

No. _____

In the Supreme Court of the United States

JIMMY DAVIS, JR.,
Petitioner,

v.

GREG LOVELACE, COMMISSIONER,
ALABAMA DEPARTMENT OF CORRECTIONS,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Ethan T. Tidmore
BRADLEY ARANT BOULT
CUMMINGS LLP
1819 5th Ave
North Birmingham, AL 35203
(205) 521-8000

Michael P. Matthews
Heather A. Lee
FOLEY & LARDNER LLP
100 N. Tampa St., Ste 2700
Tampa, FL 33602
(813) 229-2300

Christopher M. Kise
Counsel of Record
CONTINENTAL PLLC
215 S. Monroe St
Ste 750
Tallahassee, FL 32301
(850) 270-2211
ckise@continental-
pllc.com

Attorneys for Petitioner

JUNE MMXXVI

**CAPITAL CASE
QUESTIONS PRESENTED**

1. Whether jury hesitation to impose the death penalty, such as in this case where five jurors initially voted for life despite the jury not knowing any of the compelling mitigation evidence trial counsel failed to investigate or present, must be considered in the evaluation of the prejudice prong of the ineffective assistance of counsel test set forth in *Strickland v. Washington*, 466 U. S. 668 (1984), as some circuits have held in conflict with the decision of the Eleventh Circuit.

2. Whether the Eleventh Circuit's determination that petitioner's trial counsel's deficient performance did not prejudice him conflicts with *Rompilla v. Beard*, 545 U. S. 374 (2005), and *Williams v. Taylor*, 529 U. S. 362 (2000), where *Rompilla's* facts are materially indistinguishable from those herein presented.

PARTIES TO THE PROCEEDING

Petitioner, and plaintiff-appellant below is Jimmy Davis, Jr.

Respondent, and defendant-appellee below is Greg Lovelace, Commissioner, Alabama Department of Corrections.

RELATED PROCEEDINGS

Circuit Court of Alabama (Calhoun Cnty.):

State of Alabama v. Jimmy Davis, Jr., No. CC-93-534.60 (Mar. 4, 1994) (sentenced)

Alabama Court of Criminal Appeals:

Jimmy Davis, Jr. v. State of Alabama, No. CR-93-1364 (Oct. 20, 1995) (judgment entered)

Jimmy Davis, Jr. v. State of Alabama, No. CR-93-1364 (Jul. 3, 1996) (returned and remanded)

Jimmy Davis, Jr. v. State of Alabama, No. CR-93-1364 (Mar. 21, 1997) (second return and remand entered)

Jimmy Davis, Jr. v. State of Alabama, No. CR-93-1364 (May. 23, 1997) (rehearing denied)

Jimmy Davis, Jr. v. State of Alabama, No. CR-03-2086 (Mar. 3, 2006) (judgment entered)

Jimmy Davis, Jr. v. State of Alabama, No. CR-03-2086 (Aug. 25, 2006) (opinion overruling rehearing)

Jimmy Davis, Jr. v. State of Alabama, No. CR-03-2086 (Apr. 4, 2008) (judgment entered)

Jimmy Davis, Jr. v. State of Alabama, No. CR-03-2086 (Jun. 13, 2008) (rehearing denied)

Supreme Court of Alabama:

Ex parte Jimmy Davis, Jr. v. State of Alabama, No. 1961441 (Feb. 13, 1998) (judgment entered)

Ex parte Jimmy Davis, Jr. v. State of Alabama, No. 1961441 (Aug. 28, 1998) (rehearing denied)

Ex parte Jimmy Davis, Jr. v. State of Alabama, No. 1051719 (Aug. 3, 2007) judgment entered)

United States District Court (ND Ala.):

Jimmy Davis Jr. v. John Hamm, Commissioner, Alabama Department of Corrections, No. 1:07-cv-00518-CLS (May 26, 2016) (judgment entered)

Jimmy Davis Jr. v. John Hamm, Commissioner, Alabama Department of Corrections, No. 1:07-cv-00518-CLS (Oct. 12, 2018) (motion to alter or amend judgment denied)

United States Court of Appeals (CA11):

Jimmy Davis Jr. v. John Hamm, Commissioner, Alabama Department of Corrections, No. 18-14671 (Oct. 30, 2024) (judgment entered)

Jimmy Davis Jr. v. John Hamm, Commissioner, Alabama Department of Corrections, No. 18-14671 (Feb. 19, 2026) (rehearing denied)

Supreme Court of the United States:

Jimmy Davis, Jr. v. Alabama, No. 98–7050
(Mar. 1, 1999) (certiorari denied. 525 U. S.
1179)

*Jimmy Davis, Jr. v. John Hamm, Commissioner,
Alabama Department of Corrections*, No.
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writ of certiorari extended to until June 19,
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The Eleventh Circuit's opinion is reported at 120 F.4th 768, and is reproduced in the Appendix at App. 1–165. The Eleventh Circuit's opinions on denial of rehearing are reported at 167 F.4th 1144, and is reproduced in the Appendix at App. 166–207. The district court's opinion is reproduced in the Appendix at App. 210–561. The Supreme Court of Alabama's opinions are reported at 718 So. 2d 1166 and 9 So. 3d 571. The Alabama Criminal Court of Appeals' opinions are reported at 718 So. 2d 1148 and 9 So. 3d 539, and are reproduced in the Appendix at App. 562–666.

JURISDICTION

The Eleventh Circuit's decision was entered on October 30, 2024. The Eleventh Circuit denied rehearing on February 19, 2026. Justice Thomas extended the time to petition for writ of certiorari to June 19, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Const., Amdt. VI provides:

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

for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U. S. Const., Amdt. VI.

U. S. Const., Amdt. XIV § 1 provides:

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

U. S. Const., Amdt. XIV § 1.

28 U. S. C. § 2254(d)(1) provides:

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 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[.]

28 U. S. C. § 2254(d)(1).

STATEMENT OF THE CASE

I. Introduction

Jimmy Davis, Jr. was sentenced to death after his trial counsel failed to investigate and present to the jury (1) evidence regarding extensive physical and sexual abuse Davis suffered from the time he was a toddler through adolescence, which left his back scarred, ear severed, and head warped, and (2) evidence demonstrating that Davis's sole prior conviction, which the state said was "very, very, aggravating" and which Davis's trial counsel just said "sounds real bad," actually involved Davis and others taking \$50 and some pizzas from a pizza delivery driver without any weapons or violence. Even without this evidence, Davis's jury initially asked the trial court if it would accept a verdict of seven for death and five for life imprisonment. When, at 7:10pm on a Friday night two weeks before Christmas, the trial judge ordered the jury to continue deliberating until it reached a different verdict, it returned a non-unanimous verdict of 11-1 in favor of death.

Noting the jury's initial vote and hesitation to impose the death penalty, the Alabama Court of Criminal Appeals (ACCA) held in Davis's state court habeas proceedings that "[t]he evidence Davis alleges should have been discovered and presented is powerful" and, but for a purported procedural bar, "we would be compelled to grant relief and order a new sentencing hearing." App. 574. The ACCA said "[c]ertainly, it is reasonable to conclude that the evidence of Davis's child abuse could very well have tipped the scales in the other direction." App. 579-80. Yet, when the Supreme Court of Alabama found Davis's claims were not

procedurally barred and remanded the case to the ACCA, the ACCA inexplicably reversed course, making no mention of the jury’s hesitation to sentence Davis to death, stating its prior comments were dicta, and finding “no prejudice” because the mitigation evidence that was not presented “would have had no affect [sic] on the outcome.” App. 663.

After the Northern District of Alabama denied Davis’s habeas petition, Davis appealed to the Eleventh Circuit. A divided panel of the Eleventh Circuit affirmed the district court’s decision. While only one judge agreed that the ACCA’s finding of no deficient performance was not unreasonable, two judges opined Davis had not shown the ACCA’s determination that trial counsel’s failure to present the mitigating evidence described above did not prejudice Davis was contrary to or an unreasonable application of clearly established federal law, despite the jury’s hesitation in sentencing Davis to death and ultimately non-unanimous verdict. The Eleventh Circuit panel majority stated that “the Supreme Court has never held that a jury’s hesitation in reaching a verdict is necessarily an indicator of prejudice or that such a factor must be considered or should weigh more heavily in the prejudice analysis under *Strickland* [v. *Washington*, 466 U. S. 668 (1984)].” App. 56. The dissent disagreed, stating that “[i]t is unreasonable . . . to conclude that there is *no* ‘reasonable probability that at least one juror would have struck a different balance’ but for counsel’s errors, given the seven-five split in deliberations that occurred even without these mitigating facts.” App. 153 (citing *Wiggins v. Smith*, 539 U. S. 510, 537 (2003)) (emphasis in original). The Eleventh Circuit’s denial of Davis’s petition for rehearing drew two

dissents, stating among other things that “the panel majority’s reading of *Strickland* and application of [the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)] on the issue of juror hesitation flies in the face of this great body of caselaw and historical practice cementing the importance of juries and giving shape to the right to a fair jury trial.” App. 197.

As set forth below, the U. S. appellate courts are all over the map in whether and how they consider the impact of jury hesitation to impose the death penalty on the prejudice prong of the ineffective assistance of counsel test set forth in *Strickland*. Six circuits repeatedly have found that jury hesitation should be considered in assessing prejudice pursuant to *Strickland*, treating jury hesitation (whether in the form of an initial deadlock, jury split, lengthy deliberation or a combination of the foregoing) as a strong indication that the case was close and minimal additional mitigating or exculpatory evidence could have changed the outcome. Three circuits have rejected this approach. The Court should therefore take this opportunity to provide much-needed guidance regarding the significance of a jury’s hesitation to impose the death penalty on courts’ evaluation of *Strickland*’s prejudice prong. Ignoring the importance of a jury’s reluctance to impose the death penalty undermines not only defendants’ Sixth Amendment right to the effective assistance of counsel but also the right to a trial by jury and is inconsistent with this Court’s precedent interpreting that right. See, e. g., *Apprendi v. New Jersey*, 530 U. S. 466 (2000) (holding any fact that increases the penalty for a crime beyond the statutory maximum must be found by a jury, not a judge); *Ring v. Arizona*, 536 U. S. 584 (2002) (holding a jury, not a

judge, must find the existence of statutory aggravating factors supporting the death penalty); *Hurst v. Florida*, 577 U. S. 92 (2016) (holding the Sixth Amendment requires a jury, not a judge, to find the existence of all facts supporting imposition of the death penalty); *Ramos v. Louisiana*, 590 U. S. 83 (2020) (holding the Sixth Amendment right to a unanimous jury verdict is fully incorporated to the states via the Fourteenth Amendment).

Apprendi, *Ring*, *Hurst*, and *Ramos* all support the primacy of the right to trial by jury and compel the conclusion that disregarding a jury’s hesitation to impose a death sentence in the *Strickland* prejudice analysis inappropriately dismisses the jury’s critical role in capital sentencing. A jury that hesitated to impose death after sitting through a live trial despite not hearing unquestionably powerful mitigating evidence should be trusted to sit in judgment on life or death, rather than solely an appellate court looking at a dated and incomplete cold paper sentencing-phase record and deciding what that jury would have thought of such evidence had it been presented.

Additionally, the Eleventh Circuit’s holding that the ACCA’s no-prejudice determination was not contrary to, or an unreasonable application of, this Court’s precedent resolved an important federal question in a way that conflicts with *Rompilla v. Beard*, 545 U. S. 374 (2005), and *Williams v. Taylor*, 529 U. S. 362 (2000), which is a separate and independent ground warranting certiorari review.

II. State Court Proceedings

On Friday, December 10, 1993, at 7:10 p.m. after a week-long jury trial, the jury asked the trial court

whether it could “accept seven for death and five for life? If not, what procedure should we go by?” App. 14. The trial court instructed the jury that it could not accept a seven-to-five verdict and to continue deliberating into the night. App. 14–15. The jury subsequently voted 11-1 to recommend 23-year-old Davis be put to death for his purported role in a murder committed during a gas station robbery. App. 14–15.

Davis’s jury initially split seven-to-five despite Davis’s trial counsel’s failure to investigate and present to the jury the powerful mitigating evidence described below. Davis’s two attorneys spent only a combined 114.20 hours¹ preparing for both the guilt and penalty phases of Davis’s trial. App. 112 (Rosenbaum, J., dissenting). This bare-bones approach meant Davis’s trial counsel did not investigate, much less present to the jury, mitigating evidence showing (1) in addition to enduring extraordinary sexual abuse as a two-year-old, Davis was repeatedly beaten by his mother with a belt buckle, a switch, an extension cord, and a broomstick, giving him a severed ear, a warped head, and 25-35 bloody lashes on his back, which a State of Alabama social worker described as the worst scarring she had ever seen, and (2) Davis’s only prior conviction, for third-degree robbery, involved taking \$50 and several pizzas from a delivery man without a weapon or violence. *E. g.*, App. 101 These errors

¹ Trial counsel Jonathan Adams did no work on Davis’s case until November 24, 1993, less than two weeks before the trial started. Co-counsel Steven Giddens spent just 4.5 hours on Davis’s case before December 1, 1993, five days before trial started. Trial counsels’ failure to prepare for trial may have been attributable to Alabama’s \$1,000.00 cap on fees payable for out-of-court time. See Ala. Code § 15-12-21 (1984).

irreparably prejudiced the penalty phase of Davis's trial in two ways, particularly given five jurors voted initially for life imprisonment rather than death despite not hearing any of this evidence.

First, had trial counsel not mistakenly believed that the facts of Davis's sole prior offense were inadmissible at sentencing, and had they bothered to read the file from the prior case, the jury would have known that one of just two² aggravating factors supporting the death penalty—Davis's prior conviction for a crime involving the threat or use of violence—involved someone other than Davis saying “give it up” not with a weapon but instead with his hand in his pocket to a pizza delivery man, who handed over \$50 and six pizzas, who was not injured, and who later said he did not feel threatened. App. 101 (Rosenbaum, J., dissenting). All Davis did was run away with one of the six pizzas. App. 101 (Rosenbaum, J., dissenting). Instead of learning those facts and putting them before the jury to counter the prosecution's argument to the jury that this prior robbery conviction was a “very, very aggravating circumstance,” (App. 120 (Rosenbaum, J., dissenting)), Davis's trial counsel just told the jury that Davis's prior conviction “sounds bad, I know it sounds real bad.” App. 14.

Second, had trial counsel spoken to Davis's adult sisters or other family members, requested records from the Alabama Department of Human Resources (DHR), or even just asked Davis whether he was ever abused, the jury would have heard that, at two years old, Davis suffered sexual abuse that caused his penis

² The only other aggravating factor was that the murder was committed during a robbery. App. 15.

to swell and bleed, and that throughout his childhood his mother regularly whipped him (primarily to punish him for wetting the bed), resulting in permanent and severe scarring, a warped head, and a severed ear. App. 23-25. The jury would have seen for themselves DHR's photos of 10-year-old Davis's back covered in scars from repeated whippings. App. 575. But the jury did not hear any of this evidence; instead, the jury only heard unsupported pleas for mercy from Davis's mother (his abuser) and cousin and testimony from a psychometrist that Davis had an IQ of 77. App. 8-14.

Even without this critical mitigating evidence, the jury hesitated in imposing the death penalty and ultimately rendered a non-unanimous verdict. App. 14-15. On a Friday night two weeks before Christmas after a week-long trial, the jury asked the trial court whether it could "accept seven for death and five for life? If not, what procedure should we go by?" App. 14-15.³ The jury was significantly divided as to the appropriate sentence, and the prosecution was three votes shy of a death verdict.⁴ The trial court responded by forcing the jury to continue to deliberate

³ This same jury also had just sat through the week-long guilt phase of the trial, which featured no physical evidence against Davis and only one eyewitness who could not identify Davis as the shooter and testified (1) the shooter was about five foot eight inches tall (the approximate height of two cousins involved in the incident who later identified Davis as the shooter and received more lenient sentences) when Davis is over six feet tall and (2) the clothes the shooter wore matched the cousins' clothing, not Davis's clothing. *Davis v. Comm'r, Ala. Dep't of Corr.*, No. 18-14671, ECF 37-3 at 154-155 (CA11); App. 283.

⁴ In Alabama, at least ten members of the jury must agree to sentence a defendant to death for the jury to return a death verdict. Ala. Code § 13A-5-46(f).

into the night. Later that same night, the jury then returned a non-unanimous verdict of 11-1 in favor of death. App. 14–15, 332. If just two jurors would have struck a different balance or stuck to their votes against death, Davis would have received a sentence of life imprisonment without the possibility of parole.

On direct appeal, after two remands, the ACCA affirmed Davis’s conviction and death sentence. *Davis v. State*, 718 So. 2d 1148 (Ala. Crim. App. 1995). The Supreme Court of Alabama affirmed, *Ex parte Davis*, 718 So. 2d 1166 (Ala. 1998), and this Court denied Davis’s certiorari petition, *Davis v. Alabama*, 525 U.S. 1179 (1999).

Davis’s request for post-conviction relief was denied, and the ACCA affirmed, finding the issue procedurally barred. App. 574. Notably, though, the ACCA acknowledged the jury’s initial 7-5 split and found clear prejudice that would have required a new sentencing but for the perceived procedural bar:

Davis’s most troubling claim is that counsel failed to investigate and present mitigation evidence at the penalty phase. The evidence Davis alleges should have been discovered and presented is *powerful*. Had this issue not been procedurally barred *we would be compelled to grant relief and order a new sentencing hearing*.

App. 574.⁵

Indeed, after recounting in detail the mitigation evidence and how the jury reached its non-unanimous verdict, the ACCA concluded: “Certainly, it is

⁵ All emphasis herein is supplied unless otherwise noted.

reasonable to conclude that *the evidence of Davis's child abuse could very well have tipped the scales in the other direction.*" App. 579–80.

The Supreme Court of Alabama reversed the ACCA's procedural bar holding and remanded. *Ex parte Davis*, 9 So. 3d 537, 539 (Ala. 2007). Thereafter, despite its earlier statements regarding being compelled to grant relief, the ACCA affirmed the state habeas denial, calling its previous statements dicta and making no mention of the jury's hesitation in sentencing Davis to death. App. 32, 596, 621. The ACCA provided no further explanation for this reversal other than that it had engaged in "further research and review of the record[.]" App. 621. The Supreme Court of Alabama denied Davis's application for rehearing and petition for certiorari. *Ex parte Davis*, 9 So. 3d 571 (Ala. 2008). Neither court considered the jury's hesitation in reaching its non-unanimous death verdict. App. 156 (Rosenbaum, J., dissenting).

III. Federal Habeas Proceedings

After exhausting his state court remedies, Davis filed a petition for a writ of habeas corpus pursuant to 28 U. S. C. § 2254 in the Northern District of Alabama. *Davis v. Allen*, No. 1:07-cv-00518-CLS, N. D. Ala. ECF Nos. 1, 33. The district court denied Davis's petition, declined to issue a certificate of appealability, and denied Davis's motion to alter the judgment. App. 34, 210–561.

Davis filed a motion for a certificate of appealability with the Eleventh Circuit. App. 2. The Eleventh Circuit granted the motion as to Davis's claim that trial counsel was ineffective in failing to investigate and present mitigating evidence regarding the facts

surrounding Davis’s prior robbery conviction and his childhood abuse. App. 2. Then, over Judge Rosenbaum’s dissent, two judges affirmed the district court’s denial of relief on the ground that the ACCA’s (second) ruling that Davis failed to show his counsel’s ineffective assistance prejudiced the outcome of the penalty phase of his trial was not an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984). App. 1–165. In so doing, the majority reasoned that while the Eleventh Circuit and sister circuits have considered “the circumstances of the jury’s decision,” *i. e.* the jury’s hesitation, unreasonableness depends only on decisions of “the Supreme Court, not the circuit courts,” and “the Supreme Court has never held that a jury’s hesitation in reaching a verdict is necessarily an indicator of prejudice or that such a factor must be considered or should weigh more heavily in the prejudice analysis under *Strickland*.” App. 55–56. Because the Eleventh Circuit’s majority opinion only ruled on prejudice, it did not address the state court’s ruling that Davis’s trial counsel was not constitutionally ineffective. Davis filed a petition for rehearing en banc, which was denied over Judge Rosenbaum’s and Judge Abudu’s dissents, discussed further below. App. 166–207.

Davis now files this timely petition for certiorari, in which he asks the Court to rule, for the first time, whether and how a jury’s hesitation to impose the death penalty should impact the evaluation of *Strickland*’s prejudice prong.

Separately, Davis seeks review of the Eleventh Circuit’s majority opinion because it resolved an important federal question in a way that conflicts with *Rompilla* and *Williams*. As Judge Rosenbaum said, “If

the panel opinion is wrong, Davis perhaps should not be executed. So this case seems to me to involve a question of exceptional importance.” App. 174 (Rosenbaum, J., dissenting) (quotation marks omitted). Because Davis’s jury was precluded “from giving independent mitigating weight to aspects of [Davis’s] character and record and to circumstances of the offense proffered in mitigation[, there is a] risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.” *Lockett v. Ohio*, 438 U. S. 586, 605 (1978).

REASONS FOR GRANTING THE PETITION

I. This Court Should Settle the Important Question, Undecided by This Court, of Whether and How Jury Hesitation Should Impact Courts’ Analysis of *Strickland*’s Prejudice Prong, About Which the Courts of Appeals Have Ruled Inconsistently.

A. The Eleventh Circuit’s Decision Implicates an Important and Undecided Question of Federal Law, About Which the Courts of Appeals Have Ruled Inconsistently.

The Eleventh Circuit’s majority decision highlights the lack of uniformity in federal circuits’ evaluation of the impact of jury hesitation on *Strickland*’s prejudice prong. In affirming the District Court’s decision, the Eleventh Circuit observed that this Court has “never held that a jury’s hesitation in reaching a verdict is

necessarily an indicator of prejudice or that such a factor must be considered or should weigh more heavily in the prejudice analysis under *Strickland*.” App. 56. As set forth in Section I.B. below, this inconsistent with *Strickland*. Further, the absence of clear direction from this Court regarding how to treat a jury’s hesitance to sentence a defendant to death in evaluating *Strickland* prejudice has led to disparate treatment of this question across—and even within—the circuits.

The Eleventh Circuit’s majority decision in this case stands in conflict with at least the First, Second, Fourth, Sixth, Ninth, and Tenth Circuits. In those circuits, courts repeatedly have found that jury hesitation should be considered in assessing prejudice pursuant to *Strickland*, treating jury hesitation (whether in the form of an initial deadlock, jury split, lengthy deliberation or a combination of the foregoing) as a strong indication that the case was close and that minimal additional mitigating or exculpatory evidence could have changed the outcome. See, e.g., *Dugas v. Coplan*, 428 F. 3d 317, 335–36 (CA1 2005) (three days of deliberations after an eight-day trial showed the case “lay on a knife edge,” significantly lowering the threshold for a finding of prejudice); *Ouber v. Guarino*, 293 F. 3d 19, 33–35 (CA1 2002) (finding state court’s “no prejudice” determination “unreasonable considering, *inter alia*, two prior juries’ deadlocks, resulting in mistrial, and current jury’s “deadlock[] for a time,” and stating “in a borderline case, even a relatively small error is likely to tilt the decisional scales”); *Mason v. Scully*, 16 F. 3d 38, 45 (CA2 1994) (a finding of *Strickland* prejudice was supported by the fact that the jury first asked for rereading of testimony before

then reporting that “it was hopelessly undecided” and reached a verdict only after an *Allen* charge); *Cox v. Donnelly*, 387 F. 3d 193, 199–200 (CA2 2004) (finding state court’s denial of appeal unreasonable given, *inter alia*, jury’s repeated requests for reinstruction on intent, deadlock, and verdict only after an *Allen* charge, which supported finding of *Strickland* prejudice); *Williams v. Stirling*, 914 F. 3d 302, 318–19 (CA4 2019) (finding the significance of mitigating evidence omitted at trial “is further heightened here given that the jury was initially deadlocked on whether to impose the death penalty” in determining *Strickland* prejudice was established and state court’s contrary conclusion was unreasonable); *Mason v. Mitchell*, 543 F. 3d 766, 780, 785 (CA6 2008) (ruling that the fact that the “jury initially reported a deadlock regarding his sentence” supported a finding of prejudice and state court’s contrary finding was unreasonable); *Powell v. Collins*, 332 F. 3d 376, 401 (CA6 2003) (“jury’s apparent difficulty in reaching a decision regarding the appropriate penalty” led court to believe capital defendant was prejudiced by counsel’s ineffective assistance during penalty phase of trial); *Silva v. Woodford*, 279 F. 3d 825, 849–50 (CA9 2002), *as amended* (Feb. 22, 2002) (jury hesitation during the penalty phase bolstered finding of prejudice and suggested that a death sentence “was not a foregone conclusion”); *Sanders v. Davis*, 23 F. 4th 966, 994–95 (CA9 2022) (jury note asking about consequences of non-unanimity “weighs towards a finding of prejudice”); *Vega v. Ryan*, 757 F. 3d 960, 974 (CA9 2014) (difficulty reaching verdict and inability to agree on several counts was an “additional indicator of prejudice,” contributing to unreasonableness of state

court’s no-prejudice finding); *Medina v. Barnes*, 71 F. 3d 363, 369 (CA10 1995) (jury’s indication that it might be unable to reach a unanimous verdict supported a finding of prejudice).

The First, Second, Fourth, Sixth, Ninth, and Tenth Circuits, then, all have recognized that when the jury struggles to reach a verdict, that fact materially supports a finding that trial counsel’s deficient performance prejudiced the defendant under *Strickland*. Put another way, when a jury already is on the fence regarding its verdict, it of course takes less evidence to convince the jury to switch sides, making it easier to show a “reasonable probability” that, but for trial counsel’s deficient performance, “the result of the proceeding would have been different.” 466 U. S. at 694.

On the other hand, the Eleventh Circuit’s majority panel decision in this case and decisions of the Third, Seventh and Eighth Circuits have declined to give any weight to jury hesitation in evaluating prejudice under *Strickland*. In *Wharton v. Superintendent Graterford SCI*, the Third Circuit dismissed a jury’s own declaration of deadlock as having minimal probative value in finding that there was no showing of prejudice. 95 F. 4th 113, 124 (CA3 2024), *cert. denied* decided with *Wharton v. Terra*, 145 S. Ct. 1439 (2025) (cert sought and denied on different issues). In *Sanders v. Trickey*, the Eighth Circuit held that the petitioner “offered no showing of prejudice whatsoever” despite the jury’s lengthy deliberations, the jury’s questions during deliberations, and that the court had to give an *Allen* charge because the jury was initially deadlocked. 875 F. 2d 205, 210 (CA8 1989); but see *Carter v. Bowersox*, 265 F. 3d 705, 716 (CA8 2001) (finding state court decision unreasonable applied

Strickland and holding “[w]ith regard to the prejudice requirement . . . , it does not take speculation to find that there is a reasonable probability that the result of the sentencing phase would have been different had petitioner’s jury been properly instructed. We know that one member of the jury at the penalty stage was at least uncertain of petitioner’s guilt. Surely there is a reasonable probability that that juror would have decided the omitted second issue in favor of life.”). Likewise, in *Allen v. Chandler*, the Seventh Circuit, applying AEDPA, refused to “draw any inference” of prejudice from a prior mistrial, reasoning that the mere fact of a prior deadlock did not itself show that an error was outcome-determinative. 555 F.3d 596, 602–03 (CA7 2009).

Moreover, the Sixth Circuit has recently strayed from its own precedent on this issue. As set forth above, in the *Mason v. Mitchell* case in 2008, the Sixth Circuit treated the jury’s initial deadlock at the penalty phase as supporting a finding of prejudice, concluding the state court’s contrary decision was unreasonable under AEDPA. 543 F.3d at 780. But in *White v. Plappert*, 131 F.4th 465 (CA6 2025), the Sixth Circuit, again applying AEDPA, discounted similar juror hesitation—an initial jury split, nine hours of deliberation, and a death recommendation reached only after continued deliberations the next day—reasoning, in a sentiment similar to the Eleventh Circuit’s denial here, that the petitioner cited “no clearly established Supreme Court precedent holding that a nine-hour deliberation period or an initial jury split proves

prejudice.” 131 F.4th at 496.⁶ The Sixth Circuit’s holding in *White*, like the Eleventh Circuit panel majority’s holding here, “creates a new limit on clearly established law” in holding that “jury hesitation is not necessarily an indicator of prejudice or a fact that must be considered,” even though *Strickland* requires review of “the totality of the evidence before the judge or jury.” App. 171–72 (Abudu, J., dissenting). “The fact that the jury already was conflicted is of paramount importance in undertaking this [prejudice] analysis.” App. 183 (Abudu, J., dissenting). This “new limitation” “minimizes the jury’s role in assessing prejudice, . . . minimizes the importance of the jury in our legal system,” and makes the Eleventh Circuit “the first state or federal court to suggest . . . that a court may ignore the jury’s behavior in assessing prejudice.” App. 188–89.

While this Court has not yet directly considered whether and how a jury’s hesitation to impose a death sentence impacts the analysis of whether a defendant’s trial counsel’s deficient performance prejudiced the defendant, this Court’s jurisprudence regarding the importance of juries to this country and its justice system is instructive. Beginning at least as far back

⁶ Although *White* attempted to distinguish *Mason* on the ground that the jury there heard no mitigating evidence, *Mason* did not treat jury deadlock as relevant only when the mitigation case at trial was wholly empty; it treated the jury’s inability to agree as objective evidence that the jury was already struggling and that additional mitigation evidence may have changed at least one juror’s vote. By discounting an initial split and extended deliberations, *White* directly contradicts *Mason*’s reasoning and illustrates the uncertainty in the lower courts regarding whether and how to consider jury hesitation in evaluating prejudice under *Strickland*.

as *Apprendi*, this Court has steadily expanded the Sixth Amendment’s protection of the jury’s role in criminal sentencing. 530 U. S. 466. In *Apprendi*, this Court held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Id.* at 490. This Court invoked the “historical foundation” of the Sixth and Fourteenth Amendments and emphasized that these rights “extend[] down centuries into the common law” and limit judicial “discretion to operate within the limits of the legal penalties” established by a jury’s factual findings. *Id.* at 477–83.

Two years later, in *Ring*, this Court applied *Apprendi* to capital sentencing and held that the jury must find all facts “necessary for imposition of the death penalty.” 536 U. S. at 609. This Court pronounced that “the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant’s [maximum] sentence . . . , but not the factfinding necessary to put him to death.” *Ibid.* Then in *Alleyne v. United States*, this Court held that a jury, not a judge, must find facts that are required to increase a defendant’s mandatory minimum sentence. 570 U. S. 99, 117–18 (2013). And in *Hurst*, the Court struck down a statute that “required the judge alone to find the existence of” facts “necessary for imposition of the death penalty” and reiterated that “[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death.” 577 U. S. at 94.

Then, in *Ramos*, this Court held that the Fourteenth Amendment fully incorporates the Sixth Amendment’s unanimity requirement, overruling

precedent that diminished the role of juries in state court actions by permitting non-unanimous verdicts of guilt. 590 U. S. 83. At the same time, in *Andrus v. Texas*, this Court explained that “because [the defendant’s] death sentence required a unanimous jury recommendation, . . . prejudice here requires only a reasonable probability that at least one juror would have struck a different balance regarding [the defendant’s] moral culpability.” 590 U. S. 806, 822 (2020) (quotation marks omitted). *Ramos* and *Andrus* are not isolated decisions; they are direct extensions of this Court’s earlier jurisprudence that enshrined the jury as the decider of a defendant’s fate.⁷

Read together, these cases confirm an unmistakable trajectory: this Court continues to recognize and entrench the jury’s constitutional role in criminal punishment, particularly in capital cases where the stakes could not be higher. See also, *e. g.*, *Erlinger v. United States*, 602 U. S. 821 (2024) (holding the Sixth Amendment requires a jury to find all facts that may increase a defendant’s maximum or minimum sentence, including whether prior offenses occurred on separate occasions); *Pena-Rodriguez v. Colorado*, 580 U. S. 206, 210 (2017) (holding evidentiary rules cannot preclude courts from considering evidence of racial

⁷ Further, this Court recently granted certiorari in *Kian v. Florida*. 608 U. S. ____ (2026) (slip op., at 2). In *Kian*, the petitioner asks the Court to reconsider its holding in *Williams v. Florida*, 399 U. S. 78 (1970) that criminal juries may consist of as few as six members, arguing jurors of less than 12 members are unconstitutional. *Kian v. Florida*, No. 25–6623, Pet. at ii (Jan. 9, 2026). Like *Kian*, this case serves as a vehicle to embrace the jury’s constitutional importance and clarify how courts should assess jury hesitation.

bias on a jury, as doing so impairs a defendant’s Sixth Amendment rights, and finding “the jury is a central foundation of our justice system and our democracy”); *Duncan v. Louisiana*, 391 U. S. 145, 149, 151–55 (1968) (recognizing that “trial by jury in criminal cases is fundamental to the American scheme of justice” and providing history of trial by jury in criminal cases); cf. *SEC v. Jarkesy*, 603 U. S. 109, 121 (2024) (civil context) (quoting *Dimick v. Schiedt*, 293 U. S. 474, 486 (1935)) (“The right to trial by jury is ‘of such importance and occupies so firm a place in our history and jurisprudence that any curtailment of the right’ has always been and ‘should be scrutinized with the utmost care.’”).

Further, this Court’s Sixth Amendment capital sentencing cases reflect a growing acknowledgment that juries were never intended to serve as “mere factfinder[s]” but rather as the ultimate sentencing authority in cases involving the death penalty. See Richa Bijlani, *More Than Just A Factfinder: The Right to Unanimous Jury Sentencing in Capital Cases*, 120 Mich. L. Rev. 1499, 1503 (2022). The historical foundation of the jury right confirms that, at common law, the jury’s role in capital cases encompassed “de facto sentencing” because guilt and punishment were adjudicated in a single proceeding. See John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 Colum. L. Rev. 1967, 1973 (2005).

For the reasons Judge Abudu persuasively set forth in her dissent in this case, applying the historical tradition of the importance of juries to this country and this Court’s precedent “shows that the jury’s non-unanimity and hesitation is one of the best, if not the best, indication of prejudice.” App. 190 (Abudu, J.,

dissenting). When judges usurp the jury’s function by dismissing record evidence of juror hesitation—the most concrete indicator that the jury itself was not persuaded that the defendant deserved death—they contravene the principle that *Apprendi*, *Ring*, *Alleyne*, *Hurst*, *Ramos*, and *Andrus* together establish: that the Sixth Amendment secures the right of the jury, not the judiciary, to make the findings that determine whether a defendant lives or dies. Those findings necessarily include the aggravating circumstances that trigger death penalty eligibility along with mitigating evidence that undermines application of the death penalty. See *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 264–65 (2007) (recognizing that a jury must be “permitted to give meaningful effect or a ‘reasoned moral response’ to a defendant’s mitigating evidence”).

The foregoing demonstrates the constitutional infirmity in holding that a jury’s reluctance to sentence a defendant to death matters naught in determining whether that jury would have struck a different balance if presented with powerful mitigating evidence. Such a holding not only is illogical but also ignores this Court’s repeated instruction that the Sixth Amendment mandates that juries must make all fact findings that impact a defendant’s sentence and ultimately decide, based on those findings, whether the death penalty is a proper punishment for the defendant standing before them. Ignoring juror hesitation in assessing prejudice under *Strickland* also contravenes this Court’s holdings that the jury’s conduct matters. See, e.g., *Andrus*, 590 U.S. 806; *Pena-Rodriguez*, 580 U.S. 206. A defendant’s Sixth Amendment right is impaired twice-over where, as here, the jury’s fact-finding ability is nullified by incompetent counsel

and the jury’s conduct is ignored in evaluating what it may have decided had that fact-finding power not been taken away.

Because of the foundational importance and increasing instability on this issue among the federal circuits, the time is ripe for this Court to instruct the lower courts whether and how to evaluate a jury’s hesitation to impose the death penalty when considering prejudice under *Strickland*.

B. *Strickland* Itself Supports that Courts Must Consider Jury Hesitation when Evaluating Prejudice.

Strickland requires courts to consider “the totality of the evidence” in determining whether trial counsel’s deficient performance prejudiced a petitioner. *Strickland*, 466 U.S. at 695. The only limitation placed on this otherwise all-inclusive assessment, that “evidence about the actual process of decision, if not part of the record of the proceeding under review . . . should not be considered in the prejudice determination,” (*ibid.*) is not at issue here because this jury’s hesitation is part of the record in this case.⁸ The

⁸ The fact that the jury hesitated cannot be waived, contrary to what seems to be implied in a concurrence to the Eleventh Circuit’s rehearing decision. See App. 168–72. The jury’s hesitation is a fact that must be considered by courts in determining prejudice under *Strickland*, not a claim subject to waiver. Davis could not have raised a separate standalone claim for “jury hesitation” in his habeas petition, App. 179 (ABUDU, J. dissenting), and both he and courts evaluating this case have raised the jury’s initial 7-5 split. Jury hesitation is not in itself a claim of deficient performance; rather, it factually illustrates that deficient performance was prejudicial. Davis repeatedly highlighted the jury’s hesitation and non-unanimous verdict in briefing and at oral

jury explicitly asked the trial court if it would accept a verdict of seven jurors for death and five for life, and the trial court responded to that question. App. 14–15. “The jury here expressed its hesitation and its split on the record at trial, *ibid.*, so the hesitation must be considered under the Supreme Court’s test in *Strickland*.” App. 183 (citing *Strickland*, 466 U. S. at 695) (Abudu, J., dissenting). The Eleventh Circuit majority ran afoul of *Strickland* in determining that it was not unreasonable for the ACCA to disregard this pivotal fact in its analysis of prejudice under *Strickland*. The Third, Sixth, Seventh, and Eighth Circuits in *Wharton*, *White*, *Allen*, and *Sanders*, respectively, made this same error, in some instances without even applying AEDPA’s doubly-deferential standard. See *Wharton*, 95 F. 4th at 124 (*de novo* review); *White*, 131 F. 4th 465; *Allen*, 555 F. 3d at 602–03; *Sanders*, 875 F. 2d at 210 (*de novo* review).

The Eleventh Circuit panel majority’s holding in this regard “created a new limit on clearly established law” in holding that “jury hesitation is not necessarily an indicator of prejudice or a fact that must be considered,” even though *Strickland* requires review of “the totality of the evidence.” App. 171–72 (Abudu, J., dissenting). “The fact that the jury already was conflicted is of paramount importance in undertaking this analysis.” App. 183 (Abudu, J., dissenting). The Eleventh Circuit panel majority’s new limitation “minimizes

argument. See *Davis*, No. 1:07-cv-00518-CLS, N. D. Ala. ECF Nos. 1 ¶ 333, 33 ¶ 282, 52, p. 25–26; CA11 ECF Nos. 18, p. 21–22; 35, p. 20, 36, 52–53; 86 at 17:55–18:24; 92; 97, p. 10, 13, 19, 23–25. The fact of hesitation by the jury here is not waivable, and Davis has emphasized the importance of this fact in the underlying proceedings in any event.

the jury's role in assessing prejudice, . . . minimizes the importance of the jury in our legal system" and makes the Eleventh Circuit "the first state or federal court to suggest . . . that a court may ignore the jury's behavior in assessing prejudice." App. 188–89 (Abudu, J., dissenting). This limitation is contrary to *Strickland*'s directive to consider all record evidence in determining prejudice. See *Strickland*, 466 U. S. at 695. As Justice Brennan stated in concurring with the *Strickland* standard, "[w]hat is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine." 466 U. S. at 705 (citing *Jurek v. Texas*, 428 U. S. 262, 276 (1976)). *Strickland* itself "determined that jury hesitation is relevant. The panel majority was thus also wrong to limit *Strickland* in a way the Supreme Court never has." App. 188–89 (Abudu, J., dissenting). It simply "is not plausible that *Strickland* instructs courts to do something different than they do in every other jury trial context and disregard the jury." App. 197 (Abudu, J., dissenting).

Here, the jury's reluctance to impose the death penalty illustrates that it likely would not have taken much mitigating evidence to convince two or more additional jurors—perhaps from the four that initially voted for life—that Davis should have received a life sentence. The jury asked whether the court could "accept seven for death and five for life." App. 14. That question revealed that nearly half the jury favored a life sentence, without ever hearing that Davis's mother repeatedly beat him bloody as a small child which disfigured his back, ear, and head for wetting the bed, or that his only prior conviction involved taking pizzas and \$50 from a delivery driver without any

weapons or violence. Moreover, the jury ultimately returned a non-unanimous verdict despite not hearing any of that evidence. App. 14–15. Yet, the Eleventh Circuit majority decision allowed the ACCA to ignore the jury’s hesitation in finding that this significant and “powerful” (App. 574) mitigating evidence does not raise a “reasonable probability” that, if the already-reluctant jury heard this evidence, it “would have struck a different balance.” *Wiggins v. Smith*, 539 U. S. 510, 537 (2003). The Eleventh Circuit’s majority decision contravenes *Strickland* and “flies in the face of this great body of caselaw and historical practice cementing the importance of juries and giving shape to the right to a fair jury trial.” App. 197 (Abudu, J., dissenting).

Because *Strickland* is contrary to the new limitations the Eleventh Circuit majority panel decision attempts to impose on what courts should consider as indicative of prejudice, this Court should address how lower courts should evaluate record evidence of jury hesitation on *Strickland*’s prejudice prong. Indeed, in the over forty years since *Strickland*, the Court has offered little guidance regarding how to assess prejudice—that is, whether a defendant has proven a reasonable probability of a different outcome, which leaves lower courts with not much more than a subjective “you know it when you see it” standard. The inherently speculative nature of *Strickland*’s prejudice prong makes guidance from this Court regarding juror hesitation essential. The jury’s *own uncertainty and hesitation* in reaching its verdict is the best objective evidence of the likelihood of a different outcome when confronted with the powerful mitigating evidence trial counsel here failed to investigate or

present. Accordingly, the Court should clarify that lower courts should consider jury hesitation in assessing prejudice under *Strickland*.

II. A Separate and Independent Ground for Granting a Writ of Certiorari Is that the Eleventh Circuit’s Decision Conflicts with *Rompilla* and *Williams*.

The Eleventh Circuit’s ruling that the ACCA’s no-prejudice determination was not contrary to or an unreasonable application of *Rompilla*, 545 U. S. 374, is itself “contrary to *Rompilla*” and contradicts *Williams*. App. 118–20 (Rosenbaum, J., dissenting) (stating what happened in *Rompilla* is “precisely what happened here” and “[w]hen the facts of a Supreme Court case line up so perfectly with a case under review,” as with Davis’s case and *Rompilla*, “applying that Supreme Court precedent to reach its opposite answer is both unreasonable and ‘contrary to . . . clearly established Federal law.’”). As *Williams* explained, a state court’s decision is contrary to clearly established Supreme Court precedent “if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from [the Court’s] precedent.” *Williams*, 529 U. S. at 406. That is exactly what happened here, and the Eleventh Circuit’s ruling to the contrary therefore conflicts with *Rompilla* and *Williams* on this issue of “exceptional importance.” App. 174 (Rosenbaum, J., dissenting).

As in this case, where Davis’s trial counsel knew the state would use Davis’s sole prior conviction as a crime-of-violence aggravating factor to support the death penalty (App. 15), *Rompilla*’s “[c]ounsel knew

that the [state] intended to seek the death penalty by proving Rompilla had a significant history of felony convictions indicating the use or threat of violence, an aggravator under state law.” *Rompilla*, 545 U. S. at 383. And just as in this case, in which Davis’s trial counsel believed he looked at the file of the prior conviction and saw what Davis was convicted of but could not recall and did not investigate the facts of the prior offense (App. 659–60), Rompilla’s trial counsel believed “she had looked at some files regarding that prior conviction . . . [b]ut she could not recall what the files were” beyond the summary rap sheet, which “would reveal only the charges and dispositions, being no reasonable substitute for the prior conviction file.” *Rompilla*, 545 U. S. at 385 n. 3. In *Rompilla*, “[t]he obligation to get the file was particularly pressing here owing to the similarity of the violent prior offense to the crime charged” (*id.* at 386), just as the prosecutor in Davis’s trial characterized the prior robbery conviction as “very, very aggravating” in this robbery murder case. App. 120 (Rosenbaum, J., dissenting). And in this case, as in *Rompilla*, “[w]ithout making reasonable efforts to review the file, defense counsel could have had no hope of knowing whether . . . there were circumstances extenuating the behavior” in the prior case. *Rompilla*, 545 U. S. at 386. Also as here, the Court stated in *Rompilla* that “it is difficult to see how counsel could have failed to realize that without examining the readily available file they were seriously compromising their opportunity to respond to a case for aggravation.” *Id.* at 385. And exactly as in this case, “defense counsel missed an opportunity to argue that circumstances of the prior conviction were less damning than the prosecution’s characterization of the

conviction would suggest.” *Id.* at 386, n. 5. “That’s so on point here that the Supreme Court could have been talking about Davis’s case.” App. 109 (Rosenbaum, J., dissenting).

Moreover, as here, Rompilla’s trial counsel’s failure to investigate caused counsel to miss evidence of Rompilla’s abusive childhood, that his parent beat him “with his hands, fists, leather straps, belts and sticks,” which the Court said “might well have influenced the jury’s appraisal of Rompilla’s culpability.” *Rompilla*, 545 U. S. at 392–93 (quotation marks omitted). The Court reached this conclusion in *Rompilla* despite evidence of three statutory aggravating factors in support of the death penalty: that the murder was committed during a felony, that the murder was committed by torture (the victim was “stabbed repeatedly and set on fire”), and Rompilla’s “significant history” of violent felonies and mitigation evidence including testimony from five relatives. *Id.* at 378.

The aggravating factors presented in *Rompilla* were greater in number and severity than those presented in Davis’s case (in which the only aggravating factors were that the murder was committed during a robbery and that Davis had one prior conviction for robbery, which the jury did not know involved taking pizzas and \$50 without violence or weapons). Moreover, Rompilla’s jury also received more mitigating evidence in support of a sentence of life imprisonment than Davis’s jury did, yet this Court still found Rompilla’s trial counsel’s failure to present additional mitigating evidence was prejudicial. *Id.* at 390.

Under *Strickland*, prejudice exists when there is a “reasonable probability” that “the result of the proceeding would have been different.” 466 U. S. at 694.

Here, there is more than a reasonable probability that Davis’s split jury would have struck a different balance if it had heard evidence of the horrific abuse Davis suffered as a child and the not-so-aggravating facts of his sole prior conviction, which was just one of two aggravating factors supporting death. Indeed, in *Rompilla*, the Court found prejudice despite the far more aggravated facts of the murder, the greater mitigating evidence counsel presented (pleas for mercy from five relatives, versus two for Davis), and the existence of three aggravating factors for *Rompilla*, including an extensive violent criminal history and torture of the victim, *id.* at 378, whereas Davis had a single non-violent prior conviction for participating in a group of young men taking pizzas and \$50 from a pizza delivery man without violence or a weapon. App. 101 (Rosenbaum, J., dissenting).

This case falls well within *Rompilla*’s boundaries because (1) the murder here did not involve any especially egregious circumstances like torture, (2) Davis’s counsel presented only “naked pleas for mercy” from just two family members and never told the jury that Davis suffered heinous sexual and physical abuse as a child, (3) Davis’s death penalty was supported by just two aggravating factors (that the murder was committed during a robbery, and Davis’s prior non-violent pizza robbery conviction), and the weight of Davis’s prior-conviction aggravating factor for the pizza robbery would have been substantially reduced had counsel introduced the facts surrounding that prior conviction, and (4) a statutory mitigating factor, Davis’s young age, weighed in favor of life. See App. 14–15, 23–25, 101. These factors resulted in a divided jury that initially voted 7-5 for death and, even at the

conclusion of the deliberations, split 11-1. App. 14–15. If only two jurors would have struck a different balance. Davis would have received a sentence of life imprisonment without the possibility of parole rather than a death sentence.

Despite *Rompilla*'s obvious applicability to this case, the ACCA found Davis's trial counsels' errors did not prejudice him. In affirming the ACCA's error, the Eleventh Circuit majority decision committed its own, as its holding that the ACCA's prejudice determination was not an unreasonable application of, or contrary to, *Rompilla* itself conflicts with *Rompilla* and *Williams*. The ACCA was "confront[ed with] a set of facts that are materially indistinguishable from [two] decision[s] of this Court and nevertheless arrive[d] at a result different from [this Court's] precedent." See *Williams*, 529 U. S. at 406. Given the materially indistinguishable facts of this case and *Rompilla*, it was not just incorrect, but unreasonably contrary to clearly established law for the ACCA to find Davis was not prejudiced by his counsel's deficient performance. The Eleventh Circuit majority decision's holding to the contrary resolved this important federal question in a way that plainly conflicts with *Rompilla*'s prejudice analysis and *Williams*' holding regarding what amounts to an unreasonable application of this Court's precedent.

In evaluating prejudice under *Strickland*, this Court's precedent requires lower courts to consider the totality of the record and determine whether there is "a reasonable probability that at least one juror [or here, two jurors] would have struck a different balance regarding [the defendant's] moral culpability" but for trial counsel's errors. *Andrus*, 590 U. S. at 822.

In this case, “[t]he fact that the jury already was conflicted is of paramount importance in undertaking this analysis.” App. 183 (Abudu, J., dissenting). Given five jurors initially voted to sentence Davis to life imprisonment, it is unreasonable to conclude that the additional mitigating evidence would not have “influenced the jury’s appraisal’ of [Davis’s] culpability.” See *Rompilla*, 545 U. S. at 393. Equally unreasonable is the Eleventh Circuit majority decision’s conclusion—untethered to any objective indicia like jury hesitation—that the ACCA’s purported application of *Rompilla* was not an unreasonable application of, or contrary to, *Rompilla*. See *Williams*, 529 U. S. at 406. Accordingly, the Eleventh Circuit majority decision’s holding should be reversed.

CONCLUSION

For the foregoing reasons, the Court should grant Davis's petition for writ of certiorari and reverse the Eleventh Circuit's decision.

Respectfully submitted,

Ethan T. Tidmore
BRADLEY ARANT BOULT
CUMMINGS LLP
1819 5th Ave
North Birmingham, AL 35203
(205) 521-8000

Michael P. Matthews
Elizabeth A. Lee
FOLEY & LARDNER LLP
100 N. Tampa St., Ste 2700
Tampa, FL 33602
(813) 229-2300

Christopher M. Kise
Counsel of Record
CONTINENTAL PLLC
215 S. Monroe St
Ste 750
Tallahassee, FL 32301
(850) 270-2211
ckise@continental-
pllc.com

JUNE 2026

Attorneys for Petitioner

No. _____

In the Supreme Court of the United States

JIMMY DAVIS, JR.,
Petitioner,

v.

GREG LOVELACE, COMMISSIONER,
ALABAMA DEPARTMENT OF CORRECTIONS,
Respondent.

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

APPENDIX, VOLUME I

Ethan T. Tidmore	Christopher M. Kise
BRADLEY ARANT BOULT	<i>Counsel of Record</i>
CUMMINGS LLP	CONTINENTAL PLLC
1819 5th Ave	215 S. Monroe St
North Birmingham, AL 35203	Ste 750
(205) 521-8000	Tallahassee, FL 32301
	(850) 270-2211
Michael P. Matthews	ckise@continental-
Heather A. Lee	pllc.com
FOLEY & LARDNER LLP	
100 N. Tampa St., Ste 2700	
Tampa, FL 33602	
(813) 229-2300	

Attorneys for Petitioner

JUNE MMXXVI

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Appendix A

[Filed: Oct. 30, 2024]

[PUBLISH]

In the
United States Court of Appeals
For the Eleventh Circuit

No. 18-14671

JIMMY DAVIS, JR.,

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. 1:07-cv-00518-CLS

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Before ROSENBAUM, BRANCH, and GRANT, Circuit Judges.

Branch, J., Circuit Judge:

Jimmy Davis, Jr., an Alabama prisoner sentenced to death for the 1993 murder of Johnny Hazle during a gas station robbery, appeals the district court's denial of his 28 U.S.C. § 2254 federal habeas petition. Before us are Davis's arguments that the state court unreasonably applied *Strickland v. Washington*, 466 U.S. 668 (1984), in denying his claim that trial counsel rendered ineffective assistance in the penalty phase of his capital trial by (1) failing to investigate and present mitigating evidence of childhood abuse; and (2) failing to investigate and present mitigating evidence of the circumstances of his prior conviction for third-degree robbery.¹ After careful consideration and with the benefit of oral argument, we affirm the denial of Davis's habeas petition.

¹ Davis sought a certificate of appealability ("COA") in this Court on several issues. We granted Davis a COA on only the two issues specified above. Importantly, in his § 2254 petition, Davis raised claims that his trial counsel rendered constitutionally ineffective assistance in the penalty phase by failing to secure mental health testimony and to obtain mitigation evidence relating to mental and psychological dysfunction and brain damage. The district court denied these claims on the merits and denied a COA. And Davis did not seek a COA on these claims in this Court. Yet in his brief, he discusses the mental health and brain damage evidence at length. As this testimony is unrelated to the claims upon which we granted a COA and beyond the scope of the COA, we do not consider it. See *Murray v. United States*, 145 F.3d 1249, 1251 (11th Cir. 1998) (explaining that "appellate review is limited to the issues specified in the COA").

I. Background

A. The Crime and Guilt Phase of Trial

Following the March 1993 murder of Johnny Hazle during a gas station robbery in Anniston, Alabama, an Alabama grand jury indicted Davis for the capital offense of murder committed during a robbery in the first degree or an attempt thereof. *See* Ala. Code § 13A-5-40(a)(2) (1975). The trial court appointed Steve Giddens to represent Davis at trial on April 9, 1993. Giddens had been a criminal defense solo practitioner in Alabama since 1986, but he had worked on only one capital case previously. Giddens requested that co-counsel be appointed, and the trial court appointed Jonathan Adams. The case went to trial eight months later in December 1993.

The Alabama Court of Criminal Appeals summarized the facts of Davis's case as follows:

The state's evidence showed that on March 17, 1993, [Davis], Alphonso Phillips, and Terrance Phillips made plans to rob the Direct Oil Station, a gasoline service station in Anniston. According to the plan, [Davis], who possessed a .25 caliber semiautomatic pistol, would point the pistol at the station operator, Alphonso would grab the money, and Terrance would act as a lookout. The state's evidence support[ed] the conclusion that [Davis] was the principal actor in the conspiracy. He conceived the idea to rob the station and he recruited the others to help him. As the trio approached the station, Terrance changed his mind, abandoned the conspiracy, and

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walked away. Alphonso and [Davis] approached the station; [Davis] confronted the operator, Johnny Hazle, in the doorway of the station, pointed the pistol at him, and said, “Give it up, fuck-n[*****].” [Davis] almost immediately fired two shots from the pistol, which struck Hazle in the chest and abdomen. Terrance testified that he was about a block from the station, walking toward his home, when he heard two or three shots fired. After the shooting, [Davis] and Alphonso ran from the scene. Hazle died from these wounds shortly thereafter. Three empty .25 caliber shell casings were recovered at the scene, and two bullets of the same caliber were recovered from Hazle’s body. The pistol was subsequently recovered. The ballistics evidence showed that the two bullets recovered from Hazle’s body and the three empty shell casings found at the scene had been fired from [Davis’s] pistol.

Davis v. State, 718 So. 2d 1148, 1155 (Ala. Crim. App. 1995). Both Alphonso and Terrance pleaded guilty to conspiracy to commit robbery in the first-degree and testified against Davis.² *Id.* Alphonso testified that, when they reached the door of the gas station, Davis “pointed the pistol at Hazle and said, ‘Give it up, fuck-n[*****]’; that Hazle . . . smiled; and that [Davis] shot Hazle when he smiled.” *Id.* Similarly, although Terrance was walking home when the robbery occurred,

² At the time of the murder, Davis was 22 years old, Terrance was 16, and Alphonso was 17.

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Terrance testified that Davis told him after the robbery that:

he had told [Hazle], Give it up, fuck-n[*****]. And then he said the man had smiled or something at him, laughed or something. And then he said he had shot and the man had kicked the door. And then he shot again. . . . And then he said they ran.

Id. (quotations omitted). Other individuals similarly testified that Davis relayed similar information and told them that he had robbed the gas station and shot someone. *Id.*

“[Davis’s] defense strategy consisted mainly of trying to discredit or to cast doubt upon the testimony of the state’s witnesses through cross-examination and arguments to the jury and to the trial court.” *Id.* at 1156. Specifically,

he attempted to exploit differences as to some details in their testimony, attempted to persuade the jury that under the facts it was more likely that Alphonso did the shooting, argued to the jury and to the trial court that the facts surrounding the commission of the crime better fit the elements of the lesser included offense of felony-murder rather than with the offense of capital murder, and attempted to cast doubt upon the veracity of Alphonso, Terrance, and [another witness] (who was involved with the authorities in an unrelated case) by emphasizing the deals they had made with the state for lenient treatment in return for their testimony.

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Id. at 1156. The jury found Davis guilty of murder committed during a robbery in the first-degree as charged.

B. The Penalty Phase

Following the guilty verdict, the court took an approximately 50-minute recess prior to the start of the penalty phase.³ The State offered two statutory aggravating circumstances: (1) that the murder was committed during the commission of a robbery, and (2) that Davis had a prior conviction involving the use or threat of violence to a person—a 1992 conviction for

³ When a defendant is convicted of a capital offense in Alabama, the trial court is required to conduct a separate sentencing hearing “as soon as practicable after the defendant is convicted” to determine whether the defendant should be sentenced to life imprisonment without parole or to death. Ala. Code § 13A-5-45(a). During the hearing, the parties may present evidence of the existence of any aggravating or mitigating circumstances. *Id.* § 13A-5-45(c). After deliberation, the jury weighs the aggravating and mitigating circumstances. *Id.* § 13A-5-46(e). At the time of Davis’s trial, Alabama law provided that if the jury determined that no statutory aggravating circumstances existed or that one or more aggravating circumstances existed but did not outweigh the mitigating circumstances, the jury “shall return an advisory verdict recommending to the trial court that the penalty be life imprisonment without parole.” *Id.* § 13A-5-46(e)(1)–(2) (1993). If the jury determined that one or more statutory aggravating circumstances outweighed the mitigating circumstances, it “shall return an advisory verdict recommending to the trial court that the penalty be death.” *Id.* § 13A-5-46(e)(3) (1993). Importantly, “[t]he decision of the jury to return an advisory verdict recommending a sentence of life imprisonment without parole [had to] be based on a vote of a majority of the jurors. The decision of the jury to recommend a sentence of death [had to be] based on a vote of at least 10 jurors.” *Id.* § 13A-5-46(f) (1993).

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Alabama third-degree robbery.⁴ The State introduced a certified copy of Davis's 1992 robbery conviction. The defense then stipulated that Davis was convicted of third-degree robbery in 1992, and he received a sentence of a year and a day. The State then rested.

The defense urged the jury to recognize that third-degree robbery was "the lowest level of robbery" in Alabama and requested that the jury members "keep [their] minds open" in recommending a sentence. Davis called three witnesses during the penalty phase:

⁴ At the time of Davis's sentencing, the following constituted statutory aggravating circumstances in Alabama:

- (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 the enforcement of laws; or
- (8) The capital offense was especially heinous, atrocious or cruel compared to other capital offenses.

Ala. Code § 13A-5-49 (1994).

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his mother Lillie Davis, his cousin Andre Sigler, and a counselor and school psychometrist,⁵ Annie Storey. Adams handled the questioning of Lillie and Sigler, and Giddens handled the questioning of Storey.

Davis's mother, Lillie, testified that she had six children, Mary Nell, Davis, Hortense, Patricia Ann, Linda, and Angie. Lillie stated that she and Davis's father were married, but they separated when Davis was about a year old. Lillie raised Davis and her other children by herself—there was never a father in the home. Lillie “started having a little difficulty problem” with Davis when he was nine. When Davis was 15 years old, she sent Davis to live with his father in Detroit to keep him away from a “bad crowd” at school. However, Davis's father died unexpectedly only a couple of months after Davis moved there, and Davis returned to Alabama. Lillie explained that when Davis returned home, he would say that he wished he was with his dad or that he wished she and his dad had been together. Lillie told the jury that she raised Davis with “[t]he best of the knowledge [she] could,” and she pleaded with the jury to show mercy and give Davis life without parole.

On cross-examination, when asked to describe what kind of problems Davis started exhibiting around the age of nine, Lillie explained that he had “[b]ehavior problems” at school and home. She elaborated, stating:

Just like he [would] do something in school
and he get suspended or go in the in-house.

⁵ A psychometrist is someone who “administers intelligence and diagnostic educational tests to individuals between the ages of two and adult.”

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And then I would have parents—parent conference with the teachers. And then at home, when I say, “Jimmy, clean the yard,” or either, “Don’t go nowhere,” or either, “Don’t do things,” sometimes he do and then sometimes he don’t. And then just sneak away from the house sometime. And I had problems with him.

She confirmed that Davis’s problems were behavioral and that he did not always obey her. Lillie stated that she “punish[ed] him,” but she did not elaborate on the methods or frequency of punishment.

Between the ages of 15 and 19, she had issues with Davis “stealing things,” “[s]taying out all night,” or being gone for days at a time, but never any violent behavior. Davis dropped out of school at 16 and, once he turned 17, Lillie stated that she could not control him anymore because she “couldn’t discipline him” at that age. Davis moved out at 19, but he visited Lillie weekly. Lillie confirmed that she never observed Davis with a gun.

Next, Davis’s cousin, Andre Sigler, testified that he is five years older than Davis, that he and Davis were “close friends,” and that they saw each other almost daily until Sigler enlisted in the army after he graduated high school. He lost contact with Davis while he was in the army. Sigler denied any knowledge of Davis getting into trouble before the instant case, and he did not realize until the day of trial that Davis was charged with a capital offense. Sigler did not know about Davis’s prior third-degree robbery conviction from 1992.

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Sigler agreed that Davis must be punished for the murder, but he pleaded with the jury to “spare [Davis’s] life” because

life in prison is punishment enough for any crime. And also, I think that [Davis] wasn’t given the opportunities that a lot of people are given coming up. And who knows, maybe in prison he can learn to adjust, adapt, and get the proper counseling and things he need[s]. . . . I think [Davis] was missing a lot as he was coming up. People to rely on, people to talk to, people who could understand him and try and help him out. A lot of things that we all have had, more successful people have had.

Sigler confirmed that, after Davis’s father died, there was a “noticeable difference” in Davis—his appearance and attitude changed, “he wasn’t home very much,” and “[t]here were times when his mother had . . . problems with him.” Sigler attributed his own successful path in life—graduating high school, joining the military, and being honorably discharged four years later—to the fact that he was raised by both of his supportive grandparents. He attributed Davis’s path in life to the fact that Davis was raised by a single parent and did not have a father figure in his life. Sigler stated he was “sure it would have been different” for Davis if he had “had better circumstances.”

Finally, the defense presented the testimony of Annie Storey, a certified school psychometrist, who was employed at the Calhoun-Cleburne Mental Health Center and at a local high school as a counselor. Storey possessed three master’s degrees and a “double-A

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certificate in the area of education, school psychometry, guidance and counseling.” At the time of Davis’s trial, Storey had practiced in her field for seven and a half years, had conducted “[h]undreds” of intelligence and diagnostic educational tests, and had testified in court about those tests.

She testified that she spent about an hour and fifteen minutes administering the Weschler Adult Intelligence Scale Revised (“WAIS-R”) and the Wide Range Achievement Test (“WRAT”) to Davis. On the WAIS-R (an IQ test), Davis achieved a verbal score of 82 and a performance scale of 70, resulting in an overall IQ score of 77. The standard deviation for the test was 15 points. Davis’s IQ score of 77 placed him in the bottom sixth percentile (with the national average IQ being between 85 and 115), meaning Davis was “within the borderline range of intelligence.” Storey explained that Davis was functioning between “an individual who is mentally retarded and one who is low average.” She used the WRAT test to determine Davis’s academic functionality, and the results revealed that he functioned at a fifth-grade level. Storey concluded that Davis’s cumulative testing results demonstrated that:

He is borderline in intelligence. He would probably experience a lot of difficulty performing any task that required a lot of intellectual performance. His fund of information is very limited. He does not seem to be able to determine a lot about social intelligence, social type responses that he’s supposed to make in his environment. He’s easily

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distracted. [And h]is visual perceptual motor skills are very limited.

Storey noted that, on a personal level, Davis recognized one of Storey's sons from a photograph in her office and identified him as someone Davis knew at one time. Storey told Davis that her son graduated from West Point, and "at that point [she] could see some remorse in [Davis]. Sort of like, if you were alluding to the fact that if [he] could have done something else with [his] life, maybe it would have been a different route." Storey also administered "the MMPI," which was a personality assessment, but the results were not yet available.

On cross-examination, Storey testified that Davis's lowest scores on the WAIS-R test were on the subtests that measured social intelligence. Based on these results, Davis's ability to know "when to appropriately handle himself or how to appropriately handle himself in his environment" would be impaired, but she could not opine based on the tests administered whether or not Davis knew right from wrong. Storey confirmed that she did not discuss with Davis any details related to his prior third-degree robbery conviction because she "did not conduct a social history on him. It was strictly intelligence. That type of thing would come up in a social history, which [she] did not perform" because it "wasn't requested."

In closing arguments, the State emphasized that Davis was released on the 1992 third-degree robbery conviction only three short months before the present murder. The State expressed sympathy and compassion for Lillie, stating that she "has done all that she can do and did all that she [could] do with [Davis]."

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Nevertheless, the State argued that, despite her pleas for mercy, the jury had “to look at the serious nature of the crime,” and that the aggravating circumstances outweighed the mitigating circumstances.

Defense counsel Adams argued for mercy and urged the jury to recommend life imprisonment without the possibility of parole. He emphasized that:

[W]e put Lillie Davis up here to show you that Jimmy Davis didn’t have a typical home that some of us might have. Not to use as an excuse. Lillie Davis did the best she could for her minor children. . . . She raised [Davis] the best she could without a father.

And when he got up to a certain age that she really couldn’t control him so much, she sent him to his father. He didn’t have a father up till that time. Not somebody in the home that probably could really discipline him and give him exactly what he needed when he needed it. But he stayed with his father two months and some odd days when his father died. And he comes back. And he starts living with his mother again.

And you heard, he stayed in trouble. She didn’t deny it. See, it started out little and didn’t get much better; did it? Until he finally caught a felony, robbery in the third degree. And then it didn’t get better; did it? Until ultimately it caused the death of another individual

The defense argued that, contrary to the State’s position, the “ultimate punishment” would be life

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imprisonment. Turning to Davis's cousin, Sigler, the defense emphasized:

isn't it amazing how two individuals growing up could turn out so differently? How [Sigler] could go on and finish school, get in the military and get out. And [Davis] can't even finish [school].

See, [Sigler] had the backing that he needed. Maybe [Davis] didn't. Maybe [Davis] needs to spend the rest of his life in prison to think about this mistake that he made. Maybe that is the ultimate punishment in this case. . . .

So please think about that when you go back. Think about it. Don't get caught up that he just had [the third-degree robbery] case in December and he gets [this robbery] case in March. That sounds bad, I know it sounds real bad. But reckon why [Davis] travels down that road?

Defense counsel Giddens followed Adams and urged the jury to consider Storey's testimony concerning Davis's low intelligence along with the other testimony presented.

The jury deliberated approximately an hour and returned an 11 to 1 advisory recommendation in favor of the death penalty.⁶

⁶ About 40 minutes into deliberation, the jury submitted the following question to the trial court: "Can you accept seven for death and five for life? If not, what procedure should we go by?" The trial court responded, "No. There must be ten votes for a

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At the sentencing hearing,⁷ the trial court found that two statutory aggravating circumstances existed—(1) Davis murdered Hazle during the commission of a robbery, and (2) Davis had a prior conviction involving the use or threat of violence to a person—his 1992 conviction for third-degree robbery. It also determined that Davis’s age (23) constituted a statutory mitigating circumstance.⁸ The trial court then

recommendation of death sentence. There must be at least seven votes for a recommendation of life without parole. Keep deliberating.”

⁷ Davis refused to cooperate in the preparation of his presentence investigation report. Instead, his mother provided a detailed history for the report.

⁸ At the time of Davis’s sentencing, the following constituted statutory mitigating circumstances in Alabama:

- (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 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.

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determined that the aggravating circumstances “significantly outweigh[ed]” the mitigating circumstances, and it sentenced Davis to death.

C. Direct Appeal

The Alabama Court of Criminal Appeals affirmed Davis’s conviction and sentence on direct appeal. *Davis*, 718 So. 2d at 1148. Davis petitioned for a writ of certiorari in the Alabama Supreme Court, which was granted on grounds not relevant to the present appeal. The Alabama Supreme Court affirmed. *Ex parte Davis*, 718 So. 2d 1166, 1178 (Ala. 1998). The United States Supreme Court denied Davis’s petition for a writ of certiorari. *See Davis v. Alabama*, 525 U.S. 1179 (1999).

D. State Postconviction Proceedings

Davis, through counsel, filed a state postconviction petition, pursuant to Alabama Rule of Criminal Procedure 32, raising numerous claims of ineffective assistance of counsel and trial court error. But we focus on only the two claims that are the subject of Davis’s COA. First, Davis argued that his trial attorneys were ineffective during the penalty phase for failing to

Ala. Code § 13A-5-51 (1994). Further, in addition to the statutory mitigating circumstances enumerated in § 13A-5-51, the Alabama Code provided for consideration of non-statutory mitigating circumstances, which included:

any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant offers as a basis for a sentence of life imprisonment without parole instead of death, and any other relevant mitigating circumstance which the defendant offers as a basis for a sentence of life imprisonment without parole instead of death.

Id. § 13A-5-52.

obtain readily available mitigating evidence, which would have showed that “Davis had been exposed to . . . extensive physical, psychological and sexual abuse, domestic violence, rejection and abandonment by [his] mother and father” Second, Davis asserted that his trial attorneys were ineffective for failing to investigate the circumstances of his 1992 third-degree robbery conviction, which would have revealed that the robbery involved a pizza delivery man, that Davis was a minor participant, and that no weapon was involved.

i. Rule 32 Evidentiary Hearing

The trial court held a four-day evidentiary hearing on the Rule 32 petition, during which Davis presented evidence and testimony from the following witnesses in support of his ineffective-assistance claims: (1) Steve Giddens—one of Davis’s trial counsel; (2) several social workers from the Calhoun County Department of Human Resources; (3) Cynthia and Betty Jacobs—family friends; (4) Andre Sigler—Davis’s cousin who testified at his trial; (5) Mary Davis and Hortense Davis—two of Davis’s sisters; (6) Geneva Davis—Davis’s paternal aunt; (7) John Mays—an expert in capital defense; (8) Jan Vogelsang—a social worker and expert in conducting social histories; and (9) Jadie Boozer—Davis’s counsel in the pizza robbery case. We discuss each of these witnesses’ testimony in turn.

Trial counsel Giddens testified that, at the time of his appointment in April 1993 to Davis’s case, he had worked on at least one other capital murder case. Giddens met with Davis outside of court proceedings twice before the trial—once in June and once in

November 1993—for about an hour each time.⁹ Giddens did not recall whether he and Adams requested funds for a private investigator. He “[did] not believe” he had ever requested such funds in prior cases, but he stated that he and Adams “did a lot of preparation” and “a good bit of investigation” themselves.¹⁰

⁹ Notably, when asked about the substance of Davis’s conversations with Giddens, Giddens stated that he could not discuss the substance of the conversations unless Davis waived attorney-client privilege, which Davis declined to do. In fact, the issue of attorney-client privilege came up repeatedly throughout Giddens’s testimony. The State argued extensively that Davis was using the privilege as a sword and a shield because “[t]he analysis of whether or not an attorney is reasonable is largely dependent upon what was told to him by the defendant.” In response, Davis argued that there was no legal authority that required him to waive privilege and that the State had to find another way to defend against the ineffective-assistance claims. During Giddens’s cross-examination, the district court ruled that Davis needed to make a decision regarding waiver, and his postconviction counsel raised a continuing objection and requested that the court consider the issue of waiver of attorney-client privilege on a question-by-question basis, and the district court agreed to proceed on that basis. Davis only waived privilege as to one conversation that is unrelated to the claims before this Court.

¹⁰ The record establishes that the defense did not hire a private investigator in this case, and the dissent makes much of this point. But this fact is irrelevant to our analysis in this majority opinion because, as we explain further, Davis failed to show that the state court’s determination that he did not suffer prejudice was an unreasonable application of, or contrary to, federal law. And failure to establish either Strickland prong is fatal to his claim. *Kokal v. Sec’y, Dep’t of Corr.*, 623 F.3d 1331, 1344 (11th Cir. 2010). For further discussion concerning counsel’s failure to hire a private investigator and how that relates to the deficient performance prong of Davis’s ineffective-assistance claim, see Concurring Op. at 3 n.2.

Giddens recorded 141.55 hours of work on Davis’s case, which included 49.2 hours of “out of court time” preparing for both phases of trial and 24.5 out-of-court hours during trial and preparing for the post-trial sentencing hearing before the judge. Giddens explained that his time sheet was an accurate reflection of “any significant amount of time” he spent working on the case but that there may have been other five- or ten-minute tasks that he did not record. The bulk of the hours were recorded in the two weeks prior to the start of the trial.

Davis did not call his other trial counsel, Jonathan Adams, to testify at the Rule 32 evidentiary hearing. However, the State stipulated to the admission of Adams’s time sheets, which reflected that he recorded approximately 152.85 hours spent on Davis’s case, which included 65 hours of “out of court time” preparing for both phases of trial and an additional 24.5 out-of-court hours during trial and preparing for the post-trial sentencing hearing before the judge.¹¹ Giddens

¹¹ During oral argument, the parties disputed the extent of the State’s stipulation. Davis argued that it was the State’s idea to enter the stipulation, and that the State stipulated “to what Adams’s testimony would be,” and that what he did was the same as Giddens. Davis’s argument is belied by the record. Specifically, during the Rule 32 evidentiary hearing, the following colloquy occurred:

[Davis’s counsel Langford]: In an effort to try to speed this along and not put cumulative evidence on, we’re weighing the thought of not calling Mr. Adams. And I spoke to [the State] about whether—if we were willing not to call Mr. Adams if [the State] would stipulate to the admission of Mr. Adams’s time sheets. And [the State] told me [it] had no problem doing that if I would make

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testified that he did not believe that he and Adams “ever had any discussion of who was lead counsel.” Instead, they both “got in there and both worked and both tried it.” Indeed, although Giddens often referred to himself and Adams as “we” during his evidentiary hearing testimony, he emphasized repeatedly that he

a phone call to Mr. Adams and inquire as to whether it was his recollection he did any other work that was not recorded on the time sheets.

And I did make that phone call. And Mr. Adams reported to me that there was no significant time spent that was not recorded on his attorney’s fee declaration, which I believe that statement would be consistent. . . .

[The State]: The state would stipulate that [Adams’s] testimony would have been in this regard as to the time sheet the same as Mr. Giddens, in that there may have been some small five or three minute things that he didn’t write down. But if he did anything of substance or anything that was significant and took up a lot of time, it was on that time sheet.

The Court: All right. So stipulated.

Thus, the record confirms that one of Davis’s postconviction counsel brought up the stipulation suggestion, not the State. Furthermore, the State stipulated to the veracity of Adams’s time sheet and that Adams’s time sheet—like Giddens’s—was an accurate representation of the substantive time he spent on the case. In other words, the State stipulated that there was no significant time spent on the case that was not reflected in the time sheets. However, this stipulation does not mean that the State stipulated that the work Adams did was identical to that of Giddens or that Adams agreed with Giddens’s testimony about what was done or not done. Nor would such a stipulation make any logical sense given that Adams’s time sheet indicates that he recorded more out of court time preparing for trial (65 hours) than Giddens (49.2 hours), which establishes that Adams did work that Giddens did not.

and Adams did some things together and some things independently.

Giddens testified that it was his practice to prepare mitigation for the sentencing phase from the beginning of the case because “[y]ou have to be prepared” for what will happen if the jury returns a guilty verdict. As part of the preparation for sentencing, the defense interviewed Davis’s mother and obtained a court order for Davis’s mental evaluation. When presented with a brief outline of notes from the defense’s interview with Davis’s mother, Giddens confirmed that the handwriting was Adams’s, but stated that he did not know what Adams meant by many of the notes. Giddens explained that he was “not a note taker,” it was not his practice to take notes, and that he did not “recall making any notes” of witness interviews in Davis’s case.

Giddens knew that Davis had several siblings, but he did not recall attempting to interview any of Davis’s other family members other than Davis’s mother. Giddens did not recall trying to obtain Davis’s school records, but he testified that he did not typically request such records, even in capital cases. Similarly, it was not his practice to get records from social services, and he did not consider doing that in Davis’s case.

Giddens explained that, at the sentencing hearing, it was the defense’s job to put forth “virtually anything” that could serve as mitigation, which frequently included putting family members on the stand to ask for mercy and provide positive testimony to paint “a picture of the defendant” that the jury may not have seen. Giddens emphasized that each case is different and no checklist or “cookie cutter” approach can be used for

mitigation. He acknowledged that “a plea for mercy,” like that made in Davis’s penalty phase, “doesn’t take a lot of preparation.”

Giddens stated that during his approximately 13 years defending criminal cases, he never put forth evidence of a defendant’s abuse as a child as mitigation evidence—although he acknowledged that such evidence was admissible. Furthermore, Giddens denied knowing that Davis was abused as a child, noting that neither Davis nor his mother mentioned anything about abuse. Giddens explained that he did not ask about abuse because he had no reason to suspect it. He acknowledged that information about abuse Davis may have suffered as a child “might” have affected the jury in mitigation if he had known about it.

Giddens confirmed that the only social history he had came from Davis’s mother. Giddens explained that he did not recall doing any investigation into Davis’s friends because to the best of Giddens’s knowledge all of Davis’s friends were in legal trouble and would not have been able to provide helpful mitigation. He did not attempt to speak with any of Davis’s teachers or past employers. Giddens did not recall when he met Davis’s cousin, Sigler, or whether Giddens himself or Adams interviewed Sigler. He acknowledged it may have been on the day of the penalty phase.

As for Davis’s prior robbery conviction, Giddens testified that he knew of the conviction and reviewed the conviction record, but he did not attempt to contact anyone involved with the robbery case. Giddens explained that he did not do any investigation into the circumstances of the robbery conviction because “[t]he

[S]tate offered simply a certified copy of the conviction. Which we don't object to, because you don't want them to have to put on a witness to bring out the facts."

Next, Davis presented testimony from three social workers from Alabama's Calhoun County Department of Human Resources ("DHR"), and several other witnesses in support of his claim that he suffered physical abuse as a child. The social workers testified that DHR came into contact with Lillie Davis in 1981 after a local medical clinic made a suspected child abuse complaint after the clinic observed some "marks from a whipping" on Davis's back during a routine medical exam. The DHR report also stated that during this same medical visit another staff member observed Davis's mother "backhanding him in the face." And during a prior visit to the health care facility, Davis's mother had left an infant child in the hallway in a carrier unattended, and a staff member had to take care of the child.

Davis, who was 10 years old at the time of the report, admitted to DHR that he had wet the bed and his mother had disciplined him with a switch. Social worker Theresa Peebles observed "25 to 35" marks on Davis's back, and Peebles opined at the evidentiary hearing that she had "never seen a back that looked worse than [Davis's] did." Lillie never admitted that she made the marks. The abuse complaint was deemed "founded." As a result, DHR offered various services for both Lillie and Davis, including counseling. Lillie declined most of the services, but she agreed to mental health counseling for herself and Davis.

Social worker Beverly Boggs testified that she visited Lillie's home multiple times and observed that

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Davis and his siblings “seemed to [be] overly quiet. I wouldn’t want to say scared, but I would say maybe overly disciplined. They were just too good to be children of their age.” Boggs discussed alternative forms of discipline with Lillie, but Lillie told Boggs, “I’m going to whip and chastise my children. I just won’t do it as hard, as severe.” DHR did not remove Davis from the home, but Boggs opined at the evidentiary hearing that DHR “probably should have removed” him.¹² The 1981 DHR report was the only documented report of abuse involving Davis that was introduced.¹³

Two of Davis’s sisters, Mary and Hortense,¹⁴ testified that their mother beat them frequently with extension cords, switches, and belts (including the belt buckle).¹⁵ These beatings would last 15 to 20 minutes

¹² Similarly, Jan Vogelsang, a clinical social worker who conducted a biopsychosocial assessment of Davis in preparation for the evidentiary hearing, testified that the incident involving Davis’s back was one of the worst cases of abuse she had ever seen and stated that Davis should have been removed from the home. Notably, notwithstanding the DHR records, Davis’s mother denied any contact with DHR to Vogelsang.

¹³ Vogelsang testified that, when Davis was two years old, a DHR report was made suggesting that Davis and Mary had been molested after a doctor observed that Davis’s “penis was bleeding and was swollen.” However, the alleged molestation was only briefly investigated by DHR and later dropped.

¹⁴ Both Mary and Hortense testified that Davis’s trial counsel did not contact them, but that they would have testified on his behalf if contacted.

¹⁵ We note that during oral argument Davis’s counsel referenced testimony about incidents in Davis’s childhood home that the State objected to during the Rule 32 hearing, and which were

and would often leave “whelp . . . marks that had blood oozing from them. And they would be so bad . . . they couldn’t take baths.” These marks would be on “[t]heir backs, their face, their chest, their legs, their butt. Basically all over.” One time, Lillie beat Mary with a broom and broke her arm, but Mary lied at the emergency room and said she fell off her bike.

His sisters further testified that, when Davis was in the second grade, their mother beat him “with a broom handle across his head” and this “dented” and “warped his head.”¹⁶ However, Davis’s mother did not take him to the doctor. Instead, Davis “put a skullcap over his head” “until his head reshaped.” They also testified that Lillie often whipped Davis for bed-wetting and the whippings continued until he was 14 or 15 years old. Davis never fought back, and they never told anyone about the beatings.

According to his sisters, Lillie started “put[ting] [Davis] out of the house a lot” at age 15, because she was afraid the landlord would discover she had six children, instead of the three she had reported. Hortense and Davis went to live with their father for a few months when Davis was 15, and while there, they had a much better life. But after their father died

excluded by the trial court. We are bound by the state court record. See *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (holding that “review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits”). Therefore, because the state court did not consider these incidents, we do not either.

¹⁶ Mary stated that the next morning, Davis’s “head was swollen and his ear was severed.”

unexpectedly, they returned to live with their mother in Alabama.

His sisters also testified that Davis looked up to Bill Jacobs (the father of three of Davis's sisters—Patricia, Linda, and Angela) and the two were “close” and had a “good,” “positive relationship.” But Bill died shortly after Davis's father died, and after that Davis seemed “withdrawn” and “he started to be more out on the streets then.”

Geneva, Davis's paternal aunt, testified that she saw Davis during two periods of his life—once when he was around two years old and lived near her in Hayneville, Alabama, and again when he was 15 after his father's death. Once, when Davis was a toddler, Geneva witnessed Lillie beat Davis with a switch because he wet the bed. According to Geneva, after a beating, Davis went into a “spasm” and would “shake for days.” She said that, when her brother (Davis's father) lived in the home, he would try to protect the kids by taking them and leaving for a while, but he never made any report to social services. Geneva feared Lillie and did not take any action either. She first learned of Davis's murder conviction a few weeks before the Rule 32 evidentiary hearing—approximately 8 years after Davis's conviction.

Cynthia Jacobs, a family friend, testified that her uncle was Bill Jacobs, who was the father of Davis's three younger sisters. Cynthia and Davis were “like . . . cousin[s].” Cynthia testified that she never observed Lillie show Davis “any kind of love.” On one occasion, Davis, who was “[p]robably 12 or 13,” showed up to Cynthia's house “crying and fidgety,” and she observed welt marks on his arms and legs from “a

whooping.” She thought a “switch” made the marks because the welt marks were “like bleeding sores on him.” She observed Davis in a similar state probably “eight or nine times,” and each time, Davis would stay at Bill’s house for a few days before going back home.

Cynthia’s mother, Betty, testified that she saw Davis regularly because typically he stayed several days a week with Bill, and Betty and Bill lived in the same duplex. Although Betty never personally witnessed any abuse, on several occasions, Davis had red welts on his body that looked “like he had been whipped with either an extension cord or switch.” Betty explained that Lillie’s abuse of the children upset Bill and he told Betty one time that he intended to take the children away from Lillie because “she was really abusing them.” Betty spoke with Lillie once about the alleged abuse, and Lillie told her “[y]ou take care of your children and I’ll take care of mine.” Betty “threatened several times” to go to the authorities, but she never did.

Davis’s cousin Sigler—who testified during the penalty phase—testified at the evidentiary hearing that he and Davis saw each other almost daily, and they grew up in a poor neighborhood where a lot of drinking, gambling, fights, shootings, and stabbings occurred. Sigler stated that he witnessed Lillie treat Davis “[a]t times pretty bad. At times good. You know, she—I felt like she loved him as all her kids. She always was working and did things, but she was a little extreme with her discipline. She was pretty hard.” Sigler observed Davis receive “real bad whippings” from Lillie with switches, extension cords, and belts. He estimated that some of Davis’s “whippings lasted

over five minutes,” and often left open scars and “tears of the skin” on Davis’s back, butt, legs, and arms that would take “a week or so” to heal. Sigler told his grandmother about Davis’s whippings, but he never told anyone outside the family. Sigler witnessed Lillie insult Davis, calling him “stupid,” “stupid fool,” and “tall, lanky bastard.” Davis was always shy, timid, and scared—he ran from fights and got upset when people engaged in roughhousing.

Sigler admitted that he too was whipped “weekly” with belts, switches, and extension cords. Yet, despite this rough upbringing, Sigler graduated high school and joined the army. Sigler (who was several years older than Davis) lost touch with Davis after joining the army. When Sigler came back to visit, Lillie stated that Davis was out of control, staying out late, and she could not “do nothing with him.”

Sigler learned of Davis’s trial when Lillie called him and asked him to come to the trial for support. He spoke to Davis’s attorneys for the first time during a trial recess, and they asked Sigler if he would be willing to help Davis at sentencing to avoid the death penalty. He never discussed his potential testimony with Davis’s counsel and did not know what they planned to ask him. No one told him that family history might be relevant or helpful to Davis. Had Sigler known that Davis’s background and family history could have helped, he would have told the jury the information because “[e]verybody needs to know” the truth.

Finally, with regard to his ineffective-assistance claim related to the failure to investigate the circumstances of Davis’s prior third-degree robbery conviction, Davis called Jadie Boozer, his court appointed

counsel in the robbery case. Boozer testified that Davis and three other men ordered a pizza and then robbed the delivery man of six pizzas and \$32 when he arrived. In her opinion, Davis was not the leader and was merely a follower in the incident. No weapon was involved—although one of the robbers had his hand in his pocket “as if he . . . had a gun.” The victim said that “there really was never a threat made to him.” Boozer was not contacted by Giddens or Adams, but she would have cooperated if they had contacted her.

After Davis rested at the evidentiary hearing, the State called one witness, Dr. Glen King, an expert in forensic psychology, who evaluated Davis. Davis provided a self-reported social history to King, in which he stated that: (1) he remembered going hungry between the ages of 11 and 12, but no other details; (2) he got “good grades” in school; (3) he dropped out in the ninth grade because he “got tired of it” and “hung around with the wrong crowd and was clowning around too much”; (4) he earned his GED through Job Corps; (5) he was arrested for the first time at 13 and several more times as a juvenile for theft-of-property offenses; (6) he held a job off and on; and (7) he had romantic relationships but nothing serious. Davis conveyed to Dr. King that he felt that his trial attorneys had not investigated enough, complaining that counsel “only talked to my mother and two sisters” and that counsel “could have found out a whole lot of stuff” regarding his family history and background. Yet, despite his apparent dissatisfaction with the investigation conducted by trial counsel and the mitigation evidence produced, Dr. King testified that Davis “was

not too forthcoming” about his background. Although Dr. King asked “a number of questions” about Davis’s background and his mother’s discipline of him, Davis reported only that his childhood “wasn’t rosy,” that his mother disciplined him with a switch, and that sometimes he felt he was disciplined “too much.” At no time during the interview did Davis report being hit in the head with a broom handle or that such an action caused his head to be misshapen.

ii. Trial Court Denies Rule 32 Petition

Following the evidentiary hearing, the Alabama postconviction court (“Rule 32 court”) denied Davis’s Rule 32 petition on the merits. Although the court found that Davis was abused and that this information was relevant mitigation evidence, the court concluded that Davis’s trial counsel did not perform deficiently by not presenting it in the penalty phase. The court emphasized that neither Davis, his mother, Sigler, or the two unnamed siblings (that, per Davis, spoke with his counsel before the penalty phase) ever mentioned anything about the abuse, despite having opportunities to do so. Rather, the court concluded that it was clear from the Rule 32 testimony that the family engaged in “a conspiracy of silence” about the abuse. The court further noted that it was “difficult” to evaluate counsel’s preparation at the time of trial when Davis—who bore the burden of proof—did not call as witnesses at the evidentiary hearing either co-counsel Adams, Davis’s mother, or Davis’s two unnamed siblings who spoke with trial counsel at the time of trial.

The Rule 32 court concluded that Davis and his family—particularly his mother—deliberately misled

trial counsel, and, based on the information counsel had, counsel was not on notice of any abuse and acted reasonably. The court rejected the contention that counsel was deficient in failing to obtain the DHR records, emphasizing that there was “absolutely no evidence . . . that reasonably competent counsel would have been on notice that such records existed,” there are “no constitutionally required checklists for mitigation investigations,” and counsel cannot be expected to expend limited resources and time to look for records “just in case.”

The court further found that Davis was not prejudiced by counsel’s failure to present this mitigation evidence because it did “not change the fact that the facts of this crime and the two aggravating circumstances proven by the State far outweighed the one statutory mitigating factor and these non-statutory mitigating factors.” In addition, the court observed that some of the mitigation evidence presented could have been a double-edged sword—noting that the evidence showed that Davis had some good role models in his life. Further, the court observed that Davis’s violent behavior did not begin until shortly before his 1992 robbery offense, several years after the abuse stopped and he had moved out of his mother’s house, indicating that some other factor other than his upbringing led to his behavior.

Finally, the court determined that counsel was not ineffective for failing to investigate the circumstances of Davis’s third-degree robbery conviction, because the conviction qualified as an aggravating circumstance under Alabama law regardless of the underlying facts.

iii. Davis Appeals to Alabama Court of Criminal Appeals

In 2008, the Alabama Court of Criminal Appeals affirmed the denial of Davis’s Rule 32 petition. *Davis v. State*, 9 So. 3d 539, 570 (Ala. Crim. App. 2008). Adopting the trial court’s findings and quoting extensively from the trial court’s opinion, the Alabama Court of Criminal Appeals denied Davis’s ineffective-assistance claims on the merits.¹⁷ *Id.* at 553–70. Specifically, with regard to the mitigation evidence related to childhood abuse, the court concluded that:

Based on the unusual circumstances presented in this case and the fact that we [do] not know the extent of cocounsel’s investigation because Adams was not called to testify, we cannot say that counsel was ineffective for failing to discredit the statements of

¹⁷ Initially, the Alabama Court of Criminal Appeals sua sponte dismissed Davis’s ineffective-assistance claims as procedurally defaulted because they were not raised in a motion for new trial by Davis’s new counsel appointed after his sentencing. *Davis v. State*, 9 So. 3d 514, 521–22 (Ala. Crim. App. 2006). Nevertheless, the Alabama Court of Criminal Appeals noted that the mitigation evidence Davis presented was “powerful” and were the issue not procedurally barred, it “would be compelled to grant relief and order a new sentencing hearing.” *Id.* at 522.

Later, the Alabama Supreme Court reversed and remanded the case to the Alabama Court of Criminal Appeals in light of its decision in *Ex parte Clemons*, 55 So. 3d 348, 355–56 (Ala. 2007), which held that procedural bars to postconviction relief were not jurisdictional and could be waived. *Ex Parte Davis*, 9 So. 3d 537, 538–39 (Ala. 2007). On remand, however, the Court of Criminal Appeals concluded that its prior comments were “dicta” and denied Davis’s claims on the merits. *Davis*, 9 So. 3d at 553.

Davis, his mother, and two of his siblings, and to conduct yet more investigations. Thus, we conclude that the circuit court did not abuse its discretion in finding that the investigation conducted by Davis's attorneys was reasonable.

Id. at 566. The court further noted that “[e]vidence of childhood abuse has been described as a double-edged sword.” *Id.*

As for Davis's ineffective-assistance claim related to the failure to investigate his prior robbery conviction, the court concluded that Davis's case was different from that of *Rompilla v. Beard*, 545 U.S. 374 (2005), in that Davis's counsel reviewed the prior conviction file and “tried to minimize the prior conviction” by making the jury aware that it was the lowest degree of robbery in Alabama. *Id.* at 569.

Finally, after analyzing each claim of ineffective assistance during the penalty phase, the Alabama Court of Criminal Appeals addressed prejudice in a separate section. *Id.* at 569–70. It concluded that, “even if we were to find that counsel's performance was deficient in the penalty phase of Davis's trial, we would find no prejudice.” *Id.* Applying the Strickland prejudice standard, it explained that it had

reweighed the alleged omitted mitigation evidence against the aggravating circumstances that existed in this case. We agree with the [trial] court that death was the appropriate sentence in this case and that the fact that certain potential mitigation

evidence was not presented would have had no affect on the outcome.

Id. at 570. Davis appealed, and the Alabama Supreme Court denied his petition for a writ of certiorari. *Ex parte Davis*, 9 So. 3d 571 (Ala. 2008).

E. Federal Habeas Proceedings

In 2009, Davis, through counsel, filed the underlying amended federal habeas petition under 28 U.S.C. § 2254. The district court denied the § 2254 petition on the merits, concluding that the state court did not unreasonably apply Supreme Court precedent or base its decision on an unreasonable determination of the facts when it denied the two ineffective-assistance claims at issue. The district court then denied a COA. We granted Davis a COA on whether the state court unreasonably applied Strickland in denying Davis's claim that counsel rendered ineffective assistance by (1) failing to investigate and present mitigating evidence of childhood abuse; and (2) failing to investigate and present mitigating evidence of the circumstances of Davis's 1992 robbery conviction.

II. Standard of Review

We review the district court's denial of a § 2254 habeas petition de novo. *Ward v. Hall*, 592 F.3d 1144, 1155 (11th Cir. 2010). That said, central to our review is the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which establishes a "highly deferential standard for evaluating state-court rulings, [and] demands that state-court decisions be given the benefit of the doubt." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam)). Thus, under AEDPA, a

federal court’s review of a final state habeas decision is greatly circumscribed, and a federal habeas court cannot grant a state petitioner habeas relief on any claim that was adjudicated on the merits in state court unless the state court’s adjudication of the claim:

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

28 U.S.C. § 2254(d)(1)–(2).

“Clearly established Federal law’ means ‘the holdings, as opposed to the dicta, of the Supreme Court’s decisions as of the time of the relevant state-court decision.’” *Gavin v. Comm’r, Ala. Dep’t of Corr.*, 40 F.4th 1247, 1262 (11th Cir. 2022) (alterations adopted) (quoting *Williams v. Taylor*, 529 U.S. 362, 412 (2000) (hereinafter *Terry Williams*)), cert. denied sub nom. *Gavin v. Hamm*, 143 S. Ct. 2438 (2023). “[T]o be ‘contrary to’ clearly established federal law, the state court must either (1) apply a rule that contradicts the governing law set forth by Supreme Court case law, or (2) reach a different result from the Supreme Court when faced with materially indistinguishable facts.” *Ward*, 592 F.3d at 1155 (quotations omitted); see also *Bell v. Cone*, 535 U.S. 685, 694 (2002).

An “unreasonable application” of federal law occurs “if the state court correctly identifies the governing

legal principle from [the Supreme Court’s] decisions but unreasonably applies it to the facts of the particular case.” *Bell*, 535 U.S. at 694. “To meet [the unreasonable application] standard, a prisoner must show far more than that the state court’s decision was merely wrong or even clear error.” *Shinn v. Kayer*, 592 U.S. 111, 118 (2020) (quotations omitted); *Renico v. Lett*, 559 U.S. 766, 773 (2010) (“Indeed, ‘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.’” (quoting *Terry Williams*, 529 U.S. at 411)). Rather, the state court’s application of federal law “must be objectively unreasonable,” *Renico*, 559 U.S. at 773 (quotations omitted), meaning that “the state court’s decision is so obviously wrong that its error lies beyond any possibility for fairminded disagreement,” *Shinn*, 592 U.S. at 118 (quotations omitted).

“[W]hen the last state court to decide a prisoner’s federal claim explains its decision on the merits in a reasoned opinion . . . a federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable.” *Wilson v. Sellers*, 584 U.S. 122, 126 (2018). However, we are not limited by the particular justifications the state court provided for its decision, and we may consider additional rationales that support the state court’s determination. *Pye v. Warden, Ga. Diagnostic Prison*, 50 F.4th 1025, 1036 (11th Cir. 2022) (*en banc*).

Importantly, “even a strong case for relief does not mean the state court’s contrary conclusion was unreasonable.” *Harrington v. Richter*, 562 U.S. 86, 102

(2011). Rather, a petitioner must show that the state court’s ruling “was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement.” *Id.* at 103. In other words, where AEDPA deference applies, we are precluded from granting federal habeas relief “so long as fair-minded jurists could disagree on the correctness of the state court’s decision.” *Pye*, 50 F.4th at 1034 (*en banc*) (quoting *Harrington*, 562 U.S. at 101).

Finally, under AEDPA “a determination of a factual issue made by a State court shall be presumed to be correct,” and the petitioner bears “the burden of rebutting the presumption of correctness by clear and convincing evidence.” 28 U.S.C. § 2254(e)(1).

III. Discussion

Both claims before us involve allegations of ineffective assistance of counsel. To succeed on an ineffective-assistance-of-counsel claim, a petitioner must prove two elements—(1) deficient performance by his counsel and (2) prejudice to the defense as a result of the deficient performance. *Strickland*, 466 U.S. at 687.

Under *Strickland*’s performance prong, review of counsel’s actions is “highly deferential” and “a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Id.* at 689. Additionally, “every effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” *Id.*

Strickland’s prejudice prong asks whether there is a reasonable probability that, “but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. “When a defendant challenges a death sentence . . . the question is whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.” *Id.* at 695. “The likelihood of a different result must be substantial, not just conceivable.” *Harrington*, 562 U.S. at 112. In determining whether there is a reasonable probability of a different result, a court must “consider ‘the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding’—and ‘reweig[h] it against the evidence in aggravation.’” *Porter v. McCollum*, 558 U.S. 30, 41 (2009) (quoting *Terry Williams*, 529 U.S. at 397–98).

Failure to establish either prong is fatal to the petitioner’s claim. *Kokal v. Sec’y, Dep’t of Corr.*, 623 F.3d 1331, 1344 (11th Cir. 2010). And “[s]urmounting *Strickland*’s high bar is never an easy task.” *Harrington*, 562 U.S. at 105 (quoting *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010)).¹⁸ Applying AEDPA’s

¹⁸ Indeed, as the Supreme Court explained in *Harrington*, “[e]stablishing that a state court’s application of *Strickland* was unreasonable under [AEDPA] is all the more difficult” because “[t]he standards created by *Strickland* and § 2254(d) are both ‘highly deferential,’ and when the two apply in tandem, review is ‘doubly’ so.” 562 U.S. at 105 (internal citations omitted). The dissent states that double deference does not apply to the state

deferential lens to the state court’s prejudice determination, the question before us is whether every fair-minded jurist would conclude that prejudice has been established. *See Brown v. Davenport*, 596 U.S. 118, 136 (2022) (explaining that “AEPDA asks whether every fairminded jurist would agree that an error was prejudicial”); *Williamson v. Fla. Dep’t of Corr.*, 805 F.3d 1009, 1016 (11th Cir. 2015) (“To establish prejudice [where AEDPA applies, a petitioner] has to show that every fair-minded jurist would conclude that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” (quotations omitted)). With these principles in mind, we turn to the merits of Davis’s claims.

Davis argues that Giddens and Adams rendered constitutionally deficient performance in two ways—(1) by failing to investigate and uncover significant evidence of Davis’s childhood abuse, and (2) by failing to investigate the circumstances surrounding Davis’s prior robbery conviction, which the State relied on as an aggravating factor.

courts’ resolution of the prejudice prong, citing a separate concurring opinion in *Evans v. Sec’y, Dep’t of Corr.*, 703 F.3d 1316, 1334 (11th Cir. 2013) (*en banc*) (Jordan, J., concurring). We note that other circuit courts disagree, *id.* at 1335, and this Court has not yet resolved this issue in a published opinion. Here the parties have not briefed the double deference split related to the prejudice prong, and we need not decide that issue in order to resolve this case. Therefore, for the purpose of this opinion, we do not apply double deference to the state court’s resolution of the prejudice prong.

The state court determined that counsel’s investigation into Davis’s childhood and his prior robbery was not deficient and that, in any event, Davis could not establish prejudice. Ultimately, we need not decide whether the state court’s decision on the performance prong involved an unreasonable application of *Strickland* because Davis failed to show that the state court’s determination that he did not suffer prejudice was an unreasonable application of, or contrary to, federal law.¹⁹ See *Jennings v. Sec’y, Fla. Dep’t of Corr.*,

¹⁹ Davis argued for the first time at oral argument that the state court made no prejudice finding on his claim that counsel was ineffective during the penalty phase for failing to investigate and present the circumstances of his prior robbery conviction, and he urges us to review prejudice de novo. Although the dissent embraces Davis’s belated argument at least with regard to his ineffective-assistance claim concerning his prior third-degree robbery, we do not for several reasons.

First, Davis raises this argument improperly for the first time at oral argument. See *Am. Builders Ins. Co. v. Southern-Owners Ins. Co.*, 71 F.4th 847, 861 (11th Cir. 2023) (explaining that the appellant “did not preserve the issue by waiting to raise it at oral argument”); *Hernandez v. Plastipak Packaging, Inc.*, 15 F.4th 1321, 1330 (11th Cir. 2021); *Green v. Graham*, 906 F.3d 955, 963 (11th Cir. 2018) (“We do not consider arguments not raised in a party’s initial brief and made for the first time at oral argument.” (alterations adopted)).

Second, the argument lacks merit. Although the state court did not expressly mention prejudice in the context of its analysis of the third-degree robbery claim, the state court noted that “there [was] no allegation that the file of Davis’s prior conviction contained a plethora of mitigating evidence” and that counsel tried to minimize the prior conviction to the jury. *Davis*, 9 So. 3d at 568–69. Based on this discussion, the district court concluded that “Davis’s failure to prove prejudice appears to have formed

the primary basis of the decision of the Alabama Court of Criminal Appeals to deny relief.” (emphasis added). Notably, neither Davis nor the dissent has addressed this conclusion. We agree with the district court that the state court’s discussion clearly relates to the prejudice element, which requires the court to determine whether the petitioner has shown “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. By noting that there was no allegation that the third-degree robbery file contained “a plethora of mitigating evidence” and that counsel tried to minimize the prior conviction to the jury by emphasizing that it was for the lowest degree of robbery in Alabama, the state court implicitly concluded that Davis failed to show a reasonable probability of a different outcome based on counsel’s alleged failure to investigate the third-degree robbery case file. While the dissent disagrees and concludes that the state court erroneously disregarded a plethora of evidence in the case file—namely, the non-violent nature of the robbery—as we discuss later in the opinion, the conviction would have qualified as an aggravating factor regardless of the underlying nature of the robbery, and the non-violent nature of the robbery could have just as easily been a double-edged sword.

Finally, even if we accepted Davis’s argument that the state court failed to address prejudice with regard to his claim predicated on the prior robbery conviction, there is nonetheless a cumulative prejudice determination to which we owe deference. Specifically, as noted previously, after addressing each and every individual claim of ineffective assistance at the penalty phase, the state court in a separate section of its opinion conducted a cumulative prejudice analysis, as required in capital cases, and found prejudice lacking. *Davis*, 9 So. 3d at 569–70 (“Last, even if we were to find that counsel’s performance was deficient in the penalty phase of Davis’s trial, we would find no prejudice.”). In doing so, the state court cited Wiggins, stating that “[i]n assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence.” *Id.* at 570 (emphasis added) (quotations omitted). And the state court then affirmatively stated that “[w]e have reweighed the alleged

55 F.4th 1277, 1293 (11th Cir. 2022) (“Because both prongs of the *Strickland* standard must be satisfied to show a Sixth Amendment violation, a court need not address the performance prong if the petitioner cannot meet the prejudice prong, and vice-versa.” (quotations omitted)), *cert. denied sub nom. Jennings v. Dixon*, 144 S. Ct. 164 (2023); 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.”).

Davis argues that his trial counsel’s failure to present any of the mitigating evidence concerning his childhood abuse left the jury with “an incomplete picture of his life.” Furthermore, he asserts that, had his counsel investigated the circumstances underlying the third-degree robbery conviction, counsel would have discovered that the robbery merely involved Davis and his friends stealing six pizzas and a small sum of money from a pizza delivery man without any weapons.²⁰ Even though one of the men with Davis had

omitted mitigation evidence against the aggravating circumstances that existed in this case. We agree with the [Rule 32 court] that death was the appropriate sentence in this case and that the fact that certain potential mitigation evidence was not presented would have had no affect on the outcome.” *Id.* There is thus a prejudice determination to which we owe deference.

²⁰ The dissent similarly downplays the robbery as a mere “heist” in which Davis and his friends “swiped” pizzas and took some money from a pizza delivery man without any weapons or violence. This characterization evokes images of juvenile pranks, and a “boys will be boys” attitude. But this crime was not a prank; it was a robbery, plain and simple—and not a spur of the moment

made a gesture in his pocket like he had a gun, the deliveryman stated that no real threat was made to him. Thus, Davis argues, the non-violent nature of the robbery would have “obviate[ed] its status as an aggravating factor.” Accordingly, he maintains that, had all of this “impactful” evidence been presented during the penalty phase, there is a reasonable probability that the jury would have recommended life imprisonment rather than a death sentence. We disagree.

“When a defendant challenges a death sentence . . . the question is whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs evidence—would have concluded that the

crime of opportunity, but a planned robbery. Furthermore, Davis was not a juvenile—he was a 21-year-old adult. And while the group may not have had an actual gun, one of the participants pretended to have a gun in his pocket, and the pizza delivery man had no way to know that the gun was not real. While the dissent emphasizes that the crime was accomplished without actual violence or—according to Davis’s public defender in the robbery case—an overt threat of violence to the pizza delivery man, the dissent overlooks the commonsense fact that most individuals do not simply hand over property in their possession unless they feel there is in fact a threat of violence to their person. Indeed, the criminal complaint and warrant issued in relation to this crime alleged that, in the course of the robbery, Davis “threaten[ed] the imminent use of force against the person of” the pizza delivery man “while [a] co-defendant was armed or [led] said [delivery man] to believe he was in possession of a deadly weapon or dangerous instrument.” And the State of Alabama certainly thought this crime was much more serious than a mere pizza “heist” because it charged Davis with first-degree robbery and set Davis’s bond at \$2,500, only later permitting him to plead to the lesser third-degree robbery.

balance of aggravating and mitigating circumstances did not warrant death.” *Strickland*, 466 U.S. at 695. To assess the reasonable probability of a different result, courts must “consider the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—and reweigh it against the evidence in aggravation.” *Porter*, 558 U.S. at 41 (alteration adopted) (quotations omitted).

Here, the state court explained that it “reweighed the alleged mitigation evidence against the aggravating circumstances,” and determined that “death was the appropriate sentence in this case” and that the omitted mitigation evidence “would have had no effect on the outcome.” *Davis*, 9 So.3d at 570. “Applying AEDPA to *Strickland*’s prejudice standard, we must decide whether the state court’s conclusion that [counsel’s] performance at the sentencing phase . . . [did not] prejudice [Davis]”—[i.e.,] that there was no substantial likelihood of a different result—was ‘so obviously wrong that its error lies beyond any possibility for fairminded disagreement.’” *Pye*, 50 F.4th at 1041–42 (*en banc*) (quoting *Shinn*, 592 U.S. at 118).

For the reasons explained below, the state court’s conclusion that Davis was not prejudiced by any of his counsels’ alleged deficiencies was not “contrary to” and did not “involve[] an unreasonable application of, clearly established Federal law.” 28 U.S.C. § 2254(d). While the dissent may disagree with the state court’s conclusion and would have reached a different conclusion in the first instance, the state court’s decision was “not so obviously wrong that its error lies beyond any possibility for fairminded disagreement.” *Pye*, 50

F.4th at 1042 (*en banc*) (quotations omitted); *Harrington*, 562 U.S. at 101 (explaining that a state court’s decision is reasonable “so long as ‘fairminded jurists could disagree’ on the correctness of the state court’s decision” (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004))).²¹

Like the state court, we begin with a review of the mitigation evidence presented during the penalty phase and that produced during the Rule 32 proceedings.

At trial, the jury learned that Davis was raised by a single mother without a father in the home; that his father passed away when he was 15, which Davis struggled with; that he had behavioral problems in school and at home, which his mother struggled to control; that Davis started “staying out” all night at 15 and moved out of his mother’s house at 19, but he visited weekly; and that Davis has below-average intelligence.

Had the evidence submitted during the Rule 32 proceedings been presented at the penalty phase, the jury and the sentencing judge would also have learned that Davis grew up in poverty; that he suffered verbal and physical abuse from his mother but was not removed from the home by social services; that the family

²¹ Because we are not addressing the performance prong in this majority opinion, for purposes of the analysis that follows, we assume that counsel would have uncovered the evidence of childhood abuse with a more thorough investigation. However, as the concurring opinion explains, the validity of this assumption is significantly undermined by the record in this case. *See Concurring Op.* at 20–22.

members who were aware of the abuse took no action to report it or stop it; that his mother used severe forms of corporal punishment with switches, belts, or other objects that left welts and marks on Davis; that his mother had poor parenting skills; that Davis was very close with Bill Jacobs (the father of three of his younger sisters) and Bill was a positive influence in Davis's life, but he too died when Davis was 15; that there was an allegation that Davis was sexually abused at the age of two, but the allegation was later dropped; that Davis struggled in school and dropped out in the ninth grade, but later got his GED; that Davis had a criminal history of theft dating back to the age of 13; and that his prior robbery conviction at the age of 22 was for the non-violent robbery of a pizza delivery man of six pizzas and some cash, although one of the members of the group pretended to have a gun in his pocket.

Even with all of this additional non-statutory mitigation evidence, upon considering the totality of the mitigation evidence and reweighing it against the evidence in aggravation—that the murder was committed during a robbery and that Davis had a prior conviction involving the use or threat of violence to a person—it was not objectively unreasonable for the state court to conclude that there was no reasonable probability of a different outcome. *See Porter*, 558 U.S. at 41 (explaining that to assess the reasonable probability of a different result, courts must “consider the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—and reweigh it against the evidence in

aggravation” (alteration adopted) (quotations omitted)).

First, as to the evidence of childhood abuse, it was not unreasonable for the state court to conclude that the weight to be afforded the evidence of physical abuse would have been decreased by several factors—(1) the remoteness in time of the childhood physical abuse to the murder (at which time Davis was 22 years old), (2) the fact that the family concealed the physical abuse and did not report it to authorities, and (3) the fact that DHR did not remove Davis from the home. *Davis*, 9 So. 3d at 562.

Second, we also agree with the state court that some of the childhood abuse evidence could have been a double-edged sword. *Id.* at 562–63. For instance, the evidence showed that Davis had some good role models in his life and did not become violent until later in life after he had moved out of his mother’s home and was incarcerated for the pizza robbery, which suggests that his violent behavior resulted from some factor other than his abusive upbringing. Additionally, the fact that his siblings and his cousin had gone on to lead successful lives, despite experiencing the same physically abusive upbringing, may have undermined the mitigation value of the evidence of physical abuse. *See Callahan v. Campbell*, 427 F.3d 897, 937 (11th Cir. 2005) (concluding that the fact that none of the defendant’s siblings had committed violent crimes “reduc[ed] the value of abuse as mitigating evidence”); *Grayson v. Thompson*, 257 F.3d 1194, 1227 (11th Cir. 2001) (“The fact that [the defendant] was the only child to commit such a heinous crime also may have undermined defense efforts to use his childhood in

mitigation.”); *see also Jenkins*, 963 F.3d at 1271–72 (explaining no prejudice because sibling’s testimony about childhood abuse and a difficult upbringing could have been a double-edged sword—it may have made the defendant more sympathetic to the jury or it may have made the defendant look more culpable because despite the same background sibling went on to lead a successful life).

The dissent contends that, under *Rompilla*, counsel’s failure to present the circumstances surrounding the prior robbery conviction alone compels a finding of prejudice. It does not. The situation in *Rompilla* is very different from the one here. Significantly, in *Rompilla*, the Supreme Court reviewed the prejudice prong *de novo* because the state court had never reached the question of prejudice—thus, AEDPA deference was not a factor. 545 U.S. at 390. Therefore, *Rompilla* does not aid us in assessing whether the Alabama Court of Criminal Appeals unreasonably determined that prejudice was lacking in this case. *See Pinholster*, 563 U.S. at 202 (explaining that the Court “did not apply AEDPA deference to the question of prejudice” in *Rompilla* and “therefore [it] offer[s] no guidance with respect to whether a state court unreasonably determined that prejudice is lacking”). Moreover, in *Rompilla* it was “uncontested” that had counsel looked at the prior conviction file, “they would have found a range of mitigation leads that no other source had opened up”—including leads on Rompilla’s severely deprived and abusive childhood; Rompilla’s mental health issues and “red flags” pointing to a need for further mental health examinations; and IQ testing, which would have revealed that “Rompilla’s IQ

was in the mentally retarded range” and that he suffered brain damage and significant impairment in cognitive function. 545 U.S. at 391–93. In other words, it was not simply that counsel failed to review the file and uncover mitigation related to the prior conviction that led the Supreme Court on de novo review to conclude that *Rompilla* had established prejudice. Rather, it was the vast wealth of mitigation that counsel could have uncovered if they had reviewed the file that led to the prejudice conclusion.

Davis’s case is in no way akin to the circumstances in *Rompilla*. There is no indication that reviewing Davis’s prior robbery file would have uncovered a treasure trove of unrealized mitigation as in *Rompilla*. Thus, Davis did not suffer the same type of prejudice that *Rompilla* did from his counsel’s failure to investigate the circumstances of the prior robbery.²²

²² Additionally, we note that the State in Davis’s case merely introduced a certified copy of the prior conviction to establish a statutory aggravating factor. Unlike in *Rompilla*, the State did not read from the transcript of the prior proceedings or attempt to use the conviction to emphasize Davis’s violent character or propensity to engage in similar acts. Furthermore, it was undisputed that under Alabama law a conviction for robbery qualified as a felony involving the use or threat of violence to the person regardless of the underlying facts. *Bush v. State*, 695 So. 2d 70, 91 (Ala. Crim. App. 1995); *see also Shaw v. State*, 207 So. 3d 79, 121 (Ala. Crim. App. 2014) (“Robbery in the third degree, by its statutory definition . . . involves the use or threat of force. Thus, proof of these convictions, by itself, was sufficient to prove the aggravating circumstances set out in []§ 13A-5-49(2).”). Accordingly, even if Giddens had presented the details of the crime during the penalty phase, it would not have, as Davis alleges, “obviate[d] its status as an aggravating factor.”

Notwithstanding that the mitigation information in Davis's file obviously pales in comparison to what was awaiting counsel in *Rompilla*, the dissent contends that the nonviolent nature of the pizza robbery would have lessened the weight of the statutory aggravator based on the prior conviction and certainly would not have "made [Davis] more deserving of the death penalty." (emphasis omitted). Not necessarily. While the jury might have viewed the facts about the pizza robbery in the manner in which the dissent contends, it is equally plausible that the facts of the pizza robbery could have pointed to an escalating pattern of violence given that it was close in time to the 1993 murder, and the 1993 murder was also committed during a robbery. Moreover, any appeal to the allegedly nonviolent nature of the pizza robbery would have potentially opened the door for the State to introduce as rebuttal evidence Davis's violent behavior during his incarceration for the pizza robbery. *See Davis*, 9 So. 3d at 563 (highlighting that "[o]ne of Davis's own witnesses [at the Rule 32 hearing] noted that [Davis's] violent behavior did not begin until the commission of [the pizza robbery] offense" and that after that robbery Davis "began fighting in jail and became aggressive and disrespectful"). The dissent asserts that the facts related to the pizza robbery "would have gone only to the weight (if any) that the jury should apply to the state's prior-violent-conviction aggravator" and that it would not have opened the door to "irrelevant" character evidence. The dissent's position is contrary to Alabama law. While the facts related to the pizza robbery may directly relate to the weight afforded the statutory aggravator, they also tend to show that Davis did not have a violent nature and was not a "ringleader" as he

had been accused of being during the guilt phase. After all, as the dissent asserts, “[w]ho would think that a nonviolent [pizza] robbery of this nature made [Davis] more deserving of the death penalty?” (emphasis omitted). Had the defense offered this information, the State would have been permitted to introduce rebuttal evidence to show that, despite the nonviolent nature of the pizza robbery, Davis did in fact have a violent nature and was a leader.²³ See Ala. Code. § 13A-5-45(d) (1975) (“Any evidence which has probative value and is relevant to sentence shall be received at the sentence hearing regardless of its admissibility under the exclusionary rules of evidence”); *Lindsay v. State*, 326 So. 3d 1, 53 (Ala. Crim. App. 2019) (“As previously stated . . . , § 13A-5-45(d), Ala. Code 1975, allows for the broad admission of evidence at the penalty phase of a capital-murder trial. Indeed, any

²³ The dissent asserts that the prosecution never argued future dangerousness during the penalty phase, and, therefore, the State would not have been permitted to introduce rebuttal evidence of Davis’s violent nature in prison because it would have been irrelevant. But that assertion is based on the flawed premise that the circumstances surrounding the pizza robbery exist in a vacuum and would be probative of only the weight afforded the statutory aggravating factor. The same evidence that allegedly shows the mitigating nature of the prior robbery also tends to establish—whether explicitly argued or implied—that Davis had a non-violent nature and was not a ringleader as he had been accused of being in the guilt phase by the State. In other words, because these same facts are probative of more than just the weight afforded the statutory aggravator and pass upon Davis’s character and worthiness of the death penalty, their presentation would have opened the door to rebuttal evidence from the State that tended to demonstrate that Davis had a violent nature as well as an argument that Davis posed a future dangerousness risk.

evidence that has probative value towards sentencing, regardless of its admissibility under the Alabama Rules of Evidence, is admissible.”); *Whatley v. State*, 146 So. 3d 437, 481–82 (Ala. Crim. App. 2010) (explaining that “any evidence which has probative value and is relevant to the sentence” may be presented at sentencing and holding that evidence of the defendant’s “conduct in jail and the statement he made concerning harming other inmates were relevant to rebut evidence that [the defendant] presented in mitigation”). And such evidence was certainly available, as Vogelsang testified at the evidentiary hearing that Davis’s jail records related to the pizza robbery indicated that Davis engaged in fighting with other inmates, exhibited violent behavior, and was “written up frequently for aggressive behavior, profanity or disrespect.”

So while the dissent may be correct that the facts of the pizza robbery would have “severely undermined the factor’s usefulness as an aggravating one warranting the death penalty,” it is equally plausible that the evidence could have had the opposite effect and demonstrated an escalating pattern of violence or otherwise opened the door for the introduction of further aggravating evidence, which would not have aided Davis in his quest to demonstrate the death penalty was not appropriate in his case.

Under similar circumstances, both the Supreme Court and this Court have upheld state court findings that the defendant could not establish prejudice when evidence offered in mitigation was a double-edged sword or would have opened the door to harmful rebuttal evidence. *See, e.g., Pinholster*, 563 U.S. at 200–

03; *Wong v. Belmontes*, 558 U.S. 15, 22–28 (2009); *Jenkins*, 963 F.3d at 1270–73; *Evans*, 703 F.3d at 1327; *Ponticelli v. Sec’y, Fla. Dep’t of Corr.*, 690 F.3d 1271, 1296 (11th Cir. 2012) (“[B]oth the Supreme Court and this Court have consistently rejected [the] prejudice argument [] where mitigation evidence was a two-edged sword or would have opened the door to damaging evidence.” (second and third alterations in original) (quotations omitted)).

Thus, given the facts of this case, it was not necessarily objectively unreasonable for the state court to conclude, after reweighing the totality of the mitigating evidence against the aggravating circumstances, that the mitigating evidence would not have outweighed the aggravating circumstances present in this case. Davis has certainly not shown that every fairminded jurist would conclude that prejudice has been established. *Williamson*, 805 F.3d at 1016; *Nance v. Warden, Ga. Diagnostic Prison*, 922 F.3d 1298, 1301 (11th Cir. 2019) (“[I]f some fairminded jurists could agree with the state court’s decision, although others might disagree, federal habeas relief must be denied.” (alteration in original) (quotations omitted)).

The primary cases on which Davis relies—*DeBruce v. Comm’r, Ala. Dep’t of Corr.*, 758 F.3d 1263 (11th Cir. 2014), and *Williams v. Allen*, 542 F.3d 1326 (11th Cir. 2008) (hereinafter *Herbert Williams*)—do not compel a different conclusion.

The mitigation evidence in *DeBruce* was far stronger than that in Davis’s case. See *DeBruce*, 758 F.3d at 1270–72. It included that (1) “DeBruce witnessed stabbings, shootings, and other violence in the

housing projects where he grew up, and that [he] was frequently attacked by gangs”; (2) his older brother (to whom DeBruce was very close) was incarcerated when DeBruce was eight, and DeBruce’s father was an alcoholic and verbally abusive to DeBruce and his siblings; (3) DeBruce’s older sister, who was primarily responsible for raising him, beat him daily and withheld meals, threatened him at times with a knife, and placed him in a closet for hours after the beatings; (4) DeBruce suffered from brain damage and had only a seventh grade education and borderline range intelligence; (5) DeBruce suffered from blackout episodes consistent with seizures and accompanied by memory loss; (6) DeBruce had a history of alcohol and marijuana abuse; and (7) by the age of 20, DeBruce had attempted suicide four times. *Id.* at 1270–72. Given the significant differences between DeBruce and this case, DeBruce cannot compel a finding of prejudice.²⁴

And Davis’s case is not analogous to *Herbert Williams* because, in that case, AEDPA deference did not apply to the state court’s prejudice determination and we reviewed prejudice *de novo*. 542 F.3d at 1344–45

²⁴ Additionally, in reaching our decision in *DeBruce*, we hinged our decision on the Supreme Court’s decisions in *Wiggins*, *Rompilla*, and *Terry Williams*. *DeBruce*, 758 F.3d at 1277–79. But the Supreme Court did not apply AEDPA deference to the question of prejudice in those cases. *Wiggins*, 539 U.S. at 534 (reviewing prejudice *de novo* because state court never reached the prejudice prong); *Pinholster*, 563 U.S. at 202 (explaining that it did not apply AEDPA deference to the question of prejudice in *Terry Williams* or *Rompilla*). Therefore, those cases “offer no guidance with respect to whether a state court has *unreasonably* determined that prejudice is lacking.” *Pinholster*, 563 U.S. at 202 (emphasis in original).

(holding that no AEDPA deference was due to the state court's prejudice determination because the state court failed to apply the correct legal standard when making its prejudice determination). Thus, because Herbert Williams lacks the critical AEDPA deference, it cannot compel a finding of prejudice in this case.

Finally, we note that the dissent declares the state court's prejudice decision unreasonable in part because the state court failed to consider in its analysis that early on in the one-hour total jury deliberation, the jury indicated once that at least five jurors favored life without parole, and the final jury verdict was still not unanimous (it was 11 to 1 in favor of the death penalty), noting that when this Court "[has] evaluated prejudice, we [and several of our sister circuits] have frequently considered the circumstances of the jury's decision to assess whether there is 'a reasonable probability that at least one juror would have struck a different balance,'" citing *Sears v. Warden GDCP*, 73 F.4th 1269, 1299 (11th Cir. 2023). But regardless of whether this Court and our sister circuits have considered the circumstances of the jury's decision when assessing whether there is a reasonable probability of a different outcome, the state court's failure to do so does not render its decision objectively unreasonable under AEDPA. Unreasonableness under AEDPA turns on whether the state court's decision is contrary to, or an unreasonable application of, clearly established federal law as established by the Supreme Court, not the circuit courts. 28 U.S.C. § 2254(d)(1); Gavin, 40 F.4th at 1262 ("Clearly established Federal law' means 'the holdings, as opposed to the dicta, of

the Supreme Court’s decisions as of the time of the relevant state-court decision.” (alterations adopted) (quoting *Terry Williams*, 529 U.S. at 412)). And the Supreme Court has never held that a jury’s hesitation in reaching a verdict is necessarily an indicator of prejudice or that such a factor must be considered or should weigh more heavily in the prejudice analysis under *Strickland*.²⁵

²⁵ Even if circuit case law was relevant to our analysis, we note that the majority of the cases the dissent relies on for the principle that juror splits are relevant to the prejudice analysis are pre-AEDPA cases—meaning that our review was *de novo* and AEDPA’s highly deferential framework did not apply to our evaluation of the state court’s decision. See *Hardwick v. Sec’y, Fla. Dep’t of Corr.*, 803 F.3d 541, 549 (11th Cir. 2015); *Cave v. Singletary*, 971 F.2d 1513 (11th Cir. 1992); *Blanco v. Singletary*, 943 F.2d 1477 (11th Cir. 1991); *Sanders v. Davis*, 23 F.4th 966, 970 (9th Cir. 2022); *Stankewitz v. Wong*, 698 F.3d 1163, 1167 (9th Cir. 2012). Thus, these cases have no bearing on our analysis as we—like the district court—agree that AEDPA deference applies. And, the remaining post-AEDPA cases on which the dissent relies are factually distinguishable from the circumstances here for a number of reasons.

For instance, our decision in *Sears v. Warden GDCP*, is distinguishable because it did not involve a prejudice analysis under *Strickland*. 73 F.4th at 1296. Rather, it involved a prejudice analysis under *Brecht v. Abrahamson*, 507 U.S. 619 (1993). *Id.* And we took care to note that “the *Strickland* prejudice standard imposes a higher burden on the defendant than does the *Brecht* standard,” and, therefore, “the *Strickland* standard is distinct from our analysis under the *Brecht* standard.” *Id.* (quotations omitted). Thus, our prejudice discussion in *Sears* has no bearing on this case. But even if it did, the circumstances in *Sears* are a far cry from those here. In *Sears*, the jury sent out multiple notes indicating that it was deadlocked and could not reach a unanimous verdict; the trial court gave the jury multiple instructions

Under the framework of § 2254, we must remember that “an unreasonable application of federal law is different from an incorrect application of federal law.” *Terry Williams*, 529 U.S. at 410 (emphasis in original). To grant federal habeas relief, the state court’s application of clearly established federal law, as

to continue deliberations; the deliberations spanned multiple days; and one of the jurors later testified at the petitioner’s evidentiary hearing that other jurors yelled and cursed at her, and she felt coerced into changing her vote. *Id.* at 1293–95. Davis’s case bears no resemblance to *Sears*. Davis’s case was not a case in which the jury seemed hopelessly deadlocked or in which deliberations dragged on for an extended period of time. The jury deliberated a total of one hour before returning its 11 to 1 advisory verdict in favor of the death penalty. The short length of deliberations undermines the dissent’s contention that, in determining whether Davis was prejudiced, great weight or significance should be afforded to the fact that the jury sent a note initially asking whether the trial court could accept seven votes for death and five for life.

Similarly, the Fourth Circuit’s decision in *Williams v. Stirling* is distinguishable because the mitigation evidence was more powerful than that here. There was evidence not only that the petitioner had a troubled childhood, but also that he suffered from fetal alcohol syndrome that impaired his judgment and his ability to control his impulses and to understand the consequences of his actions—and the Fourth Circuit believed the evidence of fetal alcohol syndrome would have been particularly compelling because it “could have provided the jury evidence of a neurological defect that caused [the petitioner’s] criminal behavior.” 914 F.3d 302, 307–308, 318 (4th Cir. 2019). And the jury deliberations in *Williams* were clearly more deadlocked than here—the deliberations spanned over two days, the jury reported being deadlocked, the petitioner moved for a mistrial, and the trial court gave an *Allen* charge to the jury—whereas Davis’s jury deliberated for approximately an hour. *Id.* at 308. In other words, Davis’s case bears no resemblance to *Williams* either.

established by the Supreme Court, must be “objectively unreasonable,’ not merely wrong; even ‘clear error’ will not suffice.” *White v. Woodall*, 572 U.S. 415, 419 (2014) (quoting *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003)). We must observe this distinction and are not at liberty to “substitute[] [our] own judgment for that of the state court.” *Woodford*, 537 U.S. at 25. Thus, even if we might have reached a different conclusion as an initial matter in this case, “it was not an unreasonable application of [*Strickland* or its progeny] for the [state court] to conclude that [Davis] did not establish prejudice.” *Pinholster*, 563 U.S. at 203.

Accordingly, we affirm the district court’s denial of Davis’s § 2254 federal habeas petition.

AFFIRMED.

BRANCH, J., Circuit Judge, Concurring:

As explained in the majority opinion, the district court's judgment is due to be affirmed because Jimmy Davis cannot demonstrate that the Alabama Court of Criminal Appeals' determination that he failed to show prejudice from his counsels' alleged deficient performance was contrary to, or an unreasonable application of, clearly established federal law as required for federal habeas relief under 28 U.S.C. § 2254(d)(1). I write separately to respond to the dissent's contentions regarding counsel's alleged deficient performance. Applying the doubly deferential standards of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") and *Strickland*¹ to the facts of this case, the state court's determination that counsels' performance was not constitutionally deficient was not contrary to, or an unreasonable application of, clearly established federal law. Accordingly, I would also affirm on that basis as well.

I. Background

Jimmy Davis, Jr., is on death row for the 1993 murder of Johnny Hazle during the robbery of a gas station. Davis's mother, Lillie Bell Davis, and his cousin, Andre Sigler, both testified at the penalty phase of Davis's trial. They provided testimony concerning Davis's background and personality—including that Davis's parents divorced when he was a baby; that he and his five siblings were raised by Lillie as a single mother with no father figure in the home; that Lillie sent Davis to live with his father when he was 15

¹ *Strickland v. Washington*, 466 U.S. 668 (1984).

because he was hanging out with “a bad crowd,” but his father died unexpectedly shortly thereafter and Davis returned to his mother’s home; that Davis struggled with his father’s death; that Davis had behavioral issues in his teens, would not obey Lillie, and would stay out all night or be gone for days at a time; however, he was never violent; and that Davis dropped out of school. Both Lillie and Sigler begged the jury to show mercy.

Additionally, Dr. Annie Storey provided testimony concerning IQ-related assessments that she administered to Davis. These results indicated that Davis was “borderline in intelligence” and that his ability to know “when to appropriately handle himself or how to appropriately handle himself in his environment” would be impaired. The jury returned an 11 to 1 advisory recommendation in favor of the death penalty, which the trial court ultimately imposed.

Following his direct appeal, Davis pursued state postconviction relief under Alabama Rule of Criminal Procedure 32, asserting, as relevant here, that his trial counsel was ineffective during the penalty phase for failing to obtain readily available mitigating evidence of childhood abuse, and failing to investigate the circumstances of his 1992 Alabama third-degree robbery conviction.

As recounted in the majority opinion, Davis was represented at trial by appointed counsel Steve Giddens and Jonathan Adams, both of whom were available to testify at the Rule 32 evidentiary hearing. Yet, Davis only called Giddens as a witness and introduced copies of Giddens’s and Adams’s time sheets as evidence of the work that they did in this case. Giddens

recorded 141.55 hours of work on Davis’s case, which included 49.2 hours of “out of court time” preparing for both phases of trial and 24.5 out-of-court hours during trial and preparing for the post-trial sentencing hearing before the judge. Adams recorded approximately 152.85 hours on Davis’s case, which included 65 hours of “out of court time” preparing for both phases of trial and an additional 24.5 out-of-court hours during trial and preparing for the post-trial sentencing hearing before the judge. The bulk of the hours for both were recorded in the two weeks leading up to the trial.

Although Giddens and Adams did not hire a private investigator to assist with the case,² Giddens testified that he and Adams “did a lot of preparation” and “a good bit of investigation” themselves. Neither one

² Giddens testified that he “[did] not believe” he had ever requested such funds [for an investigator] in prior cases.” The dissent makes much of this fact because counsel acknowledged the value of an investigator in his subsequent work as a prosecutor during the late 1990s and early 2000s. As a prosecutor, however, he bore the burden of proof. With that burden, prosecutors necessarily must employ and rely on the work of investigators.

Moreover, as the Rule 32 trial court noted, the approach to investigators and their involvement in cases has changed significantly in the last several decades since Davis’s trial. As acknowledged by the Rule 32 court, at the time of Davis’s 1993 trial, such investigators were not commonplace, and it “was not clear cut that an investigator would be appointed just because one was requested.” Indeed, the trial court found that Davis had “made no showing that trial counsel had sufficient grounds to request the assistance of an investigator.” And the Alabama Court of Criminal Appeals agreed. *See Davis v. State*, 9 So. 3d 539, 556–57 (Ala. Crim. App. 2008). That determination is not challenged in this appeal. Thus, the dissent’s emphasis on the lack of an investigator is a red herring at best.

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acted as lead counsel. Instead, Giddens explained that they both “got in there and both worked and both tried it”—doing some things together and others independently.³

As part of the preparation for sentencing, counsel interviewed Davis’s mother and obtained a court order for Davis’s mental evaluation. Giddens, however, was “not a note taker” and did not have any notes of his interview with Davis’s mother. Giddens knew that Davis had several siblings, but he did not recall attempting to interview any of Davis’s other family members other than Davis’s mother. He did not recall doing any investigation into Davis’s friends because, to the best of Giddens’s knowledge, all of Davis’s friends were in legal trouble and would not have been able to provide helpful mitigation. Giddens did not recall trying to obtain Davis’s school records, but he testified that he did not typically request such records, even in capital cases.⁴ Similarly, it was not his practice to get records from social services, and he did not consider doing that in Davis’s case. Rather, the defense had only the social history from Davis’s mother.

Neither Davis nor his mother mentioned anything about abuse to Giddens, and Giddens was unaware of

³ The time sheets corroborate this assertion given that Adams recorded more out-of-court time preparing for the trial (65 hours) than Giddens (49.2 hours), which confirms that Adams did some work that Giddens did not.

⁴ However, I note that the record contains a copy of a subpoena filed by Giddens to the “Custodian of Records of Anniston High School” requesting “any and all records of Jimmy Davis.” Thus, it appears that counsel did in fact attempt to secure some of Davis’s school records.

any abuse. Giddens explained that he did not ask about abuse because he had no reason to suspect it. He acknowledged that information about abuse Davis may have suffered as a child “might” have affected the jury in mitigation if he had known about it. Giddens admitted, however, that during his 13 years as a criminal defense attorney (from 1986–1999), he had never put forth evidence of childhood abuse as mitigation.

As for Davis’s prior robbery conviction, Giddens testified that he knew of the conviction and reviewed the conviction record, but he did not attempt to contact anyone involved with the robbery case. Giddens explained that he did not do any investigation into the circumstances of the robbery conviction because “[t]he [S]tate offered simply a certified copy of the conviction. Which we don’t object to, because you don’t want them to have to put on a witness to bring out the facts.”

Following Giddens’s testimony, Davis presented testimony about abuse that he suffered at the hands of his mother as a child. Specifically, he presented the testimony of several social workers concerning a single 1981 social services complaint involving 25 to 35 switch marks from “a whipping” on Davis’s back when he was 10 years’ old. The complaint was deemed founded by social services; social services offered services and counseling to Davis’s mother Lillie and to Davis; and Davis was not removed from the home.⁵ Notably, in 1981, Lillie never admitted to making the marks on Davis’s back, and over twenty years later,

⁵ Social worker Beverly Boggs testified that in hindsight, Davis “probably should have [been] removed” from the home based on the 1981 incident.

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she denied ever having any contact with social services to Jan Vogelsang, a clinical social worker who assisted Davis's postconviction team with the postconviction investigation in preparation for the Rule 32 proceedings.

Davis also called his paternal aunt, a cousin, two family friends, and two of his sisters, Mary and Hortense, as witnesses at the evidentiary hearing, all of whom testified to other instances of abuse that were not documented in social services records. His sisters provided the bulk of this testimony, testifying at length that their mother beat them frequently with extension cords, switches, and belts (including the belt buckle) "all over" their bodies; that the whippings lasted for extended periods of time; and that the whippings left them with bloody "whelp . . . marks." They explained that their mother whipped Davis for bed-wetting until he was 14 or 15 years' old. On one occasion, when Davis was in the second grade, their mother beat him "with a broom handle across his head" and this "dented" and "warped his head," and Davis had to wear "a skullcap over his head" until it reshaped.

None of these witnesses ever told anyone about the beatings or otherwise reported the abuse to authorities. Indeed, Davis's older sister Mary admitted during the Rule 32 evidentiary hearing that, even when Davis's postconviction team contacted her, she shared just "the basics" about the abuse with them and not the specific details she testified to during the evidentiary hearing. And when Davis's younger sister Hortense was asked at the Rule 32 evidentiary hearing if she would have testified to the abuse if called as a

witness at trial, she stated only that she “probably would have.”

Although Davis did not testify at the Rule 32 evidentiary hearing, the State’s expert, Dr. Glen King, spoke with Davis as part of his evaluation. Dr. King testified that Davis “was not too forthcoming” about his childhood. Indeed, Dr. King asked “a number of questions” about Davis’s background and his mother’s discipline of him, but Davis reported only that his childhood “wasn’t rosy,” that his mother disciplined him with a switch, and that sometimes he felt he was disciplined “too much.” At no time during the interview did Davis report being hit in the head with a broom handle or report any of the other instances of abuse detailed by his other witnesses. Davis also told Dr. King that his trial counsel had “talked to [his] mother and two [of his] sisters” at the time of trial.⁶

⁶ Although we do not know to which of Davis’s five sisters Dr. King referred, the state court found this testimony credible and made a factual determination consistent with Dr. King’s testimony. In his reply brief, Davis for the first time takes issue with the state court’s finding that trial counsel spoke with two of Davis’s siblings, alleging that the occurrence of such an interview is “highly unlikely,” “improbable,” and unsupported by the record. The dissent also expresses skepticism as to whether such an interview occurred, citing the fact that “counsel’s complete file includes no notes of such interviews.” As an initial matter, Davis abandoned any challenge to this factual finding by failing to raise this argument in his initial brief. *See Herring v. Sec’y, Dep’t of Corr.*, 397 F.3d 1338, 1343 (11th Cir. 2005) (“As we repeatedly have admonished, arguments raised for the first time in a reply brief are not properly before a reviewing court.” (alteration adopted) (quotations omitted)). But even if not abandoned, Davis has not rebutted by clear and convincing evidence the

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Finally, with regard to his ineffective-assistance claim related to counsel's alleged failure to investigate the circumstances of Davis's prior third-degree robbery conviction, Davis called Jadie Boozer, his court appointed counsel in the robbery case. Boozer testified that Davis and three other men ordered a pizza and then robbed the delivery man of six pizzas and \$32 when he arrived. In her opinion, Davis was not the leader and was merely a follower in the incident. No weapon was involved—although one of the robbers had his hand in his pocket “as if he . . . had a gun.”

presumption of correctness that AEDPA affords to state-court determinations of fact. *See* 28 U.S.C. § 2254(e)(1). Instead, he merely quarrels with the finding, arguing that given the circumstances, it is “highly unlikely” and “improbable” that such an interview occurred. Davis's speculation that such an interview did not occur is not clear and convincing evidence. Dr. King testified that Davis reported that trial counsel spoke with two of his siblings and his mother. Davis has five sisters. At the time of trial, both Mary and Hortense had moved out of their mother's home, and they confirmed at the Rule 32 hearing that they did not speak with Davis's trial counsel. In light of Dr. King's testimony, it was not unreasonable for the state court to conclude that counsel spoke with two of Davis's three younger sisters, who were ages 16, 15, and 13, at the time of the trial. Davis has not proffered any clear and convincing evidence to overcome this factual determination, so we are bound to defer to it. *See Nejad v. Att'y, Gen., State of Ga.*, 830 F.3d 1280, 1292 (11th Cir. 2016) (“Determining the credibility of witnesses is the province and function of the state courts, not a federal court engaging in habeas review. . . . [I]n the absence of clear and convincing evidence, we have no power on federal habeas review to revisit the state court's credibility determinations.” (quotations and internal citations omitted)); *see also* 28 U.S.C. § 2254(e)(1) (providing that state court's factual findings are presumed to be correct and the petitioner must present clear and convincing evidence to overcome that presumption).

The victim said that “there really was never a threat made to him.”

Following the evidentiary hearing, the trial court and the Alabama Court of Criminal Appeals (“ACCA”) denied Davis’s claims on the merits, concluding that counsel’s performance was not deficient with regard to the investigation of Davis’s childhood or the investigation of Davis’s prior robbery conviction. *Davis v. State*, 9 So. 3d 539, 566, 569 (Ala. Crim. App. 2008), cert. denied sub nom. *Ex parte Davis*, 9 So. 3d 571 (Ala. 2008).

After exhausting his state postconviction remedies, Davis filed the underlying federal habeas petition under 28 U.S.C. § 2254. The district court denied the § 2254 petition on the merits and the related COA request, concluding that the state court did not unreasonably apply Supreme Court precedent or base its decision on an unreasonable determination of the facts. We then granted a COA on the two ineffective-assistance claims at issue in this appeal.

II. The Governing Framework

We review the district court’s denial of a § 2254 habeas petition de novo. *Ward v. Hall*, 592 F.3d 1144, 1155 (11th Cir. 2010). Under AEDPA, however, we can only grant habeas relief with respect to a claim adjudicated on the merits by the state court if the state court’s decision “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,” 28 U.S.C. § 2254(d)(1), or “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,” *id.* § 2254(d)(2). “[W]hen the last state court to decide a prisoner’s federal claim explains its decision on the merits in a reasoned opinion . . . a federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable.” *Wilson v. Sellers*, 584 U.S. 122, 126 (2018).

Davis argues only that the state court’s decision was contrary to, or involved an unreasonable application of, clearly established federal law under § 2254(d)(1). “To meet that standard, [he] must show far more than that the state court’s decision was ‘merely wrong’ or ‘even clear error.’ [He] must show that the state court’s decision is so obviously wrong that its error lies beyond any possibility for fairminded disagreement.” *Shinn v. Kayer*, 592 U.S. 111, 118 (2020) (quotations omitted); *Woods v. Etherton*, 578 U.S. 113, 116–17 (2016) (“A state court’s determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court’s decision.” (quotations omitted)). “If this standard is difficult to meet—and it is—that is because it was meant to be.” *Burt v. Titlow*, 571 U.S. 12, 20 (2013) (quotations omitted).

To establish that counsel rendered ineffective assistance in violation of one’s Sixth Amendment right to counsel, a petitioner must show *both* that his “counsel’s performance was deficient” and that counsel’s deficient performance resulted in prejudice. *Strickland*, 466 U.S. at 687. Because the majority opinion addresses the prejudice prong, I focus solely on the deficient performance prong.

To prove counsel performed deficiently, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness" measured by "prevailing professional norms" and "considering all the circumstances." *Id.* at 688. The Supreme Court has repeatedly and emphatically instructed that review of counsel's performance is "highly deferential" and requires "indulg[ing] a strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance." *Id.* at 689; *Knowles v. Mirzayance*, 556 U.S. 111, 124 (2009); *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011). In other words, "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690. Critically, "the burden to show that counsel's performance was deficient rests squarely [and at all times] on the defendant." *Titlow*, 571 U.S. at 22–23 (quotations omitted).

In evaluating counsel's performance, the reviewing court must make "every effort . . . to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689 (emphasis added). "And because counsel's conduct is presumed reasonable, for a petitioner to show that the conduct was unreasonable, a petitioner must establish that no competent counsel would have taken the action that his counsel did take." *Chandler v. United States*, 218 F.3d 1305, 1315 (11th Cir. 2000) (*en banc*). In other words, "[t]he challenger's burden is to show that counsel made errors so serious that counsel was not functioning as the

counsel guaranteed the defendant by the Sixth Amendment.” *Harrington v. Richter*, 562 U.S. 86, 105 (2011).

Importantly, “[t]he purpose of ineffectiveness review is not to grade counsel’s performance.” *Chandler*, 218 F.3d at 1313. “To state the obvious: the trial lawyers, in every case, could have done something more or something different. So, 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 (1987)); *Bates v. Sec’y, Fla. Dep’t of Corr.*, 768 F.3d 1278, 1295 (11th Cir. 2014) (explaining that *Strickland*’s reasonableness test “has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial.” (quotations omitted)). Moreover, when we review counsel’s performance, we keep in mind that “[t]he reasonableness of counsel’s actions may be determined or substantially influenced by the defendant’s own statements or actions.” *Strickland*, 466 U.S. at 691. “Counsel’s actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant.” *Id.* “In particular, what investigation decisions are reasonable depends critically on such information.” *Id.*

As is clear from the discussion of *Strickland*’s highly deferential standard, “[s]urmounting *Strickland*’s high bar is never an easy task.” *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010). And critically, where, as

here, “§ 2254(d) applies, the question is not whether counsel’s actions were reasonable” under *Strickland*. *Harrington*, 562 U.S. at 105. Instead, the question is whether “the state court’s determination under the Strickland standard . . . was unreasonable—a substantially higher threshold.” *Knowles*, 556 U.S. at 123 (quotations omitted).

Consequently, “[e]stablishing that a state court’s application of *Strickland* was unreasonable under § 2254(d) is all the more difficult” because “[t]he standards created by *Strickland* and § 2254(d) are both ‘highly deferential’ and when the two apply in tandem, review is ‘doubly’ so.” *Harrington*, 562 U.S. at 105 (internal citations omitted). Under this doubly deferential standard, “federal courts are to afford ‘both the state court and the defense attorney the benefit of the doubt.’” *Woods*, 578 U.S. at 117 (quoting *Titlow*, 571 U.S. at 15).

Adherence to these deferential principles “serves important interests of federalism and comity,” and federal habeas courts reviewing a state court’s decision must remember that “[f]ederal habeas review . . . exists as a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal.” *Woods v. Donald*, 575 U.S. 312, 316 (2015) (quotations omitted). Accordingly, “it is a rare case in which an ineffective assistance of counsel claim that was denied on the merits in state court is found to merit relief in a federal habeas proceeding.” *Nance v. Warden, Ga. Diagnostic Prison*, 922 F.3d 1298, 1303 (11th Cir. 2019) (quotations omitted).

My dissenting colleague acknowledges these deferential principles but resolves this case in a manner fundamentally inconsistent with AEDPA. Instead of focusing on whether the state court's decision is so obviously wrong that its error lies beyond any possibility for fairminded disagreement, the dissent applies "a *de novo*-masquerading-as-deference approach that the Supreme Court has repeatedly condemned." *Shinn*, 592 U.S. at 117 (quotations omitted). Although the dissent claims to apply deference, the dissent in fact evaluates the merits of Davis's *Strickland* claims *de novo*, concludes that counsels' performance was deficient, that Davis suffered prejudice, and then uses that conclusion to assert that the state court's decision was unreasonable. "In other words, it . . . treat[s] the unreasonableness question as a test of its confidence in the result it would reach under *de novo* review." *Id.* at 523 (quotations omitted).

Applying the proper framework, I explain why the state court's determination that Davis's counsels' performance was not deficient was an objectively reasonable determination. I begin with counsel's alleged failure to investigate and present mitigating evidence of childhood abuse, and then I turn to the alleged failure to investigate the circumstances surrounding Davis's prior robbery conviction.

III. Evidence of Childhood Abuse

Davis argues that Giddens and Adams "did virtually nothing" to prepare for the penalty phase and failed to investigate and uncover significant evidence of Davis's childhood abuse, which could have been offered as non-statutory mitigation during the penalty phase. He maintains that the state court's conclusion

that counsel performed reasonably was an unreasonable application of *Strickland* and contrary to clearly established federal law. I disagree.

“*Strickland* require[s] that [counsel] make a reasonable investigation into possible mitigating factors and make a reasonable effort to present mitigating evidence to the sentencing court.” *Anderson v. Sec’y, Fla. Dep’t of Corr.*, 752 F.3d 881, 904 (11th Cir. 2014) (quotation omitted) (alteration adopted). Evidence of childhood abuse can constitute a mitigating circumstance in a capital sentencing proceeding. *Puiatti v. Sec’y, Fla. Dep’t of Corrs.*, 732 F.3d 1255, 1287 (11th Cir. 2013). Thus, defense counsel’s failure to undertake reasonable efforts to obtain mitigation evidence of abuse may constitute ineffective assistance of counsel in some cases. Even so, as “[i]n any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel’s judgments.” *Strickland*, 466 U.S. at 691. The Supreme Court has never held that counsel is constitutionally required to investigate specific areas of mitigation. *See Hannon v. Sec’y, Dep’t of Corr.*, 562 F.3d 1146, 1155 (11th Cir. 2009). With these principles in mind, I turn to counsel’s investigation in this case.

The ACCA concluded that Davis failed to demonstrate that counsel rendered constitutionally deficient performance with regard to counsels’ investigation of Davis’s childhood abuse. *Davis v. State*, 9 So. 3d 539, 553–67 (Ala. Crim. App. 2008). In reaching this decision, the ACCA quoted extensively from the Rule 32 trial court’s order denying this claim, highlighting the failure of Davis to call one of his attorneys to testify

and of Davis and his family to disclose the childhood abuse to his counsel:

In this claim, Davis has alleged that his trial counsel were ineffective in regard to the penalty phase of his trial. Quite simply, this claim can only be described as bizarre, based on the fact that [Davis's] own family seems to have concealed important information from trial counsel. Having considered the petition, having carefully reviewed the evidence presented at this hearing, as well as at the trial, and following the law governing Sixth Amendment claims—including the recent decision in *Williams v. Smith*, [539 U.S. 510] (2003)—the court finds that this claim is due to be denied.

This finding is not meant to imply that the Court did not find compelling some of the mitigation evidence presented by [Davis] during the evidentiary hearing. Much of the evidence presented at the Rule 32 hearing focused on abuse inflicted on Davis by his mother, Lillie Bell–Davis. The Court finds that Davis was abused by his mother to an extent that would have rendered it relevant to the issue of the appropriate penalty determination in this case under existing law. . . .

The Court's major concern, however, is that if this Court used this evidence to find the existence of deficient performance the Court would be engaging in the inappropriate activity of judging the performance of trial

counsel through the use of hindsight. Further, the Court would be passing judgment on Attorney Adams without the benefit of his testimony. Even worse, this Court would be inappropriately shifting the blame for the inexcusable actions of Davis's family, particularly his mother, to his trial counsel. This Court must judge trial counsel's performance through their perspective at the time. That being the case, the Court does not find that trial counsel's performance was deficient.

To the contrary, Jimmy Davis's family—and to a very large extent his mother—bears a heavy burden in this case for their role in this matter. Because Adams did not testify, this Court does not know what Adams did or did not do in preparation for this case. The Court presumes, however, that Adams acted reasonably in the questions he asked his client and his client's mother and in preparing for the penalty phase. Further, the testimony of Giddens establishes that at no time did Davis ever mention to his attorneys the abuse suffered at the hands of his mother or the intervention of DHR [the State Department of Human Resources] in the Davis home.

...

Looking at Giddens's testimony and the trial testimony of Lillie Bell-Davis, much of the background information given by Davis's family was true, but given with Ms. Davis's personal 'spin' on it, omitting the important portions of Davis's life in which he was

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beaten by a belt or switch. The information concerning Davis's participation in the job corps, obtaining his GED at Tuskegee, the death of his father, his parents' marital difficulties, are all items that Lillie Bell told counsel about and was willing to testify about. Thus, trial counsel did obtain much of this information through the most obvious source: Davis's mother.

Although Davis faults trial counsel for not subpoenaing his DHR records, there is absolutely no evidence before this Court that reasonably competent counsel would have been on notice that such records existed. There are no constitutionally required checklists for mitigation investigations. Trial counsel are faced with the realities of limited time and limited resources. Those resources have to be managed in an efficient manner. Thus, this Court does not find that attorneys are expected to subpoena agency records just in case. Had Lillie Bell–Davis, Davis's siblings, or Davis himself told his trial counsel that this issue needed to be investigated—that DHR had been involved in the Davis home—this Court would absolutely find ineffective assistance of counsel for failure to investigate, discover and/or develop this evidence, depending on the strategic decisions made by counsel following their investigation. But that is not what happened here.

Davis is asking this Court to declare two competent trial lawyers incompetent due to

the fact that they were manipulated by Lillie Bell–Davis, the Davis family, and Davis himself due to the family’s conspiracy of silence. Quite simply, it is not trial counsel’s fault, it is the fault of [Davis], of his mother, of Andre Sigler, and of the Davis family as a whole; a family that apparently sought collateral counsel’s assistance in keeping these facts private, even during the time leading up to the evidentiary hearing in this matter.

Id. at 553–56 (alterations in original). The ACCA concluded that the trial court’s findings were “supported by the record,” and it “adopt[ed] them as part of [its] opinion.” *Id.* at 563.

The ACCA then explained that it had reviewed the record and found that “Adams’s involvement in the case was not minor” and the court was “troubled” that Adams was not called to testify given that it was clear that “he had a significant role in preparing for Davis’s trial.” *Id.* at 564. Accordingly, the ACCA held that,

[b]ased on the unusual circumstances presented in this case and the fact that we do not know the extent of cocounsel’s investigation because Adams was not called to testify, we cannot say that counsel was ineffective for failing to discredit the statements of Davis, his mother, and two of his siblings, and to conduct yet more investigations.

Id. at 566. Given the record in this case, the state court’s conclusion that counsel did not perform deficiently was not an unreasonable application of Supreme Court precedent.

As an initial matter, although the majority opinion assumes *arguendo* that a more thorough investigation would have uncovered evidence of Davis’s childhood abuse (because the majority focused on the prejudice prong), that assumption is not necessarily true. There was a single 1981 report of confirmed child abuse by social services that involved Davis, but Davis’s mother was provided with some services and Davis was not removed from the home. There were no other documented incidents of abuse involving Davis that trial counsel would have discovered through more investigation.⁷

⁷ The dissent disagrees, citing the “343 pages of DHR records” introduced by postconviction counsel—in other words, according to the dissent, if counsel had only looked, he would have found a plethora of mitigation in the DHR records. The dissent’s reference to the volume of records alone without context is misleading and makes it appear as though there was far greater documentation of abuse than actually existed. When examined, the vast majority of the DHR records consist of correspondence and documentation concerning public assistance benefits that Lillie applied for or received, not allegations of child abuse. Further, approximately 70 of those pages concern public assistance benefits and parenting issues of Davis’s older sister Mary regarding her own children, not about Davis’s mother. The dissent’s reference to “a 1981 report [that] noted several other incidents of abuse, including that Lillie used a switch and a belt to whip Davis whenever he misbehaved, stretching back at least a year,” is in fact part of the same 1981 complaint that I have already discussed. The dissent is correct that a 1987 report noted in passing that Lillie had kicked then-sixteen-year-old Davis out of the house; that he had returned home; and that Lillie stated that she would kick him out if he misbehaved again. However, while that passing note exists, the 1987 report did not involve abuse allegations related to Davis. Instead, the report of neglect listed then-minor Hortense as the alleged victim, and it indicated that Lillie had

Furthermore, Davis and his family exhibited a pattern of denial concerning the abuse that was pervasive throughout this case, both at trial and during the post-conviction hearing. Davis's mother consistently and repeatedly denied any abuse, and Davis inexplicably did not call her as a witness during the Rule 32 proceedings, despite her availability and his knowledge that the abuse inflicted by her was key to his mitigation case.

Likewise, Davis himself has consistently and repeatedly declined to discuss his childhood. For instance, the record reveals that during the trial proceedings, he refused to cooperate with the presentence investigation—indeed, when approached about assisting with background for the presentence investigation, Davis used vulgar expletives, dropped his pants and exposed his underwear, “stat[ing] his absolute refusal in no uncertain terms to cooperate with [the] [c]ourt or in [the] investigation in any regard, and walked out.” And during his Rule 32 proceedings, he provided only deliberately evasive answers in response to questioning by Dr. King about his childhood—stating only that his childhood “wasn’t rosy,” that his mother disciplined him with a switch, and that sometimes he felt he was disciplined “too much”—despite knowing that the childhood abuse he suffered was a key to his claim of ineffective assistance.

kicked Hortense out of the house and refused to let her return after Hortense and her older sister Mary got into a fight. It is unclear that had counsel requested DHR records for Davis that counsel would have automatically received the records related to Davis's siblings.

Davis’s family members demonstrated a similar reluctance to discuss the abuse. For instance, when Davis’s younger sister Hortense was asked at the Rule 32 evidentiary hearing if she would have testified to the abuse if called as a witness at trial, she stated only that she “probably would have.” Similarly, Davis’s older sister Mary admitted during the Rule 32 evidentiary hearing that, even when Davis’s postconviction team contacted her, she shared just “the basics” about the abuse with them and not the specific details she testified to during the evidentiary hearing.

In fact, every single family member and friend that testified at the evidentiary hearing stated that they never told anyone about the abuse and never reported the abuse to the authorities. Thus, I agree with the state court that it is far from certain that a more thorough investigation by counsel would have uncovered the evidence of childhood abuse that was produced during the Rule 32 proceedings.⁸

⁸ As the dissent notes, Davis also called as a witness capital defense expert John Mays, who opined that Giddens and Adams did not spend enough time preparing for mitigation. However, neither the Supreme Court nor this Court has ever held that counsel must spend a certain amount of time preparing for trial in order to provide constitutionally effective assistance. *Jenkins v. Comm’r, Ala. Dep’t of Corr.*, 963 F.3d 1248, 1266 (11th Cir. 2020). Furthermore, what the dissent fails to acknowledge is that Mays’s testimony has little relevance to the question of whether Davis’s counsel performed deficiently. See *Newland v. Hall*, 527 F.3d 1162, 1208 (11th Cir. 2008) (“[S]tatements from other attorneys are not dispositive; indeed, they have little weight in our analysis.”); *Provenzano v. Singletary*, 148 F.3d 1327, 1332 (11th Cir. 1998) (explaining that the reasonableness of counsel’s actions “is a question of law to be decided by the . . . courts” and,

Regardless, the biggest problem for Davis is that he failed to present a thorough and complete record of counsels' performance. *Strickland* commands that courts presume that counsel acted reasonably, and Davis bears the burden of overcoming that presumption. *Strickland*, 466 U.S. at 688–89. Here, the record is incomplete as to Adams's preparation for the penalty phase because Davis did not call Adams as a witness at the evidentiary hearing or submit other evidence about the nature of Adams's involvement in the case, such as an affidavit from Adams.

Davis argues that he did not need to present such evidence because the State stipulated to Adams's time sheet, which reflected the work he did in the case. But the time sheet only underscores the importance of Adams's testimony. Specifically, Adams recorded more hours of out-of-court time in this case than Giddens, and Adams listed "interviewed witnesses" several times in the description of time spent. However, we do not know who these witnesses were or whether they related to preparation for the guilt phase, the penalty phase, or both.⁹ And Giddens emphasized repeatedly

thus, "it would not matter if a petitioner could assemble affidavits from a dozen attorneys swearing that the strategy used at his trial was unreasonable").

⁹ The dissent contends that Adams's time sheet on its face shows that Adams did not interview witnesses or meaningfully prepare for the penalty phase, and the state court unreasonably applied *Strickland* in affording Adams a presumption of reasonable performance. In support, the dissent points to the fact that both Giddens's and Adams's time sheets have a 12.5 hour entry for December 3, 1993, with almost the same description—"communication with co-counsel; trip to Channel 40; Anniston Star;

interviewed witnesses; trip to crime scene; communication with Judge; reviewed evidence at Anniston City Jail; reviewed video statements of co-defendant; conference with D.A.; trial preparation.” Thus, the dissent concludes counsel must have been together on that date and done the same activities, and therefore it necessarily follows that the reference to “interviewed witnesses” in this billing entry must have related to only guilt-phase witnesses because Giddens did not recall interviewing any other mitigation witnesses.

But even if we assume that the dissent is correct that counsel were together on December 3 and did the same activities, Adams also had two additional billing entries for December 1 and 2 that referred to the investigation and interviewing of witnesses, which totaled an additional 21.5 hours—entries that did not match Giddens’s time sheet. The dissent surmises that (1) “the most reasonable way” to interpret the December 1 entry is that Adams must have been working on the guilt phase of the trial based on the other tasks recorded in his billing entries, and (2) the most reasonable way to interpret the December 2 entry is that, given Adams’s other tasks listed in that same 10-hour block Adams must “not have spent a significant amount [of time] investigating witnesses.” These assumptions are pure speculation and certainly do not rise to the level of overcoming the presumption of reasonable performance that is afforded counsel under *Strickland*. *Strickland*, 466 U.S. at 690 (“[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.”).

Moreover, the dissent’s assumption that there was line drawing between counsels’ preparation for the guilt phase and the penalty phase is undermined by Giddens’s testimony that the defense began preparing mitigation simultaneously with the guilt phase because “you have to be prepared” for what will happen if the jury returns a guilty verdict.

In any event, while the dissent may believe that the state court got the answer wrong on the deficiency prong, that belief is not a sufficient basis for granting federal habeas relief under § 2254(d).

during the Rule 32 evidentiary hearing that both he and Adams participated in the preparation and investigation of the case, and that they did some things independently and some things together. In fact, at times Giddens said that he could not recall certain information, and deferred to Adams's recollection, but we have no information about Adams's recollection. In other words, the nature and extent of counsel's pre-trial investigation in this case is simply incomplete without Adams's testimony or other evidence such as a sworn affidavit attesting to his involvement in this case.

In short, as the state court found, "Adams's involvement in the case was not minor." *Davis*, 9 So. 3d at 564. The record confirms that Adams played a very active role during all phases of the trial—he made the opening and closing statements at trial, he cross-examined many of the State's key witnesses, he handled the majority of the defense's objections and motions at trial, and he conducted the questioning of Davis's mother and cousin during the penalty phase. Yet the record is silent, or at best ambiguous, as to Adams's actions, and the Supreme Court has stated repeatedly that "the absence of evidence cannot overcome the strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance." *Titlow*, 571 U.S. at 23 (alteration adopted) (quotations

See Shinn, 592 U.S. at 118 (explaining that to overcome AEDPA's hurdles, the state "prisoner must show far more than that the state court's decision was merely wrong or even clear error" (quotations omitted)). Rather, Davis must show "that the state court's decision is so obviously wrong that its error lies beyond any possibility for fairminded disagreement." *Id.* (quotations omitted). And he has not done so.

omitted); *Chandler*, 218 F.3d at 1314 n.15 (“An ambiguous or silent record is not sufficient to disprove the strong and continuing presumption.”); *see also Dunn v. Reeves*, 594 U.S. 731, 739–41 (2021) (explaining that, although it is case dependent, the defendant’s failure to call his attorneys to testify can be fatal to his ineffective-assistance claim); *Jenkins*, 963 F.3d at 1265–67 (explaining, in the context of an ineffective-assistance claim based on counsel’s failure to discover evidence of childhood abuse, that because the petitioner failed to present testimony or an affidavit from one of his counsel, “we must assume counsel carried out his professional responsibility and discussed mitigation with his client”). Thus, without a fully developed record, it is impossible for Davis to overcome the “strong presumption that counsel’s conduct [fell] within the wide range of reasonable professional assistance,” *Strickland*, 466 U.S. at 689, and impossible for this Court to say—as it must in order to grant relief under § 2254—that the state court’s application of *Strickland* was “objectively unreasonable.”¹⁰ *Renico v. Lett*, 559 U.S. 766, 773 (2010).

¹⁰ Davis argues that our decision in *DeBruce v. Commissioner, Alabama Department of Corrections*, 758 F.3d 1263 (11th Cir. 2014), makes clear that the testimony of only one counsel can be sufficient to establish deficient performance. Davis is correct, in part. There may be some instances where the testimony of only one counsel is needed—which was certainly the case in *DeBruce* where the absent counsel “played only a minor role in the investigation, preparation and presentation of [the] case,” and the testifying counsel discussed actions that he and his non-testifying co-counsel took or did not take and the reasons why. *Id.* at 1272–73. But Davis’s case is very different from the circumstances in *DeBruce*. Here, Adams’s involvement in the case was not minor,

Even putting aside the absence of evidence related to Adams's involvement in the case, there is still Giddens's testimony at the evidentiary hearing that he was unaware of any abuse and that—critically—neither Davis nor his mother mentioned any abuse. “[T]he reasonableness of a trial counsel’s acts, including lack of investigation or excluding . . . witnesses from the sentencing phase, depends ‘critically’ upon what information the client communicated to counsel.” *Chandler*, 218 F.3d at 1324 (quoting *Strickland*, 466 U.S. at 691). Davis and his mother provided Giddens with detailed information about Davis’s background—that his parents divorced when he was a baby; that he was raised by a single mother without a father figure in the home; that he had five siblings; that his father died when Davis was a teen and that he struggled with his father’s death; that Davis did not listen to his mother and acted out as a teen; and that Davis dropped out of high school but later got his GED—but neither Davis nor his mother gave any indication that there was a history of abuse in Davis’s childhood. As this Court has previously emphasized, “because information about childhood abuse supplied by a defendant is extremely important in determining reasonable performance, when a petitioner does not mention a history of physical abuse, a lawyer is not ineffective for failing to discover or to offer evidence of abuse as

and Giddens repeatedly stated that he and Adams did many things independently. Further, Giddens could not recall a great deal of information and stated that he would defer to Adams’s recollection. Thus, Giddens’s testimony alone was not sufficient to provide a complete picture of counsels’ performance in this case.

mitigation.” *Newland*, 527 F.3d at 1202 (alterations adopted) (quotations omitted). Given this record, Davis has not shown that no fairminded jurist could have concluded, as the ACCA did, that Davis failed to carry his burden of proving deficient performance.

Davis disputes that he had any obligation to disclose the abuse, arguing that any reasonable counsel would have essentially put in a blind request for records with social services just in case records of abuse existed. I disagree. As the state court explained, there are “no constitutionally required checklists for mitigation investigations,” and counsel cannot be expected to expend limited resources and time to look for records “just in case.” *Davis*, 9 So. 3d at 556. To be clear, “[t]he Constitution imposes no burden on counsel to scour a defendant’s background for potential abuse given the defendant’s . . . failure to mention the abuse.”¹¹ *Stewart v. Sec’y, Dep’t of Corr.*, 476 F.3d 1193, 1211 (11th Cir. 2007).

¹¹ The dissent responds that the facts in *Stewart* and *Newland* do not resemble Davis’s case, and, therefore, those cases do not support the conclusion that Davis’s counsel was not deficient for failing to uncover the unknown, primarily undocumented, and closely held secrets of abuse that existed in Davis’s background. No matter the factual differences, however, the overarching principle from *Stewart* and *Newland* that counsel is not constitutionally required to go on a fishing expedition and scour a defendant’s background to look for potential abuse when the defendant fails to mention such abuse to counsel is well-established and regularly invoked. See *Williams v. Head*, 185 F.3d 1223, 1237–38 (11th Cir. 1999) (holding counsel did not render constitutionally ineffective assistance when he spoke with the defendant and the defendant’s mother but neither gave counsel any reason to suspect abuse); *Callahan v. Campbell*, 427 F.3d 897, 934 (11th Cir.

Davis and the dissent argue that the ABA Guidelines in effect at the time of his trial as well as Alabama's Capital Defense Trial Manual establish that counsels' failure to seek out publicly available records violated the applicable professional norms. The argument is unpersuasive for two reasons. First, as noted previously, the question before this Court at this stage "is not whether counsel's actions were reasonable." *Harrington*, 562 U.S. at 105. Instead, the question is whether "the state court's determination under the *Strickland* standard . . . was unreasonable—a substantially higher threshold." *Knowles*, 556 U.S. at 123

2005) ("Especially when it comes to childhood abuse, information supplied by a petitioner is extremely important in determining whether a lawyer's performance is constitutionally adequate. This Court has already stated in no uncertain terms: An attorney does not render ineffective assistance by failing to discover and develop evidence of childhood abuse that his client does not mention to him." (alteration adopted) (quotations omitted)). Perhaps counsel here could have done more and explicitly asked Davis and his mother whether there was childhood abuse in his background—although all evidence points toward the high likelihood that both of them would have denied the existence of any abuse if asked—but what matters is that counsel was not constitutionally required to do so. I also note that, as a 23-year-old adult, Davis was fully capable of apprising counsel of his background, but he failed to do so. See *Blankenship v. Hall*, 542 F.3d 1253, 1276 ("[T]he petitioner is often in the best position to inform his counsel of salient facts relevant to his defense, such as his background."). Regardless, as I have explained repeatedly, the question at this stage of the proceedings is not whether counsel's actions were reasonable; rather, the question is whether the state court's determination was an objectively unreasonable application of *Strickland*. *Harrington*, 562 U.S. at 105. Those two questions are critically different, despite the dissent's contentions to the contrary.

(quotations omitted). Second, the Supreme Court has cautioned that these types of professional guidelines are “only guides”—not binding standards—to be considered in determining whether counsel’s conduct was reasonable. *Strickland*, 466 U.S. at 688 (“Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable, but they are only guides.”); *see also Pinholster*, 563 U.S. at 195 (“Beyond the general requirement of reasonableness, specific guidelines are not appropriate.” (quotations omitted)); *Bobby v. Van Hook*, 558 U.S. 4, 8–9 (2009) (reversing the Sixth Circuit’s grant of relief on petitioner’s ineffective assistance claim and admonishing the circuit court for treating the ABA Guidelines as “inexorable commands with which all capital defense counsel must fully comply” (quotations omitted)).

In other words,

our deferential review . . . does not ask whether counsel could possibly or ideally have been more effective. The test . . . is not whether counsel could have done more. We do not ask whether an attorney’s representation deviated from best practices or common custom, and we should resist the temptation to second-guess an attorney with the benefit of our hindsight.

Jenkins, 963 F.3d at 1269–70 (quotations and internal citations omitted). Thus, rather than blindly applying ABA Guidelines or similar state standards and determining whether counsel “measured up” to those standards, we assess counsel’s actions “for reasonableness in all the circumstances, applying a heavy

measure of deference to counsel's judgments." *Id.* at 1267 (quotation omitted); *Van Hook*, 558 U.S. at 9 ("American Bar Association standards and the like are only guides to what reasonableness means, not its definition. . . . [T]he Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices." (quotations omitted) (internal citations omitted)). Under that rubric and in light of the unique factual circumstances in this case, Davis has not shown that "every fairminded jurist would agree that every reasonable lawyer would have made a different decision" than his counsel made in this case regarding an investigation into potential abuse. *Reeves*, 594 U.S. at 740 (emphasis in original) (alteration adopted) (quotations omitted). Absent such a showing, the Supreme Court has been unequivocally clear that we cannot grant habeas relief. *Id.*

The dissent contends that the state court's decision that counsel's performance was not deficient was contrary to clearly established Supreme Court case law in *Wiggins v. Smith*, 539 U.S. 510 (2003). I disagree. The evidence in *Wiggins* established that trial counsel's investigation into records concerning *Wiggins's* life placed counsel on notice of significant issues in *Wiggins's* childhood, yet counsel conducted no further investigation. *Id.* at 518. The dissent contends that much like the counsel in *Wiggins*, *Giddens* and *Adams* were on notice that they needed to investigate more of *Davis's* background because Dr. Storey, who administered IQ-related tests to *Davis* prior to trial, stated in passing in her written report of the testing results that *Davis's* performance on some of the subtests indicated that he "may be . . . maladjusted, and

emotionally unstable,” and that “[a]n emotional disturbance [was] suggested.” But the passing reference by Dr. Storey in two lone sentences of a five-page intellectual assessment was not sufficient to put counsel on notice that Davis may have been physically abused by his mother as a child. After all, childhood abuse is not the only cause of suspected emotional disturbances or maladjustment. At best, this reference may have alerted counsel to potential mental health issues, but counsel is not accused of failing to discover mental health issues. Moreover, Storey’s passing reference to a possible emotional disturbance and instability is a far cry from the evidence in Wiggins that counsel uncovered and yet failed to investigate concerning Wiggins’s childhood, which included Wiggins’s “misery as a youth,” “his description of his own background as disgusting,” “recorded incidences of physical and sexual abuse, an alcoholic mother, placements in foster care, . . . borderline retardation,” and “frequent, lengthy absences from school.” *Id.* at 518, 523–26 (quotations omitted). Given the stark factual differences between Wiggins and Davis’s case, it cannot be said that the state court’s determination is contrary to Wiggins.

In sum, while Davis’s counsel perhaps could have done more, “whether counsel could possibly or ideally been more effective” is not the standard for this Court’s doubly deferential review under *Strickland* and AEDPA. *Jenkins*, 963 F.3d at 1269–70. What is relevant here is that Davis has not shown, in light of this record, that no fairminded jurist could have concluded, as the ACCA did, that his counsel rendered reasonably adequate performance within the meaning

of the Sixth Amendment. In other words, because “fairminded jurists could reasonably disagree about the reasonableness of counsel’s performance, . . . habeas relief is due to be denied.” *Id.* at 1270 (quotations omitted); see also *Pye v. Warden, Ga. Diagnostic Prison*, 50 F.4th 1025, 1034 (11th Cir. 2022) (*en banc*) (same). Accordingly, I would also affirm the state court’s determination that counsel’s performance was not deficient for failing to investigate and present evidence of Davis’s childhood abuse in mitigation.

IV. The Prior Robbery File

Next, Davis argues that his trial counsels’ failure to investigate and present evidence of the facts surrounding his prior 1992 third-degree robbery conviction, which was a statutory aggravating factor, constituted deficient performance. He maintains that had his counsel investigated the circumstances of the prior robbery, the non-violent nature of this crime would have been revealed, which could have portrayed him in a different light to the jury and perhaps lessened the weight afforded this statutory aggravating factor. I disagree.

In *Rompilla v. Beard*, 545 U.S. 374, 377 (2005), the Supreme Court held that a “lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial.” Accordingly, the Supreme Court held Rompilla’s counsel ineffective for failing to examine a court file concerning the defendant’s prior conviction, despite knowing that the prosecution intended to use it as an aggravating factor at sentencing and also intended to “emphasize [Rompilla’s] violent character

by introducing a transcript of the rape victim's testimony given in that earlier trial." *Id.* at 383. Thus, the Supreme Court explained that

it is difficult to see how counsel could have failed to realize that without examining the readily available file they were seriously compromising their opportunity to respond to a case for aggravation. *The prosecution was going to use the dramatic facts* of a similar prior offense, and Rompilla's counsel had a duty to make all reasonable efforts to learn what they could about the offense. Reasonable efforts certainly included obtaining the Commonwealth's own readily available file on the prior conviction to learn what the Commonwealth knew about the crime, to discover any mitigating evidence the Commonwealth would downplay, and to anticipate the details of the aggravating evidence the Commonwealth would emphasize. Without making reasonable efforts to review the file, defense counsel could have had no hope of knowing whether the prosecution was quoting selectively from the transcript, or whether there were circumstances extenuating the behavior described by the victim. The obligation to get the file was particularly pressing here owing to the similarity of the violent prior offense to the crime charged and Rompilla's sentencing strategy stressing residual doubt. Without making efforts to learn the details and rebut the relevance of the

earlier crime, a convincing argument for residual doubt was certainly beyond any hope.

Id. at 385–86 (footnote omitted). In so holding, although the Supreme Court cited the ABA’s Standards for Criminal Justice in effect at the time of *Rompilla*’s trial, which advised counsel to “explore all avenues leading to facts relevant to . . . the penalty,” including information in the possession of “the prosecution and law enforcement authorities,” the Supreme Court took care to note that it was not adopting a “per se rule” requiring counsel to completely review every prior conviction file in all cases, and that the unreasonableness of counsel’s investigation in *Rompilla*’s case was dependent on the facts of the case. *Id.* at 387, 389–90 (quotations omitted); *see also id.* at 393–96 (O’Connor, J., concurring); *Hannon*, 562 F.3d at 1155 (explaining that *Rompilla*’s “directive does not require a particular level of investigation in every case”).¹²

It is undisputed that Davis’s counsel knew that the State intended to present Davis’s third-degree robbery conviction as a statutory aggravating factor—namely, that Davis had a prior conviction that involved the use or threat of violence. Unlike in

¹² Davis’s 1993 trial occurred pre-*Rompilla*, so counsel did not have the benefit of the *Rompilla* decision that would issue over a decade later. Nevertheless, because *Rompilla* existed at the time of the ACCA’s decision here, we must examine whether the ACCA’s decision was contrary to, or an unreasonable application of, *Rompilla*. *See Lockyer v. Andrade*, 538 U.S. 63, 71–72 (2003) (holding that the phrase “clearly established federal law” in 28 U.S.C. § 2254(d)(1) means “the governing legal principle or principles set forth by the Supreme Court” at “the time of the relevant state-court decision”).

Rompilla, however, the State did not introduce the facts of Davis's prior conviction or read from any transcripts related to the prior conviction. Instead, the State simply produced a certified copy of the prior conviction.

At the Rule 32 evidentiary hearing, Giddens testified that he "was aware of" Davis's prior robbery conviction because he "had gotten those records so [he] was aware of that through the criminal justice system." Giddens confirmed that he did not "speak to anyone involved in [the robbery] case." However, he reiterated that he "reviewed the record on that and saw what [Davis] was convicted of. And [he thought Davis] actually served time on it." Giddens stated that he "[did not] remember the exact facts" of the robbery. "[He] just remember[ed] it was a robbery that [Davis] had—was convicted of and it was offered in the sentenc[ing] hearing." When asked whether he did any investigation to learn of the circumstances of the robbery itself, Giddens stated, "[w]ell, the only thing that is admissible is the conviction itself, not the facts of it. . . . The state offered simply a certified copy of the conviction. Which we don't object to, because you don't want them to have to put on a witness to bring out the facts."

In light of Giddens's testimony, the ACCA found that Davis's case was distinguishable from *Rompilla* because unlike in *Rompilla* where "the attorney testified that she had not looked at the file of *Rompilla*'s prior rape conviction[,] Giddens testified that he did examine the file on Davis's prior conviction but had not spoken to anyone about the prior case." *Davis*, 9 So. 3d at 569 (emphasis added). "More importantly," the ACCA noted, "the jury in [Davis's] case was aware

that Davis had previously been convicted of the lowest degree of robbery. Counsel tried to minimize the prior conviction. Thus, we do not believe that *Rompilla* mandates that we reverse Davis’s sentence on this issue.” *Id.*¹³ Thus, the state court concluded that “we

¹³ The dissent faults the Rule 32 trial court for misunderstanding Davis’s ineffective-assistance argument concerning the investigation of his prior robbery conviction. Instead of making factual findings regarding what investigation, if any, counsel conducted regarding the prior robbery conviction, the trial court held that the claim lacked merit because, regardless of the circumstances, the prior conviction qualified as a statutory aggravating factor—“[t]here [was] no explaining it away”—and noted that Davis could not use his Rule 32 petition to collaterally attack his prior conviction. The trial court’s analysis is not surprising because the Rule 32 trial court issued its decision denying Davis’s Rule 32 petition in August 2004 well before the June 2005 *Rompilla* decision—indeed, before even the grant of certiorari in *Rompilla*. See *Rompilla v. Beard*, 542 U.S. 966 (2004) (granting certiorari). Consequently, the Rule 32 trial court did not have the benefit of the *Rompilla* decision to define the contours of Davis’s claim—nor did Davis refer to any specific cases, any ABA standards, or other similar state guidelines in his Rule 32 petition in support of this claim. Rather, Davis placed *Rompilla* on the state court’s radar and framed his claim expressly in terms of *Rompilla* for the first time in his reply brief during his collateral appeal proceedings before the ACCA. Thus, given this unique procedural context and lack of supporting authority proffered by Davis, it is not shocking that the Rule 32 trial court did not precisely understand the contours of Davis’s claim or anticipate the Supreme Court’s decision in *Rompilla*. But in any event, the Rule 32 trial court’s decision is not what is before us for review, and the dissent’s discussion of its failure “to make any findings relevant to the *Rompilla* issue” is an attempt to muddy the waters and distract from what is to be our main focus—the thorough and well-reasoned decision of the ACCA. See *Wilson*, 584 U.S. at 125 (explaining that under AEDPA a federal habeas court reviews

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cannot say that counsel was ineffective for failing to conduct a more detailed investigation into Davis's prior conviction for robbery in the third degree." *Id.* I agree.

The ACCA was entitled to credit Giddens's testimony and, whether or not it is the best reading, the state court's interpretation of Giddens's testimony as establishing that he reviewed the file from Davis's prior conviction was not clearly and convincingly erroneous.¹⁴ Further, the ACCA acknowledged that

the reasoned decision from "the last state court to decide a prisoner's federal claim"). In short, much like how our job under Strickland is not to grade counsel's performance, we should not embark on a mission to grade the performance of the state courts—particularly when, as here, no party has asserted that the state trial court failed in its duties.

¹⁴ Instead of giving Giddens and the state court the benefit of the doubt, as required by the doubly deferential lens of AEDPA and Strickland, the dissent reads Giddens's testimony differently from the ACCA and independently concludes that Giddens did not review the prior conviction file. Specifically—despite the fact that Davis does not directly challenge the ACCA's finding that Giddens "did examine the file"—the dissent concludes upon an independent examination of the record that the "file" Giddens and the ACCA must have been referring to was nothing more than the Alabama State Action Summary sheet. The dissent justifies its conclusion by pointing out that the district court reached the same conclusion. True. The district court also rejected the ACCA's factual finding that Giddens examined the file, but much like the dissent, the district court's rejection of the state court's factual findings was erroneous. Section 2254(e)(1) provides that a state court's factual findings "shall be presumed to be correct" and the petitioner "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). Davis provided no evidence to rebut the state

Giddens did not further investigate the underlying circumstances surrounding the robbery. But even under *Rompilla*, that failure does not *per se* establish deficient performance. The *Rompilla* Court expressly stated that it was not creating “a ‘rigid *per se*’ rule that requires defense counsel to do *a complete review* of the file on any prior conviction introduced.” 545 U.S. at 389 (emphasis added). Indeed, the Court noted that “[o]ther situations, where a defense lawyer is not charged with knowledge that the prosecutor intends to use a prior conviction in this way, might warrant a different assessment.” *Id.* at 390 (emphasis added).

The situation in *Rompilla* is very different from the one here. Significantly, in *Rompilla*, the prosecution introduced Rompilla’s prior conviction as an aggravating factor not merely by entering a notice of conviction into evidence—as was done here—but by emphasizing

court’s findings, and thus neither the district court nor the dissent should have rejected the state court’s factual findings related to the deficiency

determination. *Pye*, 50 F.4th at 1034–35; *see also Putman v. Head*, 268 F.3d 1223, 1233 n.5 (11th Cir. 2001) (“In accordance with 28 U.S.C. § 2254(e)(1), we presume the factual findings of the state habeas court are correct, since Appellant has not presented clear and convincing evidence to the contrary.”). The fact that the district court and the dissent read the record differently and would have reached a different conclusion than the state court is irrelevant under AEDPA. *Titlow*, 571 U.S. at 18 (explaining 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” (quotation omitted)); *Rice v. Collins*, 546 U.S. 333, 341–42 (2006) (“[If] [r]easonable minds reviewing the record might disagree about” the state court factfinding in question, “on habeas review that does not suffice to supersede” the state court’s factual determination.).

Rompilla’s violent character by reading into evidence extensive portions of the rape victim’s testimony from the prior case. *Id.* at 385, 389. Here, in contrast, the State merely introduced a certified copy of Davis’s prior conviction to establish a statutory aggravating factor. It did not read from the transcript of the prior proceedings or attempt to use the conviction to emphasize Davis’s violent character or propensity to engage in similar acts. Further, as the majority notes, it was undisputed that under Alabama law a conviction for robbery qualified as a felony involving the use or threat of violence to the person regardless of the underlying facts. *Bush v. State*, 695 So. 2d 70, 91 (Ala. Crim. App. 1995). Thus, because Giddens knew (1) that the State intended to introduce a certified copy of the prior conviction but not use the underlying facts, and (2) the conviction would qualify as an aggravator regardless of the underlying facts, it was not necessarily objectively unreasonable for Giddens not to investigate the facts surrounding the pizza robbery and instead focus on minimizing the weight afforded the prior violent felony aggravator by emphasizing that the conviction was for the lowest degree of robbery in Alabama—particularly in light of the heavy measure of deference to be afforded counsel’s judgments. *See Rompilla*, 545 U.S. at 383 (“[R]easonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste.”).

The Supreme Court has told us time and time again that “because the Strickland standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard.” *Shinn*, 592 U.S. at 119 (quoting

Knowles, 556 U.S. at 123); *Sexton v. Beaudreaux*, 585 U.S. 961, 968 (2018); *Renico*, 559 U.S. at 776 (“Because AEDPA authorizes federal courts to grant relief only when state courts act unreasonably, it follows that the more general the rule at issue—and thus the greater the potential for reasoned disagreement among fairminded judges—the more leeway state courts have in reaching outcomes in case-by-case determinations.” (alterations adopted) (quotations omitted)). Based on this record and the double deference afforded the state court’s determination as to the performance prong under *Strickland* and AEDPA, Davis has not shown that the state court’s conclusion was objectively unreasonable—i.e., “so obviously wrong that its error lies beyond any possibility for fairminded disagreement,” *Shinn*, 592 U.S. at 118 (quotations omitted); *Virginia v. LeBlanc*, 582 U.S. 91, 94 (2017) (“In order for a state court’s decision to be an unreasonable application of this Court’s case law, the ruling must be objectively unreasonable, not merely wrong; even clear error will not suffice.” (quotations omitted)); *Pye*, 50 F.4th at 1034 (explaining that where AEDPA deference applies, we are precluded from granting federal habeas relief “so long as fairminded jurists could disagree on the correctness of the state court’s decision.” (quoting *Harrington*, 562 U.S. at 101)).

Accordingly, I would also affirm the state court’s reasonable determination that Davis’s counsel’s performance was not constitutionally deficient.

ROSENBAUM, Circuit Judge, dissenting:

Counsel made two serious errors that may well have changed the outcome of the penalty phase of Jimmy Davis, Jr.'s capital trial from life imprisonment to death. Neither error stemmed from a strategic choice. Rather, they both resulted directly from counsel's ignorance of the law and failure to investigate as a competent attorney would have. Based on Supreme Court jurisprudence on the powerful nature of the errors here—as well as the known divisions of Davis's jury over imposing the death penalty—a reasonable probability exists that, but for counsel's unprofessional errors, the result of the penalty phase would have been different. The state courts reached the opposite answer only because they unreasonably applied Supreme Court precedent. So I would grant Davis's petition to the extent that it seeks a new penalty-phase trial. And I respectfully dissent from the Majority Opinion's decision to the contrary.

Before I dive into the details of my analysis, I begin by summarizing counsel's errors. First, counsel failed to learn the underlying facts of the sole prior conviction that the State relied on as one of only two aggravating factors supporting its pursuit of the death penalty (against one mitigating factor supporting life imprisonment). The State offered a certified copy of Davis's prior conviction for third-degree robbery into evidence to establish the aggravating factor that Davis had once been convicted of a crime involving the use or threat of violence to a person.

As it turned out, though, the facts of that prior conviction reflected a heist that qualified for the violent-prior-conviction aggravating factor in name only.

When Davis was 22, he and three of his friends ordered pizza. When the pizza deliveryman arrived, the group swiped the six pepperoni pizzas and took about \$50 from him. Then they ran away with the pizzas. But the police quickly caught up with all four culprits, including Davis, who was still carrying a pizza. And though one of the four told the deliveryman to “[g]ive it up” and made a gesture in his pocket like he may have had a gun, no weapons were involved, no violence was involved, and the deliveryman said that “there really was never a threat made to him.” Nor was Davis the group’s ringleader.

But Davis’s counsel knew none of these moderating facts. So counsel never showed the jury that the sole “violen[t]” prior conviction the State used to support its death-penalty request concerned a pizza heist; involved no weapons, no real threats, and no violence; and no one was hurt.

Instead, Davis’s counsel argued only that third-degree robbery is the least serious kind of robbery. But that’s like saying a particular type of cancer is the least serious kind of cancer. The term “robbery,” like the term “cancer”—even when accompanied by a descriptor indicating it is the least serious type—necessarily conveys grave seriousness in the absence of any other facts. And here, that incomplete impression comprised the entire basis for the weight the jury and court gave when they found that this aggravating factor—one of only two the State raised—supported the death penalty.

Second, counsel failed to investigate Davis’s background, including whether Davis had endured abuse growing up. In fact, Davis had. His own mother, Lillie

Bell Davis, repeatedly and often severely beat Davis with broomsticks, extension cords, belts, and switches. When Davis was in second grade, Lillie beat him so viciously that his head became “dented,” “warped,” and “swollen,” and his ear was partially severed. After the extreme beatings that Lillie inflicted on Davis, Davis went “into spasm[s]” and shook for days. This abuse persisted through the time Davis was at least 14 or 15 years old. And Theresa Peebles, a social worker from the Calhoun County Department of Human Resources, said she had “never seen a back that looked worse than Jimmy’s” from his mother’s beatings. Davis’s DHR file even included photographs of his back, covered in scars, when he was ten years old.

But counsel never knew any of this. That’s because counsel’s entire mitigation investigation consisted of interviewing Davis about the crime under indictment, interviewing Lillie (Davis’s abuser), and having intelligence tests administered to Davis. And even when counsel interviewed Davis and Lillie, counsel never asked about abuse. Yet the Supreme Court has recognized that evidence of things like a defendant’s abuse as a child can “influence[] the jury’s appraisal of [a defendant’s] moral culpability.” *Williams v. Taylor*, 529 U.S. 362, 398 (2000).

Worse still, counsel’s defense strategy was to put Lillie on the stand to plead for mercy for her son.¹

¹ The only other witness defense counsel presented to plead for mercy for Davis was Andre Sigler, Davis’s cousin. But in yet another demonstration of counsel’s ill preparation and deficient performance, had fate not intervened on the day of the penalty-phase proceedings, counsel wouldn’t have known to present

Much of her testimony focused on how difficult Davis was as a child. After she testified that she “had problems with [Davis]” from the time he was nine years old, Davis’s own counsel argued that Lillie “raised him the best she could without a father.” They even said that Davis didn’t have “somebody in the home that probably could really discipline him.” Of course, nothing could have been further from reality. But counsel had no idea. After all, they never asked. And that is textbook ineffective performance.

Not only that, but when we consider the record here and Supreme Court jurisprudence on mitigation, it’s clear that counsel’s performance prejudiced Davis. That is, a reasonable probability exists that, but for counsel’s unprofessional errors, the result of the penalty phase would have been different.

First, as I’ve mentioned, the Supreme Court has found mistakes just like these to be material in other cases. And we know that at one point during the deliberations, five jurors supported sentencing Davis to life in prison and opposed imposing the death penalty. Even if we look solely to the verdict, the jury ultimately voted eleven to one—not unanimously—in favor of the death penalty.² Put simply, significant

Sigler, either. Counsel did not even speak with Sigler for the first time until a brief trial recess on the day Sigler testified. And Sigler was only at the courthouse in the first place because Lillie had asked him to come—not as part of counsel’s penalty-phase strategy.

² In Alabama, at least ten members of the jury must agree to sentence a defendant to death for the jury to return a death verdict. Ala. Code § 13A-5-46(f).

divisions existed even without the type of mitigating evidence that competent counsel would have presented and that the Supreme Court has characterized as “powerful.” See *Wiggins v. Smith*, 539 U.S. 510, 534–35 (2003). Had counsel not performed deficiently, the jury would have learned that the State supported one of its two aggravating factors solely with the pizza-heist conviction. It also would have learned that the real “difficulty” wasn’t Lillie’s challenge with Davis but rather Davis’s “difficulty” with the severe abuse his own mother inflicted on him. On this record, there can be but one conclusion: counsel’s errors prejudiced Davis.

As I show below, the state courts based their conclusion that Davis did not suffer ineffective assistance of counsel on unreasonable applications of the law. And the Majority and Concurring Opinions’ reasons for concluding otherwise do not stand up to scrutiny. The Majority and Concurring Opinions discuss at length the double deference we afford state-court determinations under AEDPA and Strickland’s ineffective-assistance-of-counsel standard,³ but “[e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review.” *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). And review here requires relief. I divide my discussion into two parts. In Section I, I show that the state courts unreasonably concluded that counsel did not perform deficiently. And in Section II, I describe how the state courts’ conclusion that counsel’s errors did not

³ For a more precise discussion of that deference, see *infra* at 7–8 n.4, 47–48 n.23.

prejudice Davis was also unreasonable. Along the way, I respond to the Majority and Concurring Opinions' mistakes in their analyses.

I. The state courts' determination that counsel did not perform deficiently was "contrary to, [and] involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1).

I begin with a review of the standards governing the deficient-performance aspect of an ineffective-assistance-of-counsel claim. Then, in Section I.A., I apply those standards to counsel's failure to learn any information about the pizza-heist conviction that served as the State's sole support for seeking the prior-violent-conviction aggravator. I also explain why the state courts' resolution of the performance aspect of this ineffective-assistance claim was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1). In Section I.B., I apply the deficient-performance prong of an ineffective-assistance claim to counsel's failure to investigate Davis's background sufficiently to learn of his mother's severe abuse of him. I then show why the state courts' resolution of the deficient-performance aspect of this claim was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," *id.*

But first things first: the Sixth Amendment guarantees the right to effective counsel. *See Strickland v. Washington*, 466 U.S. 668, 691–92 (1984). As the

Supreme Court has explained, the purpose of that right “is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding.” *Id.* So to establish constitutionally ineffective assistance of counsel, a defendant must show (1) counsel performed deficiently, and (2) that deficiency prejudiced the defendant. *Wiggins*, 539 U.S. at 521.

On the performance prong, a defendant “must show that counsel’s representation fell below an objective standard of reasonableness . . . under prevailing professional norms.” *Strickland*, 466 U.S. at 688. Because counsel must have “wide latitude . . . in making tactical decisions,” and because we review counsel’s performance only “to ensure that criminal defendants receive a fair trial,” our “scrutiny of counsel’s performance must be highly deferential.”⁴ *Id.* at 689.

Yet some absolutes in representation still exist. Among other obligations, “counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Id.* at 691. When we assess whether counsel has satisfied this standard, “we must conduct an objective review of their performance, measured for

⁴ This is where AEDPA’s double deference to state courts’ resolution of ineffective assistance comes in. Because *Strickland*’s standard itself requires deference to counsel’s performance, and because AEDPA, by its terms, requires deference to state-court decisions, our review of state courts’ resolution of the deficient-performance prong of *Strickland*’s ineffective-assistance standard requires double deference. *Woods v. Etherton*, 578 U.S. 113, 116–17 (2016) (per curiam). The same is not true of our deference to state courts’ resolution of *Strickland*’s prejudice prong. See *infra* at 47–48 n.23.

reasonableness under prevailing professional norms, which includes a context-dependent consideration of the challenged conduct as seen from counsel's perspective at the time." *Wiggins*, 539 U.S. at 523 (cleaned up).⁵

Here, even under the double deference that *Strickland* and AEDPA's combined standards require, the state courts unreasonably ruled that counsel's performance was not deficient.

⁵ The Concurring Opinion mischaracterizes this Dissent as a "de novo-masquerading-as-deference approach" because as part of my review, I evaluate the merits of the *Strickland* claims. Concurring Op. at 14. But to reiterate, *Wiggins* requires that we "conduct an objective review of [counsel's] performance" to determine whether the state courts' application of *Strickland* was objectively unreasonable. 539 U.S. at 523. So that is precisely the analysis that this Dissent engages in. The Concurring Opinion's implication that merits review means the Dissent fails to address the state courts' decisions head on is baseless. Rather, as this Dissent shows, habeas analysis of a *Strickland* claim can (and must) do both. See, e.g., *infra* at 11–23, 39–46, 50–51, 56–62; see also *Harrington v. Richter*, 562 U.S. 86, 102 (2011) (explaining that habeas courts cannot conduct *de novo* review, determine how they would have decided the case, and then conclude that the state court must have been unreasonable for concluding otherwise, but not suggesting that habeas courts refrain from assessing the merits of the underlying *Strickland* claims). After all, it's hard to evaluate the reasonableness of a court's application of federal law to the facts of the case without understanding first what federal law requires as applied to the facts of the case. The Concurring Opinion's failure to comply with this prescribed analytical framework explains some of its own deficiencies.

- A. *The state courts' determination that counsel's failure to learn any information about the pizza-heist conviction besides the fact of conviction itself, when that conviction served as the State's sole support for seeking the prior-violent-conviction aggravating factor, was not deficient performance was "contrary to, [and] involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1).*

When defense counsel know that the prosecution intends to use a prior conviction as an aggravating factor justifying the death penalty, at a minimum, they must review easily accessible information about the underlying facts of that prior conviction. I can't say it any better than the Supreme Court: "There is an obvious reason that the failure to examine [the defendant's] prior conviction file fell below the level of reasonable performance. Counsel knew that the Commonwealth intended to seek the death penalty by proving [the defendant] had a significant history of felony convictions indicating the use or threat of violence, an aggravator under state law." *Rompilla v. Beard*, 545 U.S. 374, 383 (2005).

As the Court has explained, when counsel do not learn the readily obtainable facts supporting an aggravating factor, they "seriously compromis[e] their opportunity to respond to a case for aggravation." *Id.* at 385. For instance, "[c]ounsel may . . . find extenuating circumstances that can be offered to lessen the weight of a conviction." *Id.* at 387 n.7 (quoting ABA Guidelines for the Appointment and Performance of

Def. Couns. in Death Penalty Cases guideline 10.7 cmt. (rev. ed. 2003), reprinted in 31 Hofstra L. Rev. 913, 1027 (2003) (footnotes omitted)).⁶ And more to the point, “[w]e may reasonably assume that the jury could give more relative weight to a prior violent felony aggravator where defense counsel missed an opportunity to argue that circumstances of the prior conviction were less damning than the prosecution’s characterization of the conviction would suggest.” *Id.* at 386 n.5.

That’s so on point here that the Supreme Court could have been talking about Davis’s case. So under Supreme Court jurisprudence, it is simply impossible to conclude anything but that Davis’s counsel were deficient. As in *Rompilla*, counsel knew the State intended to introduce Davis’s prior conviction to support an aggravating factor it was relying on to seek the death penalty. In fact, here, that aggravating factor was one of only two aggravating factors on which the State relied (in *Rompilla*, it was one of three). And as in *Rompilla*, Davis’s counsel also knew that the aggravating factor was that Davis had before been convicted of a crime that involved use or threat of violence to a person. So again, as in *Rompilla*, under prevailing standards of practice, counsel had a duty to learn the underlying facts of that case because counsel “may . . . [have] f[ou]nd extenuating circumstances that c[ould]

⁶ Earlier versions of the ABA Guidelines also directed that “[c]ounsel should make efforts to secure information in the possession of the prosecution or law enforcement authorities, including police reports.” ABA Guidelines for the Appointment and Performance of Couns. in Death Penalty Cases guideline 11.4.1.D.4 (1989).

have] be[en] offered to lessen the weight of [the] conviction.” *Id.* at 387 n.7 (citation omitted).

Here, those “extenuating circumstances” existed. And defense counsel could easily have learned of them—the case file for the pizza heist was in the possession of the same State Attorney’s Office that prosecuted this case. But counsel did not bother.

The state courts’ attempts to distinguish *Rompilla*—which involves the same fact pattern as Davis’s case—are both unreasonable and “contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States,” 28 U.S.C. § 2254(d)(1).⁷ Counsel’s failure to investigate—or even to learn the readily available facts for—the only conviction supporting the State’s proposed violent-prior-conviction aggravator was textbook deficient performance. Yet somehow the state courts concluded the opposite.

Before I explain the errors in the Court of Criminal Appeals of Alabama’s legal analysis, it’s important to recognize that the Alabama Rule 32 trial court made no factual findings as to what, if any, investigation Davis’s counsel did to prepare to address the State’s announced intention to rely on the violent-prior-conviction aggravator. The state Rule 32 trial court’s

⁷ AEDPA, by its terms, requires us to review the state courts’ decisions for “unreasonable” applications of federal law. 28 U.S.C. § 2254(d). So that’s what this Dissent does. That said, even though I think the state courts’ rulings were “unreasonable,” I have no doubt that the state courts ruled in Davis’s case in good faith and made their best efforts. But that, of course, is not the standard that AEDPA establishes for our review.

entire discussion of the violent-prior-conviction challenge in collateral proceedings consisted of only this:

Paragraph 65 lacks merit. This claim would have been appropriately denied under Rule 32.7(d) of the Alabama Rules of Criminal Procedure. Regardless of the individual facts, robbery in the third degree is an offense involving the use or threat of force against a person. There is no “explaining it away.” The law is clear and does not make exceptions for “this is what really happened” defenses. Davis pleaded guilty to robbery III and that conviction involved the use or threat of force against a person by the very definition of the offense he pleaded guilty to. As such, this claim lacks merit Furthermore, Rule 32 petitions are specific to a single conviction. It is improper to attempt to attack a prior felony collaterally in a Rule 32 proceeding dealing with a separate offense. As such, Davis cannot attack the validity of his Robbery III conviction in this forum.

Davis v. Alabama, No. CC-93-534.60, at *57 (Calhoun Cnty. Cir. Ct. Aug. 3, 2004).

As the state Rule 32 trial court’s discussion lays bare, it missed the whole point. Davis did not complain that counsel rendered ineffective assistance by failing to attack the validity of his pizza-heist conviction. Nor did he argue counsel were ineffective because they did not assert that the pizza-heist conviction didn’t qualify as an aggravating factor.

Rather, Davis’s argument anticipated *Rompilla*. He said that counsel were ineffective because they completely failed to learn or even investigate any mitigating facts of the prior conviction that, upon presentation to the jury, would have significantly lessened the weight the jury gave the prior-felony-conviction aggravator. See *Rompilla*, 545 U.S. at 389–90. But the state Rule 32 trial court made no findings relevant to this argument. Indeed, it made no findings about what, if any, investigation counsel undertook or whether any investigation was sufficient.⁸

Even after *Rompilla* issued and Davis brought it to the attention of the Alabama Court of Criminal

⁸ The Concurring Opinion complains that I am “grad[ing] the performance of the state courts.” Concurring Op. at 38 n.13. Not so. As part of our review, we must, of course, afford a presumption of correctness to factual findings by the state trial and appellate courts. *Bui v. Haley*, 321 F.3d 1304, 1312 (11th Cir. 2003) (citing *Sumner v. Mata*, 449 U.S. 539, 547 (1981)). Before we can do that, we must discern what they are. I show that the Rule 32 trial court clearly misunderstood Davis’s argument, so it failed to make any factual findings relevant to the *Rompilla* issue. That means that the factual findings of the Alabama Court of Criminal Appeals are the only ones we have. So reviewing the state courts’ factual findings doesn’t “muddy the waters,” as the Concurring Opinion accuses. Concurring Op. at 38 n.13. It clears them. As for the Concurring Opinion’s contention that I criticize the Rule 32 trial court for failing to divine the issuance of *Rompilla*, given that its opinion predates *Rompilla*, that’s wrong, too. To state the obvious, unlike the Alabama Court of Criminal Appeals, the Rule 32 trial court did not have the benefit of *Rompilla*. That said, the Rule 32 trial court did have the benefit of Davis’s argument (which turned out to anticipate *Rompilla* pretty closely). But the trial court didn’t address it. And that’s why there are no factual findings from the trial court on the *Strickland* aggravating-factor issue.

Appeals to support his argument, the court never remanded to the state Rule 32 trial court to make factual findings relevant to the *Rompilla* argument. Instead, the Alabama Court of Criminal Appeals attempted to distinguish *Rompilla* on the facts in the first instance.

In doing so, the Alabama Court of Criminal Appeals relied exclusively on Giddens's testimony during the Rule 32 hearing to determine the scope of counsel's investigation:

[Rule 32 counsel]: Did you make an attempt to talk to any other person within the criminal justice system that had had any dealings with [Davis]?

[Giddens]: Criminal justice systems being I believe he had a robbery conviction that was offered against him. And I was aware of that. I mean, I had gotten those records so I was aware of that through the criminal justice system.

[Rule 32 counsel]: Did you speak to anyone involved in that case?

[Giddens]: No. I reviewed the record on that and saw what he was convicted of it. And I think he actually served time on it.

....

[Rule 32 counsel]: And you didn't do any investigation to find out what the circumstances of that robbery was; did you?

[Giddens]: Well, the only thing that is admissible is the conviction itself, not the facts of it.

[Rule 32 counsel]: Even at a sentence hearing in mitigation?

[Giddens]: The state offered simply a certified copy of the conviction. Which we don't object to, because you don't want them to have to put on a witness to bring out the facts.

Davis v. State, 9 So. 3d 539, 568 (Ala. Crim. App. 2008) (emphases added). Based on this testimony, the Alabama Court of Criminal Appeals concluded that Davis's counsel were not "ineffective [under *Rompilla*] for failing to conduct a more detailed investigation into Davis's prior conviction." *Id.* at 569.

But Giddens never testified that he obtained, reviewed, or examined the pizza-heist's substantive file. To the contrary, Giddens implicitly conceded that he obtained his entire knowledge of the pizza-heist conviction from the certified Alabama State Action Summary that the State provided counsel and then used to prove the prior-violent-crime aggravating factor.⁹ And when Rule 32 counsel asked defense counsel, "[Y]ou didn't do any investigation to find out what the circumstances of that robbery was; did you?," defense

⁹ Counsel's complete file on Davis's case—which is also a part of the record—independently shows that counsel never obtained the State's substantive file on the pizza heist. In this respect, Giddens testified that he and co-counsel Jonathan Adams turned over their complete file on Davis's case to collateral counsel, who entered it into the record at the Rule 32 proceedings. That file contains no records with information about the facts of the pizza heist.

counsel effectively admitted that he never obtained documents other than the Alabama State Action Summary or otherwise learned or investigated the underlying facts of prior conviction. He said, “Well, the only thing that is admissible is the ***conviction itself, not the facts of it.***” *Id.* at 568 (emphasis added). (That statement was wrong.).

As to the one document counsel had—the Alabama State Action Summary—that document lacks any facts about the underlying robbery. Rather, it looks like a court docket page and, as relevant here, identifies only that Davis was arrested for first-degree robbery, pled to third-degree robbery, and was sentenced to one year and one day. So when Giddens testified that he “had gotten those records” informing him of the prior conviction, he was referring to the Alabama State Action Summary. And when the Alabama Court of Criminal Appeals said, “Giddens testified that he did examine the file on Davis’s prior conviction,” *id.* at 569, it’s clear that the “file” was the Alabama State Action Summary.

Plus, even during the penalty phase of Davis’s trial, counsel implicitly admitted they hadn’t reviewed the prior conviction’s case file. Counsel argued, “Whatever set of facts those were [for the prior robbery conviction], whatever type of case it was, the charge was reduced down to robbery third.” Had they reviewed the State’s substantive case file on that case, they could not have missed that the case was about pizza swiping because the charging instrument and every police

report in the file discussed that fact.¹⁰ Nor could they have missed the fact that no weapons of any type were recovered, and no police reports or other documents in the file mentioned violence. But counsel were unaware of these facts. Even the Alabama courts did not conclude that counsel were aware of the facts and had made a strategic decision not to use them.

In fact, the district court recognized that Giddens did not testify that he had reviewed the substantive file on the prior conviction. *Davis v. Allen*, No. CV 07-S-518-E, 2016 WL 3014784, at *59 (N.D. Ala. May 26, 2016). Rather, Giddens testified that he “reviewed the record and saw what [Davis] was convicted of.” *Id.* As the district court observed, this testimony “suggests that Giddens was referring to the actual charge, third degree robbery, and not the underlying circumstances of the crime.” *Id.* Not only that, the court noted, but “the state court did not find, and the record does not support a finding, that counsel was in fact familiar with the underlying facts of Davis’s prior offense.” *Id.* Exactly.

So to summarize, the record shows counsel never obtained or reviewed the case file. And while the Alabama Court of Criminal Appeals said that “Giddens

¹⁰ See, e.g., Indictment (noting Davis participated in “a theft of lawful United States Currency . . . ; Six (6) Large Pepperoni Pizzas, of the value of to-wit: \$36.00 [and] Two (2) Insulated Pizza Carry Bags, of the value of to-wit: \$50.00”); Ala. Uniform Incident/Offense Report (Bates No. 0457)) (providing a “property description” of the “stolen” items as “2 Blue in color, Insulated Pizza Carry Bags[;] 6 Large Pepperoni Pizzas[;] 1 \$10.00 U.S. Currency[;] 1 \$5.00 U.S. Currency[;] 35 \$1.00 U.S. Currency[;] 1 Miscellaneous Change amt. unknown”).

testified that he did examine the file on Davis's prior conviction," it's clear that "file" refers to the Alabama State Action Summary. Plus, critically, the Alabama Court of Criminal Appeals never found that counsel were ever aware of the facts of the pizza heist. Nor did the Rule 32 trial court make any factual findings to the contrary. That is the same factual pattern that existed in *Rompilla*. But the Alabama Court of Criminal Appeals attempted to distinguish *Rompilla*, anyway.

To be sure, the Alabama Court of Criminal Appeals implicitly recognized that if *Rompilla* governed, it required the conclusion that counsel's performance was deficient. Given this dilemma, the court reasoned that Davis's case was "distinguishable from *Rompilla*" for three reasons. *Davis*, 9 So. 3d at 569. Each of those reasons unreasonably applied *Rompilla*.

First, the Alabama Court of Criminal Appeals asserted that the prosecution in *Rompilla* relied on only one aggravating circumstance (that "*Rompilla* had a significant history of felony convictions indicating the use or threat of violence," *Rompilla*, 545 U.S. at 383), while here, the State invoked two aggravating circumstances (that the murder occurred during a robbery and that Davis had a prior conviction for a robbery involving the use or threat of violence to a person).

That's just wrong. In fact, *Rompilla* expressly states that "the prosecutor [there] sought to prove **three** aggravating factors to justify a death sentence," that "[t]he Commonwealth presented evidence on all **three** aggravators, and [that] **the jury found all proven**." *Id.* at 378 (emphases added). To state the obvious, three is not one.

But on top of the fact that the state courts distinguished *Rompilla* by relying on a materially false statement of Rompilla's facts, the number of aggravating circumstances played no role in the Supreme Court's *Rompilla* analysis. What the Supreme Court explained in *Rompilla* applies with equal force here, where the State raised two (instead of *Rompilla*'s three) aggravating factors: "it is difficult to see how counsel could have failed to realize that without examining the readily available file they were seriously compromising their opportunity to respond to a case for aggravation," *id.* at 385.

And even if the number of aggravating factors had figured into the Court's analysis, Davis's case is more compelling. In *Rompilla*, in the absence of counsel's failure, the weight of two aggravating circumstances would have remained. But here, had counsel not performed deficiently, the weight of only one would have had any continuing force.

In any case, the Court in *Rompilla* found deficient performance because "[c]ounsel knew that the Commonwealth intended to seek the death penalty by proving *Rompilla* had a significant history of felony convictions indicating the use or threat of violence, an aggravator under state law." *Id.* at 383. And that's precisely what happened here: counsel knew the State was pursuing the death penalty by proving Davis had a felony conviction involving the use or threat of violence, an aggravator under state law. The Alabama Court of Criminal Appeals's attempt to distinguish *Rompilla* on an objectively wrong version of *Rompilla*'s facts—especially when, even if the state court's recitation of the facts had been right, they made no

difference to *Rompilla*'s analysis—was not simply wrong; it was unreasonable. And no “fairminded jurist[] could disagree.” See *Pye v. Warden, Ga. Diagnostic Prison*, 50 F.4th 1025, 1034 (11th Cir. 2022) (*en banc*) (quoting *Harrington v. Richter*, 562 U.S. 86, 101 (2011)).

Second, the Alabama Court of Criminal Appeals attempted to distinguish *Rompilla* on the basis that “the jury in [Davis’s] case was aware that Davis had previously been convicted of the lowest degree of robbery,” which it characterized as counsel’s efforts to “minimize the prior conviction.” Davis, 9 So. 3d at 569. But that doesn’t excuse counsel’s failure to learn the facts of Davis’s prior conviction in the first place. Without knowing the facts, counsel could not—and in fact did not—make a strategic decision to highlight that Davis was convicted of third-degree robbery instead of filling the jury in on the facts of the prior conviction.

In both *Rompilla* and here, defense counsel knew the prosecution was going to use a prior conviction as an aggravating factor, maximizing its impact either by delving into the facts or, in Davis’s case, by using the title of the conviction itself to incorrectly imply extreme facts. *Rompilla*’s point was that counsel must examine the substantive file for a prior conviction when they know it will be proffered as an aggravating factor, so they can understand both the prosecution’s potential arguments and any extenuating circumstances that could minimize the conviction’s impact. *Rompilla*, 545 U.S. at 385–86. As the Supreme Court explained, “[T]he sentencing jury was required to weigh aggravating factors against mitigating factors. We may reasonably assume that the jury could give

more relative weight to a prior violent felony aggravator where defense counsel missed an opportunity to argue that circumstances of the prior conviction were less damning than the prosecution's characterization of the conviction would suggest." *Id.* at 386 n.5.

Yet defense counsel here did exactly that: they "missed an opportunity to argue that circumstances of the prior conviction were less damning than the prosecution's characterization of the conviction would suggest"—all because, as in *Rompilla*, they failed to learn the facts of the prior conviction. When the facts of a Supreme Court case line up so perfectly with a case under review, applying that Supreme Court precedent to reach its opposite answer is both unreasonable and "contrary to . . . clearly established Federal law."¹¹

¹¹ Apparently recognizing the damning nature of the state courts' unreasonable *Rompilla* analysis, the Concurring Opinion attempts to distinguish *Rompilla* on a basis the state courts did not. It argues that *Rompilla* doesn't govern here because the *Rompilla* prosecution "emphasiz[ed] *Rompilla*'s violent character" by quoting damaging testimony from the victim of the prior conviction, but the Davis prosecution "merely" entered the notice of conviction into evidence. Concurring Op. at 40 (citing *Rompilla*, 545 U.S. at 385, 389). That's a meaningless distinction. The prosecution in both cases made representations about a prior conviction, the substantive file for which was easily accessible to defense counsel. In *Rompilla*, the prosecution maximized the aggravating nature of the prior conviction by introducing particularly damaging facts. There were no particularly damaging facts underlying the pizza heist, so the Davis prosecution maximized the aggravating nature of the prior conviction by naming the prior conviction without introducing any facts—all of which were especially mitigating. Then, the prosecution described Davis's prior conviction as a "very, very aggravating circumstance[]."

Third, the Alabama Court of Criminal Appeals distinguished *Rompilla* because there, “the attorney testified that she had not looked at the file of Rompilla’s prior rape conviction[,] [but] [h]ere, [the court said,] [counsel] testified that [they] did examine the file on Davis’s prior conviction but had not spoken to anyone about the prior case.” *Davis*, 9 So. 3d at 569.¹²

But again, the Alabama Court of Criminal Appeals identified a non-existent difference between the cases. As I’ve explained, the record establishes that the only file trial counsel examined was the Alabama State Action Summary, not the State’s underlying substantive file on the conviction.

That factual situation is materially indistinguishable from the one that the Supreme Court found amounted to deficient performance in *Rompilla*. There, the Supreme Court noted that counsel “were

And in arguments to the court before it delivered the sentence, the prosecution characterized the prior conviction as “dangerous to human life.” Like in *Rompilla*, Davis’s counsel could not rebut those characterizations or even make a strategic decision not to rebut those characterizations because counsel failed “to make all reasonable efforts”—or in this case, any reasonable efforts—to learn what they could about the offense.” *Rompilla*, 545 U.S. at 385.

¹² The Alabama Court of Criminal Appeals then extensively quoted *Davis v. State*, 928 So. 2d 1089 (Fla. 2005), because, there, the Florida Supreme Court found that counsel performed reasonably by collecting and reviewing records relevant to the penalty phase. But that case involved a different defendant named Davis, in a different state, before a different court, with no apparent connection to the events in this case. And most importantly, in any case, counsel there—unlike here—obtained and reviewed the relevant records.

aware of their client’s criminal record.” *Rompilla*, 545 U.S. at 382. The problem, the Court explained, was that they did not “examine the court file on Rompilla’s prior conviction.” *Id.* at 383. So, too, here—counsel knew of Davis’s prior conviction but did not bother to learn its easily accessible facts. Thus, *Rompilla* is “clearly established Federal law,” 28 U.S.C. § 2254(d)(1), on counsel’s performance deficiency here. And the Alabama Court of Criminal Appeals’s decision “reach[ing] a different result from the Supreme Court ‘when faced with materially indistinguishable facts’” was “contrary to’ clearly established federal law.” *Ward v. Hall*, 592 F.3d 1144, 1155 (11th Cir. 2010).

B. The state courts’ determination that counsel’s failure to investigate Lillie Bell Davis’s long-term abuse of Davis was not deficient performance was “contrary to, [and] involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,” 28 U.S.C. § 2254(d)(1).

Counsel’s failure to sufficiently investigate Davis’s background, let alone conduct any investigation into whether he suffered childhood abuse, was deficient performance under *Wiggins*. Section I.B.i explains the clearly established federal law that governs this analysis. Section I.B.ii points out why counsel’s “investigation” here was deficient under any reasonable application of clearly established federal law. And Section I.B.iii shows that the state courts’ conclusion that counsel’s performance was not deficient was an

unreasonable application of and contrary to clearly established federal law.

- i. Clearly established federal law requires counsel to make a reasonable mitigation investigation or make a reasonable decision not to further investigate.*

As I've mentioned, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. We judge the reasonableness of counsel's conduct "on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690. To be sure, counsel need not "investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing." *Wiggins*, 539 U.S. at 533. But a "decision not to investigate . . . 'must be directly assessed for reasonableness in all the circumstances.'" *Id.* (quoting *Strickland*, 466 U.S. at 691). In other words, counsel has a duty to investigate for mitigation purposes unless and until reasonably diligent counsel would "have good reason to think further investigation would be a waste." *Rompilla*, 545 U.S. at 382–83.

In other capital cases, the Supreme Court has considered common state practice and the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases as "guides to determining what is reasonable." *See, e.g., Wiggins*, 539 U.S. at 524 (citation omitted). Of course, the Supreme Court has cautioned courts not to treat these types of sources as "inexorable commands with which all capital defense counsel must fully comply." *Bobby v. Van Hook*, 558 U.S. 4, 8 (2009) (quotations

omitted). But that does not detract from the Court's instructions to courts to use them as "guides to determining what is reasonable."

So I begin with those standards. The ABA Guidelines in 1993 recognized that, given the high stakes of a capital case, "[t]rial counsel should maintain close contact with the client throughout preparation of the case" and "arrange for an in-depth interview with [the] client with an eye toward both developing the necessary trust and eliciting as many facts as [counsel] can." ABA Guidelines for the Appointment and Performance of Def. Couns. in Death Penalty Cases guidelines 11.4.2, 11.4.1 cmt. 10 (1989).

As for counsel's responsibilities related to the investigation of other sources of mitigation evidence, the Guidelines dictated "independent investigations relating to the guilt/innocence phase and to the penalty phase of a capital trial." *Id.* at guideline 11.4.1(A). Not only that, but "[b]oth investigations should begin immediately upon counsel's entry into the case and should be pursued expeditiously" *Id.* As for the scope of these investigations, the Guidelines directed that they "should comprise efforts to discover ***all reasonably available mitigating evidence*** and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *Id.* at guideline 11.4.1(C) (emphasis added). For example, the Guidelines continued, key areas of mitigation evidence include, among others, physical and emotional abuse and prior offenses. *Id.* at guideline 11.8.6(B).

And the 1992 Alabama Capital Defense Trial Manual cautioned that "[t]he importance of a thorough investigation cannot be overemphasized. Even the most

skillful lawyer's effectiveness can be undermined by inadequate knowledge about the facts of the case." Alabama Cap. Def. Trial Manual at 28 (2d ed. 1992).

In explaining what it meant by a "thorough investigation," the Manual continued, "[I]t is the obligation of every lawyer to find out as much as possible about a case as soon as possible. Speed is essential Thoroughness is just as crucial. Counsel can never gather too many details concerning the facts and circumstances of each case." *Id.* Then the Manual went on to direct counsel to appropriate sources to consider when conducting a mitigation investigation:

The clues to a theory of mitigation may often be found in written records – doctor's records, hospital records (emergency room records can be especially helpful), school records, welfare department records, juvenile court or training school records, jail and prison records from prior convictions, employment records, marriage or divorce records, and any other piece of paper you think may exist.

Id. Ultimately, the Manual explained, "The goal of such a search is to discover the physical, social, psychological, and sexual problems with which your client has been forced to contend since his or her birth." *Id.*

ii. *Counsel's mitigation "investigation" was unreasonable and deficient.*

Counsel's mitigation investigation here looked nothing like the mitigation investigations these guidelines describe. For starters, counsel never asked Davis about his upbringing. Giddens testified at the Rule 32

hearing that during defense counsel's limited meetings (three in all for only a few hours total), they discussed matters relating to only the guilt phase.

Second, counsel never requested or reviewed any records from Davis's schools or the Alabama Department of Human Resources ("DHR") (which kept records associated with reports of abuse).¹³ Nor did they obtain any "doctor's records, hospital records . . . , school records, welfare department records, juvenile court or training school records, jail and prison records from prior convictions, employment records, marriage or divorce records, and any other piece of paper you think may exist." Alabama Cap. Def. Trial Manual at 28.

Third, counsel never moved for discovery from the State, though they would have been entitled to

¹³ The Majority and Concurring Opinions argue that even if counsel had conducted a more thorough investigation, they may not have discovered the abuse. Maj. Op. at 46 n.21; Concurring Op. at 20–22. They base this contention, in part, on the false statement in both opinions that the record contains only one documented incident of abuse. Maj. Op. at 24–25; Concurring Op. at 20. Remarkable. Rule 32 counsel introduced about 273 pages of DHR records that included not only the photographs of a 10-year-old Davis's back heavily scarred from whippings, but reports of numerous other incidents of abuse. For example, the 1981 report alone noted several other incidents of abuse, including that Lillie used a switch and a belt to whip Davis whenever he misbehaved, stretching back at least a year. And a 1987 report concerning Davis's sister Hortense stated that Lillie kicked Davis out of the house and said she'd kick him out again if he misbehaved. I can't understand how the Majority and Concurring Opinions can suggest with a straight face that these records wouldn't have put counsel on notice that they should investigate whether Davis had been abused.

discovery within fourteen days had they sought it. So counsel did not receive any discovery from the State until November 12, 1993—about three weeks (one of which was Thanksgiving week) before Davis’s trial started. And they didn’t receive the State’s supplemental discovery until a week before trial began. Of course, that self-inflicted timeframe seriously limited any follow-up counsel could conduct before trial.

Fourth, though counsel moved for a psychological evaluation of Davis, they did not do so until precisely one week before trial began. And the evaluation did not occur until two days before trial started. That left no time for follow up and was too late for counsel to meaningfully consider and incorporate psychological evidence into their trial strategy.

Beyond that, the evaluation wasn’t a traditional psychological evaluation. Rather, Anne M. Storey, M.Ed., a certified psychometrist,¹⁴ merely administered the Wechsler Adult Intelligence Scale-Revised, the Wide Range Achievement Test-Revised, and the Minnesota Multiphasic Personality Inventory-2 (MMPI-2) to Davis and observed him as he took the tests. Storey determined from these tests that Davis

¹⁴ According to the American Psychological Association, psychometrics is “the branch of psychology concerned with the quantification and measurement of mental attributes, behavior, performance, and the like, as well as with the design, analysis, and improvement of the tests, questionnaires, and other instruments used in such measurement.” Psychometrics, APA Dictionary of Psychology, <https://dictionary.apa.org/psychometrics> [<https://perma.cc/2SED-RSKZ>].

fell “at the 6th percentile [on the IQ scale] and in the Borderline range of intelligence.”

Fifth, despite the shortcomings in the evaluation counsel requested Storey perform, Storey still noted that the tests “suggested” “[a]n emotional disturbance” and that Davis “may be . . . maladjusted, and emotionally unstable.” So as in *Wiggins*, 539 U.S. at 525, Davis’s counsel were on notice that they needed to further investigate Davis’s background. Yet counsel did nothing to follow up on that. (Of course, because of their own delays in procuring the testing, counsel had only one day before trial began at that point.).

Sixth, despite not undertaking any of this investigation themselves, counsel never hired an investigator to look into Davis’s background, either. That fact is undebatable.¹⁵ Yet even Giddens recognized the value of an investigator in his later work as a prosecutor. Indeed, he conceded during the Rule 32 hearing that “in prosecuting [his] cases now as a District

¹⁵ The Majority Opinion says, “Giddens did not recall whether he and Adams requested funds for a private investigator” and that he did “not believe” he had ever requested such funds in prior cases. Maj. Op. at 19. Not exactly. Giddens testified that he did not believe he had ever requested funds for a private investigator in any case he was defense counsel in, including Davis’s case. So while the Majority Opinion appears to suggest that there’s room to believe Giddens may have hired a private investigator for Davis, there’s really no question that counsel did not request funds for a private investigator in Davis’s case. And there’s no evidence to suggest that counsel paid for a private investigator on Davis’s case out of their own pockets. In short, the record unambiguously shows that counsel didn’t hire a private investigator—even though Giddens readily admitted knowing that he could have done so.

Attorney, [he] . . . rel[ies] upon the work of investigators.”¹⁶

Seventh, Giddens testified that the only member of Davis’s family whom counsel interviewed was Lillie, even though counsel’s mitigation strategy at trial consisted of having Davis’s family ask the jury for mercy and presenting Storey to say Davis had below-average intelligence—and nothing more. And even that interview of Lillie was perfunctory. Counsel’s file contains precisely one page of sparse notes. Ironically, most of that page merely identifies other relatives of Davis. Yet counsel never interviewed these relatives.

The state Rule 32 trial court concluded that Davis’s counsel also spoke to two of Davis’s five sisters. *Davis*, No. CC-93-534.60, at *35 n.24. But since counsel’s complete file includes no notes of such interviews, the state court based this conclusion on solely the most unreliable kind of multi-layered hearsay: Dr. Glen King, an expert in forensic psychology who evaluated Davis *after* his trial and sentencing, testified at the Rule 32 hearing that Davis had complained to him that counsel had spoken with only his mother and two sisters. But even assuming Davis wasn’t confused as to the timing of the interviews and the interviewing

¹⁶ The Concurring Opinion describes this discussion of investigators as a “red herring.” Concurring Op. at 3–4 n.2. It once again misses the point. To be sure, the Rule 32 trial court stated it “[did] not recall” assistance by private investigators “being commonplace in 1993.” But the point is that Davis’s counsel had three options: they could have conducted a meaningful investigation themselves, they could have hired a private investigator to do that, or they could have done both. Instead, they did none of these things.

attorneys (Rule 32 counsel versus trial counsel), there's no evidence to suggest that Davis had been in any meetings with his sisters—even assuming those meetings happened—to know for himself whether counsel interviewed two of his sisters.

Even so, for purposes of the analysis, I will assume that this hearsay is true. It still doesn't make the state courts' analysis reasonable under Supreme Court precedent.

Davis's adult sisters, Hortense and Mary, both testified at the Rule 32 hearing that Davis's trial counsel never spoke with them. That leaves his other three sisters, who were 13, 15, and 16 during Davis's trial. Even if we assume counsel talked to the 15- and 16-year-old sisters, they were at least seven years younger than Davis, so they would not have been able to provide information about at least his first ten or eleven years of life. And they would have been 11 and 12 years old, at the oldest, by the time Davis left the house. In any case, they were still living under the same roof as Lillie at the time of Davis's trial. So if there were home abuse to share, it would have been unreasonable to expect them to spill it for fear of retaliation—even if counsel interviewed them outside their mother's presence. In other words, interviewing only Lillie and the 15- and 16-year-old sisters to learn of Davis's family background would have been effectively the same thing as interviewing only Lillie.

And eighth, more generally, counsel did not spend an appropriate amount of time preparing for the penalty phase. Don't take my word for it—Giddens himself attempted to defend his lack of preparation by testifying at the Rule 32 hearing that his strategy for the

mitigation presentation “d[id]n’t take a lot of preparation.” And counsel’s billing records (attached as an appendix to this dissent) show counsel didn’t engage in much preparation.¹⁷ Indeed, based on his review of

¹⁷ The Concurring Opinion suggests that Davis’s counsel prepared for the mitigation phase simultaneously with the guilt phase, based on Giddens’s statement at the Rule 32 hearing that counsel has “to be prepared for” sentencing even during the guilt phase. Concurring Op. at 25 n.9. And it criticizes this Dissent for highlighting how little mitigation-specific preparation occurred. In support of its argument, the Concurring Opinion seems to suggest we cannot reliably distinguish between guilt-phase and mitigation-phase tasks, so we should construe all time entries as potentially involving mitigation-phase preparation. That reinvents the record here and defies counsel’s own admission. Here’s what Giddens actually said. He was asked directly whether he “started to prepare the guilt/innocence part of [Davis’s] case . . . [at] the same time [he] began to prepare the mitigation case.” And he responded, “Well, I mean, we had spoken with his mother sometime during that time and knew that she was going to be a witness in that event. And also got an order signed for a mental evaluation to use as mitigation if, you know, if it came out favorable . . . I mean, during the time frame of preparing for the case, you have to prepare for the sentence hearing as well because it will be immediately after the trial.” Far from suggesting counsel worked extensively on the mitigation case throughout the guilt-phase preparation, Giddens’s actual answer confirms, again, that the entire mitigation case consisted of interviewing Lillie and conducting a mental evaluation. And not surprisingly, counsel’s records support this statement. Before the guilt phase, which ran from December 6–10, 1993, the only entry from Adams’s records I can identify as probably relating to counsel’s mitigation investigation is “Conference with . . . client’s mother,” which occurred a week before the trial began. See *infra* at 34–36. Plus, as I’ve noted, the ABA Guidelines in place in 1993 directed counsel to conduct “independent investigations relating to the guilt/innocence phase and to the penalty phase of a capital trial.”

counsel's times sheets, John Mays, a qualified expert witness on defending capital cases, testified that counsel's time sheets show that they did not spend enough time preparing a mitigation case.

Even with all these failures to investigate, the state courts concluded they didn't matter because Davis did not call Adams to testify, and Adams may have done more than Giddens. In other words, the state courts found that, for the mitigation case, Davis failed to present enough evidence to overcome a presumption that, whatever Giddens may have failed to do, at least Adams acted reasonably. The Concurring Opinion echoes this. Concurring Op. at 23–27.

But that is an unreasonable application of Strickland. The record here starkly refutes any presumption that Adams acted reasonably. To start, the State stipulated that Adams's billing records represent the entirety of the time Adams spent substantively working on this case. So if it's not in the billing records, it didn't happen. And there is no indication Adams on his own conducted any of the investigatory tasks the Guidelines or Manual identify.

Indeed, the billing records show that Adams did not interview witnesses or undertake meaningful

ABA Guidelines for the Appointment and Performance of Def. Couns. in Death Penalty Cases guideline 11.4.1(A) (1989) (emphasis added). So they, along with counsel's time records, support any "line drawing" between preparation for the guilt phase and mitigation phase. Concurring Op. at 25 n.9. In short, while Giddens's testimony shows that meager mitigation-phase preparation may have occurred during the guilt-phase preparation period, it confirms counsel's lack of investigatory efforts.

preparations in advance of the penalty phase. For example, we know for certain that one of the two entries on Adams's billing records that lists "interviewed witnesses"—the entry for December 3, 1993 (three days before trial)—does not refer to any mitigation witnesses but rather, only guilt-phase witnesses. We know this because the billing records reflect that Adams was with Giddens for the entirety of this 12.5-hour entry,¹⁸ and Giddens testified that counsel did not interview any mitigation witnesses other than Lillie (which did not occur on December 3, 1993).

As for the only other entry in Adams's billing records that states "interviewed witnesses,"¹⁹ that one is

¹⁸ Giddens's and Adams's billing records for that day both begin with a notation that they were together and continue by listing all the places they went and the things they did in the exact same order. Both sets of records also attribute 12.5 hours to this block of time. More specifically, Giddens's billing records for December 3, 1993, contain an entry for 12.5 hours, accompanied by the following description: "Conference with co-counsel; trip to Channel 40; Anniston Star; **interviewed witnesses**; trip to crime scene; conference with judge; review evidence; conference with D.A.; trial preparation." (Emphasis added). Similarly, Adams's billing records for December 3, 1993, contain an entry for 12.5 hours, along with the following description: "Communication with co-counsel; trip to Channel 40; Anniston Star; **interviewed witnesses**; trip to crime scen[e]; communication with Judge; reviewed evidence at Anniston City Jail; reviewed video statements of co-defendant; conference with D.A.; trial preparation." (Emphasis added).

¹⁹ The only other possibly relevant time entry was on December 2, 1993, noting, among several other tasks, that Adams "Investigated [*sic*] witnesses." The reported 10-hour day also included within the block entry, "communication with co-counsel; conference with Judge; reviewed discovery; conference with Channel

for December 1, 1993, for 11.5 hours and appears in the following list: “Investigated, interviewed witnesses; reviewed discovery; visited crime scene; neighborhood; secured map of Anniston; met with printing co. for defendant’s Exhibit; Communication with co-counsel.” It’s clear from this list, which involved in-person trips to different locations to accomplish several of the identified tasks, Adams spent only a fraction of the 11.5 hours reported interviewing witnesses. And given that all the other tasks on this list had to do with the guilt phase of the trial, it’s clear that the interviews also dealt with the witnesses for the guilt phase.

40; trial preparation.” Obviously, given these other tasks, Adams did not spend a significant amount investigating witnesses. Nor is this conclusion “speculation,” as the Concurring Opinion asserts. *See* Concurring Op. at 24 n.9. Rather, it’s the only rational conclusion that the evidence supports. And in any case, we’ve already established that counsel didn’t interview any mitigation witnesses besides Lillie. Quite simply, that wasn’t enough in a capital case. *See, e.g., Williams*, 542 F.3d at 1340 (“Here, despite the availability of several of Williams’ family members, trial counsel sought mitigating evidence from only one person with firsthand knowledge of his background: his mother. By choosing to rely entirely on her account, trial counsel obtained an incomplete and misleading understanding of Williams’ life history.”); *Williams v. Alabama*, 73 F.4th 900, 907 (11th Cir. 2023) (“Williams testified that Funderburg asked him only general questions about his childhood, such as about family and school. Williams was never asked about his family background; whether he had been neglected; or whether he had been sexually, physically, or emotionally abused. These deficiencies were patently unreasonable.”), *vacated on other grounds*, 144 S. Ct. 2627 (2024); *see also Cooper v. Sec’y, Dep’t of Corr.*, 646 F.3d 1328, 1352 (11th Cir. 2011).

If that weren't enough, Giddens testified that he was unaware that anyone but Lillie was interviewed for the mitigation phase. And given that Giddens testified that he and Adams worked in concert on Davis's defense and that Adams wrote that he communicated with co-counsel on December 1, Giddens would have known if Adams had interviewed any mitigation witnesses that or any other day.

But more than that, we know that Adams did not interview any of Davis's adult family members who were the most likely to know about his upbringing—including those Lillie told counsel about during her interview. In fact, several family members testified at the Rule 32 hearing that counsel did not interview them: Davis's adult sisters who did not live with (and therefore were less beholden to) Lillie, Davis's cousin Andre Sigler, Davis's aunt Geneva, Davis's stepfather's niece Cynthia Denise Jacobs (who described herself as Davis's "cousin"), and Davis's step-father's sister Betty Jacobs. And Giddens admitted that they did not interview Davis's grandmother Alice Sigler.

In short, there is no reasonable basis upon which to entertain the idea—let alone to presume—that Adams, unbeknownst to Giddens, conducted his own stealth mitigation investigation that somehow brought Giddens's sub-par investigation up to the level of acceptable performance under *Strickland*. And while we don't have testimony from Adams, the record includes his time sheets and entire case file, which speak volumes, contrary to the Concurring Opinion's unfair and inaccurate characterization of the record as containing an "absence of evidence related to Adams's involvement in the case." Concurring Op. at 27.

To summarize, then, in the best light, counsel's entire mitigation investigation consisted of interviewing Davis for a few hours about the crime to be tried, arranging for last-minute psychometric testing for Davis, and interviewing Davis's physical abuser and her two underage children who lived with her (without asking her or Davis about whether Davis ever experienced abuse). Counsel requested no discovery from the State; sought no "written records," including "school records, welfare department records, . . . and any other piece of paper you think may exist," Alabama Cap. Def. Trial Manual at 28, from anyone else; and interviewed no other mitigation witnesses.

This is about as close as counsel can get to failing to undertake a mitigation investigation at all. Yet the Supreme Court has warned that "defense counsel [cannot] simply ignore[] their obligation to find mitigating evidence." *Rompilla*, 545 U.S. at 381. Rather, defense counsel act deficiently when "their failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment." *Wiggins*, 539 U.S. at 526.

As I've noted, Giddens rationalized this meager excuse for an investigation by saying that "a plea for mercy," which was the mitigation strategy he had settled upon, "doesn't take a lot of preparation." But settling on a strategy of little more than "a plea for mercy"²⁰ before a mitigation investigation is even conducted is the epitome of deficient performance. As

²⁰ The entire rest of the strategy involved arguing that Davis had low intelligence, based on the last-minute psychometric testing Storey performed.

the Supreme Court has explained, “strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.” *Strickland*, 466 U.S. at 690–91. And here, even less than “less than complete investigation” occurred before counsel decided not to investigate anything other than “a plea for mercy.”

Even Giddens said that “[i]f [he] had obtained photographs of a defendant in a capital case showing that he had been abused as a child, [he] would [have] consider[ed] . . . put[ting] those into evidence in the mitigation phase.”²¹ In other words, counsel conceded that it was worth conducting at least some investigation of whether Davis had been abused. Yet they never did so at all.

Under Supreme Court precedent, this was clearly deficient performance. That’s so because counsel’s failure to find important mitigating evidence amounts to deficient performance if counsel has “not fulfilled their obligation to conduct a thorough investigation of the defendant’s background.” *See, e.g., Wiggins*, 539 U.S. at 522 (cleaned up). That’s exactly what happened here: counsel did not fulfill their obligation to conduct a thorough (or almost any) investigation of Davis’s background.

²¹ As it turns out, DHR had photographs showing Davis’s back when he was ten years old, already heavily scarred from years of whipping.

iii. The state courts' "conspiracy of silence" theory belies reality and common sense.

Inexplicably, the state courts reached the opposite conclusion. Based solely on the fact that Davis and his abusive mother did not affirmatively volunteer that she had abused him, the state courts went so far as to accuse Davis of deliberately misleading trial counsel and participating in a "conspiracy of silence" with his mother and family to hide his abuse. *Davis*, 9 So. 3d at 554. In fact, the state courts said, "Davis is asking this Court to declare two competent trial lawyers incompetent due to the fact that they were manipulated by Lillie Bell-Davis, the Davis family, and Davis himself due to the family's conspiracy of silence." *Id.* at 556 (citation omitted). The courts then blamed Davis and his family for counsel's deficiency, remarking, "Quite simply, it is not trial counsel's fault, it is the fault of [Davis], of his mother, of Andre Sigler, and of the Davis family as a whole" *Id.*

The Concurring Opinion endorses this fiction, again blaming Davis, his abusive mother, and his family members whom counsel never questioned, and arguing that proper investigation would not necessarily have uncovered the abuse because the family members had not reported it to anyone before the Rule 32 hearing. *See* Concurring Op. at 23.²²

²² The Alabama appellate court and the Concurring Opinion note that Lillie "consistently and repeatedly denied" abusing Davis in the past, contributing to the so-called "conspiracy of silence." Concurring Op. at 21. The Concurring Opinion then criticizes Davis for not calling Lillie as a witness during the Rule 32 proceedings, "despite her availability and his knowledge that the

But this conspiracy theory is like something out of another universe. And the state courts' reliance on it to avoid applying Wiggins's rule that counsel must conduct a thorough investigation of the defendant's background, or reasonably decide such an investigation is unnecessary, was unreasonable.

For starters, it should come as no surprise that no one volunteered the information about the abuse when (1) counsel didn't ask about it, and (2) the only people counsel interviewed were the abuser, the abuse victim, and maybe, at best, two minor children who still lived with the abuser and remained subject to her abuse.

Yet the state courts and the Concurring Opinion seem to think that the several other Davis family members and close friends should have, on their own, discerned that evidence about Lillie's abuse of Davis could be helpful to Davis's mitigation case. Then, after

abuse inflicted by her was key to his mitigation case." *Id.* For starters, Lillie's absence from the Rule 32 proceedings is irrelevant. By then, once Davis knew the significance of the abuse evidence, Davis and his counsel had more than enough testimony to prove it without needing to call Lillie, Davis's abuser. And the state courts found "that Davis was abused by his mother." *Davis*, 9 So. 3d at 553. Nobody disputes that this is true. Plus, we also know that counsel never asked Lillie if Davis suffered abuse as a child. Not only that, but nobody disputes that counsel were unaware of the abuse, which means we know that Lillie did not voluntarily disclose it to counsel. Of course, that's anything but surprising. On the other hand, it is absurd to suggest, as the Alabama appellate court and the Concurring Opinion do, that Davis is somehow to blame for Lillie's failure to affirmatively volunteer the horrific abuse she inflicted upon Davis, especially because she denied it in the past to DHR officers.

somehow divining this legal insight, the state courts and Concurring Opinion apparently believe Davis's family members should have taken action to identify and seek out Davis's counsel, and unsolicited, give them this information. The absurdity of this theory speaks for itself. And Davis's family members' failure to engage in this improbable series of realizations and actions does not somehow suggest that they all got together to keep this information from counsel who never bothered to interview them in the first place. This is hardly the stuff of a "conspiracy."

Even less convincing is the state courts' view that Sigler willingly took part in this alleged "conspiracy of silence." *See Davis*, 9 So. 3d at 556. Specifically, Sigler testified that "[Davis] wasn't given the opportunities that a lot of people are given coming up." Counsel asked, "When you say that, what do you mean[?]" And Sigler responded, "I think [Davis] was missing a lot as he was coming up. People to rely on . . . [and] people who could . . . help him out." The state courts suggest Sigler's answers purposely hid Davis's abuse. The state courts miss the point of counsel.

For starters, it was counsel's job to know what information Sigler possessed. But counsel didn't so much as speak with Sigler until the day Sigler testified—and even then, counsel spoke to Sigler only during a brief trial recess. Plus, counsel never asked Sigler about any abuse. Nor did counsel even tell Sigler what he was going to ask before putting Sigler on the stand. So Sigler had no reason to mention Davis's abuse, and counsel could not ask thoughtful follow-up questions during Sigler's testimony. Second, Sigler is not an attorney, and it is unreasonable to expect

Sigler to have known on his own to discuss Lillie's abuse of Davis when counsel never asked any question directly related to that type of testimony. In fact, Sigler's answer was directly responsive to the question counsel asked. And when Sigler testified that Davis "was missing . . . [p]eople to rely on" and people who could "help him," defense counsel asked no questions about why Lillie wasn't such a person to Davis.

But the state courts suggest it was the responsibility of Sigler, a non-lawyer whom counsel did not even prepare to testify, to know and then decide while on the stand that testifying about Davis's domestic abuse would be helpful to the mitigation case. Once again, the absurdity of this argument speaks for itself. As for Davis, it's true that Giddens testified that Davis talked about only the facts of the crime and his defense to that crime in their meetings. But counsel met with Davis for a total of only a few hours. And counsel never asked Davis questions designed to reveal whether he had ever been abused. Nor is Davis an attorney. It wasn't Davis's job to know on his own that he even needed to discuss mitigation (as opposed to a defense to the crime he was on trial for), let alone what might be relevant to mitigation. That was counsel's job. And that was especially so, given that Davis's IQ falls in the bottom 6% of the population. Add to that the fact that Davis grew up with so much abuse that he may well not have even realized that there was anything unusual about it without direct questions, and it is astounding that the state courts and Concurring Opinion blame counsel's failure on Davis.

Apparently recognizing the unreasonableness of its position, the Concurring Opinion points to Davis and

his family's failure when Davis was a child to report Lillie's abuse of Davis to try to bolster their baseless "conspiracy of silence" theory. Concurring Op. at 22 ("[E]very single family member and friend that testified at the [Rule 32] evidentiary hearing stated that they never told anyone about the abuse and never reported the abuse to the authorities."). First off, it's not clear who the Concurring Opinion thinks was in a position to report the abuse: the minor Davis? His minor sisters who were still subject to Lillie's abuse? Davis's victimizing mother? And second, Davis's family members' failures when Davis was a child to affirmatively report Davis's abuse do not somehow support the notion that his family members would have refused years later to discuss Davis's abuse if affirmatively asked about it when it might have resulted in a life-imprisonment sentence instead of a death sentence.

Even if I wore a tin-foil hat, I couldn't understand how the Concurring Opinion and state courts' conclusion that counsel's performance wasn't deficient—based on an implausible and outlandish conspiracy theory—is not unreasonable.

The Concurring Opinion's reliance on *Newland v. Hall*, 527 F.3d 1662 (11th Cir. 2008), and *Stewart v. Secretary, Department of Corrections*, 476 F.3d 1193 (11th Cir. 2007), to support this unreasonable conclusion is misplaced, no matter how hard the Concurring Opinion tries to squeeze Davis's square peg of a case into Newland and Stewart's round hole. The Concurring Opinion cites the cases for the ideas that "when a petitioner does not mention a history of physical abuse, a lawyer is not ineffective for failing to discover or to offer evidence of abuse as mitigation," *Newland*, 527

F.3d at 1202, and that counsel has no constitutional obligation to “scour a defendant’s background for potential abuse given the defendant’s . . . failure to mention the abuse,” *Stewart*, 476 F.3d at 1211.

But no decision can hold anything beyond the facts of that case. *Edwards v. Prime, Inc.*, 602 F.3d 1276, 1298 (11th Cir. 2010); *see also Nelson v. Tompkins*, 89 F.4th 1289, 1303 (11th Cir. 2024) (Ed Carnes, J., concurring) (collecting cases). And *Newland*’s and *Stewart*’s facts don’t even bear a passing resemblance to this case. In *Newland*, the Court emphasized that the defendant did not provide counsel with so much as the names of family members; here, in contrast, counsel had the names of several family members available to them. Indeed, counsel’s notes even listed family members. And in *Stewart*, counsel had “frequent interaction” with the defendant. But here, counsel met with Davis for only a few hours total and spoke almost exclusively, if not exclusively, about the facts of the crime. Neither *Newland* nor *Stewart* stands for a broad proposition that any time counsel fails to investigate a defendant’s background and the defendant, in turn, does not proactively disclose background information, counsel was not ineffective.

To the contrary, the Supreme Court has repeatedly ruled that “counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Wiggins*, 539 U.S. at 521 (quoting *Strickland*, 466 U.S. at 690–91). And we’ve applied that rule to find deficient performance by attorneys in case after case. *See, e.g., Williams v. Allen*, 542 F.3d 1326, 1340 (11th Cir. 2008) (collecting cases); *see also Williams v. Alabama*, 73

F.4th 900, 907 (11th Cir. 2023) (“*Williams* testified that [counsel] asked him only general questions about his childhood, such as about family and school. *Williams* was never asked about his family background; whether he had been neglected; or whether he had been sexually, physically, or emotionally abused. These deficiencies were patently unreasonable.”), vacated on other grounds, 144 S. Ct. 2627 (2024). Counsel certainly did not fulfill their duty to perform a reasonable investigation or to make a reasonable decision that made any further investigation unnecessary here. And “a federal court may grant relief when a state court has misapplied a governing legal principle to a set of facts different from those of the case in which the principle was announced.” *Wiggins*, 539 U.S. at 520 (cleaned up). The Alabama courts’ conclusions as to the investigation here were contrary to clearly established Supreme Court precedent, for the reasons I’ve explained.

II. The state courts’ determination that counsel’s deficient performance did not prejudice Davis was “contrary to, [and] involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,” 28 U.S.C. § 2254(d)(1).

The second prong of an ineffective-assistance claim requires a petitioner to show that counsel’s deficient performance prejudiced him. *Wiggins*, 539 U.S. at 521. To establish prejudice, a petitioner must show “a reasonable probability that, but for counsel’s

unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694.²³

²³ Unlike for the performance prong, we afford AEDPA deference but not double deference to state courts’ resolution of Strickland’s prejudice prong. See *Evans v. Sec’y, Dep’t of Corr.*, 703 F.3d 1316, 1333–36 (11th Cir. 2013) (*en banc*) (Jordan, J., concurring). The Majority Opinion notes that other circuits have held double deference applies to the prejudice prong, too. See *Foust v. Houk*, 655 F.3d 524, 534 (6th Cir. 2011); *Anaya v. Lumpkin*, 976 F.3d 545, 554 (5th Cir. 2020). Most respectfully, I disagree with these courts. On the performance prong, we afford double deference because there are, in fact, two layers of deference. They are (1) Strickland’s instruction that “[j]udicial scrutiny of counsel’s performance must be highly deferential,” including a presumption of reasonable professional judgment, 466 U.S. at 689–90, and (2) AEDPA’s deference requirements. *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011). The deference afforded under the first layer goes towards counsel’s performance, not towards any prejudice caused by it. And while Strickland’s prejudice standard has teeth—the petitioner must show a “reasonable probability” that the result of the case would have been different absent the errors, *Strickland*, 466 U.S. at 694—that does not equate to deference because, simply, there is nothing to defer to. We don’t defer to counsel’s conduct when considering prejudice because prejudice concerns whether the outcome could have been different. And we don’t defer to the outcome itself beyond considering whether a reasonable probability exists that it would have been different. In any event, even if we label our analysis “double deference” on the prejudice prong, it would not substantively change anything because, again, *Strickland* does not demand deference to anything on the prejudice prong, anyway. No matter what we call it, on the prejudice prong, we’re still applying AEDPA’s deferential lens to the question of whether the state courts reasonably determined that Davis did not show a reasonable probability that the outcome of his case would have been different absent the errors.

Here, the ineffective performance I've described changed the entire nature of Davis's mitigation case because it omitted both evidence that would have lessened the impact of the aggravating factors and evidence that would have increased the weight of the mitigating circumstances. Had counsel's performance not been deficient in even one of these respects, a reasonable probability exists that the jury would have returned a penalty recommendation of life in prison instead of death. And that's doubly so, had counsel performed appropriately with respect to both the aggravating and mitigating factors.

At trial, the State relied on two aggravating factors in seeking the death penalty: (1) that the murder occurred during the course of a robbery, and (2) that Davis had previously been convicted of a crime involving violence or threat of violence. Hearing that the facts of the only conviction supporting this second aggravating factor involved a pizza heist with no violence, no weapons, and no real threats, and no one was hurt would have severely undermined the aggravating nature of Davis's prior conviction. In fact, it's hard to imagine how a crime involving violence or threat of violence could be carried out with less violence than Davis's pizza heist. Who would think that a nonviolent robbery of this nature made him more deserving of the *death penalty*?

As the district court here recognized, "[c]ommon sense does suggest that testimony that Davis went along with a group of boys who ordered and then stole several pizzas and \$35 from a delivery person, where no gun or weapon was involved and no one was injured, could have been more compelling to a jury than an

argument by defense counsel that [Davis’s] prior conviction and sentence were for the lowest degree of robbery in Alabama.”²⁴ *Davis*, 2016 WL 3014784, at *59.

And more importantly, *Rompilla* requires this same conclusion.²⁵ As I’ve explained, see *supra* at Section

²⁴ The Majority Opinion criticizes this Dissent for “downplay[ing] the robbery” and evoking “images of juvenile pranks, and a ‘boys will be boys’ attitude.” Maj. Op. at 44 n.20. But of course, I don’t suggest that any robbery is good. *Cf. United States v. Perez*, 943 F.3d 1329, 1330 (11th Cir. 2019). Still, as the district court noted, it’s common sense that there’s a world of difference between a few young men, with one making a finger gun to steal some pizzas from a pizza-delivery man who said he didn’t feel threatened, and a crime involving violence or a threat of violence that involves real guns, shooting, injuries, and death. And the second crime I’ve described provides a whole lot more justification for finding the violence-crime aggravator supports a death sentence.

²⁵ The Majority Opinion insists that “*Rompilla* does not aid us in assessing whether the [state courts] unreasonably determined that prejudice was lacking in this case” because *Rompilla* reviewed the prejudice prong de novo, rather than under AEDPA deference. Maj. Op. at 50. Two responses: first, as I explain below, *see infra* at 50, the state courts never expressly reached the prejudice prong as to the pizza heist, and so it is unlikely AEDPA deference even applies here. But second, even if AEDPA deference is appropriate when we consider Davis’s argument that counsel’s failure to investigate the pizza heist prejudiced Davis, the fact that *Rompilla* applied de novo review does not mean its holdings are irrelevant to our analysis. True, the Supreme Court has stated *Rompilla* “offer[s] no guidance with respect to whether a state court has unreasonably determined that prejudice is lacking.” *Cullen*, 563 U.S. at 202. But that does not mean *Rompilla* offers no guidance as to whether the conduct *Rompilla* involves may cause prejudice. And that in turn bears on the analysis of whether a state court’s prejudice decision was reasonable or not. As I’ve noted, *Rompilla* and Davis’s case involve the same

I.A, *Rompilla*'s facts were materially indistinguishable from counsel's failure here to learn the facts of the pizza-heist conviction. In both cases, counsel knew that the State intended to rely on the uninvestigated prior conviction to prove the aggravating factor that the defendant had previously been convicted of a crime of violence. *See Rompilla*, 545 U.S. at 383–84. In both cases, despite this knowledge, counsel didn't bother to learn the facts underlying the prior conviction, even though that information was readily available to counsel. *See id.* at 384–85. In that situation, the Supreme Court concluded, "We may reasonably assume that the jury could give more relative weight to a prior violent felony aggravator where defense counsel missed an opportunity to argue that circumstances of the prior conviction were less damning than the prosecution's characterization of the conviction would suggest." *See id.* at 386 n.5. And in Davis's case, the circumstances of the prior conviction were in fact significantly less damning than the prosecution's characterization of the conviction suggested.

The state courts disposed of Davis's first claim (that counsel were ineffective for failing to learn and present the facts of his pizza-heist conviction when they knew the State intended to use only the robbery conviction to support application of the prior-violent-conviction aggravating factor) on the deficient-

deficient attorney conduct. And "[b]ecause [*Rompilla*] illuminate[s] the kinds of mitigation evidence that suffice to establish prejudice under *Strickland*, [it] provide[s] useful, but not dispositive, guidance for courts to consider when determining whether a state court has unreasonably applied *Strickland*." *See id.* at 241 (Sotomayor, J., dissenting).

performance prong. They never expressly reached the prejudice prong as to the pizza heist.

The Majority Opinion acknowledges this fact, but it nonetheless reads deeply between the lines of the Alabama courts' decisions to conclude that they ruled that counsel's deficient performance did not prejudice Davis. Maj. Op. at 42–43 n.19. No matter. Whether the Alabama courts made a prejudice ruling on counsel's failure to learn the facts of the pizza heist goes to only the standard we apply in reviewing the state courts' decisions: *de novo* review or AEDPA deference. And here, under either standard, a conclusion of no prejudice just can't hold up.

To the extent we are willing to attribute the Alabama courts' deficient-performance analysis to a prejudice analysis, the Alabama courts concluded that counsel's failure to learn the pizza-heist facts was not prejudicial for three incorrect reasons: (1) the Alabama courts wrongly claimed that the state in *Rompilla* invoked only one aggravating factor, while the State here invoked two (in fact, *Rompilla* involved three aggravating factors, and the number of aggravating factors did not play a role in the Supreme Court's prejudice finding); (2) the Alabama courts excused counsel's failure to learn and present the facts of the pizza heist because counsel told the jury the far less compelling fact that third-degree robbery is the "lowest degree of robbery"; and (3) the Alabama courts thought that counsel's review of only the Alabama State Action Summary (which identified only the facts of conviction, date of conviction, original charges, and sentence, but not the facts underlying pizza-heist conviction) was good enough. *See supra* at Section I.A.

I've previously explained why each of these reasons presents an unreasonable basis for distinguishing *Rompilla*. *See id.* And the reasons don't somehow improve just because we consider them under the heading of prejudice.

Apparently recognizing the problems with the Alabama courts' efforts to distinguish *Rompilla*, which is directly on point here, the Majority Opinion attempts to give the Alabama courts an assist. In this regard, the Majority Opinion comes up with two reasons of its own why it says *Rompilla* doesn't demand a finding of prejudice in this case.

First, the Majority Opinion posits that the facts of the pizza heist may not have helped Davis's case. Rather, the Majority Opinion asserts, "it is equally plausible that the facts of the pizza robbery could have pointed to an escalating pattern of violence given that it was close in time to the 1993 murder, and the 1993 murder was also committed during a robbery." Maj. Op. at 51.

But that is nonsensical. The jury already heard that Davis had a third-degree robbery conviction and that the conviction supported the State's requested prior-violent-felony aggravator. It also knew that the pizza heist occurred close in time to the 1993 murder and that the 1993 murder happened during a robbery. So the non-violent facts of the pizza heist—the only prior conviction supporting the prior-felony aggravator—only would have minimized (or eradicated) any potential assumption of violence. Plus, as a practical matter, any time a person with any prior conviction is on trial for murder, if he hasn't previously committed murder, the current charges "point[] to an escalating pattern

of violence.” In sum, the Majority Opinion’s suggestion that the jury may have used the facts of the pizza heist to find more of a reason to recommend death is unreasonable and defies reality.

Second, the Majority Opinion contends that “any appeal to the allegedly nonviolent nature of the pizza robbery would have potentially opened the door for the state to introduce as rebuttal evidence Davis’s violent behavior during his incarceration for the pizza robbery.” Maj. Op. at 51–52. I disagree.

Stating the facts of the pizza heist would have gone only to the weight (if any) that the jury should apply to the state’s prior-violent-conviction aggravator. And a defendant’s conduct in jail after his prior conviction does not make any fact that could have a bearing on the weight *owed to the prior conviction as an aggravating factor* more or less likely (the definition of “relevance,” *see* Ala. R. Evid. 401). So evidence concerning Davis’s conduct in jail was irrelevant and non-responsive to the facts of the pizza heist.

The cases the Majority Opinion cites are not to the contrary. Rather, consistent with my position, each requires that the admitted evidence have “probative value.” Maj. Op. at 53–54 (citing *Lindsay v. State*, 326 So. 3d 1, 53 (Ala. Crim. App. 2019) and *Whatley v. State*, 146 So. 3d 437, 481–82 (Ala. Crim. App. 2010)).²⁶ As I’ve noted, evidence of behavior during

²⁶ In *Lindsay*, the Alabama Court of Criminal Appeals affirmed the admission of the defendant’s statements about prior bad acts. 326 So. 3d at 53. But there, the prior bad acts related directly to the defendant’s motive in the offense at issue. The defendant

incarceration sheds no light on how much weight the pizza heist itself should garner as an aggravating factor. Nor was that evidence relevant to any of the statutory aggravating circumstances in Alabama at the time. *See* Maj. Op. at 7 n.4.

Because the facts of the pizza heist would have diminished the impact of the prior-violent-conviction aggravator, the State would have been left with only one real aggravating factor. Plus, the court found a mitigating factor (Davis's age, which was 23 at the time of trial) against which that remaining aggravating factor would have had to have been balanced.

And we already know that, even with counsel's ineffective assistance in failing to learn and present the

confessed that he murdered his daughter because a religious deity told him to, and the statements about the prior bad acts related to why he began to follow that religion. *Id.* The court never implied that evidence about prior bad acts unrelated to the offense at issue would always be admissible in sentencing. *Whatley* helps the Majority Opinion no more. There, the Alabama Court of Criminal Appeals explained that evidence of future dangerousness can be admitted during the penalty phase. 146 So. 3d at 482. But it did so because the prosecution in that case had requested before sentencing to admit evidence of future dangerousness. Here, the prosecution did not argue future dangerousness. Not only that, but in *Whatley*, the defendant claimed he changed and was remorseful after committing the murder for which he was convicted. *Id.* Evidence of bad conduct while in jail was directly relevant to rebutting those arguments. *Id.* Again, the court never suggested that evidence of bad acts committed while incarcerated for an unrelated crime—which is what the Majority Opinion suggests would have become admissible in Davis's case if the facts of the pizza heist were admitted—would be admissible, let alone probative of the weight the aggravator for having committed a prior violent crime should be given.

facts of Davis's pizza-heist conviction to the jury, the jury was five to seven in favor of life imprisonment two-thirds of the way through deliberations (and the ultimate verdict wasn't unanimous).

The Majority Opinion has two responses to this. First, it responds that the state court's failure to consider "the circumstances of the jury's decision . . . does not render [the state court's] decision objectively unreasonable under AEDPA," because "the Supreme Court has never held that a jury's hesitation in reaching a verdict is necessarily an indicator of prejudice or that such a factor must be considered or should weigh more heavily in the prejudice analysis under Strickland." *Id.* at 57. But the jury's split is significant to the determination of prejudice here. It is unreasonable, not just "incorrect," *id.* at 59, to conclude that there is no "reasonable probability that at least one juror would have struck a different balance" but for counsel's errors, given the seven-five split in deliberations that occurred even without these mitigating facts, *Wiggins*, 539 U.S. at 537.

Second, the Majority Opinion relies on the fact that the jury delivered its death verdict within an hour to suggest that the fact that five jurors favored life imprisonment carries little if any weight. Maj. Op. at 57–59 n.25. That completely misses the point. Even in the face of counsel's deficient performance, five jurors felt strongly enough that life was the more appropriate sentence that they sent a note to the judge saying so. At that point, only two more votes would have resulted in a recommendation by the jury for a life sentence. Had counsel reviewed and shared the mitigating facts of the pizza heist conviction—and given the

sizeable chunk of the jury that favored life even with the powerful nature of counsel's deficiency—it is reasonably probable that at least two more of the remaining seven jurors would have agreed with the other five. Had they done so, the jury would have returned a recommendation for life imprisonment, not death.

Any other conclusion is contrary to *Rompilla*. For this reason alone, we should grant Davis's petition for a new penalty-phase trial.

But it's even worse than that. As I've explained, counsel were also deficient in their failure to conduct any real background investigation—an error that caused them not to learn of and then present (among other things) the horrific abuse Lillie inflicted on Davis when he was growing up. The Supreme Court has described mitigation evidence similar to this as “powerful.” *Wiggins*, 539 U.S. at 534–35 (describing evidence that the petitioner had “experienced severe privation and abuse in the first six years of his life while in the custody of his alcoholic, absentee mother” and that he had “suffered physical torment, sexual molestation, and repeated rape during his subsequent years in foster care”). And here, even the state courts found “that Davis was abused by his mother to an extent that would have rendered it relevant to the issue of the appropriate penalty determination.” *Davis*, 9 So. 3d at 553.

Yet somehow the state courts found no prejudice stemming from counsel's failure to investigate Davis's background, including his abuse. In support of this conclusion, the state courts said that the abuse evidence was a “double-edged sword” because “some of the evidence indicated that Davis had good role

models in his life” and Davis’s violent behavior did not begin until after “he [was] away from his mother and her influence.” *Id.* at 562–63. But that misunderstands the purpose of the mitigation evidence of abuse.

The state courts’ no-prejudice finding fails to account for the fact that Davis grew up in a violent household, so he may have learned violence was a permissible way to deal with things. It also once again disregards evidence: specifically, two of the “good role models” that the state courts said were a double-edged sword died when Davis was 15 years old, within a week of one another, only adding to the instability and trauma of Davis’s upbringing. No reasonable juror could have looked at the additional evidence of Davis’s background and concluded he was not disadvantaged. And “evidence about the defendant’s background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background may be less culpable than defendants who have no such excuse.” *Johnson v. Sec’y, Dep’t of Corr.*, 643 F.3d 907, 935–36 (11th Cir. 2011) (cleaned up).²⁷

²⁷ “[T]he fact that [Davis’s] siblings and his cousin had gone on to lead successful lives, despite experiencing the same physically abusive upbringing,” Maj. Op. at 49, is also unavailing because it is based on a false premise—that Davis’s siblings and cousin had to endure “the same physically abusive upbringing.” In fact, Davis’s older sister Hortense testified that Davis got the worst of the abuse. Not only was his abuse more severe, but Lillie beat Davis until he was much older than Hortense was when Lillie stopped. And Sigler testified that he witnessed Davis receive “real bad whippings,” some that “lasted over five minutes” and consisted of “20 or more licks.”

The state courts also concluded that “the facts of this crime and the two aggravating circumstances proven by the State far outweighed the one statutory mitigating factor and these non- statutory mitigating factors.”²⁸ *Davis*, 9 So. 3d at 562. But this reasoning didn’t account for the actual facts of the only conviction the State relied on to support the violent-prior-crime aggravating factor—facts that severely undermined the factor’s usefulness as an aggravating one warranting the death penalty.

Yet when we evaluate prejudice, we must consider “the totality of the available mitigation evidence . . . in reweighing it against the evidence in aggravation.” *Williams*, 529 U.S. at 397–98. And especially when we consider counsel’s failure to show the jury Lillie’s abuse of Davis and counsel’s failure to present the circumstances of Davis’s prior conviction to the jury, the “evidence adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury.” *Rompilla*, 545 U.S. at 393.

On top of that, again, the state courts failed to consider at all in their prejudice analysis that, at one point, five members of the jury favored life without parole and not the death penalty, and even at the verdict, the jury was not unanimous. But “when we have evaluated prejudice, we have frequently considered the circumstances of the jury’s decision to assess whether there is ‘a reasonable probability that at least

²⁸ The phrase “these non-statutory mitigating factors” in the sentence quoted above refers to (1) the abuse evidence and (2) Davis’s “below-average intellect.” *Davis*, 9 So. 3d at 562. It does not encompass the evidence about the pizza heist.

one juror would have struck a different balance.” *Sears v. Warden GDCP*, 73 F.4th 1269, 1299 (11th Cir. 2023) (per curiam) (quoting *Wiggins*, 539 U.S. at 537).

In *Sears*, like here, the jury made clear through notes to the court during deliberations that it was not yet unanimous in its verdict, and we granted the habeas petition acknowledging that “the jury still struggled to reach a consensus regarding a death sentence” even without the additional mitigation evidence at issue. *Id.* at 1299–1300. *See also Hardwick v. Sec’y, Fla. Dep’t of Corr.*, 803 F.3d 541, 564 (11th Cir. 2015) (finding prejudice where, even without the compelling mitigation evidence that emerged in later stages, “the jury still came within a single vote of recommending life”); *Daniel v. Comm’r, Ala. Dep’t of Corr.*, 822 F.3d 1248, 1276 (11th Cir. 2016) (finding prejudice partially because “if one more juror voted for a sentence of life without parole, there could have been no recommendation for death”); *Cave v. Singletary*, 971 F.2d 1513, 1519 (11th Cir. 1992) (“[D]espite the presentation of no mitigating circumstances, [petitioner] came within one vote of being spared execution.”); *Blanco v. Singletary*, 943 F.2d 1477, 1505 (11th Cir. 1991) (finding that “there was a reasonable probability that [petitioner’s] jury might have recommended a life sentence” “[g]iven that some members of [petitioner’s] jury were inclined to mercy”); *Lawhorn v. Allen*, 519 F.3d 1272, 1297 (11th Cir. 2008) (finding prejudice after noting that “one juror voted to recommend life instead of death” so defendant “needed only to convince two other jurors to alter the outcome of the proceedings”).

The Majority Opinion tries to sidestep these cases, arguing that we conducted Sears’s prejudice analysis under the *Brecht* standard, not under *Strickland*. See Maj. Op. at 58 n.25. But we’ve found juror splits relevant to the prejudice inquiry whether under *Brecht* or *Strickland* and whether pre-AEDPA or under AEDPA. See, e.g., *Lawhorn*, 519 F.3d at 1297–98.

Other circuits have also confronted cases in which the trial jury “initially reported a deadlock regarding [petitioner’s] sentence,” and concluded that “[e]ven a slightly more compelling case for mitigation . . . might have altered the outcome of the sentencing phase of [petitioner’s] trial.” *Mason v. Mitchell*, 543 F.3d 766, 780 (6th Cir. 2008). When considering prejudice, “[t]he jury’s initial hesitance in reaching a verdict in the penalty phase . . . weighs towards a finding of prejudice,” and “[a] jury note indicating hesitance in reaching a penalty phase verdict suggests that a death sentence for [petitioner] was not a foregone conclusion.” *Sanders v. Davis*, 23 F.4th 966, 994–95 (9th Cir. 2022) (internal quotation marks and citation omitted) (alteration adopted); see also *Stankewitz v. Wong*, 698 F.3d 1163, 1175 (9th Cir. 2012) (“Another indicator of prejudice . . . is the difficult time the jury had reaching a unanimous verdict on death.”); *Williams v. Stirling*, 914 F.3d 302, 318 (4th Cir. 2019) (“[P]ersuasive mitigating evidence for a jury—particularly a deadlocked one—considering the death penalty” could be “outcome-determinative[.]”).

The state courts’ failure to consider the effect of the evidence that counsel would have uncovered but for their deficient performance, on a jury where five votes favored life without parole two-thirds of the way

through deliberations and the ultimate death verdict was not unanimous, was also unreasonable.

In short, the state courts' conclusion that counsel's failure to learn and present the moderating details of the prior conviction that the State used to support one of two aggravating factors, and that counsel's failure to conduct any real mitigation investigation, including of Davis's abuse, was not prejudicial was contrary to federal law as clearly established by the Supreme Court—namely, in *Strickland*, *Rompilla*, and *Wiggins*.

Because the state courts' resolution of Davis's claims is contrary to and involves unreasonable applications of clearly established federal law, I would grant Davis's petition as it seeks a new penalty-phase trial. I therefore respectfully dissent from the Majority Opinion's decision not to do that.

APPENDIX

(Counsel's Billing Records)

App-160

APPENDIX		Case Number
State of Alabama Judicial System Form C-62A 10/1/90	ATTORNEY'S FEE DECLARATION (Adult)	7616 CC#931534
Appropriate court: Circuit Court of <u>GALHOUN</u> County ☐ District Court of _____ County Alabama Court of Criminal Appeals ☐ Supreme Court of Alabama		
Title of Case: <u>STATE OF ALABAMA VS. JIMMY DAVIS</u> Charge: <u>CAPITAL MURDER</u> Imposition case numbers and charges or convictions: _____		
The undersigned attorney declares that on (date) <u>6-02-93</u> , the Honorable <u>MALCOLM STREET, JR.</u> , Judge, appointed the undersigned to present the above-named defendant or appellant, and on (date) <u>3-04-94, 1-20-94</u> the case was disposed of by <u>Found guilty of Capital Murder, sentenced to death</u> <u>and attorney allowed to withdraw</u>		

App-161

SG200037

1647

ATTORNEY'S FEE DECLARATION

STATE OF ALABAMA VS. JIMMY DAVIS

Charge: Capital murder
Case Number: CC-93-534
Appointed: MALCOMB STREET, JR.
Date: 06-02-93
Disposition: Found guilty of capital murder, sentenced to death. Attorney allowed to withdraw
Date: 03-04-94; 3-30-94

IN COURT TIME

<u>DATE</u>	<u>DESCRIPTION</u>	<u>TIME</u>
03-04-94	Sentence hearing	2.5
02-14-94	Sentence hearing (cont.)	2.0
12-10-93	Trial	9.0
12-09-93	Trial	12.5
12-08-93	Trial	8.0
12-07-93	Trial (striking jury)	10.25
12-06-93	Trial (striking jury)	14.0
11-24-93	Pre-trial	2.5
		<u>60.75</u>

OUT OF COURT TIME

<u>DATE</u>	<u>DESCRIPTION</u>	<u>TIME</u>
04-01-94	Reviewed Court's order	.1
03-29-94	Conference with co-counsel; communication with Court	1.0
03-08-94	Conference with co-counsel; prepared Motion to Withdraw; Communication with Court	1.5
03-03-94	Sentence preparation; reviewed file; made notes	1.5
02-14-94	Sentence preparation	1.0
02-10-94	Sentence preparation; discussed case with co-counsel; reviewed file	1.5
12-09-93	Reviewed notes; prepared written jury instructions	7.0

SG200037

App-162

SG200038

1648

12-08-93	Reviewed trial notes; trial preparation	5.0
12-07-93	Reviewed file for trial	4.0
12-06-93	Reviewed voir dire; file	4.5
12-05-93	Trial preparation	5.0
12-04-93	Trial preparation; conference with co-counsel	6.5
12-03-93	Communication with co-counsel; trip to Channel 40; Anniston Star; interviewed witnesses; trip to crime scene; communication with Judge; reviewed evidence at Anniston City Jail; reviewed video statements of co-defendant; conference with D.A.; trial preparation	12.5
12-02-93	Investigated witnesses; communication with co-counsel; conference with Judge; reviewed discovery; conference with Channel 40; trial preparation	10.0
12-01-93	Investigated, interviewed witnesses; reviewed discovery; visited crime scene; neighborhood; secured map of Anniston; met with printing co. for defendant's Exhibit; Communication with co-counsel	11.5
11-30-93	Reviewed discovery	4.0
11-29-93	Conference with client; client's mother; communication with co-counsel; reviewed file	6.0
11-28-93	Reviewed discovery; made notes	2.0
11-26-93	Reviewed discovery; made notes; legal research	4.0
11-24-93	Communication with co-counsel; conference with D.A.; investigated case file (scene)	3.5
		92.1

290⁰⁰ Calhoun - Cheburne
Mental Health

SG200038

App-163

State of Alabama
Unified Judicial System
Form C-62A 10/1/90

ATTORNEY'S FEE DECLARATION
(Adult)

Case Number
CC-93-534

Mark appropriate court:
☒ Circuit Court of Calhoun County
☐ District Court of 0003 County
☐ Alabama Court of Criminal Appeals
☐ Supreme Court of Alabama

Style of Case: STATE OF ALABAMA VS. JIMMY DAVIS
 Charge: Capital Murder
 Companion case numbers and charges or convictions:

The undersigned attorney declares that on (date) 4-9-93, the Honorable Gus Colvin, Judge, appointed the undersigned to represent the above-named defendant or appellant, and on (date) 3-4-94 the case was disposed of by sentencing after conviction and on 3-30-94 order granting undersigned attorneys Motion to Withdraw (plea of guilty, conviction, acquittal, affirmance, reversal, cert. denied)

(1) In Court Appearance	Total Hours	<u>65.25</u>	x	\$40.00 =	\$ <u>2,610.00</u>
(2) Out of Court Preparation Trial Level	Total Hours	<u>50.00</u>	x	\$20.00 =	\$ <u>1,000.00</u>
(3) Out of Court Preparation Appellate Level	Total Hours		x	\$40.00 =	\$
(4) Extraordinary Expenses (If approved in advance by court.)	Total Amount of Expenses				\$ <u>290.00</u>
TOTAL CLAIM OF ATTORNEY					\$ <u>3,900.00</u>

NOTICE TO ATTORNEY: Complete this form. Attach a copy of a complete itemization of (1) In Court Appearance; (2) Out of Court Preparation; and (3) Extraordinary 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 said 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
Steven D. Giddens
 Name and Address of Attorney (please print)
P.O. Box 6057
Talladega, AL 35160
 SS No. or FEIN No. [REDACTED]
 Telephone No. [REDACTED]

Sworn to and subscribed before me this 16 day of June, 1994
[Signature]
 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 charges and expenses in any case (companion or otherwise).
 Based on the above, I hereby approve the declaration and claim in the amount of \$ 3,900.00.
 Done this 22 day of June, 1994.
[Signature]
 Judge's Signature

NOTICE TO ATTORNEY AND JUDGE: Sections 15-12-21 through 15-12-23, Code of Alabama (1975), provide for payment of attorney fees and extraordinary expenses incurred by counsel appointed to represent indigent defendants on 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, THE CLERK SHALL SUBMIT THE ORIGINAL DECLARATION TO THE STATE COMPTROLLER FOR AUDIT AND ALLOWANCE. MAIL TO: State Comptroller, Room 1 Alabama State House, Montgomery, Alabama 36130.

Filed in the Clerk's Office on this 20 day of June, 1994.

PETITIONER'S EXHIBIT
#8
JD00232

App-164

0004

ATTORNEY'S FEE DECLARATION

STATE OF ALABAMA VS. JIMMY DAVIS

Charge: Capital Murder
Case Number: CC-93-534
Appointed: Gus Colvin
Date: 04-09-93
Disposition: Found guilty of Capital Murder, sentenced to death. Attorney allowed to withdraw
Date: 03-4-94; 03-30-94

IN COURT TIME

<u>DATE</u>	<u>DESCRIPTION</u>	<u>TIME</u>
03-04-94	Sentence Hearing	2.5
02-14-94	Sentence Hearing (cont.)	2.0
12-10-93	Trial	9.0
12-09-93	Trial	12.5
12-08-93	Trial	8.0
12-07-93	Trial (striking jury)	10.25
12-06-93	Trial (striking jury)	14.0
11-24-93	Pre-trial	2.5
06-02-93	Arraignment	1.5
04-09-93	Preliminary Hearing	3.0
		<u>65.25</u>

OUT OF COURT TIME

<u>DATE</u>	<u>DESCRIPTION</u>	<u>TIME</u>
04-01-94	Review Court's order	.1
03-29-94	Conference with co-counsel	1.0
03-08-94	Conference with co-counsel; prepared Motion to Withdraw	1.5
03-03-94	Sentence preparation	1.5
02-14-94	Sentence preparation; conference with co-counsel	1.0
02-10-94	Sentence preparation; discussed case with co-counsel; reviewed file	1.5
12-09-93	Review file; prepared jury instructions	7.0
12-08-93	Reviewed trial notes; trial preparation	5.0

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12-07-93	Review file	4.0
12-06-93	Review file, notes etc.	4.5
12-05-93	Trial preparation	5.0
12-04-93	Trial preparation; conference with co-counsel	6.5
12-03-93	Conference with co-counsel; trip to Channel 40; Anniston Star; interviewed witnesses; trip to crime scene; conference with judge; review evidence; conference with D.A.; trial preparation	12.5
12-02-93	Trial preparation; review file, evidence, etc.	8.0
11-30-93	Review discovery	4.0
11-29-93	Review discovery; conference with co-counsel	2.0
11-24-93	Conference with co-counsel; conference with D.A.; investigated case (scene)	3.5
11-29-93	Prepared motion	.5
11-19-93	Filed motion	1.2
11-29-93	Call to Mental Health	.3
11-29-93	Call to Mental Health	.3
11-19-93	Call to Judge Street	.3
12-01-93	Call to Mental Health	.3
12-01-93	Call to Judge Street	.3
11-12-93	Picked up discovery	1.4
11-12-93	Conference with client	1.0
11-10-93	Conference with D.A.	.5
08-10-93	Review file	.3
07-11-93	Review file	.3
06-11-93	Conference with client	1.0
		76.3 *

EXTRAORDINARY EXPENSE

Calhoun-Cleburn Mental Health; Mental examination \$290.00

*Only fifty (50) hours billed due to cap of One thousand (\$1,000.00) dollars

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Appendix B

[Filed: Feb. 19, 2026]

FOR PUBLICATION

In the
United States Court of Appeals
For the Eleventh Circuit

No. 18-14671

JIMMY DAVIS, JR.,

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. 1:07-cv-00518-CLS

Before JORDAN, ROSENBAUM, JILL PRYOR, BRANCH,
GRANT, LUCK, LAGOA, ABUDU, and KIDD, Circuit
Judges.*

* Chief Judge Pryor, Judge Newsom, and Judge Brasher recused themselves and did not participate in the en banc poll.

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BY THE COURT:

A petition for rehearing having been filed and a member of this Court in active service having requested a poll on whether this appeal should be reheard by the Court sitting en banc, and a majority of the judges in active service on this Court having voted against granting rehearing en banc, IT IS ORDERED that this appeal will not be reheard en banc. The Petition for Rehearing en banc filed by Jimmy Davis, Jr. (D.E. 97) is denied.

BRANCH, Circuit Judge, joined by GRANT, Circuit Judge, Concurring in the Denial of Rehearing En Banc:

In 1994, an Alabama jury convicted Jimmy Davis, Jr., of the capital offense of murder committed during a robbery in the first-degree. As we recounted in the majority opinion:

The state's evidence showed that on March 17, 1993, Davis, Alphonso Phillips, and Terrance Phillips made plans to rob the Direct Oil Station, a gasoline service station in An-niston. According to the plan, Davis, who possessed a .25 caliber semiautomatic pistol, would point the pistol at the station operator, Alphonso would grab the money, and Terrance would act as a lookout. The state's evidence supported the conclusion that Davis was the principal actor in the conspiracy. He conceived the idea to rob the station and he recruited the others to help him. As the trio approached the station, Terrance changed his mind, abandoned the conspiracy, and walked away. Alphonso and Davis approached the station; Davis confronted the operator, Johnny Hazle, in the doorway of the station, pointed the pistol at him, and said, "Give it up, fuck-n*****." Davis almost immediately fired two shots from the pistol, which struck Hazle in the chest and abdomen. Terrance testified that he was about a block from the station, walking toward his home, when he heard two or three shots fired. After the shooting, Davis and Alphonso ran from

the scene. Hazle died from these wounds shortly thereafter. Three empty .25 caliber shell casings were recovered at the scene, and two bullets of the same caliber were recovered from Hazle's body. The pistol was subsequently recovered. The ballistics evidence showed that the two bullets recovered from Hazle's body and the three empty shell casings found at the scene had been fired from Davis's pistol.

Both Alphonso and Terrance pleaded guilty to conspiracy to commit robbery in the first-degree and testified against Davis. Alphonso testified that, when they reached the door of the gas station, Davis "pointed the pistol at Hazle and said, 'Give it up, fuckn*****'; that Hazle . . . smiled; and that Davis shot Hazle when he smiled." Similarly, although Terrance was walking home when the robbery occurred, Terrance testified that Davis told him after the robbery that:

he had told [Hazle], Give it up, fuck-n*****. And then he said the man had smiled or something at him, laughed or something. And then he said he had shot and the man had kicked the door. And then he shot again. . . . And then he said they ran.

Other individuals similarly testified that Davis relayed similar information and told them that he had robbed the gas station and shot someone.

. . . .

The jury found Davis guilty of murder committed during a robbery in the first-degree as charged.

Davis v. Comm’r, Ala. Dep’t of Corr., 120 F.4th 768, 774–75 (2024) (alterations adopted) (quotations and citations omitted). Following the penalty phase, at which Davis’s mother and cousin testified, along with psychometrist Annie Storey, the jury returned an 11 to 1 advisory recommendation in favor of the death penalty.¹ *Id.* at 776–79. The trial court imposed the death penalty, and the Alabama Court of Criminal Appeals (“ACCA”) affirmed. *Davis v. State*, 718 So. 2d 1148 (Ala. Crim. App. 1995).

Thereafter, postconviction proceedings and appeals proceeded in the state court for over a decade, but Davis was unsuccessful. Having exhausted his state avenues for relief, Davis filed a 28 U.S.C. § 2254 federal habeas petition in the federal district court. Following the denial of his § 2254 petition, Davis obtained a certificate of appealability from this Court in which he argued that the ACCA unreasonably applied

¹ Approximately 40 minutes into deliberations, the jury submitted a question to the court asking whether the court could “accept seven for death and five for life?” The trial court explained that there had to be at least 10 votes for death or 7 for life and instructed the jury to keep deliberating. *See* Ala. Code § 13A-5-46(f) (1993) (explaining that a recommendation of life required only a bare majority vote of the jurors, but a recommendation of death required the vote of at least 10 jurors). Additionally, at the time of Davis’s trial, the jury’s recommendation was merely advisory. The trial court had the ultimate sentencing authority. *Id.* § 13A-5-47(a) (1993).

Strickland v. Washington, 466 U.S. 668 (1984), in denying his claims that trial counsel rendered ineffective assistance in the penalty phase of his capital trial by (1) failing to investigate and present mitigating evidence of childhood abuse and (2) failing to investigate and present mitigating evidence of the circumstances of his prior conviction for third-degree robbery. A divided panel of this Court affirmed, holding that the ACCA's conclusion that Davis was not prejudiced by his trial counsels' failure to present evidence of Davis's childhood abuse and the circumstances of his prior Alabama third-degree robbery conviction was not contrary to, or an unreasonable application of, clearly established federal law under 28 U.S.C. § 2254(d). *See Davis*, 120 F.4th at 789–99. I concur in the denial of rehearing en banc for the reasons set forth in the majority opinion. *See id.*

My dissenting colleague misreads our panel decision and incorrectly asserts that our treatment of the jury's initial hesitation in the context of our prejudice discussion "created a new limit on clearly established law." To be clear, our majority panel opinion did not dispute that juror hesitation could be an indicator of prejudice or that the state court could have considered this information as part of a prejudice analysis. *See id.* at 797–98. Such hesitation is a valid factor—one of many—that a court may consider in assessing prejudice. Our majority decision merely rejected the dissent's contention that the ACCA's prejudice decision was an *unreasonable application of federal law* because it failed to *expressly* consider the jury's initial hesitation in its prejudice analysis. *Id.* at 797. Our conclusion was a proper application of Supreme Court precedent and AEDPA. Not only did Davis never

make an argument about the state court's failure to consider the initial juror hesitation as part of the prejudice analysis—it was instead raised for the first time in the dissenting opinion—but the Supreme Court has never held that a jury's hesitation in reaching a verdict is necessarily a presumptive indicator of prejudice under *Strickland* or that such a factor must be considered or should weigh more heavily in the prejudice analysis. *Strickland* is a very general standard, and Judge Abudu's contention that the ACCA was required to consider the jury's initial hesitation because it falls within the ambit of *Strickland*'s general framework of considering what happened at the original trial is an improper attempt "to refine or sharpen a general principle" into a specific legal rule that the Supreme Court has not announced. See *Marshall v. Rodgers*, 569 U.S. 58, 64 (2013). While *Strickland* requires "a court hearing an ineffectiveness claim [to] consider the totality of the evidence before the judge or jury," 466 U.S. at 695, that imperative "is a far cry from a federal court requiring that a state court prove to a federal court that it did so by setting out every relevant fact or argument in its written opinion," see *Lee v. Comm'r, Ala. Dep't of Corr.*, 726 F.3d 1172, 1212 (11th Cir. 2013). Yet, that heightened standard is essentially the standard Judge Abudu's dissent calls for state courts to employ in order for state court decisions to be deemed reasonable under AEDPA. Her standard turns AEDPA and its highly deferential framework on its head.

In sum, as explained in the majority opinion, Davis failed to show that the ACCA's determination that he did not suffer prejudice was "so lacking in justification that there was an error . . . beyond any possibility for

fairminded disagreement.” *Harrington v. Richter*, 562 U.S. 86, 103 (2011). And that question is the only one we were tasked with answering under AEDPA. See *Pye v. Warden, Ga. Diagnostic Prison*, 50 F.4th 1025, 1041–42 (11th Cir. 2022) (*en banc*) (“Applying AEDPA to *Strickland*’s prejudice standard, we must decide whether the state court’s conclusion that [counsel’s] performance at the sentencing phase . . . didn’t prejudice [petitioner]—that there was no substantial likelihood of a different result—was so obviously wrong that its error lies beyond any possibility for fairminded disagreement.” (quotations omitted)). Because fairminded jurists could disagree regarding the correctness of the ACCA’s application of *Strickland* to Davis’s penalty phase ineffective-assistance claims, we were bound by AEDPA and Supreme Court precedent to conclude that he was not entitled to habeas relief. As a result, the Court properly denied *en banc* review.

ROSENBAUM, Circuit Judge, Dissenting from the Denial of Rehearing En Banc:

For the reasons I gave in my dissenting opinion, *Davis v. Comm’r, Ala. Dep’t of Corr.*, 120 F.4th 768, 818–45 (11th Cir. 2024) (Rosenbaum, J., dissenting), I continue to think that we wrongly decided *Davis*. Judge Abudu also makes some excellent points highlighting the problems with the panel opinion.

If the panel opinion is wrong, Davis perhaps should not be executed. So this case seems to me to involve “a question of exceptional importance.” I therefore respectfully dissent from the denial of rehearing en banc.

ABUDU, Circuit Judge, Dissenting from the Denial of Rehearing En Banc:

Jimmy Davis, Jr., an Alabama prisoner, seeks habeas corpus relief from his death sentence based on his attorney's errors at trial that made his sentencing fundamentally and constitutionally unfair.¹ Without deciding whether his attorney's performance was so poor as to be constitutionally deficient, a split panel of this Court denied relief, concluding the state court reasonably found Davis did not suffer any prejudice from his attorney's failures. *Davis v. Comm'r, Ala. Dep't of Corr.*, 120 F.4th 768, 799 (11th Cir. 2024). For the reasons Judge Rosenbaum articulated in her dissent from the panel majority opinion, the district court should have granted Davis habeas relief. *Id.* at 818–51 (Rosenbaum, J., dissenting). As she thoroughly explained, the panel majority: (1) misapplied the Anti-terrorism and Effective Death Penalty Act of 1996 (“AEDPA”) and on-point Supreme Court caselaw, *e.g.*, *Rompilla v. Beard*, 545 U.S. 374 (2005), and *Porter v. McCollum*, 558 U.S. 30 (2009), to deny relief; (2) unreasonably minimized the mitigation value of the evidence Davis's attorney failed to present at trial, which showed that Davis suffered horrific childhood trauma and had no serious history of violence; and (3) gave no weight to the fact the jury—despite counsel's severe failures—was split, hesitant, and ultimately not

¹ The Supreme Court established the test for ineffective assistance of counsel in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail on such a claim, a petitioner must show: (1) his counsel's performance was deficient; and (2) the deficient performance prejudiced his defense. *Id.* at 687.

unanimous in its recommendation to impose the death penalty.

All three of these errors, separately and combined, are sufficient to vacate the district court's ruling. However, the panel majority's dismissive treatment of the jury's hesitation warrants special attention. Davis was prejudiced by his attorney's failure to present weighty mitigation evidence at trial, and the jury's initial split—where nearly half of the jury was in favor of a life sentence—and the fact that the jury never reached a unanimous sentencing recommendation, show a reasonable probability that the missing pieces of mitigation evidence would have altered the outcome.

The panel majority's treatment of the jury's hesitation to impose the death penalty and its ultimate non-unanimous vote improperly suggests the jury's role is far less important than history and precedent demonstrate. The Supreme Court has repeatedly ruled that juries must be given the authority to determine the facts necessary for sentencing and must reach their conclusions unanimously. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *Hurst v. Florida*, 577 U.S. 92, 94 (2016); *Ramos v. Louisiana*, 590 U.S. 83, 90 (2020). In *Strickland* itself, the Supreme Court established a test for ineffective assistance claims that requires courts to look at the relevant decisionmaker's on-the-record conduct at trial. *See* 466 U.S. at 695. Here, that means the jury's conduct as the decisionmaker is of critical importance and should not be cast aside in a prejudice analysis. In a death penalty scheme like Alabama's, where the question of life and death is submitted to a jury, these principles compel a conclusion that juries must unanimously agree to

impose the death penalty for a death penalty sentence to be imposed. *Cf. Hurst*, 577 U.S. at 102–03; *Spaziano v. Florida*, 468 U.S. 447, 469–70 (1984) (Stevens, J., concurring and dissenting) (arguing that this protection is guaranteed under the Eighth Amendment); *Ring v. Arizona*, 536 U.S. 584, 614 (2002) (Breyer, J., concurring) (same). Any reasonable application of Strickland to a non-unanimous and conflicted jury must be informed by the Constitution’s focus on the jury trial right and a proper appreciation of the jury’s role in our legal system. Such a historically informed view of the Sixth Amendment shows that courts must weigh jury hesitation when assessing prejudice.

Given the jury’s role in death penalty sentencing, moreover, effective assistance in the death penalty context requires adequate investigation and presentation of mitigating evidence to aid a jury in fairly determining whether to impose a death sentence. *See, e.g., Rompilla*, 545 U.S. at 387–90; *Wiggins v. Smith*, 539 U.S. 510, 520–29 (2003). “Although a sentencing authority may decide that a sanction less than death is not appropriate in a particular case, the fundamental respect for humanity underlying the Eighth Amendment requires that the defendant be able to present any relevant mitigating evidence that could justify a lesser sentence.” *Sumner v. Shuman*, 483 U.S. 66, 85 (1987); *see also Boyde v. California*, 494 U.S. 370, 387 (1990) (Marshall, J., dissenting) (“The insistence in our law that the sentencer know and consider the defendant as a human being before deciding whether to impose the ultimate sanction operates as a shield against arbitrary execution and enforces our abiding judgment that an offender’s circumstances,

apart from his crime, are relevant to his appropriate punishment.”). When Davis’s counsel’s performance and the jury’s hesitation and non-unanimity are reviewed with this historical and doctrinal backdrop, the state court’s conclusion that Davis suffered no prejudice is untenable. The panel majority was wrong to diminish the jury’s lack of consensus to impose the death penalty and to minimize Davis’s mitigating evidence, and its reasoning erodes the Sixth Amendment’s rights to effective assistance of counsel and a fair jury trial.

The full facts of the case are not recounted here. *See Davis*, 120 F.4th at 818–51 (Rosenbaum, J., dissenting). The key point is that Davis’s counsel presented a woefully inadequate mitigation case during the penalty phase of trial. *Id.* at 818. After 40 minutes of deliberation, the jury submitted a question to the trial court: “Can you accept seven [jurors voting] for death and five for life? If not, what procedure should we go by?” *Id.* at 779 n.6 (majority opinion). After the trial judge said that the jury could not be split this way, the jury deliberated further and returned a non-unanimous verdict: 11 to 1 for the death penalty. *Id.* at 779 & n.6. Then, despite the jury’s non-unanimous recommendation, the trial judge “found that two statutory aggravating circumstances existed” and imposed the death penalty. *Id.* at 779.

In rejecting Davis’s appeal, the panel majority broke new ground and rejected the jury’s behavior as irrelevant. First, it stated that the Supreme Court has “never held that a jury’s hesitation . . . is necessarily an indicator of prejudice . . .” *Id.* at 798. Second, it concluded that the Supreme Court has never held that

jury hesitation “must be considered” by a court assessing prejudice. *Id.*

To be clear, the panel majority only reached these holdings because they were necessary to answer the question Davis raised in his habeas petition, on which this Court granted him a certificate of appealability. *See Freeman v. Comm’r, Ala. Dep’t of Corr.*, 46 F.4th 1193, 1215 (11th Cir. 2022) (explaining that certificates of appealability “encompass any issue that ‘must be resolved before reaching the merits’ of a claim identified in” that certificate of appealability). This highly important legal issue is squarely before us and the answer to the issue could determine whether Davis will be executed.²

Because the Supreme Court has instructed courts to consider jury hesitation when determining whether deficient performance prejudices the outcome, and because the historical scope of the right to a jury counsels against the panel majority’s holdings, we should have reheard this case *en banc* to correct the panel majority’s errors.

I. AEDPA, STRICKLAND, & JUROR

² There was no requirement, nor would there have been any grounds, for Davis to raise a standalone claim based on the jury’s hesitation: his claim throughout has been that his attorney was deficient and he was prejudiced by that deficiency. *See Davis*, 120 F.4th at 773 (“Before us are Davis’s arguments that the state court unreasonably applied *Strickland* . . . in denying his claim that trial counsel rendered ineffective assistance in the penalty phase of his capital trial . . .”). Thus, Judge Rosenbaum’s panel dissent and this opinion address an issue of exceptional importance.

HESITATION

When AEDPA applies, a federal court may grant habeas relief only if the decision of the state court: (1) was contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court, or (2) was based on an unreasonable determination of the facts considering the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d)(1), (2). If AEDPA deference does not apply, a federal court applies *de novo* review to a petitioner’s claim. *Calhoun v. Warden, Baldwin State Prison*, 92 F.4th 1338, 1346 (11th Cir. 2024), *cert. denied*, 145 S. Ct. 443 (2024) (mem.); *Adkins v. Warden*, 710 F.3d 1241, 1250 (11th Cir. 2013).

“[C]learly established federal law’ for purposes of” AEDPA “includes only the holdings, as opposed to the dicta, of [the Supreme] Court’s decisions.” *Woods v. Donald*, 575 U.S. 312, 316 (2015) (quoting *White v. Woodall*, 572 U.S. 415, 419 (2014)). When the Supreme Court “relies on a legal rule or principle,” even a seemingly broad rule or principle, “to decide a case, that principle is a ‘holding’” for purposes of AEDPA. *Andrew v. White*, 604 U.S. 86, 92 (2025); *id.* at 94 (“General legal principles can constitute clearly established law for purposes of AEDPA”). While AEDPA precludes federal habeas relief in situations where relief requires the extension of federal law, *Woodall*, 572 U.S. at 424–26, this does not mean “that § 2254(d)(1) requires an ‘identical factual pattern before a legal rule must be applied,’” *id.* at 427 (quoting *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007)). “[C]ertain principles [can be] fundamental enough that when new factual permutations arise, the

necessity to apply the earlier rule will be beyond doubt.” Andrew, 604 U.S. at 95 (quoting *Woodall*, 572 U.S. at 427).

Importantly, there is a difference between deference to a state court’s *application* of precedent and a federal court’s “independent obligation” to determine what the law is. *Id.* The questions regarding what constitutes “clearly established law,” and when that law applies in a given case are “threshold,” and our review is “*de novo*,” without deference to state courts. *Id.*; *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003); *Walker v. Cromwell*, 140 F.4th 878, 890 n.3 (7th Cir. 2025). AEDPA’s deferential standard does not in any way eliminate an Article III court’s obligation to determine a new what law applies to a given case and, as applies here, what the Sixth Amendment requires.³

With the significance of juror hesitation at issue, the panel majority should have answered, *de novo*, the question of what federal law requires. *Strickland* answers both: (1) how much harm a petitioner like Davis must suffer from counsel’s performance to show

³ See, e.g., *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 385 (2024) (“It is emphatically the province and duty of the judicial department to say what the law is.” (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803))); *id.* at 430 (Gorsuch, J., concurring); Anthony G. Amsterdam & James S. Liebman, *Loper Bright and the Great Writ*, 56 COLUM. HUM. RTS. L. REV. 54, 153–57 (2025) (exploring tension between AEDPA and the Supreme Court’s precedent in other contexts); see also *Williams v. Taylor*, 529 U.S. 362, 402 (2000) (O’Connor, J., concurring) (“We have always held that federal courts, even on habeas, have an independent obligation to say what the law is.” (citation omitted)).

prejudice; and (2) what courts must consider in assessing whether a petitioner has suffered prejudice.

As to how much harm, Strickland says a petitioner needs to show 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. “This standard” is not so stringent as to require “a defendant to show that it is more likely than not that adequate representation would have led to a better result” *Thornell v. Jones*, 602 U.S. 154, 163–64 (2024). Instead, a court must ask whether counsel’s poor performance simply has created a “reasonable probability” of a different result that is “sufficient to undermine confidence in the outcome.” *Id.* at 164 (quoting *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011)). Yet, assessing prejudice in every ineffectiveness case does not require hard and fast rules; it is a practical inquiry. *See Strickland*, 466 U.S. at 696. Courts must “be concerned with whether . . . the result of a particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.” *Id.*

As to how to assess harm, “a court must ‘consider the *totality of the evidence* before the judge or jury’—both mitigating and aggravating” and the underlying proceedings. *Thornell*, 602 U.S. at 164 (emphasis added) (quoting *Strickland*, 466 U.S. at 695). This rule is straightforward: to assess whether counsel’s errors affected the proceeding, a court must review what happened and compare it to what hypothetically would have happened if counsel had not been

deficient.⁴ In Davis’s case, this means the state court should have compared the conduct of Davis’s attorney to that of a reasonable attorney to determine whether Davis suffered prejudice from his attorney’s failures. For Davis to prevail on prejudice, he had to show only a reasonable probability that the jury would have reached a different result. *Strickland*, 466 U.S. at 695. The fact that the jury already was conflicted is of paramount importance in undertaking this analysis.

This especially is clear because the Supreme Court discussed essentially this issue in *Strickland*. *Id.* The Supreme Court explained that a court assessing prejudice must focus on what actually happened on the record at trial. *Cf. id.* (“[E]vidence about the actual process of decision, if not part of the record of the proceeding under review . . . should not be considered.” (emphasis added)). It contrasted this proper on-the-record focus with what a court “should not” do, which would be to consider outside sources that might shed light on “the idiosyncracies of the particular decisionmaker, such as unusual propensities toward harshness or leniency,” because those facts are irrelevant. *Id.* The jury here expressed its hesitation and its split on the record at trial, *id.*, so the hesitation must be considered under the Supreme Court’s test in *Strickland*.

The state court in Davis’s case failed to discuss or consider the fact that five jurors were predisposed to

⁴ As my colleague has put it, *Strickland* requires “a predictive human endeavor based on a hypothetical construct.” *Pye v. Warden, Ga. Diagnostic Prison*, 50 F.4th 1025, 1058 (11th Cir. 2022) (*en banc*) (Jordan, J., concurring).

a life sentence even though Davis's counsel failed to present any substantive mitigation evidence. Moreover, the mitigation evidence counsel should have uncovered, if an adequate investigation had been performed, painted a very different story than that told at trial.

At trial, the State presented evidence of two statutory aggravating circumstances in support of its position that the jury should sentence Davis to death: (1) the murder Davis committed occurred during a robbery; and (2) Davis had a prior 1992 conviction for third-degree robbery. *Davis*, 120 F.4th at 839 (Rosenbaum, J., dissenting); *see also* Ala. Code. § 13A-5-51 (1994) (statutory aggravators). The State argued the prior robbery was “dangerous to human life” and a “very, very aggravating circumstance.” *Davis*, 120 F.4th at 827 n.11 (Rosenbaum, J., dissenting). The State introduced a record of Davis's conviction for the 1992 robbery, which Davis's attorney stipulated was accurate. *Id.* at 775 (majority opinion). In mitigation, Davis's counsel suggested Davis's mother “raised him the best she could without a father,” and that Davis did not have “somebody in the home that . . . could really discipline him.” *Id.* at 819 (Rosenbaum, J., dissenting). Davis's attorney had Davis's mother testify, where she stated she “had problems with [Davis]” since he was nine years old. *Id.*

The facts presented in Davis's ineffectiveness claim paint a very different picture than the facts the jury considered. Davis was 22 at the time of the prior robbery. *Id.* at 818. The crime began when Davis and three of his friends ordered a pizza. *Id.* Once the pizza deliveryman arrived, one of the men made a finger

gesture in his pocket as if he had a gun, and then the group took the pizzas and \$50 from the deliveryman and ran off. *Id.* The police quickly caught them and found Davis carrying a pizza. *Id.* No evidence suggested that Davis was the ringleader, and neither weapons nor violence were involved. *Id.* In fact, the deliveryman later said that “there really was never a threat made to him.” *Id.* Davis’s counsel never investigated these facts, and thus never argued (or presented available evidence) that this prior conviction—Davis’s only prior conviction underlying the aggravating factor—did not involve violence or weapons and was not, as the State put it at trial, “dangerous to human life” and a “very, very aggravating circumstance.” *Id.* at 827 n.11.

Davis’s counsel also failed to investigate and present evidence of the extreme abuse Davis suffered throughout his childhood at the hands of his own mother, resulting in serious physical and psychological injuries. *Id.* at 819. Once, when Davis was in the second grade, she beat him until his head was “dented,” “warped,” and “swollen,” and “his ear was partially severed.” *Id.* Several times, after vicious beatings, Davis went “into spasm[s]” and shook for days. *Id.* Davis’s file with the Alabama Department of Human Resources included photographs of his injuries and, after examining him, a local social worker stated that she had “never seen a back that looked worse than Jimmy’s.” *Id.* This abuse lasted at least until Davis was 14 or 15 years old. *Id.* Even so, Davis’s counsel only cursorily interviewed Davis and his mother (his abuser) and never investigated this horrific history of abuse. *Id.* Davis’s attorney then called

Davis’s mother as a mitigation witness and, unsurprisingly, she provided testimony that hurt Davis’s case. *Id.*

The Alabama Court of Criminal Appeals rejected Davis’s ineffective assistance claim on procedural grounds but noted the weight of this evidence and the jury’s hesitation, stating that “[c]ertainly, it is reasonable to conclude that the evidence of Davis’s child abuse could very well have tipped the scales in the other direction.” *Davis v. State*, 9 So. 3d 514, 524 (Ala. Crim. App. 2006) (“*Davis I*”), overruled, 9 So. 3d 537 (Ala. 2007). Two years later, however, ruling on the merits, the same court reasoned that none of this evidence would have changed the outcome of trial. *Davis v. State*, 9 So. 3d 539, 553 (Ala. Crim. App. 2008) (“*Davis II*”).⁵ In that opinion, the relevant decision for AEDPA’s purposes, the state court did not consider the jury’s hesitation in its analysis of whether there was a reasonable probability the outcome would have been different had Davis’s counsel presented this mitigation evidence. *See id.*

To sidestep the obvious import of the jury’s initial unwillingness to impose the death penalty without knowledge of any of the highly mitigating facts summarized above—and the state court’s obvious error in failing to consider that hesitation and non-unanimity—the panel majority created a new limit on clearly

⁵ After being reversed by the Alabama Supreme Court, the state court changed course and called its rulings—e.g., that Davis’s mitigation evidence was “powerful” and that it “would be compelled to grant relief and order a new sentencing hearing,” *Davis I*, 9 So. 3d at 522—“dicta,” *Davis II*, 9 So. 3d at 553.

established law. It held that juror hesitation is not “necessarily an indicator of prejudice” or a fact that “must be considered” or given weight, because the Supreme Court has never so held. *Davis*, 120 F.4th at 798 (majority opinion). These conclusions violate *Strickland* and *Andrew* and confuse the inquiry. Federal law, which we determine *de novo*, provides the rule: a court must undertake a holistic review of the omitted evidence and the record of the proceedings. *Strickland*, 466 U.S. at 694–96. No court applying *Strickland* can ignore what happened at trial when assessing prejudice. *Id.* The state court’s failure to apply this blackletter law—*i.e.*, to consider the totality of circumstances, including the jury’s hesitation, in assessing prejudice—should have triggered *de novo* review. *Calhoun*, 92 F.4th at 1346; *Adkins*, 710 F.3d at 1250.

AEDPA does not require the Supreme Court to have decided a case with identical facts as *Davis*’s for us to say the Alabama courts unreasonably applied *Strickland* by not considering this highly relevant circumstance. *Andrew*, 604 U.S. at 95; *Woodall*, 572 U.S. at 427. Indeed, the panel majority cites no cases where juror hesitation has not been considered by a court assessing prejudice; our cases, and the cases from our sister circuits, uniformly go in the other direction.⁶

⁶ See, e.g., *Blanco v. Singletary*, 943 F.2d 1477, 1505 (11th Cir. 1991); *Cave v. Singletary*, 971 F.2d 1513, 1519 (11th Cir. 1992); *Lawhorn v. Allen*, 519 F.3d 1272, 1297–98 (11th Cir. 2008); *Daniel v. Comm’r, Ala. Dep’t of Corr.*, 822 F.3d 1248, 1276 (11th Cir. 2016); *Sears v. Warden GDCP*, 73 F.4th 1269, 1298 (11th Cir. 2023); *Hardwick v. Sec’y, Fla. Dep’t of Corr.*, 803 F.3d 541, 564 (11th Cir. 2015); *Jordan v. Hargett*, 34 F.3d 310, 316 (5th Cir.

Alabama courts themselves have considered juror hesitation in this context when it has been presented—except, it seems, in the second decision in Davis’s case. *E.g.*, *Reeves v. State*, 974 So. 2d 314, 325 (Ala. Crim. App. 2007); *Ex parte Carroll*, 852 So. 2d 833, 836 (Ala. 2002). In this way, the panel majority opinion is an extreme outlier; making us the first state or federal court to suggest—in the 40 years since *Strickland*—that a court may ignore the jury’s behavior in assessing prejudice.

This uniform caselaw and practice only further demonstrates that the Supreme Court in *Strickland* already has determined that jury hesitation is relevant. The panel majority was thus also wrong to limit *Strickland* in a way the Supreme Court never has. *Cf.* *Motorcity Ltd. ex rel. Motorcity, Inc. v. Se. Bank N.A.*, 120 F.3d 1140, 1143 (11th Cir. 1997) (*en banc*) (“[We] must follow Supreme Court precedent that has ‘direct application’ in a case, even if it appears that the reasoning of the Supreme Court precedent has been rejected in other cases. Only the Supreme Court has ‘the prerogative of overruling its own decisions.’” (citation omitted) (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989))); *United States v. Johnson*, 921 F.3d 991, 1001 (11th Cir. 2019) (*en banc*) (“[W]e must apply Supreme Court

1994); *Mason v. Mitchell*, 543 F.3d 766, 780 (6th Cir. 2008); *Stankewitz v. Wong*, 698 F.3d 1163, 1175 (9th Cir. 2012); *Vega v. Ryan*, 757 F.3d 960, 974 (9th Cir. 2014); *Williams v. Stirling*, 914 F.3d 302, 318 (4th Cir. 2019); *Sanders v. Davis*, 23 F.4th 966, 994–95 (9th Cir. 2022).

precedent neither narrowly nor liberally—only faithfully.”).

Prejudice is assessed by considering “the totality of the new mitigating evidence,” and “juxtapos[ing]” it with the evidence presented in that original trial, in light of what happened at the original trial. *Pye*, 50 F.4th at 1058 (Jordan, J., concurring). The jury was an integral and constitutionally required part of the original trial, so the only reasonable application of *Strickland*’s test is (1) to consider that the jury was hesitant to impose the death penalty and (2) to conclude that Davis’s strong mitigating evidence is clearly “sufficient to undermine confidence in the outcome” of the trial. *Thornell*, 602 U.S. at 163–64. For these reasons, a rule that minimizes the jury’s role in assessing prejudice departs from the clear federal law the Supreme Court established in *Strickland*.⁷

II. THE JURY’S ROLE & THE CONSTITUTION

Even though the panel majority’s errors under AEDPA justified *en banc* review, the panel majority’s treatment of jury hesitation suffers from a broader problem: it minimizes the importance of the jury in our legal system. The Constitution requires that we take juries seriously. In Davis’s case, even with counsel’s failures, the State never obtained a unanimous jury recommendation for the death penalty. In fact, notwithstanding the jury’s non-unanimous verdict,

⁷ In fact, the Supreme Court has expressly rejected the adoption of “strict rules” in applying *Strickland*, such as the no-consideration of juror hesitation rule the panel majority approved here. *Cullen*, 563 U.S. at 196.

the state court made findings that statutory aggravating circumstances were present. In this context, Davis's nonunanimous sentencing verdict not only clearly shows *Strickland* prejudice, it should foreclose his death sentence altogether. While our rulings in the habeas context might not fix unconstitutional death penalty schemes, we should view Davis's *Strickland* claim of prejudice through the context and historical tradition of valuing and prioritizing the jury's perspective. Applying this historical tradition and precedent shows that the jury's non-unanimity and hesitation is one of the best, if not the best, indication of prejudice.

The Sixth Amendment guarantees that defendants like Davis receive effective assistance of counsel and that “[i]n all criminal prosecutions” they “enjoy the right to a speedy and public trial, by an impartial jury” U.S. CONST. amend. VI. As the Supreme Court has explained, juries “protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority.” *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). This “[p]rovid[es] . . . an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.” *Id.* (holding that this protection applies to state prosecutions because “[t]he deep commitment of the Nation to the right of jury trial in serious criminal cases”

serves “as a defense against arbitrary law enforcement”).⁸

As the Supreme Court recently explained in *Ramos*, the right to a jury trial is substantive; it means “*something*.” 590 U.S. at 89 (emphasis in original). Historically, one of the core and “unmistakable” features of the right is “unanimity.” *Id.* at 90.⁹ The jury’s role in sentencing, also with its required unanimity, also is protected by the Constitution and proven through historical practice. Historically, juries in England could, and did, refuse to convict on capital charges when they believed the crimes did not warrant execution. See *Jones v. United States*, 526 U.S. 227, 245–46 (1999); Thomas A. Green, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY 1200-1800, 18–20 (1985) (“The power of the jury may have reflected more than its institutional setting and role: it may have reflected a social

⁸ “Beyond this, the [rights to a jury trial] in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges.” *Duncan*, 391 U.S. at 156.

⁹ Indeed, the “origins” of nonunanimous convictions in state courts “are clear,” and intentionally aimed to thwart the Sixth Amendment’s protections. *Ramos*, 590 U.S. at 88. States adopted provisions allowing for nonunanimous juries during the Jim Crow era to nullify the votes of Black citizens participating in juries for the first time. *Id.*; see also *id.* at 88 n.4 (citing, among others, Thomas Ward Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593 (2018)); Frampton, 71 VAND. L. REV. at 1613 (explaining that some sources “endorsed the adoption of nonunanimous verdicts as a way of placating those intent on committing extralegal forms of racial violence”).

understanding about the appropriate circumstances under which a person’s life might be surrendered to the Crown.”). After the founding, juries’ refusals to return verdicts of guilty to avoid subjecting a defendant to execution led to criminal reforms that cut down on “the number of capital offenses” and “separate[d] murder into degrees.” *Woodson v. North Carolina*, 428 U.S. 280, 290–93 (1976); *see also Winston v. United States*, 172 U.S. 303 (1899) (reversing murder conviction where district court had improperly limited the jury’s discretion to impose a life sentence).

Given the role of juries in the development of our criminal legal system and the structural protections afforded by having a trial by jury—and, again, because it had served as a valuable tool for resistance against colonial England—it is natural that the jury trial right was of utmost importance to the founders. *See* Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U.CHI. L.REV. 867, 869–75 (1994) (detailing the history that led to the Sixth Amendment); *cf. SEC v. Jarkesy*, 603 U.S. 109, 121 (2024) (civil context) (“The right to trial by jury is ‘of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right’ has always been and ‘should be scrutinized with the utmost care.’” (quoting *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935))). To protect this right, James Madison drafted the Bill of Rights to include criminal and civil “protections for the jury trial right.” *Erlinger v. United States*, 602 U.S. 821, 830 (2024). The Sixth Amendment, the Supreme Court has explained, was designed to alleviate “fear[]” that the “government might fall prey to the kinds of

temptations that led the British to restrict the jury trial right in the colonies.” *Id.* Given that history, it is logical that the Supreme Court repeatedly has stepped in to protect the right to a jury trial and to preserve juries’ role. The Court has done so in numerous ways.

For instance, both the Supreme Court and this Court have recognized many times that the Constitution requires juries to be representative of the community and selected in a non-discriminatory manner. *See, e.g., Strauder v. West Virginia*, 100 U.S. 303 (1880); *Witherspoon v. Illinois*, 391 U.S. 510 (1968); *Taylor v. Louisiana*, 419 U.S. 522 (1975); *Duren v. Missouri*, 439 U.S. 357 (1979); *Batson v. Kentucky*, 476 U.S. 79 (1986); *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127 (1994); *Pena-Rodriguez v. Colorado*, 580 U.S. 206 (2017); *Flowers v. Mississippi*, 588 U.S. 284 (2019); *United States v. Brown*, 996 F.3d 1171 (11th Cir. 2021) (*en banc*); *Sockwell v. Comm’r, Ala. Dep’t of Corr.*, 141 F.4th 1231 (11th Cir. 2025). Then, once a jury is constitutionally selected, and a criminal case proceeds to a trial, juries are given significant deference in finding facts and are presumed to follow the court’s instructions.¹⁰ *See, e.g., United States v. Pulido*, 133 F.4th

¹⁰ Indeed, if a jury’s factual findings lead to an acquittal, as the Supreme Court has explained, that “jury’s verdict of acquittal is inviolate.” *McElrath v. Georgia*, 601 U.S. 87, 94 (2024). Thus, while judges can step in to acquit a defendant after a jury convicts to avoid manifest injustice, *e.g., United States v. Tapia*, 761 F.2d 1488, 1492 (11th Cir. 1985), juries “hold[] an ‘unreviewable power . . . to return a verdict of not guilty’ even ‘for impermissible reasons,’” *Smith v. United States*, 599 U.S. 236, 253 (2023) (quoting *United States v. Powell*, 469 U.S. 57, 63 (1984)). In light of

1256, 1276 n.17 (11th Cir. 2025); *see also* *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Ramirez*, 426 F.3d 1344, 1352 (11th Cir. 2005) (“A jury is presumed to follow the instructions given to it by the district judge.”). We affirm convictions if any rational jury could possibly have reached the result the jury did in a given case. *See id.*; *United States v. Burnette*, 65 F.4th 591, 604 (11th Cir. 2023) (“[A] guilty verdict need only ‘be reasonable, not inevitable, based on the evidence presented at trial.’” (quoting *United States v. Browne*, 505 F.3d 1229, 1253 (11th Cir. 2007))). We often explain that it is a jury’s role—not a court’s—“to weigh the evidence, make credibility determinations, and [to] draw any legitimate inferences from the facts.” *Hicks v. Middleton*, 141 F.4th 1174, 1180 (11th Cir. 2025) (civil context); *see also* *United States v. Brown*, 53 F.3d 312, 316 (11th Cir. 1995) (“All questions of credibility are for the jury”). So great is our deference to the jury that we repeatedly have held that if a jury disbelieves a defendant’s testimony, the jury may consider that disbelief as “*substantive evidence* of the defendant’s guilt.” *Brown*, 53 F.3d at 314 (emphasis in original) (collecting cases); *United States v. Beaufils*, 160 F.4th 1147, 1164 (11th Cir. 2025) (same).¹¹

this constitutionally protected asymmetry between judges and juries, Alabama’s death penalty scheme, which puts judges as the driver of the death penalty sentencing proceedings notwithstanding the jury’s view, is ahistorical and unconstitutional, as explained above.

¹¹ In some respects, the law calls on us to afford juries greater deference even than we give to experienced judges. *See, e.g.*,

The jury’s role at sentencing also is constitutionally protected and rooted in history.¹² As the Supreme Court has held, the Constitution provides a “time-honored guarantee that a unanimous jury ordinarily must find beyond a reasonable doubt any fact that increases a defendant’s exposure to punishment.” *Erlinger*, 602 U.S. at 836; *see also, e.g., Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Ring v. Arizona*, 536 U.S. 584 (2002); *Blakely v. Washington*, 542 U.S. 296 (2004); *Alleyne v. United States*, 570 U.S. 99 (2013); *Hurst*, 577 U.S. at 94. Accordingly, in a situation like Davis’s, where

Joseph Blocher & Brandon L. Garrett, *Fact Stripping*, 73 DUKE L.J. 1, 21–22 (2023) (describing the “typical rule[]” that deference to a jury’s finding of facts is more deferential than clear error review, which applies to judge-found facts, but arguing that recent practice has undermined this rule). So, while this Court has “habit[ually]” failed to give appropriate deference to our district court colleagues, *Otto v. City of Boca Raton*, 41 F.4th 1271, 1285 (11th Cir. 2022) (Jordan, J., dissenting from the denial of reh’g); *see also Fla. Decides Healthcare, Inc. v. Fla. Sec’y of State*, No. 25-12370, 2025 WL 3738554, at *9 (11th Cir. Sept. 9, 2025) (Abudu, J., dissenting) (same), we traditionally have been consistent about giving deference to juries, *see Brown*, 996 F.3d at 1183 (“Jurors *are* ordinary people. They are expected to speak, debate, argue, and make decisions the way ordinary people do in their daily lives. Our Constitution places great value on this way of thinking, speaking, and deciding.” (emphasis supplied) (quoting *Pena-Rodriguez*, 580 U.S. at 236 (Alito, J., dissenting))).

¹² *See* Nancy J. King, *The Origins of Felony Jury Sentencing in the United States*, 78 CHI.-KENT. L.REV. 937, 937–38 (2003) (describing the history, beginning in the 1790s, of juries determining the appropriate sentence in state courts); Nancy J. King, *The American Criminal Jury*, 62 L. & CONTEMP. PROBS. 41, 64 (Spr. 1999) (“One of the most unique tasks of the criminal jury in the United States is deciding whether a convicted criminal will be put to death for his [or her] crime.”).

state law creates statutory aggravating circumstances that affect whether the death penalty should be imposed, *see* Ala. Code. § 13A-5-51 (1994); *Davis*, 120 F.4th at 775 n.4 (majority opinion), the Constitution establishes that those factors must be tried to a jury and the jury, not a judge, must unanimously conclude that the government established the existence of those aggravating circumstances, *see Ring*, 536 U.S. at 609 (majority opinion) (“Because Arizona’s enumerated aggravating factors operate as ‘the functional equivalent of an element of a greater offense,’ *Apprendi*, 530 U.S. at 494 n.19, the Sixth Amendment requires that they be found by a jury.”); *see also id.* at 612 (Scalia, J., concurring) (“Accordingly, . . . wherever [aggravating] factors exist they must be subject to the usual requirements of the common law, and to the requirement enshrined in our Constitution, in criminal cases: they must be found by the jury beyond a reasonable doubt.”); *Hurst*, 577 U.S. at 102 (holding the Sixth Amendment “right require[s] Florida to base . . . death sentence[s] on a jury’s verdict, not a judge’s factfinding”).¹³

As noted, *Strickland* already says that a jury’s hesitation should be considered in the totality of circumstances analysis applicable to assessing prejudice in a

¹³ *Hurst*, *Ramos*, and *Ring* show that aggravating circumstances themselves must be tried to a jury and the jury must reach a conclusion on those circumstances unanimously. There is no question that Alabama’s death penalty sentencing scheme provided various aggravating circumstances in 1994, Ala. Code. § 13A-5-51 (1994), *Davis*, 120 F.4th at 779 (majority opinion), so the Sixth Amendment (and precedent) establishes that a unanimous jury verdict should have been required on those issues.

case like this. *Supra*, Section I. Given the history of juries and the reaffirmation of the paramount protection of the jury trial right in Supreme Court caselaw, it is not plausible that *Strickland* instructs courts to do something different than they do in every other jury trial context and disregard the jury. Therefore, the panel majority's reading of *Strickland* and application of AEDPA on the issue of juror hesitation flies in the face of this great body of caselaw and historical practice cementing the importance of juries and giving shape to the right to a fair jury trial.¹⁴ See *United States v. Rahimi*, 602 U.S. 680, 738 (2024) (Barrett, J., concurring) (explaining that history “can reinforce our understanding of the Constitution’s original meaning; liquidate ambiguous constitutional provisions; [and] provide persuasive evidence of the original meaning” (citations and quotations omitted)); *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 491 (1931) (“Acts of Congress are to be construed and applied in harmony with and not to thwart the purpose of the Constitution.” (quoting *Phelps v. United States*, 274 U.S. 341, 344 (1927))). The Sixth Amendment has always

¹⁴ As noted previously, a court applying *Strickland* must “be concerned with whether . . . the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.” *Strickland*, 466 U.S. at 696. Just results, in this context, necessarily means that the proceeding be consistent with traditional understandings of fairness. *Ramos*, 590 U.S. at 89 (“Imagine a constitution that allowed a ‘jury trial’ to mean nothing but a single person rubberstamping convictions without hearing any evidence . . .”). For the same reason, we must ask, at the prejudice stage, what a fair trial, with constitutional representation and a unanimous jury, would have looked like. See *Pye*, 50 F.4th at 1058 (Jordan, J., concurring).

instructed courts to respect and consider the perspectives of the community members our system entrusts with determining guilt and punishment, so our interpretation of AEDPA and *Strickland* should reflect that same structural concern and reverence.

III. JURIES AND THE DEATH PENALTY

In 1972, the Supreme Court held that the imposition of the death penalty in the cases before it violated the Constitution. *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972).¹⁵ In the years that followed, the Supreme Court retreated from *Furman*, laying out the framework for the resumption of executions and death penalty trials—like Davis’s in Alabama—after a moratorium of several years. *See Gregg v. Georgia*, 428 U.S. 153, 207 (1976) (opinion of Stewart, J.); *id.* at 207, 226 (White, J., concurring); *id.* at 227 (Blackmun, J., concurring). In the post-*Furman* years, however, the Supreme Court revisited and reshaped the death penalty, approving and disapproving aspects of individual states’ death penalty schemes. In doing so, it attempted to establish meaningful safeguards to avoid states reverting to death penalty schemes that would be as arbitrary and random as those that the *Furman*

¹⁵ Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1151–52 (2009) (“[The *Furman* Court’s] central concern was avoiding arbitrary and capricious death sentences. To be sure, the opinions were splintered, but a majority of Justices shared that same basic sentiment.” (footnote omitted)).

Court found unconstitutional.¹⁶ This reform also touched on the role of juries. In the Court's view, procedural and substantive reforms would prevent the death penalty from being "wantonly and freakishly impose[d]." Instead, a "jury's discretion [would be] channeled" and "circumscribed by the legislative guidelines." *Id.* at 207.

One aspect of this narrowing jurisprudence¹⁷ tried "to ensure that only the most deserving of execution are put to death." *Atkins v. Virginia*, 536 U.S. 304, 319 (2002).¹⁸ Only adult offenders who commit murder,

¹⁶ See *Gregg*, 428 U.S. at 206 (opinion of Stewart, J.) ("The basic concern of *Furman* centered on those defendants who were being condemned to death capriciously and arbitrarily. Under the procedures before the Court in that case, sentencing authorities were not directed to give attention to the nature or circumstances of the crime committed or to the character or record of the defendant. Left unguided, juries imposed the death sentence in a way that could only be called freakish.").

¹⁷ Chelsea Creo Sharon, The "Most Deserving" of Death: The Narrowing Requirement and the Proliferation of Aggravating Factors in Capital Sentencing Statutes, 46 HARV. C.R.-C.L. L. REV. 223, 225 (2011) ("The narrowing requirement demands that aggravating factors limit the death-eligible class to the most heinous offenders, whom jurors are likely to deem especially deserving of death sentences."); see also *Graham v. Florida*, 560 U.S. 48, 89 (2010) (Roberts, C.J., concurring) (describing "the unique context of the death penalty, a punishment that our Court has recognized must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution" (quotations omitted) (quoting *Roper v. Simmons*, 543 U.S. 551, 568 (2005)).

¹⁸ The Supreme Court's narrowing jurisprudence is best contextualized, in part, as a response to the numerous distinguished

and who are not insane or suffering from severe disabilities in areas of reasoning, judgment and control of

members of that Court who argued, convincingly, that the death penalty is, in all circumstances, unconstitutional. *See, e.g., Gregg*, 428 U.S. at 227–31 (Brennan, J., dissenting) (“The fatal constitutional infirmity in the punishment of death is that it treats ‘members of the human race as nonhumans, as objects to be toyed with and discarded. [It is] thus inconsistent with the fundamental premise of the [Eighth Amendment] that even the vilest criminal remains a human being possessed of common human dignity.’” (quoting *Furman*, 408 U.S. at 273 (Brennan, J., concurring))); *id.* at 231–41 (Marshall, J., dissenting) (“The death penalty, unnecessary to promote the goal of deterrence or to further any legitimate notion of retribution, is an excessive penalty forbidden by the Eighth and Fourteenth Amendments.”); *Collins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting) (“From this day forward, I no longer shall tinker with the machinery of death. . . . I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies.”); John Calvin Jeffries, JUSTICE LEWIS F. POWELL: A BIOGRAPHY 451–52 (1994) (explaining that, after his retirement, Justice Powell stated: “I have come to think that capital punishment should be abolished”); *Baze v. Rees*, 553 U.S. 35, 81 (2008) (Stevens, J., concurring) (“The time for a dispassionate, impartial comparison of the enormous costs that death penalty litigation imposes on society with the benefits that it produces has surely arrived.”); *Glossip v. Gross*, 576 U.S. 863, 908–09 (2015) (Breyer, J., joined by Ginsburg, J., dissenting) (explaining that changes in society and recent scholarship, “taken together with . . . 20 years of experience on th[e Supreme] Court, . . . lead me to believe that the death penalty, in and of itself, now likely constitutes a legally prohibited ‘cruel and unusual punishmen[t]’” (quoting U.S. CONST. amend. VIII)).

their impulses, are eligible for the death penalty.¹⁹ Another aspect of this jurisprudence put procedures in place so that death penalty cases would be fair and, to a higher degree than other state criminal processes, uniform both in their substantive criminal phase and in their sentencing phase.²⁰ The Supreme Court has reviewed death penalty schemes many times since 1972, creating a unique body of substantive and procedural law that has changed in the decades since Davis’s trial.

The procedural rulings around the death penalty produced anomalies with respect to juries, however. For one thing, while juries must be unanimous to

¹⁹ See, e.g., *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988) (plurality opinion); *Roper*, 543 U.S. at 578; *Miller v. Alabama*, 567 U.S. 460, 465 (2012); *Coker v. Georgia*, 433 U.S. 584, 598 (1977) (plurality opinion); *Kennedy v. Louisiana*, 554 U.S. 407, 413 (2008); *Enmund v. Florida*, 458 U.S. 782, 801 (1982); *Ford v. Wainwright*, 477 U.S. 399, 410 (1986); *Atkins*, 536 U.S. at 306; *Hall v. Florida*, 572 U.S. 701, 704 (2014).

²⁰ The Supreme Court’s cases addressing procedural safeguards in the death penalty context are legion. See, e.g., *Sumner*, 483 U.S. at 85; *Roberts v. Louisiana*, 428 U.S. 325, 336 (1976) (plurality opinion); *Woodson*, 428 U.S. at 301 (plurality opinion); *Beck v. Alabama*, 447 U.S. 625, 627 (1980); *Simmons v. South Carolina*, 512 U.S. 154, 161–62 (1994) (plurality opinion); *id.* at 178 (O’Connor, J., concurring in judgment); *Ring*, 536 U.S. at 588–89; *Hurst*, 577 U.S. at 94; *Lynch v. Arizona*, 578 U.S. 613 (2016); *Cruz v. Arizona*, 598 U.S. 17, 20 (2023). The Court also has ensured that the actual process of executions themselves is constitutional and fair, see, e.g., *Nelson v. Campbell*, 541 U.S. 637, 644–47 (2004); *Baze v. Rees*, 553 U.S. 35, 40 (2008) (plurality opinion); *Ramirez v. Collier*, 595 U.S. 411, 416 (2022); *Nance v. Ward*, 597 U.S. 159, 162 (2022), to some extent, see *Boyd v. Hamm*, 146 S. Ct. 40, 40–44 (2025) (Sotomayor, J., dissenting).

convict a defendant of a crime, *Ramos*, 590 U.S. at 93, around the time of Davis’s trial, a splintered Supreme Court approved Alabama’s death penalty scheme, which did not require jury unanimity for sentencing or vest sentencing authority in the hands of the jury, see *Harris v. Alabama*, 513 U.S. 504, 515 (1995). So, while a jury was required at sentencing, its role was minimized at this critical stage. In fact, a judge could override a jury’s recommendation not to impose the death penalty. See *id.* at 515 (Stevens, J., dissenting) (“In Alabama, unlike any other State in the Union, the trial judge has unbridled discretion to sentence the defendant to death—even though a jury has determined that death is an inappropriate penalty, and even though no basis exists for believing that any other reasonable, properly instructed jury would impose a death sentence.”).

In light of *Ramos*, it is apparent that this non-unanimous aspect of Alabama’s death penalty sentencing scheme—which was in place at the time of Davis’s trial—is irreconcilable with the Sixth Amendment’s “vital” promise of jury unanimity. 590 U.S. at 90. The Supreme Court’s more recent sentencing precedent—such as *Hurst*, *Ring*, and *Apprendi*—further confirms Alabama’s death penalty sentencing scheme flouted the Sixth Amendment multiple times over: a judge, not the jury, decided whether statutory aggravating circumstances existed, and the jury did not need to reach a unanimous conclusion in the punishment phase of the trial. Yet Alabama’s scheme was also constitutionally unsupportable at the time. As Justice Marshall explained, “[i]t approaches the most literal sense of the word ‘arbitrary’ to put one to death in the

face of a contrary jury determination where it is accepted that the jury had indeed responsibly carried out its task.” *Jones v. Alabama*, 470 U.S. 1062, 1065 (1985) (Marshall, J., dissenting).²¹

For another thing, while jurors are supposed to be impartial and represent a fair cross-section of the community, States that pursue the death penalty have often sought and obtained the dismissal of jurors opposed to the death penalty. See Stephen Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1, 4–5 (1980). Such a practice also is foreign to the historical scope of the jury trial right. *Id.* Taken together, these features of Alabama’s scheme neutered the critical role

²¹ The Supreme Court approved similar schemes in other states as well. See *Spaziano v. Florida*, 468 U.S. 447 (1984), overruled by *Hurst*, 577 U.S. at 101; *Hildwin v. Florida*, 490 U.S. 638 (1989), overruled by *Hurst*, 577 U.S. at 101; see also Raoul G. Cantero, *Death is Different: The Need for Jury Unanimity in Death Penalty Cases*, 22 ST. THOMAS L. REV. 4, 33 (2009) (“Florida stands alone in allowing a simple majority of the jury both to recommend a sentence of death and to decide whether aggravating circumstances exist, and does not even require that majority to decide on the same aggravator.”). After *Hurst* (and *Ramos*), the unconstitutionality of these schemes has been made clear, yet defendants like Davis have received little benefit from those rulings. For example, despite *Hurst*, Florida has re-enacted a new non-unanimous sentencing scheme, which suffers from the same problem as Alabama’s scheme that was applied in Davis’s case. See *Jackson v. State*, __ So.3d __, 2025 WL 3673716, at *21 (Fla. 2025) (Labarga, J., concurring in the judgment) (noting that Florida law began requiring unanimity after *Hurst* until a new statute was enacted to allow non-unanimity in 2023); see also *id.* at 22 (“[A] jury’s unanimous recommendation of death provides a narrowing function that is wholly warranted in this state that, with 30 exonerations, still leads the nation in exonerations from death row.”).

of juries as impartial decisionmakers and checks on government overreach. *See supra*, Section II.²² In states like Alabama, where judges are often elected, these schemes have been accused of incentivizing judges to impose the death penalty if they perceive that doing so will help their election chances, even if a jury did not so recommend.²³ These features further minimized the importance of the jury and produced unfairness, as evidenced by the fact that literature around the time suggested “that jurors were more ‘life-prone’ (more likely to sentence a defendant to life than death) than judges.” Katheryn K. Russell, *The Constitutionality of Jury Override in Alabama Death Penalty Cases*, 46 ALA. L. REV. 5, 19 (1994).

In 2017, the Alabama legislature ended the past practice of judicial override of jury recommendations

²² See G. Ben Cohen & Robert J. Smith, *The Death of Death Qualification*, 59 CASE W. RES. L. REV. 87, 89 (2008) (“Modern ‘death-qualification jurisprudence frustrates the Framers’ understanding as to the role of the criminal jury.”); *see also* Joan L. Larsen, *Ancient Juries and Modern Judges: Originalism’s Uneasy Relationship with the Jury*, 71 OHIO ST. L.J. 959, 965 (2010) (“Mutations in the original jury-and our understanding of its role-have left today’s jury seeming, at best, like the original jury’s distant cousin, and not at all like its twin.”); Douglas Colby, *Death Qualification and the Right to Trial By Jury: An Originalist Assessment*, 43 HARV. J.L. & PUB. POL’Y 815, 841 (2020) (“Death qualification does not seem to have had a direct analogue at common law or early American practice.”).

²³ See Richard R. W. Brooks & Steven Raphael, *Life Terms or Death Sentences: The Uneasy Relationship Between Judicial Elections and Capital Punishment*, 92 J. CRIM. L. & CRIMINOLOGY 609, 638–39 (2002); Paul Brace & Brent D. Boyea, *State Public Opinion, the Death Penalty, and the Practice of Electing Judges*, 52 AM. J. POL. SCI. 360, 370–71 (2008).

against the death penalty. *Alabama Abolishes Judge Override in Death Penalty Cases*, EQUAL JUST. INIT. (Jan. 29, 2026, at 02:32 PM), <https://eji.org/news/alabama-legislature-passes-law-abolishing-judicial-override/> [<https://perma.cc/6SN4-JZKJ>]. All the same, relief has not been retroactive; many prisoners in Alabama await execution even though their jury did not unanimously recommend a death sentence. *See Alabama's Death Penalty*, EQUAL JUST. INIT. (Jan. 29, 2026, at 02:34 PM ET), <https://eji.org/issues/alabama-death-penalty/> [<https://perma.cc/7K2S-EEMG>]. The number of affected defendants can be attributed, in part, to the fact that judges in Alabama imposed death sentences over a jury's recommendation of life much more frequently than they imposed life sentences over a death recommendation. *See Woodward v. Alabama*, 571 U.S. 1045, 1046 & n.1 (2013) (Sotomayor, J., dissenting).

While Alabama's scheme devalues juries, our de novo reading of *Strickland* and the Sixth Amendment should place juries in their rightful place as a protection against unfair and arbitrary punishment. *See Ramos*, 590 U.S. at 110 (rejecting a rule that would "have us discard a Sixth Amendment right in perpetuity rather than ask two States to retry a slice of their prior criminal cases"); *Duncan*, 391 U.S. at 156. Otherwise, we simply are importing Alabama's unconstitutional scheme into our interpretation and application of *Strickland*.

* * *

Considering the whole body of Supreme Court precedent on the right to a jury under the Sixth Amendment, we should not promote non-unanimous death

sentences and invasions on the right to a jury trial in death penalty cases.²⁴ See *Furman*, 408 U.S. at 371 (Marshall, J., concurring) (“This is a country . . . that clings to fundamental principles, cherishes its constitutional heritage, and rejects simple solutions that compromise the values that lie at the roots of our democratic system.”). We also should give more deference, not less, to the jury’s behavior when its hesitation suggests the defendant should not be subjected to the “ultimate sanction.” *Id.* at 286 (Brennan, J., concurring). Davis was entitled to a trial by a jury of his peers, and he was entitled to have courts listen to and respect the voice of the jury. Alabama instead provided him a trial where the jury was deprived of highly relevant information, and courts ignored that the jury was still hesitant and non-unanimous, even without that information, to impose the death penalty.

For these reasons, the state court should have viewed the jury’s hesitation to impose the death penalty here for what it was: a strong sign that Davis suffered prejudice and that the mitigation evidence his attorney failed to present would have changed the outcome. The state court’s contrary ruling was unreasonable, and the panel majority’s opinion resurrects unconstitutional aspects of Alabama’s 1993 death penalty scheme, importing them into our Sixth Amendment precedent. We should have, instead, left ahistorical jury minimization in the past. See *Ramos*, 590 U.S.

²⁴ See Richa Bijlani, Note, *More Than Just a Factfinder: The Right to Unanimous Jury Sentencing in Capital Cases*, 12 U. MICH. L. REV. 1499, 1502 (2022) (“The uniqueness of death penalty sentencing requires that the Sixth Amendment confer more protection to defendants facing capital punishment, not less.”).

at 88, 93; *Roberts*, 428 U.S. at 336 (“The Eighth Amendment, which draws much of its meaning from ‘the evolving standards of decency that mark the progress of a maturing society,’ *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion), simply cannot tolerate the reintroduction of . . . practice[s] so thoroughly discredited.”).

To Jimmy Davis, Jr., the question of whether a death penalty system might ever be fair and constitutionally applied is purely academic. He has experienced Alabama’s death penalty system, and his trial was constitutionally unfair; his attorney’s performance was woefully inadequate, and he was prejudiced by that performance. State courts failed to correct those constitutional errors, and federal courts have abdicated their responsibility to do so in their stead. While we, as a lower federal court, cannot fix all the problems with the death penalty, we should have fixed the errors in the case before us. I respectfully dissent.

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Appendix C

[Filed: Mar. 13, 2026]

In the
United States Court of Appeals
For the Eleventh Circuit

No. 18-14671

JIMMY DAVIS, JR.,

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. 1:07-cv-00518-CLS

JUDGMENT

ISSUED AS MANDATE 3/13/2026

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It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: October 30, 2024

For the Court: DAVID J. SMITH, Clerk of Court

No. _____

In the Supreme Court of the United States

JIMMY DAVIS, JR.,
Petitioner,

v.

GREG LOVELACE, COMMISSIONER,
ALABAMA DEPARTMENT OF CORRECTIONS,
Respondent.

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

APPENDIX, VOLUME II

Ethan T. Tidmore
BRADLEY ARANT BOULT
CUMMINGS LLP
1819 5th Ave
North Birmingham, AL 35203
(205) 521-8000

Michael P. Matthews
Heather A. Lee
FOLEY & LARDNER LLP
100 N. Tampa St., Ste 2700
Tampa, FL 33602
(813) 229-2300

Christopher M. Kise
Counsel of Record
CONTINENTAL PLLC
215 S. Monroe St
Ste 750
Tallahassee, FL 32301
(850) 270-2211
ckise@continental-
pllc.com

Attorneys for Petitioner

JUNE MMXXVI

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Appendix D

[Filed: May 26, 2016]

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION**

JIMMYDAVIS, JR.,	)	
	)	
Petitioner,	)	
vs.	)	Civil Action No.
	)	CV07-S-518-E
RICHARD F. ALLEN,	)	
Commissioner, Alabama	)	
Department of Corrections,	)	
Respondent.	)	

MEMORANDUM OF OPINION

The petitioner, Jimmy Davis, Jr. (“Davis”), seeks *habeas corpus* relief from his state court capital murder conviction and death sentence. *See* 28 U.S.C. § 2254.

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I. PROCEDURAL HISTORY

Jimmy Davis, Jr., was indicted in the Circuit Court of Calhoun County, Alabama, on May 17, 1993, for the capital offense of murder committed during a robbery in the first degree,¹ arising from the March 17, 1993 shooting death of Johnny Hazle, a fifty-year old service station attendant at Direct Oil, in Anniston, Alabama.² Davis was represented at trial by Steven D. Giddens and Jonathan L. Adams. The guilt phase of trial commenced on December 6, 1993, and Davis was convicted as charged on December 10, 1993.³ After

¹ See *Alabama Code* § 13A-5-40(a)(2) (1975).

² C.R. Vol. 1, Tab 1, at C-2. The court will utilize the following method of citation to the record. References to specific pages of the court record on direct appeal are designated "C.R.____," and references to the transcript on direct appeal are designated "R.____." References to the court record of the Rule 32 proceedings are designated "Rule 32 C.R. ____," and references to the transcript of the Rule 32 hearing are designated "Rule 32 R. ____." The court will strive to list any page number associated with the court records by reference to the numbers at the bottom of each page of a particular document, if said numbers are the most readily discoverable for purposes of expedient examination of that part of the record. Otherwise, the page numbers shall correspond with those listed at the upper right hand corner of the record. Additionally, if there is an easily identifiable tab number close to any cited material, the court has made reference to that for the reader's benefit.

³ R. Vol. 1, Tab 2, at 11 - R. Vol. 7, Tab 16, at 1289.

the penalty phase of the trial,⁴ the jury recommended by a vote of 11-1 that Davis be sentenced to death.⁵ At the March 4, 1994 sentencing hearing,⁶ the trial court followed the jury's recommendation and sentenced Davis to death.⁷ Trial counsel were permitted to withdraw following sentencing.⁸

The trial court appointed H. Wayne Love to represent the Davis on direct appeal. Five issues were raised.⁹ The case was remanded twice to the trial court. *Davis v. State*, 718 So. 2d 1148 (Ala. Crim. App. 1995). On the first remand, the trial court was directed to prepare and enter a formal sentencing order "encompassing all of the requirements of [Alabama Code] § 13A-5-47(d) [(1975)]." *Id.* at 1152 (alterations supplied). On return from remand, but due to "intervening caselaw," the appellate court remanded the case a second time with instructions for the trial court "to enter additional findings of fact regarding its

⁴ R. Vol. 7, Tab 16, at 1289 - R. Vol. 8, Tab 25, at 1380.

⁵ R. Vol. 8, Tab 25, at 1377-80.

⁶ R. Vol. 8, Tab 26, at 1381 - R. Vol. 8, Tab 28, at 1429.

⁷ R. Vol. 8, Tab 28, at 1427.

⁸ C.R. Vol. 1, Tab 1, at C-28.

⁹ Davis claimed that: 1) the trial court erred in denying his motion to prohibit death-qualification of prospective jurors or for separate juries for the guilt and penalty phases of the trial; 2) the trial court erred in denying his Batson claim; 3) the trial court erred in allowing testimony regarding the autopsy of the victim's body without establishing the proper chain of custody; 4) the trial court erred in sentencing him to death without entering a written finding as required by statute; and 5) the death sentence was improper in his case. C.R. Vol. 9, Tab 31, at 4.

denial of Davis's Batson motion and, if necessary, to conduct a new hearing on the issue." *Id.* On the second return from remand, the Alabama Court of Criminal Appeals addressed the merits of Davis's claims, and on March 21, 1997, affirmed the conviction and sentence of death. *Id.* at 1153-66.

Davis filed a petition for writ of *certiorari* with the Supreme Court of Alabama and reasserted three of the issues he had raised on direct appeal.¹⁰ Thereafter, Davis obtained new counsel, Ellen L. Wiesner, and she filed a second brief in support of the petition for writ of *certiorari*, raising many additional claims for the first time on direct appeal.¹¹ The Alabama Supreme Court affirmed the ruling of the Alabama Court of Criminal Appeals on February 13, 1998. *Ex parte Davis*, 718 So. 2d 1166 (Ala. 1998).

Davis filed a petition for writ of *certiorari* with the United States Supreme Court, but the petition was denied on March 1, 1999. *Davis v. Alabama*, 525 U.S. 1179 (1999).

Davis then sought postconviction relief pursuant to Rule 32 of the *Alabama Rules of Criminal Procedure*.¹² An evidentiary hearing was held from August 26-29, 2002. Davis called nineteen witnesses in an effort to prove a variety of ineffective assistance of

¹⁰ C.R. Vol. 9, Tab 34, at 3.

¹¹ C.R. Vol. 10, Tab 35.

¹² The second amended petition was the operative petition during state court collateral proceedings. Rule 32 C.R. Vol. 14, Tab 52, at 1-49.

counsel claims, as well as other claims.¹³ Neither Davis nor his trial attorney, Jonathan L. Adams, testified.

The Rule 32 court issued a “Stipulated Post-Trial Briefing Order” on December 1, 2003, giving the parties deadlines for submitting proposed findings of fact and conclusions of law, and responses thereto.¹⁴ Davis submitted his Proposed Findings of Fact and Conclusions of Law on January 20, 2004.¹⁵ The State submitted its proposed findings of fact and conclusions of law on March 10, 2004, in a document entitled “Proposed Order.”¹⁶ Davis submitted an opposition to the State’s proposed order on March 22, 2004.¹⁷

The trial court denied Davis’s Rule 32 petition on August 3, 2004.¹⁸ Davis filed “Objections to Court’s Adoption of the State’s Proposed Order Denying his Rule 32 Petition.”¹⁹ He then appealed.²⁰ The Alabama Court of Criminal Appeals affirmed the trial court’s judgment on March 3, 2006. That court found,

¹³ The transcript of the evidentiary hearing is located at Rule 32R. Vol. 18, Tab. 58, at 1-144 and Rule 32 R. Vols. 19 - 24.

¹⁴ Rule 32 C.R. Vol. 17, at 1004.

¹⁵ *Id.* at 1034-1113.

¹⁶ The state court record does not include a copy of the state’s proposed order. Evenso, references were made to its existence and date of filing in Davis’s objection to the court’s adaption of the state’s proposed order. *See Id.* at 1197.

¹⁷ *Id.* at 1115-1131.

¹⁸ Rule 32 C.R. Vol. 62, Tab 80.

¹⁹ Rule 32 C.R. Vol. 17, at 1197-1205.

²⁰ Rule 32 C.R. Vol. 57, Tab. 60, at 1-80.

sua sponte, that the vast majority of Davis's claims, including his claims for ineffective assistance of trial counsel, were procedurally barred because they had not been raised on direct appeal.

Davis v. State, 9 So. 3d 514 (Ala. Crim. App. 2006). Although the court denied relief, it discussed the ineffective assistance of trial counsel claims in detail, most notably with regard to counsels' preparations for the penalty phase. The court concluded that:

Davis's most troubling claim is that counsel failed to investigate and present mitigation evidence at the penalty phase. The evidence Davis alleges should have been discovered and presented is powerful. *Had this issue not been procedurally barred we would be compelled to grant relief and order a new sentencing hearing.*

Davis v. State, 9 So. 3d 514, 522 (Ala. Crim. App. 2006) (emphasis supplied).

Davis moved for rehearing²¹ but the Alabama Court of Criminal Appeals denied the application on August 25, 2006. *Davis*, 9 So. 3d 514. Davis then pursued a petition for writ of *certiorari*,²² but it was denied by the Alabama Supreme Court on February 16, 2007. Even so, on May 4, 2007, the Alabama Supreme Court withdrew its certificate of judgment and granted Davis's petition for *certiorari*²³ in light of the

²¹ Rule 32 C.R. Vol. 58, Tab 64.

²² Rule 32 C.R. Vol. 59, Tab 67, at 1-107.

²³ Doc. no. 14-1, at 2; doc. no. 14-2, at 2.

rule announced in *Ex parte Clemons*, 55 So. 3d 348 (Ala. 2007).²⁴

The Alabama Supreme Court reversed the procedural bar ruling against Davis on August 3, 2007, and remanded the case to the Court of Criminal Appeals “for that court to consider all of Davis’s ineffective-assistance-of-counsel claims on their merits.” *Ex parte Davis*, 9 So. 3d 537, 539 (Ala. 2007). The Alabama Court of Criminal Appeals affirmed the Circuit Court’s denial of Davis’s Rule 32 petition on April 4, 2008, holding that, “upon further research and review of the record we have reconsidered our comments in dicta in our previous opinion, and we now conclude that the circuit court did not abuse its discretion in denying Davis relief on his claims of ineffective assistance of trial counsel at the penalty phase.” *Davis v. State*, 9 So. 3d 539, 553 (Ala. Crim. App. 2008) (emphasis supplied). Davis filed an application for rehearing on May 9, 2008,²⁵ but it was denied on June 13, 2008. *Id.* at 539. Davis again petitioned the Alabama Supreme Court for a writ of *certiorari*,²⁶ but the

²⁴ In *Ex parte Clemons*, the Alabama Supreme Court held “that the procedural bars to postconviction relief contained in Rule 32.2(a), Ala. R. Crim. P., were not jurisdictional and therefore could be waived, abrogating the Court of Criminal Appeals’ holding in this case.” *Ex parte Davis*, 9 So. 2d 537, 538 (Ala. 2007).

²⁵ Rule 32 C.R. Vol. 60, Tab. 71. Davis’s federal habeas petition was filed on March 22, 2007, but was stayed after the Alabama Supreme Court withdrew its certificate of judgment and granted Davis’s petition for *certiorari* to reconsider the *Clemons* question.

²⁶ Rule 32 C.R. Vol. 61, Tab. 72.

petition was denied on November 26, 2008. *Ex parte Davis*, 9 So. 3d 571 (Ala. 2008).

Davis, through counsel, filed an amended § 2254 petition in this court on February 20, 2009.²⁷ For its consideration of this petition, the court has the respondent's response to an order to show cause with multiple exhibits comprising the underlying state court record,²⁸ the petitioner's reply and attachment,²⁹ and the petitioner's notices of supplemental authority in support of his petition.³⁰

II. THE OFFENSE OF CONVICTION

The Alabama Supreme Court set out the facts, quoting from the Court of Criminal Appeals' March 21, 1997 opinion:

The state's evidence showed that on March 17, 1993, the appellant[petitioner Jimmie Davis, Jr.], Alphonso Phillips, and Terrance Phillips made plans to rob the Direct Oil Station, a gasoline service station in Anniston. According to the plan, the appellant, who possessed a .25 caliber semiautomatic pistol, would point the pistol at the station operator, Alphonso would grab the money, and Terrance

²⁷ Doc. no. 33.

²⁸ Doc. nos. 35, 36, 37.

²⁹ Doc. no. 39.

³⁰ Doc. nos. 40, 41.

would act as a lookout. The state's evidence supports the conclusion that the appellant was the principal actor in the conspiracy. He conceived the idea to rob the station and he recruited the others to help him. As the trio approached the station, Terrance changed his mind, abandoned the conspiracy, and walked away. Alphonso and the appellant approached the station; the appellant confronted the operator, Johnny Hazle, in the doorway of the station, pointed the pistol at him, and said, "Give it up, fuck-nigger." The appellant almost immediately fired two shots from the pistol, which struck Hazle in the chest and abdomen. Terrance testified that he was about a block from the station, walking toward his home, when he heard two or three shots fired. After the shooting, the appellant and Alphonso ran from the scene. Hazle died from these wounds shortly thereafter. Three empty .25 caliber shell casings were recovered at the scene, and two bullets of the same caliber were recovered from Hazle's body. The pistol was subsequently recovered. The ballistics evidence showed that the two bullets recovered from Hazle's body and the three empty shell casings found at

the scene had been fired from the appellant's pistol. Alphonso and Terrance entered into agreements with the state pursuant to which in return for their testimony against the appellant they would be permitted to plead guilty to conspiracy to commit robbery in the first degree.

Alphonso, testifying for the state, stated that as he and the appellant reached the door of the station, the appellant pointed the pistol at Hazle and said, "Give it up, fuck-nigger"; that Hazle looked inside the store and smiled; and that the appellant shot Hazle when he smiled. Several witnesses for the state testified that the appellant told them shortly after the shooting that he had shot the Direct Oil Station operator. In his testimony, Terrance described his conversation with the appellant as follows:

He [petitioner Jimmie Davis, Jr.] said he had told him [the operator], "Give it up, fuck-nigger." And then he said the man had smiled or something at him, laughed or something. And then he said he had shot and the man had kicked the door. And then he shot again. I don't know — I can't remember how many times

he said he shot. And then he said they ran.

Alphonso testified as follows: “[petitioner, Jimmie Davis, Jr.] said, ‘Man, I shot that fuck-nigger, I shot him.’ And then he said, ‘The second time felt even better than the first time.’” Willie James Smith, an acquaintance of the appellant, testified, “[petitioner Jimmie Davis, Jr.] . . . told me he had shot someone. . . [a]nd told me he had robbed Direct and shot someone.” Smith also testified that the appellant told him that Alphonso and Terrance were with him and that the appellant “said that the man wouldn’t give up the money, so he shot him three times.” Shannon Hardy Wilson, another acquaintance of the appellant, testified as follows about his conversation with the appellant:

Before they got in there, he said they pulled up their bandannas and they went in there. And when he got to the door [petitioner Jimmie Davis, Jr.] said, “Give it up.” And that Mr. Hazle laughed at him and that Alphonso ran. And then he said he told him to give it up again. And he said Mr. Hazle laughed at him and then he shot him.

Wilson further testified that the appellant said he “wasn’t going to let no cracker laugh at him.”

718 So. 2d at 1155.

Davis did not give a confession to the police and, as the foregoing statement of facts indicates, much of the evidence against him consisted of testimony from Terrance Phillips, Alphonso Phillips, Willie James Smith, and other acquaintances. Davis did not testify at trial, and his primary trial strategy was to attempt to discredit the testimony of the state’s witnesses through cross-examination and arguments to the jury and the trial court.

Ex parte Davis, 718 So. 2d 1166, 1169-70 (Ala. 1998) (third and sixth alterations in original, other alterations supplied).

III. THE SENTENCE

The following excerpt is taken from the sentencing court’s written order on remand.³¹

In accordance with the mandate of § 13A-5-47, *Code of Alabama*, 1975, the Court proceeded to determine sentence in this cause. The Court received a written pre-sentence

³¹ On October 20, 1995, the Alabama Court of Criminal Appeals held that the trial court had failed to comply with the requirements of § 13A-5-47(d), and remanded the case to the trial court for the preparation of a formal sentencing order. *See Davis v. State*, 718 So. 2d 1148 (Ala. Crim. App. 1995). The Sentencing Order was entered pursuant to the appellate court’s remand order.

investigation report by Probation Officer Feehan. The report was made a part of the record and the Court noted several objections and denials made by the Defendant to matters stated therein.

The Court make[s] the following findings in regard to the aggravating circumstances set out by § 13A-5-49:

1. That the capital offense was not committed by a person under sentence of imprisonment;
2. That the defendant has not been previously convicted of another capital offense, but that the defendant was previously convicted of a felony involving the use or threat of violence to the person, namely, robbery in the third degree;
3. That the defendant did not knowingly create a great risk of death to many persons;
4. That the capital offense was committed while the defendant was engaged in the commission of, or an attempt to commit robbery, specifically robbery in the first degree.
5. That the capital offense was not committed for the purpose of avoiding or preventing a lawful

arrest or effecting an escape from custody;

6. That the capital offense was not committed for pecuniary gain;
7. That the capital offense was not committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; and
8. That the capital offense was not especially heinous, atrocious or cruel as compared to other capital offenses.

The Court makes the following findings under § 13A-5-51 *Code of Alabama*, 1975, in regard to mitigating circumstances:

1. That the defendant in fact does have a significant history of prior criminal activity. The written presentence investigation report reflects that since 1982 the Defendant's Juvenile Court history reflects adjudications of delinquency for theft, receiving stolen property and trespass. The Defendant's misdemeanor history since 1987 reflects adjudications of guilt for theft, resisting arrest, assault, and trespass. The defendant was, in addition[,] convicted of the felony robbery 3rd degree in 1992.

2. That the Defendant was not under the influence of extreme mental or emotional disturbances during the commission of the capital offense charged in this case;
3. That the victim, Johnny Hazel [sic], was not a participant in the Defendant's conduct and did not consent to it;
4. That the defendant was not merely an accomplice in the capital offense committed by another and that his participation was not relatively minor;
5. That the defendant did not act under extreme duress or under the substantial domination of another person;
6. That the Defendant did have the capacity to appreciate the criminality of his conduct and to conform his conduct to the requirement of the law. This finding is made even though the defense presented evidence that the defendant's intellectual quotient was 77 and in the borderline range;
7. That the defendant's age at the time of sentencing is 23 years of age, and that while he is an adult

that his age is a mitigating factor
or circumstance in this case.

In addition to the above, the Court has considered all testimony and evidence presented to the jury and to the Court in regard to the defendant's background, character, education achievement level, and circumstances as the same pertain to the mitigating circumstances that should be properly considered by the Court.

After due consideration of all matters that were presented to the Court during this hearing, both in mitigation and aggravation, and taking into consideration all other matters that are properly before the Court as herein above stated in this Order, this Court does now find and is convinced beyond a reasonable doubt that the aggravating circumstances as shown above and brought before the Court far outweigh the mitigating circumstances shown to the Court, that the said aggravating circumstances outweigh the said mitigating circumstances in all regards and that they are sufficient in both quantity and quality to more than uphold the jury's verdict recommending the death penalty in this case.

It is therefore the Judgment of this Court that the Defendant, Jimmy Davis, be sentenced to death by electrocution.

C.R. Vol. 62, Tab 76, at 17-20 (alterations supplied, underlined emphasis in original).

IV. INTRODUCTION TO A DISCUSSION OF DAVIS'S SUBSTANTIVE CLAIMS:

The Scope of Federal Habeas Review

“The habeas statute unambiguously provides that a federal court may issue the writ to a state prisoner ‘only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.’” *Wilson v. Corcoran*, 562 U.S. 1, 5 (2010) (quoting 28 U.S.C. § 2254(a)). As such, this court’s review of claims seeking habeas relief is limited to questions of federal constitutional and statutory law. Claims that turn solely upon state law principles fall outside the ambit of this court’s authority to provide relief under § 2254. *See Alston v. Department of Corrections*, 610 F.3d 1318, 1325-26 (11th Cir. 2010) (holding that a claim addressing either “an alleged defect in a collateral proceeding,” or a state court’s “interpretation of its own law or rules,” does not provide a basis for federal habeas relief) (citations omitted).

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

A *habeas* petitioner is required to present his federal claims to the state court, and to exhaust all of the procedures available in the state court system, before seeking relief in federal court. 28 U.S.C. § 2254(b)(1); *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”). That requirement serves the purpose of ensuring 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 explained by the Eleventh Circuit:

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]^[32] federal claims to the state courts in order to give the

³² 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”) (“properly” emphasized in original, all other emphasis supplied).

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 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) (alterations and ellipses in original) (footnote supplied).

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

1. General principles

It is well established that, if a *habeas* petitioner fails to raise his federal claim in the state court system at the time and in the manner dictated by the state's procedural rules, the state court can decide that the claim is not entitled to a review on the merits. Stated differently, "the petitioner will have *procedurally defaulted* on that claim." *Mason v. Allen*, 605 F.3d 1114, 1119 (11th Cir. 2009) (emphasis supplied). This so-called "procedural default" doctrine was explained by the Supreme Court in *Woodford v. Ngo*, 548 U.S. 81 (2006), as follows:

In habeas, the sanction for failing to exhaust properly (preclusion of review in federal court) is given the separate name of procedural default, although the habeas doctrines of exhaustion and procedural default "are similar in purpose and design and implicate similar concerns," *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 7 (1992). See also *Coleman v. Thompson*, 501 U.S. 722, 731–732, 111 S. Ct. 2546 (1991). In habeas, state-court remedies are described as having been "exhausted"

when they are no longer available, regardless of the reason for their unavailability. See *Gray v. Netherland*, 518 U.S. 152, 161, 116 S. Ct. 2074, 135 L. Ed. 2d 457 (1996). Thus, if state-court remedies are no longer available because the prisoner failed to comply with the deadline for seeking state-court review or for taking an appeal, those remedies are technically exhausted, *ibid.*, but exhaustion in this sense does not automatically entitle the habeas petitioner to litigate his or her claims in federal court. Instead, if the petitioner procedurally defaulted those claims, the prisoner generally is barred from asserting those claims in a federal habeas proceeding. *Id.*, at 162, 116 S. Ct. 2074; *Coleman, supra*, at 744–751, 111 S. Ct. 2546.

Woodford, 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, and that procedural bar provides an adequate and independent state ground for denying relief, then federal review of the claim also is precluded by federal procedural default principles. See *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.”) (citing *Coleman*, 501 U.S. at 731) (alteration supplied).

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 supplied).³³

Federal deference to a state court's clear finding of procedural default under its own rules is so strong that:

“[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

³³ “When the last state court rendering judgment affirms without explanation, [the federal court will] presume that it rests on the reasons given in the last reasoned decision.” *Mason v. Allen*, 605 F.3d 1114, 1118 n.2 (11th Cir. 2009) (alteration supplied). As the Supreme Court observed in *Ylst v. Nunnemaker*, 501 U.S. 797 (1991):

The problem we face arises, of course, because many formulary orders are not meant to convey *anything* as to the reason for the decision. Attributing a reason is therefore both difficult and artificial. We think that the attribution necessary for federal habeas purposes can be facilitated, and sound results more often assured, by applying the following presumption: *Where 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.* If an earlier opinion “fairly appear[s] to rest primarily upon federal law,” we will presume that no procedural default has been invoked by a subsequent unexplained order that leaves the judgment or its consequences in place. Similarly where, as here, the last reasoned opinion on the claim explicitly imposes a procedural default, we will presume that a later decision rejecting the claim did not silently disregard that bar and consider the merits.

Id. at 803 (first emphasis and alteration in original, second emphasis supplied) (citation omitted).

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 allegations 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*, 501 U.S. at 729) (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*, 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 (alteration supplied). That does not mean that the state’s procedural rule must be rigidly applied in every instance, or that occasional failure to do so will render the rule “inadequate.” “To the contrary, a [state’s] discretionary [procedural] rule can be ‘firmly established’ and ‘regularly followed’ — even if the appropriate exercise of discretion may permit consideration of a federal claim in some cases but not others.” *Beard v. Kindler*, 558 U.S. 53, 60-61 (2009) (alterations supplied). 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 supplied).

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

2. *Overcoming procedural default*

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: *i.e.*, (i) where the petitioner demonstrates that he had good “cause” for not following the state procedural rule, *and*, that he was actually “prejudiced” by the alleged constitutional violation; *or* (ii) where the state procedural rule was not “firmly established and regularly followed”; *or* (iii) where failure to consider the petitioner’s claims will result in a “fundamental miscarriage of justice.” *Edwards v. Carpenter*, 529 U.S. 446, 455 (2000) (Breyer, J., concurring) (citations omitted); *see also, 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.”) (alteration supplied); *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)).

a. *The “cause and prejudice” standard*

“A federal court may still address the merits of a procedurally defaulted claim if the petitioner can show cause for the default and actual prejudice resulting from the alleged constitutional violation.” *Ward v. Hall*, 592 F.3d 1144, 1157 (11th Cir. 2010) (citing *Wainwright v. Sykes*, 433 U.S. 72, 84-85 (1977)) (emphasis supplied). This so-called “cause and prejudice” standard is clearly framed in the conjunctive; therefore, a petitioner must prove both parts.

i. *“Cause”*

To show “cause,” a petitioner must prove that “some objective factor external to the defense impeded counsel’s efforts” to raise the claim in the state courts. *Murray*, 477 U.S. at 488; *see also Amadeo v. Zant*, 486 U.S. 214, 221-22 (1988).

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, 499 U.S. at 493-94 (citations omitted) (first alteration in original, all other alterations supplied).

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 753-54 (alterations supplied). That is because “[t]here is no constitutional right to an attorney in state post-conviction proceedings.” *Id.* at 752 (alteration supplied) (citing *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *Murray v. Giarattano*, 492 U.S. 1 (1989)).

Even so, in three recent landmark cases, the Supreme Court extended its prior decision in *Coleman* when it decided that, as a matter of *equity, and, under specific, limited circumstances*, errors by counsel on post-conviction, collateral review could establish the necessary “cause” to overcome a procedurally defaulted claim. In the first such case, *Maples v. Thomas*, — U.S. —, 132 S. Ct. 912 (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. *Id.* at 922-23.

In the second case, *Martinez v. Ryan*, 569 U.S. —, 132 S. Ct. 1309 (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. *Id.* at 1317.

Finally, in *Trevino v. Thaler*, — U.S. —, 133 S. Ct. 1911 (2013), the Supreme Court extended the exception carved out in *Martinez* to situations in which a state’s procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal. *Trevino*, 133 S. Ct. at 1921.

ii. “Prejudice”

In addition to proving the existence of “cause” for a procedural default, a *habeas* petitioner must show that he was actually “prejudiced” by the alleged constitutional violation. He must show “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); *see also McCoy v. Newsome*, 953 F.2d 1252, 1261 (11th Cir. 1992) (*per curiam*). If the “cause” is of the type described in the Supreme Court’s 2012 decision in *Martinez v. Ryan*, *supra*, 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*, 132 S. Ct. at 1318-19 (citing for comparison *Miller-El v. Cockrell*, 537 U.S. 322 (2003) (describing standards for certificates of appealability to issue)).

b. The “fundamental miscarriage of justice” standard

In a “rare,” “extraordinary,” and “narrow class of cases,” a federal court may consider a procedurally defaulted claim in the absence of a showing of “cause” for the default if *either*: (a) a fundamental miscarriage of justice “has probably resulted in the conviction of one who is actually innocent,” *Smith*, 477 U.S. at 537-38 (quoting *Carrier*, 477 U.S. at 496); *or* (b) the petitioner shows “by *clear and convincing* 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 (quoting *Sawyer v. Whitley*, 505 U.S. 333, 336 (1992)) (emphasis in *Schlup*, alteration supplied).

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

The writ of *habeas corpus* “has historically been regarded as an extraordinary remedy.” *Brecht v. Abrahamson*, 507 U.S. 619, 633 (1993). That is especially true when federal courts are asked to engage in habeas review of a state court conviction pursuant to 28 U.S.C. § 2254.

Direct review is 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. (emphasis and redaction supplied) (quoting *Barefoot*, 463 U.S. at 887). “Those few who are ultimately successful [in obtaining federal habeas relief] are persons whom society has grievously wronged and for whom belated liberation is little enough compensation.” *Fay v. Noia*, 372 U.S. 391, 440-41 (1963), overruled on other grounds by *Wainwright v. Sykes*, 433 U.S. 72 (1977) (alteration supplied).

“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 (citations, quotation marks, and footnote omitted). That is due to the fact that, under the federal system of governments created by the United States Constitution,

[t]he 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) (alteration supplied).³⁴

These principles were reinforced by the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), which amended preexisting *habeas* law.³⁵ Among other things, several provisions of the AEDPA require federal courts to give greater deference to state court determinations of federal constitutional claims than before.

1. 28 U.S.C. § 2254(e)(1)

Section 2254(e)(1) requires district court stop re-sume 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*

³⁴ “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; and *Wainwright*, 433 U.S. at 90).

³⁵ The Antiterrorism and Effective Death Penalty Act (“AEDPA”) was signed into law by President Clinton on April 24, 1996. *See* Pub. L. No. 104-132, 110 Stat. 1214 (1996). The present petition was filed after that date. Accordingly, the habeas statutes as amended by AEDPA apply to the claims asserted in this case. *See id.* § 107(c), 110 Stat. at 1226; *McNair v. Campbell*, 416 F.3d 1291, 1297 (11th Cir. 2005) (applying AEDPA to habeas petitions filed after Act’s effective date); *Hightower v. Schofield*, 365 F.3d 1008, 1013 (11th Cir. 2004) (same). Cf. *Lindh v. Murphy*, 521 U.S. 320, 327 (1997) (holding that AEDPA’s amendments do not apply to habeas petitions filed prior to the Act’s effective date); *Johnson v. Alabama*, 256 F.3d 1156, 1169 (11th Cir. 2001) (same); *Thompson v. Haley*, 255 F.3d 1292, 1295 (11th Cir. 2001) (same).

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 Section 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) (acknowledging the federal court’s obligation to accept a state court’s factual findings as correct, if unrebutted by clear and convincing evidence, and proceeding to conduct a *de novo* review of the *habeas* claim)

The presumption of correctness also applies to habeas claims that were adjudicated on the merits by the state court and, therefore, are subject to the standards of review set out in 28 U.S.C. §§ 2254(d)(1) and (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 is a summary ruling “unaccompanied by explanation.” *Id.*

Further, the “backward-looking language” of the statute requires an Examination of the state-court decision *on the date it was made*. *Cullen v. Pinholster*, 563 U.S. 170, 182 (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.* (alterations supplied) (quoting *Lockyer v. Andrade*, 538 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 (alterations and emphasis supplied). 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 the separate provisions of 28 U.S.C. § 2254(d)(1) and (d)(2) reveals that, when a state court has made a decision on a petitioner’s constitutional claim, habeas relief cannot be granted, unless it is determined that the state court’s adjudication of the claim *either*:

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; *or*

(2) resulted in a decision that was based on an unreasonable determination of the facts

in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d) (emphasis supplied).³⁶

The “contrary to” and “unreasonable application of” 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).³⁷ When considering a state court’s adjudication of a petitioner’s claim, therefore, the *habeas* court must not conflate the two inquiries.

³⁶ 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 and alteration supplied); *see also, e.g., Carey v. Musladin*, 549 U.S. 70, 74 (2006) (same); *Osborne v. Terry*, 466 F.3d 1298, 1305 (11th Cir. 2006) (same); *Warren v. Kyler*, 422 F.3d 132, 138 (3rd Cir. 2005) (“[W]e do not consider those holdings as they exist today, but rather as they existed as of the time of the relevant state-court decision.”) (internal quotation marks and citation omitted) (alteration supplied).

³⁷ *See also Williams*, 529 U.S. at 404 (O’Connor, J., majority opinion) (“Section 2254(d)(1) defines two categories of cases in which a state prisoner may obtain federal habeas relief with respect to a claim adjudicated on the merits in state court. Under the statute, a federal court may grant a writ of habeas corpus if the relevant state-court decision was either (1) ‘*contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States,*’ or (2) ‘*involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States.*’”) (emphasis and ellipses in original).

a. *The meaning of § 2254(d)(1)’s “contrary to” clause*

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

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 (emphasis supplied). See also, e.g., *Brown v. Payton*, 544 U.S. 133, 141 (2005) (same); *Early v. Packer*, 537 U.S. 3, 8 (2002) (*per curiam*) (same); *Putman v. Head*, 268 F.3d 1223, 1241 (11th Cir. 2001) (same).

The Eleventh Circuit has observed that the Supreme Court’s majority opinion in *Williams* does not limit the construction of § 2254(d)(1)’s “contrary to” clause to the two examples set forth above.³⁸ Instead,

³⁸ Indeed, as one commentator has observed, the possible permutations are not just two, but at least four in number:

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

the statutory language “simply implies that ‘the state court’s decision must be substantially different from the relevant precedent of [the Supreme] Court.’” Alderman, 468 F.3d at 791 (quoting *Williams*, 529 U.S. at 405) (alteration supplied).

b. *The meaning of § 2254(d)(1)’s “unreasonable application” clause*

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

First, a state-court decision involves an unreasonable application of this Court’s precedent if the state court identifies the correct governing legal rule from this Court’s cases

appears 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 and arrives at a correct outcome; and,
- the state court applies the correct federal standard and 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. & LEEL. REV. 677, 685 (2003) (footnotes omitted).

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 (emphasis supplied). *See also, e.g., Putman*, 268 F.3d at 1240-41 (same).

It is important to notice that “an *unreasonable* application of federal law is different from an *incorrect* application.” *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 supplied).

In other words, the question that should be asked is not whether the state court “correctly” applied Supreme Court precedent when deciding the federal constitutional issue, but whether the state court's determination was “unreasonable.” *Id.* at 409 (“[A] federal habeas court making the ‘unreasonable application’ inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable.”) (alteration supplied). *See also, e.g., Bell*, 535 U.S. at 694 (observing that the “focus” of the inquiry into the reasonableness of a state court's determination of a federal constitutional issue “is on whether the state court's application of clearly

established federal law is objectively unreasonable,” and stating that “an unreasonable application is different from an incorrect one”); *Harrington v. Richter*, 562 U.S. 86, 101-04 (2011) (same).³⁹

In order 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 fair-minded disagreement*.” *Id.* at 103 (emphasis supplied). Stated another way, if the state-court’s resolution of a claim is *debatable among fairminded jurists*, it is *not* “objectively unreasonable.”

“By 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.”

³⁹ The Eleventh Circuit has observed that § 2254(d)(1)’s “unreasonable application” provision is the proper statutory lens for viewing the “run-of-the-mill state-court decision applying the correct legal rule.” *Alderman v. Terry*, 468 F.3d 775, 791 (11th Cir. 2006).

In other words, if the state court identified the correct legal principle but unreasonably applied it to the facts of a petitioner’s case, then the federal court should look to § 2254(d)(1)’s “unreasonable application” clause for guidance. “A federal habeas court making the ‘unreasonable application’ inquiry should ask whether the state court’s application of clearly established federal law was objectively unreasonable.”

Id. (quoting *Williams*, 529 U.S. at 409) (emphasis in original).

Neelley v. Nagle, 138 F.3d 917, 924 (11th Cir. 1998), *abrogated on other grounds by Williams*, 529 U.S. at 413 (citation and footnote omitted) (alteration supplied). 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), overruled on other grounds by *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992).

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

“28 U.S.C. § 2254(d)(2) imposes a ‘daunting standard — one that will be satisfied in relatively few cases.’” *Cash v. Maxwell*, — U.S. —, 132 S. Ct. 611, 612 (2012) (quoting *Maxwell v. Roe*, 628 F.3d 486, 500 (9th Cir. 2010) (internal quotation marks omitted in original)).

As we have observed 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) (alteration in original). 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 and ellipses 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 -1250 (11th Cir. 2013) (quoting *Jones v. Walker*, 540 F.3d 1277, 1288 n.5 (11th Cir. 2008) (*en banc*) (alterations in original) (quotation marks and citations omitted in original)).

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

As set out in the previous parts of this opinion, 28 U.S.C. § 2254(d)(2) regulates federal court review of state court findings of fact by limiting the availability of federal *habeas* relief on any claims by a state prisoner that are grounded in a state court’s factual findings, unless those 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).

It also must be remembered that 28 U.S.C. § 2254(e)(1) affords a presumption of correctness to factual determinations made by a state court, and that the *habeas* petitioner bears the burden of rebutting that presumption “by *clear and convincing evidence*.”

28 U.S.C. § 2254(e)(1) (emphasis supplied); *see also Ward*, 592 F.3d at 1155-56 (holding that the presumption of correctness attending a state court's findings of fact can be overcome only by clear and convincing evidence).

The Eleventh Circuit has observed that the relationship between subsections 2254(d)(2) and (e)(1) remains an open question. *See Cave v. Secretary for Department of Corrections*, 638 F.3d 739, 744-46 (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)) (alteration supplied). Even so, the Eleventh Circuit’s earlier opinion in *Ward v. Hall*, 592 F.3d 1144 (2010), clearly held 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)) (emphasis supplied). That same opinion also observed that “28 U.S.C. § 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 1155-56 (alteration in original).

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

Habeas review “exists only to review errors of constitutional dimension.” *McFarland v. Scott*, 512 U.S. 849, 861 (1994) (O’Connor, J., concurring); *see also* 28

U.S.C. § 2254(a).⁴⁰ “When the process of direct review . . . comes to an end, a presumption of finality and legality attaches to the conviction and sentence.” *Barefoot*, 463 U.S. at 887 (ellipses supplied). Two consequences flow from those fundamental propositions.

First, the *habeas* petitioner bears the burden of overcoming the presumption of “legality” that attaches to the state court conviction and sentence, and of establishing a factual basis demonstrating that federal post-conviction relief should be granted. *See, e.g.*, 28 U.S.C. §§ 2254(d) and (e)(1);⁴¹ *Hill v. Linahan*, 697

⁴⁰ The statute cited in text provides that: “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*.” 28 U.S.C. § 2254(a) (emphasis supplied). It follows that claims pertaining solely to questions of state law fall outside the parameters of this court’s authority to provide relief under § 2254.

⁴¹ As discussed in Part IV.C. *supra*, Section 2254(d) provides that the state courts’ adjudication of a *habeas* petitioner’s claims can be overturned only if the petitioner carries the burden of demonstrating that a particular determination *either* (1) “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law,” *or* (2) that the ruling “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.” Further, § 2254(e)(1) provides that:

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

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*, 512 U.S. at 856 (citations omitted); *Borden v Allen*, 646 F.3d 785, 810 (11th Cir. 2011) (Section 2254 requires “fact pleading,” and not merely “notice pleading”). The mere assertion of a ground for relief, without concomitant allegation of 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 provides that a state prisoner must “specify all the grounds for relief available to the petitioner,” and to then “*state the facts supporting each ground.*” 28 U.S.C. § 2254 app. Rule 2(c), *Rules Governing Section 2254 Cases in the United States District Courts* (emphasis supplied).⁴² *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”) (emphasis supplied).

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

rebutting the presumption of correctness by clear and convincing evidence.

⁴² Accord Rule 2(b) of the Rules Governing Section 2255 Proceedings for the United States District Courts.

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. 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”).⁴³

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) (alteration supplied). As another district judge has stated:

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

⁴³ *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.*”) (emphasis supplied).

understand his argument and to render a decision on the matter.

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

E. Introduction to Ineffective Assistance of Counsel Claims

An introduction to ineffective assistance of counsel claims is included here because of the relationship between such claims — which are governed by a highly deferential standard of constitutional law — and 28 U.S.C. § 2254(d), which itself requires the exercise of deference. A general discussion also provides a central reference point, because Davis has divided his allegations that trial counsel provided ineffective assistance into several separate *habeas* claims.

With the sole exceptions of the situations discussed in the Supreme Court’s *Martinez* and *Trevino* decisions,⁴⁴ 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*, 501 U.S. at 752 (“There is no constitutional right to an attorney in state post-conviction proceedings. . . . Consequently, a petitioner cannot claim constitutionally

⁴⁴ *See supra*, page 30.

ineffective assistance of counsel in such proceedings.”) (citations omitted).

The Supreme Court’s “benchmark” standard for judging any claim that 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 is the question of “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. Even so, *Strickland* requires that the issue be approached in two steps: *i.e.*,

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 supplied); *see also, e.g., Williams*, 529 U.S. at 390 (quoting *Strickland*); *Grayson v. Thompson*, 257 F.3d 1194, 1215 (11th Cir. 2001) (same).

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,” *both* that the performance of his trial or appellate attorney was *deficient*; *and*, 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.”) (citation to *Strickland* omitted).

1. The performance prong

“The burden of persuasion is on the petitioner to prove by a preponderance of the evidence that counsel’s performance was unreasonable.” *Stewart v. Secretary, Department of Corrections*, 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 defendant 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 for gauging attorney performance is “reasonableness under

prevailing professional norms.” *Id.* at 688. “The test for reasonableness is not whether counsel could have done something more or different,” but whether counsel’s performance “fell within the broad range of reasonable assistance at trial.” *Stewart*, 476 F.3d at 1209 (citing *Chandler*, 218 F.3d at 1313). Furthermore, courts must “recognize that omissions are inevitable. But, the issue is not what is possible or what is prudent or appropriate, but only what is constitutionally compelled.” *Id.* (quoting *Burger v. Kemp*, 483 U.S. 776, 794 (1987)) (internal quotation marks omitted). The Sixth Amendment does not guarantee a defendant the very best counsel or the most skilled attorney, but only an attorney who performed reasonably well within the broad range of professional norms. “The test has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial.” *White v. Singletary*, 972 F.2d 1218, 1220 (11th Cir. 1992).

The reasonableness of counsel’s performance is judged from the perspective of the attorney at the time of the alleged error, and in light of all the circumstances. *See, e.g., Johnson v. Alabama*, 256 F.3d 1156, 1176 (11th Cir. 2001) (giving lawyers “the benefit of the doubt for ‘heat of the battle’ tactical decisions”); *Mills v. Singletary*, 161 F.3d 1273, 1286 (11th Cir. 1998) (noting that *Strickland* performance review is a “deferential review of all of the circumstances from the perspective of counsel at the time of the alleged

errors”)) (quoting *Baldwin v. Johnson*, 152 F.3d 1304, 1311 (11th Cir. 1998)).

Under this standard, there 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.” *Putman v. Head*, 268 F.3d 1223, 1244 (11th Cir. 2001).

Michael v. Crosby, 430 F.3d 1310, 1320 (11th Cir. 2005) (first alteration supplied, second alteration in original). Judicial scrutiny of counsel’s performance must be “highly deferential,” because representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another. See *Strickland*, 466 U.S. at 697.

It is all too tempting for a defendant to second-guess counsel’s assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time. Because of the difficulties inherent in making the evaluation, a court must

indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; *that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.* There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

Strickland, 466 U.S. at 689 (emphasis supplied) (citations and internal quotation marks omitted); *see also*, e.g., *Rogers v. Zant*, 13 F.3d 384, 386 (11th Cir. 1994) ("When reviewing whether an attorney is ineffective, courts should always presume strongly that counsel's performance was reasonable and adequate.") (internal quotation marks omitted).

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

2. The prejudice prong

"A petitioner's burden of establishing that his lawyer's deficient performance prejudiced his case is also

high.” *Van Poyck v. Florida Department of Corrections*, 290 F.3d1318, 1322 (11thCir. 2002). *See also, e.g., Gilreath v. Head*, 234 F.3d547, 551 (11th Cir. 2000) (holding that a *habeas* petitioner “must affirmatively prove prejudice, because ‘[a]ttorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial.’”) (quoting *Strickland*, 466 U.S. at 693)) (alteration in original). “It is not enough for the [*habeas* petitioner] to show that the errors had some conceivable effect on the outcome of the proceeding.” *Strickland*, 466 U.S. at 693 (alteration supplied); *see also Harrington*, 562 U.S. at 112 (citing *Strickland*, 466 at 693) (“The likelihood of a different result must be *substantial*, not just conceivable.”)) (emphasis supplied).

Instead, to prove prejudice, the *habeas* petitioner “must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694; *see also Williams*, 529 U.S. at 391 (same). When that standard is applied in the context of the death sentence itself, “the question is whether there is a reasonable probability that, absent the errors, the sentencer [*i.e.*, in Alabama, the trial court judge] . . . 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) (alteration supplied).

That is a high standard, and in order to satisfy it 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 1273, 1278 (11th Cir. 2001) (quoting *Strickland*, 466 U.S. at 687). In other words, “[a] finding of prejudice requires proof of unprofessional errors so egregious that the trial was rendered unfair and the verdict rendered suspect.” *Johnson*, 256 F.3d at 1177 (quoting *Eddmonds v. Peters*, 93 F.3d 1307, 1313 (7th Cir. 1996) (in turn quoting *Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986))) (internal quotation marks omitted) (alteration supplied).

3. *Deference accorded state court findings of historical fact, when evaluating ineffective assistance of counsel claims*

State court findings of historical fact made in the course of evaluating a claim of ineffective assistance of counsel are subject to a presumption of correctness under 28 U.S.C. §§ 2254(d)(2) and (e)(1). *See, e.g., Thompson v. Haley*, 255 F.3d 1292, 1297 (11th Cir. 2001). To overcome a state-court finding of fact, the petitioner bears a burden of proving contrary facts by “clear and convincing evidence.”

Additionally, under the AEDPA, a federal *habeas* court may grant relief on a claim of ineffective assistance of counsel *only if* the state-court determination involved an “unreasonable application” of the *Strickland* standards to the facts of the case. *Strickland* itself, of course, also requires an assessment of whether counsel’s conduct was professionally unreasonable. Those two assessments cannot be conflated into one. *See Harrington*, 562 U.S. at 101-12. Thus, *habeas* relief on a claim of ineffective assistance of counsel can be granted with respect to a claim actually decided by the state courts *only if* the habeas court determines

that it was “objectively unreasonable” for the state courts to find that counsel’s conduct was not “professionally unreasonable.” The *Harrington* Court explained:

“Surmounting *Strickland*’s high bar is never an easy task.” *Padilla v. Kentucky*, 559 U.S. 356, 371, 130 S. Ct. 1473, 1485, 176 L. Ed. 2d 284 (2010). An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest “intrusive post-trial inquiry” threaten the integrity of the very adversary process the right to counsel is meant to serve. *Strickland*, 466 U.S., at 689-690, 104 S. Ct. 2052. Even under *de novo* review, the standard for judging counsel’s representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is “all too tempting” to “second-guess counsel’s assistance after conviction or adverse sentence.” *Id.*, at 689, 104 S. Ct. 2052; *see also Bell v. Cone*, 535 U.S. 685, 702, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002); *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993). The question is whether an attorney’s representation amounted to incompetence under “prevailing professional norms,” not whether it deviated

from best practices or most common custom. *Strickland*, 466 U.S., at 690, 104 S. Ct. 2052.

Establishing that a state court’s application of *Strickland* was unreasonable under § 2254(d) is all the more difficult. The standards created by *Strickland* and § 2254(d) are both “highly deferential,” *Id.*, at 689, 104 S. Ct. 2052; *Lindh v. Murphy*, 521 U.S. 320, 333, n.7, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997), and when the two apply in tandem, review is “doubly” so, *Knowles [v. Mirzayance]*, 556 U.S. [111, 125], 129 S. Ct. at 1420 [(2009)]. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. 556 U.S., at [123], 129 S. Ct. at 1420. Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel’s actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*’s deferential standard. *Harrington*, 562 U.S. at 105 (alterations supplied); *see also Premo v. Moore*, 562 U.S. 115, 121-22 (2011).

V. DAVIS’S CLAIMS

A. Ineffective Assistance of Counsel During Guilt Phase of Trial

Davis contends that, by abdicating their “Constitutionally mandated responsibility to subject the State’s case to meaningful adversarial testing,” and by

committing errors so serious that they deprived him of a fair trial, trial counsel provided ineffective assistance under the framework established by *Strickland v. Washington*, 466 U.S. 668 (1984).⁴⁵ Davis divides this claim into five subclaims of ineffective assistance based on his trial counsel's alleged: (1) failure to conduct an adequate investigation; (2) failure to present alibi witnesses; (3) failure to challenge the State's investigation and presentation of the case; (4) failure to present, argue adequately, and seek favorable rulings on numerous pre-trial motions; and (5) failure to present additional substantive evidence in his defense.⁴⁶ He raises numerous factual allegations in support of each subclaim. Even so, the majority of those factual allegations were raised and rejected in state court.⁴⁷

The trial court found that Davis had not met his burden of establishing ineffective assistance of counsel,⁴⁸ and the Alabama Court of Criminal Appeals affirmed that finding. *Davis v. State*, 9 So. 3d 539, 546-52 (Ala. Crim. App. 2008). Davis now argues that the Court of Criminal Appeals failed to properly apply the *Strickland* test and its progeny, including *Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003); and *Williams v. Taylor*, 529 U.S. 362

⁴⁵ Doc. no. 33, at 7.

⁴⁶ *Id.* at 7-23.

⁴⁷ Any claim that was not raised in state court will be identified below. Otherwise, the claims were raised in Davis's Second Amended Rule 32 Petition. Rule 32 C.R. Vol. 14, Tab 52.

⁴⁸ Rule 32 C.R. Vol. 62, Tab 80, at 5-26.

(2000).⁴⁹ Each of Davis's five subclaims will be addressed, in turn.

1. *Failure to adequately investigate the capital murder charge*

Davis asserts that his trial counsel failed to undertake a timely and substantive investigation prior to trial, and he argues that, had they done so, they would have discovered relevant evidence that would have aided his defense. He challenges the amount of time counsel spent on his case, the scope of counsel's investigation, and counsel's failure to transcribe the preliminary hearing.

a. Time spent in preparation for trial

Davis contends that the amount of time counsel spent preparing for trial and investigating was grossly inadequate for a capital case.⁵⁰ He complains that he first met attorney Steven Giddens on April 9, 1993, and then only for a few minutes prior to the preliminary hearing.⁵¹ Thereafter, neither Giddens nor co-counsel Jonathan Adams performed any meaningful work to prepare for trial until just two weeks before the trial at the end of November. Davis asserts that Giddens' time sheets reflect that Giddens met with him only twice after their initial meeting, on

⁴⁹ However, the court notes that many of Davis's claims were not presented to the Alabama Court of Criminal Appeals.

⁵⁰ Doc. no. 33, at 8-13.

⁵¹ *Id.* at 8-9.

June 11, 1993, and November 12, 1993, and for only an hour each time.⁵²

The generalized assertion that counsel did not spend adequate time preparing for trial, standing alone, does not entitle Davis to relief. First, it should be noted that this “claim” was not specifically raised in state court. Instead, within the section of his Rule 32 petition entitled “Statement of the Case,” Davis complained that the time records submitted to the court by one of his trial lawyers showed that he did not begin working on the case until November 24, 1993, just eleven days before trial commenced.⁵³ At the conclusion of the evidentiary hearing, Davis argued that counsel should have spent more than two hours with him,⁵⁴ but conceded: “the case law requires me to point to specific errors that were made by defense attorneys and not just say, well, they only spent two weeks investigating this case and so that’s not enough.”⁵⁵ The alleged lack of sufficient time spent investigating, standing alone, does not warrant further discussion⁵⁶ as the claim was effectively

⁵² *Id.*

⁵³ Rule 32 C.R. Vol. 14, Tab. R-52, at 3.

⁵⁴ He complained that Giddens first met with him in June, 1993, three months after the crime was committed, and noted that the time sheets reflect that Adams met with Davis only one time and that nothing was done on the case until November. Rule 32 R. Vol. 24, at 1153.

⁵⁵ *Id.* at 1155.

⁵⁶ To the extent that the Respondent argues that Davis has added new factual support for this claim, the state court record

waived by counsel in state court. The amount of time involved in preparation is, however, discussed below in conjunction with specific alleged deficiencies.

b. *Scope of investigation*

Davis complains that counsel failed to take the following actions during the months prior to trial: request a continuance of the preliminary hearing because he had conducted no pre-hearing interviews; request funds to obtain an investigator; file motions to obtain mental health or social history evaluations, and subpoenas for police, school, DHR, or other family public assistance records; conduct an investigation into drug or alcohol use by Davis or members of his family; elicit exculpatory or mitigating information from Davis; interview Davis's mother until one week before trial; interview any other family members or friends of Davis; interview key witnesses closer in time to the event; interview or investigate the backgrounds of Shannon Hardy Wilson or the Phillips cousins, the centerpieces of the State's case against Davis; pursue an alibi defense; take notes of important interviews; conduct meaningful interviews of the co-defendants or Willie Smith; investigate the burglary of the firearm that was used in the offense; attempt to identify and interview the informant; and prepare a coherent defense.⁵⁷

Davis has not, however, described how or why he was prejudiced by counsel's alleged deficiencies.

reveals that essentially the same arguments were made. *Id.* at 1153-1155.

⁵⁷ Doc. no. 33, at 8-13.

Accordingly, he has failed to satisfy the heightened pleading requirements for *habeas* cases. *See McFarland*, 512 U.S. at 856. To the extent that certain allegations are repeated elsewhere within this claim or petition, with fully-developed arguments regarding prejudice, the assertions will be addressed there. To the extent that they are not, the allegations are due to be dismissed as conclusory.

c. Failure to transcribe preliminary hearing

Davis argues that his trial counsel were ineffective for failing to take notes during the preliminary hearing, or request that the hearing be recorded.⁵⁸ The Alabama Court of Criminal Appeals addressed this claim in its opinion affirming the denial of Davis's Rule 32 petition:

Davis argues that counsel was ineffective for failing to ensure that the record of the proceedings in the lower court was fully recorded.

Specifically, he asserts that counsel erred in failing to have his preliminary hearing recorded and for not ensuring that sidebar conferences were recorded.

The circuit court made the following findings on this claim:

In paragraph 38, Davis alleges [ineffective assistance of counsel] based on trial counsel's failure to move for full recordation of all proceedings in his capital murder trial. Davis failed to prove that he was prejudiced by the

⁵⁸ *Id.* at 9.

lack of transcription of certain sidebars during the course of trial. Although Giddens testified, the subject of whether any controversial rulings or prejudicial comments were made during these sidebars was not addressed. This Court, which presided over Davis's capital murder trial, cannot recall anything discussed during sidebars that would have prejudiced Davis due to their lack of transcription. Because Davis did not put forth evidence to support this claim, it is denied.

(R. 1151-52.)

At the Rule 32 hearing, Davis asked Giddens why he did not move to have the preliminary hearing transcribed. The following occurred:

[Rule 32 counsel]: Do you make a strategy decision not to make that motion or have you just never thought about making that motion?

[Giddens]: When the only witness really is going to be the investigating officer, you find out what you need to know, I mean, he's charged with killing a man at a gas station, Direct Oil here in Anniston. And that was pretty much the testimony. And I believe the officer testified what the codefendants had told him.

(R. 31-32.) Davis made no attempt to show how he was prejudiced by counsel's failure to have the preliminary hearing or certain sidebar conferences recorded. There are no allegations that the officer's testimony at the

preliminary hearing was inconsistent with his trial testimony or that the sidebar conferences contained omitted information that prejudiced Davis. “It is incumbent upon [petitioner] to show some prejudice from the failure to transcribe the preliminary hearing testimony before it may be claimed to be ineffective assistance of counsel. *Spilman v. State*, 633 P.2d 183 (Wyo. 1981).” *Jennings v. State*, 806 P.2d 1299, 1307 (Wyo. 1991). The circuit court correctly denied relief on this claim.

Davis v. State, 9 So. 3d 539, 551 (Ala. Crim. App. 2008) (alterations in original).

Davis has not shown that the state court’s rejection of this claim was contrary to, or an unreasonable application of, clearly established federal law. Although Davis argues that a transcript of the preliminary hearing *could* have been important because it *might* have contained testimony that conflicted with trial testimony,⁵⁹ he has not demonstrated that the trial testimony actually conflicted with the testimony at the preliminary hearing, or that he was prejudiced because the police officer’s testimony was not transcribed. Finally, although he claims that the state court unreasonably required him to allege prejudice with greater specificity, he offers no legal support for that contention.⁶⁰

⁵⁹ *Id.*

⁶⁰ *Id.* at 22.

2. Failure to locate, interview, and present exculpatory witnesses

Davis complains that his trial counsel's inadequate investigation prevented them from locating, interviewing, and presenting additional exculpatory witnesses, including alibi witnesses.⁶¹ Davis faults counsel for interviewing only one potential exculpatory witness, his proffered alibi witness, Tonya Heard.⁶² He argues that counsel should have sought out and interviewed other "people in Davis's extended family and social network,"⁶³ and contends that a sufficient investigation would have uncovered many other exculpatory witnesses, such as his "aunt" Betty Jacobs and her daughter Cynthia Denise Jacobs, both of whom could have provided a different, more persuasive alibi than that of Tonya Heard.⁶⁴

⁶¹ *Id.* at 13-16.

⁶² In his Rule 32 petition, Davis alleged counsel was ineffective for failing to call Tonya Heard as an alibi witness. Rule 32 C.R. Vol. 14, Tab 52, at 10. This is not the claim he raises in this court. However, it is worth noting that at the evidentiary hearing, Giddens testified that he decided not to call Ms. Heard as a witness because he felt her testimony would be damaging. Rule 32 R. Vol. 18, Tab 58, at 68-70. This was based on her statement to Giddens that Davis had been at her house on the night of the murder, but left, then later returned, acted nervous, and instructed her to tell people that he had been with her all night. *Id.* The Alabama Court of Criminal Appeals found that counsel made a sound strategic decision and was not ineffective for failing to call her as an alibi witness. *Davis v. State*, 9 So. 3d at 548-549.

⁶³ Doc. no. 33, at 16.

⁶⁴ *Id.* at 14-15. Giddens testified at the Rule 32 hearing that Davis told him Ms. Heard could provide him with an alibi, but he

Review of the underlying state court record reveals that the facts in support of this claim were presented to the state court. While Davis did not name Betty Jacobs or Cynthia Denise Jacobs in his Rule 32 petition, or assert that counsel should have presented their testimony at trial, he did call them as witnesses during the Rule 32 evidentiary hearing.⁶⁵ They testified that, on the night of the murder, Davis was at their home in Anniston, a thirty-minute walk, or an eight-to-ten-minute drive, from Direct Oil, between 7:00 and 8:00, the time the murder was committed.⁶⁶ They also testified that they had not previously informed anyone that Davis was with them because no one had asked.⁶⁷ Meanwhile, Giddens testified that Davis had never informed him that Betty or Cynthia Denise Jacobs might be able to offer testimony on his behalf.⁶⁸

The Alabama Court of Criminal Appeals affirmed the trial court's denial of this claim. That court noted that "[t]rial counsel's performance cannot be deemed ineffective for failing to locate alibi witnesses whose existence was not brought to his attention," *Davis v. State*, 9 So. 3d 539, 548 (Ala. Crim. App. 2008) (quoting *Adkins v. State*, 632 S.E. 2d 650, 653 (Ga. 2006) (in turn quoting *Escobar v. State*, 620 S.E. 2d 812

did not mention Betty Jacobs or Cynthia Denise Jacobs. Rule 32 R. Vol. 19, at 149.

⁶⁵ Rule 32 R. Vol. 19, at 241-324.

⁶⁶ *Id.* at 242-244, 260-261, 264-265, 281-282, 295-297, 309, 315-316.

⁶⁷ *Id.* at 245, 256, 295-299.

⁶⁸ *Id.* at 148-149.

(2005)) (alteration supplied), and held that “counsel was not ineffective for failing to conduct further investigation into Davis’s alibi defense and to locate Cynthia Jacobs, a witness whose testimony was inconsistent with Davis’s own statements to his attorneys.” *Davis v. State*, 9 So. 3d 539, 548 (Ala. Crim. App. 2008). Davis argues that he should not be blamed for failing to bring this information to counsels’ attention, given the paucity of time counsel actually spent with him. It is not reasonable to believe, however, that a criminal defendant facing a capital murder charge would not inform his attorneys of a legitimate alibi defense, if one existed, regardless of how much or how little time he spent meeting with those attorneys. Moreover, the Court of Appeals made the factual determination that the testimony of Davis’s aunt and her daughter was inconsistent with that of Davis’s other alleged alibi witness, as well as with Davis’s own statements to trial counsel. That determination is reasonable. Counsels’ failure to search for multiple, inconsistent potential alibis in the hope of finding one that might stick cannot be deemed deficient performance. Davis is entitled to no relief.

3. Failure to challenge the state’s investigation and presentation of its case-in-chief

Davis asserts that his trial counsels’ failure to investigate compromised his ability to challenge the State’s case during the trial.⁶⁹ He argues that counsel failed to adequately cross-examine State witnesses, and object to “irrelevant and prejudicial” evidence

⁶⁹ Doc. no. 33, at 16-19.

introduced by the State.⁷⁰ Specifically, he contends that counsel should have: (1) argued that the Phillips cousins were not credible because they received reduced sentences for their testimony, and gave their statements only after they were threatened with capital punishment if they refused to do so; (2) challenged Shannon Wilson's testimony because she failed to establish it was actually Davis she heard boasting about committing the crime; (3) taken adequate steps to ensure no gang-related references or innuendo were made during the trial; (4) objected to the admission of a note found in the pocket of a pair of shorts alleged to have been worn by Davis;⁷¹ (5) argued that the clothing descriptions given by the disinterested witnesses matched clothing worn by the Phillips cousins, not Davis; (6) emphasized to the jury that Davis was taller than 6 feet, whereas Dewey Waites' identification of the shooter included an estimation that he was approximately 5 feet, 8 inches.⁷²

Davis unsuccessfully raised these allegations in his Rule 32 petition,⁷³ and the Alabama Court of Criminal Appeals affirmed the trial court's denial of relief:

Second, Davis argues that counsel was ineffective for failing to challenge the State's

⁷⁰ *Id.* at 16.

⁷¹ This allegation is one basis of Claim G, that Davis's first, fifth, sixth, eighth and fourteenth amendment rights were violated by the admission into evidence of a note allegedly found in the pocket of Davis's clothing, and will be discussed in greater detail in Section V.G., *infra*.

⁷² Doc. no. 33, at 16-19

⁷³ Rule 32 C.R. Vol. 14, Tab 52, at 11-14.

case against him. The circuit court made the following findings of fact on this claim:

Davis failed to carry his burden of proof as to this allegation in his second amended petition. The record shows that trial counsel challenged the State's investigation and preparation of this case, including reviewing witness statements, discovery, visiting the crime scene, and speaking with Davis. In fact, this preparation paid off at trial when defense counsel prepared a defense that attempted to cast doubt on the veracity of the Phillips brothers [*sic*] [his codefendants] and on Willie Smith. That this defense was not successful does not lessen its validity. The closing arguments of defense counsel at the guilt phase demonstrate how effective they were in preparing a defense. The use of Alphonso Phillips's allocution against him — suggesting he was the triggerman — is the stuff good defenses are made of. (R. 1210-1211.) Trial counsel also used the State's evidence of the descriptions of the participants in the Direct Oil shooting in an attempt to establish a reasonable doubt as to Davis's innocence. This defense strategy included calling a police officer to the stand to recount a physical

description given immediately after the crime that was someone different from Davis's description. This testimony, combined with the efforts to discredit the Phillips brothers [*sic*], allowed defense counsel to argue that Willie Smith and the Phillips brothers [*sic*] were conspiring to frame Davis.

As to paragraphs 24-29 in the second amended petition, Davis offered no evidence or argument that would be sufficient to meet his burden of proof in this case. As Davis has not established deficient performance or prejudice in this regard, this claim is denied.

(C.R. 1147-48.) The circuit court's findings are supported by the record.

We have reviewed the record of Davis's trial. Davis's codefendants Alphonso Phillips and Terrance Phillips testified that the three made plans to rob the Direct Oil gasoline station in Anniston and that Davis was carrying a .25 caliber semiautomatic pistol. FN.

FN. In exchange for their testimony at Davis's trial, Alphonso and Terrance Phillips pleaded guilty to conspiracy to commit robbery. Alphonso was sentenced to 20 years' imprisonment, and Terrance was

sentenced to 10 years' imprisonment.

Alphonso testified that when they went into the gasoline station Davis pointed the gun at Johnny Hazle and fired two shots at him. Terrance said that he was supposed to be the lookout but that he walked away before they got to the gas station. He testified that he heard gunshots as he was walking away. Willie Smith testified that Davis told him that he had robbed and shot someone at the Direct Oil station. Still other witnesses testified that Davis had made statements to them concerning his involvement in the robbery/murder. The evidence against Davis was overwhelming.

Giddens testified at the Rule 32 hearing that "our strategy was [to] discredit the people who were there, show the jury the discrepancies in the height, weight, and actually try to establish a reasonable doubt that perhaps a co-defendant who had a motive to lie did it, not Mr. Davis." (R. 150.) The record shows that counsel did an admirable job of attempting to discredit the State's witnesses. As this Court stated on direct appeal:

The appellant's defense strategy consisted mainly of trying to discredit or to cast doubt upon the testimony of the state's witnesses through cross-examination and arguments to the jury and to the trial court. By these means, he

attempted to exploit differences as to some details in their testimony, attempted to persuade the jury that under the facts it was more likely that Alphonso did the shooting, argued to the jury and to the trial court that the facts surrounding the commission of the crime better fit the elements of the lesser included offense of felony-murder rather than with the offense of capital murder, and attempted to cast doubt upon the veracity of Alphonso, Terrance, and Smith (who was involved with the authorities in an unrelated case) by emphasizing the deals they had made with the state for lenient treatment in return for their testimony.

Davis v. State, 718 So.2d at 1156. The record also shows that counsel made numerous objections and was able to secure a ruling excluding any reference to “gang activity.” Counsel vigorously attacked the State’s overwhelming evidence against Davis. That counsel was unsuccessful in failing to obtain an acquittal is not sufficient to find that counsel’s performance was ineffective.

The fact that a particular defense was unsuccessful does not prove ineffective assistance of counsel. *Chandler v. United States*, 218 F.3d [1305] at 1314 [(11th Cir. 2000)].

“[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.’” *Chandler*, 218 F.3d at 1314 (quoting *Darden v. Wainwright*, 477 U.S. 168, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986)).

Brown v. Crosby, 249 F. Supp. 2d 1285, 1321 (S.D. Fla. 2003). The circuit court did not abuse its discretion in denying relief on this claim.

Third, Davis argues that his attorneys were ineffective for failing to object to what Davis says was irrelevant and prejudicial evidence. He argues that counsel should have objected to the admission of a letter found in Davis’s pocket that referred to gang activity and to Shannon Wilson’s testimony. Wilson testified that she overheard a conversation between Davis and Willie Smith in which Davis said that he shot and killed Hazle.

The circuit court found that Davis failed to meet his burden of proof on this claim because no evidence was introduced at the evidentiary hearing concerning this issue. We agree. Counsel was not questioned concerning this evidence.

This court has held that “[o]bjections are a matter of trial strategy, and an appellant must overcome the

presumption that ‘conduct falls within the wide range of reasonable professional assistance,’ that is, the presumption that the challenged action ‘might be considered sound trial strategy.’” *Moore v. State*, 659 So.2d 205, 209 (Ala.Cr.App. 1994), citing *Strickland [v. Washington]*, 466 U.S. [668] at 687-88, 104 S.Ct.[2052] at 2064-65 [(1984)].

Lane v. State, 708 So.2d 206, 209 (Ala. Crim. App. 1997). As we stated in *Brooks v. State*, 456 So.2d 1142, 1145 (Ala. Crim. App. 1984), “effectiveness of counsel does not lend itself to measurement by picking through the transcript and counting the places where objections might be made. Effectiveness of counsel is not measured by whether counsel objected to every question and moved to strike every answer.” Davis failed to meet his burden of proof on this claim; therefore, the trial court correctly denied him relief.

Davis v. State, 9 So. 3d 539, 549-551 (Ala. Crim. App. 2008) (alterations in original) (footnote omitted).

Davis now argues that the state court’s “refusal to find ineffective assistance in trial counsels’ complete failure to conduct an independent investigation sufficient to enable them to effectively challenge the State’s factual and legal theories resulted in a decision that was contrary to and involved an unreasonable

application of Strickland and its progeny.”⁷⁴ However, because Davis has not established that the state court’s denial of the claim was unreasonable, the claim itself is without merit.

Further, review of the trial transcript reveals that counsel actually made many of the arguments Davis faults him for not making. Counsel argued that the Phillips cousins were not credible witnesses because of their own self interests,⁷⁵ secured a ruling prohibiting the admission of any gang related references,⁷⁶ and emphasized the discrepancies in height and clothing descriptions of Davis and that of the shooter as reported by the witness.⁷⁷ Moreover, Davis cannot establish that he was actually prejudiced as a result of counsel’s failure to make the other arguments he complains were not made. There is no reasonable likelihood that counsel would have succeeded had he challenged Shannon Wilson’s testimony on the grounds that she failed to establish it was actually Davis she heard boasting about committing the crime. There were no gang-related references or innuendo during the trial that prejudiced Davis and should have prompted an objection. Finally, as discussed in Section V.G., *infra*, Davis was not prejudiced by the admission of the redacted letter. This claim is due to be denied.

⁷⁴ Doc. no. 33, at 19.

⁷⁵ R. Vol. 7, Tab 13, at 1177-78.

⁷⁶ R. Vol. 1, Tab 4, at 17.

⁷⁷ R. Vol. 1, Tab 10, at 625, 627-28, 630, 632-33.

4. Failure to present, argue adequately, and seek favorable rulings on pre-trial motions

Davis asserts that counsel failed to file pretrial motions that were necessary to his receipt of a constitutionally effective defense.⁷⁸ Specifically, he claims that counsel: (a) failed to timely file four pre-trial motions that would have challenged the validity of his arrest;⁷⁹ (b) failed to file motions that would have helped to achieve a non-biased and fair panel of jurors;⁸⁰ (c) failed to file a motion for full recordation of all proceedings, including sidebar communications;⁸¹

⁷⁸ Doc. no. 33, at 20-22.

⁷⁹ Davis claims that the following motions should have been filed: (1) an “Ex Parte Application for Investigative Expenses”; (2) a “Motion for Discovery of State and Local Health, School, Medical, Custodial, Institutional and Related Documents Involving Davis’s Family Members”; (3) a “Motion to Reveal the Identity of Informants and Reveal Deals, Promises or Inducements Relating to Testimony and Information”; and (4) an “Ex Parte Application for a Forensic Psychologist, a Social Worker and for a Neuropsychologist to Address Mitigation Factors in Sentencing.” *Id.* at 20.

⁸⁰ Davis claims that counsel should have filed: (1) a “Motion for Order for Access to, Inspection of, and Copying of All Jury System Records”; (2) “Motions for Funds for Expert Assistance to Investigate Petit Jury Venires”; (3) a “Motion for a Jury Questionnaire”; and (4) a “Motion for Disqualification from the Jury Venire of All Potential Jurors who Would Automatically Vote for the Death Penalty if They Found Davis Guilty of Capital Murder.” *Id.* He further claims that counsel failed to seek a fully sequestered *voir dire*; failed to make an adequate showing of why individual *voir dire* was necessary; and failed to adequately litigate Davis’s right to a juror questionnaire. *Id.* at 21.

⁸¹ *Id.* at 21-22.

and (d) failed to object to him being shackled before the jury.⁸²

Davis raised each of these claims in his Rule 32 petition,⁸³ but he did not raise parts (a), (b), and (d) on appeal from the denial of that petition.⁸⁴ Therefore, the motions referenced in parts (a), (b), and (d) are procedurally defaulted, and Davis has offered nothing to excuse the procedural default of the claims.

Additionally, the Rule 32 court denied these claims on the merits, and Davis has not established that the state court's determination on parts (a), (b), or (d) of this claim was unreasonable. In part (a) of his claim, Davis claims that his defense would have been significantly improved if his trial counsel had filed motions to challenge the validity of his arrest, specifically: (1) an "Ex Parte Application for Investigative Expenses"; (2) a "Motion for Discovery of State and Local Health, School, Medical, Custodial, Institutional and Related Documents involving Davis's Family Members"; (3) a "Motion to Reveal the Identity of Informants and Reveal Deals, Promises or Inducements Relating to Testimony and Information"; and (4) an "Ex Parte Application for a Forensic Psychologist, a Social Worker

⁸² *Id.* at 22.

⁸³ Rule 32 C.R. Vol. 14, Tab 52, at 17-20. The court notes that page 20 of the Second Amended Rule 32 petition is missing from this record. However, in its opinion denying the petition, the trial court noted that part (c) of this claim was raised in paragraph 38 of the petition, and part (d) of the claim was raised in paragraph 40 of the petition. Rule 32 C.R. Vol. 62, Tab 80, at 18-19. Paragraphs 38 and 40 would have been on page 20.

⁸⁴ Rule 32 C.R. Vol. 57, Tab 60, at 39-40.

and for a Neuropsychologist to Address Mitigation Factors in Sentencing.”⁸⁵

The trial court held that, to the extent the motions pertained to the guilt phase of the trial,⁸⁶ Davis had failed to establish prejudice.⁸⁷

The first such motion asserted in support of this [ineffective assistance of counsel] claim is styled by Davis as an *Ex Parte* Application For Investigative Expenses. As for the guilt phase, Petitioner failed to offer any new evidence that resulted from his employment of at least two private investigators and a number of attorneys working on his behalf. Thus, Davis did not establish prejudice as to this claim. Davis’s extensive investigation for his evidentiary hearing produced no new evidence that would have impacted his guilt phase. FN.

FN. Further, this Court heard no testimony from any investigator as to work performed investigating guilt phase issues. This Court cannot even be certain that the multiple investigators employed by Davis

⁸⁵ Doc. no. 33, at 20.

⁸⁶ The trial court noted that the second and fourth of these motions deal “primarily with the penalty phase of Davis’s trial,” and denied claims related to those motions later in its opinion. Rule 32 C.R. Vol. 62, Tab 80, at 17, 27-58. Similarly, this court will address the portions of this claim relating to the penalty phase of Davis’s trial in Claim B.

⁸⁷ Rule 32 C.R. Vol. 62, Tab 80, at 16-18.

in this proceeding did any investigation of guilt-phase claims, with the exception of portions of testimony by the Jacobs and Sharon Christopher. Davis has not proved prejudice as to this guilt-phase claim.

Further, the few witnesses called by Petitioner on guilt phase issues (Sharon Christopher, Betty Jacobs, and Cynthia Jacobs) all had the same problems with their testimony as that of Tonya Heard, who was interviewed by Giddens prior to Davis's trial. These witnesses did not provide an alibi, and provided stories inconsistent with the story given by Davis to his trial counsel. For this reason, Davis cannot establish prejudice in this regard. Competent trial counsel could have wisely chosen to stay away from these witnesses — one of whom trial counsel located without the assistance of an investigator — due to the harm that their inconsistent stories could have caused. FN.

FN. Further, the Court notes that Betty and Cynthia Jacobs — who gave alibi stories vastly different than those ascribed to Heard and Christopher — were not even names as alibi witnesses in the Davis's petition.

. . . .

Thus, the only remaining motion to be resolved . . . is the Motion to Reveal the Identity

of Informants and Reveal Deals, Promises or Inducements Relating to Testimony and Information. Davis has again failed to establish prejudice as to this claim. First, Davis has not shown that any deals, promises or inducements were made to any witnesses in this matter other than those revealed by the State prior to Davis's capital murder trial. Second, Davis failed to prevail on the issue of the State's assertion of privilege as to its confidential informant in this Rule 32 proceeding. Thus, Davis failed to prove prejudice as to that issue. FN.

FN. In addition, because the identity of the confidential informant has not been linked to any relevant issue in this case, competent trial counsel could have chosen not to waste their time chasing this issue down a rabbit hole. For all the time and court hearings collateral counsel spent on litigating this issue, Petitioner has not been able to articulate any impact the identity of this CI would have had on Davis's case.

Rule 32 C.R. Vol. 62, Tab 80, at 16-18 (alteration and ellipses supplied, emphasis in original).

In part (b) of this claim, Davis argues that counsel should have filed, and obtained favorable rulings on: (1) a "Motion for Order for Access to, Inspection of, and Copying of All Jury System Records"; (2) "Motions for Funds for Expert Assistance to Investigate Petit Jury Venires"; (3) a "Motion for a Jury Questionnaire"; and

(4) a “Motion for Disqualification from the Jury Venire of All Potential Jurors who Would Automatically Vote for the Death Penalty if They Found Davis Guilty of Capital Murder.”⁸⁸ He also argues that counsel failed to seek a fully sequestered *voir dire*, and failed to make an adequate showing of why individual *voir dire* was necessary.⁸⁹ Davis maintains that these steps would have ensured an impartial jury.⁹⁰

The trial court found Davis had failed to carry his burden of proof as to these claims:

Davis asserts [ineffective assistance of counsel] based on trial counsel’s failure to file motions on issues concerning the jury selection in this case. Davis failed to carry his burden of proof as to these claims. The Court cannot remember hearing any evidence at the evidentiary hearing that would support a finding of prejudice or deficient performance in regard to these claims.

Likewise, Davis did not carry his burden of proof in regard to his argument that trial counsel failed to argue for fully sequestered voir dire. The trial court in Alabama is given great discretion as to how to conduct voir dire, even in capital cases. This Court is very reluctant to employ the time consuming method of individual, sequestered voir dire, and would have denied such a motion in this

⁸⁸ Doc. no. 33, at 20.

⁸⁹ *Id.* at 21.

⁹⁰ *Id.*

case. Davis did not prove or establish any evidence that would have led this Court to conclude that individual voir dire was required in order to ensure a fair trial in this case. Further, Davis did not prove prejudice in this regard.

Rule 32 C.R. Vol. 62, Tab 80, at 18 (alteration supplied).

In part (d) of this claim, Davis contends that counsel should have objected to Davis being shackled in front of the jury.⁹¹ The trial court denied the claim, finding that Davis had offered no evidence to support a finding that he was shackled in view of the jury, and noting that it had no recollection of Davis being shackled in view of the jury.⁹²

Davis has not established that the denial of parts (a), (b), and (d) of this claim 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 a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

In part (c) of this claim, Davis asserts that counsel should have moved for full recordation of all proceedings, including sidebar communications and the

⁹¹ Doc. no. 33, at 22.

⁹² Rule 32 C.R. Vol. 62, Tab 80, at 19.

preliminary hearing.⁹³ The trial court denied the claim,⁹⁴ and — as previously discussed in Section V.A.1.c. of this Opinion, *supra* — the Alabama Court of Criminal Appeals affirmed the denial.⁹⁵

⁹³ Doc. no. 33, at 21-22.

⁹⁴ Rule 32 C.R. Vol. 62, Tab. 80, at 18-19.

⁹⁵ Specifically, the intermediate state appellate court held:

Davis argues that counsel was ineffective for failing to ensure that the record of the proceedings in the lower court was fully recorded. Specifically, he asserts that counsel erred in failing to have his preliminary hearing recorded and for not ensuring that sidebar conferences were recorded.

The circuit court made the following findings on this claim:

In paragraph 38, Davis alleges [ineffective assistance of counsel] based on trial counsel's failure to move for full recollection of all proceedings in his capital murder trial. Davis failed to prove that he was prejudiced by the lack of transcription of certain sidebars during the course of trial. Although Giddens testified, the subject of whether any controversial rulings or prejudicial comments were made during these sidebars was not addressed. This Court, which presided over Davis's capital murder trial, cannot recall anything discussed during sidebars that would have prejudiced Davis due to their lack of transcription. Because Davis did not put forth evidence to support this claim, it is denied.

(R. 1151-52.)

Davis makes only a very general argument that the intermediate state appellate court failed to properly apply *Strickland* and its progeny to this claim, and that the decision was contrary to or an unreasonable application of clearly established federal law.⁹⁶ His

At the Rule 32 hearing, Davis asked Giddens why he did not move to have the preliminary hearing transcribed. The following occurred:

[Rule 32 counsel]: Do you make a strategy decision not to make that motion or have you just never thought about making that motion?

[Giddens]: When the only witness really is going to be the investigating officer, you find out what you need to know, I mean, he's charged with killing a man at a gas station, Direct Oil here in Aniston. And that was pretty much the testimony. And I believe the officer testified what the codefendants had told him.

(R. 31-32.) Davis made no attempt to show how he was prejudiced by counsel's failure to have the preliminary hearing or certain sidebar conferences recorded. There are no allegations that the officer's testimony at the preliminary hearing was inconsistent with his trial testimony or that the sidebar conferences contained omitted information that prejudiced Davis. "It is incumbent upon [petitioner] to show some prejudice from the failure to transcribe the preliminary hearing testimony before it may be claimed to be ineffective assistance of counsel. *Spilman v. State*, 633 P.2d 183 (Wyo. 1981)." *Jennings v. State*, 806 P.2d 1299, 1307 (Wyo. 1991). The circuit court correctly denied relief on this claim.

Davis v. State, 9 So. 3d 539, 551 (Ala. Crim. App. 2008) (alterations in original).

⁹⁶ Doc. no. 33, at 7-8; doc. no. 39, at 15-17.

only specific assertion is that the appellate court “created a classic catch-22” by “unreasonably” requiring him to “challenge with greater specificity the prejudicial content contained in the unrecorded proceedings,” when he was “deprived of any record or transcript” from which to glean the allegedly prejudicial content.⁹⁷ However, Davis has not demonstrated that he suffered any prejudice as a result of this failure, so this claim cannot succeed.

5. Failure to present additional substantive evidence

Davis contends that counsel should have obtained evidence about his alleged low IQ and psychological profile in a more timely manner.⁹⁸ He maintains that, if counsel had done so, they could have argued that he did not “fit the mental/psychological model of a young criminal conspiracy leader as alleged by the State.”⁹⁹ Davis also asserts that counsel should have introduced his mother’s testimony that she and Davis both knew and were on friendly terms with the victim, to support an argument that Davis had no motive to shoot him.¹⁰⁰

Both of these claims were raised by Davis in his Rule 32 petition¹⁰¹ and denied by the trial court. With respect to the claim that Davis’s low IQ was

⁹⁷ Doc. no. 33, at 22.

⁹⁸ *Id.*

⁹⁹ *Id.* at 23.

¹⁰⁰ *Id.*

¹⁰¹ Rule 32 C.R. Vol. 14, Tab 52, at 23-24.

inconsistent with his being the leader of a conspiracy, the trial court found:

Davis alleges [ineffective assistance of counsel] based on defense counsel's failure to argue that Davis's IQ and psychological makeup were inconsistent with him being the leader of any criminal conspiracy. Once again, Davis failed to carry his burden of proof in this regard. While Davis offered expert and layperson testimony on his mental status and personality, this testimony did not exclude the potential for Davis to be the leader of the criminal enterprise which led to the death of Hazle.

The evidence at the hearing indicates that Davis had participated in a previous robbery involving numerous participants. Thus, Davis had prior experiences which may have led him to believe it was worth trying again with different collaborators. Certainly, the fact that the crime was performed in such a haphazard fashion may have something to do with Davis's poor leadership and planning abilities, but it does not offer any reasonable basis on which to question the State's theory. In any event, Davis failed to prove his claim

Rule 32 C.R. Vol. 62, Tab 80, at 25-26 (alteration and ellipsis supplied). Although Davis presented this claim on appeal from the denial of the Rule 32

petition,¹⁰² the Alabama Court of Criminal Appeals did not address it. Even so, Davis has not met his burden of establishing that the trial court's decision was either contrary to or an unreasonable application of clearly established federal law.

With respect to the claim pertaining to Davis's alleged lack of motive to rob or shoot the victim because he and his mother had known the victim for years, the trial court found:

Davis alleges [ineffective assistance of counsel] because trial counsel did not call Davis's mother to testify that Davis had no motive to shoot the victim. Because Davis did not call his mother to testify [at the Rule 32 evidentiary hearing], no evidence was offered in support of this contention. As such, Davis failed to carry his burden of proof as to this claim. This claim, then, is denied.

Further, because the State alleged a murder during the course of a robbery, evidence that Davis had no personal reason to kill Hazle would be of little or no benefit to the Petitioner. The motive, according to the State's theory, was a robbery attempt. Davis, apparently offended by Hazle's laughter or failure to comply with demands to produce money from the register, shot Hazle before the robbery could be completed. Thus, Davis's motive was connected to the robbery attempt. Further, testimony that Davis was

¹⁰² Rule 32 C.R. Vol. 57, Tab 60 at 40-41.

personally known by the victim would increase his motive to kill, as he would have to eliminate the witness. This claim lacks merit despite Davis's failure to put forth evidence on this issue.

Rule 32 C.R. Vol. 62, Tab 80, at 25 (alterations supplied, emphasis in original). Despite Davis's contrary assertion,¹⁰³ he did not raise this claim in his brief on collateral appeal.¹⁰⁴ Thus, this claim is procedurally defaulted, and Davis has offered nothing to excuse the procedural default of the claim. Furthermore, Davis offers nothing to establish that the trial court's denial of this claim was contrary to, or an unreasonable application of, clearly established federal law.

B. Ineffective Assistance of Counsel During the Penalty Stage

Davis argues that his trial counsel were ineffective in the investigation, preparation and presentation of mitigation evidence during the penalty phase of trial.¹⁰⁵ He contends that he was entitled to have all aspects of his background, family life, medical history, environment, school records, and any other life experience that may be considered mitigating evidence presented to the jury and, but that such evidence was not presented because counsel relied only on the

¹⁰³ Doc. no. 39, at 8. Davis contends that he raised the claim on pages 40-41 of his appellate brief (Rule 32 C.R. Vol. 57, Tab 60). Doc. no. 39-1, at 2.

¹⁰⁴ Rule 32 C.R. Vol. 57, Tab 60.

¹⁰⁵ Doc. no. 33, at 23-42.

information provided by him and his mother.¹⁰⁶ He argues that trial counsel unreasonably and inexplicably failed to obtain school, social service agency, health, employment, correctional, and religious records and, thus, failed to discover and present compelling mitigating evidence.¹⁰⁷

As with all ineffective assistance of counsel claims, Davis must show both deficient performance and resultant prejudice. To satisfy the deficient performance prong, counsels' representation must have fallen below "an objective standard of reasonableness," which is measured against the "prevailing professional norms" at the time. *Strickland*, 466 U.S. at 688. "That standard is necessarily a general one," 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." *Bobby v. Van Hook*, 558 U.S. 4, 7 (2009) (quoting *Strickland*, 466 U.S. at 688-689) (finding the Court of Appeals erred by treating the ABA's guidelines "not merely as evidence of what reasonably diligent attorneys would do, but as inexorable commands with which all capital defense counsel 'must fully comply'" (alteration supplied).

When evaluating trial counsels' investigation and preparation for the penalty phase of a capital trial, there is no checklist of tasks counsel must complete in order to perform in a constitutionally effective manner.

¹⁰⁶ *Id.* at 23.

¹⁰⁷ *Id.* at 24.

It is, nonetheless, well-settled that trial counsel has an “obligation to conduct a thorough investigation of the defendant’s background” when preparing for a capital sentencing. *Porter v. McCollum*, 558 U.S. 30, 39 (2009) (holding that counsel’s obligation was “unquestioned” under prevailing professional norms at the time of trial) (quoting *Williams*, 529 U.S. at 396); *Wiggins*, 539 U.S. 510; *Strickland*, 466 U.S. at 691 (counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary). *See also Sears v. Upton*, 561 U.S. 945, 1032 (2010) (noting that it was “unsurprising” that the state postconviction court found that “the cursory nature of counsel’s investigation into mitigation evidence — ‘limited to one day or less, talking to witnesses selected by [the defendant’s] mother’ — was ‘on its face . . . constitutionally inadequate’”) (alteration provided); *Williams v. Allen*, 542 F.3d 1326, 1339-40 (11th Cir. 2008) (investigation of mitigating evidence in capital defendant’s background fell short of prevailing professional norms); *Housel v. Head*, 238 F.3d 1289, 1294 (11th Cir. 2001) (noting that a “failure to investigate can be deficient performance in a capital case when counsel totally fails to inquire into the defendant’s past or present behavior or life history”).

Even so, the court must consider “‘counsel’s perspective at the time’ investigative decisions are made,” and a “‘heavy measure of deference’” must be afforded to counsel’s judgments. *DeYoung v. Schofield*, 609 F.3d 1260, 1284 (11th Cir. 2010) (quoting *Rompilla v. Beard*, 545 U.S. 374, 380-81 (2005)). Thus, even when, in hindsight, an investigation might be viewed as less than adequate, counsel’s performance will not always

be deemed constitutionally deficient, especially when the defendant contributed in some way to counsel's perspective. *See, e.g., Bobby v. Van Hook*, 558 U.S. 4, 12-13 (2009) (because counsel had uncovered significant mitigating evidence from the defendant's background, the decision not to seek more fell well within the range of professionally reasonable judgments); *Strickland*, 466 U.S. at 691 ("When a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable."); *Johnson v. Upton*, 615 F.3d 1318, 1331-33 (11th Cir. 2010) (an attorney does not perform deficiently by not discovering mitigating evidence that his client did not mention to him); *Reed v. Secretary, Florida Dept. of Corrections*, 593 F.3d 1217, 1240 (11th Cir. 2010) ("The defendant's own words and deeds play a role in assessing the reasonableness of counsel's conduct."); *Cummings v. Secretary for Dept. of Corrections*, 588 F.3d 1331, 1357-58 (11th Cir. 2009) (although counsel may not "blindly follow" his client's instructions not to look for or use mitigation evidence, a mentally competent defendant's instruction not to investigate or not to present mitigation evidence may make counsel's decision not to do so reasonable); *McClain v. Hall*, 552 F.3d 1245, 1251-52 (11th Cir. 2008) (whether defendant informed his trial counsel about his abusive childhood is "extremely important" to determining reasonableness of counsel's performance); *Newland v. Hall*, 527 F.3d 1162, 1202-09 (11th Cir. 2008) (defense attorney's investigation prior to penalty phase of the trial was reasonable due to the information provided by the defendant); *Stewart*, 476 F.3d at 1210-14 (counsel's

failure to present evidence of defendant's alleged abuse was not deficient because defendant did not inform counsel of this abuse); *Henyard v. McDonough*, 459 F.3d 1217, 1245-46 (11th Cir. 2006) (counsel's failure to discover evidence of sexual abuse was not deficient given defendant's repeated denials of abuse).

To satisfy the prejudice prong, a petitioner must show that, "but for his counsel's deficiency, there is a reasonable probability he would have received a different sentence." *Porter*, 558 U.S. at 41. When evaluating a claim of ineffective assistance in the context of a penalty phase mitigation investigation, courts must undertake a "probing and fact-specific analysis" that considers the totality of the available mitigation evidence, both that adduced at trial and in any postconviction proceedings, in order to assess whether there is a reasonable probability that defendant would have received a different sentence after a constitutionally sufficient mitigation investigation. *Sears*, 561 U.S. at 955-56; *Porter*, 558 U.S. at 41; *Wong v. Belmontes*, 558 U.S. 15, 20 (2009).

This analysis includes an assessment of whether the newly unearthed mitigating evidence is merely cumulative or simply additional details about a defendant's background that would have "barely altered the sentencing profile presented to the sentencing judge," or whether it would have been the only evidence that could have "humanized" the defendant, allowing the jury or the sentencing judge to "accurately gauge his moral culpability." *Porter*, 558 U.S. at 41. The court also should consider whether the missing mitigation evidence might have been viewed unfavorably, or opened doors for the prosecution to bring in damaging

rebuttal evidence, *Cook v. Upton*, No. 5:09-CV-25 (CAR), 2010 WL 1050404, at *11 (M.D. Ga. Mar. 18, 2010) (counsel's failure to introduce evidence concerning the petitioner's mental health did not prejudice the petitioner since the records contained many details that were potentially harmful to the petitioner), or whether the aggravating circumstances of the crime are such that they would outweigh any prejudice caused by the failure to present mitigating evidence, *Dobbs v. Turpin*, 142 F.3d 1383, 1390-91 (11th Cir.1998).

Davis faults counsel for failing to investigate and present four types of mitigating evidence: *i.e.*, (1) evidence relating to childhood trauma and depravity; (2) testimony regarding his mental health; (3) evidence relating to his mental/psychological dysfunction and brain damage; and (4) mitigation evidence about the prior felony conviction.¹⁰⁸ These claims were raised in Davis's Rule 32 petition,¹⁰⁹ and denied on the merits by the trial court.¹¹⁰ The Alabama Court of Criminal Appeals affirmed the denial, but based its decision on a procedural bar. *Davis v. State*, 9 So. 3d 514, 521-22 (Ala. Crim. App. 2006). The court nonetheless discussed the claim in significant detail, and commented in *dicta* that, if not for the procedural bar, it would

¹⁰⁸ Davis also raises a fifth subclaim, that counsel was ineffective for failing to object to the submission of the penalty phase case to the jury on a Friday at 4:30 p.m. That claim will be addressed at the conclusion of the discussion of the claims regarding mitigating evidence.

¹⁰⁹ Rule 32 C.R. Vol. 14, Tab 52, at 26-35.

¹¹⁰ Rule 32 C.R. Vol. 62, Tab 80, at 27-58.

have been compelled to grant relief and order a new sentencing hearing. *Id.* at 522-26. Even so, when the Court of Criminal Appeals re-examined the claim after remand from the Alabama Supreme Court, it concluded that Davis was not entitled to relief. *Davis v. State*, 9 So. 3d 539 (Ala. Crim. App. 2008).

Davis asserts that the denial of this claim was contrary to and an unreasonable application of clearly established federal law, and based on an unreasonable determination of the facts in light of the evidence presented.

1. Failure to obtain mitigation evidence relating to childhood trauma and depravity

Davis asserts that he endured horrific physical and emotional abuse throughout his childhood, and argues that his attorneys could have uncovered this abuse and presented it as mitigating evidence if they had conducted an adequate investigation by speaking with potential witnesses and consulting with qualified experts.¹¹¹ Specifically, he asserts that,

had trial counsel consulted with qualified experts on a timely basis, counsel could have established that Davis had been exposed to in utero trauma and abuse; extensive physical, psychological and sexual abuse; domestic violence; rejection and abandonment by mother and father; poverty and neglect; mentally and emotionally unstable care-givers;

¹¹¹ Doc. no. 33, at 25-34.

and an unstable, unsafe, and unpredictable home life.

Doc. no. 33, at 25. He contends that his lawyers should have asked him and his mother more probing questions, spoken to other family members, and obtained and reviewed DHS, school, medical, and judicial records.¹¹²

Because of the unusual procedural posture of this claim, and in order to conduct a “probing and fact-specific analysis,” this court will: (1) identify the relevant factual determinations and rulings made by the trial court; (2) quote what the Alabama Court of Criminal Appeals stated in *dicta*; (3) provide the final analysis of the merits by the Alabama Court of Criminal Appeals when it ultimately denied the claims; and (4) review the reasonableness of the state court’s decision and identify the arguments made by Davis in support of his contention that the state court misapplied the controlling federal law on both the performance and prejudice prongs of the *Strickland* analysis.

a. Conclusions of the trial court

In its 63-page order denying this claim in Davis’s Rule 32 petition, the trial court essentially found that the failure of Davis and his family to be forthcoming about his childhood abuse absolved counsel for failing to dig deeper in order to uncover it.¹¹³ The court also found that Davis had not been prejudiced by the

¹¹² *Id.* at 25-34.

¹¹³ Rule 32 C.R. Vol. 62, Tab 80, at 27-48.

omission of the additional evidence during the sentencing hearing.¹¹⁴ The trial judge reasoned as follows:

In this claim, Davis has alleged that his trial counsel were ineffective in regard to the penalty phase of his trial. Quite simply, this claim can only be described as bizarre, based on the fact that [Davis's] own family seems to have concealed important information from trial counsel. Having considered the petition, having carefully reviewed the evidence presented at this hearing, as well as at the trial, and following the law governing Sixth Amendment claims — including the recent decision in *Wiggins v. Smith*, 123 S. Ct. 2527 (2003) — the court finds that this claim is due to be denied.

This finding is not meant to imply that the Court did not find compelling some of the mitigation evidence presented by Petitioner during the [Rule 32] evidentiary hearing. Much of the evidence presented at the Rule 32 hearing focused on abuse inflicted on Davis by his mother, Lillie Bell Davis. The Court finds that Davis was abused by his mother to an extent that would have rendered it relevant to the issue of the appropriate penalty determination in this case under existing law, though the Court, as explained

¹¹⁴ Id.

below, finds that this evidence is insufficient to establish prejudice.

The Court's major concern, however, is that if this Court used this evidence to find the existence of deficient performance the Court would be engaging in the inappropriate activity of judging the performance of trial counsel through the use of hindsight. Further, the Court would be passing judgment on Attorney Adams without the benefit of his testimony. Even worse, this Court would be inappropriately shifting the blame for the inexcusable actions of Davis'[s] family, particularly his mother, to his trial counsel. This Court must judge trial counsel's performance through their perspective at the time. That being the case, the Court does not find that trial counsel's performance was deficient.

To the contrary, Jimmy Davis'[s] family — and to a very large extent his mother — bears a heavy burden in this case for their role in this matter. Because Adams did not testify, this Court does not know what Adams did or did not do in preparation for this case. The Court presumes, however, that Adams acted reasonably in the questions he asked his client and his client's mother and in preparing for the penalty phase. Further, the testimony of Giddens establishes that **at no time** did Davis ever mention to his attorneys the abuse suffered at the hands of his mother or the intervention of DHR in the Davis home.

. . . .

Further, the record establishes, by the Petitioner's own admission, that trial counsel did talk to two of Davis'[s] siblings. (RR. 863.) Further, even in the time frame immediately before the evidentiary hearing, Davis did not speak in detail of the abuse inflicted on him as a child, instead generalizing that his background "wasn't rosy" and that he didn't have any privileges, only "every day survival." (RR. 863.) When specifically questioned about abuse, Davis only acknowledged that he was disciplined with a switch, in stark contrast to the evidence that Davis was, in fact, hit with belts, electrical cords, and with an open hand. (RR. 863-864.) As noted by Dr. King, "he was not – he was not too forthcoming. I had to ask a number of questions about that." (RR. 863-864.) Thus, the record supports a finding that even Davis continued to participate in the family's conspiracy of silence, even on the eve of his evidentiary hearing.

The Court also takes notice of the Petitioner's request, via motion to the Court, to keep the documents and evidence concerning Petitioner's abuse sealed. As noted by counsel for the Petitioner, this was done out of the family's concern for their privacy. (RR. 161-163) It was this desire by the family to keep this matter private — in addition to their fear of Lillie Bell Davis — that the witnesses before this Court during the evidentiary hearing noted was the reason behind their

years of silence. Although the Petitioner's motion to keep these records private is not "evidence" in the formal sense of the word, it does allow this Court to once again view the family machinery that trial counsel were up against in this case, machinery that even collateral counsel had to deal with in this matter.

Further, this Court noted during the evidentiary hearing that Lillie Bell Davis failed to make an appearance during the entire week this matter was heard. Although Lillie Bell Davis attended Davis'[s] capital murder trial, she was noticeably absent as a witness or a spectator during the entire week of the evidentiary hearing. Although the Court can infer why Ms. Davis would choose not to come into court once this secret was made public, it certainly sheds light on the type of person Ms. Davis is and the type of person trial counsel were misled by. In any event, it is difficult for this Court to view the preparation of trial counsel through their eyes when the very people (Lillie Bell and the two, unnamed siblings) who were giving trial counsel information — apparently misleading information — were not called to recount their conversations with Giddens and Adams.

Giddens testified that he felt that he had a family history from talking to the mother. The Court assumes that additional information was obtained from the two siblings interviewed by trial counsel. Counsel learned

where Davis had gone to school, that he received his GED from Tuskegee, how he grew up, that Davis'[s] father had died, the parents had been divorced. (RR. 97) Davis'[s] friends, that trial counsel were aware of, were the same people who testified against Davis at his capital murder trial: Alphonso Phillips, Terrance Phillips, and Willie Smith. Other acquaintances included Tonya Heard, who was not a good witness due to the fact that Davis had attempted to manufacture an alibi story with her, something she refused to participate in.

Looking at the witnesses who testified at the evidentiary hearing, namely Cynthia and Betty Jacobs and Geneva Davis, there is nothing to suggest that the above-named individuals were not Davis'[s] friends at the time of his arrest. The others in Davis's life, including his sisters Mary Nell and Hortense, had been out of Davis'[s] life for some time before this murder and would not be considered close friends or acquaintances in the sense of people who spent a good deal of time with Davis on a day-to-day basis in the year or so leading up to Hazle's murder. Thus, trial counsel had a distinct disadvantage in that Davis'[s] friends made up the potential witnesses against him.

Further, as noted above, these friends do not appear to have had knowledge of Davis'[s] upbringing. Instead, the abuse information was a closely held secret kept within the

family by a manipulative Lillie Bell Davis. Thus, not only was trial counsel's decision not to call Davis'[s] friends a reasonable one under the circumstances, Davis has not been prejudiced in regards to this abuse information by counsel's failure to call them on his behalf.

According to *Wiggins v. Smith*, 123 S. Ct. 2527, 2536 (2003), this Court has to make a determination of whether the background investigation — which includes “a context-dependent consideration of the challenged conduct . . . from counsel's perspective at the time” — was reasonable. Based on the factors facing trial counsel, most notably Lillie Bell Davis, this Court finds that trial counsel acted reasonably, and were misled by the Petitioner's own family.

Trial counsel felt they had a reasonable idea of Davis'[s] background from their interaction with the Petitioner's mother. Generally speaking, mothers are the best advocates a son could have in difficult times. If you want to phrase it as judicial notice, this Court takes judicial notice that ordinarily there are few bonds stronger than a mother's love for her child. There has been nothing presented to this Court that suggests that Sigler, Davis'[s] siblings, or Davis himself ever alerted trial counsel to the fact that Lillie Bell Davis was not a typical loving mother.

Davis did not help his counsel, either. As the United States Supreme Court noted in *Strickland*:

The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably altogether diminished or eliminated.

Id., 466 U.S. at 691. *See also*, [sic] *Chandler*, 218 F.3d at 1319 n. 24 ("when the circumstances of a claim make these conversations relevant, the petitioner can rarely (if ever) satisfy his burden to disprove the presumption of effective assistance without disclosing the substance of these attorney-client conversations."). Giddens'[s] testimony was that Davis did not speak of any sexual abuse. Petitioner did not question Giddens about what Davis precisely told his trial counsel concerning his background, but there is no evidence

that Davis, his mother, or his siblings in Aniston, Alabama, did anything to put his attorneys on notice of the existence of any abuse. *See, [sic] Williams v. Head*, 185 F.3d 1223, 1235 (11th Cir. 1999) (“Given the lack of clarity of the record, we presume that [Attorney] Allen talked with [Client] Williams as part of his effort to ascertain whether there was any mitigating circumstance evidence that Collins had failed to present. We are comfortable with doing so because Allen is an experienced criminal defense attorney There is no reasonable possibility that Allen . . . would have neglected to talk with his client about mitigating circumstances.”).

Looking at Giddens’[s] testimony and the trial testimony of Lillie Bell Davis, much of the background information given by Davis’s family was true, but given with Ms. Davis’[s] personal “spin” on it, omitting the important portions of Davis’s life in which he was beaten by a belt or switch. The information concerning Davis’[s] participation in the job corps, obtaining his GED at Tuskegee, the death of his father, his parents’ marital difficulties, are all items that Lillie Bell told counsel about and was willing to testify about. Thus, trial counsel did obtain much of this information through the most obvious source: Davis’[s] mother.

Although Davis faults trial counsel for not subpoenaing his DHR records, there is

absolutely no evidence before this Court that reasonably competent counsel would have been on notice that such records existed. There are no constitutionally required checklists for mitigation investigations. Trial counsel are faced with the realities of limited time and limited resources. Those resources have to be managed in an efficient manner. Thus, this Court does not find that attorneys are expected to subpoena agency records ‘just in case.’ Had Lillie Bell Davis, Davis’[s] siblings, or Davis himself told his trial counsel that this issue needed to be investigated — that DHR had been involved in the Davis home — this Court would absolutely find ineffective assistance of counsel for failure to investigate, discover and/or develop this evidence, depending on the strategic decisions made by counsel following their investigation. But that is not what happened here.

Davis is asking this Court to declare two competent trial lawyers incompetent due to the fact that they were manipulated by Lillie Bell Davis, the Davis family, and Davis himself due to the family’s conspiracy of silence. Quite simply, it is not trial counsel’s fault, it is the fault of Petitioner, of his mother, of Andre Sigler, and of the Davis family as a whole; a family that apparently sought collateral counsel’s assistance in keeping these facts private, even during the time leading up to the evidentiary hearing in this matter.

. . . .

Finally, this Court finds that the substantive evidence presented at the evidentiary hearing does not establish prejudice under Strickland. Although it is clear that Davis suffered some abuse as a child, he was never hospitalized, DHR did not remove him from the home, and the abuse by Lillie Bell was remote in time to the murder of Hazle. This evidence, when considered with the facts of this crime, do not rise to the level necessary to establish prejudice.

This Court found the existence of two aggravating circumstances: prior conviction of a crime involving use or threat of force against the person and murder committed during the course of a robbery. In mitigation, this Court found the existence of only one statutory mitigating circumstance: the age of the defendant at the time of the crime. Having reviewed the evidence presented at the evidentiary hearing, this Court does not find that the substantive evidence from the evidentiary hearing, if presented at Davis'[s] sentencing[,] would have altered these statutory findings.

The substantive mitigation evidence presented during the evidentiary hearing in support of the [ineffective assistance of counsel] claims was of the non-statutory type. The Court does not find that this evidence changes the original finding that Davis had the capacity to appreciate the criminality of his conduct and to conform his conduct to the

requirements of the law and that he did not act under the influence of extreme mental or emotional disturbances during the commission of the crime.

Not only does the evidence offered at the evidentiary hearing fail to support a finding of either of these statutory mitigating circumstances, the evidence presented at the trial disproves the existence of these circumstances. The evidence shows that this crime was planned in advance and not the product of behavioral aberration. Further, the evidence supports a finding that Davis'[s] motive was to seek money from the Direct Oil station, and not the result of a mental or emotional breakdown or disturbance. Further, the evidence shows that the victim was shot when he failed to hand over the money fast enough and instead smiled at the Petitioner. Petitioner has not shown a direct link between the proffered mitigating evidence and the commission of this offense.

Instead, this evidence is of the sort consisting of "any aspect of a defendant's character or record . . . that the defendant offers as a basis for a sentence of life imprisonment without parole instead of death." Ala. Code § 13A-5-52 (1975). Had Davis'[s] family revealed this information to trial counsel, rather than concealing it, this information would have been properly introduced as non-statutory mitigation. Further, it would have

been entitled to some weight in the consideration of the proper sentence in this case.

It's [*sic*] weight, however, would not be sufficient to create a reasonable probability as to the outcome of Petitioner's sentence. The abuse suffered by Davis was remote in time, about five or six years, to the commission of this offense. (RR. 512) Further, this offense was committed after Davis had just previously committed a robbery in the third degree. The abuse was of the sort that Davis'[s] family hid it from the outside world for years, even going so far as to hide it from Davis'[s] counsel. The petitioner himself participated in the family's silence. Even immediately before the evidentiary hearing, Davis had to be prodded for information about the prior abuse. (RR. 863-864) The extent of Davis'[s] commentary on this abuse was "he felt that sometimes . . . he was disciplined too much." (RR. 864)

Another aspect of these facts that decreases the weight this mitigation evidence would have is the fact that the abuse DID NOT lead any of Davis'[s] family members to report Lillie Bell's actions to authorities, to tell people outside of the family, or otherwise remedy the situation. Further, in the one formally documented case of abuse before the Court, DHR made a decision to leave Davis in the home. Regardless of the hindsight and speculation offered by various DHR employees at the evidentiary hearing, the fact

remains that as of 1993 the evidence would have been that DHR never actually took measures to have Davis removed from the home due to abuse. This decision has a direct impact on the weight to be afforded this evidence.

When combined with the fact that Davis'[s] family members were comfortable with keeping this information secret, this abuse becomes much less powerful as evidence. Davis'[s] family must not have thought his life was in danger during his adolescence, as they did nothing to protect him from further abuse. Instead, they let family pride, fear of Lillie Bell, or other factors preclude them from coming forward. Even at the hearing, these witnesses were still hesitant to come forward and discuss these issues. The abuse of Davis obviously did not impact Davis'[s] own family to a degree great enough where they were motivated to seek assistance from authorities in dealing with the issue. This Court, as well as a jury, would have to consider such factors in determining the weight to be given this evidence.

Based on the testimony of Storey at the original sentencing hearing, this Court considered the difficulty of Davis'[s] upbringing and his below-average intellect. While this new evidence puts this information in a new perspective, it does not change the fact that the facts of this crime and the two aggravating circumstances proven by the State far

outweighed the one statutory mitigating factor and these non-statutory mitigating factors.

Likewise, some of the evidence presented by the Petitioner falls into the category of “double-edged sword” type evidence referenced by Giddens. (RR. 156, 158) For example, some of the evidence indicated that Davis had good role models in his life. One of Davis’[s] own witnesses noted that his violent behavior did not begin until the commission of the Robbery III offense prior to the Direct Oil murder. (RR. 994-995, 1006) This information leads to an inference that Davis’[s] violence was a product of some factor other than his upbringing, considering the testimony that throughout Davis’[s] childhood (when the abuse occurred) he was not a violent person. Instead, he became violent when he committed the Robbery III of a Domino’s Pizza employee and began fighting in jail and became aggressive and disrespectful. (RR. 1006) Such testimony does not suggest that the abuse suffered by Davis was of any great mitigation significance as his violent criminal behavior does not begin until years later after he is away from his mother and her influence.

This Court does not accept that the behavior of Lillie Bell Davis in abusing the Petitioner or misleading his trial counsel was appropriate. The Court’s finding of no [ineffective assistance of counsel] is not an approval

of such behavior. Instead, it is a recognition that no matter how wrong her behavior was, trial counsel were not responsible for the family's (and Davis'[s]) silence on this issue and the abuse inflicted by Lillie Bell — while wrong — does not serve as mitigation evidence that would have created a reasonable probability that the outcome of Davis's penalty phase would have been different. Accordingly, in addition to finding that counsel's performance was reasonable under the circumstances, the Court further finds that Davis did not prove prejudice in any event.

. . . .

For the foregoing reasons, the Court denies this claim. Although the Court acknowledges that this abuse evidence should have been brought out at Davis'[s] trial, the fault for it not coming out rests with Davis and his family, and not his counsel. It would pervert Sixth Amendment jurisprudence to punish lawyers for deliberate misdeeds by their client and client's families. The record before the Court establishes a family that is coming to terms with their past. The problem is that they chose to do so only after the Petitioner was sentenced to death. That this secret was more valuable to them than the potential risk of their silence to Davis at his capital murder trial is disturbing, but it is not the result of ineffective assistance of counsel. This claim, in its entirety, is denied."

Rule 32 C.R. Vol. 62, Tab. 80 at 27-29, 33-40, 51-57 (emphasis in original; footnotes omitted; seventeenth and eighteenth alterations in original, other alterations supplied; first, fifth, and eighth ellipses supplied, other ellipses in original).

b. Alabama Court of Criminal Appeals' initial opinion (dicta)

The Alabama Court of Criminal Appeals described the “powerful” mitigation evidence and the actions of counsel, whom it believed “failed to conduct the type of investigation sanctioned by the guidelines developed by the American Bar Association for attorneys representing defendants in death-penalty cases as endorsed by the United States Supreme Court in *Wiggins v. Smith*[, 532 U.S. 510 (2003)]”:

At the Rule 32 hearing, Davis presented the testimony of two sisters, an aunt, and several social workers. Davis's sisters testified that their mother regularly beat Davis with switches, extension cords, and brooms. Mary Nell Davis testified that she remembered one instance when Davis was in the second grade and their mother beat Davis so badly with a broom that his head swelled up and his ear was almost “severed.” She also said that when her mother was beating Davis he [*sic*] would call him a “black bastard.”

Beverly Boggs, a social worker with the Calhoun County Department of Human Resources (“DHR”), testified that her first contact with Davis was when he was about 10 years old. A report had been filed with DHR

that Davis was being abused and neglected. Davis's mother admitted to Boggs that she beat Davis because he was a bed wetter. The social worker recommended counseling for the child and mother.

Another social worker, Theresa Peebles, testified that she investigated a complaint that alleged that Davis was being abused when Davis was about 10 years old. Davis admitted to her that his mother beat him because he was a bed wetter. Peebles said that she observed the extent of Davis's injuries on this occasion and that Davis had between 25 and 30 marks on his back. She said, "I've never seen a back that looked worse than Jimmy's did." Peebles made photographs of his injuries, and those photographs were introduced at the Rule 32 hearing.

....

Giddens testified to the following concerning mitigation evidence:

Q [Davis's attorney]: But in your practice of defending capital cases, would you agree that an individual's educational background, family situation and employment status are some of the few things that should be taken into consideration at the mitigation phase?

A [Giddens]: I think you need to take into consideration whatever evidence you can offer to a jury.

Mitigation is simply that, to mitigate the sentence down to life [imprisonment] without parole and a lot of things to go into it. Educational background. I mean, lack of significant criminal history is one that you can offer. Many things are taken into mitigation. But simply asking for life without parole is asking to spare the death penalty, spare the defendant's life. And that's ultimately for the jury to make a recommendation. But I mean, you can offer, under the non-statutory mitigation in Alabama, you can offer virtually anything.

Q: And prior to becoming the District Attorney, when you're defending these cases, how would you go about investigating that "virtually anything" that you could put before a jury?

A: Well, the "virtually anything" is putting family members on, "Please spare my son's life"; "Please spare my brother's life"; "Please spare my mother's life." "He was a good child. He played ball, he did this." And showing a picture of the defendant that maybe they didn't get to see. And that's — that's what I'm talking about, the non-statutory

mitigation is anything. Anything that they have ever done.

. . . .

Q: Have you ever offered evidence of physical child abuse?

A: No.

Q: If you found evidence of physical child abuse in a defendant's life, would you offer that in a mitigation stage?

A: If it was somehow related to the crime or if it —

I mean, under nonstatutory mitigation, I'm sure it's admissible. I'm sure you can get it in, but I personally did not ever do that. FN.

FN. Evidence that a defendant was a victim of child abuse is a classic example of mitigating evidence; its admittance is not affected by whether the abuse directly related to the crime.

(R. 75-76.) Giddens further testified that he spoke only with Davis's mother and that he did not speak with any of Davis's siblings. He did not attempt to get any of Davis's school records or any records from DHR. Giddens was never questioned about Adams's preparation for the penalty phase. Indeed, the State's cross-examination of Giddens failed

to elicit any information that would bolster the State's position that a reasonable investigation was conducted in this case. Moreover, the record shows that most of the preparation was conducted two weeks before Davis's trial.

We have also reviewed the transcript of the penalty phase. Counsel called Lillie Davis, Davis's mother, to testify at the penalty phase. She told the jury that Davis's father had left them when Davis was approximately one year old, that Davis did not have a father figure in his life, that Davis started giving her trouble when he was around 9, that Davis went to live with his father in New York when he was 15 years old, that Davis moved back after about two months because his father had died, and that Davis dropped out of school when he was 16 years old. She also said that Davis ran with a bad crowd, that he had never been involved in any violent behavior — just stealing — and that when he reached the age of 17 she asked him to leave her house because she could not control him. Last, she asked the jury to spare her son's life.

Andrew Lamont Sigler, Davis's first cousin, also testified at the penalty phase. FN.

FN. Sigler testified at the Rule 32 hearing that Davis's attorneys had not contacted him before Davis's trial but that on the day of sentencing he was in the courthouse and

one of the attorneys asked him to testify.

Sigler testified: "I think Jimmy was missing a lot as he was coming up. People to rely on, people to talk to, people who could understand him and try and help him out. A lot of things that we all have had, more successful people have had." (Trial record at p. 1322.) Sigler also asked the jury to spare Davis's life.

. . . .

After the penalty-phase jury deliberated for 40 minutes, it returned with a question. The question was whether the trial court could accept a recommendation of death if seven jurors voted for death and five for life. The trial court sent the jury back to deliberate and gave the following instruction:

The Court has heard the responses both by the State and by the defendant to this question. Appears I have unanimity from each side of the case and no objections to the Court answering this question in the negative that no, the Court cannot accept the numbers as they state them. And further state there must be 10 votes for recommendation of death or there must be at least 7 votes for a recommendation of life without parole.

(Record of trial, p. 1375-76.) After this instruction, the jury returned with a

recommendation of 11 for death and 1 for life imprisonment without parole. Certainly, it is reasonable to conclude that the evidence of Davis's child abuse could very well have tipped the scales in the other direction.

. . . .

. . . In this case counsel failed to conduct the type of investigation sanctioned by the guidelines developed by the American Bar Association for attorneys representing defendants in death-penalty cases as endorsed by the United States Supreme Court in *Wiggins v. Smith*.

Davis v. State, 9 So. 3d 514, 522-525 (Ala. Crim. App. 2006) (alterations in original; first ellipses in original, other ellipses supplied; footnote omitted).

c. Opinion of Alabama Court of Criminal Appeals on remand

Upon reexamining the claim on remand, the Alabama Court of Criminal Appeals rejected its previous comments, and concluded that Davis was not entitled to relief:

We stated in our previous opinion affirming the circuit court's denial of Davis's Rule 32 petition that if this issue had been properly before us we would direct that a new sentencing hearing be conducted. *Davis v. State*, 9 So. 3d at 526. However, upon further research and review of the record we have reconsidered our comments in dicta in our previous opinion, and we now conclude that the circuit

court did not abuse its discretion in denying Davis relief on his claims of ineffective assistance of trial counsel at the penalty phase.

Davis v. State, 9 So. 3d 539, 553 (Ala. Crim. App. 2008).

The Court held that the findings of the circuit court, as set out above, were supported by the record, adopted them as part of its opinion, and affirmed the trial court's denial of this claim:

First, Davis argues that counsel should have discovered and presented evidence from family members and the Department of Human Resources ("DHR") records to show that he had been abused as a child.

At the penalty phase, counsel called Davis's mother, his first cousin, and a counselor who had evaluated Davis's IQ. On direct appeal we stated the following about the mitigating evidence that was presented:

[Davis] called three witnesses: his mother, Lillie Bell Davis; his first cousin, Andre Lamont Sigler; and a counselor, Annie M. Storey. His mother testified generally about [Davis's] background and family life. She stated that she and her husband, who was [Davis's] father, separated when [Davis] was one year old, and that [Davis] never had the benefit of a father in the home when he was growing up. She stated that [Davis] went to Detroit to live with his father when he was 15 years of

age, but that his father died shortly thereafter and that his death was devastating to [Davis]. She further testified that she began to have trouble with [Davis] when he was about 9 years old; that he would misbehave at school and at home; that he dropped out of school when he was 16; that he would not work, would stay out at night, and was frequently in trouble; that after he turned 17, she could not handle him; and that he left home when he was 19. She asked the jury to spare her son's life. Sigler also testified about [Davis's] background and home life. He stated that [Davis] missed not having a father in the home; that because of his circumstances he "missed a lot" when he was growing up; that when he was growing up he had no one to rely on, to talk to, or to help him; that when his father died he was noticeably affected and his appearance and attitude changed; and that he had not had the advantages that Sigler had had. Sigler also asked the jury to recommend a sentence of life imprisonment without parole. Storey, a counselor employed by the Calhoun-Cleburne Mental Health Center and the Oxford city school system, testified that she administered

intelligence and diagnostic educational tests to [Davis] before his trial; that he had a full-scale IQ of 77, which placed him at the 6th percentile, i.e., 94% of the people in his age group scored higher; that an IQ of 77 is considered within the borderline range of intelligence; that he is functioning “between where we would consider an individual who is mentally retarded and one who is low average”; and that he functions at the 5th grade level academically. [Davis] called only one witness at the second sentencing hearing before the trial court, his mother, who testified again about her son’s general background and family life, and asked the court for mercy.

Davis v. State, 718 So.2d at 1156.

Giddens testified at the Rule 32 hearing that Davis did not tell him that he had been abused as a child. Cocounsel Adams did not testify concerning his dealings with Davis or the extent of his investigation into Davis’s upbringing. We have reviewed the record of Davis’s trial and find that Adams’s involvement in the case was not minor. Adams conducted opening and closing statements and cross-examined the majority of the state witnesses. Also, Adams spoke with two of Davis’s siblings – though we do not know the identity of those siblings. We are troubled

that Adams was not called to testify at the Rule 32 hearing when it is clear that he had a significant role in preparing for Davis's trial. FN.

FN. As we stated above: "An ambiguous or silent record is not sufficient to disprove the strong and continuing presumption [of effective representation]. Therefore, 'where the record is incomplete or unclear about [counsel's] actions, we will presume that he did what he should have done, and that he exercised reasonable professional judgment.'" *Chandler v. United States*, 218 F.3d 1305, 1314 n. 15 (11th Cir. 2000) (en banc) (quoting *Williams v. Head*, 185 F.3d 1223, 1228 (11th Cir. 1999))." *Grayson v. Thompson*, 257 F.3d 1194, 1218 (11th Cir. 2001).

However, Giddens testified at the Rule 32 hearing as follows:

There was a lot of preparation. Mr. Adams and I — I had asked Judge Street if he would appoint me co-counsel since it was a capital murder case and that involved a lot of work. And I asked him to appoint a cocounsel. And he appointed Mr. Adams at my request. And Mr. Adams and I did a lot of preparation.

We came into Anniston, interviewed a lot of witnesses, did a lot of research.

(R. 36-37.) In preparing mitigation evidence, Giddens stated:

[Giddens]: As I said, at the same time as you begin to assess the evidence. You begin to think about in the event that he's convicted or she's convicted of capital murder, what are you going to do in the sentence hearing. You have to be prepared for all of its [sic].

Q [Rule 32 counsel]: So when you started to prepare the guilt/innocence part of Mr. Davis's case in November of 1993, that's about the same time you began to prepare the mitigation case?

[Giddens]: Well, I mean, we had spoken with his mother sometime during that time and knew that she was going to be a witness in that event. And also got an order signed for a mental evaluation to use as mitigation if, you know, it if [sic] came out favorable or something you would want to offer mitigation for the defendant. I mean, during the time frame of preparing for the case, you have to prepare for the

sentence hearing as well because it will be immediately after the trial.

(R. 72-73.) Giddens said that Davis provided him with little information except that he was with Heard at the time of the robbery/murder.

Counsel have a duty to investigate but this duty is confined to reasonable investigation. See *Strickland*, 466 U.S. at 691, 104 S.Ct. at 2066. In *Funchess v. Wainwright*, 772 F.2d 683, 689 (11th Cir. 1985), this Court found counsel reasonably investigated despite the fact that he had not investigated his client's psychological problems because the client never told him of any problems and the competency evaluation did not suggest any problems existed. The client also acted competently while assisting counsel in preparing his case. *See id.* Thus the court held that counsel was not put on notice of any problems and could not be faulted for not pursuing the matter. *See id.*; *cf. Collins v. Francis*, 728 F.2d 1322, 1349 (11th Cir. 1984) (determining that counsel who failed to investigate witnesses that the defendant did not tell him about was not ineffective).

Reliance upon some family members statements [sic] that other

mitigation witnesses did not exist was considered permissible in *Singleton v. Thigpen*, 847 F.2d 668, 670 (11th Cir. 1988). Rejecting a per se rule of ineffective assistance where counsel does not consult family members, we held in *Williams v. Head*, 185 F.3d 1223, 1237 (11th Cir. 1999), that counsel's investigation was reasonable when he did not interview the defendant's sister or father, the latter because the defendant had not lived with him for very long. "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make a reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary." *Strickland [v. Washington]*, 466 U.S. [668] at 690-91, 104 S.Ct. [2052] at 2066 [(1984)].

The conduct of the counsel here did not fall below the professionally competent standard. While the Warrens did not discover the records from Holladay's stay at Central State Hospital in Milledgeville, Georgia or records from other

psychiatrists who treated Holladay, there is no evidence in the record, nor does Holladay allege, that he told them of his prior treatment. As in Funchess, the report of the lunacy commission that Holladay was sane and competent combined with counsel's impression of Holladay as cooperative, articulate, and affable did not put Mrs. Warren on notice that there were or might be psychiatric records that she needed to find.

Holladay v. Haley, 209 F.3d 1243, 1251-52 (11th Cir. 2000). Based on the unusual circumstances presented in this case and the fact that we not [*sic*] know the extent of co-counsel's investigation because Adams was not called to testify, we cannot say that counsel was ineffective for failing to discredit the statements of Davis, his mother, and two of his siblings, and to conduct yet more investigations. Thus, we conclude that the circuit court did not abuse its discretion in finding that the investigation conducted by Davis's attorneys was reasonable. "Clearly this is not a case where counsel failed to investigate, a case where counsel was ignorant of what evidence could be presented in mitigation, or a case where counsel presented no mitigation evidence." *Waldrop v. State*, 987 So.2d 1186, 1202 (Ala. Crim. App. 2007).

Moreover,

“[a] defense attorney is not required to investigate all leads, however, and “there is no per se rule that evidence of a criminal defendant’s troubled childhood must always be presented as mitigating evidence in the penalty phase of a capital case.” *Bolender v. Singletary*, 16 F.3d [1547,] at 1557 [(11th Cir. 1994)] (footnote omitted) (quoting *Devier v. Zant*, 3 F.3d 1445, 1453 (11th Cir.1993), *cert. denied*, [513] U.S. [1161], 115 S.Ct. 1125, 130 L.Ed.2d 1087 (1995)). “Indeed, ‘[c]ounsel has no absolute duty to present mitigating character evidence at all, and trial counsel’s failure to present mitigating evidence is not *per se* ineffective assistance of counsel.” *Bolender*, 16 F.3d at 1557 (citations omitted).”

Marek v. Singletary, 62 F.3d 1295, 1300 (11th Cir. 1995). Evidence of childhood abuse has been described as a double-edged sword. *See Johnson v. Cockrell*, 306 F.3d 249, 253 (5th Cir. 2002) (evidence of brain injury, abusive childhood, and drug and alcohol abuse was “double edged” because it would support a finding of future dangerousness). *See also Miniel v. Cockrell*, 339 F.3d 331 (5th Cir. 2003); *Harris v. Cockrell*, 313 F.3d 238 (5th Cir. 2002). The circuit court did not abuse its discretion in denying relief on this claim.

. . . .

Last, even if we were to find that counsel's performance was deficient in the penalty phase of Davis's trial, we would find no prejudice. As the United States Supreme Court stated in *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003):

In *Strickland [v. Washington]*, 466 U.S. 668 (1984)], we made clear that, to establish prejudice, a "defendant 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." *Id.*, at 694, 104 S.Ct. 2052. In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence.

539 U.S. at 534, 123 S.Ct. 2527.

The circuit court noted in its order denying relief that the evidence of Davis's childhood abuse was not of "any great mitigation significance as his violent criminal behavior does not begin until years later after he is away from his mother and her influence." The circuit court found in mitigation that Davis was only 23 years old at the time of the robbery/murder and the court also "considered

all testimony and evidence presented to the jury and to the Court in regard to the defendant's background, character, [and] education achievement level." The court found that the failure to present evidence of Davis's childhood abuse would not have prejudiced him.

We have reweighed the alleged omitted mitigation evidence against the aggravating circumstances that existed in this case. We agree with the circuit court that death was the appropriate sentence in this case and that the fact that certain potential mitigation evidence was not presented would have had no affect [sic] on the outcome.

Davis v. State, 9 So. 3d 539, 563-566, 569-570 (Ala. Crim. App. 2008) (alterations in original).

d. Analysis

For claims that counsel was ineffective at the penalty phase of trial, the issue is "whether counsel reasonably investigated possible mitigating factors and made a reasonable effort to present mitigating evidence to the sentencing court." *Henyard v. McDonough*, 459 F.3d 1217, 1242 (11th Cir. 2006). To establish ineffective assistance of counsel, and rebut the strong presumption that counsels' performance was reasonable, the petitioner has the burden of establishing that no competent counsel would have taken the action his counsel took.

Davis's reply challenges the reasonableness of the state court's decision, asserting that the failure to grant him relief on the merits of his ineffective assistance of counsel claims was contrary to, and involved

an unreasonable application of, clearly established Federal law, and 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.¹¹⁵ He argues that the presumption of correctness owed to state court fact findings is rebutted by the clear and convincing evidence presented during the Rule 32 hearing.¹¹⁶ In support, Davis directs this court to the “Petitioner’s Proposed Findings of Fact and Conclusions of Law, submitted to the Rule 32 Circuit Court.”¹¹⁷ Davis also contends that the Alabama Court of Criminal Appeals failed to properly apply the Strickland test because it “ignored United States Supreme Court law pertaining to the professional standards and norms of representation in capital cases.”¹¹⁸

i. Performance

Davis first argues that the Alabama Court of Criminal Appeals unreasonably blamed counsels’ failure to uncover evidence of his childhood abuse on his and his family’s silence about the abuse, without faulting trial counsel for failing to investigate school, medical, and social service records, or for failing to ask probing questions of the Davis family.¹¹⁹ He cites *Rompilla*, 545 U.S. at 381, for the proposition that the Sixth Amendment requires counsel to make a reasonable

¹¹⁵ Doc. no. 39.

¹¹⁶ *Id.* at 13.

¹¹⁷ *Id.* The Petitioner’s Proposed Findings of Fact and Conclusions of Law are located in Rule 32 C.R. Vol. 17, at 1034-1113.

¹¹⁸ Doc. no. 39, at 15.

¹¹⁹ *Id.* at 18-19.

effort to obtain information, even when the defendant and his family are “uninterested in helping” and inform counsel that no mitigating evidence is available.¹²⁰ He also cites *Williams v. Taylor*, 529 U.S. 362, 396 (2000), for the proposition that counsel’s failure to conduct a “thorough investigation of the defendant’s background” could not be excused as within counsel’s discretion to make a “tactical decision.”¹²¹

It is apparent from a review of the state court record that counsel did not conduct an extensive investigation for the penalty phase of this capital trial. It is troubling that: counsel’s notes reflect only two visits with Davis prior to trial; counsel spoke with Davis’s mother only once, and then only days before the trial; much of the preparation, including the evaluation that was performed the weekend prior to the Monday morning trial, was conducted at the last minute; and, counsel did not meet with the penalty phase witnesses prior to the day they were scheduled to testify. It also is troubling that relevant mitigation evidence existed, but was not discovered.

Even so, counsel did not have many leads to pursue mitigating evidence. The record is clear that neither Davis nor his mother informed Giddens of the abuse Davis suffered.¹²² Any suggestion that Davis might have opened up to counsel if they had spent more time

¹²⁰ *Id.* at 19.

¹²¹ *Id.*

¹²² Because Davis did not call Adams to testify at the Rule 32 hearing, the court has no way of knowing if Adams was informed of the abuse or the role Adams played in preparing for the sentencing phase of the trial.

with him, earning his trust, or perhaps explaining the importance of being completely truthful and forthright, is mere conjecture, and unsupported by any evidence. Although it undoubtedly would have been far better if counsel had gathered more background information prior to the capital sentencing proceeding, they were not constitutionally required to complete any set checklist of tasks, especially when counsel had received no information to indicate that potential mitigating evidence existed.

Ultimately, this court must confront the fact that the Eleventh Circuit has “repeatedly held that ‘[a]n attorney does not render ineffective assistance by failing to discover and develop childhood abuse that his client does not mention to him.’” *Puiatti v. Secretary, Florida Department of Corrections*, 732 F.3d 1255 (11th Cir. 2013) (quoting *Williams v. Head*, 185 F.3d 1223, 1237 (11th Cir. 1999)) (alteration in original).

Thus, it cannot be said that the determination of the Alabama Court of Criminal Appeals — *i.e.*, that counsel’s investigation was not constitutionally deficient — was objectively unreasonable.

The Alabama court painstakingly considered the evidence presented, applied the controlling Supreme Court precedent, and found that,

[b]ased on the unusual circumstances presented in this case and the fact that we do not know the extent of cocounsel’s investigation because Adams was not called to testify, we cannot say that counsel was ineffective for failing to discredit the statements of Davis,

his mother, and two of his siblings, and to conduct yet more investigations.

Davis v. State, 9 So. 3d 539, 566 (Ala. 2008) (alteration supplied). Davis has not shown that no reasonable factfinder would have arrived at the same conclusion.

ii. Prejudice

In any event, Davis has not demonstrated that he suffered prejudice as a result of his attorneys' failure to more thoroughly investigate potential sources of mitigating evidence. Davis argues that he was prejudiced by counsels' failure to present to the jury the "compelling mitigating evidence of the serious abuse [he] suffered as a child, the chaotic and dysfunctional household in which he grew up, and the gross neglect of his parents."¹²³ He asserts:

The compelling mitigation evidence trial counsel failed to investigate and uncover was at least as severe as evidence that the United States Supreme Court has found to be prejudicial when excluded. *See, e.g., Wiggins*, 539 U.S. at 516, 524-25 (holding that petitioner was denied Constitutionally effective assistance of counsel when counsel chose not to expand their investigation of his life history for mitigating evidence beyond the pre-sentence investigation report and department of social services records, and thereby failed to uncover evidence of "severe physical and sexual abuse petitioner suffered"); *Williams*, 529 U.S. at 395-98 (holding that petitioner was

¹²³ Doc. no. 39, at 18 (alteration provided).

denied Constitutionally effective assistance when counsel failed to investigate and present during the sentencing phase a “voluminous amount” of evidence of his “nightmarish childhood”); *Williams v. Allen*, 542 F.3d 1326, 1339 (11th Cir. 2008) (holding that counsel’s failure to conduct an adequate investigation precluded jury from weighing evidence of childhood history of abuse and cruelty).

Doc. no. 39, at 18.

According to Davis, the Alabama Court of Criminal Appeals failed to properly weigh the additional mitigating evidence presented during the Rule 32 proceeding under the standards set forth in *Strickland* and its progeny.¹²⁴ He argues that the court improperly based its determination on his failure to “show a direct link between the proffered mitigating evidence and the commission of [the] offense.”¹²⁵ Additionally, he asserts:

As this Court held in *Boyd v. Haley*, the “fail[ure] to recognize that [petitioner’s] background evidence had any mitigating value due to the lack of its causal nexus to the crimes” results in a “legal conclusion contrary to clearly established federal law regarding the purposes of the penalty and sentencing phases of trial.” Order at 31-33, Case no. CV-00-S-2919-E (Sept. 28, 2001) (holding

¹²⁴ *Id.* at 19.

¹²⁵ *Id.* at 20 (quoting *Davis v. State*, 9 So. 3d 539, 561 (Ala. Crim. App. 2008)) (alteration in original).

that the CCA erroneously failed to properly consider and weigh petitioner's mitigating background evidence because of his failure to demonstrate a causative linkage between that evidence and his crimes) (citing *Hardwick v. Crosby*, 320 F.3d 1127, 1162-63 (11th Cir. 2003)). In short, the question is simply whether the evidence is of such a character that it might serve as basis for a sentence less than death. *Tennard v. Dretke*, 542 U.S. 274, 287 (2004). Accordingly, the CCA's decision is contrary to and an unreasonable application of clearly established federal law.¹²⁶

Doc. no. 39, at 20 (alterations in original).

Upon review of the record in this case, it is apparent that the trial court did not base its finding of no prejudice solely on the absence of a causal link between the abuse Davis suffered as a child and the crime he committed. The trial court held that the evidence could have been introduced as non-statutory mitigation and entitled to some weight in determining the proper sentence. Even so, the trial court found, for multiple reasons, that the evidence would not have been sufficient to create a reasonable probability that the sentence would have been different. Moreover, the Alabama Court of Criminal Appeals based its implicit determination that Davis was not prejudiced on the nature of evidence of childhood abuse as mitigation, noting that it is often described as a "double-edged sword," because it could also support a finding of

¹²⁶ *Id.* at 20 (alterations in original).

future dangerousness. *Davis v. State*, 9 So. 3d 539, 566 (Ala. Crim. App. 208).

Davis also argues that the Alabama Court of Criminal Appeals improperly weighed the mitigation evidence when it “completely shifted course from its 2006 opinion where it stated that ‘[i]t is reasonable to conclude that the *evidence of Davis’s child abuse could very well have tipped the scales* in the . . . direction [of life imprisonment without parole],” and “improperly agreed with the Circuit Court’s assessment that the evidence was not of ‘any great significance as his violent criminal behavior does not begin until years later after he is away from his mother and her influence.’”¹²⁷ Davis argues:

This Court has noted that “the Supreme Court has long recognized that a defendant’s troubled background is relevant mitigating evidence in the quest to determine his moral culpability.” *Boyd*, Order at 32, Case no. CV-00-S-2919-E (Sept. 28, 2001) (citing *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989)); *Eddings v. Oklahoma*, 455 U.S. 104, 112 [(1982)]; *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)). Thus, the CCA’s failure to give appropriate weight to the evidence of Davis’s childhood abuse because it occurred years earlier than the crime constitutes a decision both contrary to, and an unreasonable application of, clearly established federal law.

¹²⁷ *Id.* at 20-21 (quoting *Davis v. State*, 9 So. 3d 514, 524 and *Davis v. State*, 9 So. 3d 539, 563) (alterations and emphasis in original).

Doc. no. 39, at 21 (alteration supplied).

The trial court’s determination that Davis had not established prejudice was not based entirely on the length of time that had elapsed between the abuse and the offense. Moreover, the appellate court, which devoted most of its discussion to the performance prong of *Strickland*, based its prejudice determination primarily on the risks of presenting evidence of childhood abuse as mitigation evidence. The state court considered the totality of the available mitigation evidence, including that adduced at trial and in the postconviction proceedings, and determined that there was no reasonable probability that the introduction of that evidence would have resulted in a different sentence. That determination was not patently unreasonable.

2. Failure to obtain or present any testimony regarding Davis’s mental health

— and —

3. Failure to obtain mental health evidence relating to mental/psychological dysfunction and brain damage

Davis asserts that his trial counsel did not adequately discover, prepare, and present evidence regarding his mental health and brain damage.¹²⁸ He complains that counsel did not obtain information regarding his mental competency and health until the week before trial, when they filed a motion seeking “to determine [Davis’s] *intelligence level, educational level, any behavioral problems, or any condition*

¹²⁸ Doc. no. 33, at 34-39.

relative to his behavior in a normal social environment."¹²⁹ Because counsel did not specify that Davis was facing capital murder charges, the evaluation was performed by a psychometrist whose licensing, training, and experience were in the administration of I.Q. tests, primarily to school students.¹³⁰ The psychometrist administered IQ and MMPI (Minnesota Multiphasic Personality Inventory) tests on December 4, 1993, just two days before trial, and counsel did not speak with or meet her until just before she testified.¹³¹ Davis also contends that counsel should have sought the services of other qualified experts, such as a forensic psychologist, a social worker, and a neuropsychologist.¹³² Finally, Davis faults counsel for failing to discover and present evidence that he had sustained a frontal lobe brain injury — a defect that he contends manifested in poor performance in school and delayed maturation.¹³³

a. Evidence presented in state court

Davis called Anne M. Storey, the psychometrist who had administered IQ and MMPI tests, during the penalty phase of trial. Ms. Storey testified that Davis had a full-scale IQ of 77, which placed him in the borderline range of intellectual functioning.¹³⁴ Storey stated

¹²⁹ *Id.* at 34 (alteration supplied) (emphasis in original).

¹³⁰ *Id.* at 34-35.

¹³¹ *Id.* at 35.

¹³² *Id.* at 37.

¹³³ *Id.* at 39.

¹³⁴ R. Vol. 8, Tab 20, at 1332-33.

that Davis's IQ would make it difficult for him to perform ordinary tasks.¹³⁵ Counsel presented no evidence that Davis had brain damage or other mental deficiencies.

During the Rule 32 hearing, Davis produced several of his school records and report cards. His eighth grade report card shows that he made four B's and one C.¹³⁶ He also was administered the Wechsler Intelligence Scale ("WISC-R") IQ test in eighth grade, which revealed a full-scale IQ of 74.¹³⁷ The WISC-R evaluation form contained the handwritten comment: "all areas are above grade level expectancy."¹³⁸

During the hearing, Davis presented the testimony of Dr. Kimberly Svec Ackerson, an Alabama-licensed clinical psychologist specializing in forensic psychology, who testified that she would have referred Davis to a neuropsychologist for further investigation of possible brain injury or damage.¹³⁹ Dr. Charles J. Golden, a professor of psychology at Nova Southeastern University and Director of the Neuropsychological Assessment Center, testified, based on his assessment of Davis's IQ scores, that Davis had frontal-lobe brain damage.¹⁴⁰

¹³⁵ *Id.* at 1334-35.

¹³⁶ Rule 32 C.R. Vol. 34, Tab 58, at 1848.

¹³⁷ *Id.* at 1853.

¹³⁸ *Id.*

¹³⁹ Rule 32 R. Vols. 21-22, Tab 58, at 694-98.

¹⁴⁰ Rule 32 R. Vol. 22, Tab 58, at 795-804.

The State presented the testimony of Dr. Glen D. King, a clinical psychologist who testified, after evaluating Davis and his IQ scores, that Davis merely had borderline intellectual functioning, not brain damage, and that he would not have referred Davis to a neuropsychologist.¹⁴¹ Dr. King also testified that a CAT scan, an MRI, or a PET scan is traditionally used to diagnose brain damage, but none of those tests had been administered to Davis at any time — either prior to trial or during the postconviction proceedings.¹⁴²

b. Rule 32 court’s order of denial

Following the evidentiary hearing, the trial court rejected Davis’s claims, saying:

Next, Davis alleges [ineffective assistance of counsel] based on trial counsel’s failure to get a psychologist to conduct a mental evaluation, rather than having him tested by a psychometrist. This claim, too, fails.

First, trial counsel did not request that the evaluation be conducted by a psychometrist, nor did this Court’s order state that the evaluation should have been done by a psychometrist. Instead, due to an administrative error at the mental health center, Davis was assigned to Annie Storey, a psychometrist, for evaluation. (RR. 129) Although trial counsel did not request this procedure, Giddens testified that Storey, “did exactly what I asked her to do.” (RR. 93) Namely, Giddens

¹⁴¹ *Id.* at 869-73.

¹⁴² *Id.* at 873.

testified that he was concerned mostly with Davis'[s] IQ and achievement level.

Under the circumstances of this case, defense counsel's concern about IQ and achievement level testing was reasonable. As Giddens recounted, there was no special plea in Davis'[s] case and nothing had struck either Giddens or Adams as peculiar about Davis'[s] mental state. Giddens did not believe that Davis was incapable of assisting in his defense, and did not believe that Davis had any mental problems. Davis did not provide any evidence at the evidentiary hearing that would suggest otherwise. Accordingly, there is no basis for this Court to conclude that reasonably competent trial counsel would have been concerned about Davis'[s] mental health, other than information that might be useful for mitigation.

Trial counsel was not looking to prove the statutory mitigating circumstances of "extreme mental or emotional disturbance" or "substantial impairment of his ability to conform his conduct to the requirements of the law," just as Davis did not do so in the evidentiary hearing. Further, had Davis'[s] IQ been lower (or had the United States Supreme Court made *Atkins* [*v. Virginia*, 536 U.S. 304 (2002),] applicable to individuals in the borderline range of intelligence), trial counsel's strategy would be celebrated as genius by collateral counsel today. There was

nothing unreasonable about getting Davis'[s] IQ an achievement levels before the jury.

In addition, even though trial counsel were not responsible for the assignment of a psychologist to this case, trial counsel were under the impression that Storey's report had been reviewed and approved by Dr. Clarence McDanal, a licensed psychiatrist. Although McDanal testified at the evidentiary hearing that his review was merely an "administrative sign-off," there is nothing to impute this knowledge to trial counsel. Reasonable trial counsel could have trusted that a clinic of mental health professionals would be run with more efficiency than the picture painted by Dr. McDanal. Because Storey did exactly what trial counsel wanted her to do, it was reasonable for trial counsel to accept her work and accept the representations of the clinic that her work had been reviewed by a licensed psychiatrist.

Finally, Davis was not prejudiced by Storey's work in this case. First, Dr. King — an experienced forensic psychologist with a great deal of experience testifying in Alabama criminal cases — testified that he would not have referred Davis for any further testing or evaluation. In addition, the law allowed Storey to refer Davis for further evaluation or testing if she felt it was necessary. Ala. Code § 34-26-1(c)(1)(b). That she did not do so corroborates the findings of Dr. King.

The Court notes that, notwithstanding Dr. King's testimony, Petitioner could argue that Storey was not trained to know when referral to a neuropsychologist was necessary or indicated. This argument, however, is not persuasive. Although Dr. Ackerson, the psychologist who testified for Davis, stated that she would have referred Davis to a neuropsychologist for further evaluation, she also indicated that the results of the testing were not enough for her to reach that conclusion. (RR. 716) To reach the conclusion that a referral to a neuropsychologist was necessary, Ackerson stated that she would have needed a social history.

Thus, Ackerson's testimony that she would have referred Davis to a neuropsychologist is based on the premise that she would have had an accurate social history. As noted above, Davis'[s] family was not in the mood or habit of giving accurate social histories in 1993. Even Davis himself gave a watered down version of his social history to Dr. King in the months prior to his *evidentiary hearing*. He did not cooperate with his trial counsel or in the preparation of the [pre-sentence investigation] report. Thus, the social history that would have been given to a psychologist in 1993 is the same social history that was spoon fed to trial counsel by Davis'[s] family, intent on concealing their history of abuse. Accordingly, this Court cannot find that Davis would have been referred to a

neuropsychologist had his evaluation been completed by a psychologist rather than a psychometrist.

. . . .

Based on the testimony of Storey at the original sentencing hearing, this Court considered the difficulty of Davis'[s] upbringing and his below-average intellect. While this new evidence puts this information in a new perspective, it does not change the fact that the facts of this crime and the two aggravating circumstances proven by the State far outweighed the one statutory mitigating factor and these non-statutory mitigating factors.

Rule 32 C.R. Vol. 62, Tab. 80, at 48-51, 55 (alterations supplied) (footnote omitted) (emphasis in original).

c. Decision of the Alabama Court of Criminal Appeals

The Alabama Court of Criminal Appeals made the following findings:

Davis argues that counsel was ineffective for failing to present evidence that he suffered from damage to the frontal lobe of his brain. At the Rule 32 hearing, Giddens testified that he moved that Davis be mentally evaluated to determine his IQ and his academic performance. He said that he and Adams planned to use this information in mitigation if Davis was convicted. Giddens further testified that Davis gave him no reason to

believe that he was mentally impaired or that he could not assist in his defense.

Dr. Kimberly Ackerson, a clinical psychologist, testified at the Rule 32 hearing that after examining Davis she would have referred him to a neuropsychologist for further evaluation. Dr. Charles Golden, a professor of psychology at Nova Southeastern University and Director of the Neuropsychological Assessment Center, testified that based on Davis's IQ scores it was his opinion that Davis had frontal-lobe damage.

The State countered Davis's experts by calling Dr. Glenn King, a clinical psychologist. Dr. King testified that he had examined Davis and that it was his opinion that Davis "merely had borderline intellectual functioning" and that he would not refer Davis for further testing by a neuropsychologist.

Whether Davis suffered from brain damage was disputed by the medical experts. "[The defendant's] presentation of conflicting expert opinion would have further undermined the defense's credibility. Trial counsel 'cannot be deemed ineffective' for not presenting . . . conflicting opinions." *Philmore v. State*, 937 So.2d 578, 587 (Fla. 2006). Therefore, counsel was not ineffective for failing to discover and present this disputed evidence.

Davis v. State, 9 So. 3d 539, 566-567 (Ala. Civ. App. 2008) (alteration in original).

d. Analysis

To the extent Davis now claims he suffers from organic brain damage, the state court concluded that Davis had failed to prove the assertion during the Rule 32 evidentiary hearing. That determination is amply supported by the record. The state court's determination that counsel was not ineffective for failing to discover and present such evidence was not contrary to or an unreasonable application of clearly established federal law.

Davis also has not shown that he was prejudiced by any delay in conducting the evaluation, or by the manner in which the evaluation was conducted. It is true that, as a result of the delay, counsel never learned that the examination had been performed by a school psychometrist instead of a forensic psychologist, and the evaluator never learned that Davis was facing capital charges. Even so, there is no indication that those deficiencies affected the outcome of Davis's sentencing. Even though Davis's own expert witness testified that she would have referred Davis to a neuropsychologist for further evaluation, she conceded that she would have needed an accurate social history before making that determination. There is nothing to suggest that a different examiner performing the tests on an earlier date would have recorded an accurate social history, given the persistent reluctance of Davis and his family members to be forthcoming about the family's history of abuse. Moreover, Giddens testified that there were no signs that Davis had mental deficiencies or defects, and there has been no conclusive evidence to establish that Davis suffered from anything more than a low I.Q., which was identified by

the psychometrist and placed into evidence during the penalty phase of the trial.

The state court's denial of this claim was neither contrary to nor an unreasonable application of clearly established federal law, nor was it based on an unreasonable determination in light of the evidence presented.

4. Failure to discover and present mitigation evidence about prior felony conviction

Davis asserts that counsel was ineffective for failing to investigate the facts of his prior felony conviction for robbery, which was his sole prior felony aggravator.¹⁴³ He argues that, while the prior offense technically was classified as a robbery, it really was more of a "minor offense involving the theft of a few pizzas."¹⁴⁴ According to Davis's petition, he

was one of a group of four involved in what was a minor offense: someone called and ordered pizzas for delivery to a certain address, and when the pizza deliveryman arrived, the group robbed approximately \$35 and six pizzas, then fled. R.202/4-204/7; 206/22-25. The police quickly apprehended everyone. No weapon was involved. R.205/3-6.

Doc. no. 33, at 39. Davis asserts that Jadie Boozer, the court-appointed lawyer who had represented him on the earlier "pizza case" and testified at the Rule 32 evidentiary hearing, would have been willing to testify

¹⁴³ Doc. no. 33, at 39-41.

¹⁴⁴ *Id.* at 39.

at trial to the foregoing facts, if trial counsel had only contacted him.¹⁴⁵

This claim was considered and rejected by the Alabama Court of Criminal Appeals. The relevant portions of the opinion read as follows:

Davis argues that counsel was ineffective for failing to investigate and to present evidence concerning the facts of Davis's prior conviction for robbery. He asserts that the facts surrounding that offense were relevant to alleviate the impact of the aggravating circumstance that Davis had previously been convicted of a crime of violence. He cites *Rompilla v. Beard*, 545 U.S. 374, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005), for the proposition that he is entitled to a new sentencing hearing on that basis.

In *Rompilla v. Beard*, the United States Supreme Court held that counsel's performance at the penalty phase of a capital-murder trial was ineffective because counsel failed to examine the court file of a prior conviction that the Commonwealth of Pennsylvania intended to use at sentencing. The Supreme Court noted that its holding was due, in part, to the fact that counsel was aware

¹⁴⁵ *Id.* at 41. Davis also contends that two of the other individuals who were involved in the robbery, "Carlos Hughley and Vishon Sigler[,] would have been ready, willing, and able to testify at the penalty phase of Davis'[s] trial that Davis was a minor participant and was apprehended in possession of a single pizza as he fled the scene." *Id.* at 40 (alterations supplied).

that the Commonwealth intended to seek the death penalty by relying solely on the aggravating circumstance that the defendant had a significant history of felony convictions involving the use of violence, that the Commonwealth intended to rely on a prior conviction for rape and assault, and that the Commonwealth intended to introduce the transcript of the victim's testimony to show the defendant's violent nature. The United States Supreme Court stated:

Without making reasonable efforts to review the file, defense counsel could have no hope of knowing whether the prosecution was quoting selectively from the transcript, or whether there were circumstances extenuating the behavior described by the victim. The obligation to get the file was particularly pressing here owing to the similarity of the violent prior offense to the crime charged and Rompilla's sentencing strategy stressing residual doubt. Without making efforts to learn the details and rebut the relevance of the earlier crime, a convincing argument for residual doubt was certainly beyond any hope.

. . . .

If the defense lawyers had looked in the file on Rompilla's prior conviction, it is uncontested they would

have found a range of mitigation leads that no other source had opened up. In the same file with the transcript of the prior trial were the records of Rompilla's imprisonment on the earlier conviction, . . . , which defense counsel testified she had never seen, *id.*, at 508. The prison files pictured Rompilla's childhood and mental health very differently from anything defense counsel had seen or heard. An evaluation by a corrections counselor states that Rompilla was 'reared in the slum environment of Allentown, Pa, vicinity. He early came to the attention of juvenile authorities, quit school at 16, [and] started a series of incarcerations in and out Penna. [sic] often of assaultive nature and commonly related to over-indulgence in alcoholic beverages.' Lodging [to App. 111-120] 40. The same file discloses test results that the defense's mental health experts would have viewed as pointing to schizophrenia and other disorders, and test scores showing a third grade level of cognition after nine years of schooling.

The accumulated entries would have destroyed the benign conception of Rompilla's upbringing and

mental capacity defense counsel had formed from talking with Rompilla himself and some of his family members, and from the reports of the mental health experts.

545 U.S. at 386-91, 125 S.Ct. 2456. In responding to a dissent to its opinion, the Supreme Court in *Rompilla* stressed that it was not creating a per se rule that counsel was automatically ineffective for failing to conduct a “complete review of the file on any prior conviction.” 545 U.S. at 388, 125 S.Ct. 2456.

In this case there is no allegation that the file of Davis’s prior conviction contained a plethora of mitigating evidence. In fact, the record shows that Davis pleaded guilty to robbery in the third degree and that he was sentenced to one year and one day. At the sentencing phase of Davis’s trial[,] counsel argued that he had been convicted and sentenced for the lowest degree of robbery recognized in Alabama. At the Rule 32 hearing Giddens testified as follows:

[Rule 32 counsel]: Did you make an attempt to talk to any other person within the criminal justice system that had had any dealings with Jimmy?

[Giddens]: Criminal justice systems being I believe he had a robbery conviction that was offered against him.

And I was aware of that. I mean, I had gotten those records so I was aware of that through the criminal justice system.

[Rule 32 counsel]: Did you speak to anyone involved in that case?

[Giddens]: No. I reviewed the record on that and saw what he was convicted of it. And I think he actually served time on it.

. . . .

[Rule 32 counsel]: And you didn't do any investigation to find out what the circumstances of that robbery was; did you?

[Giddens]: Well, the only thing that is admissible is the conviction itself, not the facts of it.

[Rule 32 counsel]: Even at a sentence hearing in mitigation?

[Giddens]: The state offered simply a certified copy of the conviction. Which we don't object to, because you didn't want them to have to put on a witness to bring out the facts.

(R. 100-01.)

Davis presented testimony at the Rule 32 hearing that his prior robbery in the third degree conviction was the result of Davis and several other individuals robbing a pizza

delivery person of six pizzas. Davis was caught by police running away with a pizza.

This case is distinguishable from *Rompilla*. In *Rompilla* the sole aggravating circumstance that the Commonwealth was relying on to seek the death penalty was related to Rompilla's prior conviction for violence. In this case, the State relied on two aggravating circumstances: that the murder was committed during a robbery and that Davis previously had been committed of a "felony involving the use or threat of violence." Also, in *Rompilla* the attorney testified that she had not looked at the file of Rompilla's prior rape conviction. Here, Giddens testified that he did examine the file on Davis's prior conviction but had not spoken to anyone about the prior case. More importantly, the jury in this case was aware that Davis had previously been convicted of the lowest degree of robbery. Counsel tried to minimize the prior conviction. Thus, we do not believe that *Rompilla* mandates that we reverse Davis's sentence on this issue. As the Florida Supreme Court stated in *Davis v. State*, 928 So.2d 1089 (Fla. 2005):

"The facts of the instant matter are entirely distinguishable from those present in *Rompilla*. As noted above, defense counsel in the present case reviewed all of the materials that were in his possession in preparation for Davis's penalty

phase trial. Moreover, unlike *Rompilla*, there is no indication that there was material here that trial counsel was aware the State was going to use in aggravation that was not obtained and reviewed by trial counsel prior to the penalty phase trial. Moreover, unlike defense counsel in *Rompilla*, there is no indication that there was material here that trial counsel was aware the State was going to use in aggravation that was not obtained and reviewed by trial counsel prior to the penalty phase trial. Moreover, unlike defense counsel in *Rompilla*, Davis's trial counsel reviewed records in the public defender's file transmitted to him regarding Davis's medical history, educational background, and other general background information surrounding his life. A thorough reading of the United States Supreme Court's decision in *Rompilla* reveals that it is inapplicable to the facts of the instant matter. Unlike defense counsel's deficient performance in *Rompilla*, trial counsel's investigation in the instant matter was within the level of reasonable performance that is required by *Strickland v. Washington*, 466 U.S. 668 (1984)] and *Wiggins v. Smith*, 539 U.S. 510 (2003)]. See *Rompilla*,

125 S.Ct. at 2463 (“[T]he duty to investigate does not force defense lawyers to scour the globe on the off-chance something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste.”) (citing *Wiggins*, 539 U.S. at 525, 123 S.Ct. 2527; *Strickland*, 466 U.S. at 699, 104 S.Ct. 2052).

928 So.2d at 1108. See also *Miller v. State*, 926 So.2d 1243, 1252-53 (Fla. 2006). Thus, we cannot say that counsel was ineffective for failing to conduct a more detailed investigation into Davis’s prior conviction for robbery in the third degree.

Davis v. State, 9 So. 3d 539, 567-569 (Ala. Crim. App. 2008) (third alteration supplied; other alterations, ellipses, and emphasis in original).

Davis argues that the Alabama Court of Criminal Appeals’s decision was contrary to, and an unreasonable application of, *Rompilla*. He also challenges the state court’s findings of fact, asserting that “the [Court of Criminal Appeals] stated, without any explanation or citation to evidence, that ‘counsel tried to minimize the prior conviction,’” and contending that the record is “void of any evidence of diligence by counsel to support this judicial conclusion.”¹⁴⁶

This court does not agree with Davis’s contentions, and finds that the Alabama Court of Criminal Appeals

¹⁴⁶ Doc. no 39, at 21-22 (alteration supplied).

correctly construed *Rompilla*, and reasonably applied that decision to the facts of this case. *Rompilla* established a reasonableness test for assessing the duty of counsel to conduct an adequate investigation. In *Rompilla*, defense counsel attempted to research the defendant's background by talking to him and his family, and even consulted mental health experts in preparing the defendant's mitigation case. *Rompilla*, 545 U.S. at 381. However, counsel failed to review prior conviction records, despite his knowledge that the government intended to rely on the records in arguing aggravating circumstances. The Supreme Court found that counsel's conduct was both unreasonable and prejudicial because the records revealed "a range of mitigation leads that no other source had opened up." *Id.* at 390.

The Alabama Court of Criminal Appeals found that *Rompilla* did not require the reversal of Davis's sentence. *Davis v. State*, 9 So. 3d 538, 569 (Ala. Crim. App. 2008). It relied upon two Florida cases, both of which are factually distinguishable from the instant case. In *Davis v. State*, 928 So.2d 1089 (Fla. 2005), the petitioner did not make a specific claim about failure to investigate the facts of a prior conviction, but instead challenged trial counsel's overall investigation and preparation for the penalty phase.¹⁴⁷ The state court denied the claim, finding that counsel had adequately prepared and noting that trial counsel not only

¹⁴⁷ The petitioner in the 2005 Florida Davis case faulted counsel for waiting until after the jury found him guilty to begin preparing for the penalty phase, for spending only eleven hours in preparation, and for presenting only the petitioner's testimony during that phase of the trial. *Davis v. State*, 928 So. 2d 1089 (Fla. 2005).

obtained the old criminal file, but also “reviewed records . . . regarding [the petitioner’s] medical history, educational background, and other general background information surrounding his life.” *Id.* at 1108 (alteration supplied).

In *Miller v. State*, 926 So.2d 1243 (Fla. 2006), the state court rejected a claim that counsel was ineffective for failing to mitigate the prior violent felony aggravator by articulating the underlying circumstances of his second degree murder conviction. The court held that *Rompilla* was inapplicable because an “informed attorney” had made an “informed and strategic decision” not to present evidence of the facts of the underlying conviction. *Id.* at 1253. The record supported a conclusion that counsel had “researched all reasonable areas of mitigation, including the work and research of prior defense counsel”; was aware of the defendant’s childhood, substance abuse problems, and mental health issues; and, most relevantly, had “all relevant information regarding Miller’s 1986 second-degree murder conviction.” *Id.* at 1250, 1253. The court concluded, based on counsel’s testimony at the postconviction evidentiary hearing, that he had made a strategic decision to minimize the impact of Miller’s prior conviction by “gloss[ing] over it” and “not allowing [the state] to present more evidence on it.” *Id.* at 1252 (alterations provided).

In this case, the state court’s determination that counsel’s performance was not constitutionally deficient was based upon the following findings of fact: (1) Giddens’s testimony that he examined “the file on Davis’s prior conviction, but had not spoken to anyone about the prior case”; (2) the jury’s awareness that

Davis had previously been convicted of the lowest degree of robbery; and (3) counsel's attempt to minimize the prior conviction. *Davis v. State*, 9 So. 3d 539, 569 (Ala. Crim. App. 2008). Two of these findings are not clearly supported by the record. First, Giddens did not testify that he reviewed "the file on Davis's prior conviction"; rather, he testified that he "reviewed the record and saw what he was convicted of."¹⁴⁸ That testimony suggests that Giddens was referring to the actual charge, third degree robbery, and not the underlying circumstances of the crime. Second, the court's conclusion that counsel attempted to minimize the prior conviction is tenuous. After a thorough review of the record, it is apparent that counsel did not testify that he made an informed and strategic decision¹⁴⁹ not to present the facts of the conviction to the jury, or to "gloss over" the prior conviction in order to minimize its impact. During the hearing, Giddens testified in a general sense that he did not object to the State offering a certified copy of the conviction into evidence, "because you don't want them to have to put on a witness to bring out the facts."¹⁵⁰ But he did not explain how testimony regarding the facts of the prior offense would have been anything other than helpful. Moreover, the state court did not find, and the record does

¹⁴⁸ Rule 32 C.R. Vol. 18, Tab 58, at 100.

¹⁴⁹ The state court never made the explicit determination that counsel had made the strategic decision to ignore the underlying facts of the robbery conviction, nor did it discuss whether any such strategic decision was reasonable.

¹⁵⁰ Rule 32 C.R. Vol. 18, Tab 58, at 101.

not support a finding, that counsel was in fact familiar with the underlying facts of Davis's prior offense.

Rompilla does not mandate that defense counsel obtain the complete court files of all prior convictions of a capital defendant that will be used by the State at trial, or suggest that counsel must comb through the old files of prior defense counsel in order to obtain buried, but possibly relevant social and mitigating history. Here, however, the relevant mitigating evidence could have been discovered through a simple review of the arrest affidavit. Counsel's failure to conduct that simple inquiry is questionable at best.

Even if counsel's performance could be considered constitutionally deficient, however, Davis still must show that he suffered prejudice as a result. Davis's failure to prove prejudice appears to have formed the primary basis of the decision of the Alabama Court of Criminal Appeals to deny relief. That court noted that, unlike in *Rompilla*, "there is no allegation that the file of Davis's prior conviction contained a plethora of mitigating evidence." *Davis v. State*, 9 So. 3d 539, 568 (Ala. Crim. App. 2008). The court also relied heavily on the fact that the jury knew that Davis was convicted of the lowest degree of robbery, and that one other aggravating circumstance was present.

Davis argues that, if the jury had learned the "underlying facts of [his] tagalong involvement in the group robbery of a few pizzas, the outcome of the penalty phase might have been different."¹⁵¹ Common sense does suggest that testimony that Davis went

¹⁵¹ Doc. no. 39, at 22.

along with a group of boys who ordered and then stole several pizzas and \$35 from a delivery person, where no gun or weapon was involved and no one was injured, could have been more compelling to a jury than an argument by defense counsel that his prior conviction and sentence were for the lowest degree of robbery in Alabama. Whether this would have been sufficient to sway the jury, and the court, to impose a sentence of life without parole is another matter. In Davis's case, unlike in *Rompilla*, the State was not relying *solely* on the prior conviction of a violent offense. It also relied upon the fact that the murder was committed during a robbery as an aggravating circumstance. Importantly, the fact of the robbery was undisputed once Davis was convicted as charged.

Moreover, a review of the Rule 32 testimony of Jadie Boozer, the attorney who represented Davis in his prior robbery case, reveals that the facts surrounding the robbery actually could have been more damaging to Davis than he claims.¹⁵² Although Boozer testified that no weapon was used or recovered, he also testified on cross-examination that the victim's narrative in the police report stated that "[o]ne black male wearing a jacket and some dark cloth over his face confronted [the victim] and said, '[g]ive it up, man,' that a '[b]lack male had his hand – right hand in the jacket pocket as if he, black male, *had a gun*,' and that the victim 'gave up the money.'"¹⁵³ The events as recorded in the police report mirror the facts of the instant case, and both sets of facts suggest an escalating pattern of

¹⁵² Rule 32 R. Vol. 19, Tab 58, at 201-210.

¹⁵³ *Id.* at 205, 209 (alteration provided) (emphasis provided).

violence by Davis. Because there was evidence of the threatened use of a firearm, the prior robbery, which Boozer also testified had originally been charged as a first degree offense, might not have been viewed by the jury as a mere “prank,” as Davis now suggests. The state court’s denial of this claim was not an unreasonable application of clearly established federal law, or based on an unreasonable determination of clearly established federal law.

This claim is due to be denied.

5. Failure to object to the submission of the penalty phase case to the jury on a Friday at 4:30 p.m.

Davis contends that trial counsel were ineffective for failing to object to the submission of the penalty phase case to the jury on a Friday at 4:30 p.m. Davis offers the following in support of this claim:

Submitting the case to the jury this late in the day before the weekend, and shortly before Christmas, placed pressure on the jurors to try to “wind up” deliberations to avoid being sequestered over the weekend. The consequence of submitting the case to Davis’[s] jury at such a late hour on a Friday created a climate for a hurried, unconsidered sentence. The facts bear this out: by 7:00 p.m. that Friday evening, the jury reached a decision of 7 to 5 in favor of execution. Tr. 1374. Trial counsel posed no objection to the jury continuing to deliberate after such an exhausting and demanding day. Only twenty minutes later, they voted 11 to 1 in favor of

execution. Tr. 1377. Trial counsel erred in not objecting to the jury's deliberating Davis'[s] fate while under such time pressure.

Doc. no. 33, at 42 (alterations supplied).¹⁵⁴

Respondent maintains that this claim is unexhausted, pointing out that, even though Davis raised the claim in his second amended Rule 32 petition,¹⁵⁵ he did not raise it on collateral appeal.¹⁵⁶ Davis argues that this claim was "in fact raised on collateral appeal,"¹⁵⁷ but a review of his appellate brief does not reveal any mention of the claim.¹⁵⁸ The claim, therefore, is procedurally defaulted, and Davis has offered nothing to excuse the default.

Respondent argues, in the alternative, that habeas relief cannot be granted on this claim because the Rule 32 court denied the claim on the merits, and

Davis has not alleged, and cannot show, that the denial of relief on his claim in state court "(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

¹⁵⁴ This is the entirety of Davis's claim.

¹⁵⁵ Rule 32 C.R. Vol. 12, Tab 47, at 29.

¹⁵⁶ Doc. no. 35, at 25.

¹⁵⁷ Doc. no. 39, at 8.

¹⁵⁸ See Rule 32 C.R. Vol. 57, Tab 60.

the facts in light of the evidence presented in the state court proceeding.”

Doc. no. 35, at 26.¹⁵⁹ Contrary to Respondent’s argument, however, it does not appear that the trial court addressed this claim at all. As a result — i.e., because the trial court made no findings on this claim — there is nothing for this court to review.

Furthermore, even assuming the claim were properly before this court, it would be due to be denied on the merits. Davis has offered nothing beyond a conclusory assertion that counsel “erred in not objecting to the jury’s deliberating Davis’s fate while under such time pressure.” Similarly, he has offered nothing to indicate that he was prejudiced by counsel’s failure to object to the jury’s deliberations beginning on a Friday night.

C. Counsel Was Ineffective for Not Objecting to Prosecutorial Misconduct

Davis asserts that repeated instances of prosecutorial misconduct violated his rights to a fair trial, due process, and a reliable sentence.¹⁶⁰ He also contends that trial counsel were ineffective for failing to object to the alleged instances of prosecutorial misconduct.

¹⁵⁹ Respondent cites “C.R2. 1190-1191” as the pages of the trial court’s opinion on which it denied this claim on the merits. The trial court’s opinion denying Davis’s Second Amended Rule 32 petition is located in Rule 32 C.R. Vol. 62, Tab 80. The pages cited by the respondent correspond to Rule 32 C.R. Vol. 62, Tab 80, at 57-58. However, the trial court did not address this claim on the pages cited by the respondent.

¹⁶⁰ Doc. no. 33, at 42-50.

The relevant question on habeas review of claims of prosecutorial misconduct is “whether the prosecutors’ 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)). The Eleventh Circuit explicated that standard in *Spivey v. Head*, 207 F.3d 1263 (11th Cir. 2000), cert. denied, 531 U.S. 1053 (2000):

Improper 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.” *Drake v. Kemp*, 762 F.2d 1449, 1459 (11th Cir. 1985). When assessing this type of claim, this Court examines the entire context of the judicial proceeding to determine if it was fundamentally unfair. *See Brooks v. Kemp*, 762 F.2d 1383, 1400 (11th Cir. 1985) (en banc), *vacated*, 478 U.S. 1016, 106 S. Ct. 3325, 92 L. Ed. 2d 732 (1986), reinstated, 809 F.2d 700 (1987). Not every improper prosecutorial remark, therefore, renders the trial unfair. *See id.* 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. *See id.* at 1402. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 1401 (quoting *Strickland v. Washington*, 466 U.S. 668, 669, 104 S. Ct. 2052, 80 L. Ed. 2d 674

(1984)). 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 (alteration in original). Moreover, “improper statements during argument can be cured by clear and accurate jury instructions.” *Johnson v. Alabama*, 256 F.3d 1156, 1185 (11th Cir. 2001).

Davis raises nine distinct examples of prosecutorial misconduct as separate claims in his federal petition. All of those claims were raised for the first time in Davis’s petition for writ of *certiorari* to the Supreme Court of Alabama on direct appeal.¹⁶¹ Although the Alabama Supreme Court did not specifically address all of those claims in its opinion, it did note that it had thoroughly reviewed the petitioner’s arguments and found no reversible error. *Ex Parte Davis*, 718 So.2d 1166 (Ala. 1998). That decision was neither contrary to nor an unreasonable application of clearly established federal law, nor was it based on an unreasonable determination of the facts in light of the evidence presented. As will be seen, the record establishes that the comments did not “so infect the trial with an unfairness” as to deprive Davis 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 likely that the prosecutor’s comments influenced the jury’s decision. *See Darden*, 477 U.S. at 182 (citing *United States v. Young*, 470 U.S. 1 (1985)).

¹⁶¹ C.R. Vol. 10, Tab 35, at 49-65.

1. Implying that Davis had been involved in a gang prior to his arrest

Davis asserts that the prosecutor violated his right to a fair trial by repeatedly implying during his closing argument that Davis was a gang member and, therefore, should be convicted and sentenced to death.¹⁶² In support of this assertion, Davis contends that the prosecutor “referred to Davis’[s] use of bandanas on previous occasions, and he also called Davis a ‘hoodlum’ who ‘conned’ a state witness.”¹⁶³

The relevant portions of the opinion of the Alabama Supreme Court on direct appeal read as follows:

Davis next argues that in his closing argument the prosecutor made comments insinuating that Davis had been involved in a gang before he was arrested for this crime. Davis points out that the evidence in this case did not suggest that Hazle’s murder was connected to gang activity, and he argues that the prosecutor nevertheless used his closing argument to inject irrelevant implications of gang activity into the trial, in violation of the trial court’s ruling on a motion in limine to exclude any evidence of alleged gang activity on Davis’s part.

¹⁶² Doc. no. 33, at 43.

¹⁶³ *Id.* (alteration supplied). Davis adds that the “pre-sentence investigative report also contained damaging hearsay about Davis’s alleged gang involvement.” *Id.* (alteration supplied). This claim was raised separately in Claim H and will be addressed as part of Claim H.

. . . .

No evidence at trial established, or even implied, that Davis had any involvement in gangs. However, Davis argues that the prosecutor circumvented the motion in limine by making remarks during closing argument that, he says, were tantamount to accusations that Davis was a gang member and that were so highly prejudicial as to mandate the reversal of his conviction.

During closing arguments, defense counsel argued primarily that the testimony of Willie Smith, Alphonso Phillips, Terrance Phillips, and others was not reliable. In response to these arguments, the prosecutor stated, in pertinent part:

[The State]: Ladies and gentlemen, if I brought – if I could – if I could bring somebody that was the pillar of the community down here to say, “Yes, I saw Jimmy Davis kill Johnny Hazle at Direct Oil,” then don’t you think I’d do it?

But that’s not what you get. You get the people that were there. The people that are involved in the crime I don’t have anybody from Parker Memorial or from St. Michael’s [apparent references to Baptist and Episcopal churches in Aniston]. And you have to understand that.

We've got people that this is the streets [sic]. This is the streets where young men these days make their bones and *they carry the badge of honor with bandannas* –

[Defense counsel]: Judge, I object to that line of argument.

[The State]: Judge, I can appeal for law enforcement all day long. And we would ask the court to allow me to do so.

The Court: Overrule the objection.

[The State]: They have guns, just like this gun that was acquired. And in this situation, the guns and the bandannas led to a man's death. These were teenagers from good homes. I think you could see that.

Davis concedes that in its closing argument the State did not explicitly accuse him of being a gang member; however, he argues that it is “common knowledge” that bandannas may be used as gang paraphernalia and that the prosecution's reference to a bandanna as a “badge of honor” so strongly invoked the imagery of gang membership as to amount to an outright accusation that the defendant was a gang member.

Davis relies upon *Haralson v. State*, 227 Ga. App. 118, 488 S.E. 2d 497 (1997), wherein the Georgia Court of Appeals

affirmed the granting of a mistrial on the ground that the prosecutor had impermissibly placed the defendant's character into issue by eliciting testimony that the defendant was a gang member. . . .

. . . .

Davis argues that here, as in *Haralson*, the prosecutor's mention of "bandannas" during his closing remarks was synonymous with reference to gang involvement. Davis points out that Alabama courts have considered evidence of a defendant's association with a "gang" as functionally equivalent to evidence of a "collateral criminal act," so that such evidence "is presumptively prejudicial and . . . is admissible only when [it is] probative and [only] under certain limited exceptions." *Thomas v. State*, 625 So.2d 1149, 1153 (Ala. Cr. App. 1992), *reversed on other grounds, Ex parte Thomas*, 625 So.2d 1156 (Ala. 1993). . . .

. . . .

We recognize that admitting evidence of a defendant's association with an ill-received organization or group may constitute reversible error, *Dawson v. Delaware*, 503 U.S. 159, 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992), and that mentioning gang activity — in particular the prosecutor's mentioning it in the trial of a case that is itself not gang-related, and to which gang-related activity has no connection — may invite a reversal. *Walker v. State*, 631 So. 2d 294 (Ala. Cr. App.1993). However,

we do not agree with Davis that the prosecutor's mention of "bandannas" as a "badge of honor" was equivalent to an improper reference to gang activity, such as was present in both

Haralson and *Thomas*. In *Haralson*, the detailed evidence as to the defendant's wearing a bandanna and the significance of its color unequivocally linked the defendant with gang involvement. Likewise, in *Thomas*, the evidence directly established that the defendant was associated with a gang and it was particularly prejudicial because the crime in question was of a type commonly associated with gang activity.

In contrast, in this present case, the prosecutor's reference to "bandannas" was not even made in regard to Davis; it certainly did not directly link him to gang involvement. The prosecutor made this reference in the context of responding to defense counsel's argument that the State's witnesses were "liars"; the prosecutor admitted that the State's witnesses were not "pillar [s] of the community" but were instead from "the streets where young men . . . carry the badge of honor with bandannas." Even in view of "the massive media coverage of gang violence in contemporary society," *Ex parte Thomas*, 625 So. 2d at 1157, we find no basis for holding that the prosecutor's reference to bandannas was an overt, or even a veiled, reference to a gang affiliation. Moreover, if the reference to

bandannas carries any generally negative connotation, it necessarily reflects upon the State's own witnesses, not upon the defendant. We therefore hold that the prosecutor's remarks do not warrant a reversal of Davis's conviction.

Ex parte Davis, 718 So.2d 1166, 1174-77 (Ala. 1998) (emphasis and alterations in original).

Review of the closing arguments confirms that it was not unreasonable for the Alabama Supreme Court to conclude that any potentially negative connotation from the prosecutor's reference to "bandannas" reflected on the State's own witnesses. There was no overt or veiled reference to Davis's alleged gang membership. As such, Davis has not shown that the state court's determination that the prosecutor's remarks did not warrant a reversal was contrary to, or an unreasonable application of, clearly established federal law, or that the decision was based upon an unreasonable determination of the facts in light of the evidence presented in the state courts.

Davis argues that counsel were ineffective for failing to object when the prosecutor improperly implied that he had been involved in a gang prior to his arrest. Davis did not raise this claim in state court.¹⁶⁴ Thus,

¹⁶⁴ Davis alleged in Claim F of his Rule 32 petition that "Trial Counsel Failed to Prevent or Otherwise Object to Important Instances of Prosecutorial Misconduct." Rule 32 C.R. Vol. 14, Tab. 52, at 21. He argued, inter alia, that counsel were ineffective for failing to object to the prosecution improperly drawing attention to the fact that he did not testify in his own defense and attempting to improperly bolster the credibility of Alphonso Phillips by

it is has not been exhausted, and this court cannot review it. Even if the claim were properly before this court, it would be due to be dismissed, because the underlying claim of prosecutorial misconduct upon which the ineffective assistance of counsel claim is based is without merit. Counsel cannot be found deficient for failing to make an objection that was not warranted.

2. Improperly telling the jury that one purpose of convicting Davis was to decrease crime in general

Davis complains that the prosecutor made the following closing argument: “That doesn’t mean that if you believe beyond a reasonable doubt this defendant is guilty and you convict him that it’s not going to have an effect [on crime in general]. It doesn’t mean that

painting him as a “good kid” led astray by Davis. *Id.* at 21-22. Davis did not argue, as a part of Claim F, that counsel were ineffective for failing to object when the prosecutor improperly implied that he had been involved in a gang prior to his arrest. *Id.* at 21-23. However, in Claim C of his Rule 32 petition, in which Davis alleged counsel were ineffective for failing to challenge the State’s investigation and presentation of the case, he argued that counsel were ineffective for failing to “ensure the pretrial ruling [that the prosecution was barred from introducing any evidence that in any way implied that the murder was gang-related or that Davis or the co-defendants were involved in a gang] was enforced and that gang-related references and innuendo did not make their way into the trial.” Rule 32C.R. Vol. 14, Tab. 52, at 11- 12. Davis raised this claim as Claim A(3) of his federal petition, and it is addressed in that section of this memorandum opinion. It does not appear that Davis intended for that claim of ineffectiveness to be a part of the current claim, Claim C(1). However, even if he did, it would be due to be denied for the same reasons discussed in Claim A(3).

whatsoever.”¹⁶⁵ Davis contends that the prosecutor’s argument was irrelevant, prejudicial, and violated the principles established in *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (holding that capital cases require consideration of “the character and record of the individual offender” and “the circumstances of the particular offense”) and *Copeland v. Washington*, 232 F.3d 969, 975 (8th Cir. 2000) (prosecutor unlawfully referenced “the other murders in all of Missouri’s history” and, thereby, improperly evoked the jury’s fear of crime).

The Alabama Supreme Court summarily denied relief, *Ex Parte Davis*, 718 So.2d 1166 (Ala. 1998), and Davis merely reasserts the arguments made in state court. Davis does not explain how the denial of this claim was an unreasonable determination of clearly established federal law. Moreover, the trial transcript reveals that the portion of the argument quoted by Davis was taken out of context. The entirety of the comment is as follows:

Your job, Ladies and Gentlemen, is to decide guilt or innocence of Jimmy Davis. And you’re [sic] job is not to decide, as Mr. Giddens and Mr. Adams said before, that there’s too much violence in the street. That doesn’t mean that if you believe beyond a reasonable doubt this defendant is guilty and you convict him that it’s not going to have an affect [sic]. It doesn’t mean that whatsoever.

¹⁶⁵ Doc. no. 33, at 44 (alteration in original).

R. Vol. 7, Tab 14, at 1232. Although the prosecutor admitted that convicting Davis might have an impact on street violence in general, he clearly advised the jurors that their only purpose was to decide if Davis was guilty or innocent, regardless of the possible effect their decision might have. The comment is not comparable to the outrageously objectionable arguments made in *Copeland*; and there is no reasonable likelihood that the comment rendered Davis's trial unfair. Davis is entitled to no relief on this claim.

Davis also argues that counsel were ineffective for failing to object when the prosecutor improperly told the jury that one purpose of convicting him was to decrease crime in general. Davis did not raise this claim in state court. Thus, it has not been exhausted, and this court cannot review it. Even if the claim were properly before this court, it would be due to be dismissed, because the underlying claim of prosecutorial misconduct upon which the ineffective assistance of counsel claim is based is without merit. Counsel cannot be found deficient for failing to make an objection that was not warranted.

3. Misstating the law and arguing facts not in evidence

Davis argues that the prosecutor impermissibly argued "facts" that were not in evidence, and manipulated other facts to induce the jury to convict and sentence him to death.¹⁶⁶ He cites *Copeland v. Washington*, 232 F.3d 969, 975 (8th Cir. 2000) for the general proposition that it is unreasonable, in light of

¹⁶⁶ Doc. no. 33, at 44.

Supreme Court precedent, for a state court to find harmless a prosecutor's reference to facts not in evidence during a penalty stage argument.¹⁶⁷ He provides no further elaboration. In the one sentence Davis devotes to this claim, he fails to identify the facts — either not in evidence or allegedly manipulated — that were improperly and impermissibly argued by the prosecutor.¹⁶⁸

This claim was summarily denied by the Alabama Supreme Court. By merely asserting this ground for relief, without more, Davis has failed to satisfy his burden of proof or the requirements of 28 U.S.C. § 2254(e)(2) and Rule 2(c), Rules Governing § 2254 Cases in the United States District Courts. *See, e.g., McFarland v. Scott*, 512 U.S. 849, 856 (1994). The absence of a fully-developed argument necessarily leads this court to conclude that Davis has failed to show that the state court's denial of this claim was contrary to, or an unreasonable application of, clearly established federal law. *See Davis v. State*, 9 So. 3d 514 (Ala. Crim. App. 2006).

Davis also argues that counsel were ineffective for failing to object when the prosecutor repeatedly and impermissibly argued "facts" that were not in evidence and manipulated other facts to prejudice him and induce the jury to convict him. Davis did not raise this claim in state court. Thus, it has not been exhausted, and this court cannot review it. Even if the

¹⁶⁷ *Id.*

¹⁶⁸ Likewise, Davis failed identify these facts when he raised this claim in his *certiorari* petition on direct appeal. *See* C.R. Vol. 10, Tab 35, at 53.

claim were properly before this court, it would be due to be dismissed, because the underlying claim of prosecutorial misconduct upon which the ineffective assistance of counsel claim is based is clearly without merit. Counsel cannot be found deficient for failing to make an objection that was not warranted.

4. Improperly vouching for the veracity and quality of state witnesses

Davis contends that “the prosecutor repeatedly attempted to bolster the credibility of the State’s witnesses, in clear violation of federal law. *Berger v. United States*, 295 U.S. 78, 88 (1935) (“[I]mproper suggestions, insinuations, and especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none”).”¹⁶⁹ Davis adds that his attorneys’ failure to adequately investigate the circumstances of his case made it impossible for them to know that the prosecutor’s characterizations were false.¹⁷⁰

Davis first complains that the prosecutor improperly vouched for the credibility of Shannon Hardy Wilson, who testified, among other things, that she heard Davis confess to committing the murder.¹⁷¹ Davis points to the following argument by the prosecutor: “Shannon Hardy, what is her axe to grind in this thing? Really, I doubt very seriously — well, you Ladies and Gentleman saw her testify. I don’t think she was

¹⁶⁹ Doc. no. 33, at 44 (alteration supplied).

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 45. Ms. Wilson’s testimony is located at R. Vol. 6, at 991-1034.

trying to cover — didn't appear like she was trying to cover for her cousin in the situation.”¹⁷²

This claim was rejected without discussion by the Alabama Supreme Court. *Ex Parte Davis*, 718 So.2d 1166 (Ala. 1998). A review of the record indicates that, during closing arguments, defense counsel attacked Wilson's credibility, arguing that she had lied to protect her cousins, Alphonso and Terrance Phillips.¹⁷³ The prosecutor's argument was made in response to that attack upon Hardy's credibility, and was a legitimate inference from the evidence. The state court's implicit determination that the prosecutor's argument did not constitute plain error was neither contrary to, nor an unreasonable application of, clearly established federal law, nor was it based upon an unreasonable determination of the facts in light of the evidence.

Davis next claims that the prosecutor improperly attempted to portray co-defendant Alphonso Phillips as a “good kid” who had been led astray by Davis.¹⁷⁴ Specifically, Davis points to the prosecutor asking Alphonso if he had “ever been involved in anything like this before in your life,” to which Alphonso answered, “No, sir.”¹⁷⁵ Davis contends that, at the time of trial, the District Attorney's Office had a list compiled by the Anniston Police Department, confirming that

¹⁷² Doc. no. 33, at 45.

¹⁷³ R. Vol. 7, Tab 13, at 1178, 1184, 1196-1205.

¹⁷⁴ Doc. no. 33, at 45.

¹⁷⁵ R. Vol. 7, at 1135.

Alphonso was known to be a gang member,¹⁷⁶ and the department was aware that Alphonso had previously been arrested for disorderly conduct, a weapons violation, trespass, and violation of a liquor law.¹⁷⁷ Davis further contends that the prosecutor made repeated attempts to improperly bolster the credibility of Terrance Phillips, despite knowing that Terrance had “entered into a consent decree in connection with a third-degree assault charge in 1992.”¹⁷⁸

Davis argues that although the prosecution knew that both Alphonso and Terrance Phillips had criminal records relating to guns and assaults, District Attorney Joe Hubbard made the following statements during his closing argument:

¹⁷⁶ Doc. no. 33, at 45. Davis points out that, during his testimony at the Rule 32 hearing, Assistant District Attorney Ron Wood stated that he did not know if this information was disclosed to Davis’s attorneys during the course of the trial. *Id.* (citing Rule 32 R. Vol. 23, at 1086).

¹⁷⁷ *Id.* Davis points out that, during his Rule 32 testimony, Mr. Wood stated that he did not know if this information was disclosed to Davis’s attorneys during the course of the trial. *Id.* (citing Rule 32 R. Vol. 23, at 1089).

¹⁷⁸ *Id.* Davis points out that in his Rule 32 testimony, Mr. Wood stated that he did not know if this information was made available to trial counsel. *Id.* (citing Rule 32 R. Vol. 23, at 1088).

Further, Davis does not explain what a “consent decree” is. At the time of his trial, it was defined by § 12-15-1(6), Ala. Code 1975, as “[a]n order, entered after the filing of a delinquency petition and before the entry of an adjudication order, suspending the proceedings and continuing the case of the child under supervision in the child’s own home, under terms and conditions agreed to by all parties concerned.” *See D.D.A. v. State*, 650 So.2d 571, 573 (Ala. Crim. App. 1994) (alteration in original).

Terrance Phillips did a terrible thing. He got involved in something he shouldn't get involved in. He did a terrible thing and he knows that. But he was not a hard core criminal. He was going to school. Never been in trouble before. Terrance Phillips, 16 years old, no trouble whatsoever, a good boy, on the edge of going bad if something didn't happen. And something did happen. And Alphonso Phillips, a boy that hadn't crossed the edge was looking for something, looking for whatever. Crossed the edge and got into some trouble. Because they were looking for somebody to help him, looked to somebody to be their big brother, and the father or whatever. And they picked him. They picked Jimmy Davis. And they picked the wrong one.

Doc. no. 33, at 46 (quoting R. Vol. 7, Tab 14, at 1231). Davis argues that, because the prosecution did not disclose the information it had regarding Alphonso's gang involvement, his attorneys were unable to challenge the prosecutor's improper vouching for the credibility of Alphonso and Terrance, and were unable to use the information for cross-examination purposes.¹⁷⁹

Many of the arguments and facts presented here were not raised in the state court. When Davis first raised this claim in his petition for a writ certiorari on direct appeal, he objected to the following instances of alleged improper bolstering:

¹⁷⁹ Doc. no. 33, at 46 (quoting R. Vol. 7, Tab 14, at 1231).

The next witness for whose veracity the prosecutor testified was Terrance Phillips: “Terrance Phillips, 16 years old, no trouble whatsoever, a good boy. . . .” R. 1231) The prosecutor continued through his list of crucial witnesses: “And Alphonso Phillips, a boy that hadn’t crossed the edge, was looking for something, looking for whatever.” R. 1231) Later, the prosecutor again vouched for the credibility of the witnesses, the very witnesses who received “deals” from the prosecutor in exchange for their favorable testimony: “It’s rare, Ladies and Gentlemen, to see people cooperate against their friend in situations like this. And that’s the reason you can’t just discount what they’ve done here today, yesterday. It takes some guts, particularly when you as young as though (sic) two fellows were.” R. 1235).

C.R. Vol. 10, Tab. 35, at 54 (alteration in original). Davis argued that the “prosecutor made a concerted effort to attest to the credibility of each witness, cumulatively bolstering the state’s otherwise weak case.”¹⁸⁰ His argument was based on the premise that it is “grossly improper” for a prosecutor, as a public official, to personally vouch for the credibility of his witnesses, especially when that testimony constitutes the bulk of the State’s case against the defendant.¹⁸¹ That claim was rejected by the Alabama Supreme Court without discussion. *Ex Parte Davis*, 718 So.2d 1166 (Ala. 1998).

¹⁸⁰ C.R. Vol. 10, Tab. 35, at 54.

¹⁸¹ *Id.* at 55.

The denial of that claim was not contrary to, or an unreasonable application of, clearly established federal law, including *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974), nor was the decision based upon an unreasonable determination of the facts in light of the evidence presented in the state courts. Defense counsel had previously attacked the credibility and character of the Phillips cousins, and argued that they had conspired to tell lies in order to place all of the blame on Davis.¹⁸² The argument that Davis makes here — *i.e.*, that the prosecutor’s portrayal of the Phillips cousins as “good kids” was misleading and improper, because he knew or should have known about their contacts with the juvenile system — was not raised in the petition for writ of *certiorari* on direct appeal. The state court did not have the opportunity to address the claim in light of these belatedly offered “facts” and argument. Thus, the claim has not been exhausted, and this court cannot review it.¹⁸³

Davis also contends that counsel were ineffective for failing to object to the allegedly improper arguments about Shannon Wilson and the Phillips cousins referenced above. He adds that counsels’ unreasonable failure to adequately investigate the circumstances of his case made it impossible for them to know that the prosecutor’s characterizations were false. In his Rule 32 petition, Davis raised only the

¹⁸² R. Vol. 7, Tab 13, at 1178-1181, 1183-84, 1187-1211.

¹⁸³ To the extent Davis argues that the facts and argument were not raised on appeal because of the alleged Brady violations by the State, the Brady claim will be addressed separately.

portion of this claim relating to Alphonso Phillips. Specifically, Davis alleged that:

The prosecutor made repeated attempts to improperly bolster the credibility of Alphonso Phillips by painting him as a “good kid” led astray by Davis. The prosecutor asked this elder Phillips cousin if he had ever been involved with anything like the Hazel robbery and murder. Alphonso Phillips replied “no.” (Tr. 1135). In closing, the prosecutor refers to Alphonso as “a boy that hadn’t crossed the edge, was looking for something, for whatever.” (Tr. 1231). If trial counsel had spent any time whatsoever investigating Alphonso Phillips’ past, they would have learned that he had been in trouble on multiple occasions including conduct involving a firearm. Because defense counsel failed to conduct an investigation, however, they could not challenge the prosecutor’s portrayal of Alphonso Phillips and consequently failed to challenge Alphonso Phillips’ credibility.

Rule 32 C.R. Vol. 14, Tab. 52, at 22.¹⁸⁴ The trial court denied the claim, saying that the Court finds that

the State did not “improperly bolster” the testimony of Alphonso Phillips. The State

¹⁸⁴ Davis raised the identical issue on appeal from the denial of his Rule 32 petition. Rule 32 C.R., Vol. 57, Tab 60, at 41-42. However, the Alabama Court of Criminal Appeals did not address the claim in its opinion. *See Davis v. State*, 9 So. 3d 539 (Ala. Crim. App. 2008).

argued legitimate, reasonable inferences from the record. This type of argument is well within the State's right. Davis certainly did not establish prejudice as to this claim. Further, having read the closing argument of the State, this Court cannot find that no reasonable attorney would have failed to object to this line of argument.

Rule 32 C.R. Vol. 62, Tab 80, at 20. Davis has not established that the state court unreasonably determined that he failed to prove either deficient performance by counsel or prejudice from counsel's failure to object to the prosecutor's statements about Alphonso Phillips.

Davis did not raise his claims that counsel were ineffective for failing to object to allegedly improper arguments about Shannon Wilson and Terrance Phillips in state court. Thus, the portion of this claim pertaining to Shannon Wilson and Terrance Phillips has not been exhausted, and this court cannot review it.

5. Improperly commenting on Davis's failure to testify

Davis contends that his constitutional rights were violated by the prosecutor's comments about his silence throughout the trial. He argues that:

During his guilt-phase closing argument, the prosecutor drew the jury's attention to the fact that Davis had not testified. Tr. 1234. After emphasizing to the jury that each of the accomplices and other witnesses had admitted to minor roles in the crime, the prosecutor implied that the only person who could

have told a different story was Davis. By rhetorically asking who could contradict each witnesses' [sic] testimony, Davis contends that the prosecutor focused the jury's attention on the fact that Davis had not denied the accomplices' allegations. Tr. 1230-32.

Doc. no. 33, at 47. The Supreme Court of Alabama addressed this claim as follows:

Davis next argues that during closing arguments the prosecution made improper remarks that violated his rights to a fair trial, due process, and a reliable verdict. Davis first contends that the prosecution improperly commented upon his decision not to testify at trial and that, under Alabama law, this error, taken alone, mandates a reversal of his conviction. Davis points out that "[i]t is a basic principle of law that once a defendant chooses not to testify at his trial the exercise of that choice is not subject to comment by the prosecution." *Wherry v. State*, 402 So.2d 1130, 1133 (Ala. Cr. App. 1981). "In determining if a prosecutorial remark impairs the integrity of the defendant's right not to testify the test is whether the defense can show that the remark[, given the context in which it was made,] was intended to comment on the defendant's silence or was of such character that a jury would naturally and necessarily construe it as a comment on the defendant's silence." *United States v. LeQuire*, 943 F.2d 1554, 1565 (11th Cir. 1991), *cert. denied*, 505 U.S. 1223, 112 S. Ct. 3037, 120 L.

Ed. 2d 906 (1992). Additionally, we note that at trial Davis did not object to the comments he complains of here, and, therefore, that his argument must be reviewed for plain error; that is, for “those errors that ‘seriously affect the fairness, integrity or public reputation of judicial proceedings.’” *Kuenzel v. State*, 577 So.2d 474 (Ala. Cr. App. 1990), affirmed, *Ex parte Kuenzel*, 577 So.2d 531, cert. denied, *Kuenzel v. Alabama*, 502 U.S. 886, 112 S. Ct. 242, 116 L. Ed. 2d 197 (1991) (quoting *United States v. Young*, 470 U.S. 1, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985)).

Davis argues that during closing argument the prosecutor repeatedly drew the jury’s attention to the fact that Davis did not testify. According to Davis, the prosecutor reminded the jury that each of the other persons who participated in the crime had testified and that only Davis could “tell a different story.” To support this argument, Davis points to the following excerpt from the prosecutor’s argument:

What do we have to show that Alphonso and Terrance are telling the truth? I submit to you, ladies and gentlemen, if you’re going to get together and concoct a story about somebody else doing a crime, first thing you’re going to do is exonerate yourself. You’re going to get yourself out of it.

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Now, what would keep Shannon, Alphonso and Terrance from getting together and putting Alphonso as a lookout that just walked off, didn't do anything? Why did Alphonso change his story now? . . . Who was going to say different? . . .

. . . .

Why didn't they say Jimmy hid the gun in the back yard? *Who was going to say different than that?*

. . . .

Why did Alphonso – why didn't he just say Jimmy had the gun all day? Why didn't he say that? *Who was going to dispute that?* . . . Why didn't he just say Jimmy had it? *Who was there to dispute it?* Why didn't he? Because it wasn't the truth.

. . . .

It's rare, ladies and gentlemen, to see people cooperate against their friends in situations like this. And that's the reason you can't just discount what they've done here today, yesterday. It takes some guts, particularly when you're as young as though [sic] fellows were.

. . . .

Because, ladies and gentlemen, I wanted them to testify. And they did testify. . . . And I submit to you, ladies and gentlemen, you know who it was that did this killing. It's Jimmy Davis. The man's been sitting over there with his attorneys. (Emphasis added.)

Davis argues that these comments served only to focus the jury's attention on the fact that he did not personally refute the testimony of the other witnesses, and that they implied to the jury that he would have done so if he was innocent.

In closing argument, Davis's counsel attacked the credibility and character of the witnesses who knew Davis, suggesting that Alphonso Phillips and the other witnesses against Davis could gain from lying on the stand, and thus conspired against Davis by testifying against him. The State points out that, in its rebuttal argument, it repeatedly offered examples of how, if the witnesses were indeed conspiring to falsely testify against Davis, they could have done so to their own greater benefit by telling a different story. After reviewing the State's comments in their full context, we cannot hold that they would naturally and necessarily be construed as an attack on Davis's decision not to testify on his own behalf; rather, they could well be construed as a form of cohesive rebuttal to defense counsel's theory that the

witnesses against Davis were lying in order to rid themselves of involvement in the crime.

Ex Parte Davis, 718 So.2d 1166, 1173-74 (Ala. 1998) (alterations and emphasis in original).

The Supreme Court has held that direct comments by the prosecution about a defendant's silence violate the Fifth Amendment. *Griffin v. California*, 380 U.S. 609, 615 (1965). When determining whether a prosecutor has made an impermissible comment, federal courts must consider the totality of the circumstances and evaluate "whether the remark is 'manifestly intended' by the prosecutor or 'would naturally and necessarily be understood by the jury' as a comment on the defendant's silence." *Matire v. Wainwright*, 811 F.2d 1430, 1435 (11th Cir. 1987) (citing *United States v. Vera*, 701 F.2d 1349 (11th Cir. 1983)).

The Eleventh Circuit described the proper manner in which to evaluate a *Griffin* claim in *Isaacs v. Head*, 300 F.3d 1232 (11th Cir. 2002), saying:

The Fifth Amendment prohibits a prosecutor from commenting directly or indirectly on a defendant's failure to testify. A prosecutor's statement violates the defendant's right to remain silent if either (1) the statement was manifestly intended to be a comment on the defendant's failure to testify; or (2) the statement was of such a character that a jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.

The question is not whether the jury possibly or even probably would view the remark in this manner, but whether the jury necessarily would have done so. The defendant bears the burden of establishing the existence of one of the two criteria. The comment must be examined in context, in order to evaluate the prosecutor's motive and to discern the impact of the statement

United States v. Knowles, 66 F.3d 1146 (11th Cir. 1995) (citations, quotations, and footnotes omitted). *See also United States v. LeQuire*, 943 F.2d 1554, 1565 (11th Cir. 1991) (same); *Solomon v. Kemp*, 735 F.2d 395, 401 (11th Cir. 1984).

In applying *Griffin*, we have strictly enforced the requirement that a defendant show that the allegedly offensive comment was either manifestly intended to be a comment on the defendant's silence or that the comment naturally and necessarily related to the defendant's silence.

Isaacs, 300 F.3d at 1270 (ellipses supplied).

Davis has failed to explain how the Alabama Supreme Court's decision with respect to the prosecutor's alleged comments about his failure to testify was contrary to or an objectively unreasonable application of *Griffin*. He is entitled to no relief.

Davis also claims that his attorneys were ineffective for failing to object to the allegedly improper

argument. That claim was raised in Davis's Rule 32 petition, and on appeal from the denial of that petition. The Alabama Court of Criminal Appeals affirmed the trial court's denial of this claim, holding:

The circuit court made the following findings on this claim:

In paragraph 43, Davis alleges [ineffective assistance of counsel] because the prosecutor allegedly drew attention to the fact that Davis did not testify, without objection from defense counsel. The contention that the prosecutor improperly commented on Davis's failure to testify was reviewed and rejected by the Supreme Court of Alabama. *Ex parte Davis*, 718 So.2d 1166, 1174 (Ala. 1998). Having failed on the underlying issue on direct appeal, Davis cannot succeed by relitigating this issue in the guise of [ineffective assistance of counsel]. *See, Williams [v. State]*, 783 So.2d 108, 133 (Ala. Crim. App. 2000) ("Because we determined that the remarks did not constitute plain error even if objectionable, appellant cannot relitigate the issue under the guise of ineffective assistance of counsel in a post-conviction proceeding. A finding of no manifest injustice under the 'plain error' standard on a direct appeal serves to establish a finding of

no prejudice under the test for ineffective assistance of counsel provided in *Strickland v. Washington* [, 466 U.S. 668 (1984)].”). Because the underlying issue lacks merit, counsel could not have been ineffective in this regard. See *Card v. Dugger*, 911 F.2d 1494, 1520 (11th Cir. 1990) (“Counsel cannot be labeled ineffective for failing to raise issues which have no merit.”).

R. 1152-53.)

Initially we note that the circuit court erroneously relied on a decision by this Court, *Williams v. State*, 783 So.2d 108 (Ala. Crim. App. 2000), that was later reversed by the Alabama Supreme Court. However, the circuit court issued its order before the Supreme Court released *Ex parte Taylor*, 10 So.3d 1075 (Ala. 2005). The Taylor court held:

Although it may be the rare case in which the application of the plain-error test and the prejudice prong of the *Strickland* [*v. Washington*, 466 U.S. 668 (1984)] test will result in different outcomes, a determination on direct appeal that there has been no plain error does not automatically foreclose a determination of the existence of the prejudice required under *Strickland* to sustain a claim of ineffective assistance of counsel.”

Taylor, 10 So. 3d at 1078.

On direct appeal the Supreme Court stated the following concerning the prosecutor's argument in closing:

After reviewing the State's comments in their full context, we cannot hold that they would naturally and necessarily be construed as an attack on Davis's decision not to testify on his own behalf; rather, they could well be construed as a form of cohesive rebuttal to defense counsel's theory that the witnesses against Davis were lying in order to rid themselves of involvement in the crime.

Ex parte Davis, 718 So.2d 1166, 1174 (Ala. 1998). The Alabama Supreme Court specifically found that the prosecutor's comments were not improper. "The sixth amendment right to effective assistance of counsel does not require counsel to raise every objection without regard to its merit." *Palmer v. Wainwright*, 725 F.2d 1511, 1523 (11th Cir. 1984). See also *Thomas v. Jones*, 891 F.2d 1500 (11th Cir. 1989) (counsel not ineffective for failing to object to admissible evidence). Therefore, counsel was not ineffective for failing to object to a prosecutor's proper argument.

Moreover, whether to object is a matter of trial strategy. "[C]ounsel's failure to object to

the prosecutor's summation represents his tactical decision to avoid underscoring the prosecutor's statements so as to draw the jury's attention to them." *Gatto v. Hoke*, 809 F. Supp. 1030, 1039 (E.D.N.Y. 1992). Relief was correctly denied on this claim.

Davis v. State, 9 So. 3d 539, 551-552 (Ala.Crim. App. 2008) (alterations in original).

That determination was neither contrary to clearly established federal law, nor an unreasonable determination of the facts in light of the evidence. Davis offers no evidence to refute the court's conclusion that he failed to establish deficient performance. Moreover, because he has not established that the allegedly offensive comment was manifestly intended to be a comment on his silence or naturally and necessarily related to his silence, he cannot establish that the state court unreasonably determined that he was not prejudiced by counsels' failure to object to the comment.

6. Improperly arguing that the jury could not consider mercy in reaching a verdict

Davis contends that, during closing arguments, the prosecutor "instructed the jury to set aside their prerogative to consider mercy and convict Davis of capital murder and sentence him to death," when he argued: "It's emotional, isn't it? Really emotional But you Ladies and Gentleman have no place for tears for you right now"; and when the prosecutor later "urged the jury to disregard feelings for Davis's family and

impose a death sentence.”¹⁸⁵ In its full context, the prosecutor made the following argument to the jury:

It’s emotional, isn’t it? Really emotional. But, you know, if you believe – if we can see a 17-year-old boy look at a picture of a man that he was involved in killing and shed a tear, and then maybe there’s some hope. Because maybe he is sorry for what happened, for his involvement in it.

But you Ladies and Gentleman have no place for tears for you right now. You shed them all for Johnny Hazle when this is over with. But right now you’ve got to do your duty and if you find this defendant — we’ve shown you beyond a reasonable doubt that he’s guilty, then don’t let a murderer walk away. And don’t just put it on and say I’ve done a good job because little Terrance and 17-year-old Alphonso have bit the bullet, and they’re going to prison.

I ask you, Ladies and Gentlemen, to search your consciences and be realistic. Understand, Ladies and Gentlemen, that you’re dealing with people who are not used to testifying, would not take this stand for a million dollars if they could. But they’re consistent in one thing. And that is that Jimmy Davis was the one who killed Johnny Hazle and tried to rob him out there on that occasion.

¹⁸⁵ Doc. no 33, at 47-48 (alteration supplied).

I ask you, Ladies and Gentlemen, to do what you have to do, as unpleasant as it is, and convict him — Jimmy Davis — of capital murder.

R. Vol. 7, Tab 14, at 1235-37. Citing *Nelson v. Nagle*, 995 F.2d 1549, 1555-57 (11th Cir. 1993), Davis asserts that the Eleventh Circuit has explicitly found that “mercy is a proper consideration” in capital cases. He contends that the prosecutor improperly argued that the jury should not consider mercy or sympathy during its deliberations.¹⁸⁶

Davis has not established that the Alabama Supreme Court’s summary denial of this claim was unreasonable or contrary to clearly established law. He correctly argues that the jury may show mercy in rejecting a death sentence. Here, however, the prosecutor’s argument acknowledged the tragedy of the victim’s death, then appropriately urged the jurors not to be emotional during their deliberations. Further, the arguments made by the prosecutor in this case, even if they could be viewed as improper, did not so prejudicially affect Davis’s substantial rights as to deprive him of a fair trial.

Davis also argues that counsel were ineffective for failing to object to the prosecution’s argument that the jury should not consider mercy or sympathy during its deliberations. Davis did not raise this claim in state court. Thus, it has not been exhausted, and this court cannot review it. Even if the claim were properly before this court, it would be due to be dismissed,

¹⁸⁶ Doc. no. 33, at 47-48.

because the underlying claim of prosecutorial misconduct upon which the ineffective assistance of counsel claim is based is clearly without merit. Counsel cannot be found deficient for failing to make an objection that was not warranted.

7. Improperly instructing the jury that it was their duty to impose death

Davis asserts that, during the State's closing argument in the guilt phase, and again during the penalty phase, the prosecutor improperly argued that the jury had a duty to impose death.¹⁸⁷ He claims that:

The prosecutor unmistakably instructed the jury that they had an obligation to convict Davis: "[b]ut right now you've got to do your duty and if you find this defendant – we've shown you beyond a reasonable doubt that he's guilty, then don't let a murderer walk away," and later, "I ask you, ladies and gentlemen, to do what you have to do." Tr. 1236.

During the penalty phase, the prosecutor continued to emphasize that the jury had a duty: "You're part of society that sometimes gets drug (sic) down here by subpoena. And sometimes jurors do what they're supposed to do. And sometimes jurors don't do what they're supposed to do." And later: "I just want you to do the right thing Because I know you've done your job already and you're going to do your job again." The prosecutor

¹⁸⁷ Doc. no. 33, at 48.

concluded his [argument] by exhorting the jury to do “what is best for the community.” Tr. 1354-55.

Doc. no. 33, at 48-49 (ellipses and first alteration in original, other alteration supplied).

The Alabama Supreme Court’s summary denial of this claim is entitled to deference. Davis has not established that its determination was contrary to, or an unreasonable application of, clearly established federal law, or based on an unreasonable determination of the facts in light of the evidence presented. Although Davis argues that the prosecutor “instructed the jury that they had an obligation to convict Davis,” it is clear that the prosecutor was arguing that the State had met its burden of proof, and was asking the jury to follow the law and return a conviction. Review of the prosecution’s arguments in their entirety, reveals that these arguments did not render the trial fundamentally unfair:

But you Ladies and Gentleman have no place for tears for you right now. You shed them all for Johnny Hazle when this is over with. But right now you’ve got to do your duty and if you find this defendant — we’ve shown you beyond a reasonable doubt that he’s guilty, then don’t let a murderer walk away. And don’t just put it on and say I’ve done a good job because little Terrance and 17-year-old Alphonso have bit the bullet, and they’re going to prison.

I ask you, Ladies and Gentlemen, to search your consciences and be realistic.

Understand, Ladies and Gentlemen, that you're dealing with people who are not used to testifying, would not take this stand for a million dollars if they could. But they're consistent in one thing. And that is that Jimmy Davis was the one who killed Johnny Hazle and tried to rob him out there on that occasion.

I ask you, Ladies and Gentlemen, to do what you have to do, as unpleasant as it is, and convict him — Jimmy Davis — of capital murder.¹⁸⁸

. . . .

Ladies and Gentlemen, I know you had rather do anything in the world than look at my face one more time. But this will be the last time, I can assure you.

Because it is the last time, I want to thank you. Because I think you've done something that maybe some of you didn't think you would ever be able to do either. You came into a terrible situation and you performed admirably.

You took a situation where you could have copped out, to be honest with you. And I don't mean cop-out about finding this defendant not guilty. I don't think there's any question in your mind that this defendant is guilty.

¹⁸⁸ R. Vol. 7, Tab 14, at 1236-37.

But you could have avoided what you're doing here right now.

You could have avoided it by finding the defendant guilty of a lesser charge on the felony murder. And you didn't do that. Which tells me that you were willing to bear up under what you're bearing up under now. Don't ever let anybody tell you it's not a serious, serious thing that you're doing.

And as the District Attorney in this county, I want you to know that I appreciate the seriousness of this as well. Because not only are you making the decision with this recommendation, but I as the District Attorney, a human being, am asking you to do something that's not pleasurable to me at all.

You have borne up under the circumstances and you performed your civic duty because you are a part of society. You're part of society that sometimes gets drug down here by subpoena. And sometimes jurors do what they're supposed to do. And sometimes jurors don't do what they're supposed to do. They're still part of society.

And our society says you don't take a life when you don't have to take a life. Johnny Hazle's life didn't have to be taken.

Now, did it have anything to do with the fact, did it really, that Ms. Davis was not a good mother? Of course not. Had nothing to do with that.

Did it have anything to do with the fact that he had a lower intelligence than some other people? Do you think that?

Did it have anything to do with the fact that it might be that Jimmy Davis is mean? And that when he took that pistol in his hand he wasn't thinking, "I've got a low IQ," or, "Is this going to hurt my mama when I do this," or, "Is it going to hurt my cousin," Mr. Sigler? He was thinking of one thing: "I want some money and if I don't get it, I'm going to kill this man."

Society, of which we're all a part, has a right to exact a just punishment. I'm going to submit to you, Ladies and Gentlemen, that a just punishment as the death penalty need not require you go into McDonald's and shoot five or six or ten people. It's the person that we're looking at.

The aggravating circumstances in this case far outweigh the mitigating circumstances. And I'm as sorry as I can be for this mother. And I'm as sorry as I can be for Mr. Sigler. And the whole family. And I'm not blaming them one iota. Because do you know how many people grow up in families without fathers? Families without mothers? Families where both parents work? They never ever kill.

Jimmy Davis knew he shouldn't be doing what he did and he did it anyway. And he took a man's life. He will never be back.

I don't want to preach to you. I just want you to do the right thing. And I, like these defense lawyers, whatever you decide to do, I'll be satisfied with that. Because I know you've done your job already and you're going to do your job again.

I'm just asking you to look at the options. And if you feel like these aggravating circumstances outweigh the mitigating ones, then I ask you to return a recommendation to Judge Street. And I don't know whether he will follow it, but it will carry a great weight for him. And I don't want to mislead you. It will carry great weight whatever you do.

I appreciate your work this week. And I think it's appropriate that we end on late Friday afternoon since we started early one Monday morning. And you'll never forget this week. I know you won't. And you may be on other juries later on down the road. But you'll never forget this week and I know I won't.

As many of these cases as I handle, and my assistants handle, and that these gentlemen over here handle, we never forget these kind of cases. So we'll be satisfied with what you Ladies and Gentlemen do. And I will just ask you to do in your conscience what you feel is best for society. Do what's best for the community.

The state court reasonably determined that the prosecutor had not made an improper argument. Davis is entitled to no relief.

Davis also argues that counsel were ineffective for failing to object when the prosecutor improperly argued that the jury had a duty to impose death. Davis did not raise this claim in state court. Thus, it has not been exhausted, and this court cannot review it. Even if the claim were properly before this court, it would be due to be dismissed, because the underlying claim of prosecutorial misconduct upon which the ineffective assistance of counsel claim is based is clearly without merit. Counsel cannot be found deficient for failing to make an objection that was not warranted.

8. Improperly arguing nonstatutory aggravating circumstances in support of conviction and sentence

Davis asserts that the prosecutor put forth numerous irrelevant and prejudicial “reasons” for convicting and sentencing him to death.¹⁸⁹ He lists the following examples of improper arguments: (1) the importance of a guilty verdict to the victim; (2) the ordeal suffered by the victim’s brother in identifying the victim’s body; (3) Davis killed the victim for smiling at him; (4) Davis was the principal in the crime, rather than an accomplice; and (5) the pain inflicted on Davis’s mother.¹⁹⁰ Davis argues that none of those considerations was relevant, yet each encouraged an improper conviction

¹⁸⁹ Doc. no. 33, at 49.

¹⁹⁰ *Id.*

and sentence of death, based on nonstatutory aggravating circumstances.

In support of this claim, Davis cites pages 1173 and 1234 of the trial transcript.¹⁹¹ On page 1173, the prosecution argued at the conclusion of the guilt phase that the testimony at trial was that the victim “looked over, looked back at Jimmy Davis and smiled, and Jimmy Davis shot him.”¹⁹² In fact, the prosecution made the following comments on page 1234 of the guilt-phase rebuttal closing argument:

And I submit to you, Ladies and Gentlemen, you know who it was that did this killing. It’s Jimmy Davis. The man’s been sitting over there with his attorneys. I wish I could bring the one that really ought to be here to testify as to what kind of clothing he was wearing — this man who robbed him was wearing. And how tall he was. And what the gun looked like. And how long he was there.

The one that laughed. The one that smiled. Maybe he was nervous. Maybe he was scared. Maybe he just didn’t believe it was happening. When he looked at his old friend and smiled and looked back at Jimmy Davis and smiled, and couldn’t believe it when that bullet penetrated his chest and he grabbed his chest.

I would like to present the man to you that grabbed his chest and obviously turned and

¹⁹¹ *Id.*

¹⁹² R. Vol. 7, Tab 12, at 1173.

was shot in the back a second time. I would love to have him testify. But that man was shot and was in excruciating pain, according to Dr. Warner, when those shots pierced his liver. And yet that tough man tried to get to that telephone and call in his own emergency.

But I don't have him. We'll just have to go by what the other witnesses said. . . .

R. Vol. 7, Tab 14, at 1234-1235. These comments were proper comments on the evidence and inferences to be drawn from the evidence.

Davis's federal petition does not identify the portions of the transcript where the prosecution allegedly made other improper arguments. However, Davis did cite to specific pages of the trial transcript when he raised this claim in state court:

For example, the prosecutor improperly argued at the guilt phase that their decision was important to the deceased victim, R. 1185); that the victim's brother['s] ordeal in identifying the victim's body requires a guilty verdict R. 1186); . . . that he was the principal instead of an accomplice and therefore deserved the death penalty R. 1409); and that the pain inflicted on Mr. Davis's mother made the death penalty appropriate. R. 1409-1410).

C.R. Vol. 10, Tab 35, at 61 (alteration supplied). The arguments made on pages 1185 and 1186 of the transcript do, in fact, involve references to the importance of the verdict to the victim, and to the victim's brother's ordeal in identifying the body, *but those*

*arguments were made by defense counsel, and not by the prosecution.*¹⁹³

The arguments made on pages 1409 and 1410 were made by the prosecution during the State's final argument to the trial judge at the March 4, 1994 sentencing hearing.¹⁹⁴ Earlier in the sentencing hearing, the defense called Davis's mother, Lillie Bell Davis, to testify on his behalf, pleading for his life.¹⁹⁵ The prosecutor stated during his final argument that Lillie Bell Davis "deserves all of our sympathy and condolences."¹⁹⁶ However, there was no argument that the pain inflicted on Davis's mother made a death sentence appropriate.

Furthermore, the prosecution's argument that Davis deserved the death penalty because he was the principal in the murder was made in comparing Davis's participation in the crime with the participation of the Phillips cousins.¹⁹⁷

I want to comment on the defendant's participation in this matter as compared to Alphonso Phillips and Terrance Phillips'[s] participation. It was known at the time of trial that Terrance Phillips had, in fact, pled guilty to conspiracy to commit robbery. He had done so prior to trial.

¹⁹³ R. Vol. 7, Tab 13, at 1185-1186.

¹⁹⁴ R. Vol. 8, Tab 27, at 1409-10.

¹⁹⁵ *Id.* at 1395-1401.

¹⁹⁶ *Id.* at 1410.

¹⁹⁷ *Id.* at 1408.

It was also known at the time of trial that Alphonso Phillips would, in fact, plead guilty to robbery and receive a 20-year sentence.

And those considerations were placed before a jury of Mr. Davis'[s] peers and they understood that when they went to deliberate in this particular case. But they also understood from the evidence, Judge, and I think it was very clear that their participation in this crime was nowhere near the participation that Mr. Davis had in this crime.

The evidence was overwhelming that Terrance Phillips basically backed out in this particular robbery offense after conspiring to rob. Alphonso Phillips did, in fact, participate in the robbery, even though nothing was taken. But his participation was not nearly so great as the defendant's in one respect, in that he was not armed. And that the defendant chose to take another person's life. And that he was in fact, the shooter.

We did not charge Jimmy Davis with complicity in this matter, as Mr. Adams indicated. He is the principal without question. And that's the reason we ask for a sentence commensurate with his actions as compared to those of Alphonso and Terrance Phillips.

R. Vol. 8, Tab 27, at 1408-09 (alterations supplied). This was a proper argument based on the evidence presented at trial. Thus, the state court's summary denial of this claim was not unreasonable or inconsistent with clearly established law. Moreover, Davis

has not established that the alleged errors rendered his trial fundamentally unfair.

Davis also argues that counsel were ineffective for failing to object when the prosecutor argued nonstatutory aggravating circumstances in support of a conviction and death sentence. Davis did not raise this claim in state court. Thus, it has not been exhausted, and this court cannot review it. Even if the claim were properly before this court, it would be due to be dismissed, because the underlying claim of prosecutorial misconduct upon which the ineffective assistance of counsel claim is based is clearly without merit. Counsel cannot be found deficient for failing to make an objection that was not warranted.

9. Improperly denigrating Davis's right to an attorney

Davis contends that the prosecutor denigrated his right to an attorney, and encouraged the jury to convict him because he relied on counsel throughout the trial.¹⁹⁸ Specifically, Davis argues that “[d]uring closing arguments of the guilt phase, the State argued that the jury ‘know[s] who it was that did this killing. It’s Jimmy Davis. The man’s been sitting over there with his attorneys.’”¹⁹⁹ According to Davis, this was an impermissible argument in favor of guilt or punishment based on his assertion of a constitutional

¹⁹⁸ Doc. no. 33, at 49-50.

¹⁹⁹ *Id.* (first alteration supplied, second alteration in original)

right in violation of *Doyle v. Ohio*, 426 U.S. 610 (1976).²⁰⁰

In *Doyle*, the Supreme Court held that a prosecutor's use of the petitioner's silence at the time of his arrest for impeachment purposes violates due process. *Id.* at 619. "The Court later extended this protection to post-*Miranda* invocations of the right to counsel." *Fugate v. Head*, 261 F.3d 1206, 1222(11th Cir. 2001) (citing *Wainwright v. Greenfield*, 474 U.S. 284, 295 (1986)).

The comment in question here was made during the State's rebuttal closing argument, in response to Davis's closing argument that someone other than Davis committed the murder.²⁰¹ In full context, the prosecution argued:

It's rare, Ladies and Gentlemen, to see people cooperate against their friends in situations like this. And that's the reason you can't just discount what they've done here today, yesterday. It takes some guts, particularly when you're as young as though [sic] fellows were.

And I'm not saying anything about them — I'm not putting a halo on any of them. Alphonso and Terrance need to have — get some time. And if you Ladies and Gentlemen don't like what happened, to them, if you're upset about what happened to them, then you have to look to me, because I make those

²⁰⁰ *Id.* at 49.

²⁰¹ R. Vol. 7, Tab 13, at 1175-1214.

decisions as far as what kind of plea agreement they enter into. And don't hold that against them. You can hold that against me, if you want to.

Because, Ladies and Gentlemen, I wanted them to testify. And they did testify. And I submit to you, Ladies and Gentlemen, you know who it was that did this killing. It's Jimmy Davis. The man's been sitting over there with his attorneys. I wish I could bring the one that really ought to be here to testify as to what kind of clothing he was wearing – this man who robbed him was wearing. And how tall he was. And what the gun looked like. And how long he was there.

R. Vol. 7, Tab 14, at 1233-34. Clearly, this argument was not a comment on Davis's assertion of his right to counsel. Rather, it was an appropriate response to Davis's prior argument that someone else committed the crime. Davis cannot show that the state court's summary denial of this claim was an unreasonable application of clearly established federal law. This claim is due to be dismissed.

Davis also argues that counsel were ineffective for failing to object when the prosecutor encouraged the jury to convict him because of his reliance on counsel throughout the trial. Davis did not raise this claim in state court. Thus, it has not been exhausted, and this court cannot review it. Even if the claim were properly before this court, it would be due to be dismissed, because the underlying claim of prosecutorial misconduct upon which the ineffective assistance of counsel claim is based is clearly without merit. Counsel

cannot be found deficient for failing to make an objection that was not warranted.

D. Counsel Were Ineffective for Failing to Preserve Investigation Records and Files for Review

Davis complains that trial counsel failed to adequately preserve the record for review.²⁰² Specifically, he claims that:

Giddens did not maintain any meaningful files associated with Davis'[s] defense. No records, notes, or memoranda of interviews or investigations or preliminary hearing testimony was in the file. R.47/8-9.

Throughout the pretrial proceedings and trial, bench conferences were held that were not transcribed. These gaps in the record prevented appellate counsel from identifying and addressing all claims on appeal, foreclosed a full and fair review on direct appeal, and resulted in a trial record missing crucial portions of the proceedings against Davis.

Doc. no. 33, at 50 (alteration supplied, paragraph numbers omitted). Davis alleges that his lawyers “took no steps to preserve or retain reasonably competent client files or to return Davis'[s] files to him after they were discharged by Davis,” when, “[a]t a minimum, the files could have been sent to Davis or his successor counsel as trial counsel knew of Davis'[s] whereabouts — Holman Prison — and successor

²⁰² Doc. no. 33, at 50-51.

counsel's identity was readily available from published decisions.”²⁰³ Davis contends that his trial counsels' failures prejudiced him in his post-conviction proceedings, and that this problem was “further aggravated because trial counsel were uncooperative in the Rule 32 investigation into the effectiveness of their representation.”²⁰⁴

Davis raised this claim in his Rule 32 petition as two separate claims.²⁰⁵ In denying the claims on the merits, the trial court found:

In paragraph 46, Davis alleges [ineffective assistance of counsel] based on defense counsel's failure to adequately preserve the record. Davis failed to carry his burden of proof in regard to this claim. Davis did not establish that he was prejudiced by the failure to transcribe all bench conferences. This Court, which sat over Davis's capital murder trial, has no personal knowledge of any issues discussed during such bench conferences that supports a finding of prejudice. Accordingly, this claim is denied.

. . . .

In this claim, Davis alleged [ineffective assistance of counsel] based on trial counsel's failure to maintain Davis'[s] client files. Giddens testified at the evidentiary hearing that

²⁰³ Doc. no. 33, at 50-51 (alterations supplied).

²⁰⁴ *Id.* at 51.

²⁰⁵ R. 32 C.R. Vol. 14, Tab 52, at 22-25.

he turned over everything relating to Davis that he had in his possession. (RR. 28) Giddens also testified that he gave Davis'[s] direct appeal lawyers a copy of his file after his representation of Davis terminated. (RR. 29) Although Giddens offered the hearsay statement of Adams that Adams did not have any files relating to Davis, Adams did not testify to the circumstances surrounding the absence of these files. Again, Davis did not carry his burden of proving [ineffective assistance of counsel] in this regard.

For example, the record is silent as to whether Adams destroyed this file, whether the file was lost during a move between law offices, or whether the file was destroyed by a fire or flood. There are numerous events or reasons that Adams'[s] files could have been missing, many of which would not necessarily reflect on Adams'[s] reasonableness or diligence in attempting to maintain client files. Davis appears to attempt to capitalize on a silent record to infer deficient performance, which he cannot do.

It should also be noted that if Giddens provided his file to both Davis's direct appeal lawyers and collateral counsel, Davis has not established prejudice under Strickland, even if this Court considers the hearsay statement of Adams offered through Giddens. If Davis received items that would have been duplicated in Adam's case file, then he suffered no prejudice. There was no testimony or

evidence presented at the evidentiary hearing that would allow this Court to find the existence of prejudice in regard to this claim. As such, this claim is denied. *A.R. Cr.P.*, 32.2.

Rule 32 C.R. Vol. 62, Tab. 80, at 23, 26-27 (alterations supplied). Although Davis presented the claims to the Alabama Court of Criminal Appeals on collateral appeal,²⁰⁶ that court did not address the claims.²⁰⁷

Davis argues that the state courts' failure to grant relief on the merits of this "compelling Constitutional claim resulted in a decision that was contrary to, and involved an unreasonable application of, clearly established Federal law," and "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."²⁰⁸ Davis does not explicate that argument any further.

The trial court found that Davis failed to establish that he was prejudiced by counsel's failure to have all bench conferences transcribed, and that he failed to establish that counsel were unreasonable in failing to maintain his client files, or that he was prejudiced as a result. Davis makes the conclusory argument that counsels' shortcomings denied him effective assistance of counsel because, but for counsels' deficient performance, the outcome of his trial *could* have been different.²⁰⁹ He adds that the failures prejudiced him

²⁰⁶ Rule 32 C.R. Vol. 57, Tab 60, at 13; 39-40; 60; 72-73.

²⁰⁷ See *Davis v. State*, 9 So. 3d 539 (Ala. Crim. App. 2008).

²⁰⁸ Doc. no. 33, at 51.

²⁰⁹ *Id.*

in his post-conviction proceedings.²¹⁰ However, Davis offers nothing to support a finding that the state court's denial of this claim was contrary to, or an unreasonable application of, clearly established federal law, or that it was based on an unreasonable determination of the facts in light of the evidence presented.

E. *Brady* Claims

Davis argues that the State withheld exculpatory information, and that deprived him of his rights to due process, a fair trial, and a reliable sentencing proceeding in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments.²¹¹ Specifically, he complains that: (1) the State failed to reveal Alphonso Phillips's known gang involvement, as well as the disposition of juvenile delinquency charges against both Phillips cousins; (2) the State suppressed and/or mishandled material evidence recovered by the police; and (3) the State failed to disclose threats made against Davis and his mother, and the existence of a confidential informant who feared for his life.

The Supreme Court held in *Brady v. Maryland*, 373 U.S. 83 (1963), that “the suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment.” *Id.* at 87 (ellipses supplied). A *Brady* violation has three components: “[(1) t]he 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

²¹⁰ *Id.*

²¹¹ *Id.* at 51-55.

suppressed by the State, either willfully or inadvertently; and [(3)] prejudice must have ensued.” *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999) (alterations supplied). The prejudice requirement (which is also sometimes referred to in the case law as a “materiality” requirement) is satisfied if “there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *United States v. Bagley*, 473 U.S. 667, 682 (1985) (quoting *Strickland*, 466 U.S. at 695); see also *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). Stated differently, prejudice (or “materiality”) is determined by asking whether the evidence suppressed by the government, viewed cumulatively, would undermine confidence in the guilty verdict. See *Kyles*, 514 U.S. at 434, 436-37 & n. 10.

Davis first raised a *Brady* Claim in his Rule 32 petition. He listed nineteen items that, he alleged, were not produced to defense counsel,²¹² but he offered only a conclusory assertion his constitutional rights were violated as a result of the alleged suppression of those items. The claim was denied by the trial court.²¹³ Davis appealed the denial, focusing on the same alleged violations that he raises here.²¹⁴

The Alabama Court of Criminal Appeals held as follows:

Davis next argues that the State suppressed evidence in violation of *Brady v.*

²¹² Rule 32 C.R. Vol. 14, Tab. 52, at 36-37.

²¹³ Rule 32 C.R. Vol. 62, Tab 80, at 58-59.

²¹⁴ Rule 32 C.R. Vol. 57, Tab. 60, at 64-70

Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Specifically, Davis argues that the State failed to provide footprint evidence, failed to preserve his codefendant's clothes, failed to disclose threats made against Davis and his family, failed to reveal his codefendant's gang involvement, and failed to reveal the identity of the informants. FN.

FN. In Davis's second amended petition he merely recites 19 different evidentiary items that he alleged the State suppressed.

The circuit court made the following findings of fact on this claim:

The petitioner failed to carry his burden of proof in establishing the existence of a valid Brady claim. The United States Supreme Court definitively held, in *Brady v. Maryland*, that "the government's failure to disclose evidence favorable to the defendant who specifically requested it violates the defendant's due process rights when the evidence is material to the guilt or punishment." *Smith v. State*, 698 So.2d 189, 207 (Ala. Crim. App. 1996); *Brady v. Maryland*, 373 U.S. at 87. To properly establish a *Brady* violation, the defendant must make a showing that (1) the prosecution suppressed evidence, (2) the

evidence suppressed was favorable to the defendant or was exculpatory, and (3) the evidence suppressed was material to the issues at trial. *Ex parte Kennedy*, 472 So.2d 1106 (Ala.1985), *cert. denied*, 474 U.S. 975 (1985). “Materiality’ requires a finding that, had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.” *Coral v. State*, 628 So.2d 954, 979 (Ala. Crim. App. 1992), *aff’d* on return to remand, 628 So.2d988 (Ala. Crim. App. 1992), *aff’d*, 628 So.2d 1004 (Ala. 1993), *cert. denied*, 114 S.Ct. 1387 (1994). “A ‘reasonable probability’ is one sufficient to undermine confidence in the result.” *Coral v. State*, 628 So.2d at 979; *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987); *United States v. Bagley*, 473 U.S. 667 (1985); *Rogers v. United States*, 485 U.S. 969 (1988).

Thus, in order for Davis to make a proper *Brady* claim, he must clearly show a suppression of evidence and that there was a reasonable probability, one sufficient to undermine confidence in the proper resolution of the case at trial, that the jury would have resolved his

case differently had the prosecution disclosed the evidence in a timely manner. *Id.* There has been no such evidence established by the petitioner in this case, certainly nothing enumerated in items (a) through (s) of paragraph 67 in the second amended petition.

Davis absolutely failed in this regard. Many of the items alleged in the petition were never mentioned during the Rule 32 hearing. One of the items mentioned, an alleged footprint at the scene, was referred to in a report handed over to the defense, never used at trial, and never explained at the hearing. Thus, Davis did not prove suppression as the defense was put on notice that this evidence may have existed, did not prove materiality (it is unclear if this item even exists, where it was located, how it was found, how it was documented, whether it was casted or photographed, etc.), and he did not prove that it was exculpatory.

Based on the record before this Court, this claim is denied.

(C.R. 1191-92.) The record of the Rule 32 proceedings supports the circuit court's findings. Davis made no effort at the Rule 32 hearing to satisfy the requirements of *Brady v.*

Maryland, 373 U.S. 83, 83 S. Ct.1194, 10 L. Ed. 2d 215 (1963). Davis thoroughly failed to meet his burden of proof under Rule 32.3, Ala. R. Crim. P.

Moreover, this claim is procedurally barred for the reasons discussed by this Court in *Williams v. State*, 782 So.2d 811, 818 (Ala. Crim. App. 2000):

The appellant's first argument is that the State withheld exculpatory information in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Specifically, he contends that the State suppressed evidence that a potential witness had seen the appellant and the victim together in Mobile before the murder and evidence that a white Porsche automobile had been seen at the scene of the crime at about 3:30 p.m. on the day of the murder. The appellant did not assert that this claim was based on newly discovered evidence. Therefore, it is procedurally barred because he could have raised it at trial and on direct appeal, but did not. See Rule 32.2(a)(3) and (a)(5), Ala. R.Crim. P.; *Boyd v. State*, 746 So. 2d 364 (Ala. Cr. App.1999); *Matthews v. State*, 654 So. 2d 66 (Ala. Cr. App.1994); *Lundy v. State*, 568 So. 2d 399 (Ala. Cr. App.1990).

Davis v. State, 9 So. 3d 514, 526-528 (Ala. Crim. App. 2006).

Thus, the claim was found to be procedurally barred by the Alabama courts. Davis contends that the claim is not procedurally defaulted, arguing:

Courts have declined to procedurally bar such claims, noting that such a ruling would “reward the wrongdoer because he was not timely found out.” *Julius v. Jones*, 875 F.2d 1520, 1525 (11th Cir. 1989) (declining to impose procedural bar as to *Brady* claim and unwilling to hold that “if the prosecutor failed to produce evidence which was required to be produced under *Brady* and which failure was unknown to defendant’s counsel, the claim is procedurally barred because defense counsel did not ferret out the violation”).

Here, the *Brady* evidence was not disclosed to Davis’[s] trial counsel. Moreover, a second informant’s existence did not come to light until post-conviction proceedings were underway. Thus, this claim simply could not have been raised at trial or on direct appeal. Neither Davis nor his counsel had reason to know of the *Brady* material at an earlier stage. Subsequent to the discovery of the withheld evidence, this claim was timely raised on direct appeal as well as in Davis’s Second Amended Rule 32 Petition and on collateral appeal in the CCA. *See* Exhibit A (“Chart of Davis’s Responses to the State’s Answer”). Thus, there can be no default.

Doc. no. 39, at 6-7 (alteration supplied).

Alternatively, Davis argues that the State's suppression of this evidence constitutes cause for any default, and asserts that he suffered actual and substantial prejudice because evidence pointing to a different perpetrator likely would have resulted in a different outcome at the guilt/innocence phase. He contends that "given the strong likelihood that such evidence could have reasonably implicated another perpetrator or could have been tested to in fact prove Davis's innocence, the failure to consider Davis's claim results in a fundamental miscarriage of justice" and should be excused.²¹⁵

As discussed in Section IV.B.1., *supra*, federal courts "will not review judgments of state courts that rest on adequate and independent state grounds." *Michigan v. Long*, 463 U.S. 1032, 1041 (1983). Thus, "an adequate and independent finding of 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.'" *Harris v. Reed*, 489 U.S. 255, 262 (1989) (quoting *Murray v. Carrier*, 477 U.S. 478, 485 (1986)). In the context of a defaulted Brady claim, the Supreme Court explained in *Banks v. Dretke*, 540 U.S. 668 (2004), that the cause and prejudice standard tracks the last two elements of a *Brady* claim: suppression by the government and materiality. *Id.* at 691 (citing *Strickler*, 527 U.S. at 282). As will be seen from the discussion of each of Davis's allegations of error, in turn, he cannot establish both cause for the default and actual

²¹⁵ Doc. no. 39, at 7 (alterations supplied).

prejudice from the alleged errors, as required to excuse the procedural default.

1. *The state failed to disclose Alphonso Phillips's known gang involvement and prior adjudications of delinquency charges against both Phillips's cousins*

Davis alleges that the following information was not disclosed to counsel: (1) a 1993 “compilation of persons reported to be in gangs by the Anniston Police Department” that was maintained by the prosecutor, confirming that Alphonso Phillips was a known gang member; (2) the previous arrests of Alphonso Phillips for disorderly conduct, a weapons violation, violation of a liquor law, and trespass; and (3) the entry of Terrance Phillips into a consent decree in connection with a third-degree assault charge in 1992.²¹⁶ He argues that the State’s failure to disclose that information hindered trial counsels’ ability to effectively cross-examine the Phillips cousins and challenge the prosecutor’s improper closing arguments.²¹⁷ According to Davis:

²¹⁶ Doc. no 33, at 45.

²¹⁷ The prosecutor argued:

Terrance Phillips did a terrible thing. He got involved in something he shouldn't get involved in. He did a terrible thing and he knows that. But he was not a hard core criminal. He was going to school. Never been in trouble before. And now he's got a ten-year conspiracy to commit robbery. He's ruined his life.

. . . .

Evidence about the Phillips cousins' pasts, coupled with inconsistencies in their testimony, would likely have caused the jury to consider whether the Phillips cousins acted alone and then later conspired to blame Davis for the Direct Oil robbery and shooting. It also might have undermined that State's theory that the Phillips cousins were "good boys" led astray by Davis, and caused a jury to conclude that Davis was, at best, a follower. There is a reasonable probability that the result of the guilt/innocence phase would have been different.

Doc. no. 33, at 52.

Sufficient prejudice exists to excuse a procedurally defaulted *Brady* claim only when "the favorable evidence could reasonably be taken to put the case in such a different light as to undermine the confidence of the verdict." *Strickler*, 527 U.S. at 290 (quoting *Kyles*, 514 U.S. at 435). The "question is not whether

Terrance Phillips, 16 years old, no trouble whatsoever, a good boy, on the edge of going bad if something didn't happen. And something did happen.

And Alphonso Phillips, a boy that hadn't crossed the edge was looking for something, looking for whatever. Crossed the edge and got into some trouble. Because they were looking for somebody to help him, looked to somebody to be their big brother, and the father or whatever. And they picked him. They picked Jimmy Davis. And they picked the wrong one.

R. Vol. 7, Tab 14, at 1226-1231.

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.” *Id.* at 289-290 (quoting *Kyles*, 514 U.S. at 435).

A review of the state court record reveals that Davis has not met this standard. First, not only is it highly unlikely that the “compilation of suspected gang members” would have been admissible at trial in any event, but the record reveals that the list included Davis as a suspected gang member as well,²¹⁸ thereby negating any benefit Davis might have gained by opening the door to that inquiry.²¹⁹ Second, even making the

²¹⁸ Rule 32 C.R. Vol. 32, at 1905.

²¹⁹ In its reply brief on appeal from the denial of Davis’s Rule 32 petition, the State argued:

Davis conveniently fails to note that his name was also included on this “gang list” he (presumably) claims would have altered the outcome of his case in his favor. (R. 1085) In the previous argument, Davis attacks his attorneys for not taking more measures to prevent the mention of gangs at his trial, but now he blames the State for not allowing him to interject the gang issue into the trial. Davis cannot expect to argue it both ways and receive relief.

If Davis had used these gang records against the Phillips brothers [sic], it would have opened the door to proving Davis’s similar gang-related activities – thereby shattering all of Davis’s previous attempts to keep this information away from the jury. If anything, this information

unlikely assumption that the juvenile records of the Phillips cousins would have been admissible at trial to show bias pursuant to *Davis v. Alaska*, 415 U.S. 308 (1974),²²⁰ their omission does not undermine confidence in the verdict. Although the prosecutor did argue that Terrance Phillips had “never been in trouble before,”²²¹ that was just a portion of his argument, and the statement was in response to the arguments of defense counsel. The prosecutor did not paint the State witnesses as innocent bystanders, or upstanding citizens. Rather, he acknowledged that he did not have pastors, clergy, and nuns to present as witnesses, but only the people who were at the crime scene, on the streets, and involved in the crime.²²² While he tried to paint the Phillips cousins, who were ages 16 and 17 at the time of the offense, as less culpable than Davis, he specifically told the jury he was not “putting a halo on any of them,” and that they needed to “get some time” for their involvement in the case.²²³

would have been more prejudicial to Davis’s defense.

R. 32 C.R. Vol. 57, Tab. 61, at 40-41.

²²⁰ Under Alabama law, the use of juvenile records for purposes of general impeachment is not allowed. Alabama Rule of Evidence 609(d) states that “[e]vidence of juvenile or youthful offender adjudications is not admissible under this rule” (alteration supplied). Section 12-15-72(a)(b) of the Alabama Code provides that a juvenile adjudication is not a conviction and is not admissible against a juvenile in any court.

²²¹ R. Vol. 7, Tab 14, at 1226.

²²² *Id.* at 1225.

²²³ *Id.* at 1233.

Finally, the prosecutor's argument that the Phillips cousins were credible witnesses was not based on the assertion that they were "good boys," but on the fact that, despite their involvement in the crime, they had the fortitude to testify against a friend, and in so doing, did not try to completely exonerate themselves of culpability.²²⁴ Thus, even if the Phillips's prior arrests had been admitted, the State's argument and theory of the case would not have been significantly weakened. There is no reasonable likelihood that the verdict would have been different, nor is confidence in the verdict undermined.

2. *The state suppressed and/or mishandled material evidence recovered by police*

Davis asserts that (1) footprints were retrieved from the crime scene, but not logged into evidence or produced for examination by his attorneys; (2) a pair of white tennis shoes was recovered, but not put in evidence or provided to counsel; (3) the officers failed to retrieve clothing worn by the Phillips cousins; and (4) an officer provided false testimony regarding how he learned of the gun's location — first claiming that he received the information from another officer, but later saying he received a tip as to the gun's location from a second confidential source.²²⁵ Davis contends that all of this evidence *could have* substantiated the theory that someone else shot the victim.

Davis's bare suppositions are not sufficient to establish that any of the alleged evidence would have been

²²⁴ *Id.*

²²⁵ Doc. no. 33, at 52-54.

exculpatory, impeaching, or otherwise favorable to his defense. Without any proof of materiality, the Brady inquiry must end. *See, Allen v. Secretary, Florida Dept. of Corrections*, 611 F.3d 740, 746-47 (11th Cir. 2010).

3. *The state failed to disclose death threats against Davis and his mother and the existence of a confidential informant who feared for his life*

Davis argues that during the trial, death threats were made against him and his mother, but neither he nor defense counsel was informed.²²⁶ According to Davis, the failure to disclose this information deprived his defense team of the opportunity to investigate whether the person responsible for the threats was connected to the Direct Oil robbery and murder, and whether the threats were made as a means of intimidating him.²²⁷ As an initial matter, Davis has offered no evidence to support his conclusory assertion that defense counsel were not informed about the alleged threats. During the Rule 32 evidentiary hearing, Davis called prosecutor Ron Wood as a witness.²²⁸ Wood testified that he had no idea that such a threat was made, and that he did not know whether Davis's lawyers had been informed of the threat.²²⁹ Thus, there is no evidence to support Davis's contention that the evidence was suppressed. There also is no indication that the evidence was material.

²²⁶ *Id.* at 54-55.

²²⁷ *Id.*

²²⁸ Rule 32 R. Vol. 23, at 1066-1119.

²²⁹ *Id.* at 1104-05.

Davis further argues that, throughout both the trial and the Rule 32 proceedings, the State refused to “disclose the identity of a confidential informant identified in a supplemental report who allegedly feared for his life if his identity were disclosed.”²³⁰ Davis reasons that “if the confidential informant still fears for his life nearly ten years after the crime was committed, and Davis has been incarcerated since the day after the shooting at Direct Oil, it is likely that Davis was not the perpetrator.”²³¹

Mr. Wood was also questioned about the confidential informant during the Rule 32 evidentiary hearing,²³² but he denied any awareness:

Q: Now, Mr. Wood, are you aware that the AG’s office has taken the position that the identity of a confidential informant used in this case cannot be revealed because the confidential informant feared his life would be in danger if his ID. was revealed?

A: No, ma’am.

. . . .

Q: Have there been times where the District Attorney’s office has refused to turn over the identity of an informant because that

²³⁰ Doc. no 33, at 55.

²³¹ *Id.* (emphasis in original).

²³² R. 32 R. Vol. 23, at 1105-1108.

informant was fearful that if his identity was revealed his life would be in danger?

A: I don't have any personal knowledge of it.

....

Q: And could you read that paragraph into the record?

A: "Officer Tim Whatley introduced me to a black male that did not want his ID. known. This person told me that he had reason to believe that the following four people did the murder: Jimmy Davis, Alphonso Phillips, Terrance Phillips and Willie Smith."

Q: And does that paragraph in the report here refresh your recollection as to whether or not there was a confidential informant in this matter?

A: No, ma'am.

Q: Did you ever speak to a confidential informant in this matter?

A: I don't recall speaking to one, no, ma'am.

Q: Now, if I told you that the Attorney General's office has made argument to this Court and the Court has accepted that there was

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a confidential informant in this matter, and that person's identity could not be revealed because he felt his life would be threatened, would you take issue with that?

A: No, ma'am.

Q: And would you agree that if that's the position that the Attorney General's office took, that there must have been persons in the Anniston community in 1993 that would threaten a witness to keep him from testifying?

A: Ma'am, I have no knowledge of your procedures, what you've been doing this week, or whether that's – I don't know. I don't know what the game plan is here.

Q. Do you think the Attorney General's office would state that the confidential informant feared for his life if he didn't fear for his life?

A: No, ma'am.

R. 32 R. Vol. 23, at 1105-08 (ellipses supplied). Davis has provided no evidence to support his contentions that the identity of a confidential informant was suppressed, or that the identity of any confidential informant was material.

F. The Admission of Highly Prejudicial Hearsay Testimony

Davis contends that his Fifth, Sixth, Eighth and Fourteenth Amendment rights were violated by the admission of the damaging hearsay testimony of Willie Smith and Shannon Hardy Wilson.²³³ This claim was raised for the first time in Davis's petition for writ of certiorari on direct appeal.²³⁴ The State correctly noted in its response to the claim that no objections to the testimony were made during trial, and argued that there was no plain error.²³⁵ The Alabama Supreme Court denied the claim without discussion. *Ex parte Davis*, 718 So. 2d 1166, 1169, 1178 (Ala. 1998). That decision was neither contrary to, nor an unreasonable application of, clearly established federal law.

1. *Willie Smith*

Willie Smith, who was not charged in the offense, testified that, on the night of the shooting, Davis told him that he had shot someone while he robbed Direct Oil with Alphonso and Terrance Phillips.²³⁶ Smith also testified that he met up with Alphonso Phillips and Davis at Alphonso's home the next morning, and the conversation turned to the events of the previous

²³³ Doc. no. 33, at 55-58.

²³⁴ C.R. Vol. 10, Tab 35, at 33-36.

²³⁵ C.R. Vol. 10, Tab 36, at 35-38. The State argued that Willie Smith's testimony about what Alphonso said to him was admissible under the excited utterance exception to the hearsay rule, and that Shannon Hardy's testimony was admissible because the conversations she testified about were either not offered for the truth of the statement or were admissible under the excited utterance exception to the hearsay rule. *Id.*

²³⁶ R. Vol. 6, at 951.

evening.²³⁷ Smith testified that, during that conversation, Alphonso said to him: “Willie, you ought to seen [*sic*] how Jimmy was shooting that man.”²³⁸

Davis argues that Smith’s testimony about Alphonso’s statement was hearsay, and that it should have been excluded because it did not fall within any exception.²³⁹ He contends that admission of the testimony violated his right to due process and a fair trial because it corroborated Alphonso’s trial testimony identifying him as the shooter, and it bolstered Alphonso’s credibility.²⁴⁰

There were no objections to the testimony during trial. Consequently, the claim could only have been reviewed on direct appeal for plain error. Without regard to the propriety or the admissibility of the challenged statement, it is well settled that, even when evidence is improperly admitted, a conviction will not be reversed for plain error unless the error affected the substantial rights of the defendant. *See United States v. Arbolaez*, 450 F.3d 1283, 1291 (11th Cir. 2006). In other words, the “error must have been prejudicial,” and it must have affected the outcome of the court proceedings. *Id.*

There was no such showing in this case, due to the more damaging nature of Smith’s testimony that Davis himself admitted to the shooting, as well as the other substantial evidence against Davis. The

²³⁷ *Id.* at 953-54.

²³⁸ Doc. no. 33, at 56 (quoting R. Vol. 6, at 954-55).

²³⁹ *Id.*

²⁴⁰ *Id.* at 57

Alabama Supreme Court's implicit finding that the admission of the allegedly improper testimony did not constitute plain error or seriously impact the fairness of the trial was not unreasonable.

2. *Shannon Hardy Wilson*

Davis also complains about portions of the testimony given by Shannon Hardy Wilson, a cousin of Alphonso and Terrance Phillips.²⁴¹ Wilson lived at her grandmother's home with her husband, her two young children, and Alphonso.²⁴² Wilson testified that, on the night of the murder, Davis and Alphonso entered the house around 8:00 p.m., changed their clothes, and then sat down and watched television for a couple of hours.²⁴³

Wilson overheard a conversation between Davis and Alphonso. Wilson testified as follows:

A: I was in my grandmother's room, sitting on the bed. And they were talking about what they had — you know, what was going on and who did what. Basically they were saying, you know, that it didn't work out right.

²⁴¹ *Id.* at 57-58.

²⁴² R. Vol. 6, at 992-93.

²⁴³ *Id.* at 1000-1001. Wilson testified that she knew "Alphonso put on his night clothes," "some short pajamas and a T-shirt because he didn't go back out," and that Davis "changed into some street clothes," maybe "a pair of jeans and a shirt." *Id.*

Q: Did you know what they were talking about?

A: No.

Q: – at that time?

A: I just heard Alphonso say that it was — it was fucked up, that it didn't go right.

R. Vol. 6, at 1011. Before Wilson left the house to go to work at 10:45 p.m., Davis left her grandmother's home, and Wilson asked Alphonso why he was changing clothes. In response, Alphonso replied that he was going to bed and was not going back out that night.²⁴⁴ The next day, Davis returned to the house with Willie Smith.²⁴⁵ They went into the den with Alphonso and were “just hanging out.”²⁴⁶ According to Wilson's testimony, the three of them then discussed the events of the previous night:

Q: Who do you remember speaking first?

A: It was Willie.

Q: What did Willie say, if you remember?

A: Just asked them what they had been up to.

. . . .

²⁴⁴ *Id.* at 1002-1003.

²⁴⁵ *Id.* at 1004.

²⁴⁶ *Id.* at 1005.

Q: Did either one of them respond?

A: Jimmy did.

Q: What did Jimmy say?

A: He went in to tell them about what had happened the night before in full detail. He explained it to Willie.

Q: What did he say happened, Ms. Wilson ?

A: He said, "My nigger, let me tell you what happened last night."

....

Q: All right. And no question in your mind he said that.

A: (Nodding head up and down.)

Q: What did he say next?

A: Told him about how they planned to rob Direct.

Q: Had anybody spoken about that except Jimmy at this time?

A: No. I had heard a little bit of conversation, just a little bit the night before while I was curling my hair in the bathroom.

Q: Okay. Who was in that conversation?

A: Alphonso and Jimmy, but Jimmy was doing the talking.

Q: All right. Let's — I'll go back to that in just a minute. After he said what he said, "Let me tell you what happened last night," and he began telling him about the plan, tell us exactly what he said as best you remember.

A: That him and Terrance and Snook — I mean Alphonso were walking. And Jimmy and Alphonso decided that they had a little job that they needed to do. The job being that they were going to rob Direct.

Q: And Jimmy — was Jimmy saying this?

A: Yes, sir, he was.

Q: Was Alphonso saying anything —

A: No.

Q: — at that time?

A: No, sir, he wasn't.

Q: But Jimmy said that Jimmy and Alphonso had decided that they had a little job to do?

A: Yeah. And then Alphonso told him that he hadn't done nothing.

Q: Alphonso told him that he hadn't done nothing?

A: Yeah.

Q: Who was he talking to?

A: He was speaking to Willie.

Q: All right. And then what's the next thing your heard?

....

A: [Davis] said, "Damn right, you punk ass nigger. You ran off and left me."

Q: Okay. He said, "Damn right, you punk ass nigger. You ran off and left me?" Now, am I correct?

A: Yes.

Q: Now, what was said then?

A: Then he went on to tell what happened.

Q: All right. What did he say happened?

A: That Terrance was — Scooter was on the corner looking out for the police. And that him and Snook went on to the Direct parking lot and into the building. Before they got in there, he said they pulled up their bandanas and they went in there. And when he got to the door he said, "Give it up." And that Mr. Hazle laughed at him and that Alphonso ran. And then he said he told him to give it up again. And he said Mr. Hazle

laughed at him and then he shot him.

Q: And was that Jimmy that was saying that?

A: Yes, sir.

Q: What did Alphonso say, if anything, while Jimmy was saying that?

A: He just kind of sat there.

Q: What happened next, Ms. Wilson?

....

A: Then he raised his hand up and he said that gun went "pow pow pow." (Indicating.)

Q: All right. Who are you saying said that?

A: Jimmy said it.

Q: And were you able to see anything at that time as he was saying that?

A: I saw him with his hand up (indicating).

....

Q: After you saw him raise his hand and "pow pow pow," what's the next thing you saw or heard?

A: Willie asks him, "Man, what did you –"

Q: Speak up now?

A: Willie asked him what did he – Willie said, “Man, you didn’t have to do that, you didn’t have to shoot him.”

Q: What else was said?

A: Then he said that he wasn’t going to let no cracker laugh at him.

Q: Wasn’t going to let no cracker laugh at him?

A: (Nodding head up and down.)

Q: Do you remember anything else that was said?

A: Yeah. When they went on to talk about, they were talking about the gun. Jimmy said that the last shot felt better than the first.

R. Vol. 6, at 1005-10 (alteration supplied).

Davis challenges the admissibility of Wilson’s testimony that: (1) on the night of the murder, Alphonso told her that he was changing into his night clothes because he was not going out again; (2) the next morning, she heard Alphonso tell Willie Smith that Alphonso had not done anything wrong; (3) she overheard Smith telling Davis that Mr. Hazle did not have to be shot; and (4) the night before, she had heard Alphonso say the crime was “fucked up” and “didn’t go right.”²⁴⁷ Davis argues that the hearsay testimony

²⁴⁷ Doc. no 33, at 57.

was damaging to his case because Wilson was the only non-accomplice who testified to these statements, and the statements bolstered the credibility of Alphonso, Terrance, and Smith.²⁴⁸

Given the strength of the other evidence against Davis, it is highly unlikely that the admission of Wilson's testimony had any material effect on the outcome of the trial. Thus, there was no plain error. The Alabama Supreme Court's rejection of this claim was neither contrary to, nor an unreasonable application of, clearly established federal law.

G. Admission of Note Allegedly Found in the Pocket of Davis's Clothing

Davis challenges the admission of a note with his name on it, found in the pocket of a pair of black shorts taken from a laundry hamper in Alphonso Phillips's home²⁴⁹ the day after the homicide.²⁵⁰ During the trial, Alphonso and Terrance testified that Davis wore and discarded the shorts on the day of the murder.²⁵¹ To corroborate this testimony, the State sought the admission of the note found in the pocket of the shorts. The trial court reviewed the note, and admitted the

²⁴⁸ *Id.* at 57-58.

²⁴⁹ At the time of the Direct Oil shooting, Alphonso resided with his grandmother, Martha Jean Phillips, at 1711 Moore Avenue in Anniston. R. Vol. 6, at 1048.

²⁵⁰ Doc. no. 33, at 58-59. Officer Roy Nunnally testified that he found the note in the pocket of a pair of shorts he retrieved from Alphonso's home on March 19. R. Vol. 5, at 875-880. The note was admitted in its redacted form at R. Vol. 5, at 893-94.

²⁵¹ R. Vol. 5, at 802-803, 820, 826 (Terrance); R. Vol. 6, at 1067, 1074, 1080-1082 and R. Vol. 7 at 1107-1108, 1123 (Alphonso).

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following redacted version without objection from defense counsel²⁵²:

Dear My Little African Queen,

How's life? Mines are doing fine. I got your letter. I feel the same as you do. Here's all the things about me.

1. My Name: Jimmy Davis Jr:
2. My Birthday: Oct. 6, 1970
3. My Hobbies: Being Pro black each and every day.
4. My Birth place: Queens, New York
5. My type of women: Honest, true, and Loving.
6. My Age: 22

I wish we could of stayed a little longer, but my mommy were ready to go. I would love to get to know you better. So we would get a chance to really get to know each other in the furture [sic] soon. So that's all for now but never my loving thoughts for you.

Your furture [sic]
Lover

When you come
back to Anniston

²⁵² R. Vol. 5, at 893-94.

again call this
number 236-5912

Tell me [sic]sister
I said I love her.

C.R. Vol. 1, Tab 1, at 83.

Davis argues that, even in redacted form, the note contained references and innuendo from which a juror might infer an association with a gang, or a suggestion that the victim's death was race-related.²⁵³ Davis posits that the phrase “pro-black each and every day” could have suggested to the jury that his daily actions were motivated by racial hatred, and that the salutation to his “little African queen” furthered this prejudicial view by calling to mind black separatism and militance.²⁵⁴ Davis contends that the admission of the note likely motivated a conviction based on fear rather than on proof beyond a reasonable doubt.²⁵⁵ He further argues that the note was not relevant because it said nothing about the crime, and was useless as identification evidence.²⁵⁶

This claim was raised for the first time in Davis's petition for writ of *certiorari* on direct appeal.²⁵⁷ In its reply brief, the State argued that the note was relevant because its presence in the pocket helped establish that Davis had worn the shorts found in Alphonso

²⁵³ Doc. no. 33, at 58.

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 58-59.

²⁵⁶ *Id.* at 59.

²⁵⁷ R. Vol. 10, Tab 35, at 20-26.

Phillips's home, and thus, supported the testimony of Alphonso and Terrance Phillips describing what Davis wore during the commission of the crime.²⁵⁸ The State also asserted that the prejudicial nature of the note had been minimized by the redactions, and that any prejudice was outweighed by the probative value of the note.²⁵⁹

Without discussing the claim, the Supreme Court of Alabama found no reversible error. *Ex Parte Davis*, 718 So. 2d 1166, 1169, 1178 (Ala. 1998). Davis has not established that the denial of this claim was contrary to, or an unreasonable application of, clearly established federal law, or that it resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented. The content of the note admitted into evidence was not inflammatory or obviously gang-related, and it would not have caused the conviction to be based on fear and racial bias.

Davis also asserts that trial counsel were constitutionally ineffective because, instead of objecting to the admission of the note altogether, they stipulated to its admission in a redacted form. According to Davis, even the redacted note contained phrases that the jury was likely to associate with racism or gang activity.²⁶⁰ That claim was denied by the Rule 32 trial and appellate courts upon remand:

²⁵⁸ 8 R. Vol. 10, Tab 36, at 25-30.

²⁵⁹ *Id.*

²⁶⁰ Doc. no. 33, at 17-18, 59.

He argues that counsel should have objected to the admission of a letter found in Davis's pocket that referred to gang activity. . . .

The circuit court found that Davis failed to meet his burden of proof on this claim because no evidence was introduced at the evidentiary hearing concerning this issue. We agree. Counsel was not questioned concerning this evidence.

This court has held that “[o]bjections are a matter of trial strategy, and an appellant must overcome the presumption that ‘conduct falls within the wide range of reasonable professional assistance,’ that is, the presumption that the challenged action ‘might be considered sound trial strategy.’ *Moore v. State*, 659 So.2d 205, 209 (Ala. Cr. App. 1994), citing *Strickland [v. Washington]*, 466 U.S. [668] at 687-88, 104 S.Ct.[2052] at 2064-65 [(1984)].”

Lane v. State, 708 So.2d 206, 209 (Ala. Crim. App. 1997). As we stated in *Brooks v. State*, 456 So.2d 1142, 1145 (Ala. Crim. App. 1984), “effectiveness of counsel does not lend itself to measurement by picking through the transcript and counting the places where objections might be made. Effectiveness of counsel is not measured by whether counsel objected to every question and moved to strike every answer.” Davis failed to meet his burden of

proof on this claim; therefore, the trial court correctly denied him relief.

Davis v. State, 9 So. 3d 539, 550-551 (Ala. Crim. App. 2008) (alterations in original).

Thereafter, however, Davis failed to raise this claim in his petition for writ of *certiorari*.²⁶¹ As such, it is both unexhausted and procedurally barred because a return to state court would be futile. *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999); *Collier v. Jones*, 910 F.2d 770 (11th Cir. 1990).

Moreover, it should be noted that the Alabama Court of Criminal Appeals' denial of this claim on the merits was neither contrary to, nor an unreasonable application of, clearly established federal law. The state court's implicit determination that the note was not overly prejudicial was not unreasonable, and its conclusion that counsel was not ineffective for failing to object to its admission was consistent with clearly established federal law.

H. Improper Consideration Through the Pre-Sentencing Report of Davis's Juvenile Record and Allegations of Gang Involvement

Davis contends that the trial court violated his Eighth and Fourteenth Amendment rights by considering "allegations set forth in the pre-sentence investigation report, which consisted of inflammatory and erroneous allegations, [and] included assertions of vulgar and reckless conduct at the referenced interview, assertions based on hearsay about gang

²⁶¹ Rule 32 C.R. Vol. 61, Tab 72.

involvement or leadership, and implications that Davis had a criminal record that included gun charges.”²⁶² This claim was raised by Davis in his certiorari petition on direct appeal,²⁶³ and rejected by the Alabama Supreme Court:

Davis next argues that during the sentencing phase of the trial the court improperly considered evidence of his prior juvenile offenses in determining whether he should receive the death penalty. Davis also argues that a separate reference to gang affiliation, made in the presentencing report rather than in the prosecutor’s closing arguments, was highly prejudicial and was improperly considered by the trial court in its sentencing order.

Before the sentencing hearing, defense counsel objected to a portion of the presentencing report that refers to allegations that Davis was a member of a gang. That objection was as follows:

[Defense counsel]: And then, Judge . . . it is stated that it’s not only reported by a codefendant and other witnesses, but also other witnesses in prior cases, that Mr. Davis was a ringleader of the ‘Folks’ gang and then it’s got a branch of

²⁶² Doc. no. 33, at 60 (alteration supplied).

²⁶³ C.R. Vol. 10, Tab 35, at 26-30.

‘Disciples’ in West Anniston. And the defendant disputes that.”

Davis argues that this portion of the presentencing report was irrelevant on the question of the existence of the aggravating circumstances allowed into evidence under Ala. Code 1975, § 13A-5-49, and that it did not serve to rebut any evidence offered in mitigation. He also argues that the trial court’s considering his juvenile adjudications was, in itself, reversible error, even if the court did not consider the allegations of Davis’s gang involvement to be part of his history of juvenile delinquency.

Davis points out that “juvenile adjudications are not convictions and are not criminal in nature” and thus cannot be considered as prior criminal activity under the Alabama capital sentencing scheme. *Freeman v. State*, 555 So.2d 196, 212 (Ala. Cr. App. 1988), affirmed, *Ex parte Freeman*, 555 So.2d 215 (Ala.1989), *cert. denied*, *Freeman v. Alabama*, 496 U.S. 912, 110 S.Ct. 2604, 110 L.Ed.2d 284 (1990). He theorizes that is it “highly likely” that the trial court considered his prior juvenile adjudications as proof of gang involvement, thereby exacerbating the error, and concludes that the trial court’s sentencing order was thus based upon inadmissible and highly prejudicial evidence, which mandates that we reverse his sentence and order a new sentencing hearing.

We find nothing in the record to support Davis's contention that the trial court considered the allegations of his gang involvement when it determined his sentence and drafted its sentencing order. The presentencing report contained evidence of Davis's prior adjudications of delinquency based on theft, receiving stolen property, and trespass. However, the report also showed that, since 1987, when he became an adult, Davis had been convicted on misdemeanor counts alleging assault, trespass, theft, and resisting arrest and also on one felony count alleging robbery in the third degree.

In its order sentencing Davis to death, the trial court cited only two aggravating circumstances: (1) that Davis murdered Johnny Hazle during a robbery attempt and (2) that Davis had a prior felony conviction for third-degree robbery. In considering the "mitigating circumstance" set out in § 13A-5-51(1) — that "[t]he defendant has no significant history of prior criminal activity" — the trial court specifically cited Davis's prior juvenile adjudications in negation of that factor.

While we find no merit in Davis's argument that in determining his sentence the trial court considered the suggestion that he had been involved in gang activity, we agree that the trial court erred in considering Davis's juvenile adjudications. The juvenile adjudications could not properly be used to negate the mitigating circumstance of "no

significant history of prior criminal activity.” However, it is clear that, without regard to Davis’s juvenile adjudications, the evidence of Davis’s convictions of various misdemeanors and, most important, his conviction of robbery, would preclude the trial court from finding that he had “no significant [criminal] history.” Because the properly considered evidence of Davis’s criminal convictions would negate this mitigating factor, we conclude that the trial court’s error in considering Davis’s juvenile adjudications was harmless.

Ex parte Davis, 718 So.2d 1166, 1177-78 (Ala. 1998) (alterations in original).

It is undisputed that the presentencing report did make some references to alleged gang activity. However, the Alabama Supreme Court’s determination that there was “nothing in the record to support Davis’s contention that the trial court considered the allegations of his gang involvement when it determined his sentence and drafted its sentencing order” is entitled to deference on review. Moreover, that determination is supported by an independent review of the record.

It also is undisputed that the trial court, without objection, improperly considered Davis’s juvenile convictions in determining that he was not entitled to the statutory mitigating circumstance of having “no significant criminal history.” However, the Alabama Supreme Court determined that the error was harmless since Davis’s adult convictions would also negate the mitigating factor. That decision is neither contrary to, nor an unreasonable application of, clearly

established federal law, nor was it based on an unreasonable determination of the facts in light of the evidence presented. Davis's criminal convictions as an adult supported the state court's finding that he did not qualify for the mitigating circumstance at issue.

Finally, it is fundamental that federal courts may not grant habeas relief for errors of state law. *Estelle v. McGuire*, 502 U.S. 62, 67 (1991). Davis is entitled to no relief on this claim.

Under the heading of this claim, Davis also challenges trial counsel's failure to object to the procedures used to prepare the presentence report in this case.²⁶⁴ Davis argues that, pursuant to *Estelle v. Smith*, 451 U.S. 454, 469-70 (1981), the Sixth Amendment right to counsel is implicated at presentence interviews, and Davis should not have been interviewed outside the presence of his attorneys.²⁶⁵ Specifically, Davis claims that counsel were ineffective for failing to object to the presentence report because he was interviewed outside the presence of previous counsel; the report contained inflammatory and condemning conclusions about Davis's refusal to communicate with the author of the report; the report allegedly contained false statements; and the judge could have drawn adverse inferences from Davis's refusal to communicate with the report's author.²⁶⁶

It does not appear that this claim was raised in state court; therefore, it is unexhausted and

²⁶⁴ Doc. no. 33, at 60.

²⁶⁵ *Id.*

²⁶⁶ *Id.*

procedurally defaulted. Moreover, Davis has offered nothing to indicate that he was prejudiced by counsel's failure to object to the presentence report on these grounds. Thus, he is entitled to no relief.

I. Conviction and Sentence Obtained Through the Use of Uncorroborated Accomplice Testimony

Davis asserts that the non-accomplice testimony was insufficient to convict him of capital murder.²⁶⁷ He contends that, even though the trial court found as a matter of law that only Alphonso Phillips was an accomplice, both Terrance Phillips and Willie James Smith were accomplices.²⁶⁸ He argues that no other witness was able to connect him with the commission of the offense.²⁶⁹

Davis unsuccessfully argued this claim in the Alabama Supreme Court on direct appeal:

Davis argues that the only evidence directly linking him with the robbery and murder of Hazle was the testimony of Alphonso Phillips, Terrance Phillips, and Willie Smith. Based upon the evidence of Alphonso Phillips's participation in the robbery that ended in the murder of Jimmy Hazle, the trial court held that, as a matter of law, Alphonso Phillips was an accomplice to the crimes that

²⁶⁷ *Id.* at 63-65.

²⁶⁸ *Id.* at 63.

²⁶⁹ *Id.* at 64.

Davis was charged with. Davis relies on § 12-21-222, Ala. Code 1975:

A conviction of 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.

Davis argues that Terrance Phillips and Willie Smith were accomplices to the crimes he was charged with, just as Alphonso Phillips was, and that their testimony, therefore, could not properly be used to corroborate Alphonso Phillips's testimony. *Knowles v. State*, 44 Ala. App. 163, 204 So. 2d 506 (1967). He contends that, beyond the "accomplice" testimony of Terrance Phillips and Willie Smith, there was no evidence to link him with the robbery and murder of Johnny Hazle; thus, he concludes, his sentence and conviction should be overturned.

Before § 12-21-222 is invoked, it must clearly appear that the witness is an accomplice, and it is the defendant's burden to prove that a witness is an accomplice, unless the evidence shows without dispute that the witness is an accomplice. *Steele v. State*, 512 So. 2d 142 (Ala. Cr. App. 1987). The evidence clearly established that Alphonso Phillips acted as Davis's accomplice in the robbery

that ended in the murder of Johnny Hazle, and the trial court thus properly held that, as a matter of law, Alphonso Phillips was Davis's accomplice. Davis contends that the trial court should likewise have held that, as a matter of law, Terrance Phillips and Willie Smith were also Davis's accomplices, so that their testimony against him would have to be corroborated.

Davis emphasizes that Terrance Phillips was indicted for the same offense as Davis was; however, the mere fact that a witness is indicted for the same crime as the defendant does not alone mark the witness as an accomplice with the defendant in the commission of the crime. *Steele v. State, supra*. The evidence shows that, on the day of the crime, Terrance Phillips went to a nearby community center after school, that Davis and Alphonso Phillips were already there, and that they already had a plan to rob Direct Oil. The evidence shows that the two informed Terrance Phillips of the plan, and that he walked with them in the direction of Direct Oil. There is no evidence that Terrance Phillips participated in the formulation of the plan, or that he helped execute it; rather, it is clear that Terrance Phillips separated himself from Davis and Alphonso Phillips before the commission of the crime. These facts are sufficient to present a jury question as to whether Terrance Phillips was an accomplice in Davis's crime, and to support a finding by

the jury that Terrance Phillips was not an accomplice.

As to Willie Smith, the evidence merely shows that on the morning of March 17, 1993, Davis came to the motel room where Smith and a friend were lodging and that Smith “handled” the gun that Davis used later that day in the murder of Johnny Hazle. No evidence indicates that Smith had any prior knowledge that Davis planned to use the gun in the commission of a crime, or that Smith otherwise participated in the robbery-murder. The only evidence of any complicity on Smith’s part was that, after Davis had robbed Direct Oil and murdered Johnny Hazle, Davis discussed this crime with Smith. We agree that this was not a sufficient basis upon which the trial court could have determined, as a matter of law, that Smith was Davis’s accomplice in the crime; on the contrary, the evidence would support a jury’s finding of fact that Smith was not Davis’s accomplice.

“The test for determining whether there is sufficient corroboration of the testimony of an accomplice consists of eliminating the testimony given by the accomplice and examining the remaining evidence to determine if there is sufficient incriminating evidence tending to connect the defendant with the commission of the offense.” *Ex parte Scott*, 460 So.2d 1371 (Ala. 1984) (quoting *Ware v. State*, 409 So.2d 886, 891 (Ala.Cr.App. 1981)).

“Such corroborative evidence does not have to be very strong, or even sufficient to support a conviction, but merely must logically tend to link the accused with the offense.” *Scott*, at 1373. There was abundant evidence, through the testimony of Terrance Phillips and Willie Smith, to connect Davis with the robbery of Direct Oil and the murder of Johnny Hazle. Moreover, even if the jury considered Terrance Phillips and Willie Smith to be Davis’s accomplices, and thus followed the trial court’s instructions that their testimony would likewise require corroboration, the record provides such corroboration. We therefore find no merit in Davis’s argument as to this issue.

Ex Parte Davis, 718 So.2d 1166, 1170-71 (Ala. 1998) (emphasis in original).

Although Davis contends that the denial of this claim was contrary to, and involved an unreasonable application of, clearly established Federal law, and was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding, he does nothing but repeat the arguments he made in state court.²⁷⁰ The state court’s factual determinations were amply supported by the record, and its legal conclusions were neither contrary to, nor an unreasonable application of, clearly established federal law. Davis is entitled to no relief.

²⁷⁰ Doc. no. 33, at 63-65.

J. The State Court Violated Davis's Constitutional Rights by Applying a Blanket Rule that Hearsay Evidence is Inadmissible in Rule 32 Proceedings

Davis argues that the Alabama courts deprived him of fair sentencing under the Eighth and Fourteenth Amendments when they applied a blanket rule that hearsay evidence is inadmissible in Rule 32 proceedings.²⁷¹

This claim was raised and rejected on appeal from the denial of Davis's Rule 32 petition:

Davis also argues that the circuit court erred in excluding other evidence related to Davis's family environment. Davis's brief on this issue consists of two paragraphs. Davis states only that the circuit court erroneously excluded hearsay and that hearsay evidence is admissible at the sentencing stage of a capital-murder trial. However, Davis does not identify what hearsay was excluded.

What Davis fails to consider is that this evidence was offered in a Rule 32 proceeding and not at the sentencing phase of a capital-murder trial. The Alabama Rules of Evidence do not apply to sentencing hearings, but do apply to Rule 32 proceedings. *See* Rule 101, Ala. R. Evid., and Rule 1101(a), Ala. R. Evid. Rule 804, Ala. R. Evid., specifically forbids the admittance of hearsay evidence. It

²⁷¹ *Id.* at 65-66.

appears that the circuit court correctly applied the law. We find no error here.

Davis v. State, 9 So. 3d 514, 530 (Ala. Crim. App. 2006).

Davis contends that during the Rule 32 evidentiary hearing, he offered the testimony of his family, friends, and others familiar with his childhood, as well as social history testimony from Janet Vogelsang, a licensed clinical social worker, in support of his ineffective assistance of trial counsel claims.²⁷² Davis complains that portions of these witnesses' testimony were excluded by the trial court based on the State's hearsay objection, even though such testimony would have been admissible during the penalty phase.²⁷³ Davis asserts that it is unconstitutional to exclude mitigation evidence on the basis of hearsay during sentencing, and argues that post-conviction counsel could not have established prejudice in support of Davis's ineffective assistance of counsel claims without presenting the readily available evidence that trial counsel could and should have presented during the penalty phase hearing.²⁷⁴

It does not appear that this claim was raised in Davis's petition for writ of *certiorari* on appeal from the denial of his Rule 32 petition.²⁷⁵ As such, it is both unexhausted and procedurally barred because a return to state court would be futile. *See O'Sullivan v.*

²⁷² *Id.* at 65.

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ Rule 32 C.R. Vol. 61, Tab 72.

Boerckel, 526 U.S. 838, 842 (1999); *Collier v. Jones*, 910 F.2d 770, 773 (11th Cir. 1990).

Moreover, “state courts are the final arbiters of state law.” *Agan v. Vaughn*, 119 F.3d 1538, 1549 (11th Cir. 1997). Alabama state courts have held that hearsay is not admissible in a Rule 32 hearing. *See, e.g., Hunt v. State*, 940 So.2d 1041, 1051 (Ala. Crim. App. 2005).

Even though this claim is based primarily on state evidentiary law, and has not been exhausted, it is due to fail on the merits. Davis does not identify what “portions” of the witnesses’ testimony were excluded based on the State’s hearsay objection, nor does he demonstrate how their omission caused him prejudice.

Finally, review of the record reveals that the state court’s evidentiary rulings did not strip Davis of the opportunity to present his claim during the Rule 32 proceedings. Davis is not entitled to relief on this claim.

K. The State Court Violated Davis’s Constitutional Rights When it Excluded the Testifying Expert’s Social History Exhibit as Cumulative

Davis explains that during the Rule 32 hearing, “Ms. Vogelsang testified to Davis’s social history with reference to a testifying exhibit, Petitioner’s Exhibit 114,²⁷⁶ which was duly marked and prominently

²⁷⁶ Petitioner’s Exhibit 114 is located at Rule 32 C.R. Vol. 55, at 6102.

displayed to the court and all counsel.”²⁷⁷ However, when Exhibit 114 was offered into evidence, the State’s objections were sustained.²⁷⁸ The Alabama Court of Criminal Appeals found that, although the social history binder was otherwise admissible, there was no error in excluding the exhibit since it was cumulative of other admitted evidence. *Davis v. State*, 9 So. 3d 514, 530 (Ala. Crim. App. 2006). Davis concedes that the exhibit “may to some extent have tracked Ms. Vogelsang’s testimony,” but argues that such evidence was not merely cumulative of other lay testimony, but rather, “assigned the expert’s analysis of and conclusions regarding significant, relevant facts in an organized way found nowhere else in the record.”²⁷⁹ Davis further contends that the exhibit included matters about which Ms. Vogelsang did not testify.²⁸⁰

The Alabama Court of Criminal Appeals found the following:

Davis argues that the Rule 32 court erred in excluding clinical social worker Jan Vogelsang’s entire binder of notes that consisted of a compilation of her findings regarding Davis’s social history.

Initially, we note that Davis’s social history was introduced for the purpose of showing that mitigating evidence existed and that his trial counsel was ineffective for failing to

²⁷⁷ Doc. no. 33, at 66.

²⁷⁸ Rule 32 R. Vol. 23, at 1134-36.

²⁷⁹ Doc. no. 33, at 66.

²⁸⁰ *Id.*

introduce that evidence. However, in Part I of this opinion we held that Davis's claims of ineffective assistance of trial counsel were procedurally barred because when *Ex parte Jackson* was in effect, Davis was tried. Accordingly, if any error did occur, it was rendered harmless by our holding in Part I.

Moreover, in his brief to this Court Davis argues that "[t]his issue merits this Court's close attention because such an expert's exhibit is indeed the very sort of exhibit that belongs in the jury room in the penalty phase deliberations of a capital murder case along with whatever supporting and discrediting evidence accompanies it." (Davis's brief at pp. 75-75.) The National Association of Social Workers ("NASW") argues that social histories are reliable and important evidence and are widely used in capital-murder cases to show mitigation.

At the Rule 32 proceeding a plethora of other evidence was offered and admitted to show that mitigation evidence did exist. Indeed, the evidence introduced and admitted at the hearing was similar to the evidence contained in Vogelsang's social history binder.

When addressing a similar claim in *Williams v. Anderson*, 174 F. Supp. 2d 843 (N.D. Ind. 2001), *aff'd*, *Williams v. Davis*, 301 F.3d 625 (7th Cir. 2002), a federal court when denying relief, likewise noted:

Williams argues that the post-conviction court's decision denied him due process by precluding the court from considering additional mitigating evidence, as mandated by *Hitchcock v. Dugger*, 481 U.S. 393, 107 S. Ct. 1821, 95 L. Ed. 2d 347 (1987), *Eddings v. Oklahoma*, 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982), and *Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978). In *Skipper v. South Carolina*, 476 U.S. 1, 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986), the Supreme Court held that excluding mitigating evidence as cumulative may be implausible under the facts of a case if the court cannot conclude that the excluded evidence would have had no impact on the jury's deliberations. 476 U.S. at 8, 106 S. Ct. 1669. Thus, Williams argues that the Indiana Supreme Court's determination that the evidence was cumulative impeded the court's ability to consider all relevant facets of his character in determining his sentence, and thus violated *Skipper*.

This court first notes that the evidence was excluded during post-conviction proceedings, and not during the actual trial. Thus, it is unclear whether the protection of

Hitchcock, Eddings, Lockett, and Skipper apply at all.

174 F. Supp. 2d at 872-73.

The social history binder was admissible. The circuit court erred in not allowing this binder to be received into evidence; however, in this case, it is clear that the material in the binder was cumulative to Vogelsang's thorough and lengthy Rule 32 testimony and to testimony offered by other witnesses at the Rule 32 hearing. "The exclusion of admissible evidence does not constitute reversible error where the evidence 'would have been merely cumulative of other evidence of the same nature, which was admitted.'" *Houston v. State*, 565 So. 2d 277, 281 (Ala. Crim. App. 1990) (quoting *Ex parte Lawson*, 476 So. 2d 122, 122 (Ala. 1985)). Accordingly, for the reasons stated above we find no reversible error.

Davis v. State, 9 So. 3d 514, 529-530 (Ala. Crim. App. 2006) (alteration in original).

The denial of this claim was based on the court's factual finding that the material in the binder was cumulative to Vogelsang's testimony and the testimony of other witnesses. While Davis disputes this finding, and argues that it was an unreasonable factual determination, he does not cite to any portions of the record to demonstrate which evidence was not cumulative, and improperly and prejudicially excluded. His conclusory assertion that the exhibit "assigned the

expert's analysis of and conclusions regarding significant, relevant facts in an organized way found nowhere else in the record" is insufficient factual support for this claim.

Davis has not established that the decision of the Court of Criminal Appeals was contrary to, and involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, or was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Davis is not entitled to relief on this claim.

L. The State Court Violated Davis's Constitutional Rights By Adopting Verbatim the State's Proposed Factual Findings and Legal Conclusions

Davis complains that the Rule 32 court abdicated its responsibility to provide an independent review of the issues by adopting *verbatim* the State's proposed findings of fact and conclusions of law, without adopting anything from his own submission.²⁸¹ Davis argues that the court should have made a fair and independent judicial review of the evidence and law, and rendered its own order adopting portions from each party's submission as it deemed appropriate, incorporating any necessary text to explain its independent legal analysis and judgment.²⁸² He asserts that by

²⁸¹ Doc. no. 33, at 67-69.

²⁸² *Id.* at 68.

adopting the State's proposed order *verbatim*, the court violated Supreme Court precedent established in *Anderson v. Bessemer City*, 470 U.S. 564, 572-73 (1985), and *United States v. El Paso Natural Gas*, 376 U.S. 651, 656-57 (1964).

In response, the State first argues that, because this claim raises only an issue of state law, it is not subject to review by this court pursuant to 28 U.S.C. § 2241(c)(3), 28 U.S.C. § 2254(a), and *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). In the alternative, the State contends that the claim is procedurally barred because Davis did not raise it in his Rule 32 petition or on appeal from the denial of that petition.

This claim was raised on appeal from the denial of Davis's Rule 32 petition,²⁸³ in his application for rehearing,²⁸⁴ and in his certiorari petition.²⁸⁵ While the merits of the claim were not addressed by the Rule 32 court, and the claim itself was not identified by either appellate court, the failure of a state appellate court to mention a claim does not mean the claim was not presented. *Dye v. Hofbauer*, 546 U.S. 1, 2-4 (2005). Because the Alabama Court of Criminal Appeals did not find that this claim was procedurally defaulted, there is no procedural bar stemming from any state procedural default.

Moreover, the respondent's argument that the claim is one of pure state law is not persuasive. Davis raised the issue of whether the Rule 32 court's

²⁸³ Rule 32 C.R. Vol. 57, Tab 60, at 4, 53-55.

²⁸⁴ Rule 32 C.R. Vol. 58, Tab 64, at 27.

²⁸⁵ Rule 32 C.R. Vol. 59, Tab 67, at 7-9, 93-105.

verbatim adoption of the Rule 32 Proposed Order submitted by the State in the circumstances of this case was a violation of Davis's rights under "the Due Process Clause of the Alabama Constitution of 1901 (Article 1, Section 6) and/or the Due Process Clause of the United States Constitution."²⁸⁶ Davis elaborated by arguing that the appellate court should not employ the clear error standard on review because the Rule 32 court had essentially "rubber stamped" the State's proposed order, which was "replete with error," and based its conclusions in part on information outside the Rule 32 record.²⁸⁷ Although not presented as a separate and delineated claim for relief, Davis arguably alerted the state courts to the federal constitutional issue.

In any event, Davis's claim is without merit. Although in *Anderson v. City of Bessemer*, 470 U.S. 564, 572 (1985), and *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656-657 (1964), the Supreme Court criticized trial courts' verbatim adoption of findings of fact prepared by prevailing parties, it ultimately held "that even when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous." *Anderson*, 470 U.S. at 572.

Davis identifies two portions of the trial court's order he alleges constitute clear error. First, he alleges that the order erroneously stated that "[t]here are no constitutionally required checklists for mitigation

²⁸⁶ Rule 32 C.R. Vol. 57, Tab 60, at 4; Rule 32 C.R. Vol. 59, Tab 67, at 8-9 (emphasis supplied).

²⁸⁷ Rule 32 C.R. Vol. 57, Tab 60, at 53-55.

investigations.”²⁸⁸ He argues that “this conclusion is wholly contrary to” *Wiggins v. Smith*, 539 U.S. 510, 524-25 (2003), in which the Court noted “that a ‘checklist’ can be found in the standards for capital defense work articulated by the American Bar Association and that the Court has ‘long referred [to the ABA Standards] as ‘guides in determining what is reasonable.’”²⁸⁹

In its order denying Davis’s Rule 32 petition, the trial court stated:

Although Davis faults trial counsel for not subpoenaing his DHR records, **there is absolutely no evidence before this Court that reasonably competent counsel would have been on notice that such records existed.** *There are no constitutionally required checklists for mitigation investigations.* Trial counsel are faced with the realities of limited time and limited resources. Those resources have to be managed in an efficient manner. Thus, this Court does not find that attorneys are expected to subpoena agency records “just in case.” Had Lillie Bell Davis, Davis’s siblings, or Davis himself told his trial counsel that this issue needed to be investigated — that DHR had been involved in the Davis home — this Court would absolutely find ineffective assistance of counsel for failure to investigate, discover and/ or

²⁸⁸ Doc. no. 33, at 68 (alteration in original).

²⁸⁹ *Id.* (alteration in original).

develop this evidence, depending on the strategic decisions made by counsel following their investigation. But that is not what happened here.

Rule 32 C.R. Vol. 62, Tab. 80, at 39-40 (boldface emphasis in original, italicized emphasis supplied).

The Court in *Wiggins* did not indicate that there are “constitutionally required checklists for mitigation investigations.” In fact, *Wiggins* did not mention a checklist at all. Rather, *Wiggins* stated:

Counsel’s conduct similarly fell short of the standards for capital defense work articulated by the American Bar Association (ABA) — standards to which we long have referred as “guides to determining what is reasonable.” *Strickland*, *supra*, at 688, 104 S.Ct. 2052; *Williams v. Taylor*, *supra*, at 396, 120 S.Ct. 1495. The ABA Guidelines provide that investigations into mitigating evidence “should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.” ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(c), p. 93 (1989) (emphasis added). Despite these well-defined norms, however, counsel abandoned their investigation of petitioner’s background after having acquired only rudimentary knowledge of his history from a narrow set of sources. *Cf. Id.*, 11.8.6, p. 133 (noting that among the topics counsel should consider presenting are medical

history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences (emphasis added)); 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed. 1982) (“The lawyer also has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing Investigation is essential to fulfillment of these functions”).

Wiggins, 539 U.S. at 524-25 (emphasis in original). The American Bar Association guidelines regarding the performance of counsel in death penalty cases are not constitutionally required. Thus, the trial court’s statement was not contrary to *Wiggins*. Further, the court notes that the trial court followed *Wiggins* in adjudicating Davis’s claim that counsel were ineffective during the sentencing phase.²⁹⁰

Second, Davis questions the Rule 32 court’s conclusion that “this Court does not know what [defense counsel] Adams did or did not do in preparation for this case.”²⁹¹ Davis argues that this statement is factually false because it is “uncontroverted that trial counsel did not subpoena key documents or make any attempt to secure DHR, school, or other available records.”²⁹² Davis has taken this quote out of context. In

²⁹⁰ Rule 32 C.R. Vol. 62, Tab 80, at 27-44.

²⁹¹ Doc. no. 33, at 68 (alteration in original).

²⁹² *Id.*

denying Davis's claim that counsel were ineffective during the penalty phase, the Rule 32 court stated:

Jimmy Davis's family – and to a very large extent his mother – bears a heavy burden in this case for their role in this matter. *Because Adams did not testify, this Court does not know what Adams did or did not do in preparation for this case. The Court presumes, however, that Adams acted reasonably in the questions he asked his client and his client's mother and in preparing for the penalty phase.* FN.

FN. Further, based on Davis's statement that his attorneys only spoke with his mother and two siblings, this Court presumes Adams spoke with at least two of Davis's siblings. (RR. 863)

Further, the testimony of Giddens establishes that **at no time** did Davis ever mention to his attorneys the abuse suffered at the hands of his mother or the intervention of DHR in the Davis home.

Rule 32 C.R. Vol. 62, Tab 80, at 29 (boldface emphasis in original, italicized emphasis supplied). The court's statement was intended to emphasize that because Davis did not call Adams to testify at the Rule 32 hearing, the court did not have the benefit of Adams' testimony concerning his preparation for the penalty phase. The footnote indicates that the court did not pretend to have no knowledge of anything Adams did or did not do.

Davis has pointed to no clear error in the trial court's order denying the Rule 32 petition. Thus, his claim must fail.

M. The State Failed to Meet its Burden of Proving Capital Murder During the Course of a Robbery

Davis asserts that his conviction should have been vacated because the State failed to prove its case of capital murder committed during a robbery.²⁹³ He argues that no physical evidence linked him with the robbery of Direct Oil or the murder of Mr. Hazle, no eyewitness could identify him as the man who shot the victim, and no reliable evidence corroborated the testimony of the Phillips cousins, who were given plea agreements in exchange for their testimony against him.²⁹⁴

Davis further argues that, even if the evidence was sufficient to prove that he shot Mr. Hazle, the State did not carry its burden of proof on robbery because no money was taken from the scene, and the only evidence to support the robbery element of capital murder was the Phillips cousins' uncorroborated testimony.²⁹⁵ He adds that, without the robbery, the most serious charge for which any of the participants could have been convicted was intentional murder.²⁹⁶

²⁹³ Doc. no. 33, at 69-70.

²⁹⁴ *Id.* at 69.

²⁹⁵ *Id.*

²⁹⁶ *Id.*

Although the claim was not raised in Davis's brief on direct appeal, the Alabama Court of Criminal Appeals nonetheless considered the sufficiency of the evidence:

He does not question the sufficiency of the evidence to support his conviction. Even though he does not raise this issue on appeal, we have reviewed the evidence presented and find it was sufficient for the jury to find the appellant guilty beyond a reasonable doubt of the capital offense charged in the indictment. In fact, the evidence of his guilt is strong and convincing.

Davis v. State, 718 So. 2d 1148, 1156-57 (Ala. Crim. App. 1997).

The Alabama Supreme Court affirmed that decision, and in connection with Davis's claim in his petition for writ of *certiorari* that there was insufficient corroborating evidence to convict him, found that:

"The test for determining whether there is sufficient corroboration of the testimony of an accomplice consists of eliminating the testimony given by the accomplice and examining the remaining evidence to determine if there is sufficient incriminating evidence tending to connect the defendant with the commission of the offense." *Ex parte Scott*, 460 So. 2d 1371 (Ala. 1984) (quoting *Ware v. State*, 409 So. 2d 886, 891 (Ala. Cr. App. 1981)). "Such corroborative evidence does not have to be very strong, or even sufficient to support a conviction, but merely must

logically tend to link the accused with the offense.” *Scott*, at 1373. There was abundant evidence, through the testimony of Terrance Phillips and Willie Smith, to connect Davis with the robbery of Direct Oil and the murder of Johnny Hazle. Moreover, even if the jury considered Terrance Phillips and Willie Smith to be Davis’s accomplices, and thus followed the trial court’s instructions that their testimony would likewise require corroboration, the record provides such corroboration.

Ex parte Davis, 718 So. 2d 1166, 1171 (Ala. 1998).

The denial of this claim by the state court was neither contrary to, nor an unreasonable application of, clearly established federal law. The evidence, taken in the light most favorable to the State, amply established that the murder was committed during the course of a robbery attempt, and that Davis was indeed the man who shot and killed the victim.

N. Double Counting of Robbery as an Element of the Underlying Offense and as an Aggravating Circumstance at Sentencing Violated the Fifth, Sixth, Eighth, and Fourteenth Amendments

Davis argues that one of the aggravating circumstances presented by the State during the penalty phase of the trial was the fact that the murder was committed during the course of a first degree robbery: a fact that also was necessary to prove the offense of capital murder.²⁹⁷ Davis argues that the “double

²⁹⁷ Doc. no. 33, at 70-71.

counting” of robbery “both as an elevator in the guilt phase and as an aggravator in the penalty phase” violated his right to a reliable and rational sentence, and failed to narrow the class of cases eligible for the death penalty as required by federal law.²⁹⁸

This claim was first raised in Davis’s amended petition for writ of certiorari on direct appeal, and it was denied without discussion by the Supreme Court of Alabama. *Ex parte Davis*, 718 So. 2d 1166, 1169, 1178 (Ala. 1998). The Alabama Supreme Court’s denial of this claim was neither contrary to, nor an unreasonable application of, clearly established federal law.

“To pass constitutional muster, a capital sentencing scheme must ‘genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.’” *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988) (quoting *Zant v. Stephens*, 462 U.S. 862, 877 (1983)). The requirement that a jury in the sentencing phase find an aggravating circumstance before it can impose a death sentence, narrows the class of persons eligible for the death penalty. *Id.* The use of an aggravating circumstance is only one means of narrowing the class of death-penalty-eligible defendants. *Id.* The narrowing function may be performed by jury findings at the guilt or sentencing phases of a trial. *Id.* at 245. In Davis’s case, the “narrowing function” was performed by the jury at the guilt phase of his trial when it found him guilty of committing an intentional murder during the course of a first degree robbery. “The fact that

²⁹⁸ *Id.*

the sentencing jury is also required to find the existence of an aggravating circumstance in addition is no part of the constitutionally required narrowing process, and so the fact that the aggravating circumstance duplicated one of the elements of the crime does not make this sentence constitutionally infirm.” *Lowenfield*, 484 U.S. at 246. *See also Johnson v. Singletary*, 991 F.2d 663, 669 (11th Cir. 1993) (finding no constitutional infirmity in a Florida statute permitting a defendant to be eligible for the death penalty based upon a felony murder conviction, and to be sentenced to death based upon an aggravating circumstance that duplicates an element of the underlying conviction).

Davis is not entitled to relief on this claim.

O. The Trial Court’s Failure to Conduct Individual Sequestered *Voir Dire* Deprived Davis of His Rights to Due Process and a Fair Trial by an Impartial Jury

Davis asserts that, because he is an African-American who was charged with capital murder of a white man who was well known in the community, his case had racial overtones, and that individual *voir dire* was necessary to ensure that he obtained a fair and impartial jury.²⁹⁹ Specifically, Davis contends that, during *voir dire*, one potential juror, Nicholas Deljudice, made blatant references to race.³⁰⁰ Davis speculates

²⁹⁹ Doc. no. 33, at 71-73.

³⁰⁰ *Id.* at 72. The trial transcript reveals that the “blatant references to race” made by Deljudice were made at a sidebar, outside

that many other jurors likely held similar racially-biased attitudes, but were uncomfortable expressing them in front of the group.³⁰¹ Davis also complains that the venire was exposed to the beliefs of other potential jurors about the victim, the defendant, and the nature of the crime which may have caused him prejudice.³⁰²

of the presence of the rest of the potential jurors. When asked at sidebar what he had heard about the case, Deljudice explained:

Was strictly in the community and strictly scuttlebutt. It's never really accurate, not the intellectual community.

Anyway, the scuttlebutt is in the community amongst the blacks that it was a hit. They didn't mention names of who did. I don't know that guy from anybody else. The scuttlebutt was that it was a hit, that he, Hazle, was informing on some of the narcotics, informing, and that they hit him. And this is what was said. I don't know if it's any truth in it or not.

...

That's right, that's all I heard. And I know – like I said, I know his brother and his brother said nothing of this nature. Just was strictly scuttlebutt amongst the gang kids.

R. Vol. 2, at 109-110.

³⁰¹ Doc. no. 33, at 72.

³⁰² *Id.* at 72-73. Davis asserts that:

Specifically, several potential jurors stated in the presence of their panels that Mr. Hazel [*sic*] had worked hard, was polite, was a church-going man, had a brother who was well-known in the community and had left other family behind, and was friendly to most

This claim was first raised in Davis's second petition for writ of certiorari on direct appeal,³⁰³ and it was summarily denied by the Alabama Supreme Court. *Ex parte Davis*, 718 So. 2d 1166, 1169, 1178 (Ala. 1998).

It is well established that trial courts are granted wide discretion in conducting *voir dire*. The Supreme Court has never held that individual, sequestered *voir dire* is constitutionally required, but has left that determination to the discretion of the trial court. *Mu'Min v. Virginia*, 500 U.S. 415, 431-32 (1991). As in *Mu'Min*, the *voir dire* proceedings in Davis's case were "by no means perfunctory." *Id.* at 431. The record reflects that the trial court allowed 127 potential jurors to be questioned in groups of fourteen.³⁰⁴ Defense counsel did not object to that process, nor did they request individual sequestered *voir dire*. The *voir dire* of each fourteen-member panel was extensive and thorough.³⁰⁵ Review of the transcript reveals no comments made by prospective jurors in the presence of other panel members that would have caused bias or

people. Moreover, one of the potential jurors stated his opinion in open court that "this case is violent, very violent case." Tr. 301. One panel also heard that Davis had been suspended from school several times, and that he attended school sporadically. Tr. 413-14.

Id.

³⁰³ 3 C.R. Vol. 10, Tab 35, at 70-75.

³⁰⁴ R. Vol. 1, Tab 4, at 21-23.

³⁰⁵ R. Vol. 1, Tab 5, at 29-95; R. Vol. 2, at 96-296; R. Vol. 3, at 297-492.

prejudice.³⁰⁶ Furthermore, individual questioning was allowed if needed.

The trial court's examination of prospective jurors was within "the wide discretion granted to the trial court in conducting voir dire." *Mu'Min*, 500 U.S. at 427. There is no indication that the petitioner was prejudiced by the trial court's decision to conduct *voir dire* examination of prospective jurors in panels, rather than individually. In sum, the Supreme Court of Alabama's denial of this claim was neither contrary to, nor an unreasonable application of, clearly established federal law. This claim is due to be dismissed.

P. Davis's Rights to Due Process, a Fair Trial, and a Reliable Verdict from a Fair and Impartial Jury Were Violated When the Trial Court Failed to "Life Qualify" the Veniremembers in Accordance with *Morgan v. Illinois*

Davis argues that he was denied an adequate *voir dire* because the trial court failed to "life qualify" the venire by asking whether any juror would automatically impose the death penalty, in accordance with *Morgan v. Illinois*, 504 U.S. 719, 729 (1992).³⁰⁷ He argues that several potential jurors were struck for cause because they had fixed opinions against the death penalty, but complains that he was not afforded the opportunity to determine whether any potential jurors had fixed opinions in favor of it.³⁰⁸ This claim

³⁰⁶ *Id.*

³⁰⁷ Doc. no. 33, at 74.

³⁰⁸ *Id.*

was raised in Davis’s second petition for writ of certiorari on direct appeal,³⁰⁹ and it was summarily denied by the Alabama Supreme Court. *Ex Parte Davis*, 718 So. 2d 1166, 1172, 1179 (Ala. 1998).

The Sixth Amendment guarantees criminal defendants the right to a fair trial by an impartial jury. *Skilling v. United States*, 561 U.S. 358, 438 (2010) (citing *Irvin v. Dowd*, 366 U.S. 717, 723 (1961)). The purpose of *voir dire* is to determine whether prospective jurors can render an impartial verdict based solely on the evidence and the court’s instructions. *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981).

The *voir dire* inquiry used to determine whether there are jurors who would vote automatically to impose the death penalty if a defendant were found guilty of a capital crime is referred to as the “reverse-Witherspoon” inquiry, because it arose from a line of death penalty *voir dire* cases exemplified by *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

Brown v. Jones, 255 F.3d 1273, 1279 n.6 (11th Cir. 2001).

The Supreme Court has held that defendants have a right to conduct that inquiry at *voir dire*. *Morgan*, 504 U.S. at 736 (holding that the defendant “was entitled, *upon his request*, to inquiry discerning those jurors who, even prior to the state’s case in chief, had predetermined the terminating issue of his trial, that being whether to impose the death penalty”)

³⁰⁹ C.R. Vol. 10, Tab 35, at 79-81.

(emphasis supplied). That right can be waived, however. There is no clearly established federal law requiring a court to ask life-qualifying questions *sua sponte* during *voir dire*, when a defendant has requested that line of questioning himself.

Moreover, to the extent Davis may be attempting to assert that counsel was ineffective for failing to life-qualify the jury,³¹⁰ he has failed to satisfy both prongs of the *Strickland* analysis. See *Hightower v. Schofield*, 365 F.3d1008, 103-538 (11th Cir. 2004), *abrogated on other grounds*, 545 U.S. 1124 (2005) (to succeed on a reverse-*Witherspoon*-based claim of ineffective assistance, defendant must show that counsel's errors resulted in the seating of jurors who were unconstitutionally biased in favor of death); *Stamper v. Muncie*, 944 F.2d 170, 177 (4th Cir. 1991) (petitioner alleging ineffective assistance based on counsel's failure to explore with certain members of the venire the "reverse-*Witherspoon*" inquiry must demonstrate how any shortcoming on trial counsel's part constituted prejudice sufficient to satisfy the second prong of the *Strickland* test). Davis has not produced any evidence that any of the seated jurors were unconstitutionally biased in favor of death.

The state court's denial of this claim did not result in a decision that was contrary to, or involved an

³¹⁰ Within this claim, Davis makes the assertion: "Neither the court nor trial counsel attempted to "life qualify" the jury by asking whether any veniremember would automatically impose the death penalty. Davis was denied a fair trial because the jury was weighted in favor of death." Doc. no. 33 at 74. He elaborates no further.

unreasonable application of, clearly established federal law.

Q. The Trial Court Erred By Granting the State's Motions to Strike for Cause Potential Jurors Elaine Thomas and Sandra Tilley

Davis asserts that in capital cases, the right to a fair and impartial jury requires that veniremembers not be struck for cause merely because they express reservations about the death penalty.³¹¹ He argues that potential jurors Elaine Thomas and Sandra Tilley should not have been struck for cause for expressing their reservations about the death penalty, because their opinions did not affect their ability to perform their duties as jurors.³¹² According to Davis, the trial court used the wrong standard when it granted the State's cause challenge on the grounds that Ms. Thomas "clearly stated she has a fixed opinion against the death penalty."³¹³ He also contends that the trial court erroneously stated that Ms. Tilley "continued to be adamant in her beliefs that she would require proof beyond all doubt in order to either convict or to impose a death penalty," and incorrectly characterized Ms. Tilley's answers to *voir dire* questions as an indication that she was unable to convict under the reasonable doubt standard.³¹⁴

³¹¹ Doc. no. 33, at 75.

³¹² *Id.* at 75-77.

³¹³ *Id.* at 76 (quoting R. Vol. 3, at 314).

³¹⁴ *Id.* (quoting R. Vol. 3, at 314-15) (emphasis supplied).

This claim first was raised in Davis's second petition for writ of certiorari on direct appeal,³¹⁵ and it was summarily denied by the Supreme Court of Alabama. *Ex Parte Davis*, 718 So. 2d 1166, 1169, 1178 (Ala. 1998). That decision was neither contrary to, nor an unreasonable application of, clearly established federal law, nor was it based on an unreasonable determination of the facts in light of the evidence presented.

In *Witherspoon v. Illinois*, 391 U.S. 510 (1968), the Supreme Court held that "a sentence of death cannot be carried out if the jury that imposed it was chosen by excluding potential jurors for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." *Id.* at 522. This standard was later clarified in *Wainwright v. Witt*, 469 U.S. 412 (1985), when the Supreme Court held that a prospective juror may be excluded for cause because of his views on capital punishment when "the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Id.* at 424 (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)). The Court further held that, because the determination of juror bias involves "credibility findings whose basis cannot be easily discerned from an appellate record," the trial court's factual findings are entitled to deference on habeas review and are presumed correct under § 2254(d). *Wainwright*, 469 U.S. at 429.

³¹⁵ C.R. Vol. 10, Tab 35, at 82-89.

During *voir dire*, the following exchanges took place with potential juror Elaine Thomas:

MR. HUBBARD: Okay. With that in mind, we move into an area now for a few questions on something very heavy, if you will. And if you find this defendant guilty, as I told you before, you will then be asked to render or recommend a sentence to Judge Street, if you find him guilty of this capital murder offense. These two recommendations can only be life without parole or the death penalty.

Be candid and honest with us if you will at this time. Do any of you have a fixed opinion against the imposition of the death penalty?

You may have read about it a million times, may have seen about it on television a million times, and you never thought that it might come down to you sitting in a jury box possibly having a part in rendering a verdict in that way. But I'm telling you and the Judge will tell you that that's a very real possibility in this situation, that you may have that decision; that decision

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to make a recommendation as to that.

So what I want to ask you is, do any of you have a fixed opinion against the death penalty, whether it be religious, moral grounds, or any other type grounds that we can think of?

Yes, ma'am.

PJ THOMAS: Elaine Thomas. I don't like the death penalty.

MR. HUBBARD: Okay. Let me ask you just a couple of questions, Ms. Thomas, and I appreciate your candor there with us.

And you said you don't like the death penalty. Is there any set of circumstances that you can imagine in your mind for which you would vote for the death penalty to be imposed? Or would you always say, "I don't care what the circumstances are, I'm going to vote against the death penalty"?

PJ THOMAS: I just wouldn't want to be in a case where I would have to decide that someone should die. I wouldn't — I wouldn't want that for me.

MR. HUBBARD: And again, I understand what you're saying and I don't want to

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press you too much, because I know that lawyers tend to do that at times. But I have to try to get a yes or no answer for the record here.

PJ THOMAS: But if I had to vote for a death penalty, I would probably vote no. If I was on the jury and I was asked, I would probably say life without parole instead of death penalty. To be honest.

MR. HUBBARD: Can you imagine anytime you're sitting in a jury, regardless, not necessarily this defendant or not necessarily this case, but any case, can you ever imagine yourself sitting in a jury and voting for the death penalty?

PJ THOMAS: No.

MR. HUBBARD: All right. So I assume then you would have a fixed opinion against the imposition of the death penalty.

PJ THOMAS: Uh-huh (affirmative).

MR. HUBBARD: Am I correct?

PJ THOMAS: Yeah. I wouldn't vote for the death penalty.

MR. HUBBARD: That's fine. Thank you, ma'am. This is a very weighty decision. Everybody has to make up their

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own mind and I appreciate your candor.

. . . .

MR. GIDDENS: Okay. This question is to Ms. Thomas, Ms. Elaine Thomas. You have indicated earlier that you said, I believe, you don't like the death penalty and you would not want to be in the case. And I believe you said you would probably vote "no" in that event on the death penalty.

PJ THOMAS: Uh-huh (affirmative).

MR. GIDDENS: Do you understand that this case has two phases? You have a guilt, to determine the — the jury determines the guilty or not guilty of the defendant. And then you have the penalty phase to decide the punishment. And you believe you would probably vote "no."

Could you sit on the part whereby you determined the guilt or not guilty? I mean, would your feeling on the death penalty, do you think would prevent you from sitting in another one?

PJ THOMAS: I probably could sit there, but I wouldn't vote for it.

MR. GIDDENS: Well, my question is, could you decide on the guilt or innocence from the evidence presented to you from the witness stand —

PJ THOMAS: Yeah.

R. Vol. 2, at 285-286; R. Vol. 3, at 305-306.

The following took place with potential juror Sandra Tilley:

PJ TILLEY: My name is Sandra Tilley. And before I can impose the penalty, it would have to be beyond any doubt, you know.

MR. HUBBARD: Okay. And perhaps — Okay. Well, I understand. In other words, if the Judge charged you that if you were convinced beyond a reasonable doubt then you would still require beyond all doubt or to 100 percent?

PJ TILLEY: Yeah. I wouldn't want to sentence somebody to that, you know, if I had any doubt —

MR. HUBBARD: I understand.

PJ TILLEY: — that he was guilty.

MR. HUBBARD: What I'm saying is though, if the Judge charged you of one thing that only required beyond a reasonable doubt, you would still hold us to a higher burden of proof; that is, beyond all doubt?

PJ TILLEY: Yeah.

MR. HUBBARD: Is that correct?

PJ TILLEY: Yeah. I would want to be sure that he did it, you know.

MR. HUBBARD: Well, I don't want to mislead you. I know this is a difficult concept. But we're talking about two different phases of a trial here. The first phase would be for us to prove to you beyond a reasonable doubt that this defendant is guilty. Okay.

And then the next phase is to decide what recommendation would be made for that. So that you could actually make a finding that the defendant was guilty of capital murder and then still recommend life without parole or the death penalty, whichever, you know, you preferred. Do you understand what I'm saying there?

PJ TILLEY: Yeah.

MR. HUBBARD: But what you're saying is, as I understand it, is regardless of what the Judge said about beyond a reasonable doubt, that you had to be satisfied beyond a reasonable doubt and only that level of proof was necessary, you

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would still require proof beyond all doubt or to 100 percent; is that correct?

PJ TILLEY: Yes, you know. I would.

. . . .

MR. GIDDENS: Okay. And, Ms. Tilley, I believe you stated that you would not impose a death penalty unless it convinced to you beyond any doubt; is that correct?

PJ TILLEY: Yes. Before I would want to take someone's life I would want to be sure that he did it. I wouldn't — I wouldn't want to have any doubt he was guilty.

MR. GIDDENS: Would that be relative to imposing the death penalty? My question again would be to —

PJ TILLEY: After I heard the evidence, if I felt sure that he was guilty, then I would have no problem with, you know, with capital punishment. But if I had any doubt that he was guilty, no, I couldn't.

MR. GIDDENS: Okay. Again, we go back to beyond a reasonable doubt. And we have again, we have two parts. We have a guilt or what we call the guilt phase, that decides guilty and not guilty of capital murder.

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My question is, can you sit on that part and could you decide his guilt or innocence, so to speak, and are you saying you would impose the burden they must prove it beyond all doubt at that point?

PJ TILLEY: Well, I would want to feel sure that he was guilty.

MR. GIDDENS: Okay. Beyond all doubt?

PJ TILLEY: I wouldn't want to have any doubt he was guilty to take his life.

MR. GIDDENS: Okay.

R. Vol. 2, at 290-291; R. Vol. 3, at 306-307.

When the State challenged Ms. Thomas and Ms. Tilley, the following transpired:

MR. HUBBARD: Judge, the state would make two challenges at this time. One, Ms. Elaine Thomas, and I believe the record reflects that she could not vote for the death penalty under any circumstances.

We would also move to strike Sandra Tilley, who indicated, as I understand it, that she could not follow the Judge's instructions in that she would require the state of Alabama to prove beyond all doubt its case, and

beyond all doubt in order to have the defendant sentenced to the death penalty, as opposed to what the law would be with regard to beyond a reasonable doubt.

We would ask both of those to be struck by challenge.

THE COURT: Any challenges by the defense?

MR. ADAMS: No challenges. Are we allowed to make a response?

THE COURT: All right.

MR. ADAMS: Our response on the challenge on Juror Thomas goes exactly back to the motion we filed prior to voir dire about the defendant being entitled to a jury of his peers. This would be a classic example where a black member is wanting to be excluded by the state on the premise that she has now been death qualified. When she told the Court in response to one of Mr. Giddens' questions that she would probably render a verdict based on guilt or innocence, that her problem would be returning a verdict for capital punishment in the penalty phase.

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So we would renew our motion that we filed that it would infringe his right to a jury of his peers if she's excluded.

And on Ms. Tilley, I believe Ms. Tilley said she wanted just to be sure and have no doubt in her mind before she would impose the death penalty. I don't think that she has a problem with the death penalty and I don't think she has a problem with the presumption of reasonable doubt, what your instructions might be. She just wants to be satisfied completely in her mind.

So we would oppose the challenge of Ms. Tilley.

THE COURT: Response by the state?

MR. HUBBARD: In the first instance, Judge, with Elaine Thomas, I don't care whether she's black, white, green or purple. The law is clear in that the state can challenge any individual who says that they basically are conscientiously objecting to the imposition of the death penalty. Whether she could serve as a fair juror on the trial part and an unfair juror on the death penalty

part has already been decided — and we feel like decided correctly — that she is not a juror that is qualified to serve on this particular jury under the Whitt decision.

As far as Ms. Tilley is concerned, I understood and I tried to be as thorough as I could be with her in explaining to her what beyond a reasonable doubt and beyond all doubt meant. And each time she brought it to my attention that she could not do anything unless she was satisfied 100 percent beyond all doubt. And I think that's certainly a reason to be able to challenge her in that regard.

THE COURT: Anything further?

MR. ADAMS: No, sir.

THE COURT: The Court has heard the arguments made to the state's challenge of juror Elaine Thomas and Sandra Tilley. The Court finds from their responses that challenges are well made in that Ms. Thomas has clearly stated she has a fixed opinion against the death penalty. And Ms. Tilley, despite attempts to say otherwise, continued to be adamant

in her beliefs that she would require proof beyond all doubt in order either to convict or to impose a death penalty after conviction at the guilt phase.

Both challenges are granted.

R. Vol. 3, at 312-315.

The transcript amply supports the determination that the views of both Thomas and Tilley would have prevented, or substantially impaired, the performance of their duties as jurors in accordance with their instructions and oath. Although Ms. Thomas indicated that she could decide on the guilt or innocence from the evidence presented on the witness stand, she never contradicted her repeated declarations that she would not vote to impose the death penalty. Ms. Tilley consistently maintained that she would not impose the death penalty unless she was convinced beyond *all doubt*, rather than beyond a *reasonable doubt*. The trial court's findings are "credibility findings whose basis cannot be easily discerned from an appellate record," and they are entitled to deference from this court. *See Wainwright*, 469 U.S. at 429. Davis has failed to demonstrate that, when the state court rejected this claim, it relied on erroneous facts, applied law contrary to established United States Supreme Court precedent, or construed the applicable law in an objectively unreasonable manner. He is, therefore, not entitled to *habeas* relief on this ground.

R. The Trial Court's Failure to Strike for Cause Jurors Who Demonstrated Bias Against

Davis Deprived Him of His Rights to Due Process and a Fair Trial by an Impartial Jury

Davis asserts that the trial court erroneously failed to *sua sponte* remove for cause potential jurors Mary Deese and Robert Tate.³¹⁶ Although defense counsel

³¹⁶ Doc. no. 33, at 77-78. Davis asserts that:

Veniremember Mary Deese stated that she knew the victim's family from church and expressed that her knowledge of the family would cause problems for her if she were selected to sit on the jury. Although Ms. Deese acknowledged that she would try to set her feelings aside, she was so uncomfortable with her knowledge of the Hazel [sic] family that she again brought it to the court's attention in response to a question about pretrial publicity. Ms. Deese stated, "I knew too many of the family. I've known them for years, the family." Tr. 112. The trial court acknowledged that Ms. Deese probably had contact with the victim's family and talked about the crime with them.

Id. at 77 (alteration provided). With regard to Robert Tate, Davis complains that:

Potential Juror Robert Tate answered during voir dire that he had heard Mr. Hazel [sic] was killed in a gang hit. Tr. 310. The trial court, which had previously granted a motion in limine to prevent any mention of gangs or gang-related activity because of the inherent prejudice involved, failed to remove Mr. Tate for cause. Tr. 310-11. The fact that a veniremember who possessed such presumptively prejudicial information remained on the panel violated Davis'[s] right to be tried by a fair and impartial jury. The defense was forced to use a peremptory strike to remove Mr. Tate from the jury.

Id. at 77-78 (alteration supplied).

did not challenge either potential juror for cause,³¹⁷ Davis nonetheless argues that the court's failure to remove them *sua sponte* forced him to use valuable peremptory challenges.³¹⁸

Davis raised this claim in his second petition for writ of *certiorari* on direct appeal.³¹⁹ The Alabama Supreme Court found that the trial court did not abuse its discretion or commit plain error in failing to strike the jurors:

Davis next argues that, during voir dire examination of the venire, the trial court erred to reversal in failing to strike for cause certain members of the venire who, according to Davis, gave responses indicating a bias against him. As Davis points out, it is fundamental that jurors who display prejudice or bias against a defendant should be removed for cause from the petit jury panel. *Ross v. Oklahoma*, 487 U.S. 81, 108 S. Ct. 2273, 101 L. Ed. 2d 80 (1988); *State v. Freeman*, 605 So. 2d 1258 (Ala. Cr. App. 1992). He argues that the trial court should have struck these jurors for cause from the venire, and that its failure to do so forced his defense counsel to use valuable peremptory strikes to remove them from the venire. Davis concludes that this amounts to a denial of his right to a fair

³¹⁷ R. Vol. 3, at 312; R. Vol. 2, at 138-141.

³¹⁸ Doc. no. 33, at 78.

³¹⁹ C.R. Vol. 10, Tab 35, at 65-70.

and impartial jury and that he is therefore entitled to a new trial.

To justify a challenge for cause, there must be a proper statutory ground or “some matter which imports absolute bias or favor, and leaves nothing to the discretion of the trial court.” *Clark v. State*, 621 So. 2d 309, 321 (Ala. Cr. App. 1992) (quoting *Nettles v. State*, 435 So. 2d 146, 149 (Ala. Cr. App. 1983)). This Court has held that “once a juror indicates initially that he or she is biased or prejudiced or has deep-seated impressions” about a case, the juror should be removed for cause. *Knop v. McCain*, 561 So. 2d 229, 234 (Ala. 1989). The test to be applied in determining whether a juror should be removed for cause is whether the juror can eliminate the influence of his previous feelings and render a verdict according to the evidence and the law. *Ex parte Taylor*, 666 So. 2d 73, 82 (Ala. 1995). A juror “need not be excused merely because [the juror] knows something of the case to be tried or because [the juror] has formed some opinions regarding it.” *Kinder v. State*, 515 So. 2d 55, 61 (Ala. Cr. App. 1986). Even in cases where a potential juror has expressed some preconceived opinion as to the guilt of the accused, the juror is sufficiently impartial if he or she can set aside that opinion and render a verdict based upon the evidence in the case. *Kinder*, at 60-61. In order to justify disqualification, a juror “must have more than a bias, or fixed

opinion, as to the guilt or innocence of the accused”; “[s]uch opinion must be so fixed . . . that it would bias the verdict a juror would be required to render.” *Oryang v. State*, 642 So. 2d 979, 987 (Ala. Cr. App. 1993) (quoting *Siebert v. State*, 562 So. 2d 586, 595 (Ala. Cr. App. 1989)).

Ex Parte Davis, 718 So. 2d at 1171-72 (alterations and ellipses in original). With respect to potential juror Mary Deese, the Alabama Supreme Court found:

Davis next argues that, during voir dire, juror no. 24 indicated a strong affiliation with the victim’s family and that she therefore should have been struck for cause. Davis did not challenge this juror for cause; thus, we need only determine whether the trial court committed plain error in failing to strike juror no. 24 sua sponte. “‘Plain error’ arises only if the error is so obvious that the failure to notice it would seriously affect the fairness or integrity of the judicial proceedings.” *Ex parte Bankhead*, 585 So.2d 112, 117 (Ala. 1991).

During voir dire, juror no. 24 told the trial court that she knew the victim’s family from church and that she did not want to sit on the jury because she knew too many of the victim’s family members. Juror no. 24 stated, in pertinent part:

[Defense counsel]: Yes ma’am, you knew Mr. Hazle?

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[Juror 24]: Yes, I knew his family.
They're members of the
church where I attend.

. . . .

[Defense counsel]: All right, . . . would the
fact that you knew all
these people, would that
cause you any problems if
you were selected on this
jury?

[Juror 24]: I'm afraid it would.

[Defense counsel]: All right. Let me put it to
you another way then. If
you were selected on this
jury, would you be able to
set aside the fact that you
knew Johnny Hazle or
his family and reach a de-
cision based solely on the
evidence in the case?

[Juror 24]: I would try.

[Defense counsel]: Okay. That's a pretty
good answer, but are you
saying you're not sure?

[Juror 24]: Yes, sir.

[Defense counsel]: Do you think it might in-
fluence you in some way?

[Juror 24]: I'm afraid so.

However, the trial court questioned juror no. 24 fur-
ther, as follows:

[The Court]: . . . [L]et me ask you a question. Is your answer one really that you would be uncomfortable in sitting as a member of the jury and would rather not?

[Juror 24]: Yes, sir.

[The Court]: I understand that. The legal question, however, is if in fact you were selected could you sit as a fair and impartial juror, put out of your mind whatever you have heard from any family members of the Hazle family, or anything you've heard on any news reports of any kind, listen just to the evidence in this case, and if you had to from that evidence strictly determine what the facts are and apply the law?

[Juror 24]: Yes, I think I could, yes.

[The Court]: But your answer is you had rather not; is that it?

[Juror 24]: I have never been in court. I don't know anything about it.

[The Court]: I understand.

[Juror 24]: *But I could.*

(Emphasis added.)

We agree with the State that the voir dire of juror no. 24 does not reveal an absolute bias or favor on her part; on the contrary, she was forthright in expressing both her reservations about serving on the jury and her belief that she could overcome those reservations and properly render a decision in the case, based upon the evidence and the law. In view of this, we find no plain error in the trial court's failure to strike this juror sua sponte.

Ex Parte Davis, 718 So. 2d 1166, 1172-73 (Ala. 1998) (alterations and emphasis in original).

With respect to potential juror Robert Tate, the following exchange took place, at side bar, during *voir dire*:

THE COURT: Mr. Tate, I believe earlier when questions were asked about do you know anything about what happened at the Direct Oil or had you heard anything, I believe your answer was that you just heard what the other people were saying?

PJ TATE: That was what I heard, just hearsay, you know.

THE COURT: Right. As quietly as you can, can you tell us what it is that you heard said?

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PJ TATE: Well, what I heard was this was a gang member and he had —

THE COURT: Keep quiet as you can.

PJ TATE: Had to kill a white man to join that gang. Now, I heard that. I don't know if it's so or not.

THE COURT: I believe you told us you could — any of that that you heard you could put out of your mind and not give any consideration in the deliberation; is that correct:

PJ TATE: I think I probably could.

THE COURT: Just listen to the evidence that's presented?

PJ TATE: The evidence that's presented over there is what I want to go by.

THE COURT: All right. Any other questions?

MR. ADAMS: Who told you that it had something to do with a gang?

PJ TATE: I don't even remember. It's just friends. There's several people talking about it. I don't

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remember who it was.
Said that's what it was
all about, that they had
to go out and kill a white
man to join a gang. You
know, whether it's so or
whether it's not, I don't
know.

R. Vol. 3, at 309-311. In its opinion on direct appeal, the Alabama Supreme Court did not discuss the trial court's failure to *sua sponte* strike juror Tate, but implicitly found no plain error had occurred. *Ex Parte Davis*, 718 So. 2d 1166, 1169, 1178 (Ala. 1998).

Davis offers no Supreme Court precedent to support his inchoate claim that it is the trial court's responsibility to *sua sponte* dismiss prospective jurors for cause. Instead, the issue in the case cited by the petitioner, *Ross v. Oklahoma*, 487 U.S. 81 (1988), was whether the trial court had committed reversible error by failing to grant the defendant's motion to excuse a potential juror for cause. In that case, the Supreme Court expressly held that the an erroneous denial of a for-cause challenge of a juror does not amount to a constitutional infirmity, unless the challenged juror is actually seated on the defendant's jury. *Id.* at 89-91; *see also United States v. Martinez-Salazar*, 528 U.S. 304, 316 (2000). Thus, the relevant Supreme Court precedent does not impose a duty on the trial court to *sua sponte* strike jurors for cause as a result of bias, and it only allows a habeas petitioner to complain of a trial court's denial of his challenges for cause when the challenged veniremembers actually end up sitting on the jury. *Heath v. Jones*, 941 F.2d 1126,

1132-33 (11th Cir.1991) *cert. denied*, 502 U.S. 1077 (1992).

In this case, even though Davis failed to raise a cause challenge against either of the potential jurors about whom he now complains, he was able to remove them by exercising peremptory challenges. Neither Deese nor Tate was seated on the jury. Thus, even setting aside the fact that the trial court was not required to *sua sponte* exclude potential jurors Deese and Tate for cause, Davis did not suffer a constitutional injury because neither of those challenged jurors actually sat on his jury.

Moreover, Davis may not assert a constitutional violation based on an alleged loss of peremptory challenges, as the Supreme Court has “reject[ed] the notion that the loss of a peremptory challenge constitutes a violation of the constitutional right to a impartial jury.” *Ross*, 487 U.S. at 88 (alteration supplied). The state court’s denial of this claim was neither contrary to, nor an unreasonable application of, clearly established federal law.

S. The Use of Improper Jury Instructions Deprived Davis of His Fifth, Sixth, Eighth, and Fourteenth Amendment Rights

Davis contends that the court read erroneous instructions to the jury, and in so doing, decreased the burden of proof in violation of Supreme Court precedent and his rights to due process and a fair trial.³²⁰

1. *Reasonable doubt*

³²⁰ Doc. no. 33, at 78-79.

Davis asserts that the trial court's reasonable doubt instruction erroneously afforded the jurors the alternative of convicting based on moral certainty. He claims that the court used the terms "moral certainty" and "reasonable doubt" interchangeably, thereby decreasing the burden of proof and implying that acquittal was not mandatory if the State failed to carry its burden of proof beyond a reasonable doubt.³²¹

Davis raised this claim in his second petition for certiorari on direct appeal.³²² The Alabama Supreme Court summarily denied the claim. *Ex Parte Davis*, 718 So. 2d 1166, 1169, 1178 (Ala. 1998). That denial was neither contrary to, nor an unreasonable application of, clearly established federal law.

The record reflects that the trial court gave the following instructions to the jury:

Now, in coming before you, a jury of his peers, upon his plea of not guilty the defendant is presumed to be innocent of the charge or charges against him. The presumption of innocence remains with a defendant through every stage of the trial and during your deliberations on the verdict and is not overcome unless from all of the evidence in the case you are convinced beyond a reasonable doubt that the defendant is guilty.

The presumption of innocence with which the defendant enters into the trial is a fact in the case which must be considered with all of

³²¹ *Id.*

³²² C.R. Vol. 10, Tab 35, at 77-78.

the evidence and is not to be disregarded by you.

To state that principle another way, a defendant, although accused of crime, begins a trial with a clean slate, with no evidence against him. The law then permits nothing but legal evidence presented before the jury to be considered in support of any charge against the accused. The presumption of innocence follows a defendant as a matter of evidence until his guilt is established by the evidence beyond a reasonable doubt.

The presumption of innocence alone is sufficient to acquit a defendant — that is, to find a defendant not guilty — unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt from all of the evidence in the case.

Now, Ladies and Gentlemen, the burden is upon the state of Alabama to convince you members of the jury from the evidence and from all reasonable and proper inferences that can be drawn therefrom beyond a reasonable doubt and to a moral certainty that the defendant is guilty as charged in the indictment before you can convict him of that charge. And this burden remains on the state throughout the case. The defendant is not required to prove his innocence.

Now, the terms “reasonable doubt” and “moral certainty” are interchangeable terms, and actually are legal equivalents. That

means that if the jury is convinced beyond a reasonable doubt of the guilt of the defendant, or if the jury is convinced to a moral certainty of the guilt of the defendant, in either event you should then convict the defendant of the appropriate charge.

On the other hand, if the jury is not so convinced, then the defendant should be acquitted.

Now, the term “reasonable doubt” means just what it says. The Law tells us that a reasonable doubt is a fair doubt based upon reason and common sense and arising from the state of the evidence. While it’s rarely possible to prove anything to an absolute certainty, a defendant is never to be convicted on mere suspicion, conjecture, guess or surmise.

A reasonable doubt may arise not only from the evidence in the case that is produced, but also from a lack of evidence in the case. The burden is upon the state to prove the defendant guilty beyond a reasonable doubt of every essential element of the crime that is charged. A defendant has the right to rely upon failure of the prosecution to establish such proof.

A defendant may also rely upon evidence brought out on cross examination of witnesses for the prosecution and upon evidence presented on behalf of the defendant. But the law never imposes upon a defendant in a

criminal case the burden or the duty of producing any evidence whatsoever.

We can say, Ladies and Gentlemen, that before a conviction can be had in this case the state must satisfy each and every member of the jury of the defendant's guilt beyond a reasonable doubt. Even if the state demonstrates a probability of guilt, if it does not establish guilt beyond a reasonable doubt you must acquit the defendant.

The term "reasonable doubt" is basically self-explanatory. And efforts to define it don't always clarify the term. It may help you to know that reasonable doubt is not a mere possible doubt. Everything relating to human affairs is open to some possible or imaginary doubt.

A reasonable doubt is a doubt of a fair-minded juror honestly seeking the truth after careful and impartial consideration of all of the evidence in the case. It's a doubt based upon reason and common sense.

It does not mean a vague or arbitrary notion, but it is an actual doubt based upon the evidence, the lack of evidence, a conflict in the evidence, or a combination thereof.

It is a doubt that remains after going over in your minds the entire case and giving consideration to all of the testimony and evidence. It is distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture.

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If after considering all of the evidence you are convinced of the defendant's guilt beyond a reasonable doubt then it would be your duty to convict the defendant. However, if you still have a reasonable doubt then the defendant is entitled to the benefit of it and you should acquit the defendant.

So then, Ladies and Gentlemen, we can say that a reasonable doubt exists in any case when after careful and impartial consideration of all of the evidence the jurors do not feel convinced to a moral certainty that a defendant is guilty of the charge, then there is reasonable doubt and the jury should acquit the defendant on that charge.

Upon considering all of the evidence in the case, if you have a reasonable doubt of the defendant's guilt of the charge arising out of any part of the evidence or lack of evidence in the case, then you should find the defendant not guilty.

Now, Ladies and Gentlemen of the jury, it may well be that portions of testimony or evidence in this case that's been presented to you would be of the type that we call circumstantial evidence. The test of the sufficiency of circumstantial evidence is whether the circumstances as proved produce a moral conviction to the exclusion of all reasonable doubt of the guilt of the defendant.

There should not be a conviction based upon circumstantial evidence unless to a

moral certainty it excludes every other reasonable hypothesis than that of the guilt of the accused.

No matter how strong may be the circumstances, if they can be reconciled with the theory that the defendant is innocent then the guilt of the accused is not shown by that full measure of proof which the law requires and the defendant should be acquitted.

R. Vol. 7, Tab 15, at 1243-49 (emphasis supplied).

An identical claim was rejected in *Johnson v. Alabama*, 256 F.3d 1156 (11th Cir. 2001), in which the Eleventh Circuit set out the clearly established federal law as follows:

In a criminal case, the government must prove each element of a charged offense beyond a reasonable doubt. *See, e.g., In re Winship*, 397 U.S. 358, 361, 90 S. Ct. 1068, 1072, 25 L. Ed. 2d 368 (1970). Although a court must instruct the jury that a defendant's guilt has to be proven beyond a reasonable doubt, the Supreme Court has stated that "the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course." *Victor v. Nebraska*, 511 U.S. 1, 5, 114 S. Ct. 1239, 1243, 127 L. Ed. 2d 583 (1994). If a trial court does attempt to define reasonable doubt, it must explain the standard correctly, although "the Constitution does not require that any particular form of words be used in

advising the jury of the government's burden of proof." *Id.*

When reviewing the correctness of reasonable-doubt charges, the Supreme Court has phrased the proper constitutional inquiry as "whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the Winship standard." *Harvell v. Nagle*, 58 F.3d 1541, 1542-43 (11th Cir. 1995) (quoting *Victor*, 511 U.S. at 6, 114 S. Ct. at 1243). We consider the instruction as a whole to determine if the instruction misleads the jury as to the government's burden of proof. *See id.*; *see also Victor*, 511 U.S. at 5-6, 114 S. Ct. at 1243 (instructions must be "taken as a whole"); *Cage*, 498 U.S. at 41, 111 S.Ct. at 329 (explaining that "[i]n construing the instruction, we consider how reasonable jurors could have understood the charge as a whole").

Johnson, 256 F.3d at 1190-91 (alteration in original)

The Eleventh Circuit then examined the petitioner's claim, explaining:

At the close of the evidence at Johnson's trial, the judge gave the jury a lengthy instruction on reasonable doubt. Johnson contends that the instruction was flawed because, in the course of the instruction, the trial judge (1) equated "beyond reasonable doubt" with "moral certainty"; (2) referred to a reasonable doubt as an "actual and

substantial one,” or a “a doubt for which a good reason can be given or assigned”; and (3) said that in “the final analysis” each juror would have to look into his “own heart and mind” for the answer. Johnson asserts that these comments effectively lowered the burden of proof below the reasonable doubt standard.

. . . .

Here, the trial judge employed “beyond a reasonable doubt” and “to a moral certainty” interchangeably and even informed the jury that the two terms were synonymous. But other portions of the instruction ensured that the “moral certainty” language would not reasonably be understood to lower the State’s burden. We have specifically recognized that the use of the term “moral certainty” in a reasonable doubt instruction is not fatal. See *Felker v. Turpin*, 83 F.3d 1303, 1309 (11th Cir. 1996) (trial court’s definition of reasonable doubt as “doubt which is based on the evidence, a lack of evidence or a conflict in the evidence” and “doubt which is reasonably entertained as opposed to vague or fanciful or farfetched doubt,’ served to erase any taint created by the term ‘moral certainty’ and to thus place it beyond the potential for constitutional harm”); *Harvell*, 58 F.3d at 1543 (trial court’s statements that reasonable doubt had to be derived from the evidence and that reasonable doubt could not be “fanciful, vague, whimsical, capricious,

conjectural or speculative” cured any potential constitutional harm associated with the term “moral certainty”).

The instruction in this case included substantial language echoing the key phrases in *Felker* and *Harvell*. Specifically, the trial judge in this case repeatedly informed the jury that it could not convict Johnson unless the evidence presented to it was inconsistent with any reasonable theory of innocence; the judge also repeatedly instructed the jury not to go beyond the evidence and engage in speculation in order to find Johnson guilty. The instruction as a whole, which emphasized the jury’s obligation to focus on the evidence presented in court and made abundantly clear that a conviction could not be based on speculation, convinces us that it was not reasonably likely that the jury understood the instructions to allow conviction based on proof insufficient to satisfy *Winship*.

Johnson, 256 F.3d at 1192-93 (ellipses supplied).

A review of the entire charge in this case reflects that, as in *Johnson*, the trial court correctly conveyed to the jury that Davis was presumed innocent, that the presumption of innocence remained with him throughout his trial, and that the jury must be convinced from the evidence of his guilt beyond a reasonable doubt. Thus, the trial court’s instructions did not violate Davis’s rights to due process and a fair trial, despite the trial judge’s interchangeable use of the phrases “moral certainty” and “reasonable doubt.” *Cf. Victor v. Nebraska*, 511 U.S. 1, 8-22 (1994) (trial

courts' instructions on reasonable doubt, which contained references to "a moral certainty" and "an actual and substantial doubt," when taken as a whole, correctly conveyed the concept of reasonable doubt to the jury). Davis is entitled to no relief on this claim.

2. *Aggravating circumstances*

Davis claims the trial court improperly instructed the jury that it could consider two aggravating circumstances if it found them beyond a reasonable doubt.³²³ This claim was raised in Davis's second petition for writ of certiorari on direct appeal,³²⁴ and it was rejected without discussion by the Supreme Court of Alabama. *Ex Parte Davis*, 718 So. 2d 1166, 1169, 1178 (Ala. 1998).

The trial judge gave the following jury instruction on aggravating circumstances:

The aggravating circumstances, which you may consider in this case, if you find from the evidence that they have been proved beyond a reasonable doubt are as follows: First, that the defendant was previously convicted of a felony involving the use or threat of violence to the person; secondly, that the capital offense was committed while the defendant was engaged in or was an accomplice in the commission of or an attempt to commit or flight from committing a robbery.

³²³ Doc. no. 33, at 79.

³²⁴ C.R. Vol. 10, Tab 35, at 78-79.

R. Vol. 8, Tab 24, at 1360-1361. Davis complains that the court failed to instruct the jury on the elements of the aggravating circumstances, so the jury “received no guidance on how to determine whether Davis had previously been convicted of a crime involving violence against a person.”³²⁵ Davis concedes that the State offered a certified copy of a prior conviction for robbery in the third degree, but argues that the court never defined third degree robbery for the jury.³²⁶

Davis has not explained how the court’s failure to define third degree robbery or to offer the jury any additional guidance in determining whether Davis had previously been convicted of a crime involving violence against a person violated his constitutional rights. During the sentencing phase of the trial, the State introduced certified copies of the case action summary and bench sheets from Davis’s 1992 conviction for third degree robbery in *State of Alabama v. Davis*, CC-92-979.³²⁷ The defense stipulated that “in CC 92-979, Circuit Court of Calhoun County, Alabama, that Jimmy Davis is the same Jimmy Davis that pled guilty to robbery in the third degree, received a sentence of one year and one day, on December 21, 1992,” and that he was represented by an attorney.³²⁸ Alabama law provides that:

³²⁵ Doc. no. 33, at 79.

³²⁶ *Id.*

³²⁷ R. Vol. 7, Tab 19, at 1295-98. The exhibits themselves are located at C.R. Vol. 1, Tab 1, at 87-89.

³²⁸ R. Vol. 7, Tab 19, at 1298-99.

(a) A person commits the crime of robbery in the third degree if in the course of committing a theft he:

(1) Uses force against the person of the owner or any person present with intent to overcome his physical resistance or physical power of resistance; or

(2) Threatens the imminent use of force against the person of the owner or any person present with intent to compel acquiescence to the taking of or escaping with the property.

(b) Robbery in the third degree is a Class C felony.

Ala. Code § 13A-8-43 (1975). By pleading guilty to third degree robbery, Davis admitted to committing a crime involving the use, or threat, of force or violence against a person. The defense stipulated to the authenticity and validity of the prior conviction. Thus, the “previous conviction of a violent felony” aggravator was unquestionably satisfied.

Furthermore, even if the jury had not found the existence of a previous conviction of a violent felony, it clearly found that the “murder during the commission of a robbery” aggravator had been satisfied. Davis’s conviction was for that very offense. Thus, the robbery served as both the underlying offense and an aggravating circumstance. Under Alabama law, “any aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a

reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentence hearing.” Ala. Code § 13A-5-45(e) (1975). As such, the fact that Davis had been convicted of murder during the commission of a robbery necessarily meant that the jury had unanimously determined that the robbery aggravator had been satisfied. Davis is entitled to no relief on this claim.

T. The Trial Court’s Instructions on Accomplices and Corroboration Constituted Reversible Error

Davis complains that the trial court instructed the jury that Alphonso Phillips was an accomplice, but it did not mention whether Terrance Phillips or Willie Smith could be considered an accomplice.³²⁹ Davis contends that Terrance Phillips should have been considered an accomplice as a matter of law, and the jury should have been so informed.³³⁰ He also asserts that the court gave confusing instructions about whether anyone else could be considered an accomplice.³³¹

Specifically, Davis complains that the court committed reversible error when it failed to instruct the jury: (1) that it had the duty to determine which witnesses were accomplices; and (2) that accomplices could not corroborate each other.

The trial court gave the jury the following instructions on accomplices:

³²⁹ Doc. no. 33, at 79-82.

³³⁰ *Id.* at 80.

³³¹ *Id.*

Ladies and gentlemen of the jury, a term utilized in the law that you may have heard previously is that of “accomplice.” An accomplice is defined as an associate in crime or a partner or a partaker in guilt. An accomplice is one who is in some way connected with the commission of a crime. *And whether a witness is an accomplice or not is a question of fact to be determined by a jury where there is conflict in the evidence on that question.*

A conviction for a felony offense cannot be had on the testimony of an accomplice or of numerous accomplices unless such testimony be corroborated or be supported by other evidence tending to connect the defendant with the commission of the offense.

The rule is that such other evidence[,] to be sufficient, to be believed by the jury beyond a reasonable doubt, if such evidence merely shows the commission of the offense or the circumstances of the offense thereof, without connecting the defendant with the commission of the offense, then such other evidence is not sufficient and the defendant could not be convicted as to that charge.

If the jury is not satisfied beyond a reasonable doubt of the truth of some of the evidence in this case tending to prove the defendant’s guilty connection with the charged offense, other than the testimony of Alphonso Phillips, then the jury cannot find the defendant guilty.

The Criminal Code of the state of Alabama at Section 12-21-222 reads: A conviction of felony cannot be had on the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of such offense, and such corroborative evidence if it merely shows commission or circumstances thereof is not sufficient.

So it's the law of this state that no person can be convicted on the uncorroborated testimony of an accomplice. Corroborating testimony that would be sufficient in order to support a conviction for an offense charged, if a jury is so satisfied from the evidence beyond a reasonable doubt, need not necessarily refer to any facts testified to by an accomplice, if any there be, but may include proof of circumstances tending to prove the truth of the material features of the testimony of the alleged accomplice.

The corroborating testimony is not sufficient if it merely shows the commission of an offense or the circumstances thereof. As a matter of law in this case the defendant Alphonso [Phillips] is an accomplice of the defendant in this case.

R. Vol. 7, Tab 15, at 1261-64 (emphasis and alteration provided).

In his petition, Davis contends that the trial court's instruction was not only confusing,

it also misled the jury by telling it that only Alphonso Phillips could be considered an accomplice in determining the sufficiency of the evidence. The trial court did not tell the jury that others could be accomplices, even though Terrance Phillips was also an accomplice as a matter of law. The trial court also did not explain that although other witnesses' status as accomplices was not so clear as to warrant a directed verdict on this issue, they might still be found to be accomplices on the facts as presented at trial. This ambiguity was crucial in this case, because the State relied so heavily on the testimony of Terrance Phillips and Willie Smith.³³²

Davis further alleges that:

The trial court failed to instruct the jury that if Terrance Phillips and Willie Smith were found to be accomplices, their testimony could not be used to corroborate the testimony of Alphonso Phillips.

As a result, the jury may well have found that the testimony of Alphonso Phillips was corroborated by the testimony of accomplices Terrance Phillips and Willie Smith. The jury could also have found that Alphonso Phillips corroborated Terrance Phillips, that Terrance Phillips corroborated Willie Smith, and that Willie Smith corroborated Alphonso Phillips.

³³² *Id.* at 81-82.

The proper instruction would have required the jury to subtract all three witnesses' testimony, and then to decide whether the remaining evidence was sufficient to convict Davis of capital murder. . . .

At the very least, the jury should have been required to assess the sufficiency of the evidence without considering the testimony of Terrance and Alphonso Phillips. Whether to also subtract Willie Smith's testimony should have been left to the jury to decide. The insufficient instructions did not give guidance to the jury about the critical issue in this case and rendered Davis's conviction unreliable.³³³

Doc. no. 33, at 82 (alteration and ellipses supplied, paragraph numbers omitted).

Both claims were raised in Davis's second petition for writ of certiorari on direct appeal,³³⁴ and both were summarily denied by the Alabama Supreme Court. *Ex Parte Davis*, 718 So.2d 1166, 1169, 1178 (Ala. 1998). Davis has not shown that the state court's denial of these claims was either contrary to, or an unreasonable application of, clearly established federal law, nor that it was based on an unreasonable determination of the facts in light of the evidence presented.

Davis's contention that the court failed to instruct the jury of its duty to determine which witnesses were accomplices is belied by the record. The court

³³³ *Id.* at 82.

³³⁴ C.R. Vol. 10, Tab 35, at 7-11.

instructed the jury that the question of “whether a witness is an accomplice or not is a question of fact to be determined by a jury where there is conflict in the evidence on that question.” The jury was clearly instructed that it was their job to determine whether any witness was an accomplice.³³⁵ Further, the court never indicated that Alphonso Phillips was the only accomplice.

Davis’s contention that the trial court failed to instruct the jury that accomplices could not corroborate each other is similarly unavailing. The court instructed the jury that a “conviction for a felony offense cannot be had on the testimony of an accomplice or of *numerous accomplices* unless such testimony be corroborated or be supported by other evidence tending to connect the defendant with the commission of the offense.”³³⁶ Although the court did not identify by name the witnesses who might have been considered accomplices, it adequately informed the jury of the appropriate law.

Moreover, the United States Supreme Court has made it clear that, in the context of jury instructions,

[t]he only question for [the habeas court] is “whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.” *Cupp v. Naughten*, 414 U.S. 141, 147, 94 S. Ct. 396, 400-01, 38 L. Ed. 2d 368 (1973); *see also Henderson v. Kibbe*, 431 U.S. 145, 154, 97 S. Ct. 1730,

³³⁵ R. Vol. 7, Tab 15, at 1261-62.

³³⁶ *Id.* at 1262 (emphasis provided).

1736-37, 52 L. Ed.2d 203 (1977); *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S. Ct. 1868, 1871, 40 L. Ed. 2d 431 (1974) (“[I]t must be established not merely that the instruction is undesirable, erroneous, or even ‘universally condemned,’ but that it violated some [constitutional right]”). It is well established that the instruction “may not be judged in artificial isolation,” but must be considered in the context of the instructions as a whole and the trial record. *Cupp v. Naughten*, *supra*, 414 U.S., at 147, 94 S. Ct., at 400-01. In addition, in reviewing an ambiguous instruction . . . we inquire “whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way” that violates the Constitution. *Boyde v. California*, 494 U.S. 370, 380, 110 S. Ct. 1190, 1198, 108 L. Ed. 2d 316 (1990). And we also bear in mind our previous admonition that we “have defined the category of infractions that violate ‘fundamental fairness’ very narrowly.” *Dowling v. United States*, 493 U.S. 342, 352, 110 S. Ct. 668, 674, 107 L. Ed. 2d 708 (1990). “Beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation.” *Ibid*.

Estelle v. McGuire, 502 U.S. 62, 72-73 (1991) (ellipses and first two alterations supplied, other alterations in original) (footnote omitted). *See also Jones v. United States*, 527 U.S. 373, 389-390 (1999).

In his previous Claim V.I., Davis argued that he was convicted due to the admission of uncorroborated

accomplice testimony. When faced with the same claim, the Alabama Supreme Court found that “even if the jury considered Terrance Phillips and Willie Smith to be Davis’s accomplices, and thus followed the trial court’s instructions that their testimony would likewise require corroboration, the record provides such corroboration.” *Ex Parte Davis*, 718 So.2d1166, 1170-71 (Ala. 1998). Davis has not established that this finding was contrary to, or involved an unreasonable application of, clearly established federal law, or that it was based on an unreasonable determination of the facts in light of the evidence presented in state court. Because there was sufficient corroboration of the testimony of Terrance Phillips and Willie Smith, any “confusion” caused by what Davis alleges to be a “lack of guidance” did not render his trial fundamentally unfair. These claims are due to be denied.

U. The Penalty Phase Jury Instructions Implied That Aggravating Circumstances Did Not Have to Be Found Unanimously

Davis complains that the trial court erroneously instructed the jury on aggravating circumstances.³³⁷ The trial judge gave the following instruction at the conclusion of the penalty phase of trial:

Now, as I’ve stated to you before, the burden of proof is on the state to convince each of you beyond a reasonable doubt as to the existence of any aggravating circumstance or circumstances considered by you in

³³⁷ Doc. no. 33, at 83.

determining what punishment is to be recommended in this case.

This means before you can even consider recommending that the defendant's punishment be death, each and every one of you must be convinced beyond a reasonable doubt based on the evidence that at least one or more of the aggravating circumstances exists.

In deciding whether the state has proven beyond a reasonable doubt the existence of any given aggravating circumstance, you should bear in mind the definitions which I have given you as to reasonable doubt.

R. Vol. 8, Tab 24, at 1361.

According to Davis, this instruction implied that the jurors had permission to find either one or the other aggravating circumstance, without the State having to prove either of them beyond a reasonable doubt as required by Ala. Code § 13A-5-45(e) (1981).³³⁸ In other words, he contends, some jurors could have found the aggravating circumstance of homicide during a robbery, while others found the circumstance of

³³⁸ Doc. no. 33, at 83-84. Ala. Code § 13A-5-45(e) states:

At the sentence hearing the state shall have the burden of proving beyond a reasonable doubt the existence of any aggravating circumstances. Provided, however, any aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentence hearing.

a prior violent felony conviction.³³⁹ He argues that this instruction ran directly contrary to the concept that aggravating circumstances must be unanimously found beyond a reasonable doubt, and substantially increased the likelihood that the jury's sentence recommendation would be arbitrary and capricious, rendering his sentence unreliable.³⁴⁰

There was no objection at trial to this instruction. This claim was raised for the first time in Davis's amended petition for writ of certiorari on direct appeal,³⁴¹ and it was denied without discussion by the Supreme Court of Alabama. *Ex parte Davis*, 718 So. 2d 1166, 1169, 1178 (Ala. 1998).

These instructions present no constitutional violation. Taken as a whole, the instruction adequately informed the jury that each aggravating circumstance had to be found unanimously. *See Donnelly v. DeChristoforo*, 416 U.S. 637, 645 (1974) ("In determining the effect of this instruction on the validity of respondent's conviction, we accept at the outset the well-established proposition that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.") (citations and internal quotation marks omitted). The Alabama Supreme Court's implicit determination that no plain error had been committed was not unreasonable.

³³⁹ Doc. no. 33, at 83.

³⁴⁰ *Id.*

³⁴¹ C.R. Vol. 10, Tab 35, at 47-48.

Moreover, even if the instructions could be considered ambiguous, given the facts of this case, there is no possibility that the jurors did not unanimously find the existence of one aggravating factor. Davis was convicted of murder during the commission of a robbery. The robbery served as both the underlying offense and an aggravating circumstance. Under Alabama law, “any aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentence hearing.” Ala. Code § 13A-5-45(e). Thus, the fact that Davis had been convicted of murder during the commission of a robbery necessarily meant that the jury had unanimously determined that the robbery aggravator had been satisfied. Davis is entitled to no relief on this claim.

V. Misconduct by Jurors Deprived Davis of His Constitutional Right to Be Tried by an Impartial Jury

Davis complains that three instances of juror misconduct deprived him of his right to be tried by an impartial jury.³⁴² This claim was raised in Davis’s Rule 32 petition.³⁴³ The Rule 32 court dismissed the claim, finding it was procedurally barred:

This claim is dismissed as Petitioner never established that the information pleaded or established that the information contained in this claim could not have been discovered in

³⁴² Doc. no. 33, at 84-85.

³⁴³ Rule 32 C.R. Vol. 14, Tab 52, at 45-46.

time to be included in a motion for a new trial. Further, the Petitioner did not offer any facts that would rebut the presumption created by the State's pleading of a procedural bar. Because this was the Petitioner's burden under Rule 32.3, the Court accepted the application of the procedural bar in this case. Accord, *Debruce v. State*, CR-99-1619, 2003 WL 22846752 (Ala. Crim. App. Dec. 2, 2003). Accordingly, this claim is procedurally barred.

Further, paragraph 84 appears to violate Rule 606(b) of the Alabama Rules of Evidence,^[344] and no facts pleaded in the petition

³⁴⁴ The petitioner alleged in paragraph 84 that:

During the penalty phase of the trial, the jurors were divided on the capital punishment issue such that seven jurors were in favor of a sentence of death and five were against it. At that point, one of the group of seven jurors took four of the five jurors who had voted against the death penalty around the corner and out of ear shot of the remaining jurors, and discussed their refusal to vote for the death penalty. Thereafter, the vote in favor of the death penalty changed to 11-to-1.

Rule 32 C.R. Vol. 14, Tab 52, at 45. Alabama Rule of Evidence 606(b) provided that:

(b) *Inquiry into validity of verdict or indictment.* Upon an inquiry into the validity of a verdict or indictment, a juror may not testify in impeachment of the verdict or indictment as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the

brought this claim within any exception to that rule. Thus, this paragraph would have been rightfully dismissed under Rule 32.7(d). See, *Ex parte Neal*, 731 So. 2d 621 (Ala. 1999).

Rule 32 C.R. Vol. 62, Tab 80, at 62-63. Davis did not appeal the Rule 32 court's denial of this claim. As no cause or prejudice has been alleged or demonstrated, this claim is due to be dismissed as procedurally barred.

Moreover, even if Davis's juror misconduct claims were not procedurally barred, he would be entitled to no relief. Davis asserts that juror Brian Pike "improperly failed to disclose during *voir dire* when questioned that his brother-in-law was a law enforcement officer who escorted the Phillips cousins and/or Davis to and from the courtroom during Davis'[s] trial."³⁴⁵ Davis maintains that Pike's failure to disclose this crucial information deprived him of a trial by an impartial jury, and denied his right to have questions answered truthfully by prospective jurors so that his

juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes. Nothing herein precludes a juror from testifying in support of a verdict or indictment.

Ala. R. Evid. 606(b).

³⁴⁵ Doc. no 33, at 84-85 (alteration supplied).

counsel could exercise discretion wisely in making peremptory strikes.³⁴⁶

During *voir dire* of Mr. Pike’s panel, defense counsel asked, “How many in here . . . have law enforcement in their family background, whether their father, mother, brother, sister were in law enforcement?”³⁴⁷ Mr. Pike did not respond to the question. Davis contends that Mr. Pike “improperly failed to disclose . . . that his brother-in-law was a law enforcement officer who escorted the Phillips cousins and/or Davis to and from the courtroom” during the trial.³⁴⁸ However, the question asked was limited to having an immediate family member — “father, mother, brother [or] sister” — involved in law enforcement. The panel was never asked about in-laws.

Further, Davis alleges only that Mr. Pike’s brother-in-law “escorted the Phillips cousins and/or Davis to and from the courtroom during Davis’[s] trial.”³⁴⁹ Davis makes no claim that Mr. Pike’s brother-in-law was ever present in the courtroom during *voir dire*, or that Mr. Pike had any reason to believe, during *voir dire*, that his brother-in-law might be involved with the trial in any capacity. Finally, there is no allegation that Mr. Pike ever became aware of his brother-in-

³⁴⁶ *Id.* at 85.

³⁴⁷ R. Vol. 3, at 434-35.

³⁴⁸ Doc. no. 33, at 84-85. The court notes that Davis does not identify Mr. Pike’s brother-in-law by name, nor does he reveal who the brother-in-law allegedly worked for, or the exact nature of his employment.

³⁴⁹ *Id.* (alteration and emphasis supplied).

law's alleged participation in the trial, thus triggering a need to notify the court of his potential conflict after he was seated on the jury. This claim is without merit.

Davis further argues that:

During the penalty phase of the trial, the jurors were divided on the capital punishment: seven jurors were in favor of a sentence of death and five were against. At that point, one of the group of seven jurors took four of the five jurors who had voted against the death penalty around the corner out of ear shot of the remaining jurors, and discussed their refusal to vote for the death penalty. Thereafter, the vote in favor of the death penalty changed to 11-to-1.

Doc. no. 33, at 84. Presumably, Davis is arguing that it was reversible error in his trial for several jurors to go around the corner from the other jurors to talk. In support of this argument, Davis cites *Kimoktoak v. State*, 578 P.2d 594 (Alaska 1978), in which the Alaska Supreme Court held it was per se reversible error for the court to allow the sequestered jury to separate from each other for three days during deliberations.

The holding in *Kimoktoak* was based upon Rule 27 of the Alaska Rules of Criminal Procedure, which “requires that once a jury has begun its deliberations it must remain under the charge of the court until a verdict is agreed upon, unless the parties agree to allow the jurors to return to their homes for reasonable periods of rest.” *Kimoktoak*, 578 P.2d at 595. The court noted that the case was distinguishable from

“situations in which the court required sequestration but separation occurred by the inadvertence or carelessness of the jurors or the officer of the court, or both.” *Id.* at 596 n.4.

The Alaska Rules of Criminal Procedure do not apply to Davis, and Alabama does not have a similar rule. Even if such a rule did apply, it would not have been violated in Davis’s case because the “separation” alleged by Davis did not involve the jurors being allowed to return to their homes for a period of time during deliberation.

Finally, Davis alleges that Mr. Pike stated that “during the trial, the jurors observed persons in cars circling the hotel where the jurors were sequestered,” and

discussed amongst themselves their belief that the persons in the cars were gang members and were watching the jurors. Because no juror stated this fear or belief to the court, trial counsel and the court were unable to evaluate and/or determine whether the jurors’ belief of gang involvement affected the deliberations and verdict.

Doc. no. 33, at 85. There is nothing in the record to support even an inference that the jurors engaged in any misconduct with regard to observing cars circling their hotel, or that their deliberations were impacted in any way by their observations.³⁵⁰

³⁵⁰ The court notes, however, that if the jurors’ deliberations had been affected by their fear that gang members were watching

W. Alabama's Fee Cap Foreclosed Effective Representation

Davis asserts that Alabama Code §15-12-21, which capped the compensation for court-appointed attorneys in capital cases at \$1,000 for out-of-court work conducted in connection with each phase of the trial,³⁵¹ “inevitably discouraged” counsel from conducting the preparation necessary to provide effective assistance of counsel.³⁵² He further asserts that the State of Alabama failed to authorize ancillary costs that were necessary to investigate, prepare, and properly defend him at both phases of his trial.³⁵³

Davis raised both parts of this claim in his Rule 32 petition.³⁵⁴ The respondents contend that this claim is procedurally barred because it was not raised at trial or on appeal, and it was subsequently found to be barred by the Rule 32 court.³⁵⁵ The Rule 32 court pointed out that, because the same claim had been rejected numerous times by Alabama's appellate courts,

them, it seems more likely that their verdict would have been in favor of Davis rather than against him.

³⁵¹ Section 15-12-21 was amended in 1999 to remove the cap on the total fee an attorney representing an indigent defendant could recover. However, the cap was in effect at the time of Davis's trial.

³⁵² Doc. no. 33, at 85-87.

³⁵³ *Id.* at 86.

³⁵⁴ Rule 32 C.R. Vol. 14, Tab 52, at 7-9.

³⁵⁵ *See* Rule 32 C.R. Vol. 62, Tab 80, at 9.

the claim was frivolous and failed “to state a material issue of law.”³⁵⁶

On appeal, the Alabama Court of Criminal Appeals found that the claim was procedurally barred by Alabama Rules of Criminal Procedure 32.3(a)(3) and (a)(5) because it could have been, but was not, raised at trial or on appeal. *Davis v. State*, 9 So. 3d 514, 530 (Ala. Crim. App. 2006). Although Davis raised the claim in his *certiorari* petition,³⁵⁷ the Alabama Supreme Court “decline[d] to address issues not previously considered on the merits by the Court of Criminal Appeals,” then reversed the Court of Criminal Appeals’ judgment and remanded the case for the appeals court to “consider all Davis’s ineffective-assistance-of-counsel claims on their merits.” *Ex parte Davis*, 9 So. 3d 537, 539 (Ala. 2007) (alteration supplied). The Alabama Court of Criminal Appeals did not mention Davis’s fee cap claim in its opinion following remand. *Davis v. State*, 9 So. 2d 539 (Ala. Crim. App. 2008). Davis raised the claim in his next *certiorari* petition,³⁵⁸ but the Alabama Supreme Court denied the petition. *Ex parte Davis*, 9 So. 3d 571 (Ala. 2008).

The Alabama Court of Criminal Appeals was the last state court to address this issue. That court found the claim to be procedurally barred. *Davis v. State*, 9 So. 3d 514, 530 (Ala. Crim. App. 2006). Thus, the claim is procedurally barred from review in this court. *See Harris v. Reed*, 489 U.S. 255, 262 (1989).

³⁵⁶ *Id.* at 10.

³⁵⁷ Rule 32 C.R. Vol. 59, Tab 67, at 65-67.

³⁵⁸ Rule 32 C.R. Vol. 61, Tab 72, at 125-126.

Moreover, even if this claim were not barred, it is apparent that it cannot succeed on the merits. Inadequate funding of counsel appointed to represent capital defendants does not itself amount to ineffective assistance of counsel unless it contributes to actual errors or shortcomings in the performance of counsel. *See Strickland*, 466 U.S. at 690 (“A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment.”).

Davis asserts that Alabama’s compensation scheme provides an inherent economic disincentive to conduct effective representation. He makes the general assertion that due to this “inherent economic disincentive,” counsel were unable to interview “20 or 30 people,” unable to obtain and review hundreds of pages of “valuable mitigation documents,” unable to prepare and argue motions, and unable to spend “countless hours” working with “experts and investigators.”³⁵⁹ However, he fails to explain the actual errors or shortcomings that resulted from those deficiencies. Similarly, despite his general assertion that “[m]eaningful legal assistance and due process requires the State to ensure defendants are not deprived of crucial expert testimony simply because they are indigent,”³⁶⁰ Davis fails to identify any alleged crucial expert testimony that was not obtained in his case as a result of cost constraints.

³⁵⁹ Doc. no. 33, at 86.

³⁶⁰ *Id.* at 86.

X. Davis's Death Sentence Was Improperly Sought and Imposed Pursuant to a Pattern of Racial Bias

Davis asserts that the death penalty was sought and imposed in his case due to a pattern of racial bias, and that his attorneys were ineffective for failing to make this argument at trial and on appeal.³⁶¹ Hear-gues:

In Calhoun County and the State of Alabama, the death penalty is sought in an arbitrary and capricious fashion and pursuant to a racially discriminatory pattern in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments and the Alabama Constitution. *See McClesky v. Kemp*, 481 U.S. 279 (1987). Ineffective assistance of counsel under the standards of *Strickland* arose through failure of trial counsel to raise these issues during the trial and appeal.

Doc. no. 33, at 87.

In support of this argument, Davis points to the testimony of Assistant District Attorney Ron Wood, who testified during the Rule 32 hearing that he had noted in the case screening summary that the “[d]efendant refuses to talk and is said to hate whites.”³⁶² Davis contends that the notation evinced racial bias because, as Mr. Wood acknowledged during his testimony, murder motivated by racial prejudice is not an aggravating factor for purposes of determining whether a

³⁶¹ *Id.* at 87-88.

³⁶² *Id.* (quoting Rule 32 R. Vol. 23, at 1068-69)

crime should be charged as a capital crime under Alabama law.³⁶³ Davis also contends Mr. Wood's testimony that "he was unaware of any case where he had prosecuted the murder of an African-American victim by a white defendant as a capital murder case" is evidence of racial bias.³⁶⁴

This claim was raised in Davis's Rule 32 petition,³⁶⁵ and on appeal from the denial of that petition.³⁶⁶ The Alabama Court of Criminal Appeals held that the claim was procedurally barred pursuant to Rules 32.3(a)(3) and (a)(5), Ala. R. Crim. P., because it could have been, but was not, raised at trial or on appeal. *Davis v. State*, 9 So. 3d 514, 530 (Ala. Crim. App. 2006). That finding rests upon firmly established and regularly followed state procedural rules. Thus, the default precludes federal review of the claim.

It should be noted that included within this claim is the assertion that "[i]neffective assistance of counsel under the standards of Strickland arose through failure of trial counsel to raise these issues during the trial and appeal."³⁶⁷ Davis does not elaborate that assertion. Thus is unclear whether he is attempting to excuse his procedural default of this claim, or raise a separate claim of ineffective assistance of counsel.

³⁶³ *Id.* at 88 (citing Rule 32 R. Vol. 23, at 1077-79).

³⁶⁴ *Id.* (citing Rule 32 R. Vol. 23, at 1109).

³⁶⁵ Rule 32 C.R. Vol. 14, Tab 52, at 38.

³⁶⁶ Rule 32 C.R. Vol. 57, Tab 60, at 71-72.

³⁶⁷ Doc. no. 33, at 87 (alteration supplied).

An allegation of ineffective assistance of counsel can constitute cause for a procedural default, but only if the petitioner can prevail on an independent ineffective assistance of counsel claim, and has raised, and thus exhausted, that particular claim of ineffective assistance of counsel in state court. *Murray v. Carrier*, 477 U.S. 478, 485 (1986); *Hill v. Jones*, 81 F.3d 1015, 1029-31 (11th Cir. 1997). While Davis arguably exhausted his claim of ineffective assistance of trial counsel in state court,³⁶⁸ he did not exhaust a claim of ineffective assistance of appellate counsel. Regardless, it is clear that Davis’s conclusory claim of ineffective assistance of counsel entitles him to no relief.

Y. The Manner of Execution Used by the State of Alabama Constitutes Cruel and Unusual Punishment

Davis asserts that execution using either lethal injection or electrocution constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.³⁶⁹ He argues that a “growing number of courts have held that the protocol employed for administering lethal injection lacks ‘both reliability and transparency’ and has ‘resulted in an undue and

³⁶⁸ On appeal from the denial of his Rule 32 petition, Davis alleged that “trial counsels’ failure to address the role Davis[s] race and the victim’s race played in the decision by the District Attorney to seek the death penalty constituted ineffective assistance of counsel.” Rule 32 C.R. Vol. 57, Tab 60, at 72 (alteration supplied).

³⁶⁹ Doc. no. 33, at 88-90.

unnecessary risk of an Eighth Amendment violation.”³⁷⁰ Alternatively, he argues that electrocution constitutes cruel and unusual punishment under evolving standards of decency, because

[e]lectrocutions as carried out by the State of Alabama are qualitatively more cruel and unusual than a civilized society should tolerate. The State would utilize primitive equipment and procedures in executing Davis, which can result in grotesque, barbaric torture, including body charring, organ and tissue explosion, and mutilation.

Doc. no. 33, at 89 (alteration supplied). Davis further contends that counsel was ineffective for failing to raise this issue at trial.³⁷¹

At the outset, it should be noted that, to the extent this claim pertains to execution by electrocution, the claim is moot. Alabama Code § 15-18-82(a) (1975) provides that:

Where the sentence of death is pronounced against a convict, the sentence shall be executed at any hour on the day set for the execution, not less than 30 nor more than 100 days from the date of sentence, as the court may adjudge, by lethal injection unless the convict elects execution by electrocution as

³⁷⁰ *Id.* at 89 (citing *Morales v. Tilton*, 465 F. Supp. 2d 972, 974 (N.D. Cal. 2006); *Taylor v. Crawford*, No. 05-4173-CV-C-FJG, 2006 WL 1779035, at *8 (W.D. Mo. June 26, 2006), *aff’d* 457 F.3d 902, 904 (8th Cir. 2006)).

³⁷¹ *Id.*

provided by law. If electrocution is held unconstitutional, the method of execution shall be lethal injection.

Because Davis has not stated that he has affirmatively chosen electrocution as the means of his execution, he will be executed by lethal injection. Therefore, to the extent that he challenges the constitutionality of death by electrocution, the claim is due to be dismissed as moot.

To the extent Davis asserts that lethal injection constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments, the respondent correctly argues that review of the claim is procedurally foreclosed under the authority of *Hill v. McDonough*, 547 U.S. 573 (2006). In *Hill*, the Supreme Court held that claims challenging the execution process should be brought in a suit pursuant to 42 U.S.C. § 1983. *Id.* at 580. *See also Thompson v. Secretary, Dept. of Corrections*, 557 F. 3d 1257, 1261 (11th Cir. 2009) (citing *Hill*, 547 U.S. at 579-83). Accordingly, this court is without jurisdiction to entertain the claim in the context of a habeas petition, and the claim is due to be dismissed.

Similarly, Davis's conclusory claim that "[i]neffective assistance of counsel under the standards of Strickland arose through defense counsels' failure to raise this issue in the course of trial and direct appeal proceedings" warrants no relief.³⁷²

³⁷² *Id.* at 89 (alteration supplied).

Z. The Execution of Mentally Retarded Persons With Borderline I.Q. Levels and Brain Damage is Cruel and Unusual

Davis contends that “imposition of the death penalty on an individual at [his] limited intelligence level constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution.”³⁷³ In support of his position, Davis quotes *Atkins v. Virginia*, 536 U.S. 304, 306 (2002), for the proposition that “[b]ecause of their disabilities in areas of reasoning, judgment and control of their impulses however, [mentally retarded persons] do not act with the level of moral culpability that characterizes the most serious adult criminal conduct.”³⁷⁴ Davis asserts that “this principle is applicable” to him, as “an offender over age eighteen who is borderline mentally retarded with a fifth grade reading level, and who suffered from frontal lobe brain damage as a child, thereby impairing [his] capacity for culpability or premeditation that a normal adult would have.”³⁷⁵

Davis raised this claim in his Rule 32 petition, which was filed prior to the Supreme Court’s *Atkins*

³⁷³ *Id.* at 90 (alteration supplied).

³⁷⁴ *Id.* (first alteration supplied, second alteration by petitioner).

³⁷⁵ Doc. no. 33, at 90 (alteration supplied). He further asserts that his “combination of clinical dysfunction yields diminished capacity, diminished executive function in the brain, and diminished ability to form premeditation, as supported by Rule 32 expert testimony of forensic psychologist Dr. Kimberly Ackerson and the clinically-based diagnosis of Dr. Charles Golden.” *Id.* (citation omitted).

decision.³⁷⁶ He argued that the “United States is clearly marching towards a national consensus against executing those with mental retardation or significantly subaverage general intellectual functioning,” and asserted that the imposition of the death penalty on an individual at his limited intelligence level constitutes cruel and unusual punishment.³⁷⁷ The trial court denied the claim on the merits.³⁷⁸ The Alabama Court of Criminal Appeals affirmed the trial court’s denial of the claim:

Davis argues that in his case the death sentence is cruel and unusual punishment in violation of *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), because he says he is mentally retarded and has frontal-lobe brain damage.

In denying this claim the circuit court stated that “[Davis] does not fall within the definition of defendants protected by the Court’s decision in *Atkins* even under the broadest of definitions.” (C.R. 1194.)

The United States Supreme Court in *Atkins* held that it was a violation of the Eighth Amendment to execute a mentally retarded individual. The *Atkins* Court left the definition of mental retardation to the individual states. Though Alabama has yet to enact legislation defining mental retardation, the

³⁷⁶ Rule 32 C.R. Vol. 14, Tab. 52, at 38-39.

³⁷⁷ *Id.*

³⁷⁸ Rule 32 C.R. Vol. 62, Tab 80, at 60-62.

Alabama Supreme Court in *Ex parte Perkins*, 851 So. 2d 453 (Ala. 2002), adopted the broadest definition of mental retardation used by those states that have legislation prohibiting the execution of the mentally retarded. To satisfy the *Perkins* test, the defendant must exhibit (1) significantly subaverage intellectual functioning – an IQ of 70 or below; (2) significant or substantial deficits in adaptive behavior; and (3) these two deficiencies must have manifested themselves during the developmental years – before the defendant reached the age of 18.

We have reviewed the records of Davis's trial and the Rule 32 proceedings. The record of the postconviction proceedings contains some of Davis's school records and report cards. A report card issued to Davis in the eighth grade shows that Davis made all B's and one C. (C.R. 1848.) Davis was also administered the Wechsler Intelligence Scale ("WISC-R") IQ test in the eighth grade. The test results showed that Davis's full-scale IQ was 74. This evaluation also contained the handwritten comment: "All areas are above grade level expectancy." (C.R. 1853.)

At the penalty phase of Davis's capital trial, Davis presented the testimony of Anne M. Storey, a counselor employed by Calhoun – Cleburne County Mental Health Center and the Oxford City School System. She testified that she administered IQ tests to Davis

before his trial and that Davis had a full-scale IQ of 77.

At the postconviction hearing Davis presented testimony that when Davis was administered an IQ test while in the custody of the Alabama Department of Corrections his IQ measured in the high 70s.

R. 771.) Jan Vogelsang, a clinical social worker, also testified as follows:

Jimmy had worked at a car wash. He had worked at Glen Addie housing project. Jimmy had not maintained consistent employment. Job Corps, he went away first with Job Corps to Kentucky and he got homesick and came back.

Then he went to Tuskegee. In the Job Corps there they taught him with classes. They taught him brick masonry. He was gone about a year. He got his GED while he was there. Apparently did well.

R. 1004.)

Dr. Charles J. Golden, a professor of psychology at Nova Southeastern University and Director of the Neuropsychological Assessment Center, also testified at the Rule 32 hearing. Dr. Golden stated that based on his assessment of Davis's IQ scores, Davis had frontal-lobe brain damage. In rebuttal, the State presented the testimony of Dr. Glen D.

King, a clinical psychologist. Dr. King testified that after evaluating Davis and his IQ scores, it was his opinion that Davis “merely had borderline intellectual functioning” and that he would not refer Davis to a neurologist. The experts testified that a CAT scan, a MRI, or a PET scan are traditionally used to diagnose brain damage. However, none of these tests were administered in this case.

We have painstakingly reviewed the record of the trial and the Rule 32 proceedings and find no indication that Davis meets the most liberal definition of mental retardation adopted by the Alabama Supreme Court in *Perkins*. Therefore, *Atkins* does not bar the imposition of the death penalty in Davis’s case.

Davis v. State, 9 So. 3d 514, 528-29 (Ala. Crim. App. 2006) (alteration in original) (footnote omitted).

Upon review of the record, the Alabama courts’ rejection of Davis’s “borderline mental retardation claim” was not contrary to, or an unreasonable application of, clearly established federal law, or based on an unreasonable determination of the facts. In *Atkins*, the Supreme Court held that executing mentally retarded capital offenders violates the Eighth Amendment. Although the court did not dictate a national standard for determining mental retardation, leaving that determination to the individual states, it recognized that “clinical definitions of mental retardation require not only sub-average intellectual functioning, but also significant limitations in adaptive skills such as

communication, self-care, and self-direction that became manifest before age 18.” *Atkins*, 536 U.S. at 318.

In Alabama, there is a three part test for determining whether mental retardation rises to the level of prohibiting execution: “(1) significantly subaverage intellectual functioning (*i.e.*, an IQ of 70 or below); (2) significant or substantial deficits in adaptive behavior; and (3) the manifestation of these problems during the defendant’s developmental period (*i.e.*, before the defendant reached age eighteen).” *Holladay v. Allen*, 555 F.3d 1346, 1353 (11th Cir. 2009) (citing *Smith v. Alabama*, No. 1060427, 2007 WL 1519869, at *8 (Ala. May 25, 2007) and *Ex Parte Perkins*, 851 So.2d 453, 456 (Ala. 2002)).

Davis neither disputes that he fails to meet the Alabama criteria for mental retardation, nor contends that the Alabama courts unreasonably determined that he was not mentally retarded. Instead, he argues that the *Atkins* standard should be expanded to include defendants of limited intelligence, with evidence of frontal lobe damage. However, he points to no clearly established federal law authorizing such an application. Moreover, the Eleventh Circuit has denied a claim similar to the one propounded by Davis, holding that

Atkins protects only those individuals who are mentally retarded, as is evident by the third prong of the mental retardation inquiry, which requires onset by age 18 . . . [t]hus, a constitutional rule exempting the ‘functionally mentally retarded’ from execution would go beyond the holding of *Atkins*, something

this Court may not do when reviewing § 2254 petitions.

Carroll v. Secretary, Dep't of Corrections, 574 F.3d 1354, 1369 (11th Cir. 2009) (alteration and ellipses supplied). Davis is entitled to no relief on this claim.

VII. EVIDENTIARY HEARING

Davis requests an evidentiary hearing. “In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition’s factual allegations which, if true, would entitle the applicant to federal habeas relief.” *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007). The deferential standards prescribed by § 2254 control whether to grant habeas relief, and a federal court must take those standards into account when deciding whether an evidentiary hearing is appropriate. *Id.* at 474 (citing *Mayes v. Gibson*, 210 F.3d 1284, 1287-1288 (10th Cir. 2000) (“Whether [an applicant’s] allegations, if proven, would entitle him to habeas relief is a question governed by [AEDPA]”)) (alterations in *Schriro*).

The record in this case refutes the applicant’s factual allegations or otherwise precludes *habeas* relief. Accordingly, an evidentiary hearing need not be held and the request for a hearing is denied.

VIII. CONCLUSION

The petition for writ of *habeas corpus* is due to be denied. A separate final judgment consistent with this memorandum of opinion will be entered simultaneously herewith.

DONE this 26th day of May, 2016.

App-561

A handwritten signature in black ink, reading "Lynwood Smith". The signature is written in a cursive style with a large initial "L".

United States District Judge

App-562

Appendix E

[Filed: Mar. 3, 2006]

Notice: This opinion is subject to formal revision before publication in the advance sheets of Southern Reporter. Readers are requested to notify the Reporter of Decisions, Alabama appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 242-4621), of any typographical or other errors, in order that corrections may be made before the opinion is printed in Southern Reporter.

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2005-2006

CR-03-2086

Jimmy Davis, Jr.

v.

State of Alabama

Appeal from Calhoun Circuit Court

(CC-93-534.60)

COBB, Judge.

The appellant, Jimmy Davis, Jr., an inmate on death row at Holman Correctional Facility, appeals the denial of his petition for postconviction relief filed pursuant to Rule 32, Ala.R.Crim.P. In 1993, Davis was convicted of murdering Johnny Hazel, a gas station attendant at a Direct Oil gasoline service station in Anniston, during the course of a robbery. The jury,

by a vote of 11-1, recommended that Davis be sentenced to death. The circuit court followed the jury's recommendation and sentenced Davis to death. Davis appealed. On October 20, 1995, we remanded the case for the circuit court to enter a formal sentencing order. See Davis V. State, 718 So. 2d 1148 (Ala.Crim.App. 1995). On July 3, 1996, we again remanded the case for the circuit court to conduct a Batson v. Kentucky, 476 U. S. 79 (1986), hearing. See Davis v. State, 718 So. 2d at 1153 (opinion on return to remand). On return to second remand, we affirmed Davis's conviction and death sentence. See Davis v. State, 718 So. 2d at 1153 (opinion on second return to remand). The Alabama Supreme Court affirmed our judgment and the United States Supreme Court denied certiorari review. Davis v. State, 718 So. 2d 1166 (Ala. 1998), cert. denied, 525 U.S. 1179 (1999). We issued the certificate of judgment on September 15, 1998. See Rule 41, Ala.R.App.P.

In January 2000, Davis filed a timely Rule 32 petition in the Calhoun Circuit Court attacking his conviction and death sentence. Davis amended his petition in April 2000 and again in July 2001. An evidentiary hearing was held in August 2002. In August 2004, the circuit court issued a 63-page order denying Davis's petition in part and dismissing it in part. This appeal followed.

The circuit court made the following detailed findings of fact in its order sentencing Davis to death:

“At approximately 7:16 p.m. on the evening of March 17, 1993, Anniston, Alabama, Police Department Officer Brian Tumlin was dispatched to the Direct Oil gasoline station

at the corner of 20th and Noble Streets in Anniston, Calhoun County, Alabama, in response to a report of a shooting inside the small service station building. The officer observed Dewey Waites kneeling over the victim, Johnny Hazel. He also noted three empty shell casings from spent bullets a short distance outside the service station door.

“The report dispatched to Officer Tumlin stated two black males were seen running west on 20th Street after shots were fired. One was reported wearing a black coat and/or a tan coat.

“Sgt. Rocky Stemen of the Anniston Police Department arrived to assist Officer Tumlin and placed three possible witnesses in patrol cars. Johnny Hazel was a 50 year old white male who had worked at the 18th and Noble Street Direct Oil Station as assistant manager for five or six years. He would often be visited by his friend Dewey Waites at the station where Hazel often worked alone. Waites testified that a black male with his face covered walked up to the station doorway at approximately 7:15 p.m., said ‘Give me your money,’ and then fired two shots from a silver or chrome plated automatic pistol at Johnny Hazel. Hazel slumped, then stepped to the phone and began calling the police, but he passed out and fell to the floor. Waites slammed the door shut, locked it and Waites then completed the call to the police.

Anniston Rescue Squad personnel treated Hazel at the scene and then transported him to Northeast Alabama Regional Medical Center. ...

“Dr. Kenneth Elliott Warner, a State Medical Examiner, conducted an autopsy on Johnny Hazel. That examination revealed a gun shot wound to the right chest, as well as another to the left side of the back. Both projectiles passed through Hazel’s liver. Two metal projectiles were found, cleaned, sealed, and delivered to David Higgins in Birmingham. Dr. Warner opined that Johnny Hazel died as the result of multiple gun shots.

“Carla Lovell, a neighbor who resided on West 20th Street, heard gunshots on the night of March 17, 1993, and ran to her front porch and saw two men running to the west and called 911. She described the men as two black males with one of the males wearing a tan jacket with a bandanna around his head. She then went to the Direct Oil Station and later talked with the police. She thought the two were between 18 and 25 years of age. Mrs. Lovell’s mother-in-law, Betty Lovell, was in a house near her daughter-in-law. She heard two or three shots fired at or near the Direct Oil Service Station. She then saw two black males run around the corner of the station. She observed one of the males wore a light tan coat and that one wore either a bandanna or a hat turned backwards. ... Betty Lovell testified that the two ran west on 20th Street

past the Gurnee Avenue intersection and then turned south in the alley way in the next block past Gurnee. She went to the station and observed Mr. Dewey Waites and Mr. Hazel locked in the station. She was also later questioned by the police officers on the scene.

“

“Terrance Phillips, a 16-year-old black male, was charged in connection with the robbery and killing of Johnny Hazel. He pleaded guilty to conspiracy to commit robbery of the Direct Oil and received a ten-year sentence. At the time of this trial, he testified he had been released on bond and had applied for probation. On March 17, 1993, Phillips attended high school and around 5:00 p.m., met the defendant, Jimmy Davis, and his cousin, Alphonso Phillips, at the Carver Recreation Center. The three males left Carver Center and walked to the Direct Oil Station at 20th and Noble Streets. He testified that Jimmy Davis possessed a chrome .25 caliber Raven [brand] pistol with a white handle. Davis stated ‘We’re going to hit Direct Gas Station’ or ‘We’re going to rob Direct Gas Station.’ Plans were discussed in the alley west of Gurnee Avenue. Phillips testified that David stated that ‘he had the gun and he was going to draw down on the man.’ Davis would point the gun at the station operator while Alphonso Phillips was to get the cash money. Terrance Phillips was to serve

as a look-out. Terrance crossed the intersection of 20th and Noble Street to the North and proceeded up Noble Street as Alphonso Phillips and Jimmy Davis turned South on to the Direct Oil property. Terrance Phillips testified that he abandoned the criminal enterprise and continued walking north toward his house. After about a block's walk he stated that he heard two or three gunshots; he continued walking to his house at 2307 Moore Avenue. He later left and walked to his grandmother's home at 1711 Moore Avenue. There he encountered Jimmy Davis and Alphonso Phillips.

"Terrance Phillips stated [that] he asked Davis what had happened and that Davis said he told the attendant (Hazel) 'Give it up, fuck-nigger' and that the attendant smiled or laughed. He (Davis) shot him at least twice and then he (Davis) took off. Terrance Phillips testified that on that night he wore a black coat with a Los Angeles Kings emblem on the back; that Alphonso Phillips wore a blue jeans jacket and that Jimmy Davis wore a pair of black cut-off jean shorts and a dark green shirt with a hood on it."¹

Standard of Review

Davis appeals the denial of his petition for postconviction relief filed pursuant to Rule 32, Ala.R.Crim.P.

¹ This Court may take judicial notice of our records in previous cases. See Ex Darte Salter, 520 So. 2d 213 (Ala.Crim.App. 1987).

“A post-conviction petition is a collateral attack on a prior criminal conviction by which a defendant can assert that a conviction resulted from the substantial denial of his or her constitutional rights, and the purpose of a post-conviction proceeding is not to appeal the defendant’s underlying judgment, but rather to resolve allegations that constitutional violations occurred at trial, when those allegations have not been, and could not have been, adjudicated previously.”

People v. Coulter, 352 Ill. App. 3d 151, 156, 287 Ill. Dec. 255, 260, 815 N.E.2d 899, 904 (2004).²

A Rule 32 petition “is treated procedurally as a cross between a civil and a criminal action; [it is] a new civil action” Carroll v. State, 462 So. 2d 789, 790 (A1a.Crim.App. 1984). The burden of proof in a Rule 32 proceeding rests solely with the petitioner, not the State. According to Rule 32.3, Ala.R.Crim. P., “[t] he petitioner shall have the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief.”

When this Court reviewed Davis’s capital-murder conviction and death sentence on direct appeal, we applied a “plain error” standard of review and evaluated the issues raised in Davis’s brief, whether or not they had been brought to the attention of the circuit court. See Rule 45A, A1a.R.App.P.. However, the “plain error” standard of review does not apply to collateral

² Postconviction proceedings in Illinois are similar to Rule 32, Ala.R.Crim.P., proceedings.

proceedings attacking a death sentence. See Ex parte Dobyne, 805 So. 2d 763 (Ala. 2001); Brownlee v. State, 666 So. 2d 91 (Ala.Crim.App. 1995); Cade v. State, 629 So. 2d 38 (Ala.Crim.App. 1993); Thompson v. State, 615 So. 2d 129 (Ala.Crim.App. 1992). The United States Supreme Court in United States v. Frady, 456 U.S. 152, 164 (1982), stated:

“Because it was intended for use on direct appeal, ... the ‘plain error’ standard is out of place when a prisoner launches a collateral attack against a criminal conviction after society’s legitimate interest in the finality of the judgment has been perfected by the expiration of the time allowed for direct review or by the affirmance of the conviction on appeal.”

Other states have also declined to apply the plain-error standard of review to postconviction proceedings. See People v. Davis, 156 Ill. 2d 149, 159, 189 Ill. Dec. 49, 55, 619 N.E.2d 750, 756 (1993) (“in post-conviction proceedings, the [p]lain error rule may not be invoked to save procedurally defaulted claims”); Clemmons v. State, 795 S.W.2d 414, 418 (Mo.Ct.App. 1990) (“There is no such thing as plain error in postconviction relief cases. Appellate review of the trial court’s action on a postconviction relief motion is ‘limited’ to a determination of whether the findings and conclusions of the motion court are clearly erroneous.”) ; Prokopis v. State, 49 Md. App. 531, 534, 433 A.2d 1191, 1193 (1981) (“In urging that we now apply the plain error rule applicant is actually requesting that we consider this proceeding, not as an application for leave to appeal a denial of post conviction relief, but to recognize

it as a direct appeal. We are not empowered to do so, however, even if we were so inclined.”).

Also, when reviewing the denial or dismissal of Davis’s Rule 32 claims we apply all of the procedural bars in Rule 32, Ala.R.Crim.P. “The procedural bars of Rule 32 apply with equal force to all cases, including those in which the death penalty has been imposed.” State v. Tarver, 629 So. 2d 14, 19 (Ala.Crim.App. 1993). See also Burgess v. State, [Ms. CR-02-0977, September 30, 2005] ___ So. 2d ___ (Ala.Crim.App. 2005); Hunt v. State, [Ms. CR-02-0813, August 26, 2005] ___ So. 2d ___ (Ala.Crim.App. 2005); Brooks v. State, [Ms. CR-01-0607, April 29, 2005] ___ So. 2d ___ (Ala.Crim.App. 2005); Duncan v. State, [Ms. CK-03-1634, March 18, 2005] ___ So. 2d ___ (Ala.Crim.App. 2005); Slaton v. State, 902 So. 2d 102 (Ala.Crim.App. 2003); Woods v. State, 891 So. 2d 398 (Ala.Crim.App. 2003).

Last, “If the circuit court is correct for any reason, even though it may not be the stated reason, we will not reverse its denial of the petition.” Reed v. State, 748 So. 2d 231, 233 (Ala.Crim.App. 1999).

I.

Davis argues that he was denied the effective assistance of counsel at the guilt and penalty phase of his capital-murder trial. Specifically, he argues that counsel failed to prepare and to investigate the case. He cites numerous grounds in support of this assertion.³

³ Additional grounds were raised in Davis’s Rule 32 petition. However, the issues not raised on appeal are deemed to be abandoned. See Brownlee v. State, 666 So. 2d 91 (Ala.Crim.App. 1995).

Davis was convicted of capital murder in December 1993; he was sentenced in March 1994. At the time Davis was convicted and sentenced Ex parte Jackson, 598 So. 2d 895 (Ala. 1992), was in effect.⁴ In Jackson, the Supreme Court established a procedure for raising claims of ineffective assistance of trial counsel when new counsel was appointed for direct appeal. According to Jackson, the newly appointed appellate counsel could file a motion to suspend the time for the filing of a motion for a new trial so that a transcript of the trial proceedings could be completed. Newly appointed appellate counsel could then argue claims of ineffective assistance in the motion for a new trial and properly raise the issue on direct appeal. The Supreme Court in Jackson stated:

“We encourage counsel, whenever possible, to ascertain any possible defect in the trial process and to make an issue of that defect in an appropriate motion for a new trial. Failure to include a reasonably ascertainable issue in a motion for a new trial will result in a bar to further argument of the issue on appeal and in post-conviction proceedings.”

598 So. 2d at 897.

In this case, Davis’s trial attorneys, Steven D. Giddens, and Jonathan L. Adams, moved to withdraw from representing Davis after Davis was sentenced. The circuit court immediately appointed attorney H. Wayne Love to represent Davis on appeal. Love then

⁴ In 1996, in [Ex parte Ingram, 675 So. 2d 863 (Ala. 1996),] the Supreme Court reversed its holding in Jackson, citing the numerous procedural problems that that Jackson had created.

moved the circuit court to extend the time for filing a motion for a new trial so that a transcript of the trial proceedings could be completed and he could review that transcript. Love also filed a motion for a new trial, alleging that Davis had been deprived of the effective assistance of counsel. He cited several different grounds in support of this assertion.⁵ Here, newly appointed appellate counsel followed the procedures set out in Jackson.

In Payne v. State, 791 So. 2d 383 (Ala.Crim.App. 1999), a case involving the appeal of the denial of a Rule 32 petition attacking a death sentence, we stated:

“Because Payne was represented by different counsel at trial and on appeal, any claim of ineffective assistance of trial counsel should have been raised in a motion for a new trial in order to preserve the issue for review. Ex parte Jackson[, 598 So. 2d 895 (Ala. 1992)]. Thus, the trial court correctly concluded that Payne’s claims regarding ineffective assistance of trial counsel are procedurally barred by Rule 32.2 (a) (3) and (a) (5) as claims that could have been, but were not, raised at trial or on appeal. See Bryant v. State, 739 So. 2d 1138 (Ala.Cr.App. 1998); Dyson v. State, 722 So. 2d 782 (Ala.Cr.App. 1997); Hartzog v. State, 733 So. 2d 461 (Ala.Cr.App. 1997); Andersch v. State, 716 So. 2d 242 (Ala.Cr.App. 1997); Arrington v. State, 716 So. 2d 237 (Ala.Cr.App. 1997); Alexander v. State, 679

⁵ However, none of the grounds raised in the written motion for a new trial were pursued at the motion hearing.

So. 2d 227 (Ala. 1996); Covington v. State, 671 So. 2d 109 (Ala.Cr.App. 1995); Alderman v. State, 647 So. 2d 28 (Ala.Cr.App. 1994); Ex parte Jackson, supra.”

791 So. 2d at 390.

According to established caselaw, Davis’s ineffective-assistance-of-trial-counsel claims are procedurally barred in this Rule 32 proceeding.⁶ See also Clemons v. State, [Ms. CR-01-1355, August 29, 2003, and June 24, 2005] ___ So. 2d ___ (Ala.Crim.App. 2003) (opinion on return to remand); Brooks v. State, [Ms. CR-01-0607, April 29, 2005] ___ So. 2d ___ (Ala.Crim.App. 2005); and Mason v. State, 768 So. 2d 981 (Ala.Crim.App. 1998).⁷

We realize the harsh consequences that the application of this procedural bar has on inmates like Davis, who are incarcerated on Alabama’s death row. However, this Court has no authority to modify or amend

⁶ Davis makes no argument that his appellate counsel was ineffective. Claims of ineffective assistance of appellate counsel are properly raised in a Rule 32 petition. See Whitt v. State, 827 SO. 2d 869 (Ala.Crim.App. 2001).

⁷ “[A] procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case “clearly and expressly.” states that its judgment rests on a state procedural bar.” Harris v. Reed, 489 U.S. 255, 263 (1989). The Alabama Supreme Court has remanded a case to this Court for this Court to state specifically that a claim of ineffective assistance of counsel was procedurally barred in a Rule 32 proceeding because it was not raised within the limitations period in Rule 32.2(c). See Baker v. State, 667 so. 2d 50, 51 (Ala. 1995).

the procedural bars contained in Rule 32, Ala.R.Crim.P.

Davis's most troubling claim is that counsel failed to investigate and present mitigation evidence at the penalty phase. The evidence Davis alleges should have been discovered and presented is powerful. Had this issue not been procedurally barred we would be compelled to grant relief and order a new sentencing hearing.

At the Rule 32 hearing, Davis presented the testimony of two sisters, an aunt, and several social workers. Davis's sisters testified that their mother regularly beat Davis with switches, extension cords, and brooms. Mary Nell Davis testified that she remembered one instance when Davis was in the second grade and their mother beat Davis so badly with a broom that his head swelled up and his ear was almost "severed." She also said that when her mother was beating Davis he would call him a "black bastard."

Beverly Boggs, a social worker with the Calhoun County Department of Human Resources ("DHR"), testified that her first contact with Davis was when he was about 10 years old. A report had been filed with DHR that Davis was being abused and neglected. Davis's mother admitted to Boggs that she beat Davis because he was a bed wetter. The social worker recommended counseling for the child and mother.

Another social worker, Theresa Peebles, testified that she investigated a complaint that alleged that Davis was being abused when Davis was about 10 years old. Davis admitted to her that his mother beat him because he was a bed wetter. Peebles said that

she observed the extent of Davis's injuries on this occasion and that Davis had between 25 and 30 marks on his back. She said, "I've never seen a back that looked worse than Jimmy's did. " Peebles made photographs of his injuries, and those photographs were introduced at the Rule 32 hearing.

As previously stated, Davis was represented at trial by attorneys Giddens and Adams. Giddens testified at the Rule 32 hearing; Adams, however, did not. Giddens's fee declaration was introduced into evidence. The fee declaration showed that Giddens billed for 65 hours for in-court work and for 76 hours for out-of-court work related to Davis's case.

Giddens testified that in preparation for the penalty phase he requested that a psychological evaluation of Davis be performed.⁸ He also spoke with Davis's mother, Lillie Bell Davis.⁹ Giddens said that Davis was not very forthcoming with information.¹⁰ Adams did not testify at the Rule 32 proceedings as to his part in preparing for the penalty phase, nor did Giddens relate the extent of Adams's involvement in preparing for the penalty phase. The record does show that

⁸ Apparently this request was misdirected, and a psychometrist who was not a psychologist was assigned to test Davis.

⁹ Davis admitted that counsel spoke with two of his siblings, although at the Rule 32 hearing Giddens said he had spoken only with Davis's mother. It is possible that the two siblings spoke with Adams, but Adams did not testify.

¹⁰ This is consistent with Dr. Glen King's testimony at the Rule 32 hearing. Dr. King, a psychologist, testified that during his evaluation of Davis for the Rule 32 proceedings, Davis was not forthcoming with information about his childhood. (R. 863.)

attorney Adams had moved his office and that his file related to his work on Davis's case had been misplaced or lost.

Giddens testified to the following concerning mitigation evidence:

“Q [Davis's attorney]: But in your practice of defending capital cases, would you agree that an individual's educational background, family situation and employment status are some of the few things that should be taken into consideration at the mitigation phase?

“A [Giddens]: I think you need to take into consideration whatever evidence you can offer to a jury. Mitigation is simply that, to mitigate the sentence down to life [imprisonment] without parole and a lot of things to go into it. Educational background. I mean, lack of significant criminal history is one that you can offer. Many things are taken into mitigation. But simply asking for life without parole is asking to spare the death penalty, spare the defendant's life. And that's ultimately for the jury to make a recommendation. But I mean, you can offer, under the nonstatutory mitigation in Alabama, you can offer virtually anything.

“Q: And prior to becoming the District Attorney, when you're defending these cases, how would you go about investigating that 'virtually anything' that you could put before a jury?

“A: Well, the ‘virtually anything’ is putting family members on, ‘Please spare my son’s life’; ‘Please spare my brother’s life’; ‘Please spare my mother’s life.’ ‘He was a good child. He played ball, he did this. ‘ And showing a picture of the defendant that maybe they didn’t get to see. And that’s -- that’s what I’m talking about, the non-statutory mitigation is anything. Anything that they have ever done.

“

“Q: Have you ever offered evidence of physical child abuse?

“A: No.

“Q: If you found evidence of physical child abuse in a defendant’s life, would you offer that in a mitigation stage?

“A: If it was somehow related to the crime or if it -- I mean, under nonstatutory mitigation, I’m sure it’s admissible. I’m sure you can get it in, but I personally did not ever do that.”¹¹

(R. 75-76.) Giddens further testified that he spoke only with Davis’s mother and that he did not speak with any of Davis’s siblings.¹² He did not attempt to get any of Davis’s school records or any records from

¹¹ Evidence that a defendant was a victim of child abuse is a classic example of mitigating evidence; its admittance is not affected by whether the abuse directly related to the crime.

¹² Davis’s father was deceased at the time of trial.

DHR. Giddens was never questioned about Adams's preparation for the penalty phase. Indeed, the State's cross-examination of Giddens failed to elicit any information that would bolster the State's position that a reasonable investigation was conducted in this case. Moreover, the record shows that most of the preparation was conducted two weeks before Davis's trial.

We have also reviewed the transcript of the penalty phase. Counsel called Lillie Davis, Davis's mother, to testify at the penalty phase. She told the jury that Davis's father had left them when Davis was approximately one year old, that Davis did not have a father figure in his life, that Davis started giving her trouble when he was around 9, that Davis went to live with his father in New York when he was 15 years old, that Davis moved back after about two months because his father had died, and that Davis dropped out of school when he was 16 years old. She also said that Davis ran with a bad crowd, that he had never been involved in any violent behavior -- just stealing -- and that when he reached the age of 17 she asked him to leave her house because she could not control him. Last, she asked the jury to spare her son's life.

Andrew Lamont Sigler, Davis's first cousin, also testified at the penalty phase.¹³ Sigler testified: "I think Jimmy was missing a lot as he was coming up. People to rely on, people to talk to, people who could understand him and try and help him out. A lot of

¹³ Ssigler testified at the Rule 32 hearing that Davis's attorneys had not contacted him before Davis's trial but that on the day of sentencing he was in the courthouse and one of the attorneys asked him to testify.

things that we all have had, more successful people have had.” (Trial record at p. 1322.) Sigler also asked the jury to spare Davis’s life.

Annie Storey, a psychometrist employed at the Calhoun-Cleburne Mental Health Center, testified that she performed several IQ tests on Davis, including the Weschler Adult Intelligence Scale Revised (“WAIS-R”) and that Davis’s full scale IQ was 77, which placed him in the borderline range of intelligence functioning. Storey said that Davis’s IQ would make it difficult for him to perform ordinary tasks.

After the penalty-phase jury deliberated for 40 minutes, it returned with a question. The question was whether the trial court could accept a recommendation of death if seven jurors voted for death and five for life. The trial court sent the jury back to deliberate and gave the following instruction:

“The Court has heard the responses both by the State and by the defendant to. this question. Appears I have unanimity from each side of the case and no objections to the Court answering this question in the negative that no, the Court cannot accept the numbers as they state them. And further state there must be 10 votes for recommendation of death or there must be at least 7 votes for a recommendation of life without parole.”

(Record of trial, p. 1375-76.) After this instruction, the jury returned with a recommendation of 11 for death and 1 for life imprisonment without parole. Certainly, it is reasonable to conclude that the evidence of

Davis's child abuse could very well have tipped the scales in the other direction.

Davis asserts that according to the United States Supreme Court's decision in Wiggins v. Smith, 539 U.S. 510 (2003), he is entitled to a new sentencing hearing. In Wiggins, the Supreme Court held that trial counsel's performance was ineffective at the penalty phase of a capital-murder trial because counsel had failed to expand its investigation after discovering Department of Social Services ("DSS") records. counsel failed to discover that Wiggins had been severely beaten and tortured by his mother, who was an alcoholic, that he and his siblings had been left alone for days with no food and had been forced to beg for food and to eat paint chips and garbage, that Wiggins had been repeatedly sexually molested and raped while in foster custody and while in the Job Corps training program, and that Wiggins was borderline mentally retarded. Finding counsel's performance ineffective, the United States Supreme Court stated:

"Counsel's decision not to expand their investigation beyond the PSI [presentence investigation] and the DSS [Baltimore City Department of Social Services] records fell short of the professional standards that prevailed in Maryland in 1989 Counsel's conduct similarly fell short of the standards for capital defense work articulated by the American Bar Association (ABA) --standards to which we long have referred as 'guides to determining what is reasonable.' Strickland [v. Washington], [466 U.S.] at 688 [(1984)]; Williams v. Taylor, [529 U.S.] at 396, [(2000)]. The

ABA Guidelines provide that investigations into mitigating evidence ‘should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.’ ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93 (1989) (emphasis added). Despite these well-defined norms, however, counsel abandoned their investigation of petitioner’s background after having acquired only rudimentary knowledge of his history from a narrow set of sources. Cf. *id.*, 11.8.6, p. 133 (noting that among the topics counsel should consider presenting are medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences) (emphasis added); 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed. 1982) (“The lawyer also has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing Investigation is essential to fulfillment of these functions”).”

539 U.S. at 524-25. In this case counsel failed to conduct the type of investigation sanctioned by the guidelines developed by the American Bar Association for attorneys representing defendants in death-penalty cases as endorsed by the United States Supreme Court in Wiggins v. Smith.

Also, in this case the State relied on a prior robbery conviction to prove the aggravating circumstance that Davis had previously been convicted of a crime of violence. However, counsel testified that he did nothing to investigate this prior offense.¹⁴ Recently, in Rompilla v. Beard, ___ U.S. ___, 125 S. Ct. 2456 (2005), the United States Supreme Court found that counsel's performance was ineffective at the penalty phase of a capital trial because counsel failed to investigate a prior felony that the State was relying on to establish an aggravating circumstance. The United States Supreme Court stated:

“This evidence adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury, and although we suppose it is possible that a jury could have heard it all and still have decided on the death penalty, that is not the test. It goes without saying that the undiscovered ‘mitigating evidence, taken as a whole, ‘might well have influenced the jury’s appraisal’ of [Rompilla’s] culpability,’ Wiggins, 539 U.S., at 538, 123 S.Ct. 2527 (quoting Williams v. Taylor, 529 U.S., at 398, 120 S.Ct. 1495), and the likelihood of a different result if the evidence had gone in is ‘sufficient to undermine confidence in the outcome’ actually reached at sentencing, Strickland, 466 U.S., at 694, 104 S.Ct. 2052.”

¹⁴ It appears that Davis had pleaded guilty to robbing a pizza delivery man of approximately \$30 - \$40 and several pizzas.

___ U.S. at ___, 125 S.Ct. at 2469. The same is true of this case.

“The Supreme Court has made clear that the ‘ABA standards for counsel in death penalty cases provide the guiding rules and standards to be used in defining the “prevailing professional norms” in ineffective assistance cases.’ Hamblin v. Mitchell, 354 F.3d 482, 486 (6th Cir. 2004) (quoting Wiggins, 539 U.S. at 524, 123 S.Ct. 2527). Those standards provide that investigations into mitigating evidence ‘should comprise efforts to discover all reasonably available mitigation evidence,’ which should include investigation into ‘medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences.’ Wiggins, 539 U.S. at 524, 123 S.Ct. 2527 (quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.8.6 (1989) (emphases added)).”

Moore v. Parker, 425 F.3d 250, 261 (6th Cir. 2005) (footnote omitted) (Martin, J., dissenting). Here, the Rule 32 testimony revealed that counsel failed to conduct the type of reasonable investigation sanctioned by the ABA. Indeed, had this claim not been procedurally barred we would be compelled to grant relief and order a new sentencing hearing.

II.

Davis next argues that the State suppressed evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963). Specifically, Davis argues that the State failed to provide footprint evidence, failed to preserve his codefendant's clothes, failed to disclose threats made against Davis and his family, failed to reveal his codefendant's gang involvement, and failed to reveal the identity of the informants.¹⁵

The circuit court made the following findings of fact on this claim:

“The petitioner failed to carry his burden of proof in establishing the existence of a valid Brady claim. The United States Supreme Court definitively held, in Brady v. Maryland, that the government's failure to disclose evidence favorable to the defendant who specifically requested it violates the defendant's due process rights when the evidence is material to the guilt or punishment.’ Smith v. State, 698 So. 2d 189, 207 (Ala.Crim.App. 1996); Brady v. Maryland, 373 U.S. at 87. To properly establish a Brady violation, the defendant must make a showing that (1) the prosecution suppressed evidence, (2) the evidence suppressed was favorable to the defendant or was exculpatory, and (3) the evidence suppressed was material to the issues at trial. Ex parte Kennedy, 472 So. 2d 1106

¹⁵ In Davis's second amended petition he merely recites 19 different evidentiary items that he alleged the State suppressed.

(Ala. 1985), cert. denied, 479 U.S. 975 (1985). “Materiality” requires a finding that, had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.’ Coral v. State, 628 So. 2d 954, 979 (Ala.Crim.App. 1992), aff’d on return to remand, 628 So. 2d 988 (Ala.Crim.App. 1992), aff’d, 628 So. 2d 1004 (Ala. 1993), cert. denied, 114 S.Ct. 1387 (1994). ‘A “reasonable probability” is one sufficient to undermine confidence in the result.’ Coral v. State, 628 So. 2d at 979; Pennsylvania v. Ritchie, 480 U.S. 39 (1987); United State v. Bagley, 473 U.S. 667 (1985); Roger v. United States, 485 U.S. 969 (1988).

“Thus, in order for Davis to make a proper Brady claim, he must clearly show a suppression of evidence and that there was a reasonable probability, one sufficient to undermine confidence in the proper resolution of the case at trial, that the jury would have resolved his case differently had the prosecution disclosed the evidence in a timely manner. Id. There has been no such evidence established by the petitioner in this case, certainly nothing enumerated in items (a) through (s) of paragraph 67 in the second amended petition.

“Davis absolutely failed in this regard. Many of the items alleged in the petition were never mentioned during the Rule 32 hearing. One of the items mentioned, an

alleged footprint at the scene, was referred to in a report handed over to the defense, never used at trial, and never explained at the hearing. Thus, Davis did not prove suppression as the defense was put on notice that this evidence may have existed, did not prove materiality (it is unclear if this item even exists, where it was located, how it was found, how it was documented, whether it was casted or photographed, etc.), and he did not prove that it was exculpatory.

“Based on the record before this Court, this claim is denied.”

(C.R. 1191-92.) The record of the Rule 32 proceedings supports the circuit court’s findings. Davis made no effort at the Rule 32 hearing to satisfy the requirements of Brady v. Maryland, 373 U.S. 83 (1963). Davis thoroughly failed to meet his burden of proof under Rule 32.3, Ala.R.Crim.P.

Moreover, this claim is procedurally barred for the reasons discussed by this Court in Williams v. State, 782 So. 2d 811, 818 (Ala.Crim.App. 2000):

“The appellant’s first argument is that the State withheld exculpatory information in violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Specifically, he contends that the State suppressed evidence that a potential witness had seen the appellant and the victim together in Mobile before the murder and evidence that a white Porsche automobile had been seen at the scene of the crime at about 3:30 p.m. on

the day of the murder. The appellant did not assert that this claim was based on newly discovered evidence. Therefore, it is procedurally barred because he could have raised it at trial and on direct appeal, but did not. & Rule 32.2(a) (3) and (a) (5), Ala.R.Crim. P.; Boyd v. State, 746 So. 2d 364 (Ala.Cr.App. 1999); Matthews v. State, 654 So. 2d 66 (Ala.Cr.App. 1994); Lundy v. State, 568 So. 2d 399 (Ala.Cr.App. 1990).”

III.

Davis argues that in his case the death sentence is cruel and unusual punishment in violation of Atkins v. Virginia, 536 U.S. 304 (2002), because he says he is mentally retarded and has frontal-lobe brain damage.

In denying this claim the circuit court stated that “[Davis] does not fall within the definition of defendants protected by the Court’s decision in Atkins even under the broadest of definitions.” (C.R. 1194.)

The United States Supreme Court in Atkins held that it was a violation of the Eighth Amendment to execute a mentally retarded individual. The Atkins Court left the definition of mental retardation to the individual states. Though Alabama has yet to enact legislation defining mental retardation, the Alabama Supreme Court in Ex parte Perkins, 851 So. 2d 453 (Ala. 2002), adopted the broadest definition of mental retardation used by those states that have legislation prohibiting the execution of the mentally retarded. To satisfy the Perkins, test the defendant must exhibit (1) significantly subaverage intellectual functioning -- an IQ of 70 or below; (2) significant or substantial deficits

in adaptive behavior; and (3) these two deficiencies must have manifested themselves during the developmental years -- before the defendant reached the age of 18.

We have reviewed the records of Davis's trial and the Rule 32 proceedings. The record of the postconviction proceedings contains some of Davis's school records and report cards. A report card issued to Davis in the eighth grade shows that Davis made all B's and one C. (C.R. 1848.) Davis was also administered the Wechsler Intelligence Scale ("WISC-R") IQ test in the eighth grade. The test results showed that Davis's full-scale IQ was 74. This evaluation also contained the handwritten comment: "All areas are above grade level expectancy." (C.R. 1853.)

At the penalty phase of Davis's capital trial, Davis presented the testimony of Anne M. Storey, a counselor employed by Calhoun-Cleburne County Mental Health Center and the Oxford City School System. She testified that she administered IQ tests to Davis before his trial and that Davis had a full-scale IQ of 77.

At the postconviction hearing Davis presented testimony that when Davis was administered an IQ test while in the custody of the Alabama Department of Corrections his IQ measured in the high 70s. (R. 771.) Jan Vogelsang, a clinical social worker, also testified as follows:

"Jimmy had worked at a car wash. He had worked at Glen Addie housing project. Jimmy had not maintained consistent employment. Job Corps, he went away first with

Job Corps to Kentucky and he got homesick and came back.

“Then he went to Tuskegee. In the Job Corps there they taught him with classes. They taught him brick masonry. He was gone about a year. He got his GED while he was there. Apparently did well.”

(R. 1004.)

Dr. Charles J. Golden, a professor of psychology at Nova Southeastern University and Director of the Neuropsychological Assessment Center, also testified at the Rule 32 hearing. Dr. Golden stated that based on his assessment of Davis’s IQ scores, Davis had frontal-lobe brain damage. In rebuttal, the State presented the testimony of Dr. Glen D. King, a clinical psychologist. Dr. King testified that after evaluating Davis and his IQ scores, it was his opinion that Davis “merely had borderline intellectual functioning” and that he would not refer Davis to a neurologist. The experts testified that a CAT scan, a MRI, or a PET scan are traditionally used to diagnose brain damage.¹⁶ However, none of these tests were administered in this case.

We have painstakingly reviewed the record of the trial and the Rule 32 proceedings and find no indication that Davis meets the most liberal definition of mental retardation adopted by the Alabama Supreme

¹⁶ CAT is the acronym for computerized axial tomography; MRI is the acronym for magnetic resonance imaging; and PET is the acronym for positron emission tomography.

Court in Perkins. Therefore, Atkins does not bar the imposition of the death penalty in Davis's case.

IV.

Davis argues that the Rule 32 court erred in excluding clinical social worker Jan Vogelsang's entire binder of notes that consisted of a compilation of her findings regarding Davis's social history.¹⁷

Initially, we note that Davis's social history was introduced for the purpose of showing that mitigating evidence existed and that his trial counsel was ineffective for failing to introduce that evidence. However, in Part I of this opinion we held that Davis's claims of ineffective assistance of trial counsel were procedurally barred because when Ex parte Jackson was in effect, Davis was tried. Accordingly, if any error did occur, it was rendered harmless by our holding in Part I.

Moreover, in his brief to this Court Davis argues that [t] his issue merits this Court's close attention because such an expert's exhibit is indeed the very sort of exhibit that belongs in the jury room in the penalty phase deliberations of a capital murder case along with whatever supporting and discrediting evidence accompanies it." (Davis's brief at pp. 75-75.) The National Association of Social Workers ("NASW") argues that social histories are reliable and important evidence and are widely used in capital-murder cases to show mitigation.

¹⁷ The National Association of Social Workers ("NASW") and its Alabama Chapter was granted leave to file and filed an amicus curiae brief on this issue.

At the Rule 32 proceeding a plethora of other evidence was offered and admitted to show that mitigation evidence did exist.¹⁸ Indeed, the evidence introduced and admitted at the hearing was similar to the evidence contained in Vogelsang's social history binder.

When addressing a similar claim in Williams v. Anderson, 174 F. Supp. 2d 843 (N.D. Ind. 2001), William v. Davis, 301 F. 3d 625 (7th Cir. 2002), a federal court when denying relief, likewise noted:

“Williams argues that the post-conviction court's decision denied him due process by precluding the court from considering additional mitigating evidence, as mandated by Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), and Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). In Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986), the Supreme Court held that excluding mitigating evidence as cumulative may be implausible under the facts of a case if the court cannot conclude that the excluded evidence

¹⁸ Rule 26.6(b) (2), Ala.R.Crim.P., states that at a sentencing hearing “[a]ny evidence that the court deems to have probative value may be received, regardless of its admissibility under the rules of evidence. “ However, the Alabama Rules of Evidence apply to postconviction proceedings. See DeBruce v. State, 890 So.2d 1068 (Ala.Crim.App. 2003), rev'd on other grounds, Ex parte Jenkins, [Ms. 1031313, April 8, 2005] ___ So. 2d ___ (Ala. 2005).

would have had no impact on the jury's deliberations. 476 U.S. at 8, 106 S.Ct. 1669. Thus, Williams argues that the Indiana Supreme Court's determination that the evidence was cumulative impeded the court's ability to consider all relevant facets of his character in determining his sentence, and thus violated Skipper.

"This court first notes that the evidence was excluded during post-conviction proceedings, and not during the actual trial. Thus, it is unclear whether the protection of Hitchcock, Eddings, Lockett, and Skipper apply at all."

174 F. Supp. 2d at 872-73.

The social history binder was admissible. The circuit court erred in not allowing this binder to be received into evidence; however, in this case, it is clear that the material in the binder was cumulative to Vogelsang's thorough and lengthy Rule 32 testimony and to testimony offered by other witnesses at the Rule 32 hearing. "The exclusion of admissible evidence does not constitute reversible error where the evidence 'would have been merely cumulative of other evidence of the same nature, which was admitted.'" Houston v. State, 565 SO. 2d 277, 281 (Ala.Crim.App. 1990) (quoting Ex parte Lawson, 476 So. 2d 122, 122 (Ala. 1995)). Accordingly, for the reasons stated above we find no reversible error.

v.

Davis also argues that the circuit court erred in excluding other evidence related to Davis's family

environment. Davis's brief on this issue consists of two paragraphs. Davis states only that the circuit court erroneously excluded hearsay and that hearsay evidence is admissible at the sentencing stage of a capital-murder trial. However, Davis does not identify what hearsay was excluded.

What Davis fails to consider is that this evidence was offered in a Rule 32 proceeding and not at the sentencing phase of a capital-murder trial. The Alabama Rules of Evidence do not apply to sentencing hearings, but do apply to Rule 32 proceedings. See Rule 101, Ala.R.Evid., and Rule 1101(a), Ala.R.Evid. Rule 804, Ala.R.Evid., specifically forbids the admittance of hearsay evidence. It appears that the circuit court correctly applied the law. We find no error here.

VI.

The following issues are procedurally barred in this postconviction proceeding because they could have been, but were not, raised at trial or on appeal. See Rules 32.3 (a) (3) and (a) (5), Ala.R.Crim. P.

1. Davis was prejudiced by the State's closing argument.
2. Davis's death sentence was sought and imposed pursuant to a pattern of racial bias.
3. The fee cap for attorneys appointed to represent indigents foreclosed effective assistance of counsel.

For the foregoing reasons, we affirm the circuit court's denial of Davis's Rule 32 petition.

AFFIRMED.

McMillan, P.J. and Wise, J., concur. Shaw, J., concurs in result. Baschab, J., concurs in result with opinion.

BASCHAB, JUDGE, concurring in the result.

The majority properly concludes that the appellant's ineffective-assistance-of-counsel claims are procedurally barred. Nevertheless, it then proceeds to discuss the merits of one of the appellant's ineffective-assistance claims and to conclude that, "[h]ad this issue not been procedurally barred we would be compelled to grant relief and order a new sentencing hearing." ___ So. 2d at ___. Because the appellant's ineffective-assistance claims are procedurally barred, this discussion and conclusion are inappropriate and are nothing more than unnecessary dicta. Instead, we should simply state that the appellant's ineffective-assistance claims are procedurally barred. Accordingly, I respectfully concur in the result.

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Appendix F

[Filed: Apr. 4, 2008]

Notice: This opinion is subject to formal revision before publication in the advance sheets of Southern Reporter. Readers are requested to notify the Reporter of Decisions, Alabama appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 229-0649), of any typographical or other errors, in order that corrections may be made before the opinion is printed in Southern Reporter.

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2007-2008

CR-03-2086

Jimmy Davis, Jr.

v.

State of Alabama

Appeal from Calhoun Circuit Court

(CC-93-534.60)

After Remand from the Alabama Supreme Court

WELCH, Judge.

The appellant, Jimmy Davis, Jr., appeals the denial of his petition for postconviction relief filed pursuant to Rule 32, Ala.R.Crim.P., in which Davis attacked his 1993 capital-murder conviction and sentence of death. We affirmed the circuit court's denial of Davis's Rule

32 petition. See Davis v. State, [Ms. CR-03-2086, March 3, 2006] ___ So. 2d ___ (Ala.Crim.App. 2006). On certiorari review the Alabama Supreme Court reversed in part this Court's decision after finding that we had erroneously applied the procedural default grounds in Rule 32(a) (3) and (5), sua sponte, to bar Davis's claims that his trial counsel's performance was ineffective. See Ex parte Davis, [Ms. 1051719, August 3, 2007] ___ So. 2d ___ (Ala. 2007). The Supreme Court remanded the case for this Court to consider the merits of Davis's ineffective-assistance-of-counsel claims that were raised in Davis's brief.

The facts surrounding the robbery/murder are relevant in addressing the issues raised in Davis's brief to this Court. This Court set out the following facts in our opinion on Davis's direct appeal:

“The state's evidence showed that on March 17, 1993, the appellant, Alphonso Phillips, and Terrance Phillips made plans to rob the Direct Oil Station, a gasoline service station in Anniston. According to the plan, the appellant, who possessed a .25 caliber semiautomatic pistol, would point the pistol at the station operator, Alphonso would grab the money, and Terrance would act as a lookout. The state's evidence supports the conclusion that the appellant was the principal actor in the conspiracy. He conceived the idea to rob the station and he recruited the others to help him. As the trio approached the station, Terrance changed his mind, abandoned the conspiracy, and walked away. Alphonso and the appellant approached the station;

the appellant confronted the operator, Johnny Hazle, in the doorway of the station, pointed the pistol at him, and said, 'Give it up, fuck-nigger.' The appellant almost immediately fired two shots from the pistol, which struck Hazle in the chest and abdomen. Terrance testified that he was about a block from the station, walking toward his home, when he heard two or three shots fired. After the shooting, the appellant and Alphonso ran from the scene. Hazle died from these wounds shortly thereafter. Three empty .25 caliber shell casings were recovered at the scene, and two bullets of the same caliber were recovered from Hazle's body. The pistol was subsequently recovered. The ballistics evidence showed that the two bullets recovered from Hazle's body and the three empty shell casings found at the scene had been fired from the appellant's pistol. Alphonso and Terrance entered into agreements with the state pursuant to which in return for their testimony against the appellant they would be permitted to plead guilty to conspiracy to commit robbery in the first degree.

"Alphonso, testifying for the state, stated that as he and the appellant reached the door of the station, the appellant pointed the pistol at Hazle and said, 'Give it up, fuck-nigger'; that Hazle looked inside the store and smiled; and that the appellant shot Hazle when he smiled. Several witnesses for the state testified that the appellant told them shortly

after the shooting that he had shot the Direct Oil Station operator. In his testimony, Terrance described his conversation with the appellant as follows:

“He [the appellant] said he had told him [the operator], “Give it up, fuck-nigger.” And then he said the man had smiled or something at him, laughed or something. And then he said he had shot and the man had kicked the door. And then he shot again. I don’t know -- I can’t remember how many times he said he shot. And then he said they ran.’

“Alphonso testified as follows: ‘ [The appellant] said, “Man, I shot that fuck-nigger, I shot him.” And then he said, “The second time felt even better than the first time.”’ Willie James Smith, an acquaintance of the appellant, testified, ‘ [The appellant] ... told me he had shot someone [a]nd told me he had robbed Direct and shot someone. ‘ Smith also testified that the appellant told him that Alphonso and Terrance were with him and that the appellant ‘said that the man wouldn’t give up the money, so he shot him three times. ‘ Shannon Hardy Wilson, another acquaintance of the appellant, testified as follows about his conversation with the appellant:

“Before they got in there, he said they pulled up their bandannas and they went in there. And when he got

to the door [the appellant] said, "Give it up." And that Mr. Hazle laughed at him and that Alphonso ran. And then he said he told him to give it up again. And he said Mr. Hazle laughed at him and then he shot him.'

"Wilson further testified that the appellant said he 'wasn't going to let no cracker laugh at him.'

"The appellant did not testify and called only one witness in the guilty phase, Tim Whatley, an investigator with the Anniston police department, who testified as to his observations at the scene of the crime shortly after the shooting and the description of the fleeing suspects he obtained from witnesses at or near the scene. The appellant's defense strategy consisted mainly of trying to discredit or to cast doubt upon the testimony of the state's witnesses through cross-examination and arguments to the jury and to the trial court. By these means, he attempted to exploit differences as to some details in their testimony, attempted to persuade the jury that under the facts it was more likely that Alphonso did the shooting, argued to the jury and to the trial court that the facts surrounding the commission of the crime better fit the elements of the lesser included offense of felony-murder rather than with the offense of capital murder, and attempted to cast doubt upon the veracity of Alphonso, Terrance, and

Smith (who was involved with the authorities in an unrelated case) by emphasizing the deals they had made with the state for lenient treatment in return for their testimony.”

Davis v. State, 718 So. 2d 1148, 1155 (Ala.Crim.App. 1995) (footnote omitted).

Standard of Review

When reviewing a circuit court’s denial of a Rule 32 petition we apply an abuse-of-discretion standard. Elliott v. State, 601 So. 2d 1118, 1119 (Ala.Crim.App. 1992). On direct appeal we reviewed Davis’s trial proceedings for plain error. See Rule 45A, Ala.R.App.P. However, the plain-error standard of review does not apply in Rule 32 petitions. Hill v. State, 695 So. 2d 1223 (Ala.Crim.App. 1997); Neeley v. State, 642 So. 2d 494 (Ala.Crim.App. 1993).

This postconviction proceeding was initiated by Davis. According to Rule 32.3, Ala.R.Crim.p., Davis has the “burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief.”

Moreover, when reviewing claims of ineffective assistance of counsel, we apply the standard announced by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). The petitioner must show: (1) that counsel’s performance was deficient; and (2) that the petitioner was prejudiced by the deficient performance.

“Judicial scrutiny of counsel’s performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel’s

assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Cf. Engle v. Isaac, 456 U.S. 107, 133-34 (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy. 'See Michel v. Louisiana, [350 U.S. 91], at 101 [(1955)]. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way."

466 U.S. at 689. As the United States Supreme Court further stated:

"[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable

precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments."

466 U.S. at 690-91. This Court has noted that

"[t]he purpose of ineffectiveness review is not to grade counsel's performance. See Strickland v. Washington, [466 U.S. 668,] 104 S.Ct. [2052] at 2065 [(1984)]; see also White v. Singletary, 972 F.2d 1218, 1221 (11th Cir. 1992) ("We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately. "). We recognize that "[r]epresentation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Strickland, 104 S. Ct. at 2067. Different lawyers have different gifts; this fact, as well as differing circumstances from case to case, means the range of what might be a reasonable approach at trial must be broad. To

state the obvious: the trial lawyers, in every case, could have done something more or something different. So, omissions are inevitable. But, the issue is not what is possible or “what is prudent or appropriate, but only what is constitutionally compelled.” Burger v. Kemp, 483 U.S. 776, 107 S. Ct. 3114, 3126, 97 L.Ed.2d 638 (1987).

“

“Because the reasonableness of counsel’s acts (including what investigations are reasonable) depends “critically’ upon “information supplied by the [petitioner]” or “the [petitioner]’s own statements or actions, “evidence of a petitioner’s statements and acts in dealing with counsel is highly relevant to ineffective assistance claims. Strickland, 104 S.Ct. at 2066. “[An] inquiry into counsel’s conversations with the [petitioner] may be critical to a proper assessment of counsel’s investigation decisions, just as it may be critical to a proper assessment of counsel’s other litigation decisions.” Id. (“[W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel’s failure to pursue those

investigations may not later be challenged as unreasonable.”.’

“Chandler v. United States, 218 F. 3d 1305, 1313-19 (11th Cir. 2000) (footnotes omitted).”

Gaddy v. State, 952 So. 2d 1149, 1157 (Ala.Crim.App. 2006).

“The reasonableness of counsel’s investigation and preparation depends critically on the information supplied by the defendant. Commonwealth v. Peterkin, 511 Pa. 299, 513 A.2d 373 (1986), cert. denied, 479 U.S. 1070, 107 S.Ct. 962, 93 L.Ed.2d 1010 (1987); Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, reh’g denied, 467 U.S. 1267, 104 S.Ct. 3562, 82 L.Ed.2d 864 (1984). Appellant’s own failure to cooperate with counsel in order to apprise him of allegedly relevant information cannot now provide a basis for ineffectiveness claims.”

Commonwealth v. Uderra, 550 Pa. 389, 401, 706 A.2d 334, 340 (1998). “If the record is silent as to the reasoning behind counsel’s actions, the presumption of effectiveness is sufficient to deny relief on ineffective assistance of counsel claim.” Howard v. State, 239 S.W.3d 359, 367 (Tex.Crim.App. 2007).

“An ambiguous or silent record is not sufficient to disprove the strong and continuing presumption [of effective representation]. Therefore “where the record is incomplete or unclear about [counsel]’s actions, we will presume that he did what he should have done, and that he exercised reasonable

professional judgment.” Chandler v. United States, 218 F.3d 1305, 1314 n. 15 (11th Cir. 2000) (en banc) (quoting Williams v. Head, 185 F.3d 1223, 1228 (11th Cir. 1999)).”

Grayson v. Thompson, 257 F.3d 1194, 1218 (11th Cir. 2001).

Initially, the State argues that Davis has waived his arguments concerning ineffective assistance of counsel because the section of Davis’s brief in which those arguments are made does not comply with Rule 28 (a) (10), Ala.R.App.P. Rule 28, Ala.R.App.P., governs the contents of an appellate brief and states that the brief shall contain “an argument containing the contentions of the appellant/petitioner with respect to the issues presented, and the reasons therefor, with citations to the cases, statutes, other authorities, and parts of the record relied on.” Rule 28 (a) (10), Ala.R.App. P.

Specifically, the State argues:

“Davis failed to argue any of his 34 individual claims of ineffective assistance ... [I]nstead, he relied on one general claim that ‘the evidence is simply overwhelming that defense counsel failed under any technical standard of measurement’ and that ‘[n]o excuses advanced by the State and adopted by the Court hold up.’ This general attack on Davis’s trial attorneys, the State and Judge Street is not sufficient to be considered an argument under Rule 28 (a) (10) because Davis failed to pick any of the 34 claims raised in his petition as the one (or ones) upon which Judge

Street incorrectly denied post-conviction relief.”

(State’s brief at pages 20-21.) We believe that, “[a]lthough another attorney may have treated the ineffective-assistance of counsel argument differently,” Davis’s brief is marginally sufficient to fulfill the requirements of Rule 28 (a) (10), Ala.R.App.P. See Ex parte Borden, [Ms. 1050042, August 17, 2007] ___ So. 2d ___, ___ (Ala. 2007).

During trial, Davis was represented by attorneys Steven D. Giddens and Jonathan L. Adams. Giddens testified at the postconviction proceedings; Adams did not. Davis makes the following claims that his two attorneys were ineffective at his capital-murder trial.

Claims of Ineffective Assistance at the Guilt Phase

I.

Davis argues that his attorneys were ineffective at the guilt phase of his capital-murder trial. He lists several grounds in support of this contention.

A.

First, Davis argues that his attorneys were ineffective for failing to properly investigate and present an alibi defense.

In his Rule 32 petition Davis alleged that counsel was ineffective for failing to call Tonya Heard and “anyone else” who was present at her house in the early evening on the day of the robbery/murder. Specifically, he asserted that these witnesses could have testified that Davis was at Beard’s house at the time of the

murder and that he could not have committed the crime.

However, Tonya Heard was not called to testify at the Rule 32 hearing. Instead, Davis introduced the testimony of Cynthia Jacobs. Jacobs said that on the day of the murder Davis was at her house when she came home from work at around 4: 00 p. m. and that he left the house at approximately 7: 30 p.m. when her mother, Betty Jacobs, arrived home. (The robbery/murder occurred at approximately 7: 15 p.m.) She said that Davis and numerous other friends were on her front porch most of that afternoon, that she went in and out of the house while she was cooking, that Davis was on the porch, and that it was possible that Davis left the porch but for only short periods. Jacobs also said that she never told anyone that Davis was at her house when Hazle was shot because “no-body asked.”

Giddens testified at the Rule 32 hearing that Davis told him about Heard but did not mention Cynthia or Betty Jacobs. He said:

“The only information Mr. Davis -- and I will say, he provided me very little -- was that he was with Tonya Heard. And that’s about all. That’s in my private conversations with him.”

(R. 149.) Attorney Giddens testified that he spoke with Heard before trial

“[Ms. Heard] said that Mr. Davis had been at her house, they had played cards, that he left. When he came back, he had changed clothes and he was very nervous and that he was adamant to her that, ‘Now, I have been here all

night.’ That’s what she told me. And based on her telling me that, I didn’t want to put her on the witness stand. Because this statement when you first see it, looks like a good witness for him. But when you talk to her, she didn’t tell me that at all.

“I don’t know what she was doing or why she didn’t tell the police that version, but I felt like it would be a big mistake to put her on the witness stand based on that.”

(R. 69-70.)

The court hearing Davis’s Rule 32 petition made the following findings of fact on this claim:

“In paragraph 21 of his second amended petition, Davis alleged that trial counsel failed to utilize witness Tonya Heard, who would have testified that Davis was visiting her home at the time of the Direct Oil shooting and that others were also present. Counsel is also faulted for not calling Sharon Christopher, another person who was allegedly present at Heard’s home at the time of the shooting.

“At the evidentiary hearing, Giddens testified that he interviewed Tonya Heard and determined that she would not make a good alibi witness. (RR. 68-70.) In fact, Giddens testified that he felt he was being baited into calling her so that the State could make his client look worse. Heard told him that after Davis left and came back to her residence later in the evening, he was insistent that

she tell anyone who asked that he had been there all night. (RR. 69-70.) Because Tonya Heard never testified during the evidentiary hearing, Giddens must be given the benefit of the doubt as this Court will not second guess his professional opinions formed after interviewing this witness,

“Having heard the testimony of Sharon Christopher, it is also clear that Giddens made a wise choice. In addition to what Giddens recalled Heard say during her interview, Christopher placed Davis leaving Heard’s house before 6: 30 p.m., when the robbery occurred at 7: 15 p.m. (R. 5 13, 607.) This inconsistency was a warning sign due to the fact Davis told Giddens he had been at Heard’s all night. (RR. 147-148.) In the light of the inconsistent testimony of the Jacobs at the Rule 32 hearing (RR. 260-266, 269, 277-282, 294-295), it is clear that Giddens made a wise choice not to call Heard or Christopher, even in the absence of the Petitioner carrying his burden of proof as to this issue.”

(C.R. 1143-44.) The circuit court’s findings are supported by the record.

Cynthia Jacobs’ s testimony at the Rule 32 hearing was inconsistent with Davis’s statements to his attorneys and with Heard’s statements. As the Georgia Supreme Court stated in Adkins v. State, 280 Ga. 761, 632 S.E.2d 650 (2006):

“Counsel’s ‘decision not to investigate must be directly assessed for reasonableness in all

the circumstances, applying a heavy measure of deference to counsel's judgments.' (Punctuation omitted.) Wiggins v. Smith, 539 U.S. 510 (II), 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). In Escobar v. State, 279 Ga. 727, 730, 620 S.E.2d 812 (2005), we held that trial counsel 'was not ineffective for failing to discover a possible alibi witness of whom he was not informed.' Here, trial counsel testified at the hearing on the motion for new trial that appellant did not inform him of the existence of any alibi witnesses. It is within the trial court's discretion to resolve conflicting testimony between trial counsel and a defendant at a hearing on motion for new trial. Boyd v. State, 275 Ga. 772, 776, 573 S.E.2d 52 (2002); Fitz v. State, 275 Ga. App. 817, 825, 622 S.E.2d 46 (2005). Trial counsel's performance cannot be deemed ineffective for failing to locate alibi witnesses whose existence was not brought to his attention. Escobar v. State, supra."

280 Ga. at 762, 632 S.E.2d at 653.

"Defense counsel's failure to investigate, interview, or present alibi witnesses does not amount to the ineffective assistance of counsel, because petitioner has failed to identify these witnesses, indicate their availability, or specify the content of their testimony. United States v. Green, 21 F.Supp.2d 521, 525 (D.Md. 1998). Petitioner's vague and speculative allegations that defense counsel was ineffective for failing to investigate alibi

witnesses does not entitle him to habeas relief. See United States ex. rel. DeCreti v. Wilson, 967 F.Supp. 303, 307-308 (N.D.Ill. 1997).”

Dell v. Straub, 194 F.Supp.2d 629, 650 (E.D.Mich. 2002).

Moreover, “[c]onfronted with the contradictions between what the members of the defendant’s family would testify to and what defendant himself had told counsel, [defense counsel] could reasonably have concluded that the presentation of this testimony would have been improper on his part. ...” People v. Calhoun, 351 Ill.App.3d 1072, 1080, 815 N.E.2d 492, 498, 287 Ill.Dec. 89, 95 (2004), quoting People v. Flores, 128 Ill.2d 66, 107, 538 N.E.2d 481, 498, 131 Ill.Dec. 106 (1989).

Accordingly, counsel was not ineffective for failing to conduct further investigation into Davis’s alibi defense and to locate Cynthia Jacobs, a witness whose testimony was inconsistent with Davis’s own statements to his attorneys. Thus, the circuit court did not abuse its discretion in denying relief on this claim.

B.

Second, Davis argues that counsel was ineffective for failing to challenge the State’s case against him. The circuit court made the following findings of fact on this claim:

“Davis failed to carry his burden of proof as to this allegation in his second amended petition. The record shows that trial counsel challenged the State’s investigation and preparation of this case, including reviewing

witness statements, discovery, visiting the crime scene, and speaking with Davis. In fact, this preparation paid off. at trial when defense counsel prepared a defense that attempted to cast doubt on the veracity of the Phillips brothers [his codefendants] and on Willie Smith. That this defense was not successful does not lessen its validity. The closing arguments of defense counsel at the guilt phase demonstrate how effective they were in preparing a defense. The use of Alphonso Phillips's allocution against him -- suggesting he was the triggerman -- is the stuff good defenses are made of. (R. 1210-1211.) Trial counsel also used the State's evidence of the descriptions of the participants in the Direct Oil shooting in an attempt to establish a reasonable doubt as to Davis's innocence. This defense strategy included calling a police officer to the stand to recount a physical description given immediately after the crime that was someone different from Davis's description. This testimony, combined with the efforts to discredit the Phillips brothers, allowed defense counsel to argue that Willie Smith and the Phillips brothers were conspiring to frame Davis.

"As to paragraphs 24-29 in the second amended petition, Davis offered no evidence or argument that would be sufficient to meet his burden of proof in this case. As Davis has not established deficient performance or prejudice in this regard, this claim is denied."

(C.R. 1147-48.) The circuit court's findings are supported by the record.

We have reviewed the record of Davis's trial. Davis's codefendants Alphonso Phillips and Terrance Phillips testified that the three made plans to rob the Direct Oil gasoline station in Anniston and that Davis was carrying a .25 caliber semiautomatic pistol.¹ Alphonso testified that when they went into the gasoline station Davis pointed the gun at Johnny Hazle and fired two shots at him. Terrance said that he was supposed to be the lookout but that he walked away before they got to the gas station. He testified that he heard gunshots as he was walking away. Willie Smith testified that Davis told him that he had robbed and shot someone at the Direct Oil station. Still other witnesses testified that Davis had made statements to them concerning his involvement in the robbery/murder. The evidence against Davis was overwhelming.

Giddens testified at the Rule. 32 hearing that "our strategy was [to] discredit the people who were there, show the jury the discrepancies in the height, weight, and actually try to establish a reasonable doubt that perhaps a co-defendant who had a motive to lie did it, not Mr. Davis." (R. 150.) The record shows that counsel did an admirable job of attempting to discredit the state witnesses. As this Court stated on direct appeal:

"The appellant's defense strategy consisted mainly of trying to discredit or to cast doubt

¹ In exchange for their testimony at Davis's trial, Alphonso and Terrance Phillips pleaded guilty to conspiracy to commit robbery. Alphonso was sentenced to 20 years' imprisonment, and Terrance was sentenced to 10 years' imprisonment.

upon the testimony of the state's witnesses through cross-examination and arguments to the jury and to the trial court. By these means, he attempted to exploit differences as to some details in their testimony, attempted to persuade the jury that under the facts it was more likely that Alphonso did the shooting, argued to the jury and to the trial court that the facts surrounding the commission of the crime better fit the elements of the lesser included offense of felony-murder rather than with the offense of capital murder, and attempted to cast doubt upon the veracity of Alphonso, Terrance, and Smith (who was involved with the authorities in an unrelated case) by emphasizing the deals they had made with the state for lenient treatment in return for their testimony."

Davis v. State, 718 So. 2d at 1156. The record also shows that counsel made numerous objections and was able to secure a ruling excluding any reference to "gang activity." Counsel vigorously attacked the State's overwhelming evidence against Davis. That counsel was unsuccessful in failing to obtain an acquittal is not sufficient to find that counsel's performance was ineffective.

"The fact that a particular defense was unsuccessful does not prove ineffective assistance of counsel. 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."' Chandler, 218

F.3d at 1314 (quoting Darden v. Wainwright, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986)).”

Brown v. Crosby, 249 F.Supp.2d 1285, 1321 (S.D.Fla. 2003). The circuit court did not abuse its discretion in denying relief on this claim.

C.

Third, Davis argues that his attorneys were ineffective for failing to object to what Davis says was irrelevant and prejudicial evidence. He argues that counsel should have objected to the admission of a letter found in Davis’s pocket that referred to gang activity and to Shannon Wilson’s testimony.² Wilson testified that she overheard a conversation between Davis and Willie Smith in which Davis said that he shot and killed Hazle.

The circuit court found that Davis failed to meet his burden of proof on this claim because no evidence was introduced at the evidentiary hearing concerning this issue. We agree. Counsel was not questioned concerning this evidence.

“This court has held that “[o]bjections are a matter of trial strategy, and an appellant must overcome the presumption that “conduct falls within the wide range of reasonable professional assistance, “that is, the presumption that the challenged action “might

² Apparently, counsel did secure a ruling striking those references to gang activity from the letter. The Alabama Supreme Court in its opinion on direct appeal stated that there were no references to gang activity made at Davis’s trial. Ex parte Davis, 718 So. 2d 1166, 1175-76 (Ala. 1998).

be considered sound trial strategy.” Moore v. State, 659 So. 2d 205, 209 (Ala.Cr.App. 1994), citing Strickland [v. Washington], 466 U.S. [668] at 687-88, 104 S.Ct. [2052] at 2064-65 [(1984)].”

Lane v. State, 708 So. 2d 206, 209 (Ala.Crim.App. 1997). As we stated in Brooks v. State, 456 So. 2d 1142, 1145 (Ala.Cr.App. 1984), “effectiveness of counsel does not lend itself to measurement by picking through the transcript and counting the places where objections might be made. Effectiveness of counsel is not measured by whether counsel objected to every question and moved to strike every answer.” Davis failed to meet his burden of proof on this claim; therefore, the trial court correctly denied him relief.

D.

Fourth, Davis argues that counsel was ineffective for failing to ensure that the record of the proceedings in the lower court was fully recorded. Specifically, he asserts that counsel erred in failing to have his preliminary hearing recorded and for not ensuring that sidebar conferences were recorded.

The circuit court made the following findings on this claim:

“In paragraph 38, Davis alleges [ineffective assistance of counsel] based on trial counsel’s failure to move for full recordation of all proceedings in his capital murder trial. Davis failed to prove that he was prejudiced by the lack of transcription of certain sidebars during the course of trial. Al though Giddens testified, the subject of whether any

controversial rulings or prejudicial comments were made during these sidebars was not addressed. This Court, which presided over Davis's capital murder trial, cannot recall anything discussed during sidebars that would have prejudiced Davis due to their lack of transcription. Because David did not put forth evidence to support this claim, it is denied."

(R. 1151-52.)

At the Rule 32 hearing, Davis asked Giddens why he did not move to have the preliminary hearing transcribed. The following occurred:

"[Rule 32 counsel]: Do you make a strategy decision not to make that motion or have you just never thought about making that motion?"

"[Giddens]: When the only witness really is going to be the investigating officer, you find out what you need to know, I mean, he's charged with killing a man at a gas station, Direct Oil here in Anniston. And that was pretty much the testimony. And I believe the officer testified what the codefendants had told him."

(R. 31-32.) Davis made no attempt to show how he was prejudiced by counsel's failure to have the preliminary hearing or certain sidebar conferences recorded. There are no allegations that the officer's testimony at the preliminary hearing was inconsistent with his trial testimony or that the sidebar conferences contained omitted information that prejudiced Davis. "It is incumbent upon [petitioner] to show some prejudice

from the failure to transcribe the preliminary hearing testimony before it may be claimed to be ineffective assistance of counsel.” Spilman v. State, 633 P.2d 183 (Wyo. 1981).” Jennings v. State, 806 P.2d 1299, 1307 (Wyo. 1991). The circuit court correctly denied relief on this claim.

E.

Fifth, Davis argues that counsel failed to object to improper prosecutorial arguments that, he says, were made in closing. Specifically, he asserts that the prosecutor improperly commented on the fact that Davis did not testify.

The circuit court made the following findings on this claim:

“In paragraph 43, Davis alleges [ineffective assistance of counsel] because the prosecutor allegedly drew attention to the fact that Davis did not testify, without objection from defense counsel. The contention that the prosecutor improperly commented on Davis’s failure to testify was reviewed and rejected by the Supreme Court of Alabama. Ex parte Davis, 718 So. 2d 1166, 1174 (Ala. 1998). Having failed on the underlying issue on direct appeal, Davis cannot succeed by relitigating this issue in the guise of [ineffective assistance of counsel]. See, Williams [v. State], 783 So. 2d 108, 133 (Ala.Crim.App. 2000) (‘Because we determined that the remarks did not constitute plain error even if objectionable, appellant cannot relitigate the issue under the guise of ineffective

assistance of counsel in a post-conviction proceeding. A finding of no manifest injustice under the “plain error” standard on a direct appeal serves to establish a finding of no prejudice under the test for ineffective assistance of counsel provided in Strickland v. Washington[, 466 U.S. 668 (1984)].”). Because the underlying issue lacks merit, counsel could not have been ineffective in this regard. See Card v. Dugger, 911 F.2d. 1494, 1520 (11th Cir. 1990) (“Counsel cannot be labeled ineffective for failing to raise issues which have no merit.”).

(R. 1152-53.)

Initially we note that the circuit court erroneously relied on a decision by this Court, Williams v. State, 783 So. 2d 108 (Ala.Crim.App. 2000), that was later reversed by the Alabama Supreme Court. However, the circuit court issued its order before the Supreme Court released Ex parte Taylor, [Ms. 1040186, September 30, 2005] ___ So. 2d ___ (Ala. 2005). The Taylor court held:

“[a]lthough it may be the rare case in which the application of the plain-error test and the prejudice prong of the Strickland [v. Washington], 466 U.S. 668 (1984)] test will result in different outcomes, a determination on direct appeal that there has been no plain error does not automatically foreclose a determination of the existence of the prejudice required under Strickland to sustain a claim of ineffective assistance of counsel.”

Taylor, ___ So. 2d at ___.

On direct appeal the Supreme Court stated the following concerning the prosecutor's argument in closing:

"After reviewing the State's comments in their full context, we cannot hold that they would naturally and necessarily be construed as an attack on Davis's decision not to testify on his own behalf; rather, they could well be construed as a form of cohesive rebuttal to defense counsel's theory that the witnesses against Davis were lying in order to rid themselves of involvement in the crime."

Ex parte Davis, 718 So. 2d 1166, 1174 (Ala. 1998). The Alabama Supreme Court specifically found that the prosecutor's comments were not improper. "The sixth amendment right to effective assistance of counsel does not require counsel to raise every objection without regard to its merit." Palmes v. Wainwright, 725 F.2d 15 11, 1523 (11th Cir. 1984). See also Thomas v. Jones, 891 F.2d 1500 (11th Cir. 1989) (counsel not ineffective for failing to object to admissible evidence). Therefore, counsel was not ineffective for failing to object to a prosecutor's proper argument.

Moreover, whether to object is a matter of trial strategy. "[C]ounsel's failure to object to the prosecutor's summation represents his tactical decision to avoid underscoring the prosecutor's statements so as to draw the jury's attention to them." Gatto v. Hoke, 809 F.Supp. 1030, 1039 (E.D.N.Y. 1992). Relief was correctly denied on this claim.

Claims of Ineffective Assistance at the Penalty Phase

II.

Davis next argues that his attorneys were ineffective in the penalty phase of his capital trial. We stated in our previous opinion affirming the circuit court's denial of Davis's Rule 32 petition that if this issue had been properly before us we would direct that a new sentencing hearing be conducted. Davis v. State, ___ So. 2d ___ at ____ However, upon further research and review of the record we have reconsidered our comments in dicta in our previous opinion, and we now conclude that the circuit court did not abuse its discretion in denying Davis relief on his claims of ineffective-assistance-of-trial-counsel at the penalty phase.

The circuit court made very detailed findings of fact on this issue, and we quote extensively from its order:

“In this claim, Davis has alleged that his trial counsel were ineffective in regard to the penalty phase of his trial. Quite simply, this claim can only be described as bizarre, based on the fact that the [Davis's] own family seems to have concealed important information from trial counsel. Having considered the petition, having carefully reviewed the evidence presented at this hearing, as well as at the trial, and following the law governing Sixth Amendment claims -- including the recent decision in Wiggins v. Smith, [539 U.S. 510] (2003) -- the court finds that this claim is due to be denied.

“This finding is not meant to imply that the Court did not find compelling some of the mitigation evidence presented by [Davis]

during the evidentiary hearing. Much of the evidence presented at the Rule 32 hearing focused on abuse inflicted on Davis by his mother, Lillie Bell-Davis. The Court finds that Davis was abused by his mother to an extent that would have rendered it relevant to the issue of the appropriate penalty determination in this case under existing law, though the Court, as explained below, finds that this evidence is insufficient to establish prejudice.

“The Court’s major concern, however, is that if this Court used this evidence to find the existence of deficient performance the Court would be engaging in the inappropriate activity of judging the performance of trial counsel through the use of hindsight. Further, the Court would be passing judgment on Attorney Adams without the benefit of his testimony. Even worse, this Court would be inappropriately shifting the blame for the inexcusable actions of Davis’s family, particularly his mother, to his trial counsel. This Court must judge trial counsel’s performance through their perspective at the time. That being the case, the Court does not find that trial counsel’s performance was deficient.

“To the contrary, Jimmy Davis’s family -- and to a very large extent his mother -- bears a heavy burden in this case for their role in this matter. Because Adams did not testify, this Court does not know what Adams did or

did not do in preparation for this case. The Court presumes, however, that Adams acted reasonably in the questions he asked his client and his client's mother and in preparing for the penalty phase. Further, the testimony of Giddens establishes that at no time did Davis ever mention to his attorneys the abuse suffered at the hands of his mother or the intervention of DHR [The State Department of Human Resources] in the Davis home.

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“Further, the record establishes, by [Davis's] own admission, that trial counsel did talk to two of Davis's siblings. (RR. 863.) Further, even in the timeframe immediately before the evidentiary hearing, Davis did not speak in detail of the abuse inflicted on him as a child, instead generalizing that his background 'wasn't rosy' and that he didn't have any privileges, only 'every day survival.' (RR. 863.) When specifically questioned about abuse, Davis only acknowledged that he was disciplined with a switch, in stark contrast to the evidence that Davis was, in fact, hit with belts, electrical cords, and with an open hand. (RR. 863-864.) As noted by Dr. [Glenn] King, [a psychologist,] 'He was not -- he was not too forthcoming. I had to ask a number of questions about that.' (RR. 863-864.) Thus, the record supports a finding that even Davis continued to participate in the family's

conspiracy of silence, even on the eve of his evidentiary hearing.

“The Court also takes notice of the Petitioner’s request, via motion to the Court, to keep the documents and evidence concerning [Davis’s] abuse sealed. As noted by counsel for [Davis], this was done out of the family’s concern for their privacy. (RR. 161-163.) It was this desire by the family to keep this matter private--in addition to their fear of Lillie Bell-Davis -- that the witnesses before this Court during the evidentiary hearing noted was the reason behind their years of silence. Although [Davis’s] motion to keep these records private is not ‘evidence’ in the formal sense of the word, it does allow this Court to once again view the family machinery that trial counsel were up against in this case, machinery that even collateral counsel had to deal with in this matter.

“Further, this Court noted during the evidentiary hearing that Lillie Bell-Davis failed to make an appearance during the entire week this matter was heard. Although Lillie Bell-Davis attended Davis’s capital murder trial, she was noticeably absent as a witness or a spectator during the entire week of the evidentiary hearing. Although the Court can infer why Ms. Davis would choose not to come into court once this secret was made public, it certainly sheds light on the type of person Ms. Davis is and the type of person trial counsel were misled by. In any event, it

is difficult for this Court to view the preparation of trial counsel through their eyes when the very people (Lillie Bell and the two, unnamed siblings) who were giving trial counsel information apparently misleading information were not called to recount their conversations with Giddens and Adams.

“Giddens testified that he felt that he had a family history from talking to the mother. The Court assumes that additional information was obtained from the two siblings interviewed by trial counsel. Counsel learned where Davis had gone to school, that he received his GED from Tuskegee, how he grew up, that Davis’s father had died, the parents had been divorced. (RR. 97.) Davis’s friends, that trial counsel were aware of, were the same people who testified against Davis at his capital murder trial: Alphonso Phillips, Terrance Phillips, and Willie Smith. Other acquaintances included Tonya Heard, who was not a good witness due to the fact that Davis had attempted to manufacture an alibi story with her, something she refused to participate in. Looking at the witnesses who testified at the evidentiary hearing, namely Cynthia and Betty Jacobs and Geneva Davis, there is nothing to suggest that the above-named individuals were not Davis’s friends at the time of his arrest. The others in Davis’s life, including his sisters Mary Nell and Hortense, had been out of Davis’s life for some time before this murder and would not

be considered close friends or acquaintances in the sense of people who spent a good deal of time with Davis on a day-to-day basis in the year or so leading up to Hazle's murder. Thus, trial counsel had a distinct disadvantage in that Davis's friends made up the potential witnesses against him.

"Further, as noted above, these friends do not appear to have had knowledge of Davis's upbringing. Instead, the abuse information was a closely held secret kept within the family by a manipulative Lillie Bell-Davis. Thus, not only was trial counsel's decision not to call Davis's friends a reasonable one under the circumstances, Davis has not been prejudiced in regards to this abuse information by counsel's failure to call them on his behalf.

"According to Wiggins v. Smith, [539 U.S. 510] (2003), this Court has to make a determination of whether the background investigation which includes 'a context-dependent consideration of the challenged conduct ... from counsel's perspective at the time' -- was reasonable. Based on the factors facing trial counsel, most notably Lillie Bell-Davis, this Court finds that trial counsel acted reasonably, and were misled by the Petitioner's own family.

"Trial counsel felt they had a reasonable idea of Davis's background from their interaction with [Davis's] mother. Generally speaking, mothers are the best advocates a son could have in difficult times. If you want

to phrase it as judicial notice, this Court takes judicial notice that ordinarily there are few bonds stronger than a mother's love for her child. There has been nothing presented to this Court that suggests that [Andre] Sigler, [Davis's first cousin,] Davis's siblings, or Davis himself ever alerted trial counsel to the fact that Lillie Bell-Davis was not a typical loving mother.

"Davis did not help his counsel, either. As the United States Supreme Court noted in Strickland [v. Washington], 466 U.S. 668 (1984):

"The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably altogether diminished or eliminated.'

"466 U.S. at 691. See also, Chandler [v. United States], 218 F.3d [1305] 1319 n.24

[(11th Cir. 2000)] (“when the circumstances of a claim make these conversations relevant, the petitioner can rarely (if ever) satisfy his burden to disprove the presumption of effective assistance without disclosing the substance of these attorney-client conversations.”). Giddens testimony was that Davis did not speak of any sexual abuse. [Davis] did not question Giddens about what Davis precisely told his trial counsel concerning his background, but there is no evidence that Davis, his mother, or his siblings in Anniston, Alabama, did anything to put his attorneys on notice of the existence of any abuse. See, Williams v. Head, 185 F.3d 1223, 1235 (11th Cir. 1999) (“Given the lack of clarity of the record, we presume that [Attorney] Allen talked with [Client] Williams as part of his effort to ascertain whether there was any mitigating circumstance evidence that Collins had failed to present. We are comfortable with doing so because Allen is an experienced criminal defense attorney There is no reasonable possibility that Allen ... would have neglected to talk with his client about mitigating circumstances.”).

“Looking at Giddens ‘s testimony and the trial testimony of Lillie Bell-Davis, much of the background information given by Davis’s family was true, but given with Ms. Davis’s personal ‘spin’ on it, omitting the important portions of Davis ‘s life in which he was beaten by a belt or switch. The information

concerning Davis 's participation in the job corps, obtaining his GED at Tuskegee, the death of his father, his parents 's marital difficulties, are all items that Lillie Bell told counsel about and was willing to testify about. Thus, trial counsel did obtain much of this information through the most obvious source: Davis's mother.

“Although Davis faults trial counsel for not subpoenaing his DHR records, there is absolutely no evidence before this Court that reasonably competent counsel would have been on notice that such records existed. There are no constitutionally required checklists for mitigation investigations. Trial counsel are faced with the realities of limited time and limited resources. Those resources have to be managed in an efficient manner. Thus, this Court does not find that attorneys are expected to subpoena agency records just in case. Had Lillie Bell-Davis, Davis's siblings, or Davis himself told his trial counsel that this issue needed to be investigated -- that DHR had been involved in the Davis home -- this Court would absolutely find ineffective assistance of counsel for failure to investigate, discover and/or develop this evidence, depending on the strategic decisions made by counsel following their investigation. But that is not what happened here.

“Davis is asking this Court to declare two competent trial lawyers incompetent due to the fact that they were manipulated by Lillie

Bell-Davis, the Davis family, and Davis himself due to the family's conspiracy of silence. Quite simply, it is not trial counsel's fault, it is the fault of [Davis], of his mother, of Andre Sigler, and of the Davis family as a whole; a family that apparently sought collateral counsel's assistance in keeping these facts private, even during the time leading up to the evidentiary hearing in this matter.

"Davis's petition suggests that had trial counsel requested an investigator [and assumes one would have been appointed] this evidence would have been discovered. The facts proved by [Davis] surrounding the presentation of the evidence of abuse during his upbringing do not bear this out.

"Davis's trial occurred during the period when the United States Supreme Court's decision in Ake v. Oklahoma, 470 U. S. 68 (1985) (holding that an indigent accused is entitled to a mental health expert upon a sufficient showing that it is required under principles of fundamental fairness), was having its exact parameters settled by various courts, including this State's courts. Ex parte Sanders, 612 So. 2d 1199 (Ala. 1993) (extending Ake beyond mental health experts for this first time). Thus, unlike today, it was unclear at that time whether a private investigator would qualify as the type of expert assistance envisioned under the Ake jurisprudence. Further, even under Sanders, which dealt with a ballistics expert -- a strong showing

was required that such assistance was a matter of fundamental fairness. The law in 1993 was not clear cut that an investigator would be appointed just because one was requested. Counsel cannot be faulted for failing to see developments that would occur 10 years down the road.

“[Davis] has made no showing that trial counsel had sufficient grounds to request the assistance of an investigator. Neither Davis nor his family gave his trial counsel any information that would have suggested an investigator was needed for the mitigation preparation. Davis’s family, most notably [Davis’s] own mother, gave trial counsel a deliberately misleading social history, omitting the abuse and involvement of DHR in their home. Davis did nothing to inform his trial counsel of his mother’s past behavior. This Court, then, cannot find that trial counsel had any reasonable basis to believe that an investigator was needed in this case.

“Although this Court was left without the benefit of Adams’s recollection of the preparation for the mitigation phase -- and thus assumes Adams’s performed reasonably the Court is aware that Giddens approached the penalty phase preparation with the reasonable understanding that Calhoun County is a conservative, law-abiding community. (RR. 155.) As such, Giddens was predisposed to believe that in ordinary cases alcohol and drug use is a double-edged sword when used

as potential mitigation. (RR. 156.) The Court finds this to be a reasonable theory for defending a case in this county. Giddens also understood that in mitigation one has to be careful about the evidence that is presented, because sometimes it will backfire. (RR. 158.) In his opinion, Giddens stated that in many cases a plea for mercy from the family is the best chance a capital defendant has in Calhoun County. (RR. 158.) The Court does not find anything unreasonable about Giddens's beliefs.

“Because the Davis family, including [Davis], withheld critical information concerning the family's secret, abusive past from trial counsel, the Court concludes it was reasonable for trial counsel to assume that a plea for mercy in this case was Davis's best option. Having a mother testify that she raised her son without a father or public assistance, that Davis's father died while Davis was visiting him, and testify about Davis's reaction to his father's death was a competent attempt to humanize [Davis] prior to the request for mercy.

“Further, this Court has not been shown that Davis was prejudiced by the failure of trial counsel to obtain an investigator. What this Court saw during the evidentiary hearing was the product of at least two investigators, a mitigation specialist, a social worker, at least five attorneys, a paralegal, a psychologist, a neuropsychologist, and a

(belatedly) cooperative family. The Court cannot, and does not, accept that the evidence brought before the Court would have been discovered by one investigator when [Davis] used at least three investigators and a social worker to develop these witnesses and this information. Even with this large team of assistants, many of [Davis's] witnesses were located and contacted during the weeks leading up to the evidentiary hearing, which had been continued on several prior occasions and after the petition had been pending for several years. (RR. 129, 271, 373, 433, 441, 501-502.)

“As for reaching a prejudice determination on the IAC [ineffective-assistance] claim for failing to obtain an investigator, there is no evidence before this Court as to how collateral counsel, the investigators, or others knew that any DHR records existed. Did collateral counsel request the DHR records ‘just in case’ and get evidence of abuse that allowed them to break the family’s wall of silence? The request for discovery does not state any specific information that indicated that collateral counsel knew such evidence existed prior to requesting such information. As noted above, trial counsel are not required to subpoena records ‘just in case’ if there is no reason to believe such records exist.

“Did Davis’s family decide to break ranks with Lillie Bell-Davis who did not appear at the hearing as a spectator or witness during

the evidentiary hearing to break the wall of silence after seeing that Davis had been sentenced to death? If so, that motivation would not have been available to trial counsel, who was misled by the Davis family during their preparation of this case. Even after Davis 's jury recommended the death penalty, Lillie Bell-Davis continued her manipulative efforts as evidence by her failure to disclose this information to the Pardons and Paroles officer who prepared the PSI [presentence report]. Underscoring the difficulties trial counsel had in getting useful information from their client, Davis failed to cooperate with the preparation of the PSI report. Again, the record establishes that this family set about to cover up past incidences that they did not want the outside world to know about.

“Under these circumstances, putting forth this information in an evidentiary hearing is not the equivalent of proving that an investigator, had one been approved by this Court on the required showing under Ake and Sanders, would have uncovered this information. The family (including [Davis]) controlled this information and the family controlled when and under what circumstances this information would be relayed to those who were trying to save Davis’s life.

“Likewise, this Court rejects Davis’s contention that trial counsel were ineffective for failing to request the services of a social worker. This Court notes that social worker

involvement in capital cases is a relatively recent development in capital litigation. It was certainly not anything this Court recalls as being routine or common in capital cases in this county or other nearby counties in 1993. In fact, this Court cannot recall a specific case where a social worker was employed during the time period before Davis's capital murder trial. This is borne out by Jan Vogelsang's testimony that her involvement in Alabama death penalty cases did not start until the time frame following Davis's trial. (RR. 1049.) Further, Vogelsang noted that her involvement in these cases has been limited to work in post-conviction proceedings or nonjury proceedings. (RR. 1049.)

"The testimony of Vogelsang falls far short of establishing that social workers were on the 'ask about' or 'must seek' list of all reasonable defense attorneys in this area in 1993. See, Housel v. Head, 238 F.3d 1289, 1296 (11th Cir. 2001). As this Court is unaware of any social workers being used in the fashion suggested by the petition during this time frame, it is unclear how this Court could possibly find that no competent counsel would have failed to seek and utilize the services of a social worker. There is no merit to this contention.

"Further, this Court finds the use of a social worker to be less than an ideal procedure. Vogelsang came into Court and testified on behalf of several family members in Davis's

family who did not appear before this Court. During her testimony, Vogelsang continually assigned mental operations to witnesses who were never brought into Court to be subjected to cross-examination. (RR. 1061.) Just one example of this can be found on pages 961-962 of the evidentiary hearing transcripts where Vogelsang testified that Lillie Bell-Davis constantly got pregnant because ‘she had some unusual ideas about physical health. And she thought pregnancy was a way to get healthy and not have so many medical problems. ‘(RR. 961.) Another example is found earlier in her testimony where she testified, ‘[A]nother idea that Lillie Bell had that was cultural in nature, was that if you -- if children had clean clothes and you could pay their fees at school, then their was nothing else you had to do, that they would just sort of automatically go through and graduate. So some of these ideas she had certainly were cultural.’ (RR. 953.)

“Although [Davis] correctly noted that the Alabama Rules of Evidence are relaxed in penalty-phase proceedings, pursuant to statute, this type of testimony is certainly of the sort that pushes the envelope of permissible evidence. While arguably probative and relevant to sentence, such testimony does not seem particularly suited to have great weight placed upon it. This Court, or a jury during an actual penalty phase hearing, is being asked to accept the facts as interpreted and

sifted by a third-party in reaching a conclusion.

“Vogelsang is a professional witness, in the sense that she goes out and interviews many different people, decides what is relevant or not, and then comes into Court and places that information before the fact-finder while insulating the actual witnesses from cross-examination. Even though this is permitted, such a process must necessarily result in a lessened weight be given at times to such testimony. For example, while this Court does not doubt that someone told Vogelsang that Lillie Bell-Davis lit the curtains of Davis, Sr.’s boarding house on fire, lit Davis Sr.’s shirt on fire, and then fled New York state, it seems that such an incident would be inconsistent with Lillie Bell not being charged with a crime, with none of the family members at the evidentiary hearing testifying about this event, or with Davis Sr.’s continuing involvement with Lillie Bell-Davis. Ms. Vogelsang obviously believed this story based on who she spoke with to get this information, but without the ability to decide whether this is fact or fiction through judging the credibility of the person(s) with firsthand knowledge, the Court cannot, and will not, give such anecdotal testimony great weight in its prejudice determination.

“Further, this Court has no knowledge of why the family suddenly broke their conspiracy of silence when dealing with Vogelsang.

A very possible motivation is the fact that Davis was sentenced to death and the family decided that they had to do something to try and save his life, after the fact. If this was the family's motivation, a social worker would not have benefited trial counsel before Davis's capital murder trial, because there is no indication the family would have opened up about this family secret. Whereas Vogelsang was dealing with a cooperative family, Davis's trial counsel did not have such an advantage.

"Next, Davis alleges [ineffective assistance of counsel] based on trial counsel's failure to get a psychologist to conduct a mental evaluation, rather than having him tested by a psychometrist. This claim, too, fails.

"First, trial counsel did not request that the evaluation be conducted by a psychometrist, nor did this Court's order state that the evaluation should have been done by a psychometrist. Instead, due to an administrative error at the mental health center, Davis was assigned to Annie Storey, a psychometrist, for evaluation. (RR. 129.) Although trial counsel did not request this procedure, Giddens testified that Storey, 'did exactly what I asked her to do.' (RR. 93.) Namely, Giddens testified that he was concerned mostly with Davis's IQ and achievement level.

"Under the circumstances of this case, defense counsel's concern about IQ and achievement level testing was reasonable. As

Giddens recounted, there was no special plea in Davis's case and nothing had struck either Giddens or Adams as peculiar about Davis's mental state. Giddens did not believe that Davis was incapable of assisting in his defense, and did not believe that Davis had any mental problems. Davis did not provide any evidence at the evidentiary hearing that would suggest otherwise. Accordingly, there is no basis for this Court to conclude that reasonably competent trial counsel would have been concerned about Davis's mental health, other than information that might be useful for mitigation.

"Trial counsel was not looking to prove the statutory mitigating circumstances of 'extreme mental or emotional disturbance' or substantial impairment of his ability to conform his conduct to the requirements of the law, 'just as Davis did not do so in the evidentiary hearing. Further, had Davis's IQ been lower (or had the United States Supreme Court made Atkins [v. Virginia], 536 U.S. 304 (2002),] applicable to individuals in the borderline range of intelligence), trial counsel's strategy would be celebrated as genius by collateral counsel today. There was nothing unreasonable about getting a IQ and achievement levels before the jury.

"In addition, even though trial counsel were not responsible for the assignment of a psychometrist to this case, trial counsel were under the impression that Storey's report

had been reviewed and approved by Dr. Clarence McDanal, a licensed psychiatrist. Although McDanal testified at the evidentiary hearing that his review was merely an ‘administrative sign-off,’ there is nothing to impute this knowledge to trial counsel. Reasonable trial counsel could have trusted that a clinic of mental health professionals would be run with more efficiency than the picture painted by Dr. McDanal. Because Storey did exactly what trial counsel wanted her to do, it was reasonable for trial counsel to accept her work and accept the representations of the clinic that her work had been reviewed by a licensed psychiatrist.

“Finally, Davis was not prejudiced by Storey’s work in this case. First, Dr. King an experienced forensic psychologist with a great deal of experience testifying in Alabama criminal cases-testified that he would not have referred Davis for any further testing or evaluation. In addition, the law allowed Storey to refer Davis for further evaluation or testing if she felt it was necessary. Ala. Code § 34-26-1 (c) (1) (b). That she did not do so corroborates the findings of Dr. King.

“The Court notes that, notwithstanding Dr. King’s testimony, [Davis] could argue that Storey was not trained to know when referral to a neuropsychologist was necessary or indicated. This argument, however, is not persuasive. Although Dr. [Kimberly] Ackerson, the psychologist who testified for Davis,

stated that she would have referred Davis to a neuropsychologist for further evaluation, she also indicated that the results of the testing were not enough for her to reach that conclusion. (RR. 716.) To reach the conclusion that a referral to a neuropsychologist was necessary, Ackerson stated that she would have needed a social history.

“Ackerson’s testimony that she would have referred Davis to a neuropsychologist is based on the premise that she would have had an accurate social history. As noted above, Davis’s family was not in the mood or habit of giving accurate social histories in 1993. Even Davis himself gave a watered down version of his social history to Dr. King in the months prior to his evidentiary hearing. He did not cooperate with his trial counsel or in the preparation of the [presentence] report. Thus, the social history that would have been given to a psychologist in 1993 is the same social history that was spoon fed to trial counsel by Davis’s family, intent on concealing their history of abuse. Accordingly, this Court cannot find that Davis would have been referred to a neuropsychologist had his evaluation been completed by a psychologist rather than a psychometrist.

“Finally, this Court finds that the substantive evidence presented at the evidentiary hearing does not establish prejudice under Strickland. Although it is clear that Davis suffered some abuse as a child, he was never

hospitalized, DHR did not remove him from the home, and the abuse by Lillie Bell was remote in time to the murder of Hazle. This evidence, when considered with the facts of this crime, do not rise to the level necessary to establish prejudice.

“This Court found the existence of two aggravating circumstances: prior conviction of a crime involving use or threat of force against the person and murder committed during the course of a robbery. In mitigation, this Court found the existence of only one statutory mitigating circumstance: the age of the defendant at the time of the crime [23 years]. Having reviewed the evidence presented at the evidentiary hearing, this Court does not find that the substantive evidence from the evidentiary hearing, if presented at Davis’s sentencing would have altered these statutory findings.

“The substantive mitigation evidence presented during the evidentiary hearing in support of the [ineffective assistance of counsel] claims was of the non-statutory type. The Court does not find that this evidence changes the original finding that Davis had the capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law and that he did not act under the influence of extreme mental or emotional disturbances during the commission of the crime.

“Not only does the evidence offered at the evidentiary hearing fail to support a finding of either of these statutory mitigating circumstances, the evidence presented at the trial disproves the existence of these circumstances. The evidence shows that this crime was planned in advance and not the product of behavioral aberration. Further, the evidence supports a finding that Davis’s motive was to seek money from the Direct Oil station, and not the result of a mental or emotional breakdown or disturbance. Further, the evidence shows that the victim was shot when he failed to hand over the money fast enough and instead smiled at [Davis]. [Davis] has not shown a direct link between the proffered mitigating evidence and the commission of this offense.

“Instead, this evidence is of the sort consisting of ‘any aspect of a defendant’s character or record... that the defendant offers as a basis for a sentence of life imprisonment without parole instead of death.’ Ala. Code § 13A-5-52 (1975). Had Davis’s family revealed this information to trial counsel, rather than concealing it, this information would have been properly introduced as non-statutory mitigation. Further, it would have been entitled to some weight in the consideration of the proper sentence in this case.

“Its weight, however, would not be sufficient to create a reasonable probability as to the outcome of [Davis’s] sentence. The abuse

suffered by Davis was remote in time, about five or six years, to the commission of this offense. (RR. 512.) Further, this offense was committed after Davis had just previously committed a robbery in the third degree. The abuse was of the sort that Davis's family hid it from the outside world for years, even going so far as to hide it from Davis's counsel. [Davis] himself participated in the family's silence. Even immediately before the evidentiary hearing, Davis had to be prodded for information about the prior abuse. (RR. 8 63-8 64.) The extent of Davis's commentary on this abuse was 'he felt that sometimes... he was disciplined too much.' (RR. 864.)

"Another aspect of these facts that decreases the weight this mitigation evidence would have is the fact that the abuse DID NOT lead any of Davis's family members to report Lillie Bell's actions to authorities, to tell people outside of the family, or otherwise remedy the situation. Further, in the one formally documented case of abuse before the Court, DHR made a decision to leave Davis in the home. Regardless of the hindsight and speculation offered by various DHR employees at the evidentiary hearing, the fact remains that as of 1993 the evidence would have been that DHR never actually took measures to have Davis removed from the home due to abuse. This decision has a direct impact on the weight to be afforded this evidence.

“When combined with the fact that Davis’s family members were comfortable with keeping this information secret, this abuse becomes much less powerful as evidence. Davis’s family must not have thought his life was in danger during his adolescence, as they did nothing to protect him from further abuse. Instead, they let family pride, fear of Lillie Bell, or other factors preclude them from coming forward. Even at the hearing, these witnesses were still hesitant to come forward and discuss these issues. The abuse of Davis obviously did not impact Davis’s own family to a degree great enough where they were motivated to seek assistance from authorities in dealing with the issue. This Court, as well as a jury, would have to consider such factors in determining the weight to be given this evidence.

“Based on the testimony of Storey at the original sentencing hearing, this Court considered the difficulty of Davis’s upbringing and his below-average intellect. While this new evidence puts this information in a new perspective, it does not change the fact that the facts of this crime and the two aggravating circumstances proven by the State far outweighed the one statutory mitigating factor and these non-statutory mitigating factors.

“Likewise, some of the evidence presented by [Davis] falls into the category of ‘double-edged sword’ type evidence referenced by

Giddens. (RR. 156, 158.) For example, some of the evidence indicated that Davis had good role models in his life. One of Davis's own witnesses noted that his violent behavior did not begin until the commission of the Robbery III offense prior to the Direct Oil murder. (RR. 994-995, 1006.) This information leads to an inference that Davis's violence was a product of some factor other than his upbringing, considering the testimony that throughout Davis's childhood (when the abuse occurred) he was not a violent person. Instead, he became violent when he committed the Robbery III of a Domino's Pizza employee and began fighting in jail and became aggressive and disrespectful. (RR. 1006.) Such testimony does not suggest that the abuse suffered by Davis was of any great mitigation significance as his violent criminal behavior does not begin until years later after he is away from his mother and her influence.

"This Court does not accept that the behavior of Lillie Bell-Davis in abusing [Davis] or misleading his trial counsel was appropriate. The Court's finding of no [ineffectiveness of counsel] is not an approval of such behavior. Instead, it is a recognition that no matter how wrong her behavior was, trial counsel were not responsible for the family's (and Davis's) silence on this issue and the abuse inflicted by Lillie Bell -- while wrong -- does not serve as mitigation evidence that would have

created a reasonable probability that the outcome of Davis's penalty phase would have been different. Accordingly, in addition to finding that counsel's performance was reasonable under the circumstances, the Court further finds that Davis did not prove prejudice in any event.

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“For the foregoing reasons, the Court denies this claim. Al though the Court acknowledges that this abuse evidence should have been brought out at Davis's trial, the fault for it not coming out rests with Davis and his family, and not his counsel. It would pervert Sixth Amendment jurisprudence to punish lawyers for deliberate misdeeds by their client and client's families. The record before the Court establishes a family that is coming to terms with their past. The problem is that they chose to do so only after [Davis] was sentenced to death. That this secret was more valuable to them than the potential risk of their silence to Davis at his capital murder trial is disturbing, but it is not the result of ineffective assistance of counsel. This claim, in its entirety, is denied.”

(Capitalization in original.) (R. 1160-91.) The circuit court's findings are supported by the record, and we adopt them as part of this opinion.

A.

First, Davis argues that counsel should have discovered and presented evidence from family members

and the Department of Human Resources (“DHR”) records to show that he had been abused as a child.

At the penalty phase, counsel called Davis’s mother, his first cousin, and a counselor who had evaluated Davis’s IQ. On direct appeal we stated the following about the mitigating evidence that was presented:

“[Davis] called three witnesses: his mother, Lillie Bell Davis; his first cousin, Andre Lamont Sigler; and a counselor, Annie M. Storey. His mother testified generally about [Davis’s] background and family life. She stated that she and her husband, who was [Davis’s] father, separated when [Davis] was one year old, and that [Davis] never had the benefit of a father in the home when he was growing up. She stated that [Davis] went to Detroit to live with his father when he was 15 years of age, but that his father died shortly thereafter and that his death was devastating to [Davis]. She further testified that she began to have trouble with [Davis] when he was about 9 years old; that he would misbehave at school and at home; that he dropped out of school when he was 16; that he would not work, would stay out at night, and was frequently in trouble; that after he turned 17, she could not handle him; and that he left home when he was 19. She asked the jury to spare her son’s life. Sigler also testified about [Davis’s] background and home life. He stated that [Davis] missed not having a father in the home; that because of his circumstances he ‘missed a lot’ when he was

growing up; that when he was growing up he had no one to rely on, to talk to, or to help him; that when his father died he was noticeably affected and his appearance and attitude changed; and that he had not had the advantages that Sigler had had. Sigler also asked the jury to recommend a sentence of life imprisonment without parole. Storey, a counselor employed by the Calhoun-Cleburne Mental Health Center and the Oxford city school system, testified that she administered intelligence and diagnostic educational tests to [Davis] before his trial; that he had a full-scale IQ of 77, which placed him at the 6th percentile, i.e., 94% of the people in his age group scored higher; that an IQ of 77 is considered within the borderline range of intelligence; that he is functioning 'between where we would consider an individual who is mentally retarded and one who is low average'; and that he functions at the 5th grade level academically. [Davis] called only one witness at the second sentencing hearing before the trial court, his mother, who testified again about her son's general background and family life, asked the court for mercy."

Davis v. State, 718 So. 2d at 1156.

Giddens testified at the Rule 32 hearing that Davis did not tell him that he had been abused as a child. Cocounsel Adams did not testify concerning his dealings with Davis or the extent of his investigation into Davis's upbringing. We have reviewed the record of

Davis's trial and find that Adams's involvement in the case was not minor. Adams conducted opening and closing statements and cross-examined the majority of the state witnesses. Also, Adams spoke with two of Davis's siblings --though we do not know the identity of those siblings. We are troubled that Adams was not called to testify at the Rule 32 hearing when it is clear that he had a significant role in preparing for Davis's trial.³ However, Giddens testified at the Rule 32 hearing as follows:

"There was a lot of preparation. Mr. Adams and I -- I had asked Judge Street if he would appoint me cocounsel since it was a capital murder case and that involved a lot of work. And I asked him to appoint a cocounsel. And he appointed Mr. Adams at my request. And Mr. Adams and I did a lot of preparation."

"We came into Anniston, interviewed a lot of witnesses, did a lot of research."

(R. 36-37.) In preparing mitigation evidence, Giddens stated:

"[Giddens]: As I said, at the same time as you begin to assess the evidence. You begin to

³ As we stated above: "An ambiguous or silent record is not sufficient to disprove the strong and continuing presumption [of effective representation] Therefore, "where the record is incomplete or unclear about [counsel's] actions, we will presume that he did what he should have done, and that he exercised reasonable profession judgment." Chandler v. United States, 218 F.3d 1305, 1314 n. 15 (11th Cir. 2000) (en banc) (quoting Williams v. Head, 185 F.3d 1223, 1228 (11th Cir. 1999))." Grayson v. Thompson, 257 F.3d 1194, 1218 (11th Cir. 2001).

think about in the event that he's convicted or she's convicted of capital murder, what are you going to do in the sentence hearing. You have to be prepared for all of its.

"Q [Rule 32 counsel]: So when you started to prepare the guilt/innocence part of Mr. Davis's case in November of 1993, that's about the same time you began to prepare the mitigation case?

"[Giddens]: Well, I mean, we had spoken with his mother sometime during that time and knew that she was going to be a witness in that event. And also got an order signed for a mental evaluation to use as mitigation if, you know, it if came out favorable or something you would want to offer mitigation for the defendant. I mean, during the time frame of preparing for the case, you have to prepare for the sentence hearing as well because it will be immediately after the trial."

(R. 72-73.) Giddens said that Davis provided him with little information except that he was with Heard at the time of the robbery/murder.

"Counsel have a duty to investigate but this duty is confined to reasonable investigation. See Strickland, 4 66 U.S. at 691, 104 S. Ct. at 2066. In Funchess v. Wainwright, 772 F. 2d 683, 689 (11th Cir. 1985), this Court found counsel reasonably investigated despite the fact that he had not investigated his client's psychological problems because the client never told him of any problems and the

competency evaluation did not suggest any problems existed. The client also acted competently while assisting counsel in preparing his case. See id. Thus the court held that counsel was not put on notice of any problems and could not be faulted for not pursuing the matter. See id.; cf. Collins v. Francis, 728 F.2d 1322, 1349 (11th Cir. 1984) (determining that counsel who failed to investigate witnesses that the defendant did not tell him about was not ineffective).

“Reliance upon some family members statements that other mitigation witnesses did not exist was considered permissible in Singleton v. Thigpen, 847 F. 2d 668, 670 (11th Cir. 1988). Rejecting a per se rule of ineffective assistance where counsel does not consult family members, we held in Williams v. Head, 185 F. 3d 1223, 1237 (11th Cir. 1999), that counsel’s investigation was reasonable when he did not interview the defendant’s sister or father, the latter because the defendant had not lived with him for very long. ‘[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make a reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary.’ Strickland [v. Washington], 466 U.S. [668] at 690-91, 104 S.Ct. [2052] at 2066 [(1984)].

“The conduct of the counsel here did not fall below the professionally competent standard. While the Warrens did not discover the records from Holladay’s stay at Central State Hospital in Milledgeville, Georgia or records from other psychiatrists who treated Holladay, there is no evidence in the record, nor does Holladay allege, that he told them of his prior treatment. As in Funchess, the report of the lunacy commission that Holladay was sane and competent combined with counsel’s impression of Holladay as cooperative, articulate, and affable did not put Mrs. Warren on notice that there were or might be psychiatric records that she needed to find.”

Holladay v. Haley, 209 F.3d 1243, 1251-52 (11th Cir. 2000). Based on the unusual circumstances presented in this case and the fact that we not know the extent of cocounsel’s investigation because Adams was not called to testify, we cannot say that counsel was ineffective for failing to discredit the statements of Davis, his mother, and two of his siblings, and to conduct yet more investigations. Thus, we conclude that the circuit court did not abuse its discretion in finding that the investigation conducted by Davis’s attorneys was reasonable. “Clearly this is not a case where counsel failed to investigate, a case where counsel was ignorant of what evidence could be presented in mitigation, or a case where counsel presented no mitigation evidence.” Waldrop v. State, [Ms. CR-05-1370, August 31, 2007] __ So. 2d __, __ (Ala. Crim.App. 2007).

Moreover,

“[a] defense attorney is not required to investigate all leads, however, and “there is no per se rule that evidence of a criminal defendant’s troubled childhood must always be presented as mitigating evidence in the penalty phase of a capital case.”Bolender [v. Singletary], 16 F. 3d [1547,] at 1557 [(11th Cir. 1994)] (footnote omitted) (quoting Devier v. Zant, 3 F.3d 1445, 1453 (11th Cir. 1993), cert. denied, [5 13] U.S. [116 1], 115 S. Ct. 1125, 130 L.Ed . 2d 1087 (1995)). ‘Indeed, “[c]ounsel has no absolute duty to present mitigating character evidence at all, and trial counsel’s failure to present mitigating evidence is not per se ineffective assistance of counsel.”Bolender, 16 F. 3d at 1557 (citations omitted).’”

Marek v. Singletary, 62 F.3d 1295, 1300 (11th Cir. 1995). Evidence of childhood abuse has been described as a double-edged sword. See Johnson v. Cockrell, 306 F.3d 249, 253 (5th Cir. 2002) (evidence of brain injury, abusive childhood, and drug and alcohol abuse was “double edged” because it would support a finding of future dangerousness). See also Miniel v. Cockrell, 339 F.3d 331 (5th Cir. 2003); Harris v. Cockrell, 313 F.3d 238 (5th Cir. 2002). The circuit court did not abuse its discretion in denying relief on this claim.

B.

Second, Davis argues that counsel was ineffective for failing to hire an expert -- a social worker -- to conduct an extensive background investigation on him.

The circuit court found that at the time of Davis's trial in 1993, social workers were not routinely retained to assist in capital cases; thus, counsel was not ineffective for failing to request the assistance of a social worker.

"Although [counsel] did not hire an independent investigator, this fact alone is not indicative of ineffective assistance in a capital case. The decision to hire an investigator is reviewed for reasonableness. See Strickland, 466 U.S. at 691, 104 S.Ct. 2052." Bower v. Quarterman, 497 F.3d 459, 470 (5th Cir. 2007). Based on the information that counsel had obtained from Davis's family members, counsel had no reason to conduct a more extensive investigation into Davis's background. Thus, the circuit court did not abuse its discretion in denying relief on this claim.

C.

Third, Davis argues that counsel was ineffective for failing to present evidence that he suffered from damage to the frontal lobe of his brain. At the Rule 32 hearing, Giddens testified that he moved that Davis be mentally evaluated to determine his IQ and his academic performance. He said that he and Adams planned to use this information in mitigation if Davis was convicted. Giddens further testified that Davis gave him no reason to believe that he was mentally impaired or that he could not assist in his defense.

Dr. Kimberly Ackerson, a clinical psychologist, testified at the Rule 32 hearing that after examining Davis she would have referred him to a neuropsychologist for further evaluation. Dr. Charles Golden, a professor of psychology at Nova Southeastern University

and Director of the Neuropsychological Assessment Center, testified that based on Davis's IQ scores it was his opinion that Davis had frontal-lobe damage.

The State countered Davis's experts by calling Dr. Glenn King, a clinical psychologist. Dr. King testified that he had examined Davis and that it was his opinion that Davis "merely had borderline intellectual functioning" and that he would not refer Davis for further testing by a neuropsychologist.

Whether Davis suffered from brain damage was disputed by the medical experts. "[The defendant's] presentation of conflicting expert opinion would have further undermined the defense's credibility. Trial counsel' cannot be deemed ineffective for not presenting ... conflicting opinions." Philmore v. State, 937 So. 2d 578, 587 (Fla. 2006). Therefore, counsel was not ineffective for failing to discover and present this disputed evidence.

D.

Fourth, Davis argues that counsel was ineffective for failing to investigate and to present evidence concerning the facts of Davis's prior conviction for robbery. He asserts that the facts surrounding that offense were relevant to alleviate the impact of the aggravating circumstance that Davis had previously been convicted of a crime of violence. He cites Rompilla v. Beard, 545 U.S. 374 (2005), for the proposition that he is entitled to a new sentencing hearing on that basis.

In Rompilla v. Beard, the United States Supreme Court held that counsel's performance at the penalty phase of a capital-murder trial was ineffective

because counsel failed to examine the court file of a prior conviction that the Commonwealth of Pennsylvania intended to use at sentencing. The Supreme Court noted that its holding was due, in part, to the fact that counsel was aware that the Commonwealth intended to seek the death penalty by relying solely on the aggravating circumstance that the defendant had a significant history of felony convictions involving the use of violence, that the Commonwealth intended to rely on a prior conviction for rape and assault, and that the Commonwealth intended to introduce the transcript of the victim's testimony to show the defendant's violent nature. The United States Supreme Court stated:

“Without making reasonable efforts to review the file, defense counsel could have no hope of knowing whether the prosecution was quoting selectively from the transcript, or whether there were circumstances extenuating the behavior described by the victim. The obligation to get the file was particularly pressing here owing to the similarity of the violent prior offense to the crime charged and Rompilla's sentencing strategy stressing residual doubt. Without making efforts to learn the details and rebut the relevance of the earlier crime, a convincing argument for residual doubt was certainly beyond any hope.

“

“If the defense lawyers had looked in the file on Rompilla's prior conviction, it is uncontested they would have found a range of mitigation leads that no other source had

opened up. In the same file with the transcript of the prior trial were the records of Rompilla's imprisonment on the earlier conviction, ..., which defense counsel testified she had never seen, *id.*, at 508. The prison files pictured Rompilla's childhood and mental health very differently from anything defense counsel had seen or heard. An evaluation by a corrections counselor states that Rompilla was 'reared in the slum environment of Allentown, Pa, vicinity. He early came to the attention of juvenile authorities, quit school at 16, [and] started a series of incarcerations in and out Penna. often of assaultive nature and commonly related to over-indulgence in alcoholic beverages.' Lodging [to App. 111- 120) 40. The same file discloses test results that the defense's mental health experts would have viewed as pointing to schizophrenia and other disorders, and test scores showing a third grade level of cognition after nine years of schooling.

"The accumulated entries would have destroyed the benign conception of Rompilla's upbringing and mental capacity defense counsel had formed from talking with Rompilla himself and some of his family members, and from the reports of the mental health experts."

545 U.S. at 386-91. In responding to a dissent to its opinion, the United States Supreme Court in Rompilla stressed that it was not creating a per se rule that counsel was automatically ineffective for failing to

conduct a “complete review of the file on any prior conviction.” 545 U.S. at 388.

In this case there is no allegation that the file of Davis’s prior conviction contained a plethora of mitigating evidence. In fact, the record shows that Davis pleaded guilty to robbery in the third degree and that he was sentenced to one year and one day. At the sentencing phase of Davis’s trial counsel argued that he had been convicted and sentenced for the lowest degree of robbery recognized in Alabama. At the Rule 32 hearing Giddens testified as follows:

“[Rule 32 counsel]: Did you make an attempt to talk to any other person within the criminal justice system that had had any dealings with Jimmy?

“[Giddens]: Criminal justice systems being I believe he had a robbery conviction that was offered against him. And I was aware of that. I mean, I had gotten those records so I was aware of that through the criminal justice system.

“[Rule 32 counsel]: Did you speak to anyone involved in that case?

“[Giddens] No. I reviewed the record on that and saw what he was convicted of it. And I think he actually served time on it.”

“

“[Rule 32 counsel]: And you didn’t do any investigation to find out what the circumstances of that robbery was; did you?

“[Giddens]: Well, the only thing that is admissible is the conviction itself, not the facts of it.

“[Rule 32 counsel]: Even at a sentence hearing in mitigation?

“[Giddens]: The state offered simply a certified copy of the conviction. Which we don’t object to, because you didn’t want them to have to put on a witness to bring out the facts.”

(R. 100-01.)

Davis presented testimony at the Rule 32 hearing that his prior robbery in the third degree conviction was the result of Davis and several other individuals robbing a pizza delivery person of six pizzas. Davis was caught by police running away with a pizza.

This case is distinguishable from Rompilla. In Rompilla the sole aggravating circumstance that the Commonwealth was relying on to seek the death penalty was related to Rompilla’s prior conviction for violence. In this case, the State relied on two aggravating circumstances: that the murder was committed during a robbery and that Davis previously had been committed of a “felony involving the use or threat of violence.” Also, in Rompilla the attorney testified that she had not looked at the file of Rompilla’s prior rape conviction. Here, Giddens testified that he did examine the file on Davis’s prior conviction but had not spoken to anyone about the prior case. More importantly, the jury in this case was aware that Davis had previously been convicted of the lowest degree of robbery. Counsel tried to minimize the prior conviction. Thus, we do not believe that Rompilla mandates that we

reverse Davis's sentence on this issue. As the Florida Supreme Court stated in Davis v. State, 928 So. 2d 1089 (Fla. 2005)

“The facts of the instant matter are entirely distinguishable from those present in Rompilla. As noted above, defense counsel in the present case reviewed all of the materials that were in his possession in preparation for Davis 's penalty phase trial. Moreover, unlike Rompilla, there is no indication that there was material here that trial counsel was aware the State was going to use in aggravation that was not obtained and reviewed by trial counsel prior to the penalty phase trial. Moreover, unlike defense counsel in Rompilla, Davis's trial counsel reviewed records in the public defender's file transmitted to him regarding Davis's medical history, educational background, and other general background information surrounding his life. A thorough reading of the United States Supreme Court's decision in Rompilla reveals that it is inapplicable to the facts of the instant matter. Unlike defense counsel's deficient performance in Rompilla, trial counsel's investigation in the instant matter was within the level of reasonable performance that is required by Strickland [v. Washington], 466 U.S. 668 (1984)] and Wiggins [v. Smith], 539 U.S. 510 (2003)]. See Rompilla, 125 S.Ct. at 2463 (“[T]he duty to investigate does not force defense lawyers to scour the globe on the off-chance something will turn up;

reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste.’) (citing Wiggins, 539 U.S. at 525, 123 S.Ct. 2527; Strickland, 466 U.S. at 699, 104 S.Ct. 2052).”

928 So. 2d at 1108. See also Miller v. State, 92 6 So. 2d 1243, 1252-53 (Fla. 2006). Thus, we cannot say that counsel was effective for failing to conduct a more detailed investigation into Davis’s prior conviction for robbery in the third degree.

E.

Fifth, Davis argues that Giddens and Adams were ineffective for failing to begin their trial preparation until two weeks before the trial was scheduled to begin. “However, mere shortness of time for preparation of counsel is insufficient to show ineffectiveness.” Randall v. State, 207 Ga. App. 637, 640, 428 S. E. 2d 616, 620 (1993).

Although Giddens testified that the bulk of the work for Davis’s trial was conducted several weeks before trial, he also testified that he and Adams conducted an extensive investigation starting from the time they were appointed to represent Davis.

F.

Last, even if we were to find that counsels’s performance was deficient in the penalty phase of Davis’s trial, we would find no prejudice. As the United States Supreme Court stated in Wiggins v. Smith, 539 U.S. 510 (2003):

“In Strickland [v. Washington], 466 U.S. 668 (1984)], we made clear that, to establish

prejudice, a ‘defendant 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.’ *Id.*, at 694, 104 S.Ct. 2052. In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence.”

539 U.S. at 534.

The circuit court noted in its order denying relief that the evidence of Davis’s childhood abuse was not of “any great mitigation significance as his violent criminal behavior does not begin until years later after he is away from his mother and her influence.” The circuit court found in mitigation that Davis was only 23 years old at the time of the robbery/murder and the court also “considered all testimony and evidence presented to the jury and to the Court in regard to the defendant’s background, character, [and] education achievement level.” The court found that the failure to present evidence of Davis’s childhood abuse would not have prejudiced him.

We have reweighed the alleged omitted mitigation evidence against the aggravating circumstances that existed in this case. We agree with the circuit court that death was the appropriate sentence in this case and that the fact that certain potential mitigation evidence was not presented would have had no affect on the outcome.

For these reasons, we affirm the circuit court's denial of Davis's claims of ineffective-assistance-of-trial-counsel.

AFFIRMED.

McMillan and Shaw, JJ., concur. Baschab, P.J. concurs specially, with opinion. Wise, J., concurs in the result.

BASCHAB, Presiding Judge, concurring specially.

I concur with the majority opinion. However, I write specially to note that, on original submission of this appeal, I concurred in the result because I believed the appellant's ineffective-assistance-of-counsel claims were procedurally barred and that the majority's conclusion that, "[h]ad this issue not been procedurally barred we would be compelled to grant relief and order a new sentencing hearing," was "inappropriate and ... nothing more than unnecessary dicta." ___ So. 2d at ___ (Baschab, J., concurring in the result). I also write specially to urge the Alabama Supreme Court to revisit its decision in Ex parte Clemons, [Ms. 1041915, May 4, 2007] ___ So. 2d ___ (Ala. 2007), for the reasons I set forth in my special concurrence in Clemons v. State, [Ms. CR-01-1355, November 2, 2007] ___ So. 2d ___ (Ala. Crim. App. 2003) (opinion on remand from Alabama Supreme Court).