually rendered by him/her as an attorney and the amount is due and payable. I further declare that the above claim is not a duplication of charges and expenses in any case (companion or otherwise).

Jeff P. Montgomery
Signature of Attorney

Attorney Code HONG42

Sworn to and subscribed before me this 13th day of January, 2009.

Notary Public

Mailing Address of Attorney
(please type or print) (including city, state, and zip code)
JEFFREY P. MONTGOMERY
P.O. BOX 1858
GADSDEN, AL 35901

Telephone Number 256-543-7570 Fax Number 256-543-7578

I, the undersigned judge, hereby certify that the foregoing claim has been presented to me, and I have reviewed the same and believe the same to be true and correct. I am further of the opinion that said attorney is not duplicating said charges and expenses in any case (companion or otherwise).

Based on the above, I hereby approve the declaration and claim in the amount of $ 3021.31

Done this 13th day of January, 2009.

Judge's Signature

FILED
OCT 13 2015
CIRCUIT COURT CLERK

NOTICE TO ATTORNEY AND JUDGE: Sections 15-12-21 through 15-12-23, *Code of Alabama* 1975, provide for the payment of attorney fees and extraordinary expenses incurred by counsel appointed to represent indigent defendants at the trial level, on appeal (including petition for writ of certiorari to the Alabama Supreme Court) and in post-conviction proceedings.

THIS FORM MUST CONTAIN ORIGINAL SIGNATURES OF THE ATTORNEY AND THE JUDGE. THIS FORM WITH ATTACHED ITEMIZATION MUST BE SUBMITTED TO THE TRIAL COURT JUDGE OR PRESIDING JUDGE OR CHIEF JUSTICE OF THE APPELLATE COURT FOR APPROVAL. AFTER APPROVAL, FILE WITH THE CLERK, WHO SHALL SUBMIT THE ORIGINAL DECLARATION TO THE STATE COMPTROLLER (EXCEPT IN MUNICIPAL CASES) FOR AUDIT.

FILED
Filed in the Clerk's Office at _____, Alabama, on JAN 13 2009
date

EXCEPT IN MUNICIPAL CASES, MAIL TO: State Comptroller, Indigent Defense Section, P. O. BOX 302602, Montgomery, Alabama 36130-2602

BILLY YATES
CLERK, CIRCUIT COURT

Original: Comptroller Yellow: Court File Pink: Attorney

FILED
OCT 13 2015
CASSANDRA "SAM" JOHNSON
CIRCUIT COURT CLERK

IN THE CIRCUIT COURT OF ETOWAH COUNTY, ALABAMA

STATE OF ALABAMA
vs.
ADRIAN MARCY WEST
CC-03-801.01-DAK
UDCS
JM-1269-02

IN COURT APPEARANCE:

09/20/02	APPEARANCE FOR PRELIMINARY HEARING	1.00
02/09/04	APPEARANCE AT DOCKET CALL	1.00
05/04/04	APPEARANCE AT STATUS HEARING FOR MICHAEL REYNOLDS	.25
08/09/04	APPEARANCE AT DOCKET CALL	1.00
09/13/04	APPEARANCE AT DOCKET CALL	1.00
10/12/04	APPEARANCE AT DOCKET CALL	1.00
07/27/07	APPEARANCE AT HEARING	1.50
01/13/09	(DEFENDANT ENTERED A PLEA)	

TOTAL IN COURT HOURS: 6.75 @ $60.00 = $405.00

FILED
OCT 13 2015
CASSANDRA "SAM" JOHNSON
CIRCUIT COURT CLERK

OUT OF COURT PREPARATION:

08/20/02	APPOINTED BY JUDGE RUSSELL	
08/20/02	ADMINISTRATIVE TIME TO OPEN FILE	.25
08/21/02	DRAFTED & FILED ENTRY OF APPEARANCE	.60
08/22/02	DRAFTED & FILED MOTION FOR EXTRAORDINARY EXPENSES (APPROVED ON 08/23/02)	.75
08/23/02	DRAFTED LETTER TO CLIENT	.40
08/26/02	DRAFTED & FILED MOTION FOR PRELIMINARY HEARING	.75
08/27/02	DRAFTED MOTION FOR DISCOVERY & PRODUCTION	.75
08/27/08	CONFERENCE WITH CLIENT	1.00
08/29/02	DRAFTED LETTER TO CLIENT	.40
08/29/02	DRAFTED & FILED BRADY MOTION	.75
09/03/02	DRAFTED & FILED MOTION TO REVEAL	.60
09/04/02	DRAFTED & FILED MOTION TO DISCLOSE	.60
09/05/02	DRAFTED & FILED MOTION TO PRODUCE	.60
09/05/02	TELEPHONE CALL TO CLIENT	.10
09/05/02	TELEPHONE CALL TO CLIENT	.10
09/06/02	DRAFTED & FILED MOTION IN LIMINE	.60
09/16/02	CONFERENCE WITH CLIENT	1.00
09/20/02	DRAFTED LETTER TO CLIENT	.40
09/24/02	DRAFTED LETTER TO CLIENT	.40

FILED
JAN 13 2009
BILLY YATES
CLERK, CIRCUIT COURT

FILED
OCT 13 2015
CASSANDRA "SAM" JOHNSON
CIRCUIT COURT CLERK

09/30/02	TELEPHONE CALL TO GREEN MOUNTAIN	.10
10/01/02	TELEPHONE CALL TO CLIENT	.20
10/02/02	TELEPHONE CALL TO CLIENT	.20
03/17/03	DRAFTED LETTER TO CLIENT	.40
03/26/03	TELEPHONE CALL TO CLERK	.10
03/26/03	TELEPHONE CALL TO RICHARD RHEA	.10
03/26/03	TELEPHONE CALL TO CITY OF ATTALLA	.10
03/26/03	TELEPHONE CALL TO JAIL	.10
03/26/03	DRAFTED MEMO TO FILE	.25
03/27/03	TELEPHONE CALL FROM CLIENT	.10
05/27/03	TELEPHONE CALL FROM CLIENT	.10
05/27/03	TELEPHONE CALL FROM CLIENT'S SISTER	.10
05/27/03	CONFERERNCE WITH CLIENT	1.50
05/27/03	CONFERENCE WITH CLIENT, D.A., ASSISTANT D.A., & INVESTIGATOR	2.50
05/28/03	TELEPHONE CALL TO ASSISTANT D.A.	.10
05/28/03	TELEPHONE CALL TO CLIENT	.10
05/28/03	CONFERENCE WITH CLIENT, D.A., & INVESTIGATOR	4.50
05/29/03	TRAVEL TO SEE CITY INVESTIGATOR	.10
05/29/03	TELEPHONE CALL FROM CLIENT	.10
05/29/03	CONFERENCE WITH D.A. & CLIENT FOR STATEMENT	1.50
05/29/03	TELEPHONE CALL FROM CLIENT	.10
05/29/03	CONFERENCE WITH CLIENT	.50
05/29/03	DRAFTED AFFIDAVIT	.25
05/30/03	TELEPHONE CALL FROM CLIENT	.10
05/30/03	CONFERENCE WITH D.A.	.10
05/30/03	RESEARCH OF LAW & CONFERENCE WITH CLIENT	3.00
06/02/03	TELEPHONE CALL FROM CLIENT	.20
06/03/03	CONFERENCE WITH D.A.	.10
06/09/03	TELEPHONE CALL FROM CLIENT	.10
06/04/03	TELEPHONE CALL FROM CLIENT	.10
07/16/03	DRAFTED LETTER TO CLIENT	.40
08/04/03	TELEPHONE CALL TO CLIENT	.10
08/27/03	DRAFTED FAX TO GREEN MOUNTAIN	.20
08/27/03	TELEPHONE CALL FROM CLIENT	.10
08/27/03	DRAFTED MEMO TO FILE	.25
10/28/03	DRAFTED LETTER TO CLIENT	.40
10/29/03	REVIEWED DISCOVERY	.25
10/29/03	DRAFTED LETTER TO CLIENT	.40
10/30/03	DRAFTED LETTER TO CLIENT	.40
02/09/04	DRAFTED LETTER TO CLIENT	.40
05/04/04	DRAFTED & FILED MOTION TO CONTINUE HEARING	.50
05/13/04	TELEPHONE CALL FROM CLIENT	.10
05/13/04	TELEPHONE CALL TO CLIENT	.10
07/20/04	DRAFTED LETTER TO CLIENT	.40

FILED
OCT 13 2015
CASSANDRA "SAM" JOHNSON
CIRCUIT COURT CLERK

FILED
JAN 13 2009
BILLY YATES
CLERK, CIRCUIT COURT

DOCUMENT 95

FILED

OCT 13 2015

CASSANDRA "SAM" JOHNSON
CIRCUIT COURT CLERK

07/27/04	DRAFTED LETTER TO CLIENT	.40
08/27/04	DRAFTED LETTER TO CLIENT	.40
09/29/04	DRAFTED LETTER TO CLIENT	.40
09/30/04	DRAFTED LETTER TO CLIENT	.40
11/03/04	DRAFTED LETTER TO CLIENT	.40
12/19/05	DRAFTED LETTER TO CLIENT	.40
02/16/07	TELEPHONE CALL FROM CLIENT	.10
03/09/07	CONFERENCE WITH D.A.	.10
03/09/07	TELEPHONE CALL TO CLIENT	.10
05/06/07	TELEPHONE CALL FROM CLIENT	.10
08/28/07	TELEPHONE CALL FROM CLIENT	.20
12/23/08	DRAFTED LETTER TO CLIENT	.40
12/ /08	ADMINISTRATIVE TIME TO CLOSE FILE	.25

TOTAL OUT OF COURT PREPARATION: HOURS 34.55 @ $40.00 = $1,382.00
PHOTOCOPIES: 143 COPIES @ $.25 = $35.75
POSTAGE: $7.56
EXTRAORDINARY EXPENSES: 39.70 HOURS @ $30.00 = $1,191.00

TOTAL: **$3,021.31**

FILED
OCT 13 2015
CASSANDRA "SAM" JOHNSON
CIRCUIT COURT CLERK

FILED
JAN 13 2009
BILLY YATES
CLERK, CIRCUIT COURT

CC-03-381.00 ✓

State of Alabama
Unified Judicial System

Form C-62A Rev. 7/2000

ATTORNEY'S FEE DECLARATION
(Adult)
[For Work Performed On or After 10/1/2000]

County Code: 29

Case Number: CC-03-381.01-DAK
(Jurisdiction / Year / Case / Suffix)

Mark Appropriate Court:
- ☐ Circuit Court of ETOWAH County
- ☐ District Court of _____ County
- ☐ Municipal Court of _____
- ☐ Alabama Court of Criminal Appeals
- ☐ Alabama Court of Civil Appeals
- ☐ Supreme Court of Alabama

Indicate If Original Charge is: / **Limits**
- Capital Case (or charge carrying sentence of life without parole) ☐ (No Limit) CC
- Class A Felony ☐ ($3,500) FA
- Class B Felony ☐ ($2,500) FB
- Class C Felony ☐ ($1,500) FC
- Other ☐ ($1,000) OT
- Appeal ☐ ($2,000) AP
- Petition for Writ of Certiorari ☐ ($2,000) WC
- Post-Conviction/Habeas Corpus ☐ ($1,000) PC

Attorney Name (Please type or print): JEFFREY P. MONTGOMERY

721347350-00
Social Security Number or FEIN

STYLE OF CASE: ☒ STATE OF ALABAMA
☐ MUNICIPALITY OF _____ v. ADRIAN MARCY WEST
Defendant

CHARGE: PROBATION HEARING

Companion case numbers and charges or convictions: _____

The undersigned attorney declares that on (date) 08/20/02, the Honorable WILLIAM D. RUSSELL, Judge, appointed the undersigned to represent the above-named defendant or appellant, and on (date) 05/13/09 the case was heard by the Honorable DAVID A. KIMBERLY, Judge. The case was disposed of by PROBATION DENIED.
(Plea of guilty, conviction, acquittal, affirmance, reversal, cert. denied)

(1) In-Court Appearance (Trial Level or Post-Conviction Proceeding)	Total Hours 2.00	x	$ 60.00	per hour =	$120.00
(2) Out-of-Court Preparation (Trial Level or Post-Conviction Proceeding)	Total Hours 4.55	x	$ 40.00	per hour =	$182.00
(3) Preparation (Appellate Level)	Total Hours _____	x	$ 60.00	per hour =	
(4) Extraordinary Expenses (If approved in advance by court)					$7.35
(5) Overhead Expenses (If approved in advance by court)	Total Hours 6.55	x	$ 30	Per hour =	$196.50
	TOTAL CLAIM OF ATTORNEY				$505.85

NOTICE TO ATTORNEY: Complete this form. Attach a copy of a complete itemization of (1) in-court appearances; (2) out-of-court preparation; (3) preparation for appeals; (4) extraordinary expenses; and/or (5) overhead expenses reflecting the date of actions and amount of time involved in each activity. Make a copy of same for the court's record and a copy for your records.

The undersigned attorney further declares that the above claim is true and correct and represents the services actually rendered by him/her as an attorney and the amount is due and payable. I further declare that the above claim is not a duplication of charges and expenses in any case (companion or otherwise).

Signature of Attorney

Attorney Code MON042

Sworn to and subscribed before me this 14th day of May, 2009.

Notary Public

Mailing Address of Attorney
(please type or print) (including city, state, and zip code)
JEFFREY P. MONTGOMERY
P.O. BOX 1858
GADSDEN, AL 35901

Telephone Number 256-543-7570 Fax Number 256-543-7572

I, the undersigned judge, hereby certify that the foregoing claim has been presented to me, and I have reviewed the same and believe the same to be true and correct. I am further of the opinion that said attorney is not duplicating said charges and expenses in any case (companion or otherwise).

Based on the above, I hereby approve the declaration and claim in the amount of $ 505.85

Done this 15th day of May, 2009.

Judge's Signature

FILED
OCT 13 2015
CASSANDRA "SAM" GILLESPIE
CIRCUIT COURT CLERK

NOTICE TO ATTORNEY AND JUDGE: Sections 15-12-21 through 15-12-23, *Code of Alabama* 1975, provide for the payment of attorney fees and extraordinary expenses incurred by counsel appointed to represent indigent defendants at the trial level, on appeal (including petition for writ of certiorari to the Alabama Supreme Court) and in post-conviction proceedings.

THIS FORM MUST CONTAIN ORIGINAL SIGNATURES OF THE ATTORNEY AND THE JUDGE. THIS FORM WITH ATTACHED ITEMIZATION MUST BE SUBMITTED TO THE TRIAL COURT JUDGE OR PRESIDING JUDGE OR CHIEF JUSTICE OF THE APPELLATE COURT FOR APPROVAL. AFTER APPROVAL, FILE WITH THE CLERK, WHO SHALL SUBMIT THE ORIGINAL DECLARATION TO THE STATE COMPTROLLER (EXCEPT IN MUNICIPAL CASES) FOR AUDIT.

Filed in the Clerk's Office at _____, Alabama, on MAY 20 2009
date

BILLY YATES
CLERK, CIRCUIT COURT

EXCEPT IN MUNICIPAL CASES, MAIL TO: State Comptroller, Indigent Defense Section, P. O. BOX 302602, Montgomery, Alabama 36130-2602

Original: Comptroller Yellow: Court File Pink: Attorney

DOCUMENT 95

FILED

OCT 13 2015

CASSANDRA "SAM" JOHNSON
CIRCUIT COURT CLERK

IN THE CIRCUIT COURT OF ETOWAH COUNTY, ALABAMA

STATE OF ALABAMA
vs.
ADRIAN MARCY WEST
CC-03-381.02-DAK
UDCS
JM-1269-02

IN COURT APPEARANCE:

05/13/09	APPEARANCE AT PROBATION HEARING (PROBATION DENIED)	2.00

TOTAL IN COURT HOURS: 2.00 @ $60.00 = $120.00

OUT OF COURT PREPARATION:

08/20/02	APPOINTED BY JUDGE RUSSELL	
08/23/02	EXTRAORDINARY EXPENSES APPROVED	
02/01/09	ADMINISTRATIVE TIME TO RE-OPEN FILE	.25
01/23/09	DRAFTED LETTER TO CLIENT	.40
01/27/09	REVIEWED REPORT OF INVESTIGATION	.10
02/02/09	DRAFTED LETTER TO CLIENT	.40
03/03/09	TELEPHONE CALL TO D.A.	.10
03/03/09	TELEPHONE CALL FROM D.A.	.10
03/04/09	TELEPHONE CALL FROM CLIENT	.10
03/04/09	DRAFTED & FILED MOTION TO CONTINUE & RE-SET	.60
03/06/09	DRAFTED LETTER TO CLIENT	.40
05/01/09	REVIEWED LETTER FROM MARCUS REID	.10
05/04/09	DRAFTED LETTER TO CLIENT	.40
05/04/09	TELEPHONE CALL TO CLIENT	.10
05/04/09	CONFERENCE WITH CLIENT	.40
05/12/09	TELEPHONE CALL TO MARCUS REID	.10
05/12/09	TELEPHONE CALL FROM MARCUS REID	.10
05/12/09	DRAFTED FAX TO MARCUS REID	.25
05/14/09	DRAFTED LETTER TO CLIENT	.40
05/14/09	ADMINISTRATIVE TIME TO CLOSE FILE	.25

FILED
OCT 13 2015
CASSANDRA "SANI" JOHNSON
CIRCUIT COURT CLERK

TOTAL OUT OF COURT PREPARATION: 4.55 HOURS @ $40.00 = $182.00
PHOTOCOPIES: 21 COPIES @ $.25 = $5.25
POSTAGE: $2.10
EXTRAORDINARY EXPENSES: 6.55 HOURS @ $30.00 = $196.50

TOTAL: **$505.85**

FILED
MAY 20 [illegible]
BILLY YATES
CLERK, CIRCUIT COURT

State of Alabama
Unified Judicial System

Form C-62A Rev. 7/2000

ATTORNEY'S FEE DECLARATION
(Adult)
[For Work Performed On or After 10/1/2000]

County Code: 28

Case Number: CC-03-800-BAR
(Jurisdiction / Year / Case / Suffix)

Mark Appropriate Court:
- ☐ Circuit Court of ETOWAH County
- ☐ District Court of _____ County
- ☐ Municipal Court of _____
- ☐ Alabama Court of Criminal Appeals
- ☐ Alabama Court of Civil Appeals
- ☒ Supreme Court of Alabama

Indicate If Original Charge Is: / **Limits**

Capital Case (or charge carrying sentence of life without parole)	☐ (No Limit) CC
Class A Felony	☐ ($3,500) FA
Class B Felony	☐ ($2,500) FB
Class C Felony	☐ ($1,500) FC
Other	☐ ($1,000) OT
Appeal	☐ ($2,000) AP
Petition for Writ of Certiorari	☐ ($2,000) WC
Post-Conviction/Habeas Corpus	☐ ($1,000) PC

Attorney Name (Please type or print): JEFFREY P. MONTGOMERY

Social Security Number or FEIN: 721347350-00

STYLE OF CASE: ☒ STATE OF ALABAMA
☐ MUNICIPALITY OF _____ v. ADRIAN MARCY WEST (Defendant)

CHARGE: HINDERING PROSECUTION

Companion case numbers and charges or convictions: _____

The undersigned attorney declares that on (date) 10/29/03 the Honorable D. STEWART, Judge, appointed the undersigned to represent the above-named defendant or appellant, and on (date) 01/13/09 the case was heard by the Honorable DAVID A. KIMBERLY, Judge. The case was disposed of by DEFENDANT PLEAD GUILTY.
(Plea of guilty, conviction, acquittal, affirmance, reversal, cert. denied)

(1) In-Court Appearance (Trial Level or Post-Conviction Proceeding)	Total Hours 5.00	x $ 60.00	per hour =	$300.00
(2) Out-of-Court Preparation (Trial Level or Post-Conviction Proceeding)	Total Hours 17.05	x $ 40.00	per hour =	$682.00
(3) Preparation (Appellate Level)	Total Hours _____	x $ 60.00	per hour =	
(4) Extraordinary Expenses (If approved in advance by court)				$27.61
(5) Overhead Expenses (If approved in advance by court)	Total Hours 20.45	x $ 30	Per hour =	$613.50
			TOTAL CLAIM OF ATTORNEY	$1,622.61

NOTICE TO ATTORNEY: Complete this form. Attach a copy of a complete itemization of (1) in-court appearances; (2) out-of-court preparation; (3) preparation for appeals; (4) extraordinary expenses; and/or (5) overhead expenses reflecting the date of actions and amount of time involved in each activity. Make a copy of same for the court's record and a copy for your records.

The undersigned attorney further declares that the above claim is true and correct and represents the services actually rendered by him/her as an attorney and the amount is due and payable. I further declare that the above claim is not a duplication of charges and expenses in any case (companion or otherwise).

Signature of Attorney: J. P. Montgomery

Attorney Code: MON042

Mailing Address of Attorney
(please type or print) (including city, state, and zip code)
JEFFREY P. MONTGOMERY
P.O. BPOX 1858
GADSDEN, AL 35901

Telephone Number 256-543-7570 Fax Number 2565[illegible]7578

Sworn to and subscribed before me this 13th day of January, 2009

Carolyn L. Nelms
Notary Public

I, the undersigned judge, hereby certify that the foregoing claim has been presented to me, and I have reviewed the same and believe the same to be true and correct. I am further of the opinion that said attorney is not duplicating said charges and expenses in any case (companion or otherwise).

Based on the above, I hereby approve the declaration and claim in the amount of $ 1622.61

Done this 13th day of January, 2009

Judge's Signature

FILED
OCT 13 2015
CASSANDRA "SAM" JOHNSON
CIRCUIT COURT CLERK

NOTICE TO ATTORNEY AND JUDGE: Sections 15-12-21 through 15-12-23, *Code of Alabama* 1975, provide for the payment of attorney fees and extraordinary expenses incurred by counsel appointed to represent indigent defendants at the trial level, on appeal (including petition for writ of certiorari to the Alabama Supreme Court) and in post-conviction proceedings.

THIS FORM MUST CONTAIN ORIGINAL SIGNATURES OF THE ATTORNEY AND THE JUDGE. THIS FORM WITH ATTACHED ITEMIZATION MUST BE SUBMITTED TO THE TRIAL COURT JUDGE OR PRESIDING JUDGE OR CHIEF JUSTICE OF THE APPELLATE COURT FOR APPROVAL. AFTER APPROVAL, FILE WITH THE CLERK, WHO SHALL SUBMIT THE ORIGINAL DECLARATION TO THE STATE COMPTROLLER (EXCEPT IN MUNICIPAL CASES) FOR AUDIT.

Filed in the Clerk's Office at _____, Alabama, on _____ (date)

FILED
JAN 13 2009
BILLY YATES
CLERK, CIRCUIT COURT

EXCEPT IN MUNICIPAL CASES, MAIL TO: State Comptroller, Indigent Defense Section, P. O. BOX 302602, Montgomery, Alabama 36130-2602

Original: Comptroller **Yellow:** Court File **Pink:** Attorney

FILED
OCT 13 2015
CASSANDRA "SAM" JOHNSON
CIRCUIT COURT CLERK

IN THE CIRCUIT COURT OF ETOWAH COUNTY, ALABAMA

STATE OF ALABAMA
vs.
ADRIAN MARCY WEST
CC-03-800-DAK
HINDERING PROSECUTION
JM-1269.02-03

IN COURT APPEARANCE:

08/04/08	APPEARANCE AT DOCKET CALL	1.00
01/12/09	APPEARANCE AT DOCKET CALL	2.00
01/13/09	APPEARANCE AT HEARING (DEFENDANT ENTERED PLEA)	2.00

TOTAL IN COURT HOURS: 5.00 @ $60.00 = $300.00

OUT OF COURT PREPARATION:

10/28/03	APPOINTED BY JUDGE STEWART	
10/28/03	ADMINISTRATIVE TIME TO OPEN FILE	.25
10/28/03	DRAFTED & FILED ENTRY OF APPEARANCE	.60
10/29/03	DRAFTED & FILED MOTION FOR EXTRAORDINARY EXPENSES (APPROVED ON 10/31/03)	.75
11/03/08	REVIEWED STATEMENT	.25
11/04/03	DRAFTED MOTION FOR DISCOVERY & PRODUCTION	.75
11/05/03	DRAFTED & FILED BRADY MOTION	.75
11/06/03	DRAFTED & FILED MOTION TO REVEAL	.60
11/07/03	DRAFTED & FILED MOTION TO DISCLOSE	.60
11/09/03	COPIED COURT HOUSE FILE	.50
11/10/03	DRAFTED & FILED MOTION TO PRODUCE	.60
11/12/03	DRAFTED & FILED MOTION IN LIMINE	.60
01/26/04	DRAFTED LETTER TO CLIENT	.40
04/27/04	DRAFTED LETTER TO CLIENT	.40
11/12/04	DRAFTED LETTER TO JUDGE	.40
09/27/05	DRAFTED LETTER TO CLIENT	.40
10/02/06	REVIEWED FILE	.20
10/02/06	DRAFTED LETTER TO CLIENT	.40
01/26/07	TELEPHONE CALL FROM CLIENT	.20
01/26/07	DRAFTED MEMO TO FILE	.25
08/28/07	DRAFTED MEMO TO FILE	.25
07/15/08	RE-DRAFTED & FILED MOTION FOR DISCOVERY & PRODUCTION	.75
07/16/08	RE-DRAFTED & FILED BRADY MOTION	.75

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CASSANDRA "SAM" JOHNSON
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07/17/08	DRAFTED LETTER TO CLIENT	.40
07/17/08	RE-DRAFTED & FILED MOTION TO REVEAL	.60
07/18/08	RE-DRAFTED & FILED MOTION TO DISCLOSE	.60
07/21/08	RE-DRAFTED & FILED MOTION TO PRODUCE	.60
07/22/08	RE-DRAFTED & FILED MOTION IN LIMINE	.60
07/25/08	REVIEWED ORDER	.10
08/01/08	DRAFTED & FILED MOTION TO SUPPRESS	.75
09/10/08	REVIEWED DISCOVERY	.25
09/10/08	DRAFTED LETTER TO CLIENT	.40
01/03/09	TELEPHONE CALL FROM CLIENT	.10
01/03/09	TELEPHONE CALL TO MARCUS REID	.10
01/03/09	CONFERENCE WITH MARCUS REID	.50
01/03/09	TELEPHONE CALL TO CLIENT	.10
01/06/09	CONFERENCE WITH D.A. & JUDGE KIMBERLY	.50
01/13/09	DRAFTED MEMO TO FILE	.25
01/13/09	DRAFTED LETTER TO CLIENT	.25
01/13/09	ADMINISTRATIVE TIME TO CLOSE FILE	.25

TOTAL OUT OF COURT PREPARATION: 17.05 HOURS @ $40.00 = $682.00
PHOTOCOPIES: 97 COPIES @ $.25 = $24.25
POSTAGE: $3.36
EXTRAORDINARY EXPENSES: 20.45 HOURS @ $30.00 = $613.50

TOTAL: **$1,622.61**

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OCT 13 2015
CASSANDRA "SAM" JOHNSON
CIRCUIT COURT CLERK

FILED
JAN 13 2009
BILLY YATES
CLERK, CIRCUIT COURT

FILED
OCT 13 2015
CASSANDRA "SAM" JOHNSON
CIRCUIT COURT CLERK

IN THE CIRCUIT COURT OF ETOWAH COUNTY, ALABAMA

MICHAEL WAYNE REYNOLDS,	*	
Petitioner,	*	NO. CC-05-257.60
v.	*	
STATE OF ALABAMA,	*	
Respondent.	*	

AFFIDAVIT OF CHARLES C. HART, ESQ.

STATE OF ALABAMA)
) : S.S.:
COUNTY OF ETOWAH)

I, Charles C. Hart Esq., being duly sworn, depose and say:

1. I am an attorney licensed by the State of Alabama.

2. I was appointed as counsel for Michael Wayne Reynolds ("Petitioner") in State v. Reynolds, Nos. CC-05-257.01 – CC-05-257.05 (Cir. Ct. Etowah Cty. 2005). I withdrew from representation of Petitioner on December 17, 2007 by consent of the court.

3. On April 26, 2005, my former co-counsel Patricia Granger and I filed a Motion to Require the Prosecution to Make Known any Incentives or Agreements They Have Made with Any Witness Who will Give Testimony in This Case and to Disclose the Record of All State Witnesses. On May 3, 2005, my former co-counsel Patricia Granger and I filed a Motion for Discovery of Prosecution Files, Records, and Information Necessary to a Fair Trial. These Motions were granted.

FILED
OCT 13 2015
CASSANDRA "SAM" JENKINS
CIRCUIT COURT CLERK

by Judge William W. Cardwell on May 12, 2005, with the exception that the request to require the prosecution to disclose the record of all State witnesses was continued for later oral argument.

4. The State did not disclose any incentives or agreements the State had with any witnesses, including State's witness Adrian Marcella "Marcie" West. The State also did not produce any documents to the defense indicating that the State had offered or given any incentives to or agreements with Ms. West.

5. At Petitioner's trial, on October 17, 2007, my co-counsel Paul Roberts II, Esq., asked Ms. West if she had made any deals with the District Attorney's office for her testimony. She responded that she had not. She also denied having an agreement when asked again by Marcus Reid, one of the prosecutors in the case.

6. While I represented Mr. Reynolds, at no time did I become aware of any facts that led me to believe that the State of Alabama had made any deals or arrangements with any witnesses in exchange for their testimony at Mr. Reynolds's trial.

7. Attached as Exhibit A to this affidavit is a case action summary page from State v. West, CC-2003-000381.01 (Cir. Ct. Etowah Cty. 2003). Based on my recollection from Petitioner's trial, I photocopied this page from the clerk's file for one of Ms. West's criminal cases. The photocopy includes a Post-It note reading: "Sam, Harp wants these put off indefinitely. Talk w/ him." Based on my review of the document, I believe the signature on this note belongs to Shaun Malone, Esq., who was the Circuit Judge assigned to Ms. West's cases, when Judge Malone replaced Judge Donald W. Stewart, who was initially assigned as the judge for Ms. West's cases.

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CASSANDRA "SAM" JOHNSON
CIRCUIT COURT CLERK

Pursuant to 18 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: October 2, 2015

Charles C. Hart, Esq.

Sworn to before me this
2nd day of October, 2015

NOTARY PUBLIC

FILED

OCT 13 2015

CASSANDRA "SAM" JOHNSON
CIRCUIT COURT CLERK

EXHIBIT A

FILED
OCT 13 2015
CASSANDRA "SAM" JOHNSON
CIRCUIT COURT CLERK

CC-03-382
CC-03-383

ACR0372 ALABAMA JUDICIAL INFORMATION SYSTEM CASE: CC 2003 000381.01
OPER: SHJ CASE ACTION SUMMARY
PAGE: 1 CIRCUIT CRIMINAL RUN DATE: 06/18/2003

THE CIRCUIT COURT OF ETOWAH JUDGE: DWS

STATE OF ALABAMA VS WEST ADRIAN MARCELLA
1904 STATE STREET
CASE: CC 2003 000381.01
GADSDEN, AL 35904 0000

DOB: 10/13/1969 SEX: F RACE: W HT: 5 03 WT: 115 HR: BRO EYES: BRO
SSN: 424869485 ALIAS NAMES: WEST MARCIE

CHARGE01: UNLAW DISTRIB CONTRO CODE01: UDCS LIT: UDCS-HYDROCODO TYP: F #: 001
OFFENSE DATE: 06/28/2002 AGENCY/OFFICER: 0310500 CLIFTON
WRIT
DATE WARRANT ISS: 3/14/2003 DATE ARRESTED: 06/03/2003 (WRIT)
DATE INDICTED: 03/07/2003 DATE FILED: 06/04/2003
DATE RELEASED: 06/03/2003 (WRIT) DATE HEARING:
BOND AMOUNT: $10,000.00 B(TOTAL) SURETIES: AAA GILCHRIST BONDIN
WEST, ROBERT E.

DATE 1: DESC: TIME: 0000
DATE 2: DESC: TIME: 0000

TRACKING NOS: / /

DEF/ATY: MONTGOMERY JEFFREY P TYPE: A TYPE:
P.O. BOX 1858
GADSDEN AL 35902

CC-03-800

PROSECUTOR: HEDGSPETH JAMES E JR

OTH CSE: 000000000000 CHK/TICKET NO: -21
COURT REPORTER: SID NO: 0000000
JF STATUS: BOND DEMAND: SHJ

DATE	ACTIONS, JUDGEMENTS
8-8-2003	SO ASSESSMENT FEE
9-5-2003	SO ASSESSMENT FEE
6-4-2003	SO ASSESSMENT FEE
8-12-03	PLEA OF NOT G ARRAIGNMENT
1-20-04 2-9-04	SET FOR TRIAL WE
4-19-04 5-4-2004	SET FOR TRIAL WE MOTION AND ORDER T
7-21-04	SET FOR TRIAL WE
8/9/4	Cont by Agreement. State First Case to be Reset
8-25-04 9/14/4	SET FOR TRIAL WEEK OF: 9-13-04 Cont Motion State
9-29-04 10/14/4	SET FOR TRIAL WEEK OF: 10-12-04 Cont Motion State

Sam,
Hay wants them put off indefinitely. Talk w/ him.

10-14-04
11-15-04

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OCT 13 2015
CASSANDRA "SAM" JOHNSON
CIRCUIT COURT CLERK

Affidavit of Marcus Reid

I, Marcus Reid, do solemnly swear to the following facts:

1. I am the Chief Deputy District Attorney for the Etowah County District Attorney's Office of the Sixteenth Judicial Circuit. I have served in that position since July 2005. Prior to that appointment, I was in private practice as a licensed attorney in Alabama beginning in September 1982.

2. I, along with then-District Attorney Jimmie Harp, prosecuted the capital murder case of State of Alabama v. Michael Wayne Reynolds, CC-2005-257. One of the State's witnesses in that case was Adrian Marcella ("Marcie") West. Ms. West testified on October 16, 2007, and I handled her direct testimony during the trial. At the time of trial, Ms. West had been charged in Etowah County with hindering prosecution in the first degree, as well as other unrelated drug offenses including two counts of unlawful distribution of a controlled substance, and two misdemeanor offenses (unlawful possession of marijuana in the second degree and possession of drug paraphernalia).

3. I am aware that Reynolds has filed a Rule 32 petition challenging his capital murder convictions and sentence of death. (CC-2005-257.60). I am also aware that he has alleged that the prosecution violated Brady v. Maryland, 373 U.S. 83 (1963) by failing to disclose Ms. West had been offered a deal in exchange for her testimony. These allegations are completely false. There was no deal in any form or at any time between the Etowah County District Attorney's Office and Ms. West for her testimony during the Reynolds trial. No promises or inducements concerning Ms. West's pending charges, or any other matter, were made to Ms. West in exchange for her testimony in the Reynolds trial. In fact, I specifically informed both Ms. West and her counsel, Jeff Montgomery, that there was no deal.

4. Ms. West specifically testified that she had made no deal or agreement with the prosecution concerning her testimony. Further, the prosecution fully complied with its discovery obligations by providing Reynolds with the entire prosecution file, with the exception of a limited set of documents that constituted work product. These documents were submitted to the trial court under seal for *in camera* review and were included in the clerk's record on direct appeal.

5. On January 13, 2009, months after she testified in the Reynolds case, Ms. West entered a guilty plea to her pending charges in which she pleaded guilty to the charge of hindering prosecution in the first degree and one count of unlawful distribution of a controlled substance. The plea was entered before Circuit Judge David Kimberly, to whom Ms. West's cases were assigned. He was not the trial judge in the Reynolds case. I represented the State of Alabama at the entry of the plea, which to my knowledge was entered as a "blind plea", with no stated agreement as to the sentence or any potential probation or sentence diversion on the charges to which Ms. West entered her guilty pleas. We did agree to nolle pross one additional count of unlawful distribution of a controlled substance on the merits (based on the paucity of evidence relating to Ms. West's culpability on that count), and we also agreed to nolle pross two misdemeanor charges connected with the unlawful distribution of a controlled substance charges (an unlawful possession of marijuana in the second degree, and a possession of drug paraphernalia charge). Ms. West's sentencing was scheduled for May 13, 2009. Just prior to the sentencing date, I was contacted by Ms. West's attorney, Jeff Montgomery, regarding a potential sentencing recommendation from our Office. He told me at that time that he had memorialized a discussion with District Attorney Jimmie Harp regarding Ms. West's potential sentence. Mr. Harp is now deceased. Mr. Montgomery's memo to his file, faxed to me on May 12, 2009,

indicates that this discussion took place on the day Ms. West entered her guilty plea on January 13, 2009. I recall that Mr. Montgomery faxed a copy of his memo to my office on that date in an effort to substantiate his recollection of an agreement for a sentence recommendation from the State. Mr. Harp had no memory of that particular discussion, and I was certainly unaware of any agreement. While we did not agree to recommend the sentence Mr. Montgomery requested, and proceeded to sentencing on the "blind plea" as originally contemplated with due deference to the Court's discretion as to the sentences, we did not object to the request and we had no objection to the split sentence being reconsidered by the Court upon Ms. West's successful completion of the Etowah County Substance Abuse Program (ECSAP) at the Etowah County Jail. I can definitively say from my personal knowledge that any agreement that may have existed regarding any portion of Ms. West's plea and/or sentence **did not exist prior to January 13, 2009**, at the earliest, and in no way related to Ms. West's testimony during the Reynolds trial. Moreover, any such agreement was certainly not given in exchange for Ms. West's testimony during the Reynolds trial, but solely for the purpose of resolving Ms. West's charges at that time.

6. On May 13, 2009, the circuit court sentenced Ms. West to twenty years for the unlawful distribution of a controlled substance charge and ten years on the hindering prosecution charge to run concurrently. The court split the sentences for Ms. West to serve three years incarcerated with five years of supervised probation, and ordered Ms. West to serve her sentence in the Etowah County Jail to complete the SAP program. Again, there was no agreement for a more lenient sentence with Ms. West based on her testimony in the Reynolds trial, and I specifically reminded the circuit court during the sentencing hearing that "there was no agreement as to what would happen in her cases" related to her testimony in the Reynolds trial. (See Transcript of May 13, 2009 sentencing hearing).

7. Upon review of the case action summary sheets for Ms. West's cases, Ms. West completed the SAP program approximately six months later and, on November 24, 2009, the circuit court suspended the balance of Ms. West's sentence and placed her on probation for five years based on the recommendation of the State. I do not remember the specific circumstances surrounding Ms. West's completion of the SAP program and her being placed on probation. However, this was a routine occurrence as it was normal for a defendant who had completed the SAP program to be placed on probation.

8. In my experience as Deputy District Attorney and Chief Deputy District Attorney in this Circuit, a disposition such as the one requested by Mr. Montgomery in Ms. West's case and ultimately imposed by Judge Kimberly is not at all uncommon in this Circuit. It is certainly not unique or extraordinary, nor does it support any speculative conclusion that it represented a previously agreed-upon quid pro quo for Ms. West's testimony in the Reynolds case. The sentences to the maximum terms possible on her charges are actually severe compared to other defendants charged with similar offenses, given the defendant's personal circumstances. Ms. West had no prior felony convictions and no subsequent encounters with the law. It was obvious that her conduct deserved punishment, and equally obvious that her previous addiction issues were the primary contributing factors to her problems with law enforcement. I am certain that this was the reason that she was required to complete the ECSAP program in the Etowah County Jail, and the reason that she was released upon her successful completion of that program. The ECSAP program is administered by the Etowah County Sheriff's Office, and is an extensive in-house drug-treatment program conducted in the Etowah County Jail. Participants are inmates at the jail. It is a rigorous program, with accountability and consequences for the inmates' failure to reach the program goals and an excellent track record. If an inmate fails to comply with the

requirements of the program, he or she will be required to repeat the six month program in its entirety. Only those inmates who complete all requirements are awarded a certificate of successful completion. Ms. West successfully completed the ECSAP program and, like hundreds of offenders who entered the program before and after her, the balance of her split sentence was suspended and she was placed on probation. It is routine for our circuit judges to dispose of such cases in this manner. Although each case is handled on an individual basis, any agreement for Ms. West to enter the ECSAP program was not unusual for a defendant with the types of charges Ms. West received, with a similar criminal history and circumstances.

I declare under penalty of perjury that the foregoing is true and correct.

This the 27th day of October, 2015.

Marcus Reid

Subscribed to and sworn to before me by this 27th day of October, 2015.

Notary Public

9/14/17

Affidavit of Jeff Montgomery

I, Jeff Montgomery, do solemnly swear to the following facts:

1. I am a licensed attorney in the State of Alabama and have been in practice since 1996.

2. I was appointed to represent Marcie West who had been charged in Etowah County with hindering prosecution in the first degree (CC-2003-800) relating to the 2003 murders of Charles, Melinda, and Savannah Martin. I was also appointed to represent Marcie on other outstanding drug charges in Etowah County, namely two counts of unlawful distribution of a controlled substance (CC-2003-381.01 and CC-2003-381.02), one count of unlawful possession of marijuana in the second degree (CC-2003-382), and one count of possession of drug paraphernalia (CC-2003-383). Prior to my representation of Marcie, I was familiar with her because she was a student of mine in a junior college course that I had previously taught.

3. I am aware that Marcie was called as a prosecution witness in the capital murder trial of State of Alabama v. Michael Wayne Reynolds (CC-2005-257) in October of 2007, and I continued to represent Marcie on her other charges during this time. At no time was there a deal or agreement of any kind with the Etowah County District Attorney's Office in exchange for Marcie's testimony during the Reynolds trial. No promises were made of any kind concerning Marcie's pending charges. In fact, the District Attorney at the time, Jimmie Harp, specifically told me that there would be no agreement with Marcie.

4. On January 13, 2009, Marcie entered a blind plea where she pleaded guilty to one count of unlawful distribution of a controlled substance and the hindering prosecution charge, while the State agreed to dismiss the other count of unlawful distribution of a controlled substance, as well as the unlawful possession of marijuana and possession of drug paraphernalia charges. There was no formal agreement concerning sentencing. However, I discussed with

District Attorney Harp about Marcie attending the Substance Abuse Program ("SAP") in the Etowah County Jail and that I would reserve the right to request an early release after six months in the SAP program.

5. The fact that Marcie entered a blind plea, however, had nothing to do with her testimony in the Reynolds case and was not given in exchange for her testimony in that case. I do not recall any agreement of any kind prior to Marcie entering a blind plea on January 13, 2009. I have reviewed the document referenced as "Exhibit A" filed on October 16, 2015 in the Rule 32 case of Michael Wayne Reynolds v. State of Alabama, CC-2005-257.60. This document, dated January 13, 2009, is a memo to file that I generated to memorialize the blind plea Marcie had entered into on that day and any discussions I had with the District Attorney that day about the sentencing hearing. Although the memo indicates an "Agreement with D.A.", I do not recall having any formal agreement in place at that time, only general discussions concerning the type of sentence I would request from the Court and any objections the District Attorney may have had, if any. It was, and still is, my practice to draft a memo to file to memorialize contemporaneously a defendant's guilty plea.

6. Ultimately, Marcie was sentenced to a twenty year sentence, split to serve three years incarcerated and five years supervised probation, with Marcie ordered to serve her sentence in the Etowah County Jail to complete the SAP program. At the time, and to this day, it was not unusual for defendants in Etowah County with multiple drug charges to enter a plea agreement of this type where a defendant would plead guilty to some charges and have the others dismissed. Nor was it unusual for defendants with drug charges to be sentenced to the SAP program. In fact, based on my experience practicing criminal law in Etowah County, I believe the sentence Marcie received was harsher than the sentences received by other defendants with charges of the

same type and number that Marcie was charged with. Regardless, Marcie's plea agreement and sentence were not made in exchange for her testimony during the Reynolds trial.

7. After Marcie completed the SAP program successfully in six months, I notified the District Attorney's Office that Marcie had completed the SAP program, and the Court suspended the remainder of her sentence and placed her on five years supervised probation. Marcie was placed on probation solely as a result of her successful completion of the SAP program. The suspension of the remaining incarceration portion of her sentence did not relate in any way to her testimony during the Reynolds trial. In my experience as an attorney in Etowah County, it was routine for a defendant to be released on probation after successful completion of the SAP program and Marcie's experience was typical of the experiences of other defendants.

I declare under penalty of perjury that the foregoing is true and correct.

This the 29th day of October 2015.

Jeff Montgomery

Subscribed to and sworn to before me by this 29th day of October, 2015.

Notary Public

Affidavit of Marcie West

I, Marcie West, do solemnly swear to the following facts:

1. I am over the age of 19 and a resident of Etowah County.

2. I was called by the prosecution to testify during the capital murder trial of State of Alabama v. Michael Wayne Reynolds (CC-2005-257) in October of 2007.

3. Prior to that time, I had been charged with hindering prosecution in the first degree, two counts of unlawful distribution of a controlled substance, one count of possession of marijuana in the second degree, and one count of possession of drug paraphernalia. My attorney was Jeff Montgomery.

4. I did not make any deals or agreements of any kind with the Etowah County District Attorney's Office in exchange for my testimony during the Reynolds trial. I testified in the Reynolds trial because I knew I needed to tell the truth and tell what happened. No one ever promised me anything for my testimony and no one suggested that my charges might be lessened by testifying. No one promised me anything at all about my own charges. At the time of the Reynolds trial, I had no idea what would happen in my own cases.

5. Some time later, I pleaded guilty to the hindering prosecution charge and one unlawful distribution of a controlled substance charge, and the other charges were dismissed. I was sentenced to twenty years, but the sentence was suspended, and I was sentenced to the Etowah County Jail to participate in the SAP program. Six months later, after I completed the SAP program, I was released from jail to the community corrections probation program. At no time did anyone say that the guilty plea or the sentence I received was a result of me testifying in the Reynolds trial.

I declare under penalty of perjury that the foregoing is true and correct.

This the 29th day of October 2015.

Marcie West

Marcie West

Subscribed to and sworn to before me by this 29th day of October, 2015.

Notary Public 12/27/15

MAY-12-2009 09:10A FROM: TO:5495286 P.1

IF YOU EXPERIENCE PROBLEMS RECEIVING THIS TRANSMITTAL
CALL: (256) 543-7570

JEFFREY P. MONTGOMERY, P.C.
Attorney at Law
606 South 5th Street
P. O. Box 1858
Gadsden, AL 35902
Phone: (256) 543-7570
Fax: (256) 543-7578

FACSIMILE TRANSMITTAL

DATE: MAY 12, 2009

TO: MARCUS REID

FACSIMILE NUMBER: 549-5286

FROM: JEFFREY P. MONTGOMERY

REFERENCE: MACY WEST

NUMBER OF PAGES TRANSMITTED, INCLUDING THIS PAGE: 2

REMARKS:

NOTE: The information contained in this transmission is attorney privileged and confidential. It is intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone and return the original message to us at the above address via the U. S. Postal Service. **Thank you.**

FILED
OCT 19 2015
CASSANDRA SAM JOHNSON
CIRCUIT COURT CLERK

MEMO

TO: FILE

DATE: JANUARY 13, 2009

RE: MARCY WEST
JM-1269-04

The State dismissed one UDCS case, one UPCS, and one UPDP. Marcy plead on one distribution and hindering prosecution. She gets a 10 year sentence plus two 5 year enhancement, for a total of twenty years. Cases run concurrent and split to three years with court cost, fees and fines.

Agreement with D.A. is that she will attend SAP in the Etowah County Jail and she is to serve no longer than one year. We reserved the right to request early release, but not before six months of time. Once she is released she will be placed on Community Corrections and fines and cost will be remitted by D.A.'s office.

Sentencing is put off until March 18, 2009 9:00 a.m.

FILED
OCT 19 2015
CASSANDRA "SAM" JOHNSON
CIRCUIT COURT CLERK

IN THE CIRCUIT COURT OF ETOWAH COUNTY

STATE OF ALABAMA,	*	
Plaintiff,	*	
vs.	*	CASE ACTION NO.
	*	CC-03-381.02
ADRIAN MARCELLA WEST,	*	CC-03-800
Defendant.	*	

(Proceedings had before the Honorable David A. Kimberley, Circuit Judge of the Sixteenth Judicial Circuit of Alabama, on January 13, 2009, at the Etowah County Judicial Building, 801 Forrest Avenue, Gadsden, Alabama, 35901.)

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OCT 13 2015
CASSANDRA "SAM" JOHNSON
CIRCUIT COURT CLERK

STACY A. LONG, CCR, RPR
ACCR# 226
OFFICIAL COURT REPORTER
16TH JUDICIAL CIRCUIT OF ALABAMA

APPEARANCES

APPEARING FOR THE PLAINTIFF:

Marcus Reid, Deputy District Attorney
16th Judicial Circuit of Alabama
Etowah County Judicial Building
801 Forrest Avenue
Gadsden, Alabama 35901

APPEARING FOR THE DEFENDANT:

Jeff Montgomery, Esq.
606 South 5th Street
Gadsden, Alabama 35901

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CASSANDRA "SAM" JOHNSON
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JANUARY 13, 2009 9:55 A.M.

(PLEA HEARING)

THE COURT: Please raise your right hand.

ADRIAN MARCELLA WEST,

having been first duly sworn, was examined and testified as follows:

THE COURT: All right, ma'am. Give us your full name, please.

THE DEFENDANT: Adrian Marcella West Bozarth.

THE COURT: All right. Ms. Bozarth, you are represented today by Mr. Montgomery. And I need to ask you if you've had enough time to speak with Mr. Montgomery about the facts of your cases and your rights in these cases?

THE DEFENDANT: Yes.

THE COURT: And you understand you're accused in the charges of two

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CIRCUIT COURT CLERK

counts of unlawful distribution of hydrocodone, one count of unlawful possession of marijuana second degree, one count of possession or use of drug paraphernalia and one count of hindering prosecution?

THE DEFENDANT: Yes.

THE COURT: All right. Now, you know that the unlawful possession of marijuana second degree and drug paraphernalia are misdemeanors, but that the felonies are B and C felonies. And do you know that a Class B felony would require a sentence of between two and twenty years in the state penitentiary?

THE DEFENDANT: Yes.

THE COURT: So you know any sentence, if you plead guilty on a B felony, would require a sentence in that range?

THE DEFENDANT: Yes.

THE COURT: Also aware of enhancements that would be required on the distribution charge?

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CASSANDRA "SAM" JOHNSON
CIRCUIT COURT CLERK

THE DEFENDANT: Yes.

THE COURT: Now, I'm going to show you a form. I need you to acknowledge that you've seen this form and your signature appears on it.

MR. MONTGOMERY: Judge, we went over the form, but I didn't have her sign it. I apologize.

(Off the record.)

THE COURT: Now, do you recognize this form?

THE DEFENDANT: Yes.

THE COURT: Does your signature appear on the form?

THE DEFENDANT: Yes.

THE COURT: Did you sign this form of your own free will?

THE DEFENDANT: Yes.

THE COURT: Do you understand the contents of the form or is there any part of it that you wish to have Mr. Montgomery explain further to you?

THE DEFENDANT: I understand.

THE COURT: The next form is "The Defendant Enters a Blind Plea and

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Waives His or Her Right to an Appeal in this case." Do you recognize that form?

THE DEFENDANT: Yes.

THE COURT: Does your signature appear on the form?

THE DEFENDANT: Yes.

THE COURT: Did you sign it of your own free will?

THE DEFENDANT: Yes.

THE COURT: Do you understand the contents of the form or you wish to have Mr. Montgomery explain anything to you?

THE DEFENDANT: I understand.

THE COURT: Now, you understand as to each of these charges that you have the right to say that you're not guilty?

THE DEFENDANT: Yes.

THE COURT: You have the right to say that you're not guilty by reason of insanity?

THE DEFENDANT: Yes.

THE COURT: And, of course, you

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have the right to say that you're guilty?

THE DEFENDANT: Yes.

THE COURT: But do you understand that if you tell me you're not guilty -- and that goes for each of these charges -- you have the following Constitutional Rights: The right to a speedy and public trial?

THE DEFENDANT: Yes.

THE COURT: The right to be tried by a jury?

THE DEFENDANT: Yes.

THE COURT: The right to see, hear and question all witnesses against you?

THE DEFENDANT: Yes.

THE COURT: The right at trial to present evidence in your favor?

THE DEFENDANT: Yes.

THE COURT: The right to have a trial judge order into court evidence and witnesses in your favor?

THE DEFENDANT: Yes.

THE COURT: The right to ei

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testify on your own behalf or remain silent?

THE DEFENDANT: Yes.

THE COURT: The right to have a qualified attorney, such as Mr. Montgomery, represent you before, during and after your trial?

THE DEFENDANT: Yes.

THE COURT: But do you understand if you tell me you're guilty, you'll give up all these Constitutional Rights that I've just mentioned to you?

THE DEFENDANT: Yes.

THE COURT: Do you understand that you may not receive probation?

THE DEFENDANT: Yes.

THE COURT: You understand that you may have to pay costs?

THE DEFENDANT: Yes.

THE COURT: Fees?

THE DEFENDANT: Yes.

THE COURT: Fines?

THE DEFENDANT: Yes.

THE COURT: Restitution, if any,

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filed by affidavit?

THE DEFENDANT: Yes.

THE COURT: Do you understand that you'd have to pay the crime victim's compensation fund?

THE DEFENDANT: Yes.

THE COURT: You understand that you could receive the same punishment as if you were to tell me you were not guilty and requested a jury trial, a jury trial were held and a jury happened to find you guilty on any of these charges and I sentenced you at that time?

THE DEFENDANT: Yes.

THE COURT: Do you understand you're giving up your right to an appeal?

THE DEFENDANT: Yes.

THE COURT: Understand you're giving up your right to withdraw your plea of guilt?

THE DEFENDANT: Yes.

THE COURT: Do you understand you are giving up your right to an

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appellate bond?

THE DEFENDANT: Yes.

THE COURT: Understand you're giving up your right to any challenges brought pursuant to Rule 32 of the Alabama Rules of Criminal Procedure?

THE DEFENDANT: Yes.

THE COURT: You understand that you are waiving any motions, defenses, objections or requests which you have made in your case or you could make in your case?

THE DEFENDANT: Yes.

THE COURT: Do you understand you're reserving no issues for appellate review?

THE DEFENDANT: Yes.

THE COURT: Do you understand that I will not set your sentencing if you plead guilty today until after I have reviewed your past criminal record, if any, and any report or recommendation of the probation officer and also reviewed the Sentencing Standards?

THE DEFENDANT: Yes.

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THE COURT: Has anyone threatened you or your family to get you to say that you're guilty?

THE DEFENDANT: No.

THE COURT: Has anyone promised to reward you or your family to get you to say that you're guilty?

THE DEFENDANT: No.

THE COURT: Has anyone told you or indicated or suggested to you that you will receive a lighter sentence, probation or some other favor simply in exchange for saying that you're guilty?

THE DEFENDANT: No.

THE COURT: Well, then, please state to the Court your plea to the crimes charged against you in the indictment of CC-03-381.02, unlawful distribution of a controlled substance, hydrocodone, and CC-03-800, hindering prosecution?

THE DEFENDANT: Guilty.

THE COURT: Do we have any offers of proof that need to be made?

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MR. MONTGOMERY: We waive offer of proof, Judge.

THE COURT: Any stipulations in regards to proximity of distribution to housing project and/or school?

MR. MONTGOMERY: Judge, we waive proof of the enhancements.

THE COURT: Mr. Montgomery, have you had an opportunity to discuss with Ms. West the facts of this case and her rights in the cases?

MR. MONTGOMERY: Yes, sir.

THE COURT: Do you recommend that she -- or I'm sorry. Do you recommend the Court accept her plea?

MR. MONTGOMERY: Yes, sir.

THE COURT: Does the State recommend the Court accept the defendant's plea?

MR. REID: Yes, Your Honor.

THE COURT: Well, then, having ascertained in open court the defendant fully understood her Constitutional Rights, the nature of the crimes with which she was charged

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in the indictments and the consequences of pleading guilty to those crimes which she did plead guilty to and that the defendant understandingly and voluntarily pled guilty and waived her Constitutional Rights on those matters, I hereby order the defendant's plea of guilt and waiver of rights be accepted and entered into the record of the Court and also that the defendant be adjudicated guilty of unlawful distribution of controlled substance, hydrocodone, in CC-03-381.02 and hindering prosecution in CC-03-800.

I'm going to set sentencing on March 18th, 2009 at 9:00 a.m. and Ms. West will remain on a bond until said sentencing date.

All right. Anything else we need to take up?

MR. MONTGOMERY: Not today, Judge.

THE COURT: All right. Thank you, ma'am.

(End of plea hearing.)

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C E R T I F I C A T E

STATE OF ALABAMA:

COUNTY OF ETOWAH:

I hereby certify that the above proceedings were taken down by me and transcribed by me using computer-aided transcription, and that the foregoing pages from 1 to 13 contain a full, true and correct transcript of the proceedings taken in the above-styled cause.

I further certify that I am neither of kin nor of counsel to any of the parties to said cause, nor in any way interested in the result of said cause.

I further certify that I am duly licensed by the Alabama Board of Court Reporting as a Certified Court Reporter.

This, the 7th day of October, 2015.

Stacy G. Long

STACY G. LONG, CCR, RPR

ACCR #226

OFFICIAL COURT REPORTER

SIXTEENTH JUDICIAL CIRCUIT OF ALABAMA

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IN THE CIRCUIT COURT OF ETOWAH COUNTY

STATE OF ALABAMA,	*	
Plaintiff,	*	
vs.	*	CASE ACTION NO.
	*	CC-03-381.02
ADRIAN MARCELLA WEST,	*	CC-03-800
Defendant.	*	

(Proceedings had before the Honorable David A. Kimberley, Circuit Judge of the Sixteenth Judicial Circuit of Alabama, on May 13, 2009, at the Etowah County Judicial Building, 801 Forrest Avenue, Gadsden, Alabama, 35901.)

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STACY A. LONG, CCR, RPR
ACCR# 226
OFFICIAL COURT REPORTER
16TH JUDICIAL CIRCUIT OF ALABAMA

A P P E A R A N C E S

APPEARING FOR THE PLAINTIFF:

Marcus Reid, Deputy District Attorney
16th Judicial Circuit of Alabama
Etowah County Judicial Building
801 Forrest Avenue
Gadsden, Alabama 35901

APPEARING FOR THE DEFENDANT:

Jeff Montgomery, Esq.
606 South 5th Street
Gadsden, Alabama 35901

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MAY 13, 2009 11:23 A.M.

(SENTENCING HEARING)

THE COURT: Adrian West.

All right. Anybody here for the victim in this matter that's going to speak?

MR. REID: No, sir. I guess technically -- I guess with what she's charged with, there really isn't a victim. But we had notified the family of the victim in the capital murder case.

THE COURT: Go ahead and swear her in.

(Whereupon, the defendant was duly sworn.)

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THE COURT: Let me go ahead hear from the State for the record if they wanted to place anything on the record.

MR. REID: Well, yes, sir. I

state, for the record, Judge -- this is obviously a blind plea without an agreement. And what I had told Marcy and told Jeff was that basically at this hearing we would present both the positive and the negative aspects of this case and Marcy's history. And there are positives and negatives.

I would say that, you know, her -- from the best I can tell the Court from everything I've learned about Marcy, both from our prosecution of the Reynolds case and the involvement in her cases, is that her problems with the law appear to be contemporaneously with her involvement with Michael Reynolds. I don't think before her contact with Michael Reynolds she had any significant problems with the law.

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But after she did get involved with him and after she began having problems with drugs, these drug cases arose. And I will say that based on the information we have in those

cases, Michael Reynolds was dealing drugs. She was there at the time. And the case she pled to, she was involved, but she was not the drug dealer. She assisted in them. And the other case that we dropped was the case that we thought had no merit where she was simply present and she did not sell the drugs.

As far as the hindering prosecution case is concerned, Marcy was not on a radar in that case. She came forward early in this investigation, provided the information to law enforcement that was critical in the prosecution of Michael Reynolds and she fully cooperated with our office in preparation for that case. And she testified, even though it was a very difficult and emotional thing to do to relive the nightmare that night, she did so. And she's always been -- and she absolutely has asked nothing of us in exchange for her cooperati

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told her there was no deal. And there was no deal. There was no agreement as to what would happen in her cases. But, you know, I feel like I need to say she did cooperate.

Now, the flip side negative part of that is she was involved with Michael Reynolds. While she was not part of the murder in that case, she did destroy evidence that would have been helpful to the prosecution in this case. And for that reason, you know, she's accepted responsibility and pled guilty to what she did do. But she's always told the whole story. She's always told every bit of what she did.

So I'm simply trying to present to the Court a balanced review of where she is and how she got where she is today. She made some mistakes. She did some things that are inexcusable, as far as destroying the evidence, and there's some things that I think that will weigh on her conscience fo

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long as she lives, things she might have done in her mind that she wasn't able to do or didn't do.

But she did do -- she has done a lot of positive things since this happened. And she was very important to our prosecution -- successful prosecution of Michael Reynolds' case.

THE COURT: All right. Anything you wanted to say in response?

MR. MONTGOMERY: Judge, I think we would concur with everything that Marcus said. But we would like to add just a couple of other things to it that Marcus didn't mention. At the time she came forward, there was actually another gentleman who was actually not involved that had already confessed to this killing.

The other thing is the hindering prosecution particularly, we think, was motivated out of fear. We just kind of want to remind -- I know the Court has heard this story before. The hindering part was done be

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she was afraid for her life and --

MR. REID: Well, I'm sorry. Go ahead.

MR. MONTGOMERY: That would be the only other thing I wish to add.

MR. REID: Well, I would agree there was another person in custody that a lot of folks were looking at. And he sort of confessed under circumstances that were very questionable. And the focus had already shifted towards Michael Reynolds and some other people.

But that being said, Marcy came forward very early on and provided critical information that we wouldn't have -- may not have gotten otherwise. So, you know, she was obviously a key part of that prosecution and probably the key witness, other than very strong forensic evidence we had. As far as fact witness, she was the only living person in that house who could tell us what happened and she did so.

THE COURT: All right. Anything

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further, Mr. Montgomery?

MR. MONTGOMERY: That's all.

THE COURT: All right. Ms. West, anything you wish to say before I enter the sentence in this matter?

THE DEFENDANT: (Witness shakes head negatively).

THE COURT: All right. Having reviewed the Sentencing Standards in this matter and also the pre-sentencing report, while the Court appreciates Ms. West's cooperation, this was a particularly heinous crime and the Court thinks that the issues involving the circumstances of this need to be taken into account in regards to the sentencing. And also the Court has taken into account the issue of cooperation and has tried to fashion a sentence that addresses both of those considerations, I guess how successfully will be open to debate between the parties.

But my decision and conclusion is, Ms. West, to sentence you

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distribution charge -- to deviate from the Sentencing Standards and sentence under the statutory penalties for a Class B felony and Class C felony. And for the distribution charge, Ms. West, sentence you to twenty years in the state penitentiary. On the hindering prosecution, sentence you to ten years in the state penitentiary. Gonna run those concurrent. Gonna split you to three years, then also concurrent on both those charges.

I'm going to put a hold on you that you can serve in the Etowah County Detention Center and complete the SAP program. At the end of twelve months, assuming that you have had a satisfactory course of treatment completion of the SAP and have had a satisfactory detention, will consider the application of your attorney for diversion to Community Corrections at the conclusion of twelve months. And intend to pursue that course, assuming everything goes well in the [illegible]tion

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center for the next twelve months.

Now, I'm going to require you to pay court cost, fines -- or not a fine, but fees.

Are you retained or appointed, Mr. Montgomery?

MR. MONTGOMERY: I was appointed.

THE COURT: Fees and assessments. And once you, of course, finish -- once you finish your split, place you on five years supervised probation by that split, be according to plan with the Community Corrections and that completion of that time, then place you on five years supervised probation.

Once you start your diversion, you can commence payments. And I need to know basically how much you believe you can pay on -- how much you believe you can pay once you are released.

MR. MONTGOMERY: Judge, it may be best to let her talk with the probation officer. But if you want to --

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THE COURT: Well, I have to put something in the order. I'm just gonna put the minimum, then. I'll just say fifty dollars a month. You can pay more than that, but at least fifty dollars a month commencing from the point of either your diversion or commencement of your supervised probation.

Anything else we need to take up?

MR. MONTGOMERY: Judge, just a couple of things. Our understanding was the twenty-year sentence was a ten year plus two five-year enhancements.

MR. REID: That's correct.

THE COURT: Oh, all right.

MR. REID: And we had also discussed reserving the right to request an early release after SAP, but not before six months. We just want to be sure.

THE COURT: Yeah, I don't recall my saying if I was going along with that.

MR. MONTGOMERY: Well, 't

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think you said that you would necessarily. We just had reserved the right to ask -- request that.

THE COURT: Okay. That would be fine.

MR. MONTGOMERY: And, Judge, also just for the record --

THE COURT: Thank you. I think that I had indicated at the time that we were contemplating this that I did anticipate at least service of twelve months. So I'm not saying I might not change my mind by the end of SAP, but that was my intention at that time and it's still the Court's intention that at least twelve months actually be served in this matter.

All right. Anything further?

MR. REID: That's it, Judge. Thank you.

(That concluded the proceedings on this date.)

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C E R T I F I C A T E

STATE OF ALABAMA:

COUNTY OF ETOWAH:

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I further certify that I am duly licensed by the Alabama Board of Court Reporting as a Certified Court Reporter.

This, the 7th day of October, 2015.

Stacy G. Long

STACY G. LONG, CCR, RPR

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microphone will slide forward. Pull your chair up and slide the microphone and try to speak directly into the microphone, please.

Go ahead, sir.

ADRIAN MARCELLA WEST,

called as a witness on behalf of the state, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. REID:

Q. Would you tell the ladies and gentlemen of the jury what your name is?

A. Adrian Marcella West. I go by Marcie.

Q. Marcie, how old are you right now?

A. 38.

Q. Where do you live?

A. Brownsboro.

Q. Do you know the defendant in this case, Michael Reynolds?

A. Yes, I do.

Q. How long have you known him?

A. I met him on -- New Year's Eve in 2003,

2002.
Q. Did you know Chuck Martin?
A. Yes, I did.
Q. Did you know during her lifetime Melinda Martin?
A. I had spoken with Melinda on a couple of occasions.
Q. Did you know during her lifetime Savannah Martin?
A. I never met Savannah.
Q. Were you in their home in the early morning hours of May 25th, 2003?
A. Yes, I was
Q. Did you see Chuck that night?
A. Yes, I did.
Q. Was he alive?
A. When we pulled up, he waved. The next time I saw him he wasn't alive.
Q. The last time you saw him was he alive?
A. No, he was not.
Q. Did you see Melinda that night?
A. Yes, I did.
Q. Was she alive?
A. She was.
Q. The last time you saw Melinda was she

alive?
A. No, she was not.
Q. Did you see Savannah that night?
A. Yes, I did.
Q. Was she alive?
A. Yes, she was.
Q. The last time you saw her was she alive or dead?
A. Savannah was alive.
Q. Marcie, did you kill Chuck Martin?
A. No, I did not.
Q. Did you have anything to do with killing that man?
A. No, sir.
Q. Marcie, did you kill Melinda Martin?
A. No, I did not.
Q. And, Marcie, did you -- did you kill Savannah?
A. No, I did not.
Q. During that day -- this was a Sunday morning, wasn't it?
A. Yes.
Q. The day before Saturday were you and Michael Reynolds together?
A. Yes, we were.

Q. What kind of relationship did y'all have?
A. We were boyfriend and girlfriend. We lived together.
Q. Where did you live together?
A. At his father's house.
Q. What is his father's name?
A. We called him Cowboy.
Q. Was his true name Harold Reynolds?
A. Yes, yes, Harold.
Q. Did y'all have a room in that house together?
A. Yes, we did.
MR. HART: I object to further leading after this, Your Honor.
THE COURT: Don't lead.
Q. Were you -- did you and Michael spend some time together at that home during that day?
A. Yes, we did.
Q. Tell the Judge, if you will -- tell the jury, if you will, what you remember about that day, that Saturday.
A. We were at home. And we were getting ready to leave. And Dino pulled up and wanted Michael to put in a stereo for him.

Q. About what time of day was that? Was it during the day?
A. Yes, it was during the day.
Q. Before noon or after noon?
A. I'm not sure.
Q. What happened after that?
A. We went to Dino's house and Michael put a in stereo for him in his car and he paid us with cocaine. And we did the cocaine. We went home and did the cocaine.
Q. How did you all do the cocaine?
A. We used syringes.
Q. Were you a drug addict at that time?
A. I used drugs, yes.
Q. How long had you been a drug user prior to that day?
A. Just a couple of months before I had met Michael.
Q. Was that a big part of your lives together, drug use?
A. Yes, it was.
Q. What types of drugs did the two of you do together?
A. We did crystal meth at the beginning of our relationship, and then we started

using crack cocaine.
Q. How are you doing right now, Marcie?
A. Right now I do not do drugs.
Q. That day you said that the two of you did some cocaine together?
A. Yes.
Q. And that Michael left to go do some work on Dino's car. Do you remember about what time of day it was that he came back?
A. Well, I was with him. I don't have any idea.
Q. Was it in the evening, dark?
A. Probably getting close to dark.
Q. And was Michael's father there at home that day?
A. Yes, he was.
Q. When you came back home was Mr. Reynolds there, Harold Reynolds? Was he there?
A. Yes, he was.
Q. And was anybody else there?
A. I don't know about the time when we got back. But later Sandra came over.
Q. Who was Sandra?
A. She was dating Michael's father.
Q. Was that Sandra Roberts?

A. Yes, sir.
Q. Tell the jury what happened after you returned home.
A. We -- Sandra and Michael went and got some crack and came back and we did it. And I think they left again. Michael went and got some more and came back and we did it.
Q. When you say we, who are you referring to?
A. Michael and I, and I believe Sandra smoked some.
Q. What happened next?
A. Then it was later. And we were going to go -- Michael said we were going to go and get some money from Jerry at Sand Mountain Drive-in.
Q. Was that a friend of his?
A. Yes.
Q. Did you do that?
A. Well, we left. And we were heading that way and realized that we didn't have the gas money. And so we went back to the house. And I don't -- and then we went and got the gas. I don't know if he went and got more drugs then or not.
Q. He left by himself?

A. At one point he did. I can't remember if it was the -- I know he went and got drugs twice, I believe.
Q. And then going through the evening, about what time of the evening is it right now, in your story, what you are telling me?
A. It was after midnight.
Q. It was pretty late at that point?
A. Yeah, it was pretty late.
Q. When you say he left, what was he driving?
A. Sandra's car.
Q. What kind of car did Sandra have?
A. A little silver car.
Q. Now, did there come a time when the two of you left together in that car, Sandra's car, and ended up basically at the Martins' house?
A. Yes.
Q. Tell the jury about that.
A. We pulled up.
Q. Well, first of all, tell about getting in the car. Did y'all stop to do anything?
A. We went and got gas and headed for North Gadsden.
Q. Did the car -- did he have to do anything

special as far as the car is concerned before you left that you remember? Do you remember anything about changing the tag or anything?

A. He changed the -- got a tag off of his daddy's truck because there wasn't a tag on the car. And we went --

Q. Did y'all talk about anything while you were traveling over there?

A. Not that --

Q. Did he say anything about where you were going and why?

A. He said that we were going to go to Chuck's house and he was going to get some money.

Q. What was Michael's relationship like with Chuck as far as you knew up to that point?

A. Chuck would have done anything in the world for Michael.

Q. I'm sorry. Tell this jury what happened on the way over there.

A. We pulled up in the driveway. And Michael told me to wait in the car, that he would be right back. And he knocked on the door. And Chuck answered it. And Chuck

waved at me. And I waved at Chuck. And they went inside. And I was messing with the radio. And then I hear screaming. I heard Melinda screaming.

Q. Did you see Michael carry anything in the house with him?

A. Yes. He carried in a knife.

Q. Had you seen that knife before?

A. Yes, I had.

Q. Can you describe it to the jury, please?

A. It was about like that (indicating), and it had a handle on it, and it had a little thing that would come around your hand, and it had a cover on it.

Q. The cover on it, was it kind of a fancy ornamental type cover?

A. (Witness nods head affirmatively.)

Q. After you saw Michael go in with the knife and after you heard the screams, tell this jury what you did next.

A. I ran inside the house.

Q. Tell us everything you saw and everything you did after you went in the house, Marcie.

A. Chuck was laying on the floor in the

kitchen. And Melinda was screaming from the back. And I went down the hall. And I went between Michael and Melinda. He was stabbing her. And at some point then I was stabbed.

Q. When you saw Michael and Melinda, where were they in the house, Marcie?

A. They were in the bedroom.

Q. Now, was there a bed in that room?

A. Yes, there was.

Q. Can you tell this jury where Melinda and Michael were in relationship to that bed to the best of your recollection?

A. They were -- here is the bed (indicating). They were right here.

Q. Next to the bed?

A. Down -- yeah.

Q. Down toward the foot of the bed?

A. (Witness nods head affirmatively.)

Q. All right. And, Marcie, what was Melinda doing?

A. Melinda was bent over, and he was stabbing her.

Q. Was she screaming then?

A. I don't know if she was at that point. By

then I don't know how I was comprehending what was going on.

Q. And tell us -- you said you got stabbed. Tell the jury exactly what you did, Marcie, before you were stabbed.

A. I went between Michael and Melinda.

Q. What were you trying to do?

A. I was trying to make him quit.

Q. And what happened?

A. I got stabbed.

Q. Did you know then that you were stabbed?

A. No, I did not.

Q. What happened next, Marcie?

A. Michael was yelling at me.

Q. What was he saying?

A. He was yelling what are you doing here.

Q. What happened next?

A. He told me to get the phone and get the purse, and he handed me the knives and told me to go wait in the car.

Q. At that point in time, the knife you described to us before he gave to you; is that right?

A. Right.

Q. Did he give you another knife?

A. Yes, he did.
Q. What kind of knife was it?
A. It was a steak knife.
Q. Had you ever seen that knife before?
A. No.
Q. Did you take those knives?
A. Yes, I did.
Q. Did you do what he told you to do?
A. Yes.
Q. At the time you took the telephone and took the purse, do you remember where Melinda was then?
A. She was slouched over at end of the bed, on the floor at the end of the bed.
(State's Exhibit Number 42 was marked for identification.)
Q. Marcie, I'm going to show you what has been marked for identification purposes as State's Exhibit Number 42. I am going to ask you to tell me if you recognize what you see on this picture.
A. Yes, I do.
Q. What is it?
A. It's Melinda.
Q. Do you see the location of Melinda on this

particular photograph?
A. (Witness nods head affirmatively.)
Q. Is this the bed right next to her? Is this the location of where Melinda was the last time you saw her?
A. No, it's not.
Q. Okay. She was more toward the foot of the bed; is that correct?
A. That's correct.

MR. REID: Your Honor, we will ask for permission to publish this photograph. We would offer it and ask for permission to publish it.

THE COURT: Show it admitted.

(State's Exhibit Number 42 was offered and admitted into evidence.)

MR. HART: May we see it, Your Honor?

MR. REID: You can have it, or I will show it to you.

Q. Now, the bed that's next to Melinda where she is lying, did you see anybody on that bed that night?
A. Yes, I did.
Q. Who did you see on the bed?

A. Savannah.
Q. What was Savannah doing when you saw her?
A. She was just standing there.
Q. Is that while the mother was on the ground --
A. Yes.
Q. I mean, on the floor, at the foot of the bed?
A. (Witness nods head affirmatively.)
Q. Do you remember whether you saw her on that bed at or about the time that Michael Reynolds was stabbing her mother to death?
A. I don't remember seeing her, but I feel sure she was there.
Q. And what was she doing, Marcie? What was Savannah doing when you saw her?
A. She was just standing there. She was just standing there.
Q. What happened next?
A. He told me to get the phone and the purse and handed me the knives and told me to go wait in the car.
Q. Did you do that?
A. Yes, I did.
Q. Now, when did you learn that you had been

stabbed?
A. When he came -- when he got in the car and told me to leave.
Q. So I'm getting a little ahead of things. That's the first time you learned that you were stabbed?
A. Yes.
Q. When you took the items that he gave to you, where did you go with them? What did you do?
A. I went to the car.
Q. To get there did you walk through -- what was your route?
A. I walked down the hall. And I felt like I was going to pass out. And I remember leaning against the wall. And then I had to go across Chuck. And I felt like I was going to pass out again. And I leaned against the counter. And I went to the car.
Q. Do you remember every bit of what you did on the way out, or were you pretty shaken up?
A. I was pretty shaken up.
Q. What did you do next, Marcie?

A. I went into the passenger side of the car and put everything down in the floorboard, in the seat. And I got over to the driver's side.
Q. Okay. Now, was there a reason why you did that?
A. The driver's door wouldn't open.
Q. So it never opened? I mean, it was damaged; is that right?
A. Yes.
Q. What did you do next, Marcie?
A. I sat there, and I waited.
Q. Why didn't you leave, Marcie?
A. I was scared.
Q. What happened next?
A. He came to the car. And he got a knife. And he went back in. He told me I better not leave. And then he came back out and told me not to leave again. And he came back again and told me to go.
Q. When he came back to the car did he get anything on either one of those trips?
A. He got a knife, one of the knives.
Q. Which knife was it?
A. The big knife.

Q. And after you came back that time from that trip with the knife -- first of all, did he say anything to you when he got that knife?
A. He told me I better not leave. He told me to wait.
Q. All right. Now, when he was in the house that time, did you notice anything going on inside the house?
A. When he came out and told me to go there was fire in the house.
Q. Did you see that?
A. I saw the orange in the house.
Q. And what happened after that?
A. He told me that I was stabbed and he wanted to drive. And I wouldn't let him drive. I stayed behind the driver's -- behind the wheel.
Q. Tell the jury why you did that.
A. Because he was going to kill me.
Q. What made you think that?
A. He wanted me to go down a dirt road.
Q. Was that your usual route back to where you were going?
A. No.

Q. You didn't go that -- you didn't want to go that way, right?
A. (Witness shakes head negatively.)
Q. All right, Marcie. What happened next?
A. We went back home.
Q. Okay. When you got home, who was there?
A. Sandra and Michael's daddy were there.
Q. Were you and Sandra real close at that point in time? Were y'all close friends or anything?
A. No. We knew each other because she would come over there to see his dad.
Q. And after you got home, the two of them were there. Do you remember where Michael's father was when you got home?
A. I believe he was in bed.
Q. What happened after that?
A. Michael told me to give -- for me to give him my clothes and to get a shower.
Q. Did you do anything to treat your arm?
A. After I got out of the shower and we went up to the front, he wrapped my arm.
Q. Was there a first aid kit or anything in the room?
A. Yes.

(State's Exhibits Numbers through 43 through 55 were marked for identification.)

Q. Marcie, I'm going to show you what has been marked for identification purposes as State's Exhibits 53 and 54. First Exhibit Number 54. Do you recognize what's shown in that photograph?

A. Yes, I do.

Q. First of all, where is that scene located?

A. In our bedroom.

Q. Is that at Mr. Harold Reynolds' house?

A. Yes.

Q. Does it show the first aid kit that was used to treat your arm?

A. Yes, it does.

MR. REID: Your Honor, we will offer State's Exhibit Number 54 and would request permission to publish it to the jury.

MR. HART: No objection.

THE COURT: Show it admitted.

(State's Exhibit Number 54 was offered and admitted into evidence.)

Q. Now, is that nightstand that's shown in that photograph, is that located next to the bed --
A. Yes, it is.
Q. -- that you slept in at that house?
And the item that's on the bottom shelf, is that the first aid kit?
A. Yes, it is.
Q. Is State's Exhibit Number 53 a closer view of that same item?
A. Yes.
MR. REID: Your Honor, we will offer State's Exhibit 53 as well.
THE COURT: Show it admitted.
MR. REID: And I would request permission to publish it.
(State's Exhibit Number 53 was offered and admitted into evidence.)
Q. When you got back home to Mr. Reynolds' house, did -- Let me ask you. On the way back home, driving home, did Michael say anything to you about what had happened there?
A. (Witness shakes head negatively.)

Q. Did he at any point try to talk to you about what went on over there?
A. (Witness nods head affirmatively.)
Q. You've got to answer out so she can hear you.
A. Yes.
Q. When did he first try to bring up the subject of what had happened at the Martin house?
A. The next morning we were walking to the store.
Q. What did he say?
A. He asked me if I saw Chuck's face.
Q. Did he make any kind of comment about any coverage of any kind, newspaper coverage or anything?
A. He wanted to know if he had made the front page.
Q. When did he say that to you?
A. On the way to the store.
Q. Let's go back to when you got home. You say you happened to treat your wound with the first aid kit; is that right?
A. Yes.
Q. Did you bring it up at all to him?

A. (Witness shakes head negatively.)
Q. Did you at any point say anything to him about whether you wanted to talk about it?
A. I told him I didn't want to know anything.
Q. When did you first tell him that?
A. I'm not sure if it was that night or the next day.
Q. Did Michael say anything to you either that night or the next day about some glasses he wore?
A. Yes, he did.
Q. Let me ask you first of all whether or not Michael had prescription sunglasses he wore all the time basically?
A. Yes, he did.
Q. I'm going to show you what has been marked for identification purposes as State's Exhibit Number 50. And I will ask you to tell this jury what this photograph depicts, or tell the jury what it is.
A. It's Michael in his glasses.
Q. Does this photograph fairly and accurately show photographs that were taken of Michael on or about the time of the killings over on Tidmore Bend Road?

A. (Witness nods head affirmatively.)
Q. Is this basically the way he looked around that time?
A. Yes, it is.
Q. Now, there are photographs on this photograph. Do you know where those are located? Had you seen those photographs before?
A. Yes. They were at the house.
Q. They were pictures of him that he kept in his room; is that right?
A. That's right.
Q. And the glasses he has on in this photograph he wore often; is that correct?
A. He wore them all the time.
Q. What if anything did he --

MR. REID: We will offer this and request permission to publish it.

THE COURT: Show it admitted.

(State's Exhibit Number 50 was offered and admitted into evidence.)

Q. What did he say about those glasses that night, Marcie?
A. He said that they were broken and that

part of them was at the house, at the Martins' and that they would burn in the fire.

Q. Did you see the broken glasses?

A. Yes, I did.

Q. I want to show you what has been marked for identification purposes as State's Exhibits Numbers 51 and 52. First of all, Exhibit Number 51. And tell the jury what that is.

A. That's Michael's glasses.

Q. Is this the way -- do they look on here the way they looked when he left going over there to the Martins' home?

A. No.

Q. Is this the way they looked that night after he came back?

A. Yes.

Q. And where are they shown right here?

A. On the table by the bed.

Q. That would have been under the first aid kit?

A. Yes.

MR. REID: Your Honor, we will offer State's Exhibit Number --

Q. Let me ask you first of all, State's Exhibit Number 52, is that a longer shot of the same scene?
A. Yes, it is.
Q. And it also fairly and accurately shows those glasses the way they looked after they were broken at the Martin house and placed on that nightstand; is that correct?
A. That's correct.

MR. REID: Your Honor, we will offer State's Exhibits 51 and 52 and request permission to publish them.

THE COURT: Show them admitted.

(State's Exhibits Numbers 51 and 52 were offered and admitted into evidence.)

Q. Now, is that a lens over to the left of the screen there, the broken lens?
A. Yes.
Q. And the intact lens on the right side of the screen; is that correct?
A. Yes.
Q. And State's Exhibit 52, a longer side of the same scene; is that correct?

A. That's correct.
Q. Did he seem at all concerned about the fact that the glasses were -- a piece of these glasses were still at the house?
A. No.
Q. Marcie, after you got back home and after -- you said Sandra was there -- what did y'all do next?
A. I got in bed, and I laid in bed. And Michael went and got drugs.
Q. Did he tell you he was going to get drugs?
A. Yes.
Q. Did he bring any back?
A. Yes.
Q. Did you use any of them after he came back?
A. No.
Q. Now, about what time of the morning -- early morning hours are we talking about now, if you know?
A. Three or four. Three.
Q. Do you have a judgment as to about what time it was when you went over to the Reynolds' house -- I mean, to the Martin's house?

A. I think it was around two or a little before two.
Q. Do you have a judgment as to about what time it was when you got back?
A. Between three and four; maybe a little before three.
Q. Are you sure about those -- you're not --
A. I'm not sure.
Q. You got in the bed?
A. Yes.
Q. What were you doing?
A. I was just laying there.
Q. How do you feel about it? What do you feel about what happened over there?
MR. HART: I object to the question of how she felt, Your Honor. That calls for a mental operation.
THE COURT: Sustained.
Q. How were you feeling that night?
MR. HART: I object to how she was feeling that night.
A. I was scared to death.
Q. Were you scared of Michael too?
A. Yes.
Q. When Michael was over at the Martin house

did he have on his shoes?
A. No, he did not.
Q. Marcie, why didn't you leave that house and go to the police that night?
A. I was scared to death. I was scared he was going to kill me. I was scared he was going to kill my family.
Q. But you didn't go to the police. And in fact, you got rid of some of the stuff that came out of that house, didn't you?
A. Yes, I did.
Q. Why did you do that, Marcie?
A. If I hadn't, he would have -- he would have killed me.

MR. MCWHORTER: Judge, I'm going to object to that. That's speculation. There is no foundation for that in the course of the question.

Q. Tell us how you came to dispose of that property, Marcie. Tell the jury what you did with it and why you did it. Tell them what you did.
A. When the police got Michael, Dino pulled up in the backyard.
Q. Now, when is this?

A. This was on Sunday.
Q. Had there been any discussions about getting rid of anything before that between you and Michael?
A. Michael had said that he was going to get rid of the clothes.
Q. What did y'all -- what did you have to get rid of?
A. The clothes that we had had on.
Q. Were those clothes bloody?
A. Yes.
Q. Your clothes and Michael's?
A. (Witness nods head affirmatively.)
Q. What else did you have, Marcie?
A. The knives.
Q. Was there anything that came out of the house that he wanted to get rid of?
A. The purse and the phone.
Q. Melinda's purse?
A. Yes.
Q. Did anybody take any money out of that purse or anything else out of that purse, Marcie?
A. Michael went through the purse.
Q. When did he go through the purse?

A. That night, when we had gotten home.
Q. Is that the first thing you did when you got home?
A. I don't know if he did that first or if we wrapped my arm first.
Q. Now, y'all had gone over there in Sandra's car.
A. Yes.
Q. Did you see Sandra when you got back home?
A. Not right off.
Q. Later on that morning you did see her, didn't you?
A. Yes.
Q. Did Michael do anything about the car with respect to the car?
A. When I was in the shower he said he was going to go wipe down the car.
Q. Did you actually see him do that?
A. No, I did not see him do that.
Q. Now, the purse, Melinda's purse, was among the things you were going to get rid of; is that right? And there was also a telephone taken out of the house. What did you do with those items?
A. Dino stopped and got gas and went --

Q. Now, who is Dino?
A. Dino is who he had put a stereo in for.
Q. His true name is Donald Harvey; is that right?
A. That's correct.
Q. So you saw him?
A. Yes.
Q. When did you first see him after the incident?
A. The police had came and picked Michael up. And as soon as they left Dino pulled up in the backyard.
Q. Now, all this happened on Sunday?
A. Yes.
Q. Do you remember about what time of day it was the police picked up Michael?
A. No.
Q. All right. Was it morning, afternoon?
A. Afternoon.
Q. And it was after that time that you saw Donald Harvey; is that correct?
A. That's correct.
Q. Was he coming to see you or did he just happen to pass by or what? How did you happen to see him?

A. He happened to be going by, I guess.
Q. Tell the jury what happened.
A. He pulled up, and I went back there. And he saw I was upset. And he asked me if Michael had anything to do with what happened to Chuck. And I nodded yes. And he said for me to get the stuff. And I got the stuff, and we went and got rid of it.
Q. Where did you go?
A. First we went to Noccalula Falls. We went and burned the bag somewhere off of Tuscaloosa Avenue and threw the phone in the woods and --
Q. How did you burn it?
A. He poured -- Dino poured gasoline on the bag and lit it.
Q. What happened next?
A. Then we went to the Gadsden State boat docks and threw the knives in the river.
Q. Then what, Marcie?
A. Then I went back, and I went next door. And the police came back. And then Dino came back. And Dino told me that Michael was going to be getting out of jail.

MR. MCWHORTER: Objection. That's hearsay.

MR. REID: Your Honor, we are not offering it for the truth of the matter asserted but to show why she did something based on being told that. We are offering it for the effect of her state of mind.

THE COURT: Go ahead.

Q. What did he say, now?
A. He told me that Michael was going to get out of jail.
Q. And what happened then?
A. He took me to his stepfather's house.
Q. Now, did the fact that Michael was getting out of jail have anything to do with your leaving the residence, the fact that he told you that he was getting out?
A. (Witness nods head affirmatively.)
Q. What did that have to do with it?
A. Michael was going to kill me.
Q. You thought that?
A. Yes.

MR. MCWHORTER: Judge, I'm going to object again. That is speculation.

MR. REID: Well, Your Honor, it

explains why she took certain actions. We are offering it to show it for the effect on her state of mind.

Q. Marcie, what happened next?

A. He took me inside his stepfather's house.

Q. Now, who is he?

A. Dino. And introduced me. And then he left.

Q. Did you stay there for some period of time?

A. I spent the night there.

Q. Did a lot of -- some unpleasant things happen to you during those days when you were basically trying to avoid Michael?

A. Yes.

Q. Did there come a time when you went to somebody to talk about what had happened?

A. Yes.

Q. Who was that person?

A. Jeff Montgomery.

Q. And how did you know Jeff Montgomery if at all at that time?

A. I had worked for him.

Q. Now, Jeff Montgomery is a local lawyer; is that right?

A. Yes, he is. I had worked for him. He was my teacher in school.
Q. What kind of school were you going to when he taught you?
A. I was going to be a paralegal.
Q. He was your teacher then; is that right?
A. Yes.
Q. That's how you knew him. Did you go to him as a lawyer or as a friend?
A. As a friend.
Q. And what happened when you got to his office? Now, what day of the week is this, first of all?
A. Tuesday morning.
Q. All right. What happened after that?
A. Jeff called the DA. And we came over here and told them what had happened.
Q. When you talked to Jeff did you tell him what had happened?
A. Yes, I did.
Q. Did you tell him what you just told this jury here?
A. Yes, I did.
Q. About those incidents that took place --
MR. HART: Your Honor, I object to

that. He's attempting to bolster the credibility of his own witness, Your Honor, and I object and move to strike that answer.

THE COURT: Sustained. Rephrase your question.

Q. Did you give a statement to anybody on that date other than Mr. Montgomery?

A. Yes, I did.

Q. And who was that person?

A. To the DA.

Q. At that time Mr. Hedgspeth?

A. Yes.

Q. Now, Marcie, did you give a statement in full to the police on or about that time?

A. Yes, I did.

Q. Within a day or so of that first contact?

A. Yes.

Q. Have you ever said anything different than what you have related to this Court here today and this jury?

A. No.

Q. Is it the truth?

A. Yes, it is the truth.

Q. What kind of work did Michael do, Michael

Reynolds?
A. He didn't work.
Q. Didn't work?
A. Uh-uh (indicating no).
Q. I will show you what has been marked for identification purposes as State's Exhibit Number 43. I will ask you if you recognize what is shown in that photograph.
A. That's Michael's hand.
Q. How do you recognize it to be Michael's hand?
A. Because of his pinky.
Q. Is there something unusual about his pinky?
A. His pinky was crooked.
Q. I'm going to ask you to look at that photograph. And I will ask you does the condition and the appearance of his hand on this photograph look similar to the condition and appearance of his hand as you recall it before the murders at 706 Tidmore Bend Road in Gadsden?
A. No.
Q. What is different about the condition of

his hand?

MR. REID: Your Honor, first of all, we will offer this as State's Exhibit Number 43 and request permission to publish it.

MR. HART: May we examine it?

THE COURT: Show it admitted.

(State's Exhibit Number 43 was offered and admitted into evidence.)

Q. It doesn't show as well as the actual photograph. But what is different about the appearance of his hand on this photograph and the way you recall the way his hands looked?

A. There is discoloration and bruising, it looks like.

Q. There is bruising on his hand?

A. It looks like there is bruising. It looks rough, like it's peeling or something.

Q. I'm going to get the actual photograph. I'm going to actually publish it to the jury. The skin -- the condition of his skin is different?

A. Yes, it is different.

Q. And you think you see a bruise on his hand there?
A. Yes.
Q. Right in the palm area?
A. (Witness nods head affirmatively.)
MR. HART: I object to leading, Your Honor.
THE COURT: Don't lead.
MR. HART: He's done it all day.
THE COURT: I said don't lead.
Q. I'm going to show you what has been marked for identification purposes as State's Exhibit Number 44. I will represent to you that is another angle of the same hand. Do you recognize that?
A. Yes.
Q. I will direct your attention to his thumb. Is there something about his thumb that is different than you recall his hand looking prior to the night of May 25th, 2005, the early morning hours of that night?
A. Yes.
Q. What is different?
A. It looks like there is a bruise -- there

is a bruise on his thumb.

MR. REID: Your Honor, we will offer State's Exhibit 44 and request permission to publish it.

MR. HART: I object until they tie up when and where it was taken, Your Honor.

THE COURT: Sustained subject to that.

MR. REID: Your Honor, I think 43 --

THE COURT: 43 is already in.

MR. REID: 44 is marked but not introduced yet.

MR. HART: I would move to withdraw 43, Your Honor, for the same grounds.

THE COURT: Well, you are a little late on that, Mr. Hart. It's already been published to the jury and already been questioned and answered about. Go ahead, sir. Just hang on to the one that has not been admitted.

MR. HARP: Judge, if you will give us one minute to locate some evidence.

THE COURT: Yes, sir. If y'all want to stand up and stretch a minute, go right ahead, folks.

MR. REID: Is it necessary to open the exhibit?

THE COURT: I don't think so.

MR. REID: I was going to introduce it through her. I need to get some of the plastic off. Charlie? I don't know if she can see it.

THE COURT: Well, if she can, she can; if she can't, she can't. We won't open it. Otherwise, we will have to break out gloves and everything.

(State's Exhibit Number 23 was marked for identification.)

Q. First of all, Marcie, I'm going to show you what has been marked for identification purposes as State's Exhibit Number 23. There is a good bit of plastic packaging on this. I'm not sure you can see it through the packaging. But if you can, I'm going to ask you to take a look at that and see if you recognize the item that's within this packaging.

A. Yes, I do.

Q. What is it?

A. It's Michael's knife.

Q. Now, is this the actual knife?
A. No.
Q. What is it?
A. It's the cover.
Q. And this is in fact the cover that you said that you threw into the Coosa River along with Donald Harvey that night; is that right?
A. Yes, it is.
Q. Does it appear to be in the same or substantially the same condition as it was at that time other than possibly some rust or corrosion?
A. Yes.

MR. REID: Your Honor, I'm not going to offer it at this time. There will be further testimony regarding this item.

THE COURT: All right, sir. Put it with the other one.

Q. Marcie --

MR. REID: You know what? I'm not going to do that through this witness, Judge. I will do it later.

THE COURT: All right.

Q. Marcie, you told us about being stabbed

through the arm and going home that night and Michael tending to your arm. Why didn't you go to the doctor?

A. Michael said I couldn't go to the hospital.

Q. Why didn't you go anyway?

A. I was scared to go.

Q. Did you pretty much do everything Michael told you to do back then?

A. After that, yes.

Q. Stand up, if you don't mind. Pull up your sleeve, if you don't mind. Show that jury the scar on your arm.

A. (Witness complies.)

Q. Is that where Michael Reynolds stabbed you that night?

A. Yes, it is.

Q. What do you think of every time you look at that arm?

A. I'm scared to death.

Q. What about that baby in that house?

A. She shouldn't have died.

Q. Did you know she was dead when you left the house?

A. No.

Q. Was there something that made you think that he left her alive?
A. I think -- I just -- I just couldn't think about it.
Q. Why did you think he wanted you to take the telephone?
A. So he wouldn't kill her, so she couldn't call for help.

MR. REID: Thank you, Marcie.

THE COURT: Your witness, gentlemen.

MR. HART: Your Honor, we have been going right at an hour.

THE COURT: Yes, sir. That's a good idea.

Ladies and gentlemen, let's take about fifteen minutes to walk around and get you something to drink. Do not discuss the case with each other, and we will come and get you just shortly.

(Whereupon a break was taken, 2:57 p.m.)

THE COURT: All right, Joseph, bring them back in.

(All parties present; jury present, 3:14 p.m.)

Please be seated. Are you ready, Mr. Roberts?

MR. ROBERTS: Yes, sir.

THE COURT: Go ahead, sir.

CROSS EXAMINATION

BY MR. ROBERTS:

Q. Ms. West, my name is Paul Roberts. I'm one of the attorneys for Michael Reynolds. You stated that you went to Jeff Montgomery's office and then gave a statement to the police; is that correct?

A. Yes.

Q. Do you know if that statement was typed out for you?

A. Yes.

Q. Who typed that statement out?

A. I don't know.

Q. Was it typed at Jeff Montgomery's office or was it typed by the police?

A. I believe by the police.

MR. ROBERTS: May I approach, Your Honor?

THE COURT: Yes, sir.

Q. I'm going to show you what has been marked

as Defendant's Exhibit Thirteen. Is that your signature right there?

A. Yes

Q. What does that say?

MR. REID: Your Honor, may we approach?

THE COURT: Yes, sir.

(Whereupon the following proceedings were held outside the hearing of the jury:)

THE COURT: Wait until Mr. Hart gets up here. I thought we've already covered this issue about the statement and the statement could be used to impeach her if she said something different than the state's witness.

MR. ROBERTS: Okay. That's fine.

THE COURT: Just wait.

MR. ROBERTS: I will address it then.

THE COURT: I haven't found anything inconsistent so far so just wait and see what happens.

Q. (By Mr. Roberts) We are going to stay away from that for a minute. The morning of May 24th, that was a Saturday, correct?

A. Yes.
Q. And you state that these -- these matters happened early the next morning, Sunday morning?
A. Yes.
Q. And that Saturday, how many times did you go over to Dino's house, Donald Harvey's house?
A. I recall going to his house --
Q. Say that again.
A. I believe we went twice.
Q. Did he come to your house or Mr. Reynolds' house at any time during that day?
A. That day -- that's how we knew to go over there. He came over there first.
Q. Where does Dino live?
A. He lived off of South 11th, going toward South Gadsden.
Q. Is that close to the old Gadsden High School?
A. Yes.
Q. When you were back at your house, did you and Mr. Reynolds do drugs and have sex on several occasions?
A. Yes.

Q. Did Dino at any time after dark show back up at that house?
A. No.
Q. Sandra Roberts showed up that evening. Did she do any drugs with y'all?
A. I believe she did.
Q. Okay. You state that at some time that evening -- you state that Sandra and Michael went to go get drugs; is that correct?
A. That's correct.
Q. Would it not be true that only Sandra went to get drugs that evening?
A. As I recall, Sandra and Michael went.
Q. Did he return that evening and do some more drugs that evening?
A. Yes.
Q. Is it not true that -- Well, strike that.
At any time did you and Sandra leave that evening?
A. No, we did not.
Q. Is it not true the defendant told you to go to Dino's to get some more drugs?
A. No, that's not true.
Q. You stated that at some point in the

evening you went to try to go to the drive-in to get some -- you stated to get some money.

A. That's correct.

Q. Was it not -- was it not to go get some drugs?

A. No, it wasn't.

Q. You stated you went to the drive-in to get some money but you went back to your house to get some more money?

A. Right.

Q. Is it not true that you have told the police that evening you were going to the drive-in to get drugs?

A. As I recall, he was going to see Jerry to get money from her.

MR. ROBERTS: Your Honor, for just a second, please.

THE COURT: Yes, sir.

(Discussion held off record.)

Q. Again, I will ask, did you ever speak to Detective Roger Dale and Detective Mark Harris and state to them that you had gone to the drive-in movie to see about getting more drugs?

A. As I recall now, we were going to get money. I don't -- which with the money we were going to get drugs.
Q. And you stated that you had to turn around to get money at that time; is that correct?
A. Gas money, yes.
Q. Is it true that Mr. Reynolds had gotten some money from his father that day?
A. I don't recall.
Q. You don't recall him getting $500 from his father that day?
A. No, sir.
Q. Do you recall a -- had he been working on someone's house or something like that at that time?
A. I know he did a porch next door.
Q. You were asked earlier if he was working. Would you not consider that working?
A. That was -- no. That's not -- he didn't have a regular job, no. He did that like one day.
Q. Do you recall that someone came that day to give him $150 for work that he had done?

A. I don't recall.
Q. Did you go to someone named Cookie's that evening?
A. I did not.
Q. Again, you don't recall telling Detective Roger Dale and Detective Mark Harris that you went to someone's named Cookie to get more drugs?
A. No. Sandra and Michael went to Cookie's.
Q. Do you know Cookie?
A. No, I do not.
Q. Do you know where she lives? I assume she's a woman.
A. I have no idea. Around the Tuscaloosa Avenue area somewhere.
Q. Do you recall what you were wearing that evening?
A. No, I do not.
Q. Do you recall telling Detective Roger Dale and Detective Mark Harris that you were wearing blue jeans and a dark blue T shirt?
A. Yes.
Q. Do you remember what Michael was wearing that day?

A. I believe he was wearing a T shirt and shorts.
Q. Earlier in that day what was his wearing?
A. I don't recall.
Q. Was he wearing coveralls? Do you remember that?
A. I don't know. I don't remember.
Q. When you talk about later on that evening, is that when you say that he was wearing shorts and a shirt?
A. Correct.
Q. And you stated that he was wearing glasses?
A. Correct.
MR. ROBERTS: May I approach?
Q. You were shown State's Exhibit Fifty. And that was the pictures of who you say is Michael.
A. Yes.
Q. And he is wearing his glasses?
A. Yes.
Q. What else is he wearing on his head?
A. Bandana.
Q. Can you tell by that picture how many bandanas in those four pictures he was

wearing?
A. No.
Q. Can you tell that any of them were different?
A. Yes.
Q. Do you have any idea how many bandanas he might have?
A. No.
Q. Did he often wear a bandana?
A. At that time he did; but then, no.
Q. Do you recall -- when you state that Sandra and Michael were gone to Cookie's and came back, do you recall what time of the evening that was or into the morning?
A. No, sir.
Q. If I said it was possibly around 12:30 a.m., would that sound about correct?
A. Yes, sir.
Q. Do you recall -- what time do you state that you and Michael got to the Martins' house?
A. I was thinking it was somewhere around 2:00 a.m.
Q. When you left out that evening, you were

driving?
A. That is correct.
Q. How long did y'all drive around before going to the Martins' house?
A. Not long.
Q. Did y'all go near Gaston High School that evening?
A. I don't recall.
Q. What route did you take to the Martins'?
A. Down Albert Rains and through North Gadsden.
Q. Okay. Where Mr. Reynolds' father's house is, that is right off of 12th Street; is that correct?
A. I'm not sure. I'm not sure of the street addresses.
Q. You understand where McDonald's is?
A. Yes.
Q. This way, I think. And is it across the road going toward Tuscaloosa Avenue?
A. Right. Across from the Old Agricola shopping center.
Q. And that evening would y'all have gone out to Meighan Boulevard to go that way?
A. I believe so.

Q. Would you go down to -- right before you go over the river and turn down to get onto Rainbow Drive?
A. I believe so.
Q. And Tidmore Bend is -- where the Martins lived is how far you believe from --
A. I have no idea.
Q. Would you say it's less than five miles?
A. I guess. I have no idea how far it is.
Q. How many times have you driven out there?
A. A few times.
Q. You don't recall?
A. (Witness shakes head negatively.)
Q. Do you recognize that Gaston High School is pretty far beyond Tidmore Bend?
A. It's past the red light.
Q. And Tidmore Bend is the turn at the red light?
A. Correct.
Q. Would you state that you went past Tidmore Bend that evening?
A. We may have. I really don't remember the exact route.
Q. Where would you have been going if you were around Gaston High School?

A. To Chuck's -- he would go different ways.
Q. But you state that evening -- you state that you went down Meighan Boulevard and then down to Albert Rains to go straight to North Gadsden?
A. Correct.
Q. Had you ever been to Chuck's late at night before?
A. I don't recall.
Q. Did you have any understanding that you weren't supposed to go around Chuck's when his wife was home?
A. Melinda did not like Michael. But we had been there before when she was there.
Q. When y'all got in the car that evening and drove around or drove down to Tidmore Bend, did you see Michael carrying a knife at that time?
A. He took it with him to get in the car.
Q. If you gave a statement to Detective Roger Dale and Detective Mark Harris, do you know why you would leave that out, that he -- that I saw him with a knife when we were going to the car?
A. No.

MR. REID: Your Honor, I object to her being impeached with something that she didn't write or type.

THE COURT: Rephrase your question.

Q. Did you tell the police that evening that you saw Michael with a knife before y'all got in the car?

A. When?

Q. When you spoke with them several days later.

A. To the police?

Q. Yes.

A. Yeah. I told them he had a knife.

Q. Did you tell them he had a knife when you got in the car?

A. I don't -- it was the same time -- I mean --

Q. And you stated when he got out of the car that evening you stated that he had the sword and the sheath in his hand?

A. Correct.

Q. And you said before that he had told you that he was going to go get money?

A. Correct.

Q. So you knew he was going to go rob

somebody?
A. Well, he often -- he would steal stuff and trade it for money or drugs.
Q. Do you remember telling the police that you took that that he was going to rob them?
A. Yes.
Q. So you believed he was going to rob them?
A. Yes.
Q. And you stated that Michael was barefooted?
A. Yes.
Q. Was he barefooted all day long?
A. I don't recall.
Q. Do you remember if he was wearing shoes at any time during the day?
A. He wore shoes over to Dino's house to put in the stereo.
Q. When you state that you saw Michael going up to that door and Chuck waved at you, you knew he had a knife with him, didn't you?
A. Uh-huh (indicating yes).
Q. Did you know something was going to happen?

A. No.
Q. The times you had been there before with Michael, did he carry a knife in with him?
A. Not a knife.
Q. You stated after that, not long after that you heard some banging noises. What did you do at that point?
A. I heard Melinda screaming, and I ran into the house.
Q. Were the banging noises and the screaming happening at the same time?
A. Yes.
Q. Do you remember telling the police that you heard the banging noises and later you heard Melinda screaming?
A. I don't recall.
Q. Do you remember the layout of the Martins' house?
A. Yes.
Q. When you pulled in that evening you were driving, correct?
A. Correct.
Q. You pulled in. Was there a carport there?
A. Yes.
Q. Did you pull into the carport?

A. No.
Q. Did you pull up as if you were heading towards it but stopped short of it?
A. Yes.
Q. And where did you say that Michael went in the house that evening?
A. The kitchen door.
Q. Is that right inside the carport on the side of the house?
A. I believe so.
Q. And that door walked straight into the kitchen?
A. Yes.
Q. Do you recall anything that was -- strike that.

You state that you went in and you saw Chuck on the floor?
A. Yes.
Q. Did you check his pulse?
A. No.
Q. Did you do anything to see -- did you yell at him, Chuck, are you okay? Did you say wake up?
A. No.
Q. Did you go back to your car and call the

police?
A. No.
Q. Did you have a cell phone on you?
A. No.
Q. Did you see a phone in the room?
A. No.
Q. How long did you stay there around Chuck?
A. Not long. I went to -- Melinda was screaming, and I went to the back.
Q. Why didn't you before Michael -- before you stated that Michael went into the house. Why didn't you try to stop him then?
A. Before he went into the house?
Q. Before he went in.
A. There was no reason to stop him, I didn't think.
Q. Other than him carrying a long sword?
A. No. I mean, he would carry stuff and trade it or sell it for money all the time. And I wasn't thinking anything was any different than any other time.
Q. When you heard banging and after that you heard the screaming, did it occur to you that something was happening?

A. I figured something was wrong.
Q. And you state that you went back into the back and Melinda was there being stabbed; is that correct?
A. That is correct.
Q. What did you say at that point?
A. I believe I told him let's go as I was going between them.
Q. Did you jump on her body?
A. No.
Q. Did you grab him by the shoulder or by the arms to stop him?
A. I was going between them.
Q. Do you remember telling the police that you reached toward Michael?
A. I don't recall.

MR. ROBERTS: Excuse me, Your Honor.

(Whereupon a discussion was held off record.)

Q. After all this was over did you write any statements in your own hand as well?
A. I don't know if I did or not.
Q. The only statement that you have signed, that's a statement that was -- a statement that was typed for you?

A. I believe so.
Q. And do you remember when you signed that statement?
A. No, I do not.
Q. You stated that you had gone to the police. How many days after did you go to Jeff Montgomery's office?
A. It was on Tuesday morning.
Q. And this happened Sunday morning?
A. Correct.
Q. And did you go to the police that day with Mr. Montgomery?
A. Yes, I did.
Q. Did you go back to the police the next day with Mr. Montgomery?
A. I don't recall the times. I mean, I went several times.
Q. Did you go one day and give a statement and then go the next day and sign it, or did you give a statement and sign it the same day?
A. I don't remember.
MR. ROBERTS: May I approach, Your Honor?
THE COURT: Yes, sir.

Q. Again, I'm going to show you what has been marked as Defendant's Exhibit 13. Does that state that's an advice of your rights?
A. Yes.
Q. Is that your signature on the bottom?
A. Yes.
Q. What's the date of that?
A. 5/28/03.
Q. And if Sunday was the 25th, 26th, 27th, 28th, would that have been a Wednesday?
A. Sunday was what day? I'm sorry.
Q. Sunday was the 25th?
A. Tuesday, right, yes.
Q. If Sunday is the 25th, the 26th would be Monday, Tuesday, Wednesday; is that correct?
A. Right.
Q. I'm going to show you -- and that's signed by some other people. Do you recognize any of those signatures?
A. Roger Dale and Jeff Montgomery and Mark Harris.
Q. I'm going to show you another advice of rights. Is that your signature at the

bottom of it?
A. Yes, it is.
Q. What is the date of that?
A. 5/29/03.
Q. And on the first one, Defendant's Exhibit 13, is the time 2:15 p.m.?
A. That's correct.
Q. And on Defendant's Exhibit 14, is it 1:53 p.m.?
A. That's correct.
Q. Does it also have some other signatures on it?
A. The same signatures, it looks like.

MR. ROBERTS: Judge, I'd move to have these admitted as defendant's exhibits.

MR. REID: I haven't seen which documents are being marked and offered.

THE COURT: Are you talking about just the advice of rights?

MR. ROBERTS: Yes, sir.

MR. REID: No objection.

THE COURT: Show them admitted.

(Defendant's Exhibits Numbers 13 and 14 were offered and attached as exhibits hereto.)

Q. And you state that sometime during that time you gave a statement, correct?
A. Correct.
Q. I'm going to ask you to look at the last page here. Is that your signature?
A. Yes, it is.
Q. Do you anywhere see a date on this? It's a three-page document, correct?
MR. REID: Your Honor, think that's a different exhibit. I think we need to note the exhibit number for the record.
MR. ROBERTS: This is Defendant's Exhibit 15.
Q. Do you show a date anywhere on that, or do you see a date?
A. (Witness shakes head negatively.)
Q. Do you know what date you might have signed this?
A. No, sir.
Q. Do you recognize it as the statement you signed when you went to the police?
A. Yes, sir.
Q. I'm going to go back a little bit and ask you. You stated that Sandra and Michael had gone out to buy drugs that evening?

MR. REID: Your Honor, may we approach?

THE COURT: Yes, sir.

(Whereupon the following proceedings were held outside the hearing of the jury:)

MR. REID: Your Honor, the document -- this particular Exhibit Number 15, Defendant's Exhibit 15 has been marked. And Ms. West is being questioned from the document. What I'm saying is I don't think the proper predicate has been laid so far. It's been marked and he has been asking about a document that's not in evidence. I don't think the predicate has been laid. I know the whole entire document is not due to be admitted anyway. Some portions should be redacted. It is a three-page document.

THE COURT: At this point in time has she testified to something inconsistent than what's in her statement?

MR. ROBERTS: Yes.

MR. HARP: If he isn't going to offer it, then he needs to quit asking her about

it.

MR. ROBERTS: I'm going to address it.

MR. REID: Asking her about inconsistent statements in the document is not the proper way to impeach her.

MR. HART: Your Honor, I think if he asks her did you say this and then you say do you recall telling Officer Dale -- well, let me show you this typed statement you signed; what does it say, I think he can show it to her and ask her to read what she wrote. That's the way to impeach her. You show her the written document she signed and let her read it.

MR. REID: He didn't ask her if she read the document, did she read it before she signed. He didn't ask her any of those questions.

THE COURT: I don't think he has laid the proper foundation.

MR. HART: Well, he needs to show it to her because he asked if these are her initials, each of these pages, ask her if she read it, ask her if she signed the

last page and then put initials on pages one and two. But they gave it to us and it is not dated. They never told us when she signed it.

THE COURT: The fact that the document is not dated -- she said she didn't know when it was signed.

MR. HARP: I want to keep him from going into it without doing it right.

THE COURT: Either lay the proper foundation or move on.

(All parties present; jury present.)

Q. (By Mr. Roberts) Ms. West, you stated that you recognized this document?

A. Yes.

Q. Is that your signature at the bottom of this page?

A. My initials.

Q. Would you know who the initials -- Would you know whose initials those are?

A. I would guess Jeff Montgomery.

Q. And that is labeled page one of three, correct?

A. Correct.

Q. And the next page is labeled page two of three. Is that your initials at the bottom of it?
A. Yes.
Q. Again, there is a J M at the bottom of that also. And then it says page three of three. And you stated that that is your signature and it looks like the signature of Detective Roger Dale, Mark Harris, and Jeff Montgomery?
A. Yes.
Q. Did you read this document before you signed it?
A. I'm sure I did.
Q. To your knowledge was it -- this wasn't typed by you, correct?
A. Correct.
Q. And to your knowledge after reading it was it the true and correct statement that you wished to make at that time?
A. Yes, sir.
Q. And who was present when you -- were the only people present when you signed that the ones who signed at the bottom with you?

A. I don't recall.

MR. HARP: Judge, if he wants to offer it, we're not going to object to it.

THE COURT: Are you offering the document?

MR. ROBERTS: I would offer Defendant's Exhibit 15, Your Honor.

MR. HARP: No objection.

THE COURT: Then show it admitted.

(Defendant's Exhibit Number 15 was offered and admitted into evidence.)

Q. You stated earlier that Sandra and Michael went out to go get drugs; is that correct?

A. Correct.

Q. I will try not to write on it. In this statement did you not state it was Sandra or Michael had gone out to buy drugs?

A. Yes, I did.

Q. Was it Sandra or Michael or was it Sandra and Michael?

A. One of them went or both of them went. I'm not -- the way I remember it, both of them went one time and she went another time.

Q. I also ask you to see where it states Michael and I left in Sandra's car to go see Jerry. Did you state earlier that only Michael went to go see Jerry?
A. No.
Q. No, you didn't say that. Works at the drive-in; we were going to see her about drugs. Did you not earlier state that you were going to see her about money?
A. Yes, I did.
Q. And having seen this, do you recall if it was going to see drugs or going to get drugs or going to get money?
A. I don't recall. But if we were going to get money from her, it would have been for drugs.
Q. And you wrote and signed to this that Michael told me we were going to go to Chuck's to get his money; I took it Michael was going to rob him. Is that correct?
A. Correct.
Q. And this -- in your statement you stated that -- that it was around 12:30 a.m. when you left the house. And then you got to

Chuck's at 2:00. Does that sound about right?

A. No.

Q. Did you go directly to Chuck's house?

A. When we left the house to go to see Jerry and we forgot the gas money, we went back to the house to get the gas money. I'm not sure of the times now. They may have gone and gotten more drugs then. I'm not sure. I can't remember everything right now.

Q. You stated that Sandra and Michael went to Cookie's or may have gone out to get more drugs and that you did not go?

A. (Witness nods head affirmatively.)

Q. This is your statement. Does it not state that we then went by Cookie's and got more drugs and went home, shot the drugs and had sex?

A. Uh-huh (indicating yes).

Q. But you state you had never been to Cookie's?

A. I'm sorry. Yes.

Q. So you have been to Cookie's?

A. Yes, I have, I guess.

Q. You stated earlier that the screaming that you heard and the banging were at the same time; is that correct?
A. I believe they were.
Q. I will show you your statement starting here: "Not long after Michael went inside I heard some loud banging noises and later I heard Chuck's wife screaming." Was that -- and you read this statement just a few days after this event, correct?
A. Correct.
Q. Did you hear the screaming and the banging at the same time or were they one after the other?
A. I guess it was one right after the other.
Q. And you stated that you had tried to get in between Michael and Melinda; is that correct?
A. (Witness nods head affirmatively.)
Q. Then you said, "Michael, let's go." I will ask you if that -- that in your statement it states, "I reached towards Michael, and he turned and asked me what are you doing here." Did you reach toward Michael or did you reach between them?

A. I thought that I reached -- I was going between them.
Q. Were you reaching toward Michael to say let's get out of here, we need to go?
A. Yes. I was trying to get him off of Melinda.
Q. Did you check Melinda and see if she was okay?
A. No, I did not.
Q. And you state that that's the time when you got cut?
A. I believe so.
Q. Did you ever tell the police -- strike that.

You stated that Michael told you to get the phone?
A. That's correct.
Q. Michael told you to get the purse?
A. Correct.
Q. Did Michael get the purse and hand it to you?
A. I don't recall.
Q. Did Michael get the phone and hand it to you?
A. No.

Q. So you got those on your own?
A. Correct.
Q. Did he threaten you and say I am going to kill you if you don't grab the phone?
A. No.
Q. And you stated earlier that he handed you the sword and the sheath at that time?
A. I believe so, yes.
Q. And you stated he handed you a kitchen knife; is that correct?
A. Yes.
Q. I'm going to ask you from your statement if you stated that he handed me the sword and sheath, told me to get the purse and go to the car. Is that what it says right there?
A. Correct.
Q. It doesn't address an additional knife, does it?
A. No, sir.
Q. But you state that he gave you two knives and a sheath?
A. Yes, sir.
Q. Did you see him with another knife that evening?

A. I don't recall.
Q. Instead of grabbing the phone, did you think about calling the police from right there? You had the phone in your hand.
A. No, sir.
Q. Did you do anything to try to stop Michael?
A. (Witness shakes head negatively.)
Q. Did you do anything to get the child out of the room?
A. No, I did not.
Q. The first time you walked to -- passed Chuck to go into the back, where do you believe you walked?
A. Where did I walk down the hall?
Q. Do you recall how Chuck was laying in that kitchen?
A. I believe he was laying down.
Q. Did you step over Chuck, or did you walk around Chuck?
A. I believe I stepped over Chuck.
Q. When you came -- after you took the purse and you took the phone and you took a knife or knives, how did you walk back that time?

A. Back down the hall and over.
Q. Where do you -- you said before that you leaned against the wall. Where was that?
A. That was in the hall.
Q. Was it down the hall, directly across from that room, the same side of that room?
A. I don't recall.
Q. Do you recall how you leaned into it?
A. No, sir.
Q. Did you put your arm up into the wall?
A. I don't remember.
Q. When you walked back down, did you step over Chuck at that time?
A. I believe so.
Q. And you said that you got woozy or something at that time and leaned against the counter. What counter did you lean against?
A. I believe the kitchen counter.
Q. To get a lay of the land as to where you leaned against, I'm going to -- if you came in the kitchen door and Chuck was right in front of you, do you remember if there was maybe a refrigerator right beside him?

A. Yes.
Q. Maybe a counter right there?
A. I don't recall.
Q. If I told you that there was a counter that went in kind of a U shape and -- would you be able to tell me where you went to go lean?
A. Across the room.
Q. Let me show you what is marked as Defendant's Exhibit 25. If the hallway came out right here, can you tell me where you leaned?
A. I believe over in this area.
Q. Is that a -- do you see a drawer open in that area?
A. Yes.
Q. Do you recall this to be the kitchen of the Martins?
A. I know that it is.
MR. HARP: Can I see the picture, Paul?
MR. ROBERTS: Sure.
Q. I don't mean to show you again. But is that Chuck laying there and the gas can? Does it look like a gas can to you?

MR. REID: Your Honor, we can't quite hear the question. Speak up just a little bit.

Q. And you state that you came and leaned over here?

A. I believe so.

Q. Was that drawer open when you leaned over there?

A. I don't recall.

Q. Did you look in that drawer?

A. I don't --

Q. Do you happen to know what's in that drawer?

A. No, I don't.

Q. Again, to your knowledge does that correctly depict Chuck's kitchen at that time, that evening?

A. (Witness nods head affirmatively.)

Q. Less the markers.

MR. ROBERTS: Judge, I would move to submit this.

MR. REID: We have no objection, Judge.

THE COURT: Show it admitted.

(Defendant's Exhibit Number 25

was offered and admitted into evidence.)

MR. ROBERTS: And ask that it be published to the jury.

Q. I'm going to show you what has been marked as Defendant's Exhibit 27. Does that again look like the kitchen of Chuck's?

A. Yes.

Q. Can you tell me if that's the same drawer that was open before?

A. I imagine it is.

MR. REID: Your Honor, I object to her being asked to speculate. He asked her if she knew if it was and she said she imagined that's what it is.

THE COURT: Do you know, ma'am, whether it was the kitchen or not?

THE WITNESS: Yes, it is the kitchen. I guess it's the same drawer.

Q. Would you say that's the same drawer?

A. Yes.

Q. Can you tell what's in that drawer?

MR. REID: Your Honor, the basis for my objection was for her to be called upon to testify what's in the drawer with no

statement that she looked in it, but the second time I'm not going to object to it.

THE COURT: The photograph speaks for itself. Show it admitted. Move on.

(Defendant's Exhibit Number 27 was offered and admitted into evidence.)

Q. Did you look in the drawer that evening?

A. No.

Q. Did you grab something out of that drawer?

A. No, sir.

Q. Do you see steak knives in that drawer?

A. I see a steak knife.

Q. And that's exactly where you went to go lean, correct?

A. Yes, sir, on the counter.

Q. Again, I showed you Defendant's Exhibit 26 with a closer-up view of that same drawer; is that right?

A. That's correct.

MR. ROBERTS: Judge, I would move to admit 26 and 27 and ask them to be published.

THE COURT: They are admitted. Move along.

(Defendant's Exhibit Number 26 was offered and admitted into evidence.)

Q. You went outside that evening. You went out after that?

A. Yes.

Q. You crawled through the passenger side. Did you leave the door open when you crawled through?

A. I don't know if I did or not.

Q. I'm again showing you your statement. Starting right here. It says, "I got in the car from the passenger side, crawled in the driver's seat and left the passenger door open."

A. Correct.

Q. And you state that later Michael came and -- did he come out to the car at that time again? Did he stick his head in the car and say something to you?

A. Yes.

Q. And do you remember if you state that he had a knife when he left the car?

A. Yes, he did. I believe he had a knife.

Q. Did you see him grab the knife?

A. I don't remember watching him pick it up.
Q. Okay. Where did you place the knives?
A. In the passenger side.
Q. In the floorboard?
A. In the floorboard or in the seat -- probably in the floorboard.
Q. And if he leaned through the door that was open and reached down into that, you didn't see him pick up a knife?
A. I don't remember looking at him. I mean, as far as watching him --
Q. What were you looking at?
A. I was just sitting there.
Q. You were not -- did you ask him at that time we need to go?
A. No.
Q. Did you tell him I can't believe you did that, I'm going to call the police?
A. No.
Q. Did you say I've got the keys, see you later?
A. No.
Q. And you state that you saw him go out with a knife. And what did you think?
A. I thought he was going to kill Savannah.

Q. Did he take the keys with him?
A. No.
Q. Did you get back out of the car?
A. No.
Q. Did you run to stop him?
A. No.
Q. When you had the knife, the sheath and the other knife, was the knife -- was the -- what we are calling the sword, the longer knife, was it bloody?
A. I don't recall.
Q. Did you clean it?
A. No.
Q. And you set it in the floorboard?
A. I believe so, yes.
Q. Was it inside the sheath?
A. I don't know.
Q. Was the other knife bloody?
A. I don't know.
Q. And again, you set that in the floorboard?
A. Correct.
Q. Did you ever see any blood in that floorboard?
A. I never -- no.
Q. You stated earlier Michael went out to

clean the car. Did you see any blood after he cleaned the car?
A. No.
Q. Did you ever see any blood in that floorboard?
A. No.
Q. Was the purse and the phone -- you state that that was also in the floorboard?
A. Correct.
Q. At any time did you move any of those items?
A. I believe the phone was in the back seat. I don't know.
Q. Did you place it there?
A. I don't recall placing it there.
Q. But you're the one that brought it out of the house from what you say?
A. Correct.
Q. You stated earlier that he came back to the car again?
A. Correct.
Q. And then he went back inside again?
A. Correct.
Q. How many times did he go back and forth do you say?

A. I believe twice.
Q. And you state that's when Michael said -- did Michael tell you you had been cut, or did you notice you had been cut?
A. Michael told me I had been stabbed.
Q. How long had it been since -- how long had Michael been in the house after he had gone in?
A. I have no idea.
Q. Was it a little cut?
A. No. It was all the way through my arm.
Q. All the way through your arm. You didn't notice it at the time that it happened?
A. No, sir.
Q. Did you tell the police I got stabbed because I was trying to stop him?
A. No, sir.
Q. I want to show you what has been marked as Defendant's 28, 29 and 30. Do you recognize that as your arm that was cut?
(Defendant's Exhibits Numbers 28, 29 and 30 were marked for identification.)
A. Yes, I do.
Q. Do you recognize which side of the arm it

is?
A. I believe it's the inside of my arm.
Q. Can you tell -- does that depict the way your arm looked that night after being cut?
A. (Witness nods head affirmatively.)
Q. Is that the top side of your arm?
A. Yes.
Q. Does that depict the way that your arm was cut?
A. Yes.
Q. And it's in one side and out the other?
A. Correct.
Q. Do you know which side it went in and which side it came out?
A. I imagine -- I believe it went in the top side and came out the bottom side. I'm not sure. I don't know.

MR. ROBERTS: Judge, I would move to admit Defendant's Exhibit 28, 29 and 30.

THE COURT: Show them admitted.

MR. ROBERTS: I would offer them to the jury.

THE COURT: Yes, sir.

(Defendant's Exhibit Number 28,

29, and 30 was offered and admitted into evidence.)

Q. So you don't know how long it had been since you had been stabbed. You didn't even know you were stabbed, do you, or you say you don't?

A. No, sir.

Q. Do you know how long it had been before someone else told you you had been stabbed?

A. No, sir. When he got in the car.

Q. This being 30 seconds, a minute, a couple of minutes?

A. I don't know, sir.

Q. And you just didn't feel that. You didn't know you had been cut?

A. No, I did not know I had been stabbed.

Q. At any time did you hold Melinda Martin and get stabbed in the arm?

A. No, I did not.

Q. That evening you said that you went to a dirt road?

A. No, sir.

Q. Did you not state to the Court earlier that Michael took you to a dirt road?

A. No, sir.
Q. Or was going to take you down a dirt road?
A. No, sir. He wanted me to drive down a dirt road.
Q. Where was that dirt road?
A. I'm not sure where it is. We had been down it before going through North Gadsden, going from his dad's to North Gadsden.
Q. What route do you say you took that night to go back home?
A. Down Meighan.
Q. The same way you came?
A. Yes, sir.
Q. And where is that dirt road as to somewhere in that drive?
A. I'm not sure how to get to it, sir.
Q. But you didn't go there?
A. No, sir.
Q. You didn't drive to the police department?
A. No, sir.
Q. And you got home. And you state that Michael took out the purse. You state that you took a shower?
A. Correct.

Q. Is it not true that you took a shower the next morning?
A. No, sir.
Q. You stated that Michael bandaged up your arm?
A. Correct.
Q. Is it not true that he told you you needed to go to the ER?
A. No, sir.
Q. That you needed to go to the doctor because that was pretty bad?
A. No, sir.
Q. Why did you not go to the doctor?
A. If I had gone to the doctor -- he would have killed me before he let me go.
Q. When the police came and took him away, did you go to the doctor?
A. No, sir.
Q. Did you ever tell anybody it was a dog bite?
A. Not that I recall.
Q. You stated that Michael got in the shower that evening?
A. Correct.
Q. Is it not also true that he didn't have a

shower until that next morning?
A. That's not true.
Q. And you state that he told you to take off your clothes?
A. Correct.
Q. Did he tell you why you needed to take off your clothes?
A. To get in the shower.
Q. Did he tell you why he needed to seclude those clothes from anything else?
A. He put mine and his clothes in a bag.
Q. But from what you say your clothes would have only had your blood on them; is that correct?
A. Correct.
Q. But you think that getting rid of your clothes was necessary?
A. At that point he told me to give him my clothes, and I did.
Q. Did you have a pair of shoes to give him?
A. I did have on shoes.
Q. Did he take those from you?
A. Yes.
Q. And you state the next morning everything was fine, every bit -- he was acting

normal?
A. Correct.
Q. And did you go do something that morning?
A. Walked to the service station.
Q. Did someone pick you up there?
A. Dino picked us up on our way.
Q. Did you or Michael say you will never guess what happened last night?
A. No.
Q. Neither one of y'all told him anything in regards to anything that happened?
A. No.
Q. Did he take y'all home after that?
A. No.
Q. Did y'all walk back?
A. Yes.
Q. Later that day the police came by and got Michael?
A. Correct.
Q. Did you go to the police at that time?
A. No, sir.
Q. Did you not feel safe when he was in custody?
A. No, sir.
Q. In fact, he never got out; from that day

until now he has never been out?
A. Correct.
Q. You waited two, three, four days to go talk to an attorney?
A. Correct.
Q. Did you feel that you were going to be getting in trouble for this?
A. I didn't know what would happen.
Q. When Michael was taken into custody did you call anybody?
A. No.
Q. Did you ask anybody to take you to the police?
A. No.
Q. And Dino came back by that day?
A. Yes.
Q. You state that he said -- let me find it now. You state that Dino asked you if Michael had done something that happened at Chuck's?
A. Correct.
Q. Is that what he asked?
A. Correct.
Q. And you simply nodded?
A. Correct.

Q. Did you tell him you needed to go to the police?
A. No.
Q. Did you grab the knives on your own and grab the clothes and say let's go burn them?
A. I had already taken them outside. And I don't remember if I got them or if Dino said for me to get them.
Q. At that point had there been any reason for Dino to know that there were clothes and knives that needed to be gotten rid of? Because at that point all you had done is nodded to him; is that what you stated?
A. Correct.
Q. So if you stated that Dino told you to get the knives and the clothes, how did he know you had the knives and the clothes?
A. I don't know.
Q. And would you agree that you told the police that, that he told me to get the knives and the clothes?
A. Correct.
Q. And were you -- you went to go get rid of

that stuff?
A. Correct.
Q. Was that to help Michael?
A. No, sir.
Q. Was that to help you?
A. If I hadn't gotten rid of it and he came home he would have killed me.
Q. Do you not think that would have been the best way to keep him in jail, was to provide that to the police?
A. I don't know.
Q. That would have been the best way to keep you safe?
A. After I went to the police I did everything I could to help them. I told them where the stuff had been burned and where the phone was.
Q. You told them where you had destroyed the clothes?
A. Correct.
Q. And where you had thrown the knives into the river?
A. And retrieved the phone.
Q. And where you had thrown the phone into the woods?

A. (Witness nods head affirmatively.)
Q. And you didn't do that to protect Michael?
A. (Witness shakes head negatively.)
Q. That next Monday morning did you get up and go to the police?
A. No, sir.
Q. Did you get up and go to Jeff Montgomery's office?

MR. REID: I'm going to object. This has been asked and answered. She told us what day she went.

THE COURT: Move along, sir.

Q. You stated that you waited until Tuesday to go talk to an attorney?
A. Yes, sir.
Q. Why did you go to an attorney and not the police?
A. I had -- in paralegal school he was my teacher. I had worked for him. He had done my divorce. And that's where my sister and dad -- when they came and got me where they took me to.
Q. And I'm not going to ask you what your attorney told you, because that's privileged. But did your attorney call

the district attorney's office that day?
A. Yes.
Q. And you went up and gave a statement?
A. Correct.
Q. And you gave a statement because you thought you needed to keep Michael in jail, or did you think I've got to get out of trouble?
A. Michael needed to stay in jail.
Q. But you waited until Tuesday to do that?
A. Correct.
Q. Have you been charged with capital murder in this case?
A. No, sir.
Q. Have you been charged with murder in this case?
A. No, sir.
Q. Have you been charged with assault in this case?
A. No, sir.
Q. Have you been charged with attempted murder in this case?
A. No, sir.
Q. Have you been charged with hindering prosecution in this case?

A. Yes, sir.
Q. Have you made any deals with the district attorney's office for your testimony today?
A. No, sir.
Q. When you went to Jeff Montgomery's office did you think I've got to talk to an attorney because otherwise I'm going down?
A. No, sir.
Q. When you talked to Jeff Montgomery did you not think I was there, my blood was there, I may have footprints there, fingerprints there, I'm in trouble, I need to talk to an attorney?
A. No, sir.
Q. Isn't it true that that night you and Sandra were out?
A. No, sir.
Q. And that Michael was at home asleep?
A. No, sir.
Q. And that you came home and you woke him up and said something went wrong, Chuck is dead?
A. No, sir.
Q. Isn't it true that Michael got up and in

his gray shorts and his gray shirt, barefooted, threw on his glasses and took you outside to talk to you about what had happened?

A. No, sir.

Q. He didn't have his bandana on that night?

A. No, sir.

Q. When y'all went over there he didn't have his bandana on?

A. Not that I --

Q. And no shoes on?

A. No shoes.

Q. Isn't it a fact that y'all went back to Chuck's house that evening?

A. No, sir.

Q. Isn't it a fact that you went to Chuck's house, by his house, and you asked Michael should we stop?

A. No, sir.

Q. Isn't it true that Michael asked you when you had told him that Chuck had died if you had touched anything at the house?

A. No, sir.

Q. Isn't it true that after going by Chuck's house that y'all drove back towards

Michael's house and then y'all decided to go back again?
A. No, sir.
Q. Isn't it true that you had woken Michael up and he went with you and y'all went back to that house for him to protect you?
A. No, sir.
Q. Isn't it true that you were there that night but Michael was not with you until he came back?
A. That's not correct.
Q. To get rid of the evidence?
A. That is not correct.
Q. Isn't it true that he went inside, came back out and said he was going to try to wipe off fingerprints where you had been?
A. That is not true.
Q. Isn't it true that after you woke him up and took him over there that's when he went inside, spread gas around and tried to burn that house down?
A. That is not true.
Q. To get rid of the evidence for you?
A. That is not true.
Q. Before that evening had you ever filed any

complaints against Michael for domestic assault?
A. No, sir.
Q. Did you ever file for protection from abuse?
A. No, sir.
Q. Had you ever seen Michael and Chuck fight?
A. No, sir.
Q. They were friends, weren't they?
A. Yes, sir.
Q. They would do anything for each other?
A. Chuck would have done anything for Michael.
Q. Isn't it true that just a couple of weeks earlier Chuck had given him a trailer, just given him a trailer?
A. No, sir.
Q. Had Michael ever abused you before that evening?
A. No, sir.
Q. Did he ever hit you before that evening?
A. No, sir.
Q. Have you ever seen him hit anybody else?
A. No, sir.
Q. Have you ever seen him get close to a

fight and actually avoided that fight?

MR. REID: I'm going to object to that. That calls for character testimony unless the defense wants to open up that line of testimony from the prosecution.

THE COURT: Mr. Roberts?

MR. HART: Your Honor, she has testified she is scared of him. I think she can't establish a basis if she has never seen him hurt anybody before.

THE COURT: Rephrase your question, sir, and move along.

Q. Based on any relationship that you had had with Michael before did you have any reason that he -- or you didn't have any reason to believe that he would hurt you?

A. No, sir.

MR. REID: Object to it. I would withdraw it. Go ahead.

A. No, sir.

Q. So you state that you had no reason to believe that he would hurt you right now?

A. Right now?

Q. No. That night.

A. No, sir.

Q. So not being scared of him, as you state now, why didn't you leave, why didn't you go get the cops?
A. I had never seen him kill anyone before.
Q. Isn't it true that that evening Michael asked you how everything happened?
A. That's not true.
Q. Isn't it true that you told him that you didn't want to talk about it?
A. That is not true. I mean, I told him I didn't want to hear him talk about it.
Q. Didn't the defendant ask you if they were dead?
A. No, he did not.
Q. Didn't the defendant ask you if you had checked if they were dead?
A. No, he did not.
Q. Isn't it true that Michael told you to get Sandra's keys so y'all could go back over there?
A. That is not true.
Q. Isn't it true that while Michael and you as you were driving -- going around that night that he told you you just needed to ride around because he needed to think

about what he needed to do?
A. That's not true.
Q. When did you come to the understanding that you had been stabbed or that you state that you had been stabbed while trying to help Melinda?
MR. REID: I object. That's been asked and answered many times.
THE COURT: Move along, sir.
MR. ROBERTS: Judge, I believe she stated she knew when the stabbing was.
THE COURT: Rephrase your question. I think you have asked that about three times now. Ask your next question.
Q. At that time in May of 2003 were you having -- were you seeing any other men?
A. No, sir.
Q. Did you know a man by the name of Chad Martin?
A. Yes, I knew Chad.
Q. A man by the name of John Langley?
A. I don't recall John Langley.
(Whereupon a discussion was held off record.)
MR. ROBERTS: That's all I have right

now.

MR. HARP: Could I have a second, Judge?

THE COURT: Yes, sir.

(Whereupon a discussion was held off record.)

REDIRECT EXAMINATION

BY MR. REID:

Q. Marcie, I'm just going to ask you about a couple more things. One of the last things Mr. Roberts asked you about was somebody named Chad Martin. You said you knew Chad Martin. He was the nephew of Chuck Martin; is that correct?

A. That's correct.

Q. Did you see Chad Martin at all that night?

A. No, sir.

Q. Did you see Chad Martin that day or the day before or any time before this time?

A. No, sir.

Q. What about -- you say you don't even know John Langley; is that correct?

A. I don't recall John Langley.

Q. You were also asked about whether you saw

blood in the car, Sandra Robert's car, after you returned there to Mr. Harold Reynolds' house. Did you ever get back in that car again?

A. I never went back to the car.

Q. And you were asked about the criminal charge against you. You are charged with destroying that evidence, aren't you?

A. Yes, I am.

Q. Hindering prosecution; is that correct?

A. Yes, sir.

Q. Have you made any kind of agreement with our office for your testimony?

MR. ROBERTS: Objection; asked and answered, Judge.

A. No, sir.

MR. REID: I haven't asked that question before.

MR. HART: We move to strike; asked and answered.

THE COURT: Move along, gentlemen. It's 25 till 5:00. You asked the question. She has got already answered it. They have heard it. Let's move this along, please.

Q. (Mr. Reid) This is the last thing I'm going to ask you, Marcie: I want you to look this jury in the eye. I'm going to ask you one last time. Did you have anything to do with causing the death of Charles Martin?
A. No.
Q. I want you to look this jury in the eye, and I want you to tell them whether you had anything to do with the death of Melinda Martin.
A. No.
Q. And did you kill or have anything to do with killing Savannah Martin?
A. No.

MR. REID: That's all.

THE COURT: Anything else, gentlemen?

MR. ROBERTS: No, sir.

THE COURT: All right. Ladies and gentlemen, we are going to wrap up the day a little earlier today because of the way the witnesses fell. We are going to resume in the morning at 8:00 o'clock. So be here a little bit earlier than that.

In the meantime, again, not only do I admonish you but I plead with you, please, do not read any news coverage, any newspapers, any news on TV or any news on the radio. Do not do any independent investigations. Don't ride out there by the house. Don't go on the internet and look it up, anything that you have heard in this courtroom today. Do not do any type of independent investigation on your own. Do not discuss this case with your spouses, family members, total strangers or your priest if you're Catholic. Do not talk to anybody about anything to do with this case. The fact that you're on this case, that's fine. Short of that, don't go into anything with anybody, pros or cons, arguments one way or the other. We will resume in the morning at 8:00 a.m. Until then we will be in recess.

(Whereupon the following proceedings were held outside the presence of the jury:)

Y'all stick around. Mr. Harp, Mr. Defense lawyers. Who is your next

witness? Marcus, I'm trying to get some kind of lay of the land in the morning.

MR. HARP: We have a witness to put on to establish a time line. Edith Veal. She's the newspaper lady that was there at a certain time and said I saw the -- really kind of a very short witness. We expect to call at sometime --

THE COURT: The crime scene.

MR. REID: There is a lot of forensic stuff.

MR. HARP: That will probably take us through the day.

THE COURT: The day?

MR. REID: Yeah. There is a lot of forensic stuff.

THE COURT: Oh, that crime scene is not going to be just one person.

MR. REID: Oh, no. It's going to be DNA and chains.

MR. HARP: From what I understand from the defense, there isn't a whole lot of argument about that stuff, but they want us to go through the chain.

THE COURT: Well, that's fine and

dandy. But I'm looking at eight hours -- we are going to start at 8:00 and we are going to go to 12:00. We are going to start at 1:00 and we are going to go to 5:00. You have got everything lined up to fill up the day?

MR. REID: That's what I was just talking to PJ about. I want to make sure the witnesses --

MR. HARP: We are within 30 or 40 minutes of getting anybody we need here.

THE COURT: So that will put us through -- today being Tuesday --

MR. REID: I think if we get -- we have got an autopsy video that will take between two to three hours.

THE COURT: We are going to watch a two or three hour video?

MR. REID: Uh-huh.

THE COURT: And that's part of the stuff tomorrow?

MR. REID: It can be.

THE COURT: Well, that's what I'm saying.

MR. REID: I can do it tomorrow

afternoon. We are going to do the crime scene first. Then we can do the deposition.

THE COURT: Okay.

MR. REID: But I also have -- I have a fingerprint guy.

THE COURT: That's going to be tomorrow too?

MR. REID: It can be. It's kind of hard to say how much time --

MR. HARP: For example, you said you are not going to -- do you want us to go through the chain --

MR. HART: I cannot stipulate --

MR. HARP: I understand. You said that in argument that we are not going to have any problem with that.

THE COURT: I'm not worried about the problems. I want you lined up to where we have got a full day, there is no dillydallying around. I don't want to be sitting here waiting on witnesses for 30 or 40 minutes or having to round them up. Line them up. Tomorrow is Wednesday. It's a full day.

MR. REID: Judge, I can tell you there is one witness who is in the chain of the blood who is in Houston. He should be back tomorrow morning. I hope his flight comes in tomorrow morning. He really didn't want to come until Thursday morning.

THE COURT: Oh, no.

MR. REID: I'll try to get him here tomorrow, if I can get him on the phone. Well, tomorrow afternoon.

THE COURT: Tomorrow afternoon is fine.

MR. REID: His flight comes in at 11:30.

THE COURT: I'm just saying get you plenty of coffee in the morning, guys, and eat a good hearty breakfast. We are going to be here all day and we are going to work this thing tomorrow.

MR. REID: It's kind of hard to get things in before 8:00.

MR. HARP: In the courthouse.

THE COURT: It ain't going to be no problem because I am going to have the

guards here at 7:30 and the courthouse will be open; just like today. I'm saving the county a lot of money by not sequestering them. They can put a few extra folks for 30 minutes or an hour here to get them where we need them to go. I will send word to them.

MR. ROBERTS: Judge, one thing that is probably a non issue. But with regards to Mr. Reynolds may testify and the fact that Marcie may be called -- my guess is she might be called back as rebuttal. I'd ask that she not be in the courtroom.

THE COURT: That's not a problem.

MR. REID: I think she is still under the rule.

THE COURT: She is, and she will still be available. Not a problem. Thank you, gentlemen.

MR. REID: Judge, the other thing is if we can get access to the courtroom before 8:00, that will be good.

THE COURT: I will have the back doors open at 7:30 in the morning. I was here this morning about 6:00 something.

So if it's not open, you can come around and get me. I will open it for you.

Look, since last Friday until today I want to tell all of you I thank you. You have done an excellent job in keeping a good schedule and moving the thing along. And I thank all of you for that.

MR. HART: I thank you for letting Joe let me in this morning when I'm standing outside beating on the door.

THE COURT: I didn't know you were there, Charlie. Y'all all have got my cell phone number. My car was out there, wasn't it?

MR. HART: They called up and let me through, and they called Joe for confirmation, and he said yes.

(Whereupon an evening recess was taken, 4:36 p.m.)

DEFENDANT'S EXHIBIT 10

PENGAD 800-631-6989

Date MAY 29, 2003 Page No. 1

STATEMENT OF: CAPTAIN ROY HARBIN

AT OR AROUND 8PM MAY 25, 2003, I WAS PRESENT IN THE INTERVIEW ROOM WITH SGT. FINCHER, DET'S MIKE PRATER, MICHAEL HOOKS AND CHAD MARTIN. CHAD WAS BEING INTERVIEWED BY SGT. D. FINCHER. SGT. FINCHER ASK CHAD WHERE HE HAD BEEN THE NIGHT AND MORNING OF MAY 24TH AND 25TH. CHAD SAID HE AND JAMES 'DEBO' ZOOK HAD SPENT THE NIGHT AT JOHN LANGLEYS HOUSE, THAT THEY HAD BEEN IN AND OUT BUYING AND USING DRUGS. CHAD WAS ASKED WHAT HE KNEW ABOUT AN INCIDENT AT CHUCKS HOUSE. CHAD DENIED BEING THERE AND SAID HE WAS JUST WITH JOHN ZOOK (aka DEBO) and JOHN LANGLEY DOING DRUGS. HE ALSO TOLD SGT. FINCHER HE COULD PROVE IT BECAUSE HE HAD DRUGS ON HIS PERSON. CHAD REACHED INTO HIS CROTCH AND TOOK OUT A SMALL PLASTIC BAG CONTAINING WHITE ROCK SUBSTANCE AND THREW IT ON THE FLOOR. HE SAID IT WAS METH. THE PACKAGE WAS PLACED INTO PROPERTY AND EVIDENCE. SGT. FINCHER ASK CHAD WHO HE THOUGHT HAD KILLED HIS BROTHER AND HIS FAMILY, CHAD SAID IF HE HAD TO GUESS HE WOULD SAY JOHN LANGLEY. SGT. FINCHER ADVISED CHAD OF HIS RIGHTS AND HE SIGNED THE WAIVER. SGT. FINCHER TOLD CHAD SOMETHING TERRIBLE HAD HAPPENED AT HIS BROTHERS HOUSE. CHAD BEGAN CRYING UNCONTROLLABLE AND SAID "OH MY GOD" WHY DID THEY HAVE TO KILL SAVANNAH. CHAD REPEATED OVER AND OVER "WHY DID THEY HAVE TO KILL SAVANNAH. SGT. FINCHER AFTER A FEW MINUTES ASK CHAD TO TELL US THE WHOLE STORY. CHAD WANTED TO KNOW IF WE FOUND HIS BLUE SUNGLASSES INSIDE CHUCKS HOUSE. (DURING THE INTERVIEW CHAD ASK THOSE SAME QUESTIONS OVER AND OVER) HE SEEMED TO BE VERY CONCERNED ABOUT THOSE SUNGLASSES. HE SAID CHUCK HIS BROTHER HAD GIVEN THEM TO HIM AND HE LOST THEM IN THE HOUSE. CHAD SAID HE WOULD TELL EVERYTHING THAT HAPPENED. AT FIRST HE HAD ONLY LOOKED IN THE DOOR AND SEEN CHUCK LYING ON THE FLOOR BLEEDING AND ASKING CHAD TO HELP HIM. SGT. FINCHER ASK CHAD AGAIN TO START OVER. CHAD SAID HE HAD GONE TO CHUCKS HOUSE WITH JOHN AND "DEBO" IN JOHNS CAR. JOHN WAS IN THE DRIVERS SEAT "DEBO" ON THE PASSENGER SIDE AND CHAD IN THE BACK SEAT. HE SAID THEY WENT TO GET SOME PILLS FROM CHUCK. WHEN THEY GOT TO CHUCKS JOHN AND DEBO WENT INSIDE AND CHAD STAYED OUTSIDE. AFTER DEBO AND JOHN GOT IN THE HOUSE CHAD SAID HE HEARD DEBO AND CHUCK ARGUING AND HE WENT TO THE SIDE

Date MAY 29, 2003 Page No. 2

STATEMENT OF: CAPTAIN ROY HARBIN

DOOR AND SAW HIS BROTHERS FACE. CHUCK WAS LYING ON THE FLOOR BEGGING FOR CHAD TO HELP HIM AND DEBO WAS STANDING OVER HIM HOLDING A KNIFE. CHAD SAID HE SAW HIS BROTHER DIE. SGT. FINCHER SAID CHAD, I BELIEVE YOU WERE IN THE HOUSE BEFORE THEN AND YOU CAN TELL US WHAT HAPPENED. CHAD SAID OK. I WAS IN THE HOUSE WITH JOHN AND DEBO. WHEN DEBO ASK CHUCK FOR THE PILLS AND CHUCK TOLD HIM HE COULD NOT GET ANYMORE PILLS UNLESS HE HAD MONEY, THAT IT WAS JUST NOT WORKING OUT THIS WAY. DEBO GOT MAD AND TOLD CHUCK HE WOULD JUST TAKE THE PILLS FROM HIM. CHAD TOLD US THAT DEBO PUSHED CHUCK AND THEN CHUCK PUSHED HIM BACK. CHUCK WAS STANDING BY THE DINING ROOM TABLE AND DEBO PICKED UP A KNIFE FROM THE KITCHEN COUNTER AND STABBED CHUCK IN THE SIDE AND CONTINUED TO STAB HIM. CHAD SAID CHUCK WAS BEGGING FOR HIM TO HELP. CHAD SAID HE COULD NOT HELP BECAUSE THEY WOULD KILL HIM. CHAD SAID MELINDA CAME FROM THE LIVING ROOM STARTED SCREAMING AND WENT DOWN THE HALLWAY. JOHN FOLLOWED AND HE HEARD MORE SCREAMING SO HE WENT DOWN THE HALL WHERE MELINDA AND SAVANNAH WERE. HE SAW MELINDA LEANING ON THE WALL AND SHE WAS BLEEDING. CHAD SAID JOHN TOLD HIM TO STAB THE LITTLE GIRL OR HE WOULD KILL HIM. HE SAID JOHN FORCED HIM TO STAB THE LITTLE GIRL IN THE NECK. CHAD REPEATED OVER AND OVER "WHY DID HE MAKE ME STAB HER" SGT. FINCHER SAID MAYBE HE WANTED TO LEAVE NO WITNESSESS. CHAD SAID, "WHY DID HE MAKE ME STICK THAT LITTLE GIRL IN THE NECK". SGT. FINCHER ASK IF SAVANNAH SAID ANYTHING TO HIM DURING THE STABBING. CHAD SAID SHE JUST LOOKED AT ME WITH THOSE BIG BROWN EYES WIDE OPEN. SHE WAS TERRIFIED SHE DIDN'T UNDERSTAND WHAT WAS GOING ON. CHAD REPEATED AGA IN THAT JOHN HAD TAKEN HIS HAND AND MADE HIM DO IT. CHAD SAID HE GOT ON THE BED AND HELD SAVANNAH IN HIS ARMS AS SHE DIED. HE SAID SHE MADE A GURGLING SOUND AND DIED. CHAD WAS SCREAMING TO SGT. FINCHER THAT THERE WAS BLOOD ALL OVER AND HE COULD SMELL GAS ON HIS HANDS. AFTER A SHORT PAUSE TO CALM CHAD DOWN SGT. FINCHER ASK WHO HAD TAKEN THE GAS CAN INSIDE. CHAD SAID HE GOT THE GAS FROM THE TRUNK OF JOHNS CAR AND WENT BACK INSIDE AND POURED GAS ON MELINDA AND DOWN THE HALLWAY TO THE FRONT DOOR INTO THE KITCHEN, ON CHUCK AND A CHAIR.

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D.A. INVESTIGATOR ZACK JOHNSON AND ASSISTANT D.A. JIMMY HARP CAME INTO THE ROOM. SGT. FINCHER LEFT ME ZACK AND JIMMY WERE IN THE ROOM. ZACK TOLD CHAD TO START OVER. CHAD REPEATED OVER AND OVER TO US HE HAD STABBED THE LITTLE GIRL IN THE NECK. CHAD WAS VERY EXCITED, CRYING AND YELLING, "WHY DID JOHN MAKE ME DO IT". ZACK TOLD HIM TO SETTLE DOWN, STOP YELLING, SIT UP STRAIGHT AND TELL WHO WAS WITH HIM AND WHAT HAPPENED. CHAD SAID HE STABBED THE LITTLE GIRL IN THE NECK AND ZACK TOLD HIM TO STOP JERKING EVERYONE AROUND AND TELL HIM WHO HE WAS WITH. CHAD THEN SAID HE WAS WITH A GUY NAMED MICHAEL FOR THE FIRST TIME. ZACK SAID MICHAEL WHO CHAD REPLIED "I DO NOT KNOW HIS LAST NAME. ZACK SAID WAS IT MICHAEL REYNOLDS? "DAMMIT" CHAD GOT VERY QUIET. THEN CHAD TOLD ZACK, I HAVE TOLD YOU THE TRUTH BUT YOU WON'T LISTEN. ZACK SAID WAS IT MICHAEL REYNOLDS? THEN CHAD SAID I WON'T SAY ANYTHING ELSE. I WANT A LAWYER. AT THIS TIME THE ASSISTANT D.A. HARP SAID, "OK THIS INTERVIEW IS OVER!"

WE LEFT THE ROOM. LT. GARY WAS WITH CHAD WHILE WE WAITED FOR TRANSPORT UNIT. CHAD BEGAN TO TALK TO LT. GARY AND SHE JUST SAT AND LISTENED TO CHAD.

END OF STATEMENT

Captain Roy Harbin 3/29/03