

No. 24-7145
CAPITAL CASE

**In the
Supreme Court of the United States**

◆

JEFFERY DAY RIEBER,
Petitioner,
v.
JOHN Q. HAMM, Commissioner,
Alabama Department of Corrections,
Respondent.

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STEVE MARSHALL
Alabama Attorney General

Lauren A. Simpson
Deputy Attorney General
*Counsel of Record

OFFICE OF ALA. ATT'Y GENERAL
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300
Lauren.Simpson@AlabamaAG.gov

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CAPITAL CASE

QUESTIONS PRESENTED (Restated)

In this federal habeas case governed by 28 U.S.C. § 2254(d):

1. Did the state courts unreasonably find that trial counsel did not render guilt-phase ineffective assistance by pursuing a defense of mistaken identity instead of voluntary intoxication when Rieber denied involvement in the capital murder and his evidence of intoxication was weak?
2. Did the state courts unreasonably find that trial counsel did not render penalty-phase ineffective assistance by failing to offer corroborating evidence of Rieber's intoxication at the time of the capital murder when the evidence was weak and potentially harmful to Rieber, and the jury still recommended life without parole?
3. Is Rieber's death sentence unconstitutional because the trial court overrode the jury's recommendation?

TABLE OF CONTENTS

Questions Presented	i
Table of Contents	ii
Table of Authorities	iv
Introduction	1
Statement of the Case	2
A. Statement of facts concerning Rieber’s crime	2
B. Trial and direct appeal	4
C. State postconviction (Rule 32)	5
D. Habeas proceedings.....	6
Reasons the Petition Should be Denied.....	7
I. Rieber’s guilt-phase ineffective assistance claim is factbound and meritless.	8
A. Background.....	8
i. Trial.....	8
ii. State postconviction.....	10
iii. Habeas.....	14
B. Rieber’s claim is not cert-worthy.	17
II. Rieber’s penalty-phase ineffective assistance claim is also factbound and meritless.	21
A. Background.....	21
i. Trial.....	21
ii. State postconviction.....	22
iii. Habeas.....	23
B. Rieber’s claim is not cert-worthy.	25

III. Rieber's death sentence is constitutional.....	27
Conclusion.....	33

TABLE OF AUTHORITIES

Cases

<i>Bohannon v. Alabama</i> , 580 U.S. 1101 (2017)	29
<i>Brooks v. Comm’r, Ala. Dep’t of Corr.</i> , 719 F.3d 1292 (11th Cir. 2013).....	25
<i>Burt v. Titlow</i> , 571 U.S. 12 (2013).....	14
<i>Cullen v. Pinholster</i> , 563 U.S. 170 (2011)	26
<i>Dill v. Allen</i> , 488 F.3d 1344 (11th Cir. 2007).....	17
<i>Edwards v. Vannoy</i> , 593 U.S. 255 (2021)	31
<i>Estelle v. McGuire</i> , 502 U.S. 62 (1997).....	16
<i>Evans v. Sec’y, Dep’t of Corr.</i> , 703 F.3d 1316 (11th Cir. 2013).....	24
<i>Ex parte Bohannon</i> , 222 So. 3d 525 (Ala. 2016)	29
<i>Ex parte McWhorter</i> , 781 So. 2d 330 (Ala. 2000)	18, 20
<i>Ex parte Rieber</i> , 663 So. 2d 999 (Ala. 1995).....	5
<i>Ex parte Rieber</i> , No. 1170093 (Ala. Feb. 2, 2018)	6
<i>Ex parte Waldrop</i> , 859 So. 2d 1181 (Ala. 2002)	28
<i>Gideon v. Wainwright</i> , 372 U.S. 335 (1963).....	31
<i>Harris v. Alabama</i> , 513 U.S. 504 (1995).....	7, 28
<i>Herrera v. Wyoming</i> , 587 U.S. 329 (2019).....	31
<i>Hunt v. State</i> , 940 So. 2d 1041 (Ala. Crim. App. 2005)	2, 13
<i>Hurst v. Florida</i> , 577 U.S. 92 (2016)	passim
<i>Knight v. Fla. Dep’t of Corr.</i> , 936 F.3d 1322 (11th Cir. 2019)	30, 31
<i>Lindsey v. Smith</i> , 820 F.2d 1137 (11th Cir. 1987).....	15
<i>McKinney v. Arizona</i> , 589 U.S. 139 (2020)	8, 29, 30
<i>Miller v. Comm’r, Ala. Dep’t of Corr.</i> , 826 F. App’x 743 (11th Cir. 2020).....	28

<i>Pietri v. Sec’y, Fla. Dep’t of Corr.</i> , 641 F.3d 1276 (11th Cir. 2011)	15
<i>Putman v. Head</i> , 268 F.3d 1223 (11th Cir. 2001).....	23
<i>Rauf v. State</i> , 145 A.3d 430 (Del. 2016)	32
<i>Rieber v. Alabama</i> , 516 U.S. 995 (1995)	5
<i>Rieber v. Alabama</i> , 586 U.S. 882 (2018)	6
<i>Rieber v. State</i> , 663 So. 2d 985 (Ala. Crim. App. 1994)	3, 5
<i>Ring v. Arizona</i> , 546 U.S. 584 (2002)	7, 27
<i>Schriro v. Summerlin</i> , 542 U.S. 348 (2004)	8, 30, 31
<i>Shinn v. Kayer</i> , 592 U.S. 111 (2020)	16, 25
<i>Spaziano v. Florida</i> , 468 U.S. 447 (1984)	33
<i>State v. Poole</i> , 297 So. 3d 487 (Fla. 2020)	33
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984).....	7, 18, 25, 27
<i>Teague v. Lane</i> , 489 U.S. 288 (1989)	7, 27
<i>Thornell v. Jones</i> , 144 S. Ct. 1302 (2024)	26
<i>Whitehead v. State</i> , 777 So. 2d 781 (Ala. Crim. App. 1999)	13, 20
<i>Wiggins v. Smith</i> , 539 U.S. 510 (2003)	24, 25
<i>Windom v. Sec’y, Dep’t of Corr.</i> , 578 F.3d 1227 (11th Cir. 2009)	24
<i>Windsor v. State</i> , 683 So. 2d 1027 (Ala. Crim. App. 1994).....	20
<i>Wood v. Allen</i> , 558 U.S. 290 (2010)	14

Statutes

2002 Ind. Legis. Serv. P.L. 80-2002	32
28 U.S.C. § 2254.....	i, 14
ALA. CODE § 13A-5-45	28

ALA. CODE § 13A-5-46	30, 32
Ala. Laws Act 2017-131	28, 33
FLA. STAT. § 921.141	32
IND. CODE § 30-50-2-9	32

Rules

ALA. R. CRIM. P. 32.3	20
SUP. CT. R. 10	7, 8

Other Authorities

<i>NOAA Solar Calculator</i> , NOAA, http://www.esrl.noaa.gov/gmd/grad/solcalc (last visited May 6, 2025)	19
<i>Timothy Hurst, Whose Case Struck Down Florida’s Death-Penalty Statute, Is Resentenced to Life</i> , DEATH PENALTY INFO. CTR. (Mar. 14, 2025), https://deathpenaltyinfo.org/timothy-hurst-whose-case-struck- down-floridas-death-penalty-statute-is-resentenced-to-life	31

INTRODUCTION

On October 9, 1990, Glenda Phillips Craig was murdered while working in a convenience store in Huntsville, Alabama. Her killer was Jeffery Day Rieber, who purchased a revolver, cased the store for several days, and then attacked Craig when she was alone at night. Once Craig was lying defenseless on the floor and Rieber had raided the cash register, he shot her in the head and fled.

Unfortunately for Rieber's getaway plans, the robbery-murder was caught on surveillance video, and witnesses had noted him skulking around the store in the days prior to Craig's slaying. When Rieber's experienced defense attorney, Richard Kempaner, reviewed the case, he knew that Rieber was facing almost certain conviction and a death sentence. As Rieber had told police he had nothing to do with the murder, Kempaner did the best he could and pursued a defense of mistaken identity. That was unsuccessful, but co-counsel, Dan Moran, had better luck during the penalty phase, in which the defense produced seven witnesses to talk about what a kind, loving, helpful, and nonviolent man they thought Rieber was. The jury returned a life recommendation on a 7-5 vote, but the trial court, considering the heinousness of Craig's murder, overrode and sentenced Rieber to death.

During state postconviction litigation, Rieber argued that trial counsel were ineffective for several reasons, including their decision not to pursue an intoxication defense (and lesser included instruction) and present penalty-phase evidence corroborating Rieber's claim that he was out of his mind on drugs at the time of the murder. The state circuit court denied relief after an evidentiary hearing, concluding that

counsel were not ineffective for declining to present a defense incompatible with the one they used, then further finding that even if Rieber’s new evidence of habitual substance abuse had been presented at trial, it would not have swayed the verdict in his favor. As the court noted, “[T]he mere existence of a potential alternative defense theory is not enough to establish ineffective assistance based on counsel’s failure to present that theory.” Pet. App’x E at 194a (quoting *Hunt v. State*, 940 So. 2d 1041, 1067 (Ala. Crim. App. 2005)) (quotation omitted). The state appellate court affirmed. In habeas, the federal district court correctly applied AEDPA deference to the state courts’ reasonable findings and denied Rieber’s petition, and the Eleventh Circuit Court of Appeals affirmed.

Rieber now presents this Court with the two questions for which he was granted a certificate of appealability below, both concerning trial counsel’s alleged ineffectiveness for failing to argue that Rieber was intoxicated at the time of the murder—again, a crime in which Rieber denied any involvement—plus a third question as to the constitutionality of his death sentence. His claims are factbound, meritless, or contrary to this Court’s precedent, and he has failed to identify a circuit split, a decision in contravention of this Court’s jurisprudence, or other grounds warranting certiorari. Thus, the Court should deny review.

STATEMENT OF THE CASE

A. Statement of facts concerning Rieber’s crime

The following account of the crime comes from the sentencing order, DE16-62:89-92, and the opinion of the Alabama Court of Criminal Appeals (ACCA) on direct

appeal, *Rieber v. State*, 663 So. 2d 985, 987-88 (Ala. Crim. App. 1994), DE16-1:187-89.

In late September or early October 1990, Jeffery Rieber purchased a .22-caliber revolver for \$30. Over the next few days, he was seen on multiple occasions at a Mobil Mart convenience store in Huntsville.

Twenty-five-year-old Glenda Craig, a wife and mother of two young daughters, worked as a cashier at the Mobil Mart. Having noticed Rieber lurking, she was nervous in his presence, and she asked at least one customer who he was. Another customer feared that Rieber was about to rob the convenience store and suggested that Craig call the police.

Rieber visited the Mobil Mart on October 9 shortly after 5 p.m., when at least one other customer was in the store. A surveillance camera recording the counter captured his visit. Rieber left but returned that night just before 8 p.m., and he found Craig there alone. The camera captured what transpired: Rieber looked around the store for a moment, then came up to the counter, drew his revolver, and shot Craig. Her left arm went up in defense, and she fell behind the counter. Rieber opened the cash register and filled his pockets, then leaned over the counter and shot Craig again before fleeing. For Craig's life, Rieber collected \$506 from the register.

Rieber had shot Craig twice at close range. The first bullet passed through her left wrist and came to rest an inch beneath her scalp in the back of her head, but the second—ultimately the fatal shot—entered her brain from just behind her ear. She was alive when a customer found her a few minutes after Rieber left, and her husband

rushed to the scene to help her. Bleeding from the nose and mouth, Craig was taken to a hospital, where she died.

After officers reviewed the security tape that night, Rieber was identified and was arrested at home shortly after 3 a.m. Police found, in plain view, clothes similar to those the gunman on the tape had been wearing. Once Mirandized, Rieber claimed that a friend had given him a gun and money the night before. Based on the information he provided, officers found \$292 in cash under a mattress. A search of Rieber's car revealed the .22-caliber revolver, eighteen rounds of ammunition, and two spent rounds in the gun.

B. Trial and direct appeal

Rieber was indicted on one count of robbery-murder, a capital offense, in December 1990. DE16-46:5-6. After a psychological evaluation in September 1991, he was deemed competent. DE16-47:8-12.

Judge Jeri Blankenship presided over Rieber's April 1992 trial. *See* DE16-68:24. The State presented fifteen witnesses and played the security videotape for the jury, while the defense presented three witnesses. *Id.* at 27-30. On April 10, the jury found Rieber guilty as charged. DE16-78:41-42; DE16-85:99.

The penalty phase began the next day. The State presented no additional testimony, while the defense presented seven witnesses on Rieber's behalf. *See* DE16-68:31-32. That afternoon, the jury recommended 7-5 that Rieber be sentenced to life without parole. DE16-79:46; DE16-85:97-98, 100.

The sentencing hearing was held on June 19, at which time the defense

presented testimony from Rieber's mother. DE16-79:50, 54-60. The court also received a presentence investigation report. DE16-33:16-21. On June 26, the court overrode the jury's recommendation and sentenced Rieber to death. DE16-79:94; DE16-85:101-14.

ACCA affirmed in June 1994, *Rieber v. State*, 663 So. 2d 985 (Ala. Crim. App. 1994), and the Alabama Supreme Court did likewise in May 1995, *Ex parte Rieber*, 663 So. 2d 999 (Ala. 1995). This Court denied certiorari in November 1995. *Rieber v. Alabama*, 516 U.S. 995 (1995) (mem.).

C. State postconviction (Rule 32)

The state postconviction (Rule 32) proceedings in the Madison County Circuit Court were extraordinarily protracted, and the details are not particularly relevant to the present matter.

In brief, Rieber filed a Rule 32 petition pro se in February 1997 and received counsel in April. DE16-6:19-56, 85. The State moved for partial dismissal, DE16-6:91-94, 98-101, and the parties argued over discovery until 1999, when the judge passed away, and Judge Laura W. Hamilton was assigned the case. DE16-9:25-27.

Rieber filed an amended petition in January 2004. DE16-11:41-66. After the court sat on the case for years, ACCA ordered Judge Hamilton to take action in October 2007. DE16-5:18. In response, she denied the State's motion to dismiss in a one-page order, DE16-19:86, and the case stalled again until 2010, when the court granted Rieber sweeping discovery, DE16-20:30-34. ACCA vacated the discovery orders as improperly granted. DE16-26:28. In October 2011, the court finally held a three-day

evidentiary hearing. DE16-82:48–16-84:36.

Judge Hamilton retired in February 2012 but kept the case. *See* DE16-27:34. After post-hearing briefing in 2013, she took no further action, and Presiding Judge Karen Hall reassigned the case to herself in November 2014. DE16-30:55. She accepted proposed orders, granted oral argument, and in November 2015, denied Rieber’s amended petition. Pet. App’x E.

ACCA affirmed in September 2017, *Rieber v. State*, CR-15-0355 (Ala. Crim. App. Sept. 1, 2017), Pet. App’x D, and the Alabama Supreme Court denied certiorari in February 2018, *Ex parte Rieber*, No. 1170093 (Ala. Feb. 2, 2018), DE16-98:31. This Court likewise denied certiorari in October 2018. *Rieber v. Alabama*, 586 U.S. 882 (2018) (mem.).

D. Habeas proceedings

Rieber filed a habeas petition in March 2018. DE1. The proceedings were stayed until this Court denied certiorari in his state postconviction proceedings, *see* DE10, 11, after which Respondent answered, DE14, and Rieber replied, DE17.

On August 7, 2023, the district court summarily dismissed Rieber’s petition and denied a COA. Pet. App’x C. Rieber filed a Rule 59(e) motion, DE21, which was denied in October 2023, Pet. App’x B. The Eleventh Circuit granted Rieber’s motion for COA in part. On November 14, 2024, after oral argument, that court affirmed the district court’s denial of habeas relief, finding that Rieber did not prove “that the Alabama courts unreasonably concluded that he failed to show prejudice from his counsel’s allegedly deficient performance.” Pet. App’x A at 2a. The court denied

rehearing en banc in January 2025. Pet. App’x F.

The present petition for writ of certiorari followed.

REASONS THE PETITION SHOULD BE DENIED

Rieber’s petition is not worthy of certiorari. His claims are factbound, do not implicate a circuit split, and are wholly meritless.

First, as to Rieber’s two claims of ineffective assistance, Rieber would have this Court reevaluate the factual findings of the state courts and the *Strickland v. Washington*, 466 U.S. 668 (1984), determinations of the lower federal courts because he disagrees with those findings and with ACCA’s interpretation of Alabama law. This does not constitute good grounds for certiorari. *See* SUP. CT. R. 10. Moreover, the lower federal courts correctly held that the state courts’ decisions were not unreasonable.

Second, Rieber’s claim concerning the constitutionality of his 1992 death sentence is wholly unpersuasive and unsupported. Rieber argues that his sentence is unconstitutional because (1) Alabama’s capital sentencing scheme at the time was violative of *Ring v. Arizona*, 546 U.S. 584 (2002), and *Hurst v. Florida*, 577 U.S. 92 (2016), (2) *Hurst* should apply retroactively to him because it is both a substantive rule of constitutional law and a “watershed” procedural rule under the *Teague v. Lane*, 489 U.S. 288 (1989), framework, and (3) his sentence is arbitrary, capricious, cruel, and unusual. But this Court has never held that jury override is unconstitutional, *see Harris v. Alabama*, 513 U.S. 504 (1995), and *Hurst* did not invalidate Alabama’s capital sentencing scheme. Moreover, as Rieber acknowledges, Pet. 31, the

Court held in *McKinney v. Arizona*, 589 U.S. 139, 145 (2020), that “*Ring* and *Hurst* do not apply retroactively on collateral review”—a decision citing *Schriro v. Summerlin*, 542 U.S. 348 (2004), in which the Court discussed the non-retroactivity of *Ring* under the *Teague* framework. Rieber’s death sentence was and remains constitutional, and the Court should deny certiorari.

I. Rieber’s guilt-phase ineffective assistance claim is factbound and meritless.

The Court should deny certiorari as to Rieber’s first claim, Pet. 16-23, because it is factbound and meritless. The lower federal courts properly showed deference to the state courts’ factual findings, and Rieber has offered no good grounds for cert. *See* SUP. CT. R. 10.

A. Background

i. Trial

Rieber’s lead trial counsel was Richard Kempaner, who had spent more than twenty-five years as a criminal defense attorney and had worked on at least fifteen capital cases by the time he represented Rieber. DE16-82:201, 16-83:44. Kempaner was “confident” that Rieber would be convicted because “[s]omeone that resembled the defendant was on a videotape shooting the deceased in the head twice and looking into the camera as he grabbed a six-pack and walked out of the store,” DE16-83:9. Kempaner thus negotiated a plea deal for life without parole, but Rieber, backed by his mother, refused to take it. *Id.* at 9-10. Kempaner tried to reason with Rieber’s mother, warning her that going to trial was “a terrible mistake”; he recounted, “I told her maybe the next time I see you will be your boy’s funeral.” *Id.* at 10-11. Still, Rieber

went to trial.

The defense's theory was mistaken identity, a reasonable strategy under the circumstances of this case. Rieber had told police that he had never been in the Mobil Mart and knew nothing about the murder. DE16-75:61-66. Kempaner testified that Rieber never suggested any other strategy to them, including intoxication. DE16-83:45. Counsel presented three witnesses: Glenn Brooks, a private investigator; Herman Clark, Rieber's former employer; and Curtis Hunter, Rieber's employer at the time of the murder. *Id.* at 39.

Brooks—"an excellent investigator," per Kempaner, with thirty-four years of experience on his own or as a police investigator—located witnesses to support the misidentification theory. DE16-77:5, 16-83:40. He was able to undercut the testimony of one of the convenience store customers who identified Rieber. DE16-77:8-12. Clark, who had worked with Rieber at another convenience store, stated that he did not believe the person in the Mobil Mart security video was his former employee. *Id.* at 18-26. And Hunter, who testified about Rieber's actions on the day of the murder and cast doubt upon Rieber being at the Mobil Mart at 5 p.m. that night, said that the man in the security footage was not wearing the clothes Rieber had worn that day; Hunter found the footage so poor that he stated, "Well, I could not identify that as being my brother." *Id.* at 29-46.

Still, Kempaner had been prescient. The State's witness testimony and the security footage were damning, and Rieber was convicted.

ii. State postconviction

In postconviction, Rieber alleged that trial counsel should have presented an intoxication defense that would have allowed for a manslaughter instruction, a defense wholly incompatible with the defense of mistaken identity.

Kempaner was questioned about the pretrial forensic evaluation report of Dr. Kathy Rogers, who stated in relevant part:

[Rieber] denied experiencing symptoms associated with a thought disorder, other than when using drugs. He reported a very significant history of drug abuse, dating back to when he was very young, about age 9. He has consumed alcoholic beverages heavily, and had used marijuana, cocaine, “angel dust,” Valiums, Xanax, and other pills, as well as a great deal of “crystal meth,” and “acid.” He has had perceptual disturbances when using these drugs in the past.

[...]

Although Mr. Rieber stated that he does not have memory for a period of perhaps a couple of hours during the actual offense, he was well able to describe to me, at length and in detail, his behavior leading up to that time and immediately after that time. He stated that he had been using drugs during the time of the alleged offense, and it is my opinion, since I found no evidence of any type of memory impairment, that a reported lack of memory for that period of time would have been related to either substance abuse or deliberate misrepresentation of his memory, although the former is more likely in my opinion.

DE16-86:129-31. Two months later, Dr. Rogers released an addendum to her report:

Mr. Rieber did indicate to me that he had been drinking alcoholic beverages prior to the alleged offense, and had also smoked marijuana and used three hits of “acid.” He also intimated that it is possible that he was slipped some other type of drug when he went to a friend’s house before the alleged offense. He denied ever experiencing any type of blackouts when using “acid” in the past, and he has a fairly significant history of using “acid,” dating back several years. He did report experiencing blackouts in the past when he was drinking, although this did not occur on a regular basis. He had consumed approximately six or seven beers prior to the alleged offense and smoked about six joints. Mr. Rieber does not possess a memory for the time surrounding the

alleged offense. It is noted that although he may have not experienced blackouts when using mixed substances as he did on the evening of the alleged offense in the past, the combination of substances and the possibility that the “acid” which he used caused an idiosyncratic reaction, such that he experienced a blackout, is not untenable. In any event, his behaviors during the evening in question could possibly be attributed to the mixed substances and perhaps “bad acid,” however, I found no evidence to indicate that any type of mental illness contributed in any manner to his actions during the time of the alleged offense.

Id. at 135. When asked why he did not rely more heavily on this report, Kempaner explained that he and co-counsel “agreed that at the time it didn’t make any difference, our position was that it wasn’t [Rieber] that did the shooting, so it didn’t make any difference what his mental state was.” DE16-83:13-14. After all, Rieber told police that he had never been in the Mobil Mart where the murder occurred, DE16-75:61-63, and the state certainly would have used Rieber’s prior statement against him had he pursued this “bad acid” defense.

During the 2011 evidentiary hearing, Rieber called four witnesses who testified that they had (possibly) seen him use drugs on the day of the murder, more than two decades prior. Even if their testimony had been admissible at the guilt phase, none of them would have been reliable witnesses.

Charity Hubert, Rieber’s former girlfriend, stated that she knew him as a teenager in the mid-1980s. They began dating in 1986, when he was nineteen and she was fourteen. At that time, both used marijuana, but Rieber also used cocaine, crystal meth, and LSD. Hubert moved in with Rieber in mid-1988, when he was twenty-one and she was sixteen. By then, she was using the same drugs that he used, particularly crystal meth. After their relationship ended in late 1988, Hubert continued to see Rieber on an almost weekly basis, often at houses known for drug parties.

On the day of the murder in October 1990, Hubert saw drug transactions taking place at a house belonging to Bill Young, and she saw Rieber there at some point “after noon,” when it was still daylight. DE16-82:174-78, 184, 186.

Jo Duffy, Rieber’s friend, said that Rieber used marijuana during middle school. During the late 1980s, they partied together several times per week, drinking, doing drugs, and hanging out. Rieber used marijuana daily, plus cocaine, crystal meth, and LSD “as he could get it.” The partying usually began after Duffy and her ex-husband, Jeff Goodrich, got off work around 3 p.m. On the night of the murder, Rieber came to their house around dark, perhaps between 6:30 and 7 p.m., and he “maybe smok[ed] pot, [drank] a beer or something.” But Duffy testified that “Jeff was always Jeff”—Rieber did not have a massive personality change when he was high, and she never saw him lose control, become violent, or black out. DE16-83:62-70, 100.

Sonya Williamson, another friend of Rieber’s, saw him use marijuana, cocaine, and crystal meth between the mid-1980s and 1990. Rieber regularly smoked marijuana and drank alcohol, and he used cocaine and crystal meth weekly. Williamson was at Duffy and Goodrich’s house on the night of the murder, and she saw Rieber drink, use marijuana, and snort crystal meth. Williamson was a regular at the house, and she could not recall when Rieber arrived. *Id.* at 72-78.

Derrell Dwayne Maroney was with Rieber at Duffy and Goodrich’s house on the day of the murder, using LSD. He could not recall when they were together, but it was during the daytime. He also could not recall Rieber dropping acid, though he assumed that Rieber did so. Maroney did not see Rieber become violent or black out

that day, and he added, “It was a surprise to me when I was told later that he had robbed a store.” *Id.* at 96, 98, 102.

The state circuit court denied Rieber’s claim that counsel were ineffective for failing to pursue an intoxication defense, noting, “[T]he mere existence of a potential alternative defense theory is not enough to establish ineffective assistance based on counsel’s failure to present that theory.” Pet. App’x E at 194a (quoting *Hunt*, 940 So. 2d at 1067) (quotation omitted). Much of the testimony of the four witnesses Rieber offered would not have been admissible during the guilt phase of his trial, as evidence of habitual substance abuse “is not evidence that that person was intoxicated at the time of the murder.” *Id.* at 195a (quoting *Whitehead v. State*, 777 So. 2d 781, 833 (Ala. Crim. App. 1999)) (quotation omitted). As the court explained, the murder occurred around 8 p.m., and evidence that Rieber had used drugs earlier that day did not prove he was intoxicated at that time. *Id.* at 196a. Moreover, Rieber denied committing the murder or visiting the Mobil Mart. *Id.* at 196-97a. Thus, the circuit court found that Rieber failed to prove ineffective assistance. *Id.* at 197a. The court also found that even if counsel had requested an instruction on manslaughter, Rieber would not have been entitled to it. *Id.* at 197-98a.

ACCA affirmed. Noting that “[g]enerally, ‘trial counsel’s decisions regarding what to pursue represent the epitome of trial strategy,’” Pet. App’x D at 123a (quoting *Clark v. State*, 196 So. 3d 285, 306 (Ala. Crim. App. 2015)), the court held that counsel’s decision not to pursue a voluntary intoxication defense was reasonable, given Rieber’s denial of involvement with the crime. Further, Rieber’s weak postconviction

evidence would not have entitled him to an instruction on manslaughter had it been presented at trial. *Id.* at 125a.

iii. Habeas

The district court denied relief on this claim. After reviewing defense counsel’s strategy of mistaken identity—including the witnesses offered to call into question the identification of Rieber as the shooter—the court parsed Rieber’s contentions concerning his intoxication defense. Pet. App’x C at 38-39a. First, the court noted that counsel had discussed their mistaken identity defense with Rieber, who “seemed to understand the strategy, did not suggest any other defense, and never mentioned blacking out or being unable to remember what had happened at the convenience store.” *Id.* at 39a. Second, the court considered Dr. Rogers’s report and Kempaner’s recollection of it—specifically, how Kempaner said it did not matter, as the defense’s “position was [Rieber] didn’t do it.” *Id.*

Reviewing the state courts’ *Strickland* decision through the lens of double deference, *id.* at 40a (citing *Burt v. Titlow*, 571 U.S. 12, 15 (2013)), the district court found that Rieber failed to show that the state courts were unreasonable. Considering first the performance prong, the court gave deference to the state-court factual finding that “trial counsel made a strategic decision to focus on the mistaken identity defense instead of the voluntary intoxication defense.” *Id.* (citing 28 U.S.C. § 2254(d)(2); *Wood v. Allen*, 558 U.S. 290, 300-02 (2010)). The district court noted, “There is no dispute that trial counsel did not investigate the voluntary intoxication defense beyond reading Dr. Rogers’ report and briefly discussing Mr. Rieber’s drug

use with some of his family members,” *id.* at 41a, so the question then before the court was whether ACCA was reasonable in concluding that counsel’s failure to further investigate the voluntary intoxication defense was reasonable, *id.* The court answered this in the affirmative:

[ACCA’s] decision was eminently reasonable in light of federal authority on counsel’s duty to investigate. The evidence presented at the Rule 32 evidentiary hearing establishes that trial counsel consulted with Mr. Rieber in deciding the defense to present at trial. The only indication that Mr. Rieber had blacked out was contained in Dr. Rogers’ report. Mr. Rieber never told his attorney that he had blacked out, nor did he suggest any defense other than mistaken identity. And a voluntary intoxication defense would have been inconsistent with the mistaken identity defense.

Moreover, [ACCA] held in this case that “the evidence Rieber offered at the Rule 32 hearing in support of a voluntary-intoxication theory did not establish that he would have been entitled to a lesser-included-offense manslaughter instruction.” This is a state court’s interpretation of state law, which is binding on this court. *See Pietri v. Sec’y, Fla. Dep’t of Corr.*, 641 F.3d 1276, 1284 (11th Cir. 2011). And an attorney does not perform deficiently by failing to present a meritless defense. *Lindsey v. Smith*, 820 F.2d 1137, 1152 (11th Cir. 1987) (“A habeas petitioner who proposes [an] alternative trial strategy that would itself have proved futile has failed to demonstrate that the representation at trial fell below an objective standard of reasonableness.”). Accordingly, Mr. Rieber cannot establish that the state court unreasonably concluded that he failed to establish deficient performance with respect to the investigation and presentation of a voluntary intoxication defense.

Id. at 42-44a (citations omitted).

Turning then to the prejudice prong, the district court found none, as “[e]ven if trial counsel had investigated and presented to the jury all of the evidence Mr. Rieber presented during his Rule 32 evidentiary hearing, the state trial court would not have given the manslaughter instruction and there is no possibility the outcome of Mr. Rieber’s trial would have changed.” *Id.* at 44a. Therefore, the district

court concluded that the state courts' decision was not unreasonable.

The Eleventh Circuit concurred with the district court's prejudice ruling for several reasons. Dr. Rogers's report "was based on Mr. Rieber's own statements," and he did not subject himself to cross-examination during the state evidentiary hearing. Pet. App'x A at 10a. While there *was* evidence presented that Rieber used drugs, only two of the postconviction witnesses testified that he used anything on the day of the murder, and neither could specify the quantity of drugs he consumed or provide a time frame for their consumption. *Id.* Indeed, neither testified that Rieber appeared to be intoxicated or high that day, a statement echoed by Rieber's own sister, who saw him an hour after Craig's murder. *Id.* at 10-11a. And Rieber's actions—purchasing a gun and studying the convenience store—suggested premeditation instead of the impulsive act of a man out of his mind on intoxicants. *Id.* at 11a.

The court continued:

[W]e are not conducting de novo review, and the Alabama Court of Criminal Appeals ruled that the evidence presented at the Rule 32 hearing—even if it had been presented at trial—would not have entitled Mr. Rieber to a jury instruction on the lesser-included offense of manslaughter. *See Rieber V* at 17 ("Furthermore, the evidence Rieber offered at the Rule 32 hearing in support of a voluntary-intoxication theory did not establish that he would have been entitled to a lesser-included-offense manslaughter instruction."). As a general matter, federal courts conducting habeas review cannot second-guess a state court's interpretation of state law. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1997)[.]

Id. Thus, citing *Shinn v. Kayer*, 592 U.S. 111, 120-22 (2020), the court found that fair-minded jurists could agree with the state courts' determination and gave the state decisions AEDPA deference, deeming them not unreasonable. *Id.* at 12-13a. Moreover, Eleventh Circuit case law specifically holds that *Strickland* "does not require

presenting an alternative—not to mention unavailing or inconsistent—theory of the case.” *Dill v. Allen*, 488 F.3d 1344, 1357 (11th Cir. 2007) (collecting cases).

B. Rieber’s claim is not cert-worthy.

In his present petition, Rieber claims that trial counsel performed deficiently—and that this deficient performance was prejudicial to him—for failing to fully investigate and present a voluntary intoxication defense. Pet. 16-17. To support this claim, all he offers the Court is his disagreement with the factual findings of the state courts. Pet. 17.

First, as to performance, while Rieber faults counsel for not further pursuing Dr. Rogers’s report, he provides nothing of substance calling into question the fact that the references to him blacking out in that report were based on his self-serving statements to the psychologist. It was not unreasonable for the state courts to discount the veracity of Rieber’s claims to Dr. Rogers (and thus the strength of the alternative guilt-phase defense). The federal courts properly gave these findings deference. Moreover, while Rieber claims that “[n]umerous witnesses” testified about his drug use on the day of the murder, *id.*, he still fails to offer any proof of specifically what he took and when, or that he was intoxicated when he murdered Craig. Indeed, as ACCA noted, Rieber’s fact witnesses testified that they had never seen him black out or become violent when he was intoxicated or high. Pet. App. D at 124a n.5.

As for Rieber’s contention that counsel were ineffective because a voluntary intoxication defense was “much more likely to succeed,” Pet. 18, he fails to grapple with the facts Kempaner set before the state circuit court: Rieber told the police that

he had never been inside the Mobil Mart and knew nothing of the crime, and he did not suggest to counsel that they argue he was intoxicated instead. If, as Rieber initially insisted, he had never been to the crime scene, then why would it matter whether he was intoxicated that night? And Rieber cannot disagree his way around ACCA's finding that "the evidence Rieber offered at the Rule 32 hearing in support of a voluntary-intoxication theory did not establish that he would have been entitled to a lesser-included-offense manslaughter instruction." Pet. App. D at 125a. As the circuit court and ACCA explained, Rieber failed to provide evidence sufficient to show that his level of intoxication amounted to insanity in order to negate the specific intent necessary for a murder conviction. *Id.* at 124-25a; see *Ex parte McWhorter*, 781 So. 2d 330, 342-43 (Ala. 2000). Rieber may not like the Alabama courts' interpretation of Alabama law, but he cannot claim that every reasonable lawyer would have requested a jury instruction to which he was not entitled.

And while Rieber suggests in a footnote that the Eleventh Circuit's silence on the performance prong "suggest[s] Mr. Rieber established Mr. Kempaner's performance was deficient," Pet. 18 n.2, this is nothing but unfounded speculation. As this Court stated in *Strickland*, "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." 466 U.S. at 697. Here, Rieber would have lost on the performance prong—a significant vehicle problem, as the Court does not often grant certiorari to hear claims that are doomed to fail regardless.

Second, as to prejudice, Rieber claims that had counsel presented a voluntary

intoxication defense, “there is a reasonable probability the jury would have found reasonable doubt as to Mr. Rieber’s intent to commit murder,” or at least the jury would have received an instruction on manslaughter as a lesser included offense. Pet. 19. He faults the Eleventh Circuit for deferring to ACCA, contending that ACCA was wrong about Alabama law not supporting an intoxication defense in his case. Pet. 19-23. Needless to say, this Court does not typically grant certiorari to review state-court determinations of state law.

Moreover, as set forth above, the state court’s reading of state law was correct: the “evidence” upon which Rieber relies to undermine the lower courts’ decision is insufficient to support a voluntary intoxication defense under Alabama law. Rieber points to the testimony of Jo Duffy and Sonya Williamson to show that he was intoxicated at the time of the murder, Pet. 20, but Duffy stated that Rieber “maybe smok[ed] pot, [drank] a beer or something” at some point after 6:30 p.m., DE16-83:67, while Williamson claimed that she saw Rieber, a regular abuser of drugs and alcohol, drink, use marijuana, and snort crystal meth that evening, *id.* at 72-78. Williamson testified that she had been at the party since midafternoon and was drinking and using drugs herself, so she could not say when Rieber arrived and allegedly got high. *Id.* at 76-78. In sum, his two witnesses could not agree on what Rieber supposedly took or when he took it—unsurprising, as at least one of them had herself used drugs that day, and the house party was twenty years behind them.¹ As for Rieber’s

1. Notably, Charity Hubert, Rieber’s former girlfriend, testified that she saw Rieber at the house party during daylight hours, and he drove off *before* dark; she also testified that she saw drug transactions going on at the house but did not testify that Rieber consumed anything. DE16-82:184, 186-88. The

statements to Dr. Rogers about what he consumed that night, there is nothing to corroborate them; indeed, while Rieber told Dr. Rogers that he used acid that night, *see* Pet. 20, Williamson claimed that of all the drugs she saw Rieber use over the years, she never saw him take acid, DE16-83:73. So much for the “bad acid” defense.

Moreover, the state courts clearly explained why Rieber would not have been entitled to a manslaughter instruction under Alabama law:

The circuit court also concluded that even if Kempener [sic] had requested a manslaughter instruction, Rieber would not have been entitled to it. (C. 2874.) In its order denying Rieber’s amended Rule 32 petition, the circuit court acknowledged that while Rieber presented witnesses who gave testimony concerning his history of drug and alcohol abuse, such testimony would not necessarily have been admissible during the guilt phase of his trial because evidence that Rieber had been using drugs at some time during the day of the offense would not necessarily have proven that he was intoxicated at the time of the offense. (C. 2872 (citing *Windsor v. State*, 683 So. 2d 1027 (Ala. Crim. App. 1994)).) Specifically, the circuit court found that “[e]vidence that someone was a habitual drug user is not evidence that that person was intoxicated at the time of the murder.” (C. 2871-72 (quoting *Whitehead v. State*, 777 So. 2d 781, 833 (Ala. Crim. App. 1999)).) Based on these findings, the circuit court denied this claim on the ground that, under Rule 32.3, Ala. R. Crim. P., Rieber failed to prove that Kempener [sic] was ineffective during the guilt phase of his capital murder trial.

Rieber has not demonstrated that the circuit court erred in denying this claim....Furthermore, the evidence Rieber offered at the Rule 32 hearing in support of a voluntary-intoxication theory did not establish that he would have been entitled to a lesser-included-offense manslaughter instruction. *See Ex parte McWhorter*, 781 So. 2d 330, 342-43 (Ala. 2000) (holding that because there was no substantial evidence indicating that at the time of the crime defendant was intoxicated to such a degree that the intoxication amounted to insanity, as required to negate specific intent element of murder and reduce the charge to manslaughter, the trial court’s giving a voluntary-intoxication charge at guilt phase of capital murder prosecution was neither prejudicial nor

sun set on October 9, 1990, at approximately 6:20 p.m., about an hour and a half before Craig was murdered. *See NOAA Solar Calculator*, NOAA, <http://www.esrl.noaa.gov/gmd/grad/solcalc> (last visited May 6, 2025).

necessary). Therefore, Rieber is not entitled to relief on this claim. Pet. App'x D at 124-25a (footnote omitted). The Eleventh Circuit did not err in deferring to the state courts' interpretation of state law, and the state decisions Rieber cites, *see* Pet. 21-22, offered far more evidence of actual intoxication than two friends' vague and conflicting reports and the defendant's own statements to a psychologist. Again, while Rieber may disagree with ACCA, the state courts' interpretation of state law provides the guideposts for what counsel might reasonably have obtained. Here, Rieber cannot prevail on a *Strickland* claim where the instruction he contends effective counsel should have requested would not have been given, nor can he prevail under AEDPA where the state courts' decision was not unreasonable.

As Rieber's claim is factbound and meritless, the Court should deny certiorari.

II. Rieber's penalty-phase ineffective assistance claim is also factbound and meritless.

The Court should deny certiorari as to Rieber's second claim, Pet. 23-26, because, like his guilt-phase claim, it is factbound and meritless. The lower federal courts properly showed deference to the state courts' factual findings, and Rieber has offered no good grounds for cert. *See* SUP. CT. R. 10.

A. Background

i. Trial

Co-counsel Dan Moran took the lead during the penalty phase of Rieber's trial. The defense offered testimony from seven mitigation witnesses: a former employer who said Rieber was a good employee and never violent; a friend who trusted Rieber, said he was very gentle, and even used to ask Rieber to watch her convenience store

register for her; a former neighbor who said Rieber was like a son; a friend who said Rieber was “a good guy,” like a brother to him, and never violent; another former neighbor who called Rieber lovable and helpful; a friend who said Rieber was “always nice” and dependable; and finally, Rieber’s sister Shauna. DE16-78:61-100. The defense also introduced Dr. Rogers’s reports, in which Rieber discussed his alleged drug use on the night of the murder and Dr. Rogers opined that he might have blacked out. *Id.* at 100-01. While the prosecution heavily attacked Dr. Rogers’s reports in closing, arguing, “Do you think that [Rieber] might be inclined to lay it on a little heavily for the benefit of the doctor whose report might save his life?” DE16-79:7, the jury ultimately recommended life without parole on a 7-5 vote, *id.* at 46.

At the judicial sentencing hearing, even with the jury recommendation, the defense offered additional testimony from Rieber’s mother about how non-violent and helpful he was. *Id.* at 54-58. Still, the trial court overrode the recommendation, disagreeing with Dr. Rogers that there was evidence to suggest Rieber had blacked out from drugs during the murder. DE16-85:111.

ii. State postconviction

In state postconviction, Rieber argued that counsel were ineffective during the penalty phase for failing to present evidence corroborating Dr. Rogers’s conclusions about his substance abuse and intoxication at the time of the crime. DE16-11:62-63. While Moran was deceased by the time of Rieber’s 2011 evidentiary hearing, Rieber presented the testimony set forth above from Hubert, Duffy, Williamson, and Maroney concerning his substance abuse in general and leading up to Craig’s murder.

See supra part I.A.ii.

The state circuit court was unpersuaded, noting:

The testimony presented by Rieber at the evidentiary hearing from his siblings, friends, and acquaintances, and Dr. Stalcup focused on Rieber's history of drug abuse. Much of this same evidence was presented to the jury by way of Dr. [Rogers's] report and does not support Rieber's assertion that Mr. Moran's performance was deficient.

[...]

The fact that Mr. Moran did not present evidence about Rieber's history of drug abuse during the penalty phase in the manner that Rieber believes he should have does not establish that Mr. Moran was ineffective.

Pet. App'x E at 218-20a. ACCA concurred with the circuit court's findings:

The record indicates that Moran introduced as much mitigating evidence concerning Rieber's background as was available to him. Rieber has failed to point to specific examples in the record demonstrating that the evidence and testimony above rendered Moran's assistance deficient and ultimately prejudiced him during the penalty phase of his capital murder trial. As such, Rieber is not entitled to relief on this claim.

Pet. App'x D at 130a.

iii. Habeas

The district court denied relief on this claim in habeas. For Rieber to be entitled to relief, he would have had to show that “there is a reasonable probability that, absent the errors, the sentencer”—that is, the trial court—“would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.”

Pet. App'x C at 45a (quoting *Putman v. Head*, 268 F.3d 1223, 1248 (11th Cir. 2001)) (quotation and alteration omitted in order). The court reviewed the trial testimony about Rieber's good character and Dr. Rogers's reports, *id.* at 45-46a, then the state

postconviction testimony about Rieber’s drug use, *id.* at 47a, and ultimately decided to address only the prejudice prong:

The evidence presented at the Rule 32 evidentiary hearing corroborates the part of Dr. Rogers’ report reciting Mr. Rieber’s history of drug use. The evidence also corroborates Mr. Rieber’s claim that he consumed hard drugs and alcohol on the day of the murder. But it does not corroborate Mr. Rieber’s claim that he was intoxicated at the time of the murder. The evidence that Mr. Rieber used drugs on the day of the murder was limited to evidence that Mr. Rieber attended a party where drugs were being used, one witness saw him snorting meth, smoking marijuana, and drinking alcohol at an unspecified time, and one witness *might* have seen him smoking marijuana and drinking around 6:30 or 7 P.M. Multiple witnesses testified that they had never seen Mr. Rieber black out from drug use. And Mr. Rieber’s sister testified that she was familiar with how Mr. Rieber acted when he was high and that when she saw him about an hour after the murder, he did not appear to be intoxicated. It was not unreasonable for the state court to find as a fact that this evidence failed to establish that Mr. Rieber was intoxicated when he committed the murder.

Id. at 50-51a (record citations omitted). Comparing Rieber’s case to *Wiggins v. Smith*, 539 U.S. 510 (2003), the district court found that Rieber’s postconviction evidence was “weak” and noted that what trial counsel *did* present—positive character evidence—resulted in a life recommendation from the jury. *Id.* at 52a. Worse for Rieber, “the aggravators were strong”:

The state court found that—in addition to committing the murder during a robbery—Mr. Rieber planned the crime in advance with the intent to kill Ms. Craig and killed her while she was defenseless, in pain, and posed no threat to him....Moreover, some of the omitted evidence highlighted misconduct of which the sentencer was not aware, such as Mr. Rieber’s history of selling drugs and his involvement with a fourteen-year-old girl who soon began using drugs with him. [S]ee *Evans v. Sec’y, Dep’t of Corr.*, 703 F.3d 1316, 1327 (11th Cir. 2013) (accepting as reasonable a state court’s rejection of a similar claim where the mitigating evidence “was a two-edged sword or would have opened the door to damaging evidence”) (quotation marks omitted); *Windom v. Sec’y, Dep’t of Corr.*, 578 F.3d 1227, 1251 (11th Cir. 2009) (“[A]ny potential benefit to be gained by presenting the relatively weak mitigating evidence in

[the petitioner]’s case would have been severely undercut by rebuttal evidence of his own misconduct....”).

To find the state court’s determination on the prejudice prong unreasonable, the court would have to conclude that no reasonable jurist could have found a lack of prejudice. *See Brooks v. Comm’r, Ala. Dep’t of Corr.*, 719 F.3d 1292, 1300 (11th Cir. 2013). But a reasonable jurist could conclude that the omitted evidence would not have changed the sentencing court’s mind. Accordingly, the state courts’ findings on the prejudice prong were reasonable under *Strickland* and *Wiggins*, and Mr. Rieber is not entitled to habeas relief on this claim.

Id. at 52-53a (record citations omitted).

The Eleventh Circuit concurred, quoting the district court’s analysis and holding that “under the standard set out in cases like *Kayer*, 529 U.S. at 120-22, Mr. Rieber has not shown that the Alabama courts’ determination as to prejudice on the penalty-phase ineffectiveness claim was unreasonable.” Pet. App’x A at 14a.

B. Rieber’s claim is not cert-worthy.

In his present petition, Rieber claims that trial counsel performed deficiently—and that this deficient performance was prejudicial to him—for failing to “pursue mitigation evidence” concerning his substance abuse. Pet. 23.

First, Rieber faults Moran for not investigating his drug use and for billing nothing between the jury’s life recommendation and the sentencing hearing, Pet. 24, but that does not constitute a *Wiggins* violation, particularly in light of how weak the postconviction evidence was, how it would have been a double-edged sword, and how the trial evidence showed that Rieber planned the robbery-murder. Essentially, Rieber would have this Court find Moran ineffective for presenting the jury with sufficient evidence of Rieber’s good character to secure a **life recommendation** in a case in which he was caught on camera shooting a defenseless woman in the head,

and further hold that Moran should have presented evidence that Rieber was a dealer who got his young teenage girlfriend hooked on hard drugs. To put it lightly, such evidence is “by no means clearly mitigating” and more likely would have confirmed that Rieber “was simply beyond rehabilitation,” *Cullen v. Pinholster*, 563 U.S. 170, 201 (2011)—unhelpful to Rieber, as the trial court considered his crime especially heinous, atrocious or cruel compared to other capital murders, DE16-85:106-08.

Second, Rieber argues that the Eleventh Circuit and district court erred because their conclusion “is contradicted by the sentencing record, which establishes the sentencing court would have reached a different outcome had the evidence of Mr. Rieber’s drug use been developed and presented at sentencing.” Pet. 23. But Rieber offers nothing to show that his weak postconviction evidence would have swayed the trial court as to Dr. Rogers’s conclusions. Moreover, he offers nothing to suggest that had he presented his postconviction evidence instead of the good character evidence the defense offered, the trial court would have chosen life without parole. Overall, his evidence is the kind that Alabama courts “give...little mitigating weight” and “would view...with some ‘skepticism.’” *Thornell v. Jones*, 144 S. Ct. 1302, 1313 (2024). Rieber disputes the state courts’ findings and would weigh the mitigation differently, but that’s hardly enough to show entitlement to relief under AEDPA, let alone a cert-worthy claim.

Finally, while Rieber suggests in a footnote that the federal courts’ silence on the performance prong “suggest[s] Mr. Rieber established sentencing counsel was deficient for failing to pursue mitigating evidence related to drug use,” Pet. 23 n.3, this

is nothing but unfounded speculation. Again, as this Court stated in *Strickland*, “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.” 466 U.S. at 697.

As Rieber’s claim is factbound and meritless, the Court should deny certiorari.

III. Rieber’s death sentence is constitutional.

The Court should deny certiorari as to Rieber’s third claim, Pet. 26-33, because judicial override is constitutional, *Hurst v. Florida* is a mere application of *Ring v. Arizona*, and *Ring* is not retroactively applicable to cases like Rieber’s.

In brief, Rieber’s contention is that his 1992 death sentence is unconstitutional for three reasons. First, he alleges that Alabama’s capital sentencing scheme at the time was invalidated by *Hurst*, and that because the trial court independently found the existence of two aggravating circumstances, it improperly overrode the jury’s life recommendation. Pet. 26-30. Second, he claims that *Hurst* should be retroactively applicable to override cases under the *Teague v. Lane* framework. Pet. 30-32. Third, he alleges that his death sentence is arbitrary and capricious, and that because override has been abolished, his sentence is cruel and unusual and does not comport with evolving standards of decency.² Pet. 32-33. Nothing he offers here is cert-worthy.

To sum up the facts below, the trial court charged the jury on two aggravating circumstances: (1) the capital murder was committed during a robbery, and (2) the

2. While *Hurst* was not announced until Rieber’s case was on appeal in state postconviction, Rieber did argue in his amended postconviction petition that Alabama’s death penalty scheme was unconstitutional because of the override provision. He raised *Hurst* as a ground for relief in his brief to ACCA, then filed a supplement in that court once Alabama legislatively removed override.

offense was especially heinous, atrocious, or cruel compared to other capital offenses. DE16-79:32-34. The first aggravator was proven beyond a reasonable doubt by the jury's guilt-phase verdict, *id.* at 32, and under Alabama law, a single aggravating circumstance was all that was necessary to make Rieber eligible for the death penalty, *e.g.*, *Ex parte Waldrop*, 859 So. 2d 1181, 1188 (Ala. 2002) (citing ALA. CODE § 13A-5-45(f)). As noted above, Rieber's jury recommended life without parole on a 7-5 vote, but the trial court overrode that recommendation. The court's June 1992 sentencing order stated that the court found the existence of both aggravators, DE16-85:106-08, and while the court considered the mitigating circumstances and the recommendation, the court felt that the aggravating circumstances outweighed them, *id.* at 113.

Judicial override was part of Alabama's capital sentencing statutes in 1992 and remained an option until 2017. *See* Ala. Laws Act 2017-131 (amending statutes). In 1995, this Court held that override was constitutional in *Harris v. Alabama*, 513 U.S. 504 (1995), and that decision has not been overturned in the thirty years since. Thus, while Alabama does not currently permit judicial override, the practice remains constitutional, just as it was constitutional when Rieber was sentenced. *See, e.g.*, *Miller v. Comm'r, Ala. Dep't of Corr.*, 826 F. App'x 743, 749 (11th Cir. 2020) (noting that *Harris* remains binding precedent).

Turning then to Rieber's petition, ***first***, his claim that the Court should grant certiorari because Alabama's capital sentencing scheme is unconstitutional after *Hurst*, Pet. 26-30, is meritless. In 2016, *Hurst* invalidated Florida's capital sentencing

scheme because Florida law permitted the judge to make the findings of fact *necessary* to impose death. 577 U.S. at 94. The Alabama Supreme Court considered whether Alabama’s capital scheme remained constitutional following *Hurst* in *Ex parte Bohannon* and noted a critical difference: in Alabama, the fact necessary to impose death—that is, the existence of an aggravating circumstance—must be unanimously found by the jury. 222 So. 3d 525, 532-33 (Ala. 2016). In Rieber’s case, the jury did just that; the aggravating circumstance that the murder was committed during a robbery was established by the jury’s guilt-phase verdict, and that single aggravator was all that was necessary to impose the death penalty. While this Court has not specifically opined on the constitutionality of Alabama’s capital statutes post-*Hurst*, the Court denied certiorari in Bohannon’s case, *Bohannon v. Alabama*, 580 U.S. 1101 (2017) (mem.), and in 2020, the Court explained that following *Ring* and *Hurst*, “a jury (as opposed to a judge) is not constitutionally required to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision within the relevant sentencing range,” *McKinney v. Arizona*, 589 U.S. 139, 144 (2020). In other words, as long as the jury finds all facts necessary to impose the death penalty, the Sixth Amendment is satisfied. Thus, it is immaterial that Rieber’s trial court found the existence of two aggravating circumstances instead of the one established beyond a reasonable doubt by the jury’s verdict and further found that the aggravators outweighed the mitigators. The jury made the necessary fact-finding of

the existence of an aggravator, and that is all that *Hurst* and *Ring* require.³

Second, as Rieber admits, Pet. 31, the Court held five years ago in *McKinney* that “*Ring* and *Hurst* do not apply retroactively on collateral review,” 589 U.S. at 145. But Rieber would have the Court grant cert in order to consider *Hurst* under the *Teague* framework, as he contends that *Hurst* somehow created both a substantive rule of constitutional law and a “watershed” rule of criminal procedure. He is mistaken.

Rieber claims that *Hurst* created a substantive rule because it “is the first time this Court expressly and unequivocally struck down judicial override statutes as violating the Sixth Amendment.” Pet. 31. But that’s not what the *Hurst* Court did—as discussed above, the Court invalidated a different capital scheme in which the trial judge could make necessary findings of fact. Thus, even if *Hurst* were retroactive, it would have no bearing on Rieber’s sentence. Moreover, *Hurst* did not create a new substantive rule; that decision is an application of *Ring*, and as the Eleventh Circuit noted, “we have a head start [in the *Teague* analysis] because the Supreme Court has already held that *Ring* represented a ‘prototypical procedural rule[.]’” *Knight v. Fla. Dep’t of Corr.*, 936 F.3d 1322, 1336 (11th Cir. 2019) (quoting *Schriro*, 542 U.S. at 353).

In the alternative, Rieber claims that *Hurst* is a watershed rule of criminal procedure. The only such rule the Court has **ever** recognized is that of *Gideon v.*

3. As an aside, Rieber claims that with the removal of override, “[i]f less than ten jurors vote for death, the court must sentence the defendant to life without parole.” Pet. 30. This is an all-too-common misstatement of Alabama law. A death verdict requires ten of twelve jurors, while a life without parole verdict requires at least seven. Anything in between—for example, a 9-3 vote for death—is a mistrial of the penalty phase, to be followed by either a second penalty phase before a new jury or, with the consent of the parties and the court, judicial sentencing. ALA. CODE §§ 13A-5-46(f)-(g).

Wainwright, 372 U.S. 335 (1963). *Edwards v. Vannoy*, 593 U.S. 255, 267 (2021) (“The Court has never identified any other pre-*Teague* or post-*Teague* rule as watershed. None.”). And as the Court stated just four years ago, “It is time—probably long past time—to make explicit what has become increasingly apparent to bench and bar over the last 32 years: New procedural rules do not apply retroactively on federal collateral review. The watershed exception is moribund. It must ‘be regarded as retaining no vitality.’” *Id.* at 272 (quoting *Herrera v. Wyoming*, 587 U.S. 329, 342 (2019)).

Even if there were other watershed rules besides *Gideon*, the Court made clear in *Schriro* that *Ring* itself did not announce a watershed procedural rule, 542 U.S. at 355-56, and the Court granted certiorari in *Hurst* “to resolve whether Florida’s capital sentencing scheme violates the Sixth Amendment in light of *Ring*,” 577 U.S. at 97—that is, to apply *Ring* to Florida’s laws. *Hurst* is thus an application of *Ring*, and if *Ring* did not announce a new watershed rule, then neither did *Hurst*. See, e.g., *Knight*, 936 F.3d at 1337 (“*Knight* does not contend that *Hurst* announced a new watershed rule that compares to *Gideon*, and we do not see how it could have either.”). As the Court has already conducted any necessary *Teague* analysis relating to *Hurst*, this claim is not cert-worthy.

Third, Rieber claims that his sentence is arbitrary and capricious because Hurst was resentenced. Pet. 32. In 2020, Hurst was sentenced to life without parole following a new hearing because, at the time, Florida required a unanimous sentencing recommendation. *Timothy Hurst, Whose Case Struck Down Florida’s Death-Penalty Statute, Is Resentenced to Life*, DEATH PENALTY INFO. CTR. (Mar. 14, 2025),

<https://deathpenaltyinfo.org/timothy-hurst-whose-case-struck-down-floridas-death-penalty-statute-is-resentenced-to-life>. As of April 2023, Florida requires a jury vote of at least 8-4 to impose a death sentence, FLA. STAT. § 921.141(2)(c), which is lower than Alabama’s 10-2 requirement, ALA. CODE § 13A-5-46(f). That Florida and Alabama law differ on this point does not present the sort of split meriting certiorari, nor is Rieber’s sentence arbitrary and capricious because of this variance in state sentencing procedure.

Rieber also contends that because no state currently allows judicial override, his sentence falls afoul of a “national consensus” that a death sentence imposed via override “does not comport with evolving standards of decency and the Eighth Amendment’s prohibition on cruel and unusual punishment.” Pet. 32-33. The claim that Alabama’s ***sentencing procedure***, rather than the punishment, is cruel and unusual is a bizarre contention. Moreover, Rieber offers no evidence in support of this supposed “national consensus” concerning the rationale for eliminating override. Only four states have previously permitted override: Alabama, Delaware, Florida, and Indiana. Indiana’s General Assembly removed override in 2002 in anticipation of *Ring* but did not make the provision retroactively applicable. See IND. CODE § 30-50-2-9(e) (procedure for defendants sentenced after June 30, 2002); 2002 Ind. Legis. Serv. P.L. 80-2002 § 2 (amendment to § 30-50-2-9 applies only to convictions after effective date of act). In 2016, the Delaware Supreme Court deemed override violative of the Sixth Amendment, not the Eighth. *Rauf v. State*, 145 A.3d 430 (Del. 2016). Florida removed override following *Hurst*, then required unanimous penalty-phase

verdicts for a time before the Florida Supreme Court decided that was an overcorrection. *State v. Poole*, 297 So. 3d 487 (Fla. 2020). And in Alabama, the 2017 statute removing override explicitly stated that it “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,” such as Rieber. Ala. Laws Act 2017-131 § 2. Indeed, as the Court noted in *Spaziano v. Florida*, “The fact that a majority of jurisdictions have adopted a different practice...does not establish that contemporary standards of decency are offended by the jury override. The Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws.” 468 U.S. 447, 463-64 (1984) (citation omitted) (overruled on other grounds).

Thus, Rieber’s *Hurst* claim is baseless, contradicted by this Court’s decisions, and unworthy of certiorari.

CONCLUSION

Rieber offers this Court two meritless, factbound claims and a *Hurst* claim contradicted by this Court’s precedent. The lower courts correctly denied relief, and this Court should deny certiorari.

Respectfully submitted,

STEVE MARSHALL
Alabama Attorney General

/s/ Lauren A. Simpson
Lauren A. Simpson
Deputy Attorney General
*Counsel of Record

OFFICE OF ALA. ATTY GENERAL
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300
Lauren.Simpson@AlabamaAG.go