No. _____

Supreme Court of the United States

JOHN Q. HAMM,
COMMISSIONER OF THE ALABAMA
DEPARTMENT OF CORRECTIONS,
Petitioner,

v.

MICHAEL SOCKWELL,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE
QUESTION PRESENTED

Sockwell's *Batson* claim was rejected four times before the Eleventh Circuit re-read a *single phrase* in the 1990 trial transcript to infer discrimination. But the panel majority was not free to find its own facts unless Sockwell satisfied 28 U.S.C. §2254(d)(2), (e)(1). He did not. He offered the same reading of the frozen cold voir dire transcript already rejected by the state courts, whose findings must be presumed correct, App.55a.n2 (Luck, J., dissenting). Nor did the court require that Sockwell prove clear error, the appellate standard for *Batson* claims. Review of this pure issue of fact, credibility, and demeanor should have been highly deferential, but the panel majority "refuse[d]" to defer, App.58a (Luck, J., dissenting). This Court should summarily reverse on this question presented:

1. Whether the Eleventh Circuit violated 28 U.S.C. §2254.

The writ of habeas corpus is an equitable remedy, and federal courts must issue the writ only "as law and justice require." *Brown v. Davenport*, 596 U.S. 118, 312 (2022) (quoting 28 U.S.C. §2243). Addressing the State's argument that Sockwell's guilt should count against releasing him, the Eleventh Circuit held that habeas relief is automatic for any *Batson* violation identified on collateral review; no equitable analysis is required. The second question presented is:

2. Whether a federal court may grant habeas relief to a guilty state prisoner upon identifying a *Batson* violation but without determining that "law and justice" require such relief.

PARTIES

Petitioner (appellee below) is the Commissioner of the Alabama Department of Corrections. Respondent (appellant below) is Michael Sockwell.

LIST OF PROCEEDINGS

Federal habeas proceedings:

Supreme Court of the United States, No. 25A347, *Hamm v. Sockwell*, stay denied Oct. 8, 2025.

United States Court of Appeals for the Eleventh Circuit, No. 23-13321, *Sockwell v. Commissioner*, judgments entered Oct. 30, 2025 (denying stay), Aug. 7, 2025 (denying rehearing), June 30, 2025 (reversing denial of petition for writ of habeas corpus).

United States District Court for the Middle District of Alabama, No. 2:13-cv-913, *Sockwell v. Hamm*, judgment entered Sept. 29, 2023 (denying petition for writ of habeas corpus).

State post-conviction proceedings:

Alabama Supreme Court, No. 1120561, *Ex Parte Sockwell*, judgment entered Aug. 30, 2013 (denying certiorari petition).

Alabama Court of Criminal Appeals, No. CR-08-1540, *Sockwell v. State*, judgment entered Aug. 24, 2012 (affirming dismissal of petition for post-conviction relief), rehearing denied, Feb. 8, 2013.

Montgomery Circuit Court, CC-88-1244.60, *Alabama v. Sockwell*, judgment entered May 15, 2009 (dismissing petition for post-conviction relief).

Trial and direct appeal proceedings:

Supreme Court of the United States, No. 95-9117, *Sockwell v. Alabama*, judgment entered on Oct. 7, 1996 (denying certiorari petition).

Alabama Supreme Court, No. 1930754, *Ex Parte Sockwell*, judgment entered Dec. 8, 1995 (affirming conviction and sentence), rehearing denied Feb. 23, 1996.

Alabama Court of Criminal Appeals, No. CR-89-225, *Sockwell v. State*, judgment entered Dec. 30, 1993 (affirming conviction and sentence) rehearing denied Mar. 4, 1994.

Montgomery Circuit Court, CC-No. 88-1244-BRT, *Alabama v. Sockwell*, judgment entered Feb. 28, 1991 (entering conviction and death sentence).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

PETITION FOR WRIT OF CERTIORARI

Every court to review Sockwell's *Batson* claim had rejected it until the Eleventh Circuit's split decision, which violated AEDPA several times over.

First, the majority opinion rested on its self-made factual finding that the prosecution *admitted* to striking a juror "for being the same race as the defendant." App.26a n.13; *see also* App.24a-25a. But the state high court found that the prosecution's mention of race was "merely [] descriptive," *not* a "reason." App.180a. That finding was due deference, unless Sockwell proved it to be "unreasonable" and incorrect by "clear and convincing evidence." 28 U.S.C. §2254(d)(2), (e)(1). The problem for Sockwell—and the judgment below—is that the majority conceded that the ASC's finding was "not unreasonable." App.13a; *accord* Stay.Opp.13-14.

Second, there's no suggestion of deference before the panel majority found "racially discriminatory intent." App.25a. But that finding on appeal requires an "exceptional" case, owing to the trial judge's "pivotal role" assessing credibility. *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008). Sockwell agrees the panel did not apply a clear-error standard, Stay.Opp.26-27, and AEDPA demands "far more than … 'even clear error,'" *Shinn v. Kayer*, 592 U.S. 111, 118 (2020).

Third, the majority purported to apply 28 U.S.C. §2254(d)(1), but it never identified a conflict with clearly established law *in 1995*. Even on Sockwell's version of the facts, race was only *part* of the motive for the challenged strike. That may violate *Batson*'s "progeny" (App.17a), but such a rule cannot be teased out of *Batson* itself, which famously left open whether the government can defend a strike by showing that race was not outcome-determinative.

If the Court does not summarily reverse, it should grant certiorari to review the Eleventh Circuit's rule that *Batson* violations warrant habeas relief "no matter" what "law and justice" require. App.30a & n.14.

PRIOR OPINIONS

The Eleventh Circuit's opinion is reported at 141 F.4th 1231 and reproduced at App.1a-58a. The court's denial of panel rehearing is reproduced at App.256a.

The district court's opinion is reported at 2023 WL 6377645 and reproduced at App. 59a-176a.

The Alabama Supreme Court's opinion is reported at 675 So.2d 38 and reproduced at App.177a-189a.

The Court of Criminal Appeals' opinion is reported at 675 So.2d 4 and reproduced at App.190a-255a.

JURISDICTION

On August 7, 2025, the Eleventh Circuit entered judgment denying rehearing of its June 30, 2025 order granting habeas relief. This Court's jurisdiction is timely invoked under 28 U.S.C. §1254(1).

PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

Section 2254 of Title 28 of the United States Code provides, in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

Section 2243 of Title 28 of the United States Code provides, in pertinent part, that a court entertaining a petition for writ of habeas corpus "shall … dispose of the matter as law and justice require."

STATEMENT

A. Murder of Isaiah Harris

On March 10, 1988, Michael Sockwell shot Deputy Sheriff Isaiah Harris in the face for $100. The next day, Sockwell was arrested, he confessed, and he was convicted and sentenced to death for murder for pecuniary gain or pursuant to a contract for hire. App.60a;.

At the time of the murder, Harris's wife Louise was having an affair with Lorenzo McCarter. App.60a. Louise enlisted McCarter to kill her husband. *Harris v. State*, 632 So. 2d 503 (Ala. Crim. App. 1992). McCarter, in turn, recruited Michael Sockwell and

Alex Hood. *Id.* at 541. With money from Louise, McCarter paid Sockwell and Hood $100 to murder Harris, "with the promise that more money would be paid upon completion of the murder." *Id.* at 508.

On the night of the murder, the three men were driving around Harris's neighborhood, waiting for Louise to page that her husband had left the house. App.191a. Around 11:00 p.m., Harris left to work a late shift, and Louise sent the message. At that point, Sockwell got out of the car and stationed himself near a stop sign at the entrance of the subdivision. When Harris pulled to a stop, "Sockwell shot him once in the face at close range." *Harris*, 632 So. 2d at 508. "As a result, the lower half of the victim's face was blown off, leaving his teeth, tongue, and 'matter' from his face blown across the car." *Id.* Sockwell returned to the car and told his accomplices that he "was gonna ... get his money." App.60a. Later that night, Harris's body was found in a ditch not far from the crime scene.

Sockwell twice confessed to the murder: once to a friend the day before his arrest and then in a recorded statement to law enforcement. *Id.* In his videotaped confession, Sockwell "admitted to the shooting and having received a share of a hundred dollars in advance of the shooting, with a prospect of receiving more from life insurance proceeds." App.60a-61a.

B. Sockwell's *Batson* Claim

1. Sockwell's *Batson* claim in federal habeas centers on one peremptory challenge the prosecution used to strike venireman Eric Davis. The following was his individual voir dire testimony:

> THE COURT: Have you heard or read from any source anything about these circumstances that we're here today on?

[DAVIS]: I've heard a little something.

THE COURT: Okay. Have you heard or read or from any other source gained any information as to whether or not this defendant was guilty or not?

[DAVIS]: Now, I had heard something.

THE COURT: You haven't?

[DAVIS]: I had heard something.

THE COURT: What did you hear and where was it from?

[DAVIS]: Oh, I just, um, it was something in the newspaper or something.

THE COURT: Well, what did you hear in the newspaper or read in the newspaper?

[DAVIS]: Well, I just, you know, just heard talk about what they had heard in the newspaper or something like that. I didn't read it for myself.

THE COURT: From somebody you heard?

[DAVIS]: Um-hum, yes.

THE COURT: When did you hear that?

[DAVIS]: It's been a while back.

THE COURT: About how long ago?

[DAVIS]: Several months ago.

THE COURT: Several months ago. Did you hear specifically about this defendant right here?

[DAVIS]: No.

THE COURT: Okay. Do you remember what you heard?

[DAVIS]: Not exactly.

THE COURT: Can you remember it for me the best you can?

[DAVIS]: Um, the only thing I recall is just, you know, um, listening at some of the guys, you know, that said they had read about it, you know, the incident out on Troy Highway, stuff like that, you know, what had happened and so forth, you know.

THE COURT: Okay. Do you feel like you'd be able to put aside whatever you had heard some of the guys say about what they had read and listen to the facts as they come to you in Court and based on those facts and those alone make a fair, honest, conscientious impartial decision on guilt and non guilt based on those facts and the law as instructed to you by the Court?

[DAVIS]: Yes, I can.

THE COURT: Because this is a capital case … I need to ask you some questions concerning this matter if we were to get to the sentencing stage. Are you opposed to the death penalty under any circumstances?

[DAVIS]: No.

THE COURT: Okay. Are you for the death penalty under all circumstances?

[DAVIS]: Well, it could go either way.

THE COURT: Okay. You think you could follow your oath and listen to the instructions of the Court and --

[DAVIS]: Yes sir. Fair enough to listen to the trial and then come up with a verdict.

App.80a-83a.

After voir dire and for-cause strikes, the venire for Sockwell's trial had forty-two prospective jurors—thirty-two white and ten black. App.83a. The State used its peremptory challenges on seven white veniremembers and eight black veniremembers; the defense struck fifteen white veniremembers. *Id.*

After striking the jury, Sockwell raised a *Batson* challenge, and the court prompted the lead prosecutor, Montgomery County Assistant District Attorney Ellen Brooks, to give the State's reasons for each of its strikes. App.83a-84a. Brooks recounted each side's strikes in order, noting the race and sex of each veniremember. App.84a. As to Davis, she explained:

> We then struck number one twelve, Eric Davis, was a black male, according to our records twenty-three years old. He was extremely vague to the Court's questions about what he had heard. You might remember he said well, I just heard a little something and he kept -- well what did you hear? Where did you hear it? He said well, in the paper or something. The Court asked him again. He was unclear and then finally he said well, some people were talking about it. I never really read the paper. He could not remember what he heard. He said that he could go either way but he was not pro death penalty, and personal observations of the attorneys.

Id. Brooks also stated that for each strike, the State relied on "a compilation of information," including whether jurors were "freely responding" or seemed "hesitant" during voir dire. App.84a-85a. Prosecutors also relied on "information about jurors' age, residences, employment, spouse's employment, [and]

criminal histories" and "had gone over the juror lists with [a] case agent and 'sheriff 's officers.'" App.85a.

The court then allowed the defense to examine Brooks "at length" about the State's strikes. *Id.* As to Davis, the following exchange occurred:

> Q. Eric Davis, number one twelve?
>
> A. Was it a strike?
>
> Q. Correct. A black male.
>
> A. All right, sir.
>
> Q. Your reasons again for striking Mr. Davis?
>
> A. You want me to repeat them?
>
> Q. Yes, ma'am.
>
> A. Okay. Mr. Davis, according to my notes, is a black male, approximately twenty-three years of age, which would put him very close to the same race, sex, and age of the defendant. He had said to the Court he had heard a little something. The Court questioned him further and he finally said well, I heard it from the paper or something. The Court questioned him further. He was very vague and unclear in his answer. The Court asked him more about it and he said well, some people were talking about it. I didn't actually read it. He could not remember what had been said nor anything about -- anything further about those. His answers to the death penalty did not give me a lot of clues either way as to how he felt. In fact, I think the words he used were I could go either way.
>
> Q. Well, was the fact he said he could go either way a reason you struck him, or was it because of the other reasons he gave, such as well, he

> was vague as to what he had read or where he had heard it from or what it was?
>
> A. Well, Mr. Wise, I didn't just analyze it by one factor. The fact that he did not appear as convincing and as if he'd given it a lot of thought and was sure of how he felt was definitely a consideration, but he wasn't struck because of his death penalty views although that was a factor. His vagueness and -- I don't know if he didn't understand the Judge or if he just didn't want to talk about it or wasn't interested, I didn't know what it was, but I did not think that he was very clear on where he stood about the publicity.
>
> Q. Ms. Brooks, isn't it true that a substantial number of white people stated in chambers that they had heard something about it, didn't really know exactly where they had heard it, really didn't remember what they had heard. Isn't that true?
>
> A. I would not characterize it that way, no, sir. I don't recall any other juror, though, who changed his mind about where he had heard it. He said he read it in the paper and then further questioning said well, I didn't read it in the paper, I heard it from some friends.

App.85a-87a (emphasis omitted). Strikingly, the line that would become the crux of Sockwell's appeal for the next thirty years—what he has called a "dispositive" *admission* that the State violated *Batson*, DE21:41—apparently went unnoticed by anyone in the courtroom. The trial judge never mentioned that Brooks had stated that Davis and Sockwell were the same "race, sex, and age." Nor did the defense, even while arguing that the State "had given insufficient

race-neutral reasons" "in particular as to Eric Davis." App.87a. The court denied the motion, and the next day, defense counsel renewed the *Batson* claim, again failing to mention what Sockwell now claims to be a smoking gun. App.87a. Rather than assert that Brooks had given an expressly racial reason, the defense argued that she gave "no reason" for striking Davis at all and that "the DA's office" had a "pattern and practice" of "excluding blacks." *Id.* The trial court again denied the motion. App.87a-88a.

2. On appeal, Sockwell raised *Batson*—this time identifying the prosecutor's remark as the focal point of his claim. Although the Alabama Court of Criminal Appeals ("ACCA") agreed that race seemed to be "part of the reason for striking" Davis, the court identified other, "sufficiently race-neutral" reasons for the strike, including that (1) Davis was "vague" when answering the trial judge's questions about "what information [he had] about the case and from where he had received" it; (2) he "may have gained information from pretrial publicity"; (3) he "appeared less than candid." App.208a-10a. The ACCA understood that *Batson* prohibits the State from striking jurors "*solely* on account of their race." App.209a (quoting *Batson v. Kentucky*, 476 U.S. 79, 89 (1986) (emphasis in original)). But at that time, the ACCA and many other courts did not view race being "part" of the motive for the strike as dispositive in the defendant's favor. The court found no clear error and affirmed.

The Alabama Supreme Court ("ASC") also affirmed denial of Sockwell's *Batson* claim. App.182a. The ASC determined that Brooks did not strike Davis for being the same race as Sockwell. Her "descriptive identification" of the venireman was just that, not "a *reason for striking him*." App.180a. In "context," the

court observed, the prosecutor gave the reasons for striking a veniremember, either white or black, she first prefaced her remarks by stating the veniremember's race and sex, as she did with E.D. The only *reasons* the prosecutor gave for striking E.D. were [1] his vagueness and [2] lack of candor in stating what he had already heard about the trial, from what source he has gotten this information, and [3] whether he could be willing to recommend the death penalty. App.180a. The court found that the State's race-neutral reasons were supported by the record. App.183a. And given the "great discretion" of the trial judge and "the context in which race was mentioned," the ASC found no abuse of discretion. App.181a-182a.

3. After unsuccessfully seeking post-conviction relief in state court, Sockwell filed a 28 U.S.C. §2254 petition in the Middle District of Alabama. App.59a. On September 29, 2023, the district court entered an opinion and final judgment denying Sockwell's habeas petition. As to the *Batson* claim, the court concluded that Sockwell could not carry his burden with just "the trial transcript, the very evidence that was [already] reviewed and interpreted by the ASC." App.93a.

The district court reasoned that the ASC had drawn a reasonable conclusion from the record, reviewing the prosecutor's remark not "in isolation" but in light of several key factors. App.94a. First, "[b]y the time Brooks made the subject remark, she had already plainly articulated a race-neutral reason for her strike ... without drawing the racial comparison that would later become the crux of [Sockwell's] *Batson* claim." *Id.* She "repeated th[e] same justification and expanded on it further when questioned." *Id.*

Second, it was not unreasonable to find that the prosecutor did not make "an unambiguous declaration of racial animus that she had manage[] to conceal until questioned by defense counsel," especially given that "apparently no one … believed that Brooks" had done so, despite the defense being "highly attuned to *Batson* issues." App.95a. Simply put, "it is implausible in the face of this record that defense counsel would allow the functional equivalent of Brooks declaring, 'I struck Eric Davis because he is a young black male like the defendant,' to pass without notice." *Id.* In sum, the district court explained, fair-minded jurists could conclude that the "racial comparison was incidental, surplusage, or simply an extemporaneous, if ill-advised, descriptive observation … [that] conveyed no particular animus." App.100a-101a.

Third, the district court examined the prosecutor's reasons for striking Davis and found them "amply supported." App.112a. The court rejected Sockwell's comparisons between Davis and other jurors who were not struck, *id*, and found the evidence of alleged disparities in the State's use of strikes and previous *Batson* violations to be underwhelming, App.109a. In all, the "ASC did not unreasonably apply *Batson*, and its decision … was not based upon an unreasonable determination of fact." App.114a.

Alternatively, the district court held that even if Brooks had "some untoward racial consciousness," she "would have struck Davis" anyway. App.101a. And in 1995, it was not clearly established law that *Batson* forbids a "dual motivation"—*i.e.*, striking for race-based *and* race-neutral reasons. App.102a.

4. The Eleventh Circuit reversed in a divided decision. The "decisive question" was whether the

prosecutor "should be believed." App.14a. Based on its reading of the voir dire transcript, the panel majority determined that she should not. While deeming "not unreasonable" the ASC's finding that Brooks's remark was just "descriptive," App.13a, the panel majority then relied on Sockwell's version of the facts, finding "explicitly race-based reasoning" for striking Davis (App.25a) and distinguishing circuit precedent on the ground that Brooks "state[d] she struck [Davis] for being the same race as the defendant" (App.26a n.13).

As to the prosecution's actual reasons for striking Davis, the panel majority conceded that the venireman was uniquely vague, App.28a, and did not address the prosecutor's other reasons, focusing instead on circumstantial evidence like alleged *Batson* violations by the same prosecutor in other cases, App.17a-24a, or an alleged racial "pattern" of strikes, App.23a. Without a hint of deference to the findings of the state judiciary that addressed the same claim and the same evidence thirty years ago, the Eleventh Circuit identified "racially discriminatory intent," App.25a, reviewed the claim de novo, and granted relief on largely the same grounds, App.27a-30a.

The Eleventh Circuit also rejected the State's argument that "'law and justice'" do not "require" vacating Sockwell's conviction. App.30a-31a (quoting *Brown v. Davenport*, 596 U.S. 118, 134 (2022) (quoting 28 U.S.C. §2243)). The State had argued that habeas is discretionary, that the equities should be sensitive to the guilt or innocence of the petitioner, and that Sockwell is guilty of capital murder. *See* DE28:52-57 (citing, *inter alia*, *Crawford v. Cain*, 68 F.4th 273, 287 (5th Cir. 2023) (Oldham, J.), *reh'g granted, op. vacated*, 72 F.4th 109 (5th Cir. 2023)). But the panel majority held that *Batson* violations always demand

federal habeas relief—even if the violation was "harmless." App.30a-31a.

Judge Luck dissented: "Stripped of deference, the majority opinion reviews the cold record de novo, conducts its own *Batson* analysis thirty-five years removed from the courtroom, rejects the state court's no-purposeful-discrimination finding, and orders the district court to grant the habeas writ so the state can figure out a way to retry Sockwell almost four decades after the murder." App.33a. Each of the majority's "premises is flawed," he wrote, and "a fairminded jurist could conclude that striking Juror Davis from the jury was not based on purposeful discrimination. A fairminded jurist already has." *Id.*

Judge Luck explained that the state court's interpretation of the trial transcript was a "finding [that] is presumed correct" under AEDPA. App.55a. n.2. So was the state court's no-purposeful-discrimination finding entitled to deference. Citing a plethora of circuit cases denying *Batson* claims under "the same circumstances," Judge Luck concluded that a fairminded jurist "could make the same finding" here. App.55a. The majority held otherwise because it never "meaningfully engaged" with precedent, adopted its own version of the facts, and "refus[ed] to give AEDPA deference." App.55a n.2, 58.

REASONS TO GRANT THE PETITION

I. The Eleventh Circuit violated AEDPA.

This Court regularly reverses decisions granting habeas relief, especially when they involve errors applying AEDPA.[1] The Court's active hand in habeas reflects the "special costs on our federal system" when federal courts override the State's "core power to enforce criminal law." *Shinn v. Ramirez*, 596 U.S. 366, 376 (2022). Federal habeas review "disturbs the State's significant interest in repose, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

Sockwell's *Batson* claim is not close under AEDPA. Thirteen fairminded jurists had rejected it before Sockwell's 2–1 victory below. Deference was owed yet denied to both the state judiciary under AEDPA and the trial court under this Court's *Batson* precedents.

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[1] *See Cash v. Maxwell*, 132 S. Ct. 611, 616 (2012) (Scalia, J., dissenting from denial of certiorari) ("The only way this Court can ensure observance of Congress's abridgment of the[] habeas power is to perform the unaccustomed task of reviewing utterly fact-bound decisions that present no disputed issues of law. We have often not shrunk from that task…"); *id*. at 616-17 (collecting cases). The Court has recently vacated Eleventh Circuit decisions granting habeas relief in *Hamm v. Smith*, 604 U.S. 1 (2024), and *Alabama v. Williams*, No. 23-682 (June 10, 2024). The Court summarily reversed the Eleventh Circuit's failure to apply AEDPA faithfully in *Dunn v. Reeves*, 594 U.S. 731 (2021).

A. The panel majority displaced multiple state-court factual findings well within the realm of fairminded disagreement.

The panel majority took a frozen cold voir dire transcript, read twenty words of it in the least charitable light, and reached a different factual conclusion about the prosecutor's motives and credibility than either the district court or the state high court. That's not how review should be conducted under AEDPA or this Court's *Batson* cases.

For starters, Sockwell's *Batson* claim was raised at trial, yet the trial judge's "pivotal role" is entirely absent from the majority opinion. *Snyder*, 552 U.S. at 477; *see Davis v. Ayala*, 576 U.S. 257, 273-74 (2015) ("Appellate judges cannot on the basis of a cold record easily second-guess a trial judge's decision about likely motivation."). *Batson* is all about "the prosecutor's credibility," *Snyder*, 552 U.S. at 447, which is a "pure issue of fact" where "the best evidence often will be the demeanor of the attorney" exercising the strike, *Hernandez v. New York*, 500 U.S. 352, 364-65 (1991) (plurality).

If "the decisive question" was whether the prosecutor "should be believed," App.14a, then the decisive answer was given by the trial court thirty years ago. The trial judge, who had "firsthand observations" of the alleged discrimination, rejected Sockwell's claim. *Snyder*, 552 U.S. at 477. Disturbing that credibility determination, the decision below implies that "a reasonable factfinder must conclude the prosecutor lied." *Rice v. Collins*, 546 U.S. 333, 341 (2006); *accord Hernandez*, 500 U.S. at 366 ("The reasons justifying a deferential standard of review in other contexts … apply with equal force to our review of a state trial

court's findings of fact made in connection with a [*Batson*] claim."). But re-reading a line in the trial transcript decades later is no basis to reverse a credibility determination. Nothing that happened in voir dire "compel[s] the conclusion that the trial court had no permissible alternative but to reject the prosecutor's race-neutral justifications and conclude that [Sockwell] had shown a *Batson* violation." *Collins*, 546 U.S. at 341.

In particular, the majority erred in rejecting the state-court finding that the prosecutor's reference to race was "a descriptive identification," App.13a, while accepting Sockwell's contention that the remark was an admission "that she struck [the juror] for being the same race as the defendant," App.26a n.13; *see also* App.24a-25a. Sockwell did not prove the ASC's factual determination was "objectively unreasonable," let alone "incorrect by clear and convincing evidence." *Miller-El v. Cockrell*, 537 U.S. 322, 348 (2003). The most the majority could say was that it found the ASC's characterization of the record "unpersuasive" and a "factual error," yet ultimately "not unreasonable." App.13a. If the finding that Brooks referenced race merely to describe Davis was not unreasonable, then the court was required to accept it under AEDPA. Instead, the majority flatly contradicted itself by rejecting that reasonable finding in other parts of the same opinion. *Compare* App.12a-13a (rejecting Sockwell's contention that prosecutor gave "an explicitly racial reason") *with* App.25a (relying on "explicitly race-based reasoning" and "explicit racial statements"); *see also* App.24a (opining on prosecutor's alleged racial "assumptions"); App.25a (opining on how prosecutor "felt"); App.26a n.13; App.28a-29a.

The state-court finding that Brooks did not give race as a reason for her strike was not unreasonable. The district court found "compelling circumstances" in support of the ASC's reading of voir dire. App.93a. Any one of these points should have been enough in a *Batson* case governed by AEDPA to prove the possibility of fairminded disagreement.

First, the ASC's finding was "bolstered" by the record because at the time of trial, "apparently no one, including the defense, believed that Brooks had just … admitt[ed] that she struck a juror because of the juror's race," even though "counsel were highly attuned to *Batson* issues" and gave a "determined argument at the *Batson* hearing." App.95a. The district court rightly found it "implausible" that a "declaration of [] racial animus" and a "naked violation" occurred in open court yet "somehow went unnoticed." App.96a.

Second, Brooks was asked to give her reasons twice, and before she ever made the disputed remark, she "had already plainly articulated a race-neutral reason … without drawing the racial comparison." App.94a. "Brooks's mention of Davis's race and her comparison of the race of Davis and [Sockwell] plainly had nothing to do with the proffered reasons for her strike. Brooks did not offer Davis's race … as 'underpinning' for her concern that Davis was unduly vague" or lacked candor." App.99a.

Third, the "crux" of Sockwell's claim relies "only" on "the very evidence that was reviewed and interpreted by the ASC in its opinion." App.93a. The district court found that "twenty words" in the transcript do "not clearly and convincingly establish that the ASC erred in its factfinding," *id.* (applying 28

U.S.C. §2254(e)(1)), "much less that its decision was based upon an unreasonable finding of fact," *id*. (applying 28 U.S.C. §2254(d)(2)); *accord Miller-El*, 537 U.S. at 340 (describing petitioner's burden); *id.* at 359 n.4 (Thomas, J., dissenting) (same).

The Eleventh Circuit did not engage with the district court's fairminded disagreement. The opinion does not suggest that the court applied the usual appellate standard for credibility findings, let alone a standard more deferential to the peculiar province of the trial judge in *Batson* cases. *See, e.g., Hernandez*, 500 U.S. at 365. The court seemingly gave no weight to the "best evidence," which is courtroom "demeanor," *id*., and no deference to the person in the best position to evaluate it, the trial judge. Instead, the panel overrode a state-court factual finding based on the court's interpretation of twenty words in a thirty-five-year-old transcript. App.33a, 46a, 55a n.2 (Luck, J., dissenting).

The Eleventh Circuit then relied on its version of events—*viz.*, that the prosecutor had given an expressly racial reason—to find purposeful discrimination. That conclusion also transgressed AEDPA because it meant deeming the prosecutor's other race-neutral reasons to be pretextual, but the state courts found them valid. The testimony of venireman Eric Davis amply supports the prosecution's characterization of his responses as vague, contradictory, and potentially dishonest. *Supra* Statement §B. When a "juror's demeanor" is at issue, "the trial court's firsthand observations [have] even greater importance." *Snyder*, 552 U.S. at 477.

And even from the cold transcript, the panel majority had to concede that Davis was "a little vaguer"

than the other veniremen Sockwell offered as comparators. App.28a; *see also* App.42a (Luck, J., dissenting) ("Juror Davis's answers about pretrial publicity were not the same" as those of the other jurors, who "were clear from the get-go about where they heard information on the case."). Reviewing the same transcript, the state courts identified not only vagueness on the part of the juror but a "lack of candor" too. App.180a. In contrast to Davis, the others "did not flip-flop their answers when asked about what they knew about Sockwell's involvement in the murder." App.43a (Luck, J., dissenting). The ASC reasonably found that "lack of candor" was a race-neutral reason for the strike, App.180a.

The trial court's ruling on Sockwell's *Batson* motion undoubtedly relied on the court's examination and observation of Davis. During the *Batson* hearing, the prosecutor invited the judge to recall how the struck venireman could not provide a straightforward answer regarding pretrial publicity. App.84a ("You might remember…"). And when defense counsel examined the prosecution, she disputed the defense's "characteriz[ation]" of what transpired, stating, "I don't recall any other juror, though, who changed his mind about where he had heard" information bearing on the defendant's guilt. App.87a (emphasis added). The judge's ruling on Sockwell's *Batson* motion necessarily decided that Davis's "demeanor … exhibited the basis for the strike." *Snyder*, 552 U.S. at 477.

What other observations by the trial judge might have supported its ruling were unknown to the Eleventh Circuit, which is precisely why "a trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous." *Snyder*, 552 U.S. at 477 (emphasis added). "[I]n the absence of

exceptional circumstances, [this Court] would defer to the trial court." *Id.* (cleaned up) (quoting *Hernandez*, 500 U.S. at 336). Sockwell's case is not exceptional, and he did not prove "far more than … 'even clear error.'" *Kayer*, 592 U.S. at 118. On petition for writ of habeas corpus, a federal court has "no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court." *Marshall v. Lonberger*, 459 U.S. 422, 434 (1983).

Without once mentioning candor, credibility, demeanor, sincerity, or the like, the panel majority focused on circumstantial evidence, which Judge Luck picked apart in his dissent. App.34a-46a. For example, the majority focused on cases involving the same district attorney's office in the wake of *Batson's* "revolution[] [in] day-to-day jury selection," *Edwards v. Vannoy*, 593 U.S. 255, 270 (2021), which if anything demonstrated the Alabama Supreme Court's commitment to enforcing *Batson*. The majority also emphasized a racial disparity in the jurors struck by the prosecution in Sockwell's case. Whatever the weight of these circumstances on de novo review, the court should have weighed them against the best and most direct evidence of motive: the trial judge's perceptions of the prosecutor and the juror.

And then, even if the court were skeptical or suspicious of some reasons for the strike, the court still should have deferred, as other panels of the Eleventh Circuit have well appreciated. *See* App.49a-57a (Luck, J., dissenting). Deference is owed to any trial court's *Batson* ruling; deference is owed a fortiori under AEDPA. Collateral review is a guard against "extreme malfunctions …, not a substitute for ordinary error correction through appeal." *Richter*, 672 U.S. at 102-03. The panel majority did not find any extreme

malfunction, and its urge to re-litigate the same issues resolved by the ASC decades ago illustrates why "'the more general the rule[,] … the more leeway [state] courts have in reaching outcomes in case-by-case determinations' before their decisions can be fairly labeled unreasonable." *Davenport*, 596 U.S. at 144; *see also White v. Woodall*, 572 U.S. 415, 426 (2014).

B. The panel majority applied a rule for *Batson* claims that was not clearly established at the time of adjudication.

Independent of its errors under §2254(d)(2) and §2254(e)(1), the Eleventh Circuit should have affirmed because clearly established federal law in 1995 did not preclude the ACCA's "dual motivation analysis." Even if there had been a racial motive for the challenged strike, the state courts could have reasonably rejected Sockwell's *Batson* claim on the ground that the prosecution had "more than one reason." *Wallace v. Morrison*, 87 F.3d 1271, 1274 (11th Cir. 1996). Under a common rule for applying *Batson* in the 1990s, having "both racial and legitimate" motives would prevent "*Batson* error" unless "the legitimate reasons were not in themselves sufficient reason for striking the juror." *King v. Moore*, 196 F.3d 1327, 1335 (11th Cir. 1999); *accord United States v. Tokars*, 95 F.3d 1520 (11th Cir. 1996). If "the strike would have been exercised" anyway—*i.e.*, "solely for race-neutral reasons," then a superfluous race-conscious reason as a "part of the prosecutor's motivation" was not unconstitutional. *Wallace*, 87 F.3d at 1274-75.

That was the rule in the Eleventh Circuit and many other jurisdictions in the decade after *Batson*. *See Wallace*, 87 F.3d at 1274 (citing decisions of the 2nd, 4th, and 8th Circuits); *Tokars*, 95 F.3d at 1533

(same); *Wilkerson v. Texas*, 493 U.S. 924, 924 (1989) (Marshall, J., dissenting from denial of certiorari) (urging the Court to decide "whether a prosecutor's exercise of peremptory challenges *based in part* on racial considerations violates the Equal Protection Clause") (emphasis added); *id.* at 926 (discussing *Mt. Healthy v. Doyle*, 429 U.S. 274 (1977)).

Whatever the validity of the "dual motivation" approach today, the rule the Eleventh Circuit applied based on *Batson*'s "progeny" (App.15a; App.17a) was not clearly established in 1995. The core of *Batson* was that a veniremember could not be struck "solely" or "simply because" of race. *Batson*, 476 U.S. at 97-98. The Eleventh Circuit's approach cannot "be teased out" of *Batson*, *cf. Shoop v. Hill*, 586 U.S. 45, 50 (2019), evidenced by the fact that thirty years since, the Court still has not squarely addressed whether the government can defend a strike by showing that race was not outcome-determinative. *See Snyder*, 552 U.S. at 485; *Foster v. Chatman*, 578 U.S. 488, 513 n.6 (2016).

Here, the prosecutor offered five or six reasons for striking Davis, and applying AEDPA deference, the Eleventh Circuit could not (and did not) reject every one of them as a likely motivation. Even on de novo review, the court did not hold definitively that racial animus was the sole motive. App.29a-30a ("a substantial likelihood of race-based considerations"). Thus, as the district court held, "even if Brooks considered Davis's race while striking him, Brooks did not violate *Batson* because Davis's race was not a substantial motivation, much less the 'sole' reason, for her strike." App.103a-04a. This argument was briefed and argued in the Eleventh Circuit, but the court's opinion did not address it (either under AEDPA or de novo). It proves that the state-court process did not "result[] in a

decision" that violated "clearly established Federal law" at the time of adjudication. 28 U.S.C. §2254(d)(1).

II. The Eleventh Circuit erred by granting habeas relief without determining whether "law and justice" require it.

The role of federal habeas corpus is "narrow." *Ramirez*, 596 U.S. at 377. The "primary authority" to "adjudicate[e] 'constitutional challenges to state convictions'" belongs to the States, *id.* at 366, and federal habeas relief is reserved for "extreme malfunctions in the state criminal justice systems," *Richter*, 563 U.S. at 103. To obtain habeas relief, a petitioner must overcome both the limits that "AEDPA imposes" and limits that this Court "ha[s] prescribed," *Ramirez*, 596 U.S. at 377, like harmless error, *see Davenport*, 596 U.S. at 133. One who "overcomes all of these limits" is "never entitled to habeas relief" but "must still 'persuade a federal habeas court that law and justice require [it].'" *Ramirez*, 596 U.S. at 377.

Section 2243's phrase "law and justice" is not a rhetorical flourish; rather, this "language, the Court recognized, serves as 'authorization to adjust the scope of the writ in accordance with equitable and prudential considerations.'" *Davenport*, 596 U.S. at 132 (quoting *Danforth v. Minnesota*, 552 U.S. 264, 278 (2008)). The most important of "those considerations" is "punishing the guilty." *Davenport*, 596 U.S. at 132.

Yet the Eleventh Circuit opinion below rendered "law and justice" a dead letter. In the panel majority's view, "the 'law and justice' requirement" applies only to a state court's "*existing* harmless error analysis." App.30a n.14. Yet *Ramirez* said just the opposite: the petitioner's law-and-justice burden persists *even after* he satisfies doctrines like harmless error. 596 U.S. at

377; *accord Crawford*, 55 F.4th at 285. As a result of the decision below, a prisoner who is "*never* entitled to habeas relief" in this Court, *Ramirez*, 596 U.S. at 377, is *always* entitled to habeas relief in the Eleventh Circuit. That holding defies *Ramirez*, *Davenport*, the statute, and the equitable nature of the federal writ of habeas corpus. Had the Eleventh Circuit conducted any semblance of an equitable analysis, it would have counted the fact that Sockwell committed capital murder against him; it would have concluded that "law and justice" do not require freeing a guilty man thirty years after his conviction, especially when his claim is that the prosecutor discriminated against someone else. The Court should grant certiorari and reverse.

A. The petitioner's factual guilt should count against federal habeas relief.

"Foremost" among the equitable considerations that inform the scope of federal habeas relief is the "powerful and legitimate interest in punishing the guilty." *Davenport*, 596 U.S. at 132. To that end, the Court applies doctrines such as procedural default, *Wainwright v. Sykes*, 433 U.S. 72, 90-91 (1977) and non-retroactivity, *Edwards*, 593 U.S. at 263, which promote finality, comity, sovereignty, and the goals of criminal justice, *Calderon v. Thompson*, 523 U.S. 538, 555-56 (1998); *see also Withrow v. Williams*, 507 U.S. 680, 716-17 (1993) (Scalia, J., concurring in part and dissenting in part). But these "technical rules" have their own "complications," which even when properly applied can further delay justice. *Thompson v. Wainwright*, 714 F.2d 1495, 1506 & n.6 (11th Cir. 1983).

What federal courts should ask, and rarely do, is whether the alleged error will cause or has "caused the punishment of an innocent man." *Crawford*, 68 F.4th

at 288 (quoting H. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 157 n.81 (1970)).[2] If habeas is always a matter of equitable discretion and punishing the guilty is the *foremost* equitable concern, there is no reason not to consider guilt or innocence directly. And there is every reason for the Court to grant review and clarify that "[l]aw and justice do not require habeas relief—and hence a federal court can exercise its discretion not to grant it—when the prisoner is factually guilty." *Id.* at 287.

The "aim[]" of this Court's equitable rules has always been "separating the meritorious needles from the [ever] growing haystack." *Davenport*, 596 U.S. at 132. In the case that launched the "habeas boom," *id.*, Justice Jackson rightly feared a "trivialization of the writ" when "floods of stale, frivolous and repetitious petitions inundate the docket," *Brown v. Allen*, 344 U.S. 443, 536 (1953) (Jackson, J., concurring). Today, even with the benefit of AEDPA, courts face enormous backlogs in reviewing federal habeas petitions. This case arises from a murder in the 1980s. Alabama has cases that the district courts have failed to adjudicate for well over a decade. *See, e.g.*, *Maxwell v. Allen*, No. 3:10-cv-2066, DE51 (N.D. Ala. Sept. 8, 2025) (denying fourth motion for timely ruling). Many of these cases involve years of costly litigation despite "every lawyer,

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[2] *See also, e.g.*, *Granier v. Hooper*, No. 22-30240, 2023 WL 2645550, at *3 (5th Cir. Mar. 27, 2023), *withdrawn and superseded on denial of reh'g*, 2023 WL 4554903 (5th Cir. July 17, 2023) ("Law and justice do not compel issuance of the writ in the absence of factual innocence, and Granier has never claimed to be actually innocent."); *Shockley v. Crews*, 696 F. Supp. 3d 589, 706-07 (E.D. Mo. 2023), *appeal dismissed*, No. 24-1024, 2024 WL 3262022 (8th Cir. Apr. 2, 2024).

every judge and every juror [being] fully convinced of the defendant's guilt from the beginning to the end." Friendly, *supra*, at 145 n.12. Not only does this strain judicial resources, it also "prejudice[s] the occasional meritorious application to be buried in [the] flood," *Brown*, 344 U.S. at 537 (Jackson, J., concurring).

Focusing on factual innocence would also go a long way toward "returning the Great Writ closer to its historic office." *Davenport*, 596 U.S. at 132. In the Judiciary Act of 1789, Congress excluded the power to grant habeas relief to state prisoners. *Ex parte Dorr*, 44 U.S. (3 How.) 103, 104-05 (1845). Even for federal prisoners, habeas review was limited to issues implicating jurisdiction. *See Jones v. Hendrix*, 599 U.S. 465, 483 (2023) ("At the founding, a sentence after conviction by a court of competent jurisdiction was in *itself* sufficient cause for a prisoner's continued detention." (citation modified)); *Davenport*, 596 U.S. at 129 & n.1 (explaining that "the line between mere errors and jurisdictional defects was not always a 'luminous beacon' and it evolved over time."). "A perceived 'error in the judgment or proceedings, under and by virtue of which the party is imprisoned, constitute[d] no ground for' relief." *Id.* at 129. In other words, a habeas court could "examin[e] … the power and authority of the court to act," but "not the correctness of its conclusions." *Id.* (citation modified); *accord Wright v. West*, 505 U.S. 277, 285-86 (1992) (opinion of Thomas, J.).

When Congress authorized habeas corpus for state prisoners in 1867, *Felker v. Turpin*, 518 U.S. 651, 663 (1996), the Supreme Court "continued to interpret the habeas statute consistent with historical practice," *Edwards*, 593 U.S. at 285 (Gorsuch, J., concurring); *see Stone v. Powell*, 428 U.S. 465, 475 (1976). "If a prisoner was in custody pursuant to a

final state court judgment, a federal court was powerless to revisit those proceedings unless the state court had acted without jurisdiction." *Edwards*, 593 U.S. at 285-86 (Gorsuch, J., concurring). "[A] final judgment of conviction in a state court" could not be "collaterally attacked on habeas" until "well into [the twentieth] century" *Felker*, 518 U.S. at 663; *see Davenport*, 596 U.S. at 128-30; *United States v. Cotton*, 535 U.S. 625, 630 (2002) ("The Court's desire to correct obvious constitutional violations led to a somewhat expansive notion of 'jurisdiction,' which was more a fiction than anything else.").

The history demonstrates that the writ of habeas corpus was never meant for "[f]ull-blown constitutional error correction." *Davenport*, 596 U.S. at 130; *see Jones*, 599 U.S. at 480; P. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 465-74 (1963). Habeas is not "a substitute" for direct appeal, but an extraordinary remedy reserved for "extreme malfunctions" in state justice systems. *Richter*, 562 U.S. at 102. This understanding is consistent with both the history of habeas and the basic maxim of equity that just because "a court can award [some] relief" does not mean "it should." *Trump v. CASA, Inc.*, 606 U.S. 831, 853-54 (2025). One way to prevent state procedure from being a "tryout on the road to federal habeas," *Ramirez*, 596 U.S. at 377 (citation modified), is to credit, in collateral attacks, the commonsense notion that law and "justice" do not "require[] release of a person" who is "clearly … guilty of the crime of which he had been convicted." *Kaufman v. United States*, 394 U.S. 217, 233 (1969) (Black J., dissenting)).

But the Eleventh Circuit's rule that the writ should issue *automatically* upon identifying a *Batson*

violation makes federal habeas indistinguishable from a direct appeal. And it ill fits the history, which must inform not only the scope of the writ but also the federal equity power. *Cf. CASA*, 606 U.S. at 841-42 (citing *Grupo Mexican de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 119 (1999)). Neither Sockwell nor the Eleventh Circuit identified any analogous relief issued by English courts of chancery at the time of the founding. And nothing in the history prevents courts, exercising equitable discretion on collateral review, from weighing the societal "right to punish" guilty offenders when deciding whether to award relief. *Richter*, 562 U.S. at 103.

B. Law and justice do not require relief for Sockwell, who is factually guilty of capital murder.

Law and justice do not demand Sockwell's release. As the dissenting opinion well summarized: "Sockwell blew 'half of' Montgomery County Deputy Sheriff Isaiah Harris's 'face off' with a shotgun as the deputy was driving to his shift at the police station. Sockwell murdered Deputy Harris for money. He confessed in a recorded statement to the police. He confessed to his friend. And his coconspirator confessed and implicated him." App.33a. In what sense would vacating this man's conviction be equitable?

Sockwell's victory below does nothing to change the facts of his crime. He is guilty. Relief would not compensate any injury, for he "suffered no injury," *Flowers v. Mississippi*, 588 U.S. 284, 351 (2019) (Thomas, J., dissenting), from the discriminatory treatment of someone else. And there is no reason to believe the struck venireman's presence on the jury would have affected the result of Sockwell's trial. Nor

would releasing Sockwell "redress[]" any injury of the struck juror. *Id.* All it would do is "inflict a profound injury" on the public "and the victims alike" while "impos[ing] significant costs" on the government, *Ramirez*, 596 U.S. at 377.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse.

Respectfully submitted,

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November 5, 2025

APPENDIX

CONTENTS OF APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 23-13321

MICHAEL SOCKWELL,

Petitioner-Appellant,

versus

COMMISSIONER,
ALABAMA DEPARTMENT OF CORRECTIONS,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Alabama
D.C. Docket No. 2:13-cv-00913-WKW-KFP

Before LUCK, ABUDU, and WILSON, Circuit Judges.

WILSON, Circuit Judge:

Michael Sockwell was convicted of murder for pecuniary gain and sentenced to death by the State of Alabama. Sockwell appeals the district court's denial of his 28 U.S.C. § 2254 petition for the writ of habeas corpus challenging his conviction. We hold that the Alabama Supreme Court unreasonably applied clearly established federal law as determined by the Supreme Court of the United States. We also hold that Alabama violated Sockwell's Fourteenth Amendment equal protection rights under *Batson v. Kentucky*, 476 U.S. 79 (1986), by using its peremptory strikes in a discrimi-

natory manner. Accordingly, we reverse the district court's ruling and direct the district court to issue a writ of habeas corpus conditioned on Alabama's right to retry Sockwell.

I. Factual Background

In March 1988, Isaiah Harris, a sheriff in Montgomery County, was killed on his way into work. Harris' wife, Louise, was having an affair with Lorenzo McCarter. Louise asked McCarter to find someone to kill Harris so that she could obtain insurance benefit proceeds. McCarter recruited Sockwell and Alex Hood to kill Harris for $100 and promised to pay more money upon completion of the murder.

On the night of the murder, McCarter, Hood, Freddie Peterson, and Sockwell were drinking together. According to Peterson, they left Hood's house to go to the Harrises' subdivision and waited until they received a message on a pager saying, "He's leaving now." According to Peterson, Sockwell then took a shotgun and got out of the car near a stop sign, and McCarter drove to a parking lot to wait. No one saw Sockwell shoot Harris, but when he returned to the car, Sockwell suggested that he would get his money. Sockwell testified that McCarter shot Harris, and that he did not know that McCarter planned to kill Harris. Sockwell testified that he did not receive any money to kill Harris, but that he had been given $50 for fixing a car.

II. Jury Trial

In 1988, an Alabama grand jury indicted Sockwell for capital murder of Harris on the ground that Sockwell committed the murder for pecuniary gain. Sockwell pleaded not guilty, and the case went to trial in Montgomery County in 1990. In the venire, there

were fifty-five potential jurors. Of the fifty-five potential jurors, fourteen were Black.[1] Relevant to this appeal, the state trial court asked each juror how much they had heard about the case and then whether the juror could impose the death penalty.

After voir dire, thirteen potential jurors were struck for cause, leaving forty-two potential jurors. Ten of those remaining jurors were Black. Each side had fifteen preemptory strikes. Assistant District Attorney Ellen Brooks struck seven of the thirty-two remaining white jurors and eight of the ten remaining Black jurors. Sockwell raised a *Batson* challenge and explained that the State, via Brooks, used "over fifty percent of their strikes to strike [B]lacks" and "in effect, struck eighty percent of all [B]lacks on the venire." Brooks then provided her reasons for striking the jurors, with most of her answers relating to the jurors' positions on the death penalty or their exposure to pretrial publicity.

The focus of Sockwell's *Batson* challenge was on the striking of Eric Davis, a Black male. During his individual voir dire, the state trial court asked

> THE COURT: Have you heard or read from any source anything about these circumstances that we're here today on?

---

[1] The capitalization of Black when referring "to Black people and often especially to African American people or their culture" is "now widely established" in dictionaries and style guides. *See, e.g.*, *Black*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/black; *see also The Chicago Manual of Style* ¶ 8.38 (17th ed. 2017). ("*Black* is increasingly capitalized when referring to racial or ethnic identity."); Assoc. Press, *Explaining AP Style on Black and White* (July 20, 2020), https://apnews.com/article/archive-race-and-ethnicity-9105661462.

PROSPECTIVE JUROR [DAVIS]: I've heard a little something.

THE COURT: Okay. Have you heard or read or from any other source gained any information as to whether or not this defendant was guilty or not?

PROSPECTIVE JUROR [DAVIS]: Now, I had heard something.

THE COURT: You haven't?

PROSPECTIVE JUROR [DAVIS]: I had heard something.

THE COURT: What did you hear and where was it from?

PROSPECTIVE JUROR [DAVIS]: Oh, I just, um, it was something in the newspaper or something.

THE COURT: Well, what did you hear in the newspaper or read in the newspaper?

PROSPECTIVE JUROR [DAVIS]: Well, I just, you know, just heard talk about what they heard in the newspaper or something like that. I didn't read it for myself.

THE COURT: From somebody you heard?

PROSPECTIVE JUROR [DAVIS]: Um-hum, yes.

THE COURT: When did you hear that?

PROSPECTIVE JUROR [DAVIS]: It was a while back.

THE COURT: About how long ago?

PROSPECTIVE JUROR [DAVIS]: Several months ago.

THE COURT: Several months ago. Did you hear specifically about this defendant right here?

PROSPECTIVE JUROR [DAVIS]: No.

THE COURT: Okay. Do you remember what you heard?

PROSPECTIVE JUROR [DAVIS]: Not exactly.

THE COURT: Can you remember it for me the best you can?

PROSPECTIVE JUROR [DAVIS]: Um, the only thing I recall is just, you know, um, listening at some of the guys, you know that said they had read about it, you know, the incident out on Troy Highway, stuff like that, you know, what had happened and so forth, you know.

THE COURT: Okay. Do you feel like you'd be able to put aside whatever you heard some of the guys say about what they had read and listen to the facts as they come to you in Court and based on the facts and those alone make a fair, honest, conscientious impartial decision on guilt and non guilt based on those facts and the law instructed by the Court?

PROSPECTIVE JUROR [DAVIS]: Yes, I can.

After this exchange, the court asked about Davis' view of the death penalty:

THE COURT: Because this is a capital case if we were to reach a sentencing stage the possible punishments on a capital offense are

> life imprisonment without parole and the death penalty, so I need to ask you some questions concerning this matter if we were to get to the sentencing stage. Are you opposed to the death penalty under any circumstances?
>
> PROSPECTIVE JUROR [DAVIS]: No.
>
> THE COURT: Okay. Are you for the death penalty in all circumstances?
>
> PROSPECTIVE JUROR [DAVIS]: Well, it could go either way.
>
> THE COURT: Okay. You think you could follow your oath and listen to the instructions of the Court and –
>
> PROSPECTIVE JUROR [DAVIS]: Yes, sir. Fair enough to listen to the trial and then come up with a verdict.
>
> THE COURT: Okay. Thank you.

When considering Sockwell's *Batson* motion after voir dire, the state trial court asked Brooks to explain why she chose to strike the fifteen jurors that she did. As it relates to Davis, Brooks stated that Davis "was extremely vague to the Court's questions about what he had heard" about pretrial publicity. Brooks explained that Davis could not remember what he heard. After this, Sockwell sought to obtain Brooks' notes and questionnaires that she referred to when answering the trial court's questions. The state trial court denied that request but allowed Sockwell to keep questioning Brooks about the strike, in which she stated:

> Davis, according to my notes, is a [B]lack male, approximately twenty-three years of

> age, which would put him very close to the same race, sex, and age of the defendant. He had said to the Court that he heard a little something. The Court questioned him further and he finally said well, I heard it from the paper or something. The Court questioned him further. He was very vague and unclear in his answer. The Court asked him more about it and he said well, some people were talking about it. I didn't actually read it. He could not remember what had been said nor anything about -- anything further about those. His answer to the death penalty did not give me a lot of clues either way as to how he felt. In fact, I think the words he used were I could go either way.

Sockwell asked Brooks if there were white jurors that she did not strike who had heard something about the case but did not really remember what they heard. Brooks said she would not characterize what was said by other jurors that way. After brief argument from Sockwell, the state trial court denied the *Batson* motion.

Before trial, Sockwell renewed his *Batson* challenge and explained that

> [Brooks] gave no reason, no [articulable] reason, and I submit to you that she can give no reason. . . . And I also call to the Court's attention the fact that on the news last night Mr. McPhillips says that this prosecutor, in the last case she tried, in Sims, used fourteen of her strikes in the same fashion. . . . [W]e've got a pattern and practice by the D.A.'s office of excluding [B]lacks for reasons like chewing

> gum, not dressing properly and being in the wrong neighborhood.

The state trial court again denied the motion.

The jury found Sockwell guilty and recommended a sentence of life imprisonment by a vote of seven to five. But the judge overrode the recommendation and imposed the death penalty.

III. Procedural History

Sockwell appealed to the Alabama Court of Criminal Appeals (ACCA), which affirmed Sockwell's conviction and death sentence. Relevant to this appeal, the ACCA found that the state trial court's denial of the *Batson* motion was not clearly erroneous. *Sock-well v. State*, 675 So. 2d 4, 20 (Ala. Crim. App. 1993). The ACCA explained that Davis' "race was part of the reason for striking him" but that Davis' vague responses as "to what information about the case and from where he had received information about the case, is a sufficiently race-neutral reason for a peremptory challenge." *Id.*

Sockwell appealed. A divided Alabama Supreme Court affirmed the ACCA—holding its conclusion about Sockwell's *Batson* challenge was correct but "its rationale was not." *Ex parte Sockwell*, 675 So. 2d 38, 41 (Ala. 1995). The court explained it did not agree with the ACCA "that the prosecutor's opening remark identifying [Davis] as a [B]lack man was given as a *reason for striking him* from the venire." *Id.* at 40. Instead, in the "context of the entire exchange," the prosecutor's identification of Davis as a Black male "was merely a descriptive identification of the veniremember based on the prosecutor's notes." *Id.* "When the prosecutor gave the reasons for striking a veniremember, either white or [B]lack, she first

prefaced her remarks by stating the venire member's race and sex." *Id.*

The court found that "[t]he only *reasons* the prosecutor gave for striking [Davis] were his vagueness and lack of candor in stating what he had already heard about the trial, from what source he has gotten this information, and whether he could be willing to recommend the death penalty." *Id.* The court specifically disagreed with the ACCA's logic that "a non-race-neutral *reason* given for a peremptory strike [would] 'cancel out' a race-based reason." *Id.* at 41. Instead, the Alabama Supreme Court held that "the mere *mention* of race . . . does not necessarily establish that a peremptory strike was based on a racially motivated reason and was the product of purposeful discrimination." *Id.*

In December 2013, Sockwell filed his habeas petition in the Middle District of Alabama, asserting his *Batson* claim. Ten years later, the district court denied Sockwell's request for relief. *Sockwell v. Hamm*, No. 2:13-CV-913-WKW, 2023 WL 6377645, at *1 (M.D. Ala. Sept. 29, 2023). The court found the strike of Davis "problematic" but noted that the Alabama Supreme court could reasonably conclude that Brooks' "racial comparison was incidental, surplusage, or simply an extemporaneous, if ill-advised, descriptive observation that Davis and [Sockwell] were of the same race, sex, *and* age, but that this observation conveyed no particular animus toward any of those traits." *Id.* at *18. The court also found that nothing in the Alabama Supreme Court's opinion showed that it had not considered all relevant circumstances, and the Alabama Supreme Court did not unreasonably apply *Batson*'s third step. *Id.* at *19–24. Because Sockwell made a substantial showing of the denial of a constitutional right, the district court granted a certificate of appeal-

ability as to whether Alabama exercised its peremptory challenge of Davis in a racially discriminatory manner. *Id.* at *49. Sockwell timely appealed.

IV. Standard of Review

The Antiterrorism and Effective Death Penalty Act (AEDPA) governs our review of the Alabama Supreme Court's *Batson* analysis. *See* 28 U.S.C. § 2254. AEDPA generally establishes a "highly deferential" standard for reviewing a state court's *Batson* rulings. *Lee v. Comm'r, Ala. Dep't of Corr.*, 726 F.3d 1172, 1192, 1207 (11th Cir. 2013).

"If we determine that AEDPA deference does not apply [to the state court's *Batson* analysis], we must undertake a *de novo* review of the claim." *Adkins v. Warden, Holman CF*, 710 F.3d 1241, 1250 (11th Cir. 2013).

V. Applicable Law

In *Batson*, the Supreme Court ruled that "the Equal Protection Clause forbids the prosecutor [from] challeng[ing] potential jurors solely on account of their race or on the assumption that [B]lack jurors as a group will be unable impartially to consider the State's case against a [B]lack defendant." 476 U.S. at 89. *Batson* "stressed a basic equal protection point: In the eyes of the Constitution, one racially discriminatory peremptory strike is one too many."[2] *Flowers v. Mississippi*, 588 U.S. 284, 298 (2019). *Batson*, decided in 1986, was established federal law at the time of

[2] We have also emphasized that under *Batson* venire members "are entitled not to be struck for racial reasons, and [B]lack defendants are entitled to be tried in a system free of racially exclusionary practices." *United States v. David*, 803 F.2d 1567, 1571 (11th Cir. 1986).

Sockwell's trial in 1988 and when the Alabama Supreme Court decided Sockwell's direct appeal in 1995.

Batson established a three-step inquiry to evaluate the prosecutor's use of peremptory strikes:

> First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race. Second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question. Third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.

Miller-El v. Cockrell, 537 U.S. 322, 328–29 (2003) (*Miller-El I*) (citing *Batson*, 476 U.S. at 96–98) (internal citations omitted).

Neither party disputes that Sockwell made a prima facie case that the peremptory strike on Davis was based on race. Instead, the parties dispute the Alabama Supreme Court's determinations on *Batson*'s second and third steps. We address each step in turn.

VI. *Batson*'s Second Step

Sockwell argues that the Alabama Supreme Court made an unreasonable determination of fact under 28 U.S.C. § 2254(d)(2) by finding that (1) the comparison between Sockwell and Davis was merely descriptive and (2) Brooks gave a race-neutral reason for striking Davis. Sockwell asserts that Brooks' statement that "Davis, according to my notes is a [B]lack male, approximately 23 years of age, which would put him very close to the same race, sex and age of the

defendant" is an explicitly racial reason for striking Davis.

A state habeas court's findings of fact are 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). "Even if the state court made a clearly erroneous factual determination, that doesn't necessarily mean the state court's 'decision' was 'based on' an 'unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" *Pye v. Warden, Ga. Diagnostic Prison*, 50 F.4th 1025, 1035 (11th Cir. 2022) (en banc) (quoting 28 U.S.C. § 2254(d)(2)). "Depending on the importance of the factual error to the state court's ultimate decision, that decision might still be reasonable." *Id.* (internal quotation marks omitted).

Batson's first and second steps "govern the production of evidence that allows the trial court to determine the persuasiveness of the defendant's constitutional claim" when it reaches *Batson*'s third step. *Johnson v. California*, 545 U.S. 162, 171 (2005). The second step in the *Batson* inquiry "does not demand an explanation that is persuasive, or even plausible." *Purkett v. Elem*, 514 U.S. 765, 767–68 (1995) (per curiam). At this step, "the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Hernandez v. New York*, 500 U.S. 352, 360 (1991) (plurality opinion).

The question for this court is whether the Alabama Supreme Court reasonably reached its conclusion that Brooks proffered a race-neutral reason under *Batson*'s second step. The Alabama Supreme Court credited as the "only *reasons*" for Brooks' strike was Davis'

"vagueness and lack of candor in stating what he had already heard about the trial, from what source he has gotten this information, and whether he could be willing to recommend the death penalty." *Ex parte Sockwell*, 675 So. 2d at 40. In doing so, it rejected that "the prosecutor's opening remark identifying [Davis] as a [B]lack man was given as a *reason for striking* him." *Id.* The Alabama Supreme Court erred in finding that this statement by Brooks was merely a descriptive identification.

We find the Alabama Supreme Court's characterization of Brooks' statement as "merely descriptive" as unpersuasive as the district court did. More than stating Davis' race, Brooks compared Davis' race to Sockwell's. But that does not mean that the Alabama Supreme Court's underlying determination at this stage of the *Batson* inquiry was unreasonable. Considering that *Batson*'s second step is a low burden, so much so that the proffered race-neutral reason need not be "persuasive, or even plausible," the Alabama Supreme Court's determination that Brooks met this low bar is not unreasonable despite the factual error. *Purkett*, 514 U.S. at 767–68. Still, Sockwell's argument about the prosecutor's comparison to the stricken juror, Davis, has force. The language should be considered with all the relevant circumstances when we "determine the persuasiveness of the defendant's constitutional claim" at *Batson*'s third step. *Johnson*, 545 U.S. at 171.

VII. *Batson*'s Third Step

Sockwell first argues that the Alabama Supreme Court unreasonably applied clearly established Supreme Court precedent by failing to explicitly perform the third step analysis and to determine whether he established purposeful discrimination. Instead, the

court "stopped immediately after step 2" and deferred to the trial court's finding that Brooks' stated reasons for the Davis strike were race neutral. Next, he argues that even if the Alabama Supreme Court implicitly performed the required analysis, it unreasonably applied *Batson*'s third step by failing to consider all of the relevant circumstances.

Sockwell's first argument is foreclosed by this court's precedent. We do not require "courts to show their work in *Batson* decisions by mentioning every relevant circumstance." *King v. Warden, Ga. Diagnostic Prison*, 69 F.4th 856, 869 (11th Cir. 2023). State courts are not required to list each fact or argument they considered. *See Lee*, 726 F.3d at 1212. Thus, we presume that the Alabama Supreme Court implicitly considered the relevant circumstances.

Next, Sockwell argues that, even if it does not do so explicitly, the Alabama Supreme Court is not absolved from its duty to properly consider all of the relevant circumstances at *Batson*'s third step to determine whether Sockwell established purposeful discrimination. After careful review, we agree that the Alabama Supreme Court's implicit application of *Batson*'s third step was an unreasonable application of clearly established law.

A. AEDPA Review

When determining whether the defendant has established purposeful discrimination, "the decisive question will be whether [the prosecutor's] race-neutral explanation . . . should be believed." *Hernandez*, 500 U.S. at 365. In addressing this question, "a court must undertake a sensitive inquiry into such circumstantial and direct evidence of intent as may be available," *Batson*, 476 U.S. at 93 (internal quotation

marks omitted), to determine "whether the opponent of the strike has carried his burden of proving purposeful discrimination," *Purkett*, 514 U.S. at 768.

The defendant may present: (1) "statistical evidence about the prosecutor's use of peremptory strikes against [B]lack prospective jurors as compared to white prospective jurors in the case;" (2) "evidence of a prosecutor's disparate questioning and investigation of [B]lack and white prospective jurors in the case;" (3) "sideby-side comparisons of [B]lack prospective jurors who were struck and white prospective jurors who were not struck in the case;" (4) "a prosecutor's misrepresentations of the record when defending the strikes during the *Batson* hearing;" (5) "relevant history of the State's peremptory strikes in past cases;" or (6) any "other relevant circumstances that bear upon the issue of racial discrimination." *Flowers*, 588 U.S. at 302.

Under AEDPA, a state court's finding of no purposeful discrimination is entitled to deference unless it is: (1) "contrary to, or involved an unreasonable application of," *Batson* and its progeny, 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." *See* 28 U.S.C. § 2254(d)(1)–(2).

"Where the concern is that a state court failed to follow *Batson*'s three steps, the analysis should be under AEDPA § 2254(d)(1)." *McGahee v. Ala. Dep't of Corr.*, 560 F.3d 1252, 1256 (11th Cir. 2009). "Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams v. Taylor*, 529 U.S. 362, 413 (2000). "[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. Further, "[t]he decision must be 'so obviously wrong that its error lies beyond any possibility for fairminded disagreement.'" *Pye*, 50 F.4th at 1034 (quoting *Shinn v. Kayer*, 592 U.S. 111, 118 (2020) (per curiam)).

The Supreme Court has clearly articulated that "[i]n deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances." *Batson*, 476 U.S. at 96. Our decision in *Lee* discussed the AEDPA standard for evaluating whether the state court failed to consider the totality of "all relevant circumstances" under *Batson*. We held that an "unreasonable application" results where there are "explicit racial statements and strong evidence of discriminatory purpose," such that no reasonable and fairminded jurist could have considered "all relevant circumstances" and find no *Batson* violation. *Lee*, 726 F.3d at 1213.[3]

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[3] *Lee* summarized our cases applying *Batson*. Specifically, the opinion pointed to our decisions in *McGahee* and *Adkins* for examples of explicitly racial justifications for striking jurors. 726 F.3d at 1213. In *McGahee*, we noted the State's claim that several Black jurors were struck due to "low intelligence" was "a particularly suspicious explanation given the role that the claim of 'low intelligence' has played in the history of racial discrimination from juries." 560 F.3d 1252, 1265 (11th Cir. 2009). We also agreed that the State's reasoning for striking the only remaining Black juror because it "did not want to leave him individually" could "be read only to mean that the State did not want to leave [him] as the sole [B]lack juror on the panel." *Id.* at 1264. The "statement by the prosecutor that a juror was struck because of his race is a 'relevant circumstance" in determining whether *Batson* has been

Sockwell points us to the following "relevant circumstances," that he claims the Alabama Supreme Court ignored: (1) Brooks' relevant history of preemptory strikes in past cases that were found to have violated *Batson*; (2) the "statistical evidence about the prosecutor's use of peremptory strikes against [B]lack prospective jurors as compared to white prospective jurors in the case;" (3) Brooks' reasoning for striking Davis as compared to two white jurors who were not struck; and (4) Brooks' response to questions about why she struck Davis, which bears "upon the issue of racial discrimination." *See Flowers*, 588 U.S. at 302. We agree with Sockwell that the Alabama Supreme Court's decision was an unreasonable application of *Batson* and its progeny. No reasonable and fairminded jurist could have considered "all relevant circumstances" present here and find no *Batson* violation. *See Lee*, 726 F.3d at 1228.

i. History of Peremptory Strikes in Past Cases

Batson challengers may present evidence of a "relevant history of [the prosecutor's] peremptory strikes in past cases." *Flowers*, 588 U.S. at 302. Relevant history of prior peremptory strikes based on race bears on the question of present discrimination. *See id.* Here, Brooks had a significant history of striking jurors in a racially discriminatory manner

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violated." *Id.* In *Adkins*, we found that the state court unreasonably applied *Batson* when it failed to consider key facts such as "the fact that the prosecution explicitly noted the race *of* every [B]lack venire member (and only [B]lack venire members) on the jury list" used in jury selection, and "the fact that specific proffered reasons provided by the prosecutor were incorrect and/or contradicted by the record." 710 F.3d 1241, 1252 (11th Cir. 2013).

right before and during Sockwell's trial in 1990. Both the ACCA and Alabama Supreme Court found several instances of Brooks striking Black jurors in violation of *Batson* starting in 1988.[4] *Sims v. State*, 587 So. 2d 1271, 1277 (Ala. Crim. App. 1991) ("A number of cases prosecuted in Montgomery County have been reversed because of a *Batson* violation."). We discuss several of those cases in turn.

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[4] In two cases, Alabama courts identified Brooks as the prosecutor who struck most if not all the Black jurors. In *Ex parte Bird*, the Alabama Supreme Court noted "a pattern in the use of peremptory strikes by the Montgomery County District Attorney's office" to remove Black jurors—specifically in "a number of cases . . . prosecuted by Bruce Maddox and Ellen Brooks." 594 So. 2d 676, 681 (Ala. 1991). For example, "[i]n *Williams v. State*, Ms. Brooks struck 100% of the [B]lack jurors from the venire." *Id.* at 681 (citing 530 So. 2d 881 (Ala. Crim. App. 1988)).

In at least two other cases, Brooks was not named directly but we can safely deduce that she was involved. At Sockwell's trial, his attorneys pointed to *Sims v. State*—a case that Brooks prosecuted the prior week—where she struck fourteen of the sixteen Black jurors. 587 So. 2d 1271, 1275–78 (Ala. Crim. App. 1991).

Reviewing Brooks' jury selection in *Sims*, the ACCA concluded that "the reasons offered by the prosecutor for her remaining strikes present serious doubts to this court as to their validity." 587 So. 2d at 1276. The court observed that "[t]he same prosecutor involved in the present case, was also involved in *Powell*, *Williams*, *Warner*, and *Parker*. Of these cases, three were reversed for *Batson* violations." *Id.* at 1277 (referencing *Powell v. State*, 548 So.2d 590 (Ala. Crim. App. 1988), *aff'd*, 548 So.2d 605 (Ala. 1989); *Williams*, 530 So. 2d 501; *Warner v. State*, 594 So. 2d 664 (Ala. Crim. App. 1990); and *Parker v. State*, 568 So.2d 335, 338 (Ala. Crim. App. 1990)). The ACCA also cited testimony "from several local attorneys" who "had participated in trials prosecuted by the same assistant district attorney," including *Powell*, *Williams*, and *Warner*. *Sims*, 587 So. 2d at 1277. The defendant in the *Warner* case was a co-defendant in *Bird*. *See Bird*, 594 So. 2d at 678; *Warner*, 594 So. 2d at 666.

First, in 1985 Samuel Williams was convicted of drug offenses, and he raised a *Batson* challenge before the ACCA. *Williams v. State*, 530 So. 2d 881, 883–86 (Ala. Crim. App. 1988). Brooks struck all the potential Black jurors. *Id.* at 883–85. The ACCA agreed with the trial court that Williams' *Batson* objection was untimely because it had been made after the jury had been sworn in, and he failed to justify the delay. *Id.* 885–86.

But this was not Williams' only appeal to the ACCA based on Brooks' striking of Black jurors. In 1988, on appeal from Williams' conviction for a different drug offense, the ACCA found that Brooks' explanation for striking all nine Black prospective jurors "did not meet the requirements of *Batson*" and returned the case to the trial court. *Williams v. State*, 548 So. 2d 501, 503 (Ala. Crim. App. 1988). The court specifically noted that those proceedings needed to comply with *Batson*. *Id.* On remand, the state trial court held an evidentiary hearing and found that Brooks met her burden to make "a bona fide or legitimate showing that her use of the peremptory strikes was for reasons other than race." *Id.* at 504–06. But on appeal, the ACCA found Brooks' supposed race-neutral reasons for striking most of the Black jurors were not "specific, bona fide, or legitimate," and thus violated *Batson*. *Id.* at 507.[5]

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[5] The dissenting opinion points out that Williams' trial occurred in 1985, one year before the Supreme Court decided *Batson*. But *Batson* was "a new rule for the conduct of criminal prosecutions" that was "to be applied retroactively to all cases, state or federal, pending on direct review or not yet final." *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). That "Brooks could not have purposefully violated a Supreme Court decision that did not exist until nearly a year later," does not change the fact that Brooks purposefully struck Black jurors in the cases she prosecuted. Brooks' pattern of discriminatory strikes continued even after

Second, in 1987, Timothy Powell was convicted of robbery and murder. He raised a *Batson* challenge because Brooks struck all the potential Black jurors, using thirteen of the State's sixteen peremptory challenges. *Powell v. State*, 548 So. 2d 590, 592–93 (Ala. Crim. App. 1988), *aff'd sub nom. Ex parte Powell*, 548 So. 2d 605 (Ala. 1989). The ACCA noted that the trial court clearly erred in finding that many reasons that Brooks gave for striking Black jurors were sufficiently race-neutral. *Id.* at 594. "The State simply did not remove white persons for the same reasons given by the State for removing [B]lacks." *Id.* at 593.

Third, in 1987, Terry Bird was convicted of capital murder. *Ex parte Bird*, 594 So. 2d 676, 678 (Ala. 1991). Bird presented evidence that Brooks used "85% of her peremptory challenges, that is, 17 of 20 strikes, to eliminate 89% of the [B]lack veniremembers" for reasons unsupported by the record. *Id.* at 681. In 1991, the Alabama Supreme Court found Brooks violated *Batson*. *Id.* at 678. The court noted that "the venire consisted of 52 prospective jurors. The 19 [B]lack veniremembers comprised 36% of the venire. However, the fact that only one [B]lack juror was ultimately seated on the jury meant that [B]lacks comprised only 8% of the trial jury." *Id.* at 680.

Fourth, Brad Haywood Sims was convicted of a drug offense, and during voir dire, Brooks struck fourteen of the sixteen potential Black jurors. *Sims v. State*, 587 So. 2d 1271, 1272, 1275–76 (Ala. Crim. App. 1991). Although the jury included two Black jurors, the ACCA noted "[t]he fact that two [B]lacks actually sat on

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Batson, reinforces the conclusion that her discriminatory jury selection was not due to a lack of notice about what the Equal Protection Clause requires.

the jury is not proof that no racial discrimination occurred." *Id.* at 1277. Ultimately, the ACCA found that Brooks violated *Batson* by striking several Black jurors again for traits and reasons that potential white jurors provided yet were not challenged. *Id.* at 1277–78.[6] The *Sims* case had only been conducted the week before Sockwell's, and Sockwell's counsel brought up the *Sims* case in its argument to reopen the *Batson* challenge before trial.[7]

Brooks' history of *Batson* violations is germane when considering the relevant circumstances at *Batson*'s third step.[8] "We cannot ignore that history."

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[6] The ACCA expressly considered Brooks' history of excluding Black jurors. *Sims v. State*, 587 So. 2d 1271, 1277 (Ala. Crim. App. 1991). "The record also contains testimony at the *Batson* hearing from several local attorneys. These attorneys had participated in trials prosecuted by the same assistant district attorney as the one in the present case. All of the attorney-witnesses testified that in each instance, the prosecutor had excluded approximately 80% of the [B]lack veniremembers." *Id.*

[7] Sockwell's counsel asked to inquire into the *Sims* trial, but the state trial judge denied that request.

[8] We also must note that Brooks was not the only culprit within the Montgomery County District Attorney's office. Bruce Maddox, who also engaged in striking Black jurors in a racially discriminatory manner, was called out in *Bird*. *See Bird*, 594 So. 2d at 681 (pointing to Maddox's high strike rate of Black jurors in two cases). After *Bird*, the Alabama Supreme Court again had to chastise Maddox for his discriminatory striking of twenty-four of the twenty-seven potential Black jurors in *Ex parte Yelder*. 630 So. 2d 107, 108 (Ala. 1992). The Alabama Supreme Court appeared exasperated by the fact that Brooks was still striking potential Black jurors for "whimsical, *ad hoc* excuses" that it had previously rejected. *Id.* at 109 (discussing the prosecutor's "explanations" for striking Black jurors included that they had the same name as someone allegedly prosecuted by the district attorney's office, the prosecutor's "gut reaction," "body language," and alleged "communication difficulties" that weren't supported

Flowers, 588 U.S. at 307. As a result, Brooks' pattern of *Batson* violations shows that her strikes in Sockwell's trial—which occurred around the same time as these state court cases—were "motivated in substantial part by discriminatory intent." *Id*. at 305.

ii. Statistical Evidence

As *Batson* explained: "total or seriously disproportionate exclusion of Negroes from jury venires is itself such an unequal application of the law . . . as to show intentional discrimination." 476 U.S. at 93 (internal quotations and citation omitted). Further, "a 'pattern' of strikes against [B]lack jurors included in the particular venire might give rise to an inference of discrimination." *Id.* at 97; *see also Miller-El I*, 537 U.S. at 342 ("[T]he statistical evidence alone raises some debate as to whether the prosecution acted with a race-based reason," where the prosecution struck "91%" of the eligible Black venire members with ten of their fourteen peremptory strikes.).

> [I]n the statistical analysis courts must consider the statistics in the context of other factors in a case, such as: the racial composition of the venire from which the jurors were struck, the racial composition of the ultimate jury, the substance of the voir dire answers of jurors struck by the State, and any other evidence in the record of a particular case.

Lee, 726 F.3d at 1224.

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by the record). The Alabama Supreme Court stated, "We regret that the conduct of the prosecution has, because of actions taken on the basis of race, once again necessitated a retrial, thus creating an additional strain on the judicial and economic resources of this state." *Id.* at 110.

The racial composition of Sockwell's jury pool consisted of ten Black jurors (24% of the total jury pool) and thirty-two white jurors (76% of the total jury pool). During the peremptory striking process, Brooks used the State's fifteen peremptory strikes to remove eight qualified Black jurors and seven qualified white jurors. But after Brooks' strikes, 17% of the jurors were Black (i.e., only two Black jurors) and 83% were white (i.e., ten white jurors). Brooks struck 80% of the qualified Black jurors while striking only 22% of the qualified white jurors. The number of Black jurors decreased 50%, while the number of white jurors increased.[9]

This statistical information establishes a pattern of striking qualified Black jurors far more often than qualified white jurors and provides strong evidence of the disproportionate exclusion of Black jurors against which *Batson* cautioned.[10] *See McGahee*, 560 F.3d at 1265.

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[9] In the other cases in which Alabama courts found *Batson* violations, Brooks struck between 81% and 100% of Black jurors.

[10] Sockwell also points to other circuits' use of the "challenge rate," which compares the proportion of the party's strikes against a racial group to the proportion of that group in the jury. *See, e.g.*, *Jones v. West*, 555 F.3d 90, 98 (2d Cir. 2009). Sockwell asserts that Brooks' challenge rate for Black jurors was 223% while her challenge rate for white jurors was only 61% at his voir dire. Although this court's opinion in *Adkins* does not specifically mention the challenge rate, Sockwell states that after doing the calculation himself, the challenge rate there was 218% for Black jurors, which is five percent less than what happened here. *See Adkins v. Warden*, 710 F.3d 1241, 1252–53 (11th Cir. 2013). The high differential in challenge rates here further persuades us that Brooks engaged in a discriminatory pattern of striking jurors.

iii. Reasoning for Striking Davis

Third, Sockwell compares Davis with two white jurors Lisa Burch and Peggy McFarlin—who were not struck for giving vague answers about pretrial publicity. During voir dire, Davis stated that he could not remember what he heard about the trial. Both Burch and McFarlin also did not remember in detail what they had heard. This comparison suggests that the vagueness of Davis' answer was only pretextual because Brooks did not strike Burch or McFarlin. The contradiction that Brooks did not strike two white jurors who explicitly stated they did not know what they heard about the case is highly relevant when conducting the *Batson* step three analysis.[11]

iv. Brooks' Response About the Strike

Sockwell points out that Brooks directly compared Davis to Sockwell,[12] by stating that "Davis, according to my notes, is a [B]lack male, approximately twenty-three years of age, which would put him very close to the same race, sex, and age of the defendant." "The core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the jurors' race." *Batson*, 476 U.S. at 97–98; *see also Flowers*, 588 U.S. at 298–99 (summarizing key points from *Batson*, including that

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[11] Brooks also stated that Davis' view on the death penalty was another reason for striking him, but that is not addressed by the Alabama Supreme Court.

[12] Sockwell's argument at *Batson*'s second step focuses extensively on this exchange, and while we find that Sockwell did not meet his burden at that step, that does not foreclose us from considering Brooks' response in the relevant circumstances discussion.

striking a Black juror on an assumption or belief that the Black juror would favor a Black defendant is impermissible). This comparison is relevant because it supports that Brooks felt as if Davis "would be partial to [Sockwell] because of their shared race." *Batson*, 476 U.S. at 97.

* * *

These four relevant factors reinforce each other to show strong evidence of racial discrimination. Even allowing for the deference afforded to the Alabama Supreme Court under AEDPA, a reasonable and fair-minded jurist could not have considered all of this evidence and concluded that *Batson* was not violated. Denying *Batson* relief, despite "the explicit racial statements and strong evidence of discriminatory purpose," is an unreasonable application of the law. *See Lee*, 726 F.3d at 1213. Alabama state courts found that Brooks repeatedly and purposefully struck Black jurors, making only dubious and capricious excuses. *See Bird*, 594 So. 2d at 685. Along with the extensive statistical data of striking Black jurors in Sockwell's case and Brooks' explicitly race-based reasoning for removing Davis, confirms Brooks' racially discriminatory intent.

To be sure, a state court need not "discuss every fact or argument to be a reasonable application of *Batson* under § 2254(d)," *Lee*, 726 F.3d at 1214, and we must not base our holding on our own independent judgment that the state court merely applied clearly established federal law incorrectly, *Williams*, 529 U.S. at 411. Still, when there is truly an "abundan[ce of] racial discrimination evidence," we may find the state court's *Batson* decision was indeed unreasonable. *Lee*, 726 F.3d at 1214.

Sockwell presents "strong evidence of discriminatory purpose." *See id.* at 1223. No reasonable and fair-minded jurist could have considered "all relevant circumstances" and still found no *Batson* violation.[13] *See id.* at 1213. Thus, the Alabama Supreme Court acted unreasonably in applying *Batson*.

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[13] The dissenting opinion dives through several Eleventh Circuit cases to prove its point that when considering all relevant circumstances, "reasonable and fairminded jurists could conclude there was no *Batson* violation." While the dissenting opinion details troublesome relevant circumstances—instances upon instances of prosecutors purposefully striking huge swath of Black jurors and flimsy reasons for striking those Black jurors—none of those cases involved a direct comparison of the defendant to a stricken Juror *and* a state supreme court calling out the prosecutor by name and the office for serial *Batson* violations.

We do note that this court's decision in *King* may be the closest case, but we find *King* to be distinguishable. *King* featured a prosecutor with one previous *Batson* violation, two soliloquies by the prosecutor that showed animosity towards having to comply with *Batson*, unsupported reasons for striking Black jurors, and statistical evidence. *King v. Warden, Ga. Diagnostic Prison*, 69 F.4th 856, 870–71 (11th Cir. 2023). But, here, there are more relevant circumstances that skew in Sockwell's favor. First, we have more than one previous *Batson* violation with multiple Alabama appellate courts calling out Brooks and the Montgomery County District Attorney's Office for serial *Batson* violations during the relevant time. *See, e.g.*, *Bird*, 594 So. 2d at 681. Second, Brooks compared Sockwell to Davis, stating she struck him for being the same race as the defendant, which is exactly what *Batson* cautioned against. *See Batson*, 476 U.S. at 97 ("[T]he Equal Protection Clause forbids . . . the States to strike [B]lack veniremen on the assumption that they will be biased in a particular case simply because the defendant is [B]lack."). Add in the statistical evidence and the unsupported reasons for striking Davis, and Sockwell's case is more akin to cases where defendants overcame AEDPA by showing the state courts had unreasonably applied *Batson*. *See McGahee*, 560 F.3d at 1264–65; *Adkins*, 710 F.3d at 1253.

B. De Novo Review

When we have determined that a state court decision is an unreasonable application of federal law under AEDPA, we are unconstrained by § 2254's deference. *McGahee*, 560 F.3d at 1266. We now review de novo the record below to determine whether the State, via Brooks, violated *Batson* during jury selection.

As noted above, the record overflows with relevant circumstances that weigh against Brooks' proffered race-neutral reasons for exercising the challenged peremptory strike. The statistical evidence in Sockwell's case is strong. *See Batson*, 476 U.S. at 97 (considering the statistical evidence about a prosecutor's strikes of Black prospective jurors versus white prospective jurors). And in other cases in which the Alabama courts found *Batson* violations, Brooks struck Black jurors at a high rate. Those cases also show a pattern and practice of Brooks striking Black jurors because Brooks' strikes were found discriminatory by state courts from 1988 through 1992. *Flowers*, 588 U.S. at 302 (finding that the relevant history of the State's peremptory strikes supports a *Batson* claim). And Brooks compared Davis to Sockwell for no legitimate reason, instead suggesting that due to their shared characteristics Davis would be partial to Sockwell. *See Batson*, 476 U.S. at 89.

Brooks said that she struck Davis because he could not remember specifics about the pre-trial publicity, yet there were white jurors who could not remember what they heard about the case, and Brooks did not strike them. During his individual voir dire, Davis explained that he had heard something about the incident, but he was vague as to where he had heard about the case. After further questioning, Davis explained that he heard people talking about what

they had read in the newspaper. And, as noted above, there were two white jurors who were not struck despite being vague about what they heard about the case. A comparison of the voir dire shows that like Davis, the white jurors could not tell Brooks what they had heard about the trial.

For McFarlin, the state trial court asked about her access to pretrial publicity where she noted that she heard something about the matter in the paper. But in response to the state trial court's question about whether she "read *or* heard anything about it, or from any source gained any information as to whether or not this defendant was guilty or not guilty," she answered, "I can't -- I don't remember. I just barely remember the story, but I don't remember how it ended." In following up, the state trial court asked if she had "any opinion toward whether or not this defendant would be guilty or not guilty right now from any source." In response, she said, "I don't really know what the story was really about, really. I just read a little bit of it in the paper and I don't know what he's done." Ultimately, like Davis, McFarlin said that she could put aside anything she might have heard and could "make a fair, impartial, and just decision in this case."

For Burch, the state trial court asked about her access to pretrial publicity where she said that a while back, she "heard it on the news, but it was, you know, just briefly." When asked if she could set aside anything she may have heard, she responded yes, like Davis, but again reiterated that she couldn't "even remember in full detail what I heard at that time."

Although Davis may have been a little vaguer than the two white jurors, the law does not require that "similarly situated" jurors are "identical in all

respects." *Miller-El v. Dretke*, 545 U.S. 231, 247 n.6 (2005) (*Miller-El II*). Indeed, "[a] *per se* rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters." *Id.*; *see also Flowers*, 588 U.S. at 311–12 (citing *Miller-El II* and affirming that "a defendant is not required to identify an *identical* white juror for the side-by-side comparison to be suggestive of discriminatory intent").

Brooks also stated that Davis' view on the death penalty was another reason for striking him, but the Alabama Supreme Court did not address it. Our de novo review of the record does not support that argument. Although there was some initial confusion about how Davis felt about implementing the death penalty, it became very clear after the trial judge followed up that Davis could vote for the death penalty if the circumstances warranted it. Specifically, Davis stated that he could be "[f]air enough to listen to the trial and then come up with a verdict."

"A *Batson* challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false." *Miller-El II*, 545 U.S. at 252. Thus, Sockwell met his burden at *Batson*'s third step to demonstrate Davis' exclusion from the jury was purposeful discrimination.

Brooks struck eight out of the ten Black jurors from Sockwell's jury. A side-by-side comparison of individual reasons for striking Davis, a Black juror, with the reasons for not striking white jurors, Burch and McFarlin, reveals a substantial likelihood of race-

based considerations in the exercise of those strikes. In sum, the overwhelming evidence in this record compels a finding that Brooks' use of her peremptory strike to dismiss Davis violated Sockwell's rights under the Equal Protection Clause and clearly established federal law under *Batson*.

VIII. Harmless Error

The Commissioner argues that the Supreme Court's decision in *Brown v. Davenport* requires Sockwell to show that "'law and justice' require relief" for this court to grant habeas relief, even if he overcomes AEDPA. 596 U.S. 118, 134 (2022). The Commissioner asks us to interpret this requirement as adding a harmless error analysis to *Batson* claims.[14]

We decline to do so. This court has noted previously that the Supreme Court has not suggested that *Batson* violations are subject to harmless error review. *See Davis v. Sec'y for Dep't of Corr.*, 341 F.3d 1310, 1316–17 (11th Cir. 2003) (per curiam). Since this court decided *Davis* in 2003, the Supreme Court has continued to reverse convictions even when only one or two potential jurors are struck in violation of *Batson*, no matter if it affected the outcome of the trial. *See Flowers*, 588 U.S. at 315–16; *Foster v. Chatman*, 578 U.S. 488, 514 (2016); *Snyder v. Louisiana*, 552 U.S. 472, 477–78, 486 (2008). "Equal justice under law

[14] Since *Brown* was released, other circuits have applied the "law and justice" requirement when a petitioner not only has to overcome AEDPA deference but an *existing* harmless error analysis. *See Jewell v. Boughton*, 90 F.4th 1199, 1203–06 (7th Cir. 2024) (Confrontation Clause); *Neal v. Vannoy*, 78 F.4th 775, 796 (5th Cir. 2023) (ineffective assistance of counsel). This trend supports that *Brown* does not impose a *new* harmless error requirement in habeas cases.

requires a criminal trial free of racial discrimination in the jury selection process." *Flowers*, 588 U.S. at 301.

IX. Conclusion

Accordingly, the district court's order denying Sockwell's federal habeas petition is REVERSED, and the case is REMANDED to the district court with instructions to issue the writ of habeas corpus conditioned upon the right of Alabama to retry Sockwell.

REVERSED and REMANDED.

LUCK, Circuit Judge, dissenting:

Michael Sockwell blew "half of" Montgomery County Deputy Sheriff Isaiah Harris's "face off" with a shotgun as the deputy was driving to his shift at the police station. *Sockwell v. State* (*Sock-well I*), 675 So. 2d 4, 12–13 (Ala. Crim. App. 1993), *aff'd*, *Ex parte Sockwell* (*Sockwell II*), 675 So. 2d 38 (Ala. 1995). Sockwell murdered Deputy Harris for money. *Id.* He confessed in a recorded statement to the police. He confessed to his friend. *Id.* at 13. And his coconspirator confessed and implicated him. *See id.* at 12–13.

At Sockwell's trial thirty-five years ago, Ellen Brooks, the prosecutor, used a peremptory challenge to strike veniremember Eric Davis, a black male, based on Juror Davis's "vagueness and lack of candor in stating what he had already heard about the trial, from what source he ha[d] gotten this information, and whether he could be willing to recommend the death penalty." *Sockwell II*, 675 So. 2d at 40. Applying the third step of the three-step *Batson v. Kentucky*, 476 U.S. 79 (1986) inquiry, the Alabama Supreme Court found that the peremptory strike of Juror Davis was not the result of purposeful discrimination. *Sockwell II*, 675 So. 2d at 42.

In all but the most "extreme" cases, we would defer to the state court's finding. *King v. Warden, Ga. Diagnostic Prison*, 69 F.4th 856, 869, 873 (11th Cir. 2023). But the majority opinion relies on three premises to strip the Alabama Supreme Court of the deference its finding is due under the Anti-Terrorism and Effective Death Penalty Act (AEDPA). The *first premise* is that there were four relevant circumstances the Alabama Supreme Court had to consider in its *Batson* third step inquiry: (a) Ms. Brooks's history of peremptory strikes based on race; (b) statistical

evidence of a pattern of striking qualified black veniremembers; (c) Ms. Brooks's reasons for striking Juror Davis compared to her decision not to strike two white jurors; and (d) Ms. Brooks's response to Sockwell's *Batson* objection explaining why she struck Juror Davis. The *second premise* is that the Alabama Supreme Court unreasonably applied the *Batson* third step inquiry because it ignored these four relevant circumstances. And the *third premise* is that no fairminded jurist could have considered these four relevant circumstances and concluded, as the Alabama Supreme Court did, that the peremptory strike of Juror Davis was not the result of purposeful discrimination. Stripped of deference, the majority opinion reviews the cold record de novo, conducts its own *Batson* analysis thirty-five years removed from the courtroom, rejects the state court's no-purposeful-discrimination finding, and orders the district court to grant the habeas writ so the state can figure out a way to retry Sockwell almost four decades after the murder.

The problem with the majority opinion is that each of its three premises is flawed. *First*, the four circumstances are not nearly as relevant as the majority opinion says they are. The majority opinion misstates some relevant circumstances and overlooks the record as to others. *Second*, the Alabama Supreme Court did not unreasonably apply the *Batson* third step inquiry because it did not ignore the four relevant circumstances. It considered all the relevant circumstances proffered by Sockwell in finding no purposeful discrimination in striking Juror Davis. And *third*, even with the four relevant circumstances, a fairminded jurist could conclude that striking Juror Davis from the jury was not based on purposeful discrimination. A fairminded jurist already has. *See, e.g.*, *id.* at 868–73.

1. *The Four Circumstances Are Not Nearly as Relevant as the Majority Opinion Says They Are*

The majority opinion's first premise is that there were four relevant circumstances that the Alabama Supreme Court had to consider in its *Batson* finding: (a) Ms. Brooks's history of peremptory strikes in past cases; (b) the "statistical evidence about the prosecutor's use of peremptory strikes against [b]lack prospective jurors in the case"; (c) "[Ms.] Brooks'[s] reasoning for striking [Juror] Davis as compared to two white jurors who were not struck"; and (d) Ms. Brooks's response to Sockwell's *Batson* objection explaining why she struck Juror Davis. But the majority opinion overstates the relevance of these circumstances. Some are not relevant at all. And others are much less relevant than the majority opinion lets on.

A. History of Peremptory Strikes in Past Cases

As the first relevant circumstance, the majority opinion says there are "several instances of [Ms.] Brooks striking [b]lack jurors in violation of *Batson* starting in 1988." Specifically, the majority opinion points to five cases: *Williams v. State*, 530 So. 2d 881 (Ala. Crim. App. 1988); *Williams v. State*, 548 So. 2d 501 (Ala. Crim. App. 1988); *Powell v. State*, 548 So. 2d 590 (Ala. Crim. App. 1988); *Ex parte Bird*, 594 So. 2d 676 (Ala. 1991); and *Sims v. State*, 587 So. 2d 1271 (Ala. Crim. App. 1991). But, on closer look, there are not several instances of Ms. Brooks striking black veniremembers in violation of *Batson*.

First, as to the *Williams* cases, the trials in both cases were held in May 1985—almost a year before *Batson* was decided. *Compare Williams*, 530 So. 2d at 882 (the defendant was convicted at the first trial on

May 1, 1985), *and Williams*, 548 So. 2d at 503 & n.1 (the defendant was convicted at the second trial on May 27, 1985), *with Batson*, 476 U.S. at 79 (decided in April 1986). Ms. Brooks could not have purposefully violated a Supreme Court decision that did not exist until nearly a year later. At the time of the *Williams* trials, *Swain v. Alabama*, 380 U.S. 202 (1965) was the governing law on jury selection, and there was no indication in the *Williams* cases that Ms. Brooks violated *Swain*. Of course, *Batson* applied retroactively to the *Williams* cases because *Batson* was decided while those cases were on direct appeal. But the majority opinion does not explain how the *Williams* cases can establish a "pattern" of Ms. Brooks violating *Batson* during jury selection when there was no *Batson* decision in 1985 for her to violate.

Second, as to *Powell*, we cannot "safely deduce" that Ms. Brooks was the prosecutor who exercised the peremptory strikes in that case. The Alabama Supreme Court explained that a different prosecutor, Bruce Maddox, "used 75% of his peremptory challenges (6 of 8 strikes) to eliminate black veniremembers" in another case, *Parker v. State*. *See Bird*, 594 So. 2d at 681. And, according to the state supreme court, the "same prosecutor involved" in *Parker* "was also involved" in *Powell*. *See Sims*, 587 So. 2d at 1277. Mr. Maddox was the prosecutor in *Parker*; not Ms. Brooks.[1]

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[1] We have additional reasons to be skeptical. The list of cases in the majority opinion showing "several instances of [Ms.] Brooks striking [b]lack jurors in violation of *Batson*" is largely borrowed from page fifty-two of Sockwell's brief. On the same page, Sockwell also includes *Ex parte Yelder*, 630 So. 2d. 107 (Ala. 1992). In *Yelder*, he writes, "the Alabama Supreme Court vacated a conviction where [Ms.] Brooks struck 24 of 27 black veniremembers." But Sockwell is demonstrably wrong. While *Yelder*

B. Statistical Evidence

As the second relevant circumstance, the majority opinion says that the "statistical information establish[ing] a pattern of striking qualified [b]lack jurors far more often than qualified white jurors" was "strong evidence" the Alabama Supreme Court had to consider. But the statistical evidence was strong only because the majority opinion skipped over three bits of critical information.

First, black jurors made up seventeen percent (rounding up) of the jury, which wasn't far off from the twenty-four percent (rounding up) that made up the jury pool. Sockwell's jury, that is, largely reflected the makeup of the venire. *Cf. United States v. Hill*, 643 F.3d 807, 838 (11th Cir. 2011) (finding no *Batson* violation where forty-one percent of the venire was black and, after the government exercised nine of its fourteen strikes against black veniremembers, fifty percent of the jury was black).

Second, "the presence of [black] jurors," we've explained, "is a significant factor tending to prove the paucity of the [*Batson*] claim." *United States v. Puentes*, 50 F.3d 1567, 1578 (11th Cir. 1995). "[T]he unchallenged presence of two blacks on the jury," as there was here, "undercuts any inference of impermissible discrimination that might be argued to arise from the fact that the prosecutor used [seventy-five percent of the] peremptory challenges he exercised to strike blacks from the panel

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does not mention who exercised the peremptory strikes, the prosecutor in that case was a man, not a woman. *See Yelder v. State*, 630 So. 2d 92, 98 (Ala. Crim. App. 1991), *rev'd sub nom. Yelder*, 630 So. 2d at 110 (referencing "the prosecutor[]" and the "reasons for *his* strikes of black prospective jurors" (emphasis added)).

of potential jurors and alternates." *United States v. Dennis*, 804 F.2d 1208, 1211 (11th Cir. 1986); *see also Valle v. Sec'y for the Dep't of Corrs.*, 459 F.3d 1206, 1213 (11th Cir. 2006) (concluding that the Florida Supreme Court did not unreasonably apply *Batson* partly because "two blacks served as jurors and a third serve[d] as an alternate" (alteration adopted)).

Third, unlike the prosecutor in *Dennis*, Ms. Brooks used far less than seventy-five percent of her peremptory challenges to strike black veniremembers. Ms. Brooks had fifteen peremptory strikes. Of those fifteen, she used seven—a little less than fifty percent—to strike white veniremembers and eight—a little more than fifty percent—to strike black ones. Put another way, Ms. Brooks used almost as many strikes on white veniremembers as she did on black ones. *See United States v. Allison*, 908 F.2d 1531, 1538 (11th Cir. 1990) (finding no *Batson* violation where "[t]he prosecutor struck three black jurors[but] he also struck two white jurors").

C. The Reasons for Striking Juror Davis as Compared to White Jurors

As a third relevant circumstance that the Alabama Supreme Court had to consider, the majority opinion compares Juror Davis's "vague answers about pretrial publicity" during voir dire to the answers "two white jurors—Lisa Burch and Peggy McFarlin"—gave about pretrial publicity. Juror Burch and Juror McFarlin "also did not remember in detail what they heard," the majority opinion explains, which "suggests that the vagueness of [Juror] Davis'[s] answer was only pretextual because [Ms.] Brooks did not strike [Juror] Burch or [Juror] McFarlin." But Juror Davis's voir dire answers were not the same as the answers given by

Juror Burch and Juror McFarlin. Looking at the voir dire shows the difference.

Here was Juror Davis's voir dire answers to the court's questions about pretrial publicity:

The court:	Your name, please?
Juror Davis:	Eric Davis.
. . .	
The court:	Have you heard or read from any source anything about these circumstances that we're here today on?
Juror Davis:	I've heard a little something.
The court:	Okay. Have you heard or read or from any other source gained any information as to whether or not this defendant was guilty or not?
Juror Davis:	Now, I had heard something.
The court:	You haven't?
Juror Davis:	I had heard something.
The court:	What did you hear and where was it from?
Juror Davis:	Oh, I just, um, it was something in the newspaper or something.
The court:	Well, what did you hear in the newspaper or read in the newspaper?
Juror Davis:	Well, I just, you know, just heard talk about what they had heard in the newspaper or

something like that. I didn't read it for myself.

The court: From somebody you heard?

Juror Davis: Um-hum, yes.

The court: When did you hear that?

Juror Davis: It's been a while back.

The court: About how long ago?

Juror Davis: Several months ago.

The court: Several months ago. Did you hear specifically about this defendant right here?

Juror Davis: No.

The court: Okay. Do you remember what you heard?

Juror Davis: Not exactly.

The court: Can you remember it for me the best you can?

Juror Davis: Um, the only thing I recall is just, you know, um, listening at some of the guys, you know, that said they had read about it, you know, the incident out on Troy Highway, stuff like that, you know, what had happened and so forth, you know.

The court: Okay. Do you feel like you'd be able to put aside whatever you had heard some of the guys say about what they had read and listen to the facts as they come

to you in [c]ourt and based on those facts and those alone make a fair, honest, conscientious impartial decision on guilt and non guilt based on those facts and the law as instructed to you by the [c]ourt?

Juror Davis: Yes, I can.

Compare Juror Davis's voir dire answers to Juror Burch's answers to similar questions:

The court: What's your name, please?

Juror Burch: Lisa Burch.

The court: Ms. Burch, have you heard or read or do you have some knowledge about the circumstances of this case?

Juror Burch: A while back. I mean, I heard it on the news, but it was, you know, just briefly.

The court: Have you ever heard or read or from any source gained any information as to whether or not this defendant was guilty or not guilty?

Juror Burch: No, uh-huh.

The court: Okay. Do you feel like you'd be able to put whatever you may have heard or read—News source is the only source you have, that you may have heard?

Juror Burch: Um-hum, just on the news.

The court: Do you feel like you'd be able to put that aside and listen to the facts in [c]ourt and make a fair, just, and impartial determination of this case based on the facts as you hear 'em in [c]ourt and the law as instructed to you by the [c]ourt?

Juror Burch: Yes, sir. I really can't even remember in full detail what I heard at that time.

And Juror McFarlin's answers:

The court: Your name, please?

Juror McFarlin: Peggy McFarlin.

. . .

The court: Have you read or heard something about this matter?

Juror McFarlin: In the paper.

The court: Okay. Have you read or heard anything about it, or from any source gained any information as to whether or not this defendant was guilty or not guilty?

Juror McFarlin: I don't remember. This happened about a month or two ago, didn't it? I'm not sure.

The court: Well, do you remember hearing or reading anything about whether or not this defendant,

Michael Sockwell, was guilty or not guilty?

Juror McFarlin: I can't—I don't remember. I just barely remember the story, but I don't remember how it ended.

The court: Okay. So, are you telling me—

Juror McFarlin: I don't know what—

The court: Do you have any opinion toward whether or not this defendant would be guilty or not guilty right now from any source?

Juror McFarlin: I don't really know what the story was really about, really. I just read a little bit of it in the paper and I don't know what he's done.

The court: Well, whatever you've read, do you think like you'd be able to put it aside and listen to the facts as you hear 'em in [c]ourt and based on those facts as you hear them in [c]ourt and the law as instructed to you by the [c]ourt make a fair, impartial, and just decision in this case.

Juror McFarlin: I think I could.

The court: Okay. Thank you.

Juror Davis's answers about pretrial publicity were not the same as Juror Burch and Juror McFarlin's answers. Juror Davis, for example, gave vague

answers about where he heard information regarding the murder-for-hire scheme. He initially testified that he "heard something." Only when pressed by the trial court did he say that he heard about the crime from "the newspaper or something." Then later, when pressed again by the trial court, Juror Davis testified that he was "listening at some of the guys" and "heard talk about what they had heard" but "didn't read it for" himself. Juror Burch and Juror McFarlin, on the other hand, were clear from the get-go about where they heard information on the case. Juror Burch told the trial court that she heard information about the murder "on the news." And Juror McFarlin testified that she read about the scheme "[i]n the paper."

Juror Davis also initially gave a vague answer about what he heard regarding Sockwell's participation in the murder-for-hire scheme. At first, Juror Davis said he "had heard something" about "whether or not this defendant was guilty or not." Then he later changed his answer to say that he heard nothing "specifically" about Sockwell. But Juror Burch and Juror McFarlin did not flip-flop their answers when asked about what they knew about Sockwell's involvement in the murder. Juror Burch told the trial court "[n]o" when asked the same question whether she heard or read "any information as to whether or not this defendant was guilty or not guilty." And Juror McFarlin testified that she had "just read a little bit of it in the paper" and "d[id]n't know what [Sockwell]'s done."

D. Ms. Brooks's Response About the Strike After Sockwell's *Batson* Objection

As a final relevant circumstance, the majority opinion points to this snippet from Ms. Brooks's response to Sockwell's *Batson* objection: "[Juror] Davis, according to my notes, is a black male, approximately

twenty-three years of age, which would put him very close to the same race, sex, and age of the defendant." This snippet, the majority opinion says, "supports that [Ms.] Brooks felt as if [Juror] Davis would be partial to [Sockwell] because of their shared race." But the majority opinion overlooks the context of Ms. Brooks's explanation and the rest of the voir dire.

Turning to the rest of the voir dire, after Sockwell made his *Batson* objection, the trial court called on Ms. Brooks to explain her reasons for using her peremptory challenges. In her response, Ms. Brooks went through each struck veniremember, giving the veniremember's race, sex, and, sometimes, age, and then explaining her reasons for the strike. The pattern was clear. Here was Ms. Brooks explaining her first strike, giving the race and sex of the venire-member and then her reason for the strike:

> [T]he [s]tate's first strike was juror number ninety-four. She was a white female. Primary reason for striking her was she was opposed to the death penalty under any circumstances, generally opposed, she's opposed, it was possible she could do it but it was also possible she would be impaired and it would be real hard. In addition, she was dressed in a sweatshirt, extremely casually.

Here she was explaining her second strike, giving the race, sex, and age of the veniremember and then her reason for the strike:

> We struck as our second strike number one oh eight, a black male, eighty-one years old, according to our record. The [c]ourt might recall when he came into individual voir dire he sat at the end of the table and the [c]ourt

> said something to him and he looked up and couldn't find the [c]ourt, and the [c]ourt said here I am, over here. He also did not understand the [c]ourt's questions about the death penalty. He said he might give it under certain facts but he was generally opposed.

Here's her third strike doing the same thing: "The [s]tate struck juror number one twenty-two, a white male. The primary reason because he said he was opposed [to the death penalty] under most circumstances, he would have to think about it, possibly he could give it. Our challenge for cause was denied as to him." And her fourth:

> We struck number thirty-three next. Mr. Clayton was a black male. Our records indicate in February of '79 a fraud based on insufficient funds, in '86 a harassment conviction, in '86 criminal trespass, and he said under the death penalty question he was opposed under any circumstances, that he opposed it in general and that he didn't really think he could give it. We struck him for those reasons.

And so on the pattern went for each juror she struck.

Ms. Brooks used the same pattern for Juror Davis as she did for the other challenged jurors:

> Okay. Mr. Davis, according to my notes, is a black male, approximately twenty-three years of age, which would put him very close to the same race, sex, and age of the defendant. He had said to the [c]ourt he had heard a little something. The [c]ourt questioned him further and he finally said well, I heard it from the paper or something. The

> [c]ourt questioned him further. He was very vague and unclear in his answer. The [c]ourt asked him more about it and he said well, some people were talking about it. I didn't actually read it. He could not remember what had been said nor anything about—anything further about those. His answers to the death penalty did not give me a lot of clues either way as to how he felt. In fact, I think the words he used were I could go either way.

Reading the voir dire as a whole, as we must, Ms. Brooks didn't mention race as the reason for striking Juror Davis. She mentioned Juror Davis's race, sex, and age, as she did for the other challenged jurors—white and black—to describe and identify the venire-member for the trial court before she gave her reasons for the strike.

2. *The Alabama Supreme Court Did Not Ignore the Four Relevant Circumstances*

"After carefully reviewing the record as it relates to the prosecutor's preemptory strikes," the Alabama Supreme Court found that the strike of Juror Davis was not based on purposeful discrimination. *Sockwell II*, 675 So. 2d at 42. The majority opinion does not afford AEDPA deference to this finding because it agrees with Sockwell that the Alabama Supreme Court "ignored" the four relevant circumstances. But the majority opinion is wrong. The Alabama Supreme Court considered all the relevant circumstances in making its finding, as it was required to do as part of *Batson*'s third step.

In his brief on appeal to the Alabama Supreme Court, Sock-well relied on the same four relevant circumstances he proffers here. First, Sockwell cited

Ms. Brooks's history of peremptory strikes: the Alabama appellate courts had "condemned this same prosecutor personally for racially discriminating against [black] venire[]members in criminal trials through her use of peremptory strikes." Second, Sockwell listed the statistical evidence: the "use of peremptory strikes against black venire[]members was highly disproportionate to their representation in the venire." Third, he compared the reasons Ms. Brooks gave for striking Juror Davis to two white jurors: the "claim that she struck Juror Davis even in part based on the vagueness of his recollection of pretrial publicity is undermined by the fact she declined to challenge two white venire[]members who also evidenced uncertainty or confusion about what they had heard or read about Mr. Sockwell's case." Fourth, Sockwell discussed Ms. Brooks's response to his *Batson* objection: Ms. Brooks admitted "that she struck Juror Davis because he was black."

The Alabama Supreme Court did not ignore Sockwell's brief and the four relevant circumstances. First, it "carefully reviewed the record" and "the extensive briefs from Sockwell and the [s]tate." *Id.* at 39. Second, the Alabama Supreme Court cited the statistical evidence and the strikes of other black veniremembers. *See id.* at 40–41. Third, the court reviewed the voir dire testimony of white veniremembers who were not struck from the jury and compared it to the testimony of black veniremembers who were challenged. *Id.* at 40–42. Fourth, it discussed Ms. Brooks's response to Sockwell's *Batson* objection and "consider[ed] the entire context of the prosecutor's explanation." *Id.* And fifth, the Alabama Supreme Court emphasized that it had "thoroughly considered each issue Sockwell ha[d] raised," "independently searched the record for reversible error," and "con-

sider[ed] the applicable law as it relates to the facts of this case." *Id.* at 42.

What the Alabama Supreme Court did was more than enough. State courts are not required "to show their work in *Batson* determinations by mentioning every relevant circumstance." *King*, 69 F.4th at 869. "This no-grading-papers, anti-flyspecking rule stems from the presumption that state courts know and follow the law and [AEDPA's] highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt." *Id.* (cleaned up).

Thus, "[a] petitioner must do more than prove the state court failed to mention evidence in order to prove that the state court failed to consider that evidence." *Id.* (quotation omitted). He must show the state "court clearly limited its review to some circumstances and did not implicitly review the circumstances [the petitioner] proffers." *Id.* (quotation omitted). Where the state court's opinion "does not specifically address each of the arguments advanced by [the petitioner], we cannot assume that the court failed to consider all of the arguments [the petitioner] presented." *Trawick v. Allen*, 520 F.3d 1264, 1267 (11th Cir. 2008).

Sockwell did not do more than prove the Alabama Supreme Court failed to mention each of the relevant circumstances he proffered, which is not enough to show an unreasonable application of *Batson*. Sockwell does not argue that the state supreme court clearly limited its review to some circumstances and did not implicitly review others. And there's nothing in the Alabama Supreme Court's opinion suggesting that it did not consider all the relevant circumstances.

To the contrary, the Alabama Supreme Court explicitly addressed the bulk of the relevant circumstances Sockwell proffered. And the court made clear that it "thoroughly considered each issue Sockwell ha[d] raised," *Sockwell II*, 675 So. 2d at 42, which included the four relevant circumstances. We don't have to presume the state supreme court considered the circumstances cited by Sock-well. The Alabama Supreme Court explicitly told us that it did.

3. *Fairminded Jurists Could Conclude that the Strike of Juror Davis Was Not the Result of Purposeful Discrimination*

The majority opinion does not give AEDPA deference to the Alabama Supreme Court's no-purposeful-discrimination finding for a second reason: "a reasonable and fairminded jurist could not have considered" the four relevant circumstances "and concluded that *Batson* was not violated." But when faced with the same four relevant circumstances as Sockwell has proffered here—separately and together—we have held that reasonable and fairminded jurists could conclude that there was no *Batson* violation.

Beginning with *Hightower v. Schofield*, 365 F.3d 1008 (11th Cir. 2004), *cert. granted, judgment vacated*, 545 U.S. 1124 (2005), *opinion reinstated sub nom. Hightower v. Terry*, 459 F.3d 1067 (11th Cir. 2006), the statistical evidence in that case showed the prosecutor used more than eighty-five percent of his strikes—six of seven—to challenge black veniremembers; "the prosecutor had in the past shown a bent and scheme to keep down the low number of blacks on either the grand jury or regular panels," *id.* at 1031 (quotation omitted); and "the prosecutor did not strike white jurors who were as lukewarm on the death penalty as the black jurors he struck," *id.* at 1034. The Georgia

Supreme Court determined that the "trial judge was not clearly erroneous in finding that the prosecutor had articulated legitimate non-racial reasons for his challenges, and that the prosecutor had not in fact discriminated." *Id.* at 1033 (quotation omitted). Applying AEDPA deference and reviewing all the relevant circumstances, we concluded that the state supreme court's finding did not "run afoul of federal law." *Id.* at 1035.

Next, in *McNair v. Campbell*, 416 F.3d 1291 (11th Cir. 2005), "the district attorney's office that handled [the] prosecution ha[d] a history of racial discrimination." *Id.* at 1310. The petitioner provided a "list of cases in which convictions obtained by this district attorney's office ha[d] been reversed or criticized on the basis of *Batson*." *Id.* at 1312. Even with this relevant circumstance, the state court found that the strikes of black veniremembers "were not racially motivated." *Id.* at 1311. Applying AEDPA, we could not "conclude that the state court decision was based on an unreasonable determination of facts in light of the evidence presented to the state court." *Id.* at 1313.

Then, in *Valle*, the state used more than eighty-eight percent of its peremptory strikes—eight of nine—to strike minority jurors ("six blacks and two Hispanics"). 459 F.3d. at 1212 (quotation omitted). Despite the statistical evidence, the Florida Supreme Court found that the petitioner "failed to show that it is likely the challenges were used in a racially discriminatory manner." *Id.* at 1213 (quotation omitted). Applying AEDPA deference, we concluded that the Florida Supreme Court's determination was "not contrary to, nor an unreasonable application of, clearly established federal law." *Id.*

Trawick involved a slightly different *Batson* challenge based on gender discrimination. 520 F.3d at 1266. There, statistical information showed that the prosecutor used almost eighty percent of the peremptory strikes—eleven out of fourteen—on women; the prosecutor's office had a "history of discrimination in peremptory strikes," *id.* at 1267; and "two women stricken from the venire offered similar answers to men who were chosen for the jury in response to a single question regarding media exposure," *id.* at 1268. Still, "review[ing] the record and based thereupon," we could not "say that the Alabama Supreme Court's ultimate conclusion was contrary to or involved an unreasonable application of federal law." *Id.* at 1269.

Parker v. Allen, 565 F.3d 1258 (11th Cir. 2009), like *Hightower*, *McNair*, and *Valle*, involved a more traditional race-based *Batson* challenge. The statistical evidence in *Parker* showed that "the prosecution struck eight of nine qualified black venire[]members"—more than eighty-eight percent. *Id.* at 1267. The prosecution said it was striking those eight veniremembers because: of their "general opposition to the death penalty"; they had "taken psychology classes or training"; they "were related to someone who had been charged with a crime"; and they "had a series of traffic offenses and arrests." *Id.* at 1267–68 (quotations omitted). But "[e]ight of the eleven white seated jurors were, however, related to someone who had been convicted of a felony, had taken a psychology course, . . . or had been convicted of more than one traffic offense." *Id.* at 1268. Even so, the state court "did not find that there was a significant disparate treatment of the venire[]members with the same characteristics." *Id.* at 1270 (cleaned up). After reviewing "the state court's application of the law, acceptance of the prosecutor's stated reasons for his strikes, and considera-

tion of the differences in the situations of the stricken and seated jurors," we agreed that "the state court reasonably applied *Batson*." *Id.* at 1272.

In *Greene v. Upton*, 644 F.3d 1145 (11th Cir. 2011), the prosecutor struck a black veniremember who "had a cousin with a cocaine problem," but did not strike white jurors who "knew people or had relatives who had taken drugs." *Id.* at 1156. The prosecutor struck a black veniremember who "failed to return to court for jury selection," but did not strike two white jurors who "also failed to appear on the first day of jury selection." *Id.* And the prosecutor struck a black veniremember "who really wouldn't have anyone to take care of her child," but did not strike a white juror who had child-care issues because "her husband worked out of town." *Id.* (cleaned up). Applying AEDPA deference, we concluded that "the record supports the *Batson* determinations of the Supreme Court of Georgia." *Id.* at 1155.

In *Wellons v. Warden, Georgia Diagnostic and Classification Prison*, 695 F.3d 1202 (11th Cir. 2012), the prosecutor used peremptory strikes to remove seventy-five percent—three of four—of the black veniremembers. *Id.* at 1207. And, although the prosecutor struck three black veniremembers because of their views about the death penalty, the petitioner "point[ed] to four hesitant [white] jurors that despite their hesitancy about the death penalty were selected for the jury." *Id.* The Georgia Supreme Court found that the prosecutor did not purposefully discriminate in striking the black veniremembers. *Id.* "Considering this record," we concluded, "it was not unreasonable for the Georgia Supreme Court to find that [the petitioner] did not prove purposeful discrimination by the state." *Id.* at 1208–09.

In *Madison v. Commissioner, Alabama Department of Corrections*, 761 F.3d 1240 (11th Cir. 2014), we acknowledged as "strong," "[r]elevant factors supporting purposeful discrimination" that: "the prosecutor peremptorily struck 6 of 13 eligible black jurors"; "[t]he prosecutor refused to give reasons for his strikes at trial, despite being asked to do so . . . ."; and "the Mobile County District Attorney's Office[had a] well documented history of racially discriminatory jury selection, including at [the petitioner's] first trial." *Id.* at 1252. Yet, we held that the district court's finding that the prosecutor did not engage in purposeful discrimination was a "plausible[] view of the evidence." *Id.* at 1255.

Perhaps the closest case to this one is *King*. *King* had the same four relevant circumstances: a history of prior peremptory strikes based on race; statistical evidence showing a disproportionate exclusion of black veniremembers; striking black veniremembers who gave the same voir dire responses as white jurors who were not struck; and a prosecutor's racially charged response to a *Batson* challenge.

As to the history of prior peremptory strikes, earlier in the petitioner's trial, when the prosecutor struck a black veniremember, "[t]he trial court concluded that" the prosecutor's "proffered reason for striking" the black veniremember "was not credible and ruled that this strike was unconstitutional under *Batson*." *Id.* at 881–82 (Wilson, J., dissenting); *see also id.* (Wilson, J., dissenting) ("[J]ust as a prosecutor's discriminatory strikes in other cases can suggest they acted discriminatorily in this case, a finding of discriminatory intent within the same trial is also probative."). As to the statistical evidence, after the prosecutor used all of his strikes, eight percent "of the jurors were black

(i.e., only one black juror) and" ninety-two percent "were white (i.e., eleven white jurors)." *Id.* at 883 (Wilson, J., dissenting). As to the disparate treatment of black and white jurors, the prosecutor struck a black veniremember because she was a minister, but the prosecutor did not strike a white veniremember who also was a minister. *Id.* at 872. And the prosecutor struck black veniremembers who had connections to the petitioner's family, but he did not strike white jurors who also had connections to the petitioner's family. *See id.* at 872–73. Finally, in his response to the petitioner's *Batson* objection, the prosecutor "show[ed] his hostility and disdain for having to comply with *Batson*." *Id.* at 882 (Wilson, J., dissenting). His "rants demonstrated . . . that he was reluctant to abide by the requirements of *Batson*" and he "would continue to violate *Batson* if it weren't for the enforcement mechanisms put in place by the courts." *Id.* (Wilson, J., dissenting). Still, despite these four relevant circumstances, we concluded that "[t]he Georgia courts reasonably applied *Batson* when they rejected [the petitioner's] remaining objections." *Id.* at 873.

* * * *

To summarize, even where the petitioner proves as a relevant circumstance that there was a history of peremptory strikes based on race, in *Hightower*, *McNair*, *Trawick*, and *Madison*, we held that a fairminded jurist could conclude that the strike of a black veniremember was not the result of purposeful discrimination. And even where the petitioner proffers statistical evidence as a relevant circumstance that the prosecutor engaged in a pattern of strikes against black veniremembers, in *Hightower*, *Valle*, *Trawick*, *Parker*, *Wellons*, and *Madison*, we explained that a fairminded jurist could conclude the peremptory

challenge of a black veniremember was not based on race. And even where the petitioner shows as a relevant circumstance that the prosecutor struck a black venire-member based on one characteristic that was shared by a white juror who was not struck, in *Hightower*, *Trawick*, *Parker*, *Greene*, and *Wellons*, we concluded that a fairminded jurist could find that there was no purposeful discrimination. And even where the petitioner shows the prosecutor didn't give a valid reason for striking the black veniremember in response to the *Batson* objection, in *Madison*, we concluded that a fairminded jurist could find no *Batson* violation. If fairminded jurists in *Hightower*, *McNair*, *Valle*, *Trawick*, *Parker*, *Greene*, *Wellons*, and *Madison* could find no purposeful discrimination even with these relevant circumstances, then the Alabama Supreme Court could make the same finding with the same circumstances.[2]

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[2] Other than *King*, the majority opinion does not meaningfully engage with these "troublesome" cases. That's understandable given that, in each case, we concluded fairminded jurists could find no purposeful discrimination despite "instances upon instances of prosecutors purposefully striking huge swath[s] of [b]lack jurors and flimsy reasons for striking those [b]lack jurors."

Instead, in a single sentence inside a single footnote, the majority opinion says that "none of th[e]se cases involved [1] a direct comparison of the defendant to a stricken [j]uror *and* [2] a state supreme court calling out the prosecutor by name and the office for serial *Batson* violations." But Sockwell's case also did not involve a direct comparison to Juror Davis. As the Alabama Supreme Court found, Ms. Brooks's "opening remark," "given the context of the entire exchange," "was merely a descriptive identification of the veniremember based on the prosecutor's notes." *Sockwell II*, 675 So. 2d at 40. This finding is presumed correct. *See King*, 69 F.4th at 867.

And we called out by name the prosecutor and district attorney's office for serial *Batson* violations in *Hightower* and

King had all four circumstances, and each one was more relevant to the *Batson* inquiry than Sockwell proffers here. First, Sock-well alleged that Ms. Brooks had a history of making race-based peremptory challenges in other cases. But, in *King*, the prosecutor had a history of making a race-based peremptory challenge *in the petitioner's case*. The *King* prosecutor was found to have purposefully discriminated against a black veniremember minutes before he struck more black veniremembers.

Second, even after Ms. Brooks used her peremptory challenges, black jurors still made up about seventeen percent of the jury. But, in *King*, after the prosecutor went through his peremptory strikes, there were less black jurors—only eight percent—serving on the jury.

Third, while Ms. Brooks struck Juror Davis but not Juror Burch and Juror McFarlin, Juror Davis gave vague and inconsistent answers about where he heard information on the murder-for-hire scheme and about what he heard as to Sockwell's participation in the scheme while the other two jurors did not. Yet, in *King*, the prosecutor struck a black veniremember who

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Madison. In *Hightower*, defense "[c]ounsel presented a newspaper article about *State v. Amadeo*, a case which, they claimed, arose out of a memo" which "Hightower's prosecutor, Joseph Briley had admitted to being the author of," and "which detailed a purpose and plan to limit the number of African-Americans serving on grand juries." 365 F.3d at 1031 & n.46 (quotations omitted). And, in *Madison*, we noted as a "[r]elevant factor[]" "the Mobile County District Attorney's Office's well-documented history of racial discriminatory jury selection, including at Mr. Madison's first trial." 761 F.3d at 1252. (*McNair* and *Trawick* also called out district attorney's offices for serial *Batson* violations, but not by name.) Despite these relevant factors, we concluded that fairminded jurists could find the prosecutors' strikes were not based on purposeful discrimination.

served as a minister, but not a white juror who served as a minister. And he struck black jurors who had connections to the petitioner and his family, but not white jurors who also had connections to the petitioner and his family.

Fourth, in response to the petitioner's *Batson* objection, Ms. Brooks described Juror Davis's race, age, and sex, and compared them to Sockwell's race, age, and sex, before explaining her reasons for using a peremptory challenge on Sockwell. But, in *King*, in response to the petitioner's objection, the prosecutor "rant[ed]" about "his hostility and disdain for having to comply with *Batson*," which demonstrated "that he was reluctant to abide by the requirements of *Batson*" and that he "would continue to violate *Batson*." *King*, 69 F.4th at 882 (Wilson, J., dissenting).

In other words, with the same four circumstances as this case—each one more relevant for the *Batson* inquiry than here—we concluded in *King* that the "Georgia courts reasonably applied *Batson*." *Id.* at 873. If the Georgia Supreme Court in *King* could find no purposeful discrimination with these four relevant circumstances, then we cannot conclude, as the majority opinion does, that "[n]o reasonable and fairminded jurist could have considered all relevant circumstances and still found no *Batson* violation." It's hard to see how we could apply AEDPA deference to the Georgia court's finding in *King* but not to the Alabama Supreme Court's finding here.

4. *Conclusion*

Each premise of the majority opinion is flawed. The four relevant circumstances are not as relevant as the majority opinion says they are. The Alabama Supreme Court considered all the relevant circum-

stances proffered by Sockwell as required by *Batson*. And a fairminded jurist could find that there was no purposeful discrimination. Because the majority opinion's refusal to give AEDPA deference to the Alabama Supreme Court's no-purposeful-discrimination finding is not supported by the facts and the law, I respectfully dissent.

APPENDIX B

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

Case No. 2:13-CV-913-WKW [WO]

MICHAEL SOCKWELL,

Petitioner,

v.

JOHN Q. HAMM, Commissioner,
Alabama Department of Corrections,

Respondent.

MEMORANDUM OPINION AND ORDER

Petitioner Michael Sockwell, a death-sentenced inmate in the custody of the Alabama Department of Corrections, has filed a habeas corpus petition, pursuant to 28 U.S.C. § 2254, challenging his conviction for the capital murder of Isaiah Harris and the resulting death sentence he received in February 1990. Sockwell claims that his conviction and sentence were obtained in violation of his rights under the United States Constitution. For the reasons stated below, the petition will be denied.

I. BACKGROUND

"In the late evening hours of March 10, 1988, Isaiah Harris, a deputy sheriff in Montgomery County, Alabama, was shot in the head while he was driving to work." *Sockwell v. State*, 675 So. 2d 4, 12 (Ala. Crim App. 1994). Montgomery police identified a car found

near the scene of the murder as belonging to Lorenzo "Bobo" McCarter. *Id*. at 13. McCarter was known by police to be involved in an affair with Louise Harris, the wife of Isaiah Harris. *Id*. Freddie Patterson, who was an acquaintance of petitioner, McCarter, and co-defendant Alex Hood, testified that he was with the three men as they drove around Montgomery before Harris's murder. *Id*. at 12. According to Patterson, sometime after 10:00 p.m., McCarter drove the group in Hood's vehicle to the Regency Park subdivision off Troy Highway in Montgomery, where they circled a block and someone in the car identified a specific car in a driveway. *Id*. at 12–13. With that, petitioner exited the vehicle with a shotgun and some clothes and McCarter drove the group to a nearby auto parts store. *Id*. at 13.

While sitting in the parking lot of the auto parts store, Patterson heard a voice transmitted over a pager in the car state "something to the effect of 'He's leaving now.'" *Id*. After Patterson heard a loud noise, the group left the auto parts store to pick up petitioner. Back in the car, petitioner stated that he "'had to shoot him'" and that he (petitioner) "'was gonna . . . get his money.'" *Id*. The group then drove to a bridge, where petitioner disposed of the shotgun and clothes. *Id*. Kenneth Gilmore, a friend of petitioner, testified that, the day after Harris's murder, petitioner admitted having shot someone, and that he witnessed petitioner and Hood visit a house on Pineleaf Street to pick up some money. *Id*. After his arrest, petitioner gave a videotaped statement in which he gave various accounts of his involvement in the Harris murder but, ultimately, admitted to the shooting and having received a share of a hundred dollars in advance of the shooting, with a

prospect of receiving more from life insurance proceeds. *See* Doc. 14-7 at 82–100.[1]

Petitioner, McCarter, Hood, and Louise Harris were charged with Isaiah Harris's murder. Specifically, petitioner was charged in a two-count indictment alleging, in Count I, that he shot Isaiah Harris "for a pecuniary gain or other valuable consideration or pursuant to a contract or for hire," in violation of Ala. Code § 13A-5-40 (1975), as amended, and, in Count II, that he shot Isaiah Harris "while he was a police officer . . . and while he was on duty, or because of an official or job-related act or performance," in violation of Ala. Code § 13A-5-40 (1975), as amended. Doc. 14-7 at 9–10.[2]

Petitioner was convicted of capital murder as charged in Count One of the indictment. The jury recommended, by a vote of seven to five, that he be sentenced to life imprisonment without parole. The trial court overrode the jury's recommendation and sentenced petitioner to death. Petitioner's conviction and sentence were affirmed by the Alabama Court of Criminal Appeals ("ACCA"). *Sockwell*, 675 So. 2d at 38. The Alabama Supreme Court ("ASC") affirmed, issuing

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[1] Citations to the court reporter's transcript of petitioner's trial will be formatted in this order as "R. at x" and will utilize the pagination original to the reporter's transcript. The court reporter's transcript can be found in Volumes I-VI of the state court record, accessible at docket number fourteen in the ECF system. By contrast, citations to the clerk's record, the state court record on appeal, and the record of petitioner's Rule 32 proceedings will utilize the docket number and PDF page number generated in the ECF system and appearing at the top of the document.

[2] In a pre-trial hearing, the State moved to *nolle pros* Count II because the trial court had previously ruled in the Louise Harris prosecution that Isaiah Harris was not on duty at the time he was shot. R. at 112–13.

a reasoned opinion denying petitioner's claim pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), and summarily rejecting his other claims of error. *Ex parte Sockwell*, 675 So. 2d 38 (Ala. 1995). The United States Supreme Court denied certiorari review. *Sockwell v. Alabama*, 519 U.S. 838 (1996).

On June 23, 1997, petitioner filed a petition for relief from his conviction and sentence pursuant to Rule 32 of the Alabama Rules of Criminal Procedure ("Rule 32 petition") in the Circuit Court of Montgomery County, Alabama. Doc. 14-15 at 6– 86. In 2009, following amendments to the Rule 32 petition, and without affording an evidentiary hearing, the Circuit Court granted the State's motion to dismiss the operative amended Rule 32 petition. Docs. 14-20 at 130–202; 14-21 at 3–88. The ACCA affirmed, *Sockwell v. State*, 152 So. 3d 455 (Ala. Crim. App. 2012), and the ASC denied Sockwell's petition for certiorari review. *Ex parte Sockwell*, 140 So. 3d 945 (Ala. 2013). On December 12, 2013, petitioner filed the instant federal habeas corpus petition.

II. PETITIONER'S CLAIMS

Petitioner asserts the following five claims for habeas corpus relief:

(1) The State exercised its peremptory challenges of jurors in a racially discriminatory manner in violation of the Fourteenth Amendment's Equal Protection Clause;

(2) The trial court violated petitioner's Sixth and Fourteenth Amendment right to present witnesses in his defense by permitting Louise Harris to invoke her Fifth Amendment privilege against self-incrimination and refuse to testify at his trial;

(3) The prosecutor's repeated references during closing argument to out-of-court inculpatory statements by petitioner's non-testifying co-defendants violated the Sixth Amendment's Confrontation Clause;

(4) The trial court's consideration of extra-record information in overriding the jury's recommendation of life imprisonment and sentencing petitioner to death violated the Eighth and Fourteenth Amendments; and,

(5) Petitioner cannot constitutionally be sentenced to death because he is mentally retarded.[3]

III. STANDARDS OF REVIEW

Respondent argues that petitioner's second and fourth claims are procedurally barred from federal habeas review while his remaining claims cannot survive the deferential review required by 28 U.S.C. § 2254(d). The standards and criteria to be applied in evaluating these defenses are set out below.

A. Procedural Defenses.

Respondent contends that Claims II and IV are procedurally defaulted because petitioner did not exhaust the claims in the state courts and there is now no available remedy for him to exhaust the claims. A state prisoner seeking habeas corpus relief must first exhaust the remedies available to him in the state courts before seeking relief in federal court. 28 U.S.C.

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[3] This order employs the terminology utilized by the petition—filed in 2013—in summarizing the petition's claims. In the intervening years, courts have adopted the term "intellectual disability" to describe the condition that, petitioner alleges, precludes Alabama from executing him. Except where quoting from appellate authorities, this order will employ "intellectually disabled" in place of "mentally retarded" in its discussion of petitioner's claim.

§ 2254(b)(1)(A). "The prisoner exhausts his remedies by presenting his constitutional claim to the State courts, to afford them an opportunity to correct any error that may have occurred." *Hardy v. Comm'r, Ala. Dep't of Corr.*, 684 F.3d 1066, 1074 (11th Cir. 2012) (citing *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (*per curiam*)). The "opportunity" to resolve federal constitutional claims in the state courts must be "full and fair." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). Hence, the state prisoner must alert the state courts to the federal nature of a given claim. *Duncan,* 513 U.S. at 365–66 ("If state courts are to be given the opportunity to correct alleged violations of prisoners' federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution."). To do this, "a claim for relief in habeas corpus must include reference to a specific federal constitutional guarantee, as well as a statement of the facts that entitle the petitioner to relief." *Gray v. Netherland*, 518 U.S. 152, 162–63 (1996).

The state prisoner must "invok[e] one complete round of the State's established appellate review process." *O'Sullivan*, 526 U.S. at 845. This requirement obligates the state prisoner to seek even discretionary review in the state's highest court, provided that such "review is part of the ordinary appellate review procedure in the State." *Id.* at 847. A claim raised for the first and only time in a procedural posture in which review of claims is discretionary has not been "fairly presented." *Castille v. Peoples*, 489 U.S. 346, 351 (1989). *See also Mauk v. Lanier*, 484 F.3d 1352, 1358 (11th Cir. 2007) (finding that the habeas petitioner failed to fairly present his claims in Georgia's state courts

where the claims were first raised in a petition for certiorari review to the Georgia Supreme Court).[4]

Because a federal court ordinarily may not grant habeas corpus relief when the petitioner has not exhausted available state remedies, "[i]f a petitioner fails to exhaust his state remedies, a district court must dismiss the petition without prejudice to allow for such exhaustion." *Gore v. Crews*, 720 F.3d 811, 815 (11th Cir. 2013). If state remedies are no longer available to the state prisoner due to state procedural limitations, the unexhausted claim is generally treated as exhausted but procedurally defaulted from federal habeas review. *Id.* at 816 ("An unexhausted claim is not procedurally defaulted unless it is evident that any future attempts at exhaustion would be futile due to the existence of a state procedural bar."). *See also McNair v. Campbell*, 416 F.3d 1291, 1305 (11th Cir. 2005) ("It is well established that when a petitioner has failed to exhaust his claim by failing to fairly present it to the state courts and the state court remedy is no longer available, the failure also constitutes a procedural bar.").

A claim may be deemed procedurally barred in federal habeas review, even if it was presented in the state courts, for other reasons. For example, "[a]s a general rule, a federal habeas court may not review state court decisions on federal claims that rest on state law grounds, including procedural default grounds, that are 'independent and adequate' to support the judgment." *Boyd v. Comm'r, Alabama Dep't*

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[4] This rule has been applied to bar federal review of claims presented, for the first and only time, in discretionary review before the ASC. *See Waldrop v. Comm'r, Ala. Dep't of Corr.*, 711 F. App'x 900, 918–19 (11th Cir. 2017).

of Corr., 697 F.3d 1320, 1335 (11th Cir. 2012) (citing *Coleman v. Thompson*, 501 U.S. 722, 729 (1991)). In *Boyd*, the Eleventh Circuit set out its test for determining whether a state's procedural bar is adequate and independent:

> First, the last state court rendering a judgment in the case must clearly and expressly say that it is relying on state procedural rules to resolve the federal claim without reaching the merits of the claim. Second, the state court decision must rest solidly on state law grounds, and may not be intertwined with an interpretation of federal law. Finally, the state procedural rule must be adequate; i.e., it may not be applied in an arbitrary or unprecedented fashion. The state court's procedural rule cannot be manifestly unfair in its treatment of the petitioner's federal constitutional claim to be considered adequate for purposes of the procedural default doctrine. In other words, a state procedural rule cannot bar federal habeas review of a claim unless the rule is firmly established and regularly followed.

Id. at 1335–36 (quotations and citations omitted).

A federal court may consider a procedurally defaulted claim only if the petitioner can show (1) cause for the procedural default in the state courts and prejudice flowing from the asserted federal violation, or (2) that a fundamental miscarriage of justice will result if the federal claim is not considered on its merits. *Bishop v. Warden, GDCP*, 726 F.3d 1243, 1258 (11th Cir. 2013). "As a general matter, 'cause' for procedural default exists if 'the prisoner can show that some objective factor external to the defense impeded

counsel's efforts to comply with the State's procedural rule.'" *Id.* (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). A petitioner may achieve this threshold by showing, for instance, that "the factual or legal basis for a claim was not reasonably available to counsel, or that some interference by officials made compliance impracticable." *Murray*, 477 U.S. at 488 (citations and quotations omitted). Likewise, the ineffective assistance of counsel may constitute "cause" for a procedural default of a federal claim in the state courts. *Id.*

In addition to cause, the habeas petitioner must demonstrate actual prejudice to overcome a procedural default. "Actual prejudice means more than just the possibility of prejudice; it requires that the error 'worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.'" *Ward v. Hall*, 592 F.3d 1144, 1178 (11th Cir. 2010) (quoting *United States v. Frady*, 456 U.S. 152, 170 (1982)).

Finally, a federal court may review a procedurally defaulted habeas claim on the merits, even in the absence of cause or prejudice, if necessary to remedy a "fundamental miscarriage of justice." A fundamental miscarriage of justice occurs if a "constitutional violation has probably resulted in the conviction of one who is actually innocent." *Murray*, 477 U.S. at 496. To show a fundamental miscarriage of justice based on asserted actual innocence, the petitioner must "support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Schlup v. Delo*, 513 U.S. 298, 324 (1995).

B. Review Pursuant to 28 U.S.C. § 2254(d).

For those claims presented and decided on the merits in the state courts, this court is to apply the standard of review set out in § 2254(d)(1) and (2), as modified by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104, 132, 110 Stat. 1214 (1996). Section 2254(d) provides as follows:

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

The phrase "'clearly established Federal law, as determined by the Supreme Court of the United States' . . . refers to the holdings, as opposed to the dicta, of [the Supreme Court's] decisions as of the time of the relevant state-court decisions." *Williams v. Taylor*, 529 U.S. 362, 412 (2000). A state court decision is "contrary to" clearly established federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially

indistinguishable facts." *Id.* at 412–13. A state court decision "involve[s] an unreasonable application of" clearly established federal law "if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. "[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.

Likewise, under § 2254(d)(2), "a state court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301 (2010). "In reviewing whether a state court's decision was based on an 'unreasonable determination of the facts' under § 2254(d)(2), [the court] presume[s] the state court's factual findings are correct, and the petitioner has the burden to rebut those facts by clear and convincing evidence." *Wellons v. Warden, GA Diagnostic & Classification Prison*, 695 F.3d 1202, 1206 (11th Cir. 2012) (citing 28 U.S.C. § 2254(e)(1)). "This statutory presumption of correctness applies to the factual determinations of both state trial and appellate courts." *Id.* (citing *Bui v. Haley*, 321 F.3d 1304, 1312 (11th Cir. 2003)).

While "deference [in the habeas context] does not imply abandonment or abdication of judicial review" and does not "preclude relief," *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003), the deferential standard imposed by § 2254(d), as to both legal conclusions and factual determinations by the state courts, is formidable. As the Supreme Court has explained:

> As amended by AEDPA, § 2254(d) stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings. It preserves authority to issue the writ in cases where there is no probability fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents. It goes no farther. Section 2254(d) reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal. As a condition for obtaining habeas corpus relief from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.

Harrington v. Richter, 562 U.S. 86, 102–03 (2011) (quotation and citations omitted). *See also Loggins v. Thomas*, 654 F.3d 1204, 1220 (11th Cir. 2011) ("[I]f some fairminded jurists could agree with the state court's decision, although others might disagree, federal habeas relief must be denied. However it is phrased, the deference due is heavy and purposely presents a daunting hurdle for a habeas petitioner to clear.").

The force of AEDPA's "daunting" standard of review is demonstrated in other ways. For example, AEDPA deference is owed when a state court has summarily denied relief on a claim. That is, where there is no "opinion from the state court explaining the state court's reasoning," the habeas petitioner still must

show "there was no reasonable basis for the state court to deny relief." *Harrington*, 562 U.S. at 98. Thus, faced with a state court's summary disposition on the merits, "a habeas court must determine what arguments or theories supported, or . . . could have supported, the state court decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of" the Supreme Court. *Id*. at 102. Furthermore, even where the state court has provided a reasoned decision, AEDPA still requires the federal court to "consider any potential justification" for the state court's ultimate disposition, even those not expressly offered by the state court. *Pye v. Warden, Georgia Diagnostic Prison*, 50 F.4th 1025, 1036 (11th Cir. 2022) (en banc). Put another way, while a federal court in habeas must "evaluate the reasons offered by the [state] court," if the state court's reasons can be justified "on a basis the state court did not explicate, the state-court decision must still stand." *King v. Warden, Georgia Diagnostic Prison*, 69 F.4th 856, 867 (11th Cir. 2023).

If petitioner succeeds in surmounting the formidable obstacles imposed by AEDPA, then this court is "unconstrained by § 2254's deference and must undertake a *de novo* review of the record." *Adkins v. Warden, Holman CF*, 710 F.3d 1241, 1255 (11th Cir. 2013) (citation and internal quotation marks omitted). Even in *de novo* review, however, with limited exceptions, the court may not grant habeas corpus relief unless the state court error at issue was harmless. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). "In collateral cases, a federal constitutional error is harmless unless it imposed 'actual prejudice.'" *Sears v. Warden, GDCP*, 73 F.4th 1269, 1280 (11th Cir. 2023) (quoting *Brecht*, 507 U.S. at 637–38). Actual

prejudice results when the error "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 637.

IV. DISCUSSION

A. Claims Two and Four are not Procedurally Defaulted.

Before addressing petitioner's contention that the state courts unreasonably adjudicated his constitutional claims on the merits, the court first considers respondent's affirmative defense that Claims Two and Four are procedurally defaulted. For the reasons that follow, respondent's procedural default defense fails.

To review, Claim Two alleges that petitioner's Sixth and Fourteenth Amendment right to present witnesses in his defense was violated when the trial court failed to determine whether Louise Harris's invocation of her Fifth Amendment privilege against self-incrimination at petitioner's trial was valid and legitimate. Pet. ¶¶ 76–77. Claim Four alleges that petitioner's Eighth and Fourteenth Amendment rights were violated when the trial judge overrode the jury's life recommendation and sentenced petitioner to death based, in part, on extra-record evidence that was not introduced at petitioner's trial. Specifically, petitioner alleges that, nearly a year after the trial judge announced petitioner's death sentence in court, he issued a written sentencing order that "made numerous inflammatory references to evidence from the trial of Louise Harris that had never been presented at Mr. Sockwell's trial, and that Mr. Sockwell had no opportunity to challenge or rebut." Pet. ¶ 113.

Respondent contends that Claims Two and Four are unexhausted because petitioner failed to fairly present

the claims to the state courts. Furthermore, respondent asserts, because state law precludes petitioner from returning to state court to exhaust the claims, the claims are procedurally defaulted from federal habeas review and, consequently, are due to be dismissed. Doc. 13 at 11, 19. Although respondent argues that petitioner failed to exhaust both claims, the circumstances of petitioner's purported failure to exhaust differ slightly and, therefore, deserve further explanation.

Respondent argues that petitioner failed to present Claim Two in his direct appeal to the ACCA, and that his subsequent presentation of Claim Two in his petition for certiorari review in the ASC was insufficient to fairly present and exhaust the claim because petitioner did not raise the claim at all levels of state court review. Doc. 13 at 12. Respondent argues that petitioner failed to exhaust Claim Four because in his direct appeal to the ACCA he challenged the trial court's reliance on extra-record evidence exclusively on state law grounds. *Id*. at 19. Respondent further asserts that petitioner did not present a federal constitutional challenge to the trial court's reliance on extra-record evidence until his petition for certiorari review in the ASC, which, respondent maintains, for the same reasons as Claim Two, was insufficient to exhaust the claim in the state courts.

Petitioner concedes that he did not present Claim Two on direct appeal to the ACCA, and that he first presented the claim in his petition for certiorari before the ASC. Pet. ¶ 77. Likewise, with respect to Claim Four, petitioner concedes that, while he "assigned the trial court's decision as error on direct appeal" to the ACCA, he "raised his constitutional claim to the Alabama Supreme Court." Pet. ¶ 114. In essence, therefore, petitioner and respondent appear to be in

agreement that both Claim Two and Claim Four were raised as federal constitutional claims in the state courts, for the first and only time, in the ASC.[5]

Were that the end of the inquiry, and assuming the accuracy of respondent's contention that Alabama law precludes petitioner from returning to the state court to exhaust the claims, then the authorities outlined previously might compel the conclusion that Claims Two and Four are procedurally defaulted in federal habeas corpus because they were not fairly presented at all levels of Alabama's review process. The Supreme Court has recognized, however, that it is "reasonable to infer an exception" to the fair presentation requirement grounded in the decision of a state's highest appellate court to adjudicate a claim that was not presented to a lower court. *See Castille*, 489 U.S. at

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[5] Upon review of the record, it appears to the court that petitioner *did* raise the constitutional argument presented in Claim Four on direct appeal to the ACCA. In his supplemental brief in the ACCA, petitioner challenged, on federal constitutional grounds, the trial court's adoption of a proposed sentencing order that contained the information and findings from Louise Harris's trial. *See* Doc. 14-9 at 133–42. This portion of petitioner's supplemental appellate brief is substantially similar to the portion of his brief in the ASC which, the parties appear to agree, articulated Claim Four in the ASC. *Compare* Doc. 14-9 at 133–42 *with* Doc. 14-12 at 124–33. In particular, petitioner's supplemental brief in the ACCA cites and heavily relies upon the same authority, *Gardner v. Florida*, 430 U.S. 349 (1977), that he relied upon in the ASC and that he cites as governing Claim Four in the instant petition. *See* Doc. 14-9 at 140–42; Pet. ¶ 116. Nevertheless, because petitioner is the master of the petition, the court defers to his concession that he did not present his constitutional claim until his brief in the ASC. Because, for reasons that will be explained in the text, the court ultimately would not find Claim Four procedurally defaulted even if it was not presented in the ACCA, the court need not proceed further.

351. *Castille* based this exception on pragmatism, remarking that, where a state's highest court "has actually passed on the claim," "it is fair to assume that further state proceedings would be useless." *Id*. *Castille*'s inferred exception thus spares both the petitioner and the state courts from collateral relitigation of a claim that has already been decided by the state's highest court on direct review.

Other appellate courts have recognized this exception explicitly. *See*, *e.g*., *Casey v. Moore*, 386 F.3d 896, 916 n.18 (9th Cir. 2004) ("Of course, a claim is exhausted if the State's highest court expressly addresses the claim, whether or not it was fairly presented.") (citing *Castille*, 489 U.S. at 351). Thus, because the exhaustion requirement is itself "grounded in principles of comity[,]" *Mauk*, 484 F.3d at 1357, courts may reasonably infer that a claim already decided on the merits by the state's highest court, whether it was fairly presented in one complete round of the state courts' review process or not, is exhausted for purposes of federal habeas review and is therefore not subject to the procedural bars potentially applicable to claims which were similarly presented to, but not considered by, the state's highest court. *See Castle v. Schriro*, 414 F. App'x 924, 926 (9th Cir. 2011) (unpublished decision) ("Only if the appellate court goes ahead and considers the new issue on its merits are the interests of comity satisfied such that the federal court can properly consider the issue under 28 U.S.C. § 2254(b)(1)(A).").

Here, as the parties have acknowledged, there is no doubt that the constitutional arguments underlying Claims Two and Four were presented to the ASC in petitioner's brief in support of his petition for certiorari review. *See* Doc. 14-12 at 81–86 (alleging federal constitutional error with respect to Harris's

Fifth Amendment invocation); *id*. at 129–133 (alleging federal constitutional error with respect to the trial court's reliance on extra-record evidence in its sentencing order). Respondent does not argue, and nothing in the record indicates, that the ASC excluded from its review any of the claims raised by petitioner. As noted previously, in its decision affirming the ACCA, the ASC provided a reasoned discussion of its rejection of only petitioner's *Batson* claim. The ASC considered and summarily rejected petitioner's remaining claims as follows:

> We note that Sockwell has raised in this Court issues that either were not before the Court of Criminal Appeals or were not addressed in its opinion. In a capital case, this Court may consider any issue concerning the propriety of the conviction and the death sentence, and *we have thoroughly considered each issue Sockwell has raised*. We have also independently searched the record for reversible error, considering the applicable law as it relates to the facts of this case, and have found none.

Ex Parte Sockwell, 675 So. 2d at 42 (emphasis added).

It is well-settled that a state court may summarily decide the merits of a constitutional claim without providing a "statement of reasons," and that a federal court is obligated to treat such a summary decision as a decision on the merits for purposes of applying the AEDPA. *See Harrington*, 562 U.S. at 98. Indeed, the state court is not even required to affirmatively indicate that it decided a claim on the merits before the federal court must treat it as having done so. *Id*. at 99 ("When a federal claim has been presented to a state court and the state court has denied relief, it may

be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary.").

Here, petitioner plainly presented the relevant federal claims to the ASC and that court affirmatively indicated that it "thoroughly considered" such claims, notwithstanding any failure to present them to the ACCA, and found no error. Because the ASC therefore adjudicated the merits of petitioner's federal claims, this court may reasonably infer that Claims Two and Four were adequately exhausted for purposes of the AEDPA, or, alternatively, that they are excepted from the requirement of "fair presentation" at all levels of Alabama's review process, and, consequently, they are not procedurally defaulted. Accordingly, the court will consider whether the ASC's summary decision denying the claims is "contrary to, or involved an unreasonable application of, clearly established Federal law" or is "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." § 2254(d)(1) & (2).

B. Review Pursuant to 28 U.S.C. § 2254(d)(1) and (2).

1. Claim One

Claim One is petitioner's claim that prosecutors exercised peremptory challenges in a racially discriminatory manner at his trial, in violation of the Equal Protection Clause of the Fourteenth Amendment, as explicated in *Batson*. Pet. ¶ 39. Specifically, the petition alleges a constitutional violation with respect to only one of the prosecutors' peremptory challenges, that of veniremember Eric Davis. *See* Pet. ¶¶ 46–75. Petitioner's *Batson* claim challenging the Davis strike was raised on direct appeal to the ACCA, which

affirmed the trial court, *see Sockwell*, 675 So. 2d at 18–20, and was the subject of the ASC's reasoned opinion affirming his conviction and sentence. *See Ex Parte Sockwell*, 675 So. 2d at 39–41. Because the last state court to address petitioner's *Batson* claim, the ASC, issued a reasoned decision denying the claim on the merits, this court reviews that decision pursuant to § 2254(d).

a. Clearly Established Federal Law

In *Batson*, the Supreme Court held that an inquiry into the motivations behind a peremptory challenge may be required to ensure that the challenge was not made for purposeful discrimination on the basis of race. "[T]he burden is, of course, on the defendant who alleges discriminatory selection of the venire to prove the existence of purposeful discrimination." 476 U.S. at 93 (quoting *Whitus v. Georgia*, 385 U.S. 545, 550 (1967)) (quotation marks omitted).

> In deciding if the defendant has carried his burden of persuasion, a court must undertake "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Circumstantial evidence of invidious intent may include proof of disproportionate impact. . . .
>
> . . . Once the defendant makes the requisite showing, the burden shifts to the State to explain adequately the racial exclusion. The State cannot meet this burden on mere general assertions that its officials did not discriminate or that they properly performed their official duties. Rather, the State must demonstrate that "permissible racially neutral

> selection criteria and procedures have produced the monochromatic result."

Id. at 93–94 (citations omitted). The Court of Appeals' recent *King* decision describes the familiar three-step *Batson* procedure and how a federal court, sitting in habeas, is to review a state appellate court's application of *Batson*:

> At the first step, the defendant must establish a prima facie case by producing evidence sufficient to support the inference that the prosecutor exercised peremptory challenges on the basis of race [or sex]. At the second step, the burden shifts to the State to come forward with a neutral explanation for its strikes. At the third step, the trial court must find, as a matter of fact, whether the defendant has established purposeful discrimination. Typically, the decisive question will be whether counsel's race- [or sex-]neutral explanation for [the] peremptory challenge should be believed.
>
> The trial court must consider all relevant circumstances at the third step, and the conviction cannot stand if even one of the strikes was discriminatory. When a court considers a *Batson* claim in an appeal or a state habeas proceeding, the state court's written opinion is not required to mention every relevant fact or argument for its merits determination to receive deference on review by a federal court. Instead, the petitioner must prove that the state court failed to consider that argument or fact.

King, 69 F.4th at 868 (quotations and citations omitted).

b. Batson *Proceedings in the Trial Court*

The trial record indicates that there were fifty-five potential jurors in the venire at petitioner's trial. Fourteen of these fifty-five were black. After posing a number of general questions to the entire venire, the trial court proceeded to conduct individual voir dire in the jury room with the aim of "death qualifying" jurors and exploring their pretrial exposure to information about the case. Because petitioner's *Batson* claim challenges only the strike of veniremember Eric Davis, and because Davis's voir dire testimony was integral to the state courts' disposition of petitioner's *Batson* claim, the testimony of Davis during individual voir dire is reproduced here in its entirety:

> THE COURT: Your name, please?
>
> PROSPECTIVE JUROR: Eric Davis.
>
> [After having first been duly sworn to speak the truth, the whole truth, and nothing but the truth, the prospective juror testified as follows:]
>
> THE COURT: Have you heard or read from any source anything about these circumstances that we're here today on?
>
> PROSPECEIVE JUROR: I've heard a little something.
>
> THE COURT: Okay. Have you heard or read or from any other source gained any information as to whether or not this defendant was guilty or not?

PROSPECTIVE JUROR: Now, I had heard something. THE COURT: You haven't?

PROSPECTIVE JUROR: I had heard something.

THE COURT: What did you hear and where was it from?

PROSPECTIVE JUROR: Oh, I just, um, it was something in the newspaper or something.

THE COURT: Well, what did you hear in the newspaper or read in the newspaper?

PROSPECTIVE JUROR: Well, I just, you know, just heard talk about what they had heard in the newspaper or something like that. I didn't read it for myself.

THE COURT: From somebody you heard?

PROSPECTIVE JUROR: Um-hum, yes.

THE COURT: When did you hear that?

PROSPECTIVE JUROR: It's been a while back.

THE COURT: About how long ago?

PROSPECTIVE JUROR: Several months ago.

THE COURT: Several months ago. Did you hear specifically about this defendant right here?

PROSPECTIVE JUROR: No.

THE COURT: Okay. Do you remember what you heard?

PROSPECTIVE JUROR: Not exactly.

THE COURT: Can you remember it for me the best you can?

PROSPECTIVE JUROR: Um, the only thing I recall is just, you know, um, listening at some of the guys, you know, that said they had read about it, you know, the incident out on Troy Highway, stuff like that, you know, what had happened and so forth, you know.

THE COURT: Okay. Do you feel like you'd be able to put aside whatever you had heard some of the guys say about what they had read and listen to the facts as they come to you in Court and based on those facts and those alone make a fair, honest, conscientious impartial decision on guilt and non guilt based on those facts and the law as instructed to you by the Court?

PROSPECTIVE JUROR: Yes, I can.

THE COURT: Because this is a capital case and if we were to reach a sentencing stage the possible punishments on a capital offense are life imprisonment without parole and the death penalty, so I need to ask you some questions concerning this matter if we were to get to the sentencing stage. Are you opposed to the death penalty under any circumstances?

PR0SPECTIVE JUROR: No.

THE COURT: Okay. Are you for the death penalty under all circumstances?

PROSPECTIVE JUROR: Well, it could go either way.

> THE COURT: Okay. You think you could follow your oath and listen to the instructions of the Court and --
>
> PROSPECTIVE JUROR: Yes sir. Fair enough to listen to the trial and then come up with a verdict.
>
> THE COURT: Okay. Thank you.
>
> [WHEREUPON, Mr. Davis was excused from the juryroom.]

R. at 340–43.

Following individual voir dire, during which the parties lodged challenges for cause, there remained forty-two potential jurors, ten of whom were black. Thus, to seat twelve jurors, each side was afforded fifteen peremptory challenges, with the last of each side's peremptory challenges to be seated as the two alternate jurors. The lead prosecutor, Montgomery County Assistant District Attorney Ellen Brooks, used eight of her fifteen challenges to remove black veniremembers. The defense used all fifteen of its peremptory challenges to remove white veniremembers. The two alternate jurors were white. Thus, two of the jurors seated at petitioner's trial were black. Eric Davis was the State's twelfth peremptory strike overall and the seventh of its eight strikes of black veniremembers.

Immediately after striking the jury, the defense moved for a *Batson* hearing. The trial court granted the motion, but opted to hold the hearing after dismissing the veniremembers who had been struck. At the *Batson* hearing, the defense cited Brooks's eight peremptory strikes of black veniremembers and argued that she must explain the reasons for her

strikes. R. at 398–99. The trial court did not initially rule that petitioner had proven a prima facie case of racial discrimination, but it did prompt Brooks to respond to the defense's argument. Brooks argued that the defense's statistical showing was not sufficient under *Batson* to state a prima facie case, but the trial court determined to "move forward and ask you to show me what your reasons are." R. at 400.

Brooks then proceeded to review, in order, all thirty peremptory challenges by the prosecution and defense. She noted the race and gender of every veniremember struck by both sides and, with respect to the State's strikes, she articulated the reasons for each strike, including for the seven white veniremembers struck by the State. R. at 401–09. Regarding Eric Davis, Brooks stated the following:

> We then struck number one twelve, Eric Davis, was a black male, according to our records twenty-three years old. He was extremely vague to the Court's questions about what he had heard. You might remember he said well, I just heard a little something and he kept -- well what did you hear? Where did you hear it? He said well, in the paper or something. The Court asked him again. He was unclear and then finally he said well, some people were talking about it. I never really read the paper. He could not remember what he heard. He said that he could go either way but he was not pro death penalty, and personal observations of the attorneys.

R. at 407. Brooks concluded her summation by explaining that the State relied upon "a compilation of information," including the jurors' responses to

questioning, how the jurors "look," and whether they were "freely responding" or "hesitant" in their answers. She also mentioned that prosecutors had obtained information about jurors' age, residences, employment, spouse's employment, criminal histories, and that they had gone over the juror lists with their case agent and "sheriff's officers." R. at 410.

The defense requested disclosure of the prosecutors' notes from jury selection so that it could attempt to show that Brooks's stated reasons for her strikes of black veniremembers were pretext for discrimination. R. at 412. The trial court denied this request. The lead defense attorney, Ron Wise, then examined Brooks at length regarding her stated reasons for striking certain jurors. It was during this exchange that Brooks made the pivotal remark that was the crux of petitioner's *Batson* claim before the state appellate courts.

> Q. Eric Davis, number one twelve?
>
> A. Was it a strike?
>
> Q. Correct. A black male.
>
> A. All right, sir.
>
> Q. Your reasons again for striking Mr. Davis?
>
> A. You want me to repeat them?
>
> Q. Yes, ma'am.
>
> A. Okay. Mr. Davis, according to my notes, is a black male, approximately twenty-three years of age, *which would put him very close to the same race, sex, and age of the defendant.* He had said to the Court he had heard a little something. The Court questioned him further and he finally said well, I heard it from the

paper or something. The Court questioned him further. He was very vague and unclear in his answer. The Court asked him more about it and he said well, some people were talking about it. I didn't actually read it. He could not remember what had been said nor anything about -- anything further about those. His answers to the death penalty did not give me a lot of clues either way as to how he felt. In fact, I think the words he used were I could go either way.

Q. Well, was the fact he said he could go either way a reason you struck him, or was it because of the other reasons he gave, such as well, he was vague as to what he had read or where he had heard it from or what it was?

A. Well, Mr. Wise, I didn't just analyze it by one factor. The fact that he did not appear as convincing and as if he'd given it a lot of thought and was sure of how he felt was definitely a consideration, but he wasn't struck because of his death penalty views although that was a factor. His vagueness and -- I don't know if he didn't understand the Judge or if he just didn't want to talk about it or wasn't interested, I didn't know what it was, but I did not think that he was very clear on where he stood about the publicity.

Q. Ms. Brooks, isn't it true that a substantial number of white people stated in chambers that they had heard something about it, didn't really know exactly where they had heard it, really didn't remember what they had heard. Isn't that true?

> A. I would not characterize it that way, no, sir. I don't recall any other juror, though, who changed his mind about where he had heard it. He said he read it in the paper and then further questioning said well, I didn't read it in the paper, I heard it from some friends.
>
> THE COURT: Is that it?
>
> MR. WISE: Just a minute, your Honor. (Brief pause.)
>
> MR. WISE: That's all. Your Honor.

R. at 427–29 (emphasis supplied). Wise then argued that Brooks had given insufficient race-neutral reasons for her strikes, "in particular as to Eric Davis [.]" The trial court was succinct: "Motion denied. Recess till eight." R. at 429.

When trial resumed the following morning, the defense renewed its *Batson* motion. The defense argued that, with respect to Davis and one other black male juror, Brooks gave "no reason, no articulable reason, and I submit to you that she can give no reason." R. at 431. The defense also cited a news report describing Brooks's use of peremptory challenges to remove fourteen black jurors in another trial only a week before petitioner's trial. The defense argued the existence of a "pattern and practice by the D.A.'s office of excluding blacks for reasons like chewing gum, not dressing properly and being in the wrong neighborhood." R. at 432. The defense requested leave to examine Brooks about her strikes in the earlier trial, but the trial court declined to permit such questioning. R. at 433. The defense again argued that a "pattern and practice" of discriminatory challenges was evident and requested that the trial court "quash the venire" and impanel a new one. The trial court

again was succinct: "Motion denied. Are we ready now?" R. at 434.

In sum, the trial court held a *Batson* hearing in which it implicitly found that the defense made a prima facie showing of racial discrimination. After hearing Brooks's stated reasons for her peremptory strikes and the defense's argument in response, the trial court summarily denied the defense's *Batson* motion. The trial court adhered to this ruling after the defense renewed its *Batson* motion and presented additional argument about Brooks's so-called "pattern and practice" of discriminatory jury strikes in other cases.

c. State Court Appellate Review

Although this court is to apply AEDPA's standard of review to the ASC's decision denying petitioner's *Batson* claim, the ACCA's decision denying the claim provides important context for understanding the ASC's decision and, therefore, warrants some review.

On direct appeal to the ACCA, petitioner argued that the trial court erred in refusing to quash the venire as a result of his *Batson* motion. His brief raised prior instances in which Brooks was found by Alabama's appellate courts to have violated *Batson* and further noted several instances in which, he argued, Brooks did not strike white jurors for the same reasons that she gave for striking black jurors. He also specifically raised the Davis strike and referenced Brooks's remarks comparing the race of Davis and petitioner as demonstrating that Brooks articulated a race-based reason for her strike of Davis.

In its opinion, the ACCA noted the statistics underlying the State's peremptory strikes at petitioner's trial. *Sockwell*, 675 So. 2d at 18. Regarding

the Davis challenge, the ACCA concluded that, in comparing the race of Davis and petitioner, Brooks had articulated, in part, an explicitly racial reason for her strike. *Id*. at 20. In addition, the ACCA found that Davis's age and sex were not legitimate bases for striking him because no jurors were questioned about age-related biases and the "prosecution failed to establish that gender was relevant to the case." *Id*. Furthermore, "the prosecution did not strike white males of a similar age." *Id*.

Nevertheless, the ACCA went on to find that Brooks also articulated a "sufficiently race neutral reason" for the Davis strike when she cited his "vague" responses to questions about what information he had learned about the case and from where he had received his information. *Id*. The ACCA found that, "[u]nlike other veniremembers, [Davis] appeared to be less than candid in regard to his exposure to pretrial publicity. Specifically, [Davis] first stated that he had read about the case and then stated that he had heard about the case." *Id*. In essence, therefore, the ACCA concluded that the trial court's denial of petitioner's *Batson* claim was not clearly erroneous because, despite Brooks's articulation of an explicitly racial reason for her strike, she also articulated a sufficiently race-neutral reason for the strike that it found corroborated by the record.

As mentioned previously, the ASC addressed petitioner's *Batson* claim, including the Davis strike, in a reasoned opinion. In short, the ASC affirmed the ACCA's decision but rejected its reasoning in reaching that decision. The ASC first noted Brooks's removal of eight of the ten black jurors in the venire. *Ex parte Sockwell*, 675 So. 2d at 40. It then recited the pertinent parts of the state court record respecting the Davis strike, including Brooks's initial articulation of her

reasons for striking Davis, followed by her response under questioning from Wise when she noted that Davis was "very close to the same race, sex, and age of the defendant." *Id*. The ASC then explained where it parted ways with the ACCA's analysis:

> We do not agree with the Court of Criminal Appeals that the prosecutor's opening remark identifying E.D. as a black man was given as a *reason for striking him* from the venire; on the contrary, given the context of the entire exchange, we conclude that this was merely a descriptive identification of the veniremember based on the prosecutor's notes. When the prosecutor gave the reasons for striking a veniremember, either white or black, she first prefaced her remarks by stating the veniremember's race and sex, as she did with E.D. The only *reasons* the prosecutor gave for striking E.D. were his vagueness and lack of candor in stating what he had already heard about the trial, from what source he has gotten this information, and whether he could be willing to recommend the death penalty.

Id. (emphasis in original).

The ASC went on to "emphasize [its] disagreement with the [ACCA's] inference that a peremptory strike may be upheld if it is based only *partly* on race, that is, if the prosecutor articulates both a racially motivated reason and race-neutral reason for a strike." *Id*. (emphasis in original). According to the ASC, the ACCA had erroneously found justification for this "inference" in state court precedent that "cannot be read to suggest that a non-race-neutral *reason* given for a peremptory strike will 'cancel out' a race-based

reason[.]" *Id*. at 41 (citing *Owens v. State*, 531 So. 2d 22 (Ala. Crim. App. 1987) (emphasis in *Sockwell*).

The ASC concluded its reasoned discussion of the Davis *Batson* claim as follows:

> The trial court, which must be given great discretion in determining the context in which race was mentioned, found that the strike was race-neutral. After considering the entire context of the prosecutor's explanation, we find no abuse of this discretion. The Court of Criminal Appeals' disposition of this issue was correct, although its rationale was not.

Id. at 41. The ASC did not address several circumstances raised by petitioner in his briefing, including Brooks's history of *Batson* violations, his argument that Davis was not vague or lacking in candor in his voir dire responses, and his claim that Brooks did not strike white jurors who were similarly vague in their voir dire responses.

d. Petitioner's Arguments Pursuant to § 2254(d)(1) and (2)

Petitioner alleges that the ASC's decision denying relief on his Davis *Batson* claim fails both prongs of § 2254(d)'s standard of review. He first argues that, pursuant to § 2254(d)(2), the ASC made an unreasonable determination of fact at step two of *Batson* when it found that Brooks's remark comparing his and Davis's race was not a reason for striking Davis, but was, instead, "merely a descriptive identification of the veniremember" based upon Brooks's notes. He posits that, even if Brooks's first mention of Davis's race in the relevant remarks ("Okay, Mr. Davis, according to my notes, is a black male") could reasonably be deemed merely a descriptive identification of Davis, the second

reference to Davis's race ("which would put him very close to the same race, sex, and age of the defendant") cannot be so reasonably construed. He argues that the "only plausible interpretation of that statement is that the prosecutor struck Mr. Davis at least in part because she believed that a juror of the 'same race' as Mr. Sockwell would be less likely to convict him precisely what the Constitution forbids." Pet. ¶ 53.

With respect to § 2254(d)(1), petitioner alleges that the ASC unreasonably applied *Batson* because it failed to properly conduct the third step of the *Batson* analysis – evaluating Brooks's race-neutral reasons for her strike of Eric Davis to determine whether he established purposeful discrimination. Pet. ¶ 57.

Finally, petitioner claims that, pursuant to both prongs of § 2254(d), even if it is determined that the ASC implicitly considered the relevant circumstances at step three of *Batson*, its decision was an unreasonable application of *Batson*, and was based upon unreasonable determinations of fact, because all relevant circumstances "overwhelmingly demonstrated discriminatory intent." Pet. ¶ 61. He identifies the same three principal circumstances demonstrating such discriminatory intent that he presented to the ASC: a) Brooks's exclusion of 80% of eligible black veniremembers; b) Brooks's history of *Batson* violations; and c) that Brooks's supposedly race-neutral reasons for striking Davis were pretext for discrimination because they are not supported by the record and the rationale supporting those reasons applied equally to white veniremembers she did not strike. *Id*. at ¶¶ 62-68.

Each of these arguments is addressed in turn.

e. Application

i. The ASC reasonably concluded that Brooks did not articulate a race-based reason for her strike of Davis.

Petitioner first challenges the ASC's factual finding that Brooks's mention of Davis's race and her comparison of the race of petitioner and Davis was not given as a reason for striking Davis, but, instead, was merely a "descriptive identification" of Davis that was joined with a "mention" of petitioner's race and was all "part of the same predicate of identification that she mentioned for all the veniremembers she had struck, both white and black." 675 So. 2d at 41. As noted previously, he must rebut the ASC's finding of fact with clear and convincing evidence in order to overcome the statutory presumption of correctness of 28 U.S.C. § 2254(e)(1), and he must show that the ASC's erroneous finding of fact was "unreasonable" within the meaning of § 2254(d)(2). Even if he succeeds in showing erroneous state court factfinding by clear and convincing evidence, he "does not necessarily meet his burden under § 2254(d)(2)" because, "[d]epending on the importance of the factual error to the state court's ultimate 'decision,' that decision might still be reasonable[.]" *Pye*, 50 F.4th at 1035.

The only evidence that petitioner submits to satisfy his burden is the trial transcript, the very evidence that was reviewed and interpreted by the ASC in its opinion. This evidence, however, does not clearly and convincingly establish that the ASC erred in its factfinding, much less that its decision was based upon an unreasonable finding of fact. At least two compelling circumstances apparent in the transcript inform this judgment.

First, rather than focusing upon the subject remark in isolation, which is comprised of less than twenty words and was not subject to any further inquiry by the trial court or the defense, the ASC reasonably considered the entire transcript of voir dire when discerning what were Brooks's reasons for her strike of Davis. By the time Brooks made the subject remark, she had already plainly articulated a race-neutral reason for her strike of Davis—his vagueness on the question of his pretrial exposure to information about the case—without drawing the racial comparison that would later become the crux of petitioner's *Batson* claim. And, immediately after the subject remark, she repeated this same justification and expanded on it further when questioned by defense counsel. The ASC was not unreasonable in considering Brooks's mention of Davis's race and her racial comparison of Davis and petitioner in this larger context when it found that the subject remark was not a reason for her strike.

Second, while an interpretation of the subject remark holding it as a reason for Brooks's strike might be reasonable, as was found by the ACCA, it does not follow that a contrary interpretation, as found by the ASC, is unreasonable. Petitioner posits that Brooks's remark was an unambiguous declaration of racial animus that she had managed to conceal until questioned by defense counsel. Pet. ¶¶ 52–53. For petitioner, Brooks's remark was the functional equivalent of her declaring, "I struck Eric Davis because he is a young black male like the defendant," but, since "*Batson* does not require such a superficial degree of specificity," Doc. 26 at 2, the ASC was unreasonable in failing to ascribe this meaning to it. While he concedes, for obvious reasons, that it is "so rare for prosecutors to say expressly on the record that race has factored into one their peremptory strikes."

id. at 1, he nevertheless alleges the ASC was unreasonable in failing to conclude that this "rare" event in fact occurred at his trial.

The ASC's finding of fact, however, is bolstered here by the trial court record, which shows that, at the time it was uttered, apparently no one, including the defense, believed that Brooks had just committed the "so rare" act of admitting that she struck a juror because of the juror's race. This is significant because, in addition to the *Batson* hearing record excerpts quoted above, the trial transcript shows that defense counsel were highly attuned to *Batson* issues. For example, counsel argued before jury selection commenced that the assembled venire was insufficiently "representative of a cross-section of the community." R. at 126. Counsel objected and noted for the record when black jurors were challenged for cause. R. at 222, 287, and 311. Counsel even objected when a black juror who expressed a predisposition to convict was excused by the trial court. R. at 243, 247. Along with counsel's very capable and determined argument at the *Batson* hearing, these instances show counsel's vigilance in guarding against *Batson* violations and building a record to support the *Batson* claim.

It is implausible in the face of this record that defense counsel would allow the functional equivalent of Brooks declaring, "I struck Eric Davis because he is a young black male like the defendant," to pass without notice. Yet, this is exactly what happened in petitioner's version of events, as, overlooking Brooks's purported umambiguous declaration of her racial animus, counsel moved on to clarifying with Brooks whether Davis was struck because of his views about the death penalty or his vagueness about his exposure to pretrial publicity. It is more plausible that counsel

was focused on exploring the legitimacy of what everyone in the room understood to be Brooks's professed reasons for her strike, reasons that she had articulated multiple times with consistency, and he therefore tailored his questioning accordingly.[6]

At a minimum, a reviewing court reasonably would expect the "rare" and likely dispositive admission that a prosecutor struck a juror because of the juror's race to be the subject of heightened inquiry and argument at the time it was made. There is no subtlety in a prosecutor confessing her naked violation of *Batson*. The fact that neither the trial court nor defense counsel timely raised, nor followed up with, the specific objection to Brooks's remarks that was later raised on appeal is not, alone, dispositive of the *Batson* claim. It is, however, probative of whether fairminded jurists—like those comprising the ACCA and the ASC—can disagree about the meaning of the remarks. Thus, the ASC was not unreasonable for failing to conclude that Brooks had been exposed in a sort of "Perry Mason moment" that somehow went unnoticed until the appellate briefs were filed.

The core premise of the ASC's opinion—the reason that the ASC issued a written opinion at all—was to correct what it perceived as the ACCA's erroneous finding that Brooks's reference to the race of Davis and petitioner was necessarily given as a reason for her strike. The ASC clarified that the ACCA's own precedent recognized that a prosecutor's "incidental" reference to race in a *Batson* proceeding "'does not, as

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[6] Petitioner has not alleged that counsel performed ineffectively in failing to question Brooks about her supposed race-based reason for her strike of Davis or argue to the trial court that Brooks had offered a race-based reason for her strike.

a matter of law, establish purposeful discrimination.'" *Ex parte Sockwell*, 675 So. 2d at 40–41 (quoting *Owens*, 531 So. 2d at 25).

Alabama's appellate courts are not alone in concluding that a prosecutor's reference to race while defending against a *Batson* challenge does not necessarily establish purposeful discrimination on the part of the prosecutor. Federal courts have rejected similar claims, especially where review is circumscribed by AEDPA. *See, e.g., Cook v. LaMarque*, 593 F.3d 810, 820–21 (9th Cir. 2010) (*Batson* claim rejected in habeas despite that the prosecutor expressed a concern that, due to his past experiences with racism and law enforcement, a black juror "might be inclined to be sympathetic and leaning toward the defense in this case in light of the race of two of the defendants"). There is some logic to this—a prosecutor's reference to the race of a challenged veniremember in a context where the prosecutor is accused of racial discrimination and tasked with defending his or her conduct is not tantamount to evidence of a prosecutor's preoccupation with race that exists before a *Batson* challenge. *See Moore v. Vannoy*, 968 F.3d 482, 491 (5th Cir. 2020) ("For obvious reasons, it makes sense for a prosecutor to reference the juror's race when responding to a *Batson* challenge.").

Nevertheless, in both the petition and in his updated, supplemental briefing, petitioner cites federal appellate decisions for the "proposition that, when a prosecutor references a juror's race during a *Batson* challenge, such a comment cannot be dismissed as 'descriptive,'" as the ASC did in petitioner's appeal. Doc. 49 at 9. In the petition, he cited the Second Circuit's decision in *Walker v. Girdlich*, 410 F.3d 120 (2d Cir. 2005), and in the updated briefing he cited the

First Circuit's decision in *Porter v. Coyne-Fague*, 35 F.4th 68 (1st Cir. 2022). Both decisions are materially distinguishable.

In *Walker*, the prosecutor plainly stated, "one of the main things I had a problem with was that this is an individual who was a Black man with no kids and no family." 410 F.3d at 121–22. As the Second Circuit found, "the prosecutor's words and phrasing adduce [the juror's race and lack of family] as grounds for the peremptory challenge rather than as an incidental description[.]" *Id*. at 124. In other words, unlike here, the prosecutor's remark very specifically identified the race of the juror as a "main problem." Nor could the prosecutor's racial remark in *Walker* reasonably have been interpreted as prefatory or part of a predicate of identification in which the prosecutor mentioned the race and gender of all jurors, black and white, when providing reasons for her strikes.

In *Porter*, the prosecutor, unprompted, explained that he struck the only black veniremember in the panel essentially because he disbelieved the veniremember's testimony that potential "blow-back" he might receive at his job would not affect his ability to serve impartially, and, furthermore, the prosecutor believed that any such "blow-back" would accompany only a guilty verdict. 35 F.4th at 72. Crucially, the prosecutor oriented his concern about the juror's fear of repercussions in the shared race of the veniremember and the defendant: "Essentially, what he was saying is that—and, again, this is the State's take—he's a member of the African-American community, the defendant at the bar is a member of the African-American community, he's the only one on the panel who is, and if he were to vote guilty there could be consequences to it." *Id*.

In *Porter*, unlike here, the mention of the veniremember's race and the racial comparison invoked by the prosecutor was not prefatory in nature. Rather, it occurred in the middle of the prosecutor's explanation of his reason for the strike, and, as found by the First Circuit, it was offered as a way of explaining and amplifying the rationale the prosecutor was attempting to provide: "[T]he record shows that the prosecutor's racial observation underpinned the chief reason given for the strike: the assumption that Juror 103 was predisposed against a guilty verdict in particular." *Id*. 80–81.

Here, by contrast, Brooks's mention of Davis's race and her comparison of the race of Davis and petitioner plainly had nothing to do with the proffered reasons for her strike. Brooks did not offer Davis's race, or his racial affinity with petitioner, as "underpinning" for her concern that Davis was unduly vague in his voir dire responses about pretrial publicity. In short, Brooks's racial remarks were either, as petitioner has argued, a separate and independent reason for her strike, *i.e*., the real reason, or, as found by the ASC, something else. Because Brooks's racial remarks cannot reasonably be read as amplification or support for a putative race-neutral reason for her strike, *Porter* does not advance petitioner's claim that the ASC based its decision upon an unreasonable determination of fact.

So, allowing that a prosecutor may *reference* a juror's race without dooming her defense of striking that juror, it is easy to conclude that the ASC did not unreasonably find that Brooks's mere reference to Davis's race was not a reason for her strike of Davis. Brooks's further comparison of the race, sex, and age of Davis and petitioner is, of course, more problematic.

Petitioner has argued that the ASC failed to engage with his claim that Brooks's comparison of the race of Davis and petitioner demonstrates her racial animus. *See* Doc. 26 at 12. This is a fair point. The ASC addressed Brooks's reference to Davis as a black male and reasonably concluded that it was a descriptive identification consistent with Brooks's practice of noting the race and gender of other jurors, black and white, that were struck by both parties. The ASC had little to say, however, about Brooks's racial comparison except to characterize it as a "mention of Sockwell's race" that was "part of the same predicate of identification that she mentioned for all the veniremembers that she had struck." 675 So. 2d at 41. This explanation is not persuasive. Brooks's "mention" of petitioner's race while explaining the Davis strike is the only time in the transcript that Brooks mentioned petitioner's race and, more concerning, is the only time she compared the race of a juror with that of petitioner.

The question for this court, however, is not whether it agrees with the ASC. The question, instead, is whether the ASC reasonably reached its decision. This inquiry entails considering any potential justification that supports the ASC's ultimate decision, including those not explicated by the ASC. As set forth above, the ASC reasonably could, and did, determine that, viewing the record holistically, Brooks's racial remarks, including her racial comparison, were not reasons for her strike of Davis. While the record offers support for a contrary conclusion, it does not dictate that only the contrary conclusion is reasonable. The record does not render unreasonable a conclusion that Brooks's racial comparison was incidental, surplusage, or simply an extemporaneous, if ill-advised, descriptive observation that Davis and petitioner were of the same race, sex, *and* age, but that this observation conveyed no

particular animus toward any of those traits.[7] Under the deferential regime of AEDPA that controls here, and in the absence of any contemporaneous follow-up by defense counsel, that is all that is required to sustain the ASC's factfinding.

Finally, the record does not establish that, even if Brooks's racial comparison demonstrates some untoward racial consciousness in her strike of Davis, and that the ASC erred in finding otherwise, the ASC's ultimate decision denying the *Batson* claim was unreasonable. This is so because, as a matter of clearly established federal law at the time of the ASC's decision, which is what this court is charged with applying while reviewing the ASC's decision, nothing in *Batson* prohibited the ASC from considering whether, even if Brooks was motivated in part by race, she still would have struck Davis for race-neutral reasons.

As observed by the ACCA, *Batson* itself states that the Equal Protection Clause "forbids the prosecutor to

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[7] And, to the extent Brooks's comparison of the identity traits of Davis and petitioner should be construed as a reason for the strike, their similarity in age cannot be extracted from that inquiry. A juror's closeness in age to the defendant can be a legitimate, non-discriminatory reason for exercising a strike. *See McNair v. Campbell*, 307 F. Supp. 2d 1277, 1300 (M.D. Ala. 2004) (denying *Batson* claim challenging the prosecutor's strike of four black potential jurors due to their closeness in age to the defendant), *aff'd in part and rev'd in part*, 416 F.3d 1291, 1312–13 (11th Cir. 2005) (affirming denial of *Batson* claim). If Brooks's comparison is treated as a reason for her strike, it was incumbent on petitioner to prove to the state courts that Davis's age was not the identity trait that motivated Brooks to strike Davis, and it is incumbent on him to prove to this court that the ASC could not have reasonably concluded that Davis's age, rather than his race or sex, was the actual reason for the strike.

challenge potential jurors *solely* on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." 476 U.S. at 89 (emphasis supplied). The Supreme Court repeated this formulation in a holding issued after *Batson* but prior to the ASC's decision on petitioner's appeal. *See Powers v. Ohio*, 499 U.S. 400, 409 (1991) ("We hold that the Equal Protection Clause prohibits a prosecutor from using the State's peremptory challenges to exclude otherwise qualified and unbiased persons from the petit jury *solely* by reason of their race[.]") (emphasis supplied).

Taking account of this holding, some federal appellate courts, including the Eleventh Circuit, adopted a "dual motivation analysis" to test whether a *Batson* violation occurs when the prosecutor considers race along with race-neutral reasons when exercising a peremptory challenge. *See, e.g., Wallace v. Morrison*, 87 F.3d 1271, 1274 (11th Cir. 1996).

> Under dual motivation analysis, after the party raising the *Batson* claim has established a prima facie case that discrimination was a substantial part of the motivation for a strike, the party who exercised the strike may raise the affirmative defense that the strike would have been exercised solely for race-neutral reasons. The party accused of discrimination bears the burden of showing by a preponderance of the evidence that the strike would have been exercised in the absence of any discriminatory motivation.

Id. at 1274–75.[8]

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[8] In *Snyder v. Louisiana*, 552 U.S. 472, 485 (2008), issued more than a dozen years after the ASC's decision in petitioner's appeal,

To be sure, the ASC disavowed any dual motivation analysis in its decision, holding that prior ACCA authority "cannot be read to suggest that a non-race-neutral *reason* given for a peremptory strike will 'cancel out' a race-based reason[.]" *Ex parte Sockwell*, 675 So. 2d at 41 (emphasis in *Sockwell*). Although the ASC thus disagreed with the "inference that a peremptory strike may be upheld if it is based only *partly* on race[,]" *id*. at 40, clearly established federal law at the time of the ASC's decision did not preclude it from evaluating the record to determine whether, notwithstanding Brooks's consideration of race, she still would have struck Davis absent any consideration of his race.

For the reasons that will be discussed more fully below—namely, the legitimacy of Brooks's race-neutral reasons for the Davis strike—the record before the ASC reasonably supports the conclusion that, under a dual motivation analysis, even if Brooks considered Davis's race while striking him, Brooks did not violate *Batson* because Davis's race was not a

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the Supreme Court declined to clarify whether "dual motivation analysis" comports with *Batson*:

> In other circumstances, we have held that, once it is shown that a discriminatory intent was a substantial or motivating factor in an action taken by a state actor, the burden shifts to the party defending the action to show that this factor was not determinative. *See Hunter v. Underwood*, 471 U.S. 222, 228 (1985). We have not previously applied this rule in a *Batson* case, and we need not decide here whether that standard governs in this context. For present purposes, it is enough to recognize that a peremptory strike shown to have been motivated in substantial part by discriminatory intent could not be sustained based on any lesser showing by the prosecution.

substantial motivation, much less the "sole" reason, for her strike. Accordingly, the ASC's ultimate disposition is justified even if it erroneously decided that Brooks gave a race-based reason for the Davis strike.

ii. The ASC did not unreasonably apply Batson *by failing to conduct* Batson*'s third step.*

Petitioner next alleges that the ASC unreasonably applied *Batson* because it failed to conduct *Batson*'s third step and determine whether he established purposeful discrimination respecting the Davis strike. Pet. ¶ 57. In support, he argues that the ASC "stopped immediately after step 2" when it deferred to the trial court's finding that Brooks's stated reasons for the Davis strike were race neutral. *Id*. at ¶ 58. He claims that the ASC "did not even *purport* to consider *any*" of the relevance circumstances informing his claim of *Batson* error, as is required by *Batson*. *Id*. at ¶ 59 (emphasis in original). He also asserts that the ASC could not have implicitly considered the relevant circumstances at *Batson*'s third step because the ASC "explicitly" closed its analysis at step two with respect to the Davis strike but went on to perform a step three analysis with respect to the prosecutor's strikes of other veniremembers. *Id*. at ¶ 60. He specifically faults the ASC for failing to consider the following relevant circumstances in its decision: a) the prosecutor's disproportionate exclusion of blacks from the venire; b) Brook's history of *Batson* violations, as reflected in state court appellate opinions; and c) the pretextual nature of Brooks's race-neutral reasons for the Davis strike. *Id*. at ¶¶ 62–68.

As discussed previously, under *Batson*, "[t]he trial court must consider all relevant circumstances at the third step[.]" *King*, 69 F.4th at 868. *Batson* does not,

however, impose any particular opinion writing requirement on the state court in order for its decision to receive AEDPA deference:

> When a court considers a *Batson* claim in an appeal or a state habeas proceeding, the state court's written opinion is not required to mention every relevant fact or argument for its merits determination to receive deference on review by a federal court. Instead, the petitioner must prove that the state court failed to consider that argument or fact.

Id. (quotations and citations omitted). This is so even where the state appellate court does not "explicitly mention[] *Batson*'s third step" and makes "no explicit findings about the prosecutor's credibility or about discriminatory purpose, or anything at all relating to that step." *Lee v. Comm'r, Alabama Dep't of Corr.*, 726 F.3d 1172, 1215–16 (11th Cir. 2013). In such circumstances, federal courts may make a "common sense judgment" that a state court's rejection of a *Batson* claim following the state's proffer of race-neutral reasons represents an implicit finding that the state's explanations are credible and, accordingly, completes step three of *Batson*. *Id*. at 1216–17. *See also Hightower v. Terry*, 459 F.3d 1067,1072 n.9 (11th Cir. 2006).

Here, petitioner cannot surmount *King*'s directive that he prove that the ASC failed to consider the facts and circumstances he raised before that court. While he correctly argues that the ASC offered no explicit reference to those circumstances in its discussion of the Davis strike, the above authorities relieve the ASC of any such requirement. *King*, 69 F.4th at 869 ("A petitioner must do more than prove that the state court failed to 'mention' evidence in order to prove that the state court failed to consider that evidence."). More

to the point, he parses the ASC's opinion too finely for AEDPA purposes. For example, while petitioner accuses the ASC of closing its analysis of the Davis strike after step two, a fair reading of the opinion does not require that conclusion. To be sure, the thrust of the ASC's opinion regarding the Davis strike was to convey its conclusion that the ACCA's factfinding was flawed, as outlined above. But nothing in the opinion unambiguously confirms that the ASC did not implicitly consider petitioner's other arguments regarding the Davis strike. *Id*. ("Nothing in the Supreme Court of Georgia's opinion suggests that it did not consider [relevant circumstances raised by King] . . . , so we must presume that the court did consider the circumstances King cites.").

Indeed, the opinion can fairly be read to proceed beyond step two of *Batson* for at least two reasons. *First*, at the close of the step three analysis that petitioner concedes the ASC performed respecting the strikes of four other black veniremembers, the ASC remarked as follows: "After carefully reviewing the record as it relates to the prosecutor's peremptory strikes, we must conclude that it does not establish that the prosecutor engaged in disparate treatment in the striking of black persons and the striking of white persons." *Ex parte Sockwell*, 675 So. 2d at 42. This passage connotes no limitation to only the four black veniremembers that the ASC discussed in the previous paragraphs. In referring broadly to "the record" of the "prosecutor's peremptory strikes," and finding no "disparate treatment in the striking of black persons and the striking of white persons," the opinion fairly suggests that the ASC considered all of the record, including that pertaining to Davis, when it found no disparate treatment in the striking of black and white veniremembers.

Second, in concluding its opinion, the ASC noted that petitioner had raised issues "that either were not before the Court of Criminal Appeals *or were not addressed in its opinion*." *Id*. (emphasis supplied).[9] The ASC plainly stated that it "thoroughly considered each issue Sockwell has raised . . . [and] independently searched the record for reversible error, considering the applicable law as it relates to the facts of the case, and have found none." *Id*.[10]

Where the ASC thus explicitly professed to have "thoroughly considered" and rejected all issues that were raised by petitioner, including those not mentioned in the ACCA's opinion, which necessarily includes petitioner's arguments about step three of *Batson* as it relates to the Davis strike, petitioner cannot meet his burden of proving that the ASC did not consider the relevant circumstances he faults the ASC for failing to mention in its opinion. Instead, the governing principles of AEDPA require this court to treat the ASC's decision as having implicitly considered, and rejected, the arguments petitioner raised before that court, notwithstanding the ASC's failure to address those arguments in its opinion. Accordingly, this court cannot conclude that the ASC unreasonably applied *Batson* by failing to conduct step three of the *Batson* analysis.

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[9] Petitioner also accuses the ACCA of failing to conduct *Batson*'s step three analysis regarding the Davis strike because its opinion is devoid of a positive indication that it did so. *See* Pet. ¶ 58.

[10] Petitioner's brief in support of his petition for certiorari in the ASC raised, among other circumstances, his claim that Brooks's race-neutral reasons for the Davis strike were pretextual. *See* Doc. 14-12 at 48-50.

iii. The ASC's implicit step three analysis did not unreasonably apply Batson *and was not based upon an unreasonable determination of the facts before the ASC.*

Petitioner's final contention in support of his *Batson* claim is that any implicit *Batson* step three determination by the ASC constituted an unreasonable application of *Batson*, or was based upon an unreasonable determination of the facts by the ASC, because all the relevant circumstances before the ASC "overwhelmingly demonstrated discriminatory intent." Pet. ¶ 61. As set forth in the petition, and as discussed previously, those circumstances include Brooks's disproportionate strikes of black veniremembers at petitioner's trial, her record of *Batson* violations, and the pretextual character of her race-neutral reasons for striking Davis.

Regarding the first of these circumstances, it is evident that Brooks disproportionately struck black veniremembers at petitioner's trial. As discussed previously, she used eight of her fifteen peremptory challenges to remove eight of ten eligible black veniremembers. Petitioner's updated briefing capably illustrates that Brooks's "challenge rate" for black veniremembers "was more than triple the rate for white jurors" and the "exclusion rate for black jurors (80%) was almost quadruple the rate for white jurors (21.9%)." Doc. 49 at 15. Although Brooks's disproportionate strikes of black veniremembers was not expressed to the ASC in terms of "challenge rate" and "exclusion rate," the core statistics from which these rates are derived were before the ASC, which noted in its opinion that Brooks peremptorily struck eight of ten black veniremembers. *See* 675 So. 2d at 40.

Brooks's disproportionate exclusion of black veniremembers is a relevant circumstance probative of petitioner's *Batson* claim that the ASC was required to consider. *See, e.g., Miller-El v. Dretke*, 545 U.S. 231, 240–41 (2005).

It is also evident that, regarding the second relevant circumstance identified by petitioner, around the time of his trial, several convictions secured by Brooks were reversed due to her discriminatory exclusion of black veniremembers. The petition cites five state court appellate decisions issued from 1988 through 1992 in which convictions secured by Brooks were reversed on *Batson* grounds. Pet. ¶ 64. Brooks's *Batson* history is also a relevant circumstance probative of petitioner's *Batson* claim that the ASC was required to consider. *See, e.g., Miller-El*, 545 U.S. at 266; *Flowers v. Mississippi*, 139 S. Ct. 2228, 2243 (2019).

Brooks's disproportionate strikes and history of *Batson* violations only go so far, though. Petitioner still must show that Brooks discriminated against Davis based upon his race. The Eleventh Circuit's recent *King* decision is instructive on this point. There, the prosecutor used seven of his ten peremptory strikes to remove seven of the eight eligible black veniremembers in a pool of forty-two potential jurors. 69 F.4th at 863. In addition, the prosecutor in *King* was found by the trial court to have violated *Batson* with one of his seven peremptory challenges. *Id*. When the trial court made this ruling, the prosecutor launched into a "'soliloquy'" in which he disparaged *Batson* and complained about its effects on criminal trial practice. *Id*. at 863–64.

The Court of Appeals in *King* was therefore faced with what it conceded was a "troubling" record: the prosecutor employed a plainly disproportionate pattern

of peremptory strikes, was openly hostile to *Batson*, and, indeed, was found to have violated *Batson* at the underlying trial. *Id*. at 868. Nevertheless, the Court of Appeals rejected King's *Batson* claim because, examining each of the challenged strikes individually, the Court of Appeals could find no instance in which the Supreme Court of Georgia unreasonably adjudicated the facts regarding the prosecutor's peremptory challenges. *Id*. at 870–73. So, disproportionate strikes and a problematic *Batson* history, while similarly "troubling," cannot carry the day for petitioner. He still must show that the ASC unreasonably adjudicated the facts in its rejection of his Davis *Batson* claim.

Petitioner "faces a high hurdle at this stage." *King*, 69 F.4th at 870. He must provide clear and convincing evidence that the ASC erroneously credited Brooks's race-neutral reasons for her strike of Davis. He cites two reasons why the ASC unreasonably adjudicated the facts: Brooks's race-neutral reasons are not supported by the record and the rationale she articulated applied equally to white veniremembers she did not strike. Pet. ¶¶ 66–68. The court will consider each argument in turn.

On the first point, the ASC did not unreasonably adjudicate the facts when it found credible Brooks's assertion that Davis was "extremely vague" in his voir dire testimony about his exposure to pretrial publicity. In general, a juror's difficulty in answering questions, especially on an important topic like bias due to pretrial publicity or the juror's feelings about capital punishment, is a legitimate, race-neutral reason for a peremptory challenge of the juror. *See Atwater v. Crosby*, 451 F.3d 799, 807 (11th Cir. 2006). Davis's testimony, previously reproduced in full, supports Brooks's charge because it demonstrates the

considerable difficulty faced by the trial court in securing clear answers to the rudimentary questions of what, specifically, Davis knew about the case from his pretrial exposure to publicity and from what source he learned his information.

As Brooks observed under questioning by Wise, Davis kept saying that he had "heard something" about the case, including about the guilt of petitioner, but appeared to be unable, or unwilling, to articulate what he had heard. When the trial court first asked Davis to provide specifics of what he had heard, he was vague, if not evasive: "Oh, I just, um, it was something in the newspaper or something." R. at 341. After the trial court clarified that Davis had heard from others who read the newspaper, rather than reading it himself, the trial court asked Davis if he remembered what he had heard. Again, Davis was vague: "Not exactly." When the trial court finally cornered Davis on the question of what, specifically, he had heard, Davis still was inherently vague: "Um, the only thing I recall is just, you know, um, listening at some of the guys, you know, that said they had read about it, you know, the incident out on Troy Highway, stuff like that, you know, what had happened and so forth, you know." R. at 342.[11]

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[11] Even this answer by Davis appears unresponsive to the question of what, specifically, he had heard from others before trial. Before conducting individual voir dire, the trial court informed the venire that the trial concerned "the accusation that the defendant shot Isaiah Harris . . . near the Troy Highway, in the head with a shotgun . . . in exchange for money allegedly paid to him by Mr. Harris' wife, Louise Harris, by her boyfriend." R. at 168. So, Davis revealed nothing about what he had "heard" from his pretrial sources that he would not have already learned in court that morning.

In short, Davis was presented with many natural opportunities to clearly state that he had heard mention of the case from others but that he could not remember anything specific about what he had heard. Many other jurors expressed similar sentiments plainly, without the need of an extended, unsatisfying colloquy. Instead, he persisted in failing to explain the "something" that he had heard or simply stating that he could not remember what the "something" was.

Brooks was unsure whether Davis's difficulty with answering the judge's questions was because Davis "didn't understand the Judge or if he just didn't want to talk about it or wasn't interested," R. at 428, but her abiding concern about Davis's vagueness is amply supported by the transcript. No doubt, there may be an innocuous explanation for Davis's vagueness, including the one offered by Brooks, that perhaps Davis did not understand the judge's questions. But Brooks reasonably found Davis's vague testimony peculiar, and she reasonably could have inferred that he was being less than forthright about his exposure to pretrial publicity. Consequently, the ASC did not unreasonably adjudicate the facts to the extent it implicitly found credible Brooks's claim that Davis was struck because of his vagueness.

Petitioner's second point—that Brooks did not strike white jurors who were similarly vague as was Davis—fares no better because the only white jurors he identified as comparators in his briefing to the ASC, Lisa Burch and Peggy McFarlin, were not similarly vague. As recounted in the petition, *see* Pet. ¶ 68, both of these jurors acknowledged having previously heard about the case. Burch testified that she "briefly" "heard it on the news." R. at 273. Unlike Davis, who at first testified that he had "heard something" about whether

petitioner was guilty or not, Burch unequivocally answered "no" to the same question. *Id*. Burch was forthright about her inability to "remember in full detail what [she] heard" from the news. R. at 274. Her answers did not repeatedly and obliquely hint that she had heard "something" that she appeared reticent to reveal. Although, like Davis, she ultimately could not remember what she had heard about the case on the news, it is evident that her testimony was not "vague" in the same sense as was that of Davis.

McFarlin, too, was unlike Davis. She unequivocally stated that she had learned about the case "[i]n the paper." R. at 319. Unlike Davis, who, again, at first claimed to have heard "something" about whether petitioner was guilty or not, McFarlin could not remember if she had heard any such information. *Id*. She was clear that she could "barely remember the story" and did not "remember how it ended." *Id*. She had only "read a little bit of it in the paper and [she didn't] know what [petitioner had] done." *Id*. Nothing in McFarlin's testimony, unlike with Davis, was vague or suggestive of an effort not to reveal what she knew about the case.

While it can fairly be said that Davis, McFarlin, and Burch were alike in that, ostensibly, they remembered little of what they had heard or read about the case before trial, that is where the similarities end. Davis's voir dire testimony is characterized by the trial court's protracted effort to get Davis to clearly state what he had heard about the case before coming to court. After many fits and starts, it ended pretty much where it began: Davis had heard "something" but it still was unclear what that "something" was. Burch and McFarlin were upfront and clear that they had consumed earlier media reports about the case, but

that they could not remember specifics from those reports. The ASC's decision that Brooks's vagueness rationale for the Davis strike did not apply equally to Burch and McFarlin was not an unreasonable determination of the facts based upon the record before the ASC.

For all of the foregoing reasons, the ASC did not unreasonably apply *Batson*, and its decision denying petitioner's *Batson* claim was not based upon an unreasonable determination of fact. Accordingly, Claim One is due to be denied.

2. Claim Two

Claim Two is petitioner's claim that the trial court violated his Sixth and Fourteenth Amendment right to present witnesses in his defense by permitting Louise Harris to invoke her Fifth Amendment privilege against self-incrimination and refuse to answer questions at his trial. As stated previously, this claim was not presented to the ACCA on direct appeal of petitioner's conviction and sentence, but was summarily denied on the merits by the ASC in its opinion affirming petitioner's conviction. Thus, there is no reasoned state court appellate decision denying the claim. Nevertheless, this court still must determine whether the ASC's summary decision is "contrary to, or involved an unreasonable application of, clearly established Federal law" or is "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." § 2254(d)(1) & (2). To resolve this question, this court "must determine what arguments or theories supported, or . . . could have supported, the state court decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of"

the United States Supreme Court. *Harrington*, 562 U.S. at 102.

a. Clearly Established Federal Law

Two important constitutional rights are germane to petitioner's claim. The Fifth Amendment to the U.S. Constitution declares in part that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend V. The Sixth Amendment establishes the right of a criminal defendant "to have compulsory process for obtaining witnesses in his favor." U.S. CONST. amend. VI. Petitioner's claim is about how state courts are to resolve the conflict when presented with competing assertions of these two fundamental rights.

Petitioner cites *Washington v. Texas*, 388 U.S. 14 (1967), as the generally applicable clearly established federal law outlining his Sixth Amendment right to present witnesses in his defense. There, a criminal defendant challenged on Sixth Amendment grounds Texas statutes under which "persons charged or convicted as coparticipants in the same crime could not testify for one another." *Id*. at 16. The Supreme Court held that the Sixth Amendment right of compulsory process is applicable to the States under the Fourteenth Amendment and that the Texas statues at issue infringed the Sixth Amendment because they permitted the State to arbitrarily deny the accused's "right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense." *Id*. at 19, 23.

Washington described the importance of the protection afforded by the Sixth Amendment's compulsory process clause:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so that it may decide where the truth lies.

Id. at 19. The right recognized in *Washington* is not absolute, however. In particular, as observed by petitioner, the "defendant's right to call witnesses on his behalf can be overcome by the witness's invocation of the Fifth Amendment privilege against self-incrimination, if that invocation is legitimate." Pet. ¶ 80 (citing *Washington*, 388 U.S. at 23 n.21) (emphasis removed). Indeed, "the Fifth Amendment privilege against compulsory self-incrimination" is "the most important" exemption to a defendant's Sixth Amendment right to compel testimony. *Kastigar v. United States*, 406 U.S. 441, 444 (1972).

As the Supreme Court stated in *Kastigar*, the Fifth Amendment privilege "can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." *Id*. at 444–45 (citations omitted). The question, then, is how a court is to determine when a witness's invocation of his or her Fifth Amendment privilege is reasonable such that it may overcome a defendant's right to present the witness's testimony.

Petitioner cites *Hoffman v. United States*, 341 U.S. 479 (1951), as the clearly established federal law governing the determination of whether a witness has "validly asserted the privilege against self-incrimination." *See* Pet. ¶¶ 80–81. *Hoffman* involved a grand jury witness, Samuel Hoffman, who was "convicted of criminal contempt for refusing to obey a federal court order requiring him to answer certain questions asked in a grand jury investigation." 341 U.S. at 480. "It was stipulated that [Hoffman] declined to answer on the ground that his answers might tend to incriminate him of a federal offense." *Id*. at 482.

The Supreme Court first explained that the privilege extends not just to "answers that would support a conviction[,]" but also to "those which would furnish a link in the chain of evidence needed to prosecute" the witness invoking the privilege. 341 U.S. at 486. The Court emphasized, however, that the Fifth Amendment privilege's "protection must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer." *Id*. *Hoffman* places the onus on the court to ascertain whether a witness's invocation of the privilege is reasonable.

> The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified, and to require him to answer if it clearly appears to the court that he is mistaken. . . . To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it

> cannot be answered might be dangerous because injurious disclosure could result.

Id. at 486–87 (citations omitted). Importantly, in assessing the validity of a witness's invocation of his or her Fifth Amendment privilege, the presiding judge "must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence." *Id.* at 487 (citation and quotation omitted).

b. Proceedings in the Trial Court

The defense subpoenaed Louise Harris to testify in the guilt phase at petitioner's trial. As related in the petition, the defense intended to have Harris essentially replicate the testimony she gave in her own defense at her previous trial. Pet. ¶ 76. That testimony—that she gave money to McCarter to pay petitioner for a car repair, not to kill her husband—was exculpatory as to Harris and, by extension, petitioner. The defense and the trial court quickly learned, however, that Harris did not intend to offer such testimony at petitioner's trial. While the trial court was conducting individual voir dire of potential jurors, Harris's attorney, Bryan Stevenson, addressed the court and apprised it of Harris's intentions:

> Judge Thomas, I'm Bryan Stephenson. I represent Louise Harris, and she was brought over here today to testify, I think on a subpoena issued by the defense. She is not willing to testify and would assert her Fifth Amendment right. And I was just wondering if we could have her sent back to Tutwiler. I don't know if there's an Order from the Court.

R. at 190.

The trial judge asked the defense if it wanted to put Harris on the stand to assert her Fifth Amendment right. The defense answered affirmatively and further argued that Harris should be made to do so before the jury. R. at 191. The defense also asserted that Harris had waived her Fifth Amendment privilege by testifying at her previous trial, which resulted in a conviction and death sentence. The defense recognized, however, the practical limitations of the court's ability to compel Harris to answer questions:

> She has, in our opinion, waived her Fifth Amendment Right by her previous testimony, but irrespective of that, she hasn't got to testify if she don't want to by other grounds, but I want the jury to hear her invoke her Fifth Amendment Right.
>
> . . .
>
> I don't think she has one to begin with, but if she refuses all you can do is put her in jail and she's there already.

R. at 191–92. With that, the trial judge requested that Stevenson make himself available when the defense called Harris to the stand and proceeded with individual voir dire.

The issue was revisited during trial when the prosecution moved *in limine* to prevent the defense from calling Harris to the stand knowing her intent to assert her Fifth Amendment privilege in front of the jury. R. at 773. Brooks argued that the defense should not be permitted to "call a witness merely to prejudice the jury." R. at 773. The following exchange occurred:

> [Defense attorney] MR. WOOD: Well, your Honor, we expect to call Louise Harris. She

testified in her own defense, and we have no reason to believe, other than Bryant [sic] Stevenson said she was going to invoke the Fifth in your Honor's presence. We'd like to have her come and do that. Our position is as we told you, is that she waived any such privilege having testified. If she takes that position I think in light of the fact that Michael Sockwell is accused with her in this case we ought to be able to read portions of her testimony from the prior trial. She's waived it. I certainly have a right to call her and see if that's what she does.

MS. BROOKS: Your Honor, the case of Douglas [v. Alabama] speaks to that, and it says that if you waive your Fifth Amendment Right for one trial you do not automatically waive it for subsequent trials when your own case is on appeal, as hers clearly is. We would suggest to the Court – and I don't dispute if the defense says this – if they have no reason to believe that the witness will take the Fifth then we ask for an out of presence hearing from the witness on whether or not he or she intends to take the Fifth Amendment. If he or she does then we're all on notice and there won't be any prejudice. If they say they don't, then of course our motion is improper.

. . .

THE COURT: They probably could, even if the law is [sic] that she can claim the Fifth[,] I think they would probably be able to introduce her testimony.

MS. BROOKS: Judge, we considered that as well, and because the parties were different and the issues are different as to the involvement of Michael Sockwell and it was State versus Louise Harris, not Michael Sockwell that she testified before and the attorneys were different, we don't think it would have been admissible, just like Mr. McCarter's testimony is not in and of itself admissible right now.

. . .

MR. WOOD: Your Honor, . . . we believe that the denial to this defendant of the right to call Louise Harris . . . will be a violation of his right under the United States Constitution Amendments Five, Six, Eight, Nine, and Fourteen, as applied to the States and under Constitution of Alabama Article One Section Six. Now, that's especially true where this jury has already heard, as I pointed out earlier, under a conspiracy theory, all kinds of stuff from officers about what Bobo said or about what Louise said. We have a right to call them. If they take the Fifth then let 'em take the Fifth, but this defendant is prejudiced if we don't get that opportunity, and I believe that this Court, even under Douglas, is subject to being reversed on that point alone.

MS. BROOKS: Judge, our position is not that they don't have a right to call, but it should be done out of the presence of the jury to determine whether or not the witness will take the Fifth. If the witness indicates that he or she will then the witness is being called not

to solicit testimony, but to prejudice the jury, which is clearly improper.

MR. WOOD: Your Honor, the converse of that is true. If we don't call them and if the jury is not aware of an attempt to call them then we're prejudiced by it. We're prejudiced in that we don't try to show anything different from what they've already been told that these officers say they said.

. . .

THE COURT: Okay. I've got two questions before me. One, can you call them and see if they're going to plead the Fifth and how that's done, whether it's done out of the presence of the jury or before, and the other question is . . . whether or not if the plead the Fifth, some testimony that was illicited [sic] in a prior trial could be admissible here.

MR. WISE: Your Honor, I think there's a further question, if I could say it. . . . Mrs. Harris does not have the right to take the Fifth Amendment unless it would incriminate her. We can ask her her name, we can ask her where she lives, we can ask her if she was the wife of one Isaiah Harris. Those types of questions and others which are relevant to this case and admissible she does not have Fifth Amendment Right as to the answers those questions would invoke.

THE COURT: You're saying a defendant wouldn't have the right just not to just answer who she was or --

> MR. WISE: No, sir, that's not incriminating. Who she is is not incriminating. She has no Fifth Amendment right. It is on her birth certificate, it's on her tax returns, it is on her Social Security records. Those are all public records.
>
> THE COURT: I thought a defendant has a right not to do anything.
>
> MR. WISE: No, sir, not unless it would incriminate them.
>
> . . .
>
> THE COURT: I'm ready to rule on the fact whether or not you can call 'em. I think you can call 'em and they'd have the take their Fifth Amendment with the jury here. Now the next question is what happens if they do.
>
> MR. WOOD: I think I can't go any further than when they take the Fifth. I stop. Now, I'm asking you in the matter of Harris to consider the question of whether or not I can use the transcript or portions of it from her -- I understand the State would have the right to any portion of it for themselves. I'm not satisfied with everything in the testimony from her prior trial.
>
> THE COURT: All right. Well let's get started. Show the jury out and we'll make rulings as we go.

R. at 774–85.

When the defense called Harris to the stand, the following exchange occurred:

> BY MR. WOOD:
>
> Q. Ms. Harris, I'm Jerry Wood and I'm one of the lawyers for Michael Sockwell. Where are you presently incarcerated?
>
> A. Julia Tutwiler Prison for Women.
>
> Q. And what is the charge -- what is the basis for your being there? Why are you there?
>
> MR. STEVENSON: Your Honor, at this point, for the record, I'm Bryant [sic] Stevenson counsel for Ms. Harris. Ms. Harris has indicated her desire to assert her Fifth Amendment Right in these proceedings and refuses to answer any and all questions relevant to this case based on her Fifth Amendment Right, and at this point I would invoke that Right on her behalf and ask that she be subject to no further questioning.
>
> MR. WOOD: I'll respect that, your Honor.
>
> THE COURT: Grant that motion.
>
> MS. BROOKS: No questions from the State, your Honor.
>
> THE COURT: You may step down.

R. at 812–13.

c. State Court Appellate Review

As discussed previously, petitioner did not raise a federal constitutional claim regarding the trial court's handling of Harris's invocation of her Fifth Amendment privilege on direct appeal to the ACCA. Petitioner first raised the claim in his brief in support of his petition for certiorari to the ASC. *See* Doc. 14-12 at 77–90.

Specifically, he argued that the trial court erred in accepting Harris's invocation of her Fifth Amendment privilege because Harris waived the privilege when she testified at her own trial and, furthermore, because Harris had already been convicted and sentenced at the time of petitioner's trial. In relevant part, he also argued that the trial court erred because "there was no showing that [Harris's] answers to defense counsel's questions would have a tendency to incriminate her." *Id*. at 89.

The ASC did not address petitioner's arguments in its decision affirming his conviction and sentence. Instead, after stating that it had "thoroughly considered" all issues petitioner raised, it found no reversible error and, accordingly, summarily denied the claim. *Ex parte Sockwell*, 675 So. 2d at 42.

d. Petitioner's Arguments Pursuant to § 2254(d)(1)

Petitioner alleges that, pursuant to § 2254(d)(1), the ASC's summary denial of his claim unreasonably applied clearly established federal law because it failed to conclude that the trial court violated petitioner's Sixth Amendment right to compulsory process by 1) failing to conduct an inquiry into the validity of Harris's invocation of her Fifth Amendment privilege; and 2) failing to conclude that Harris "had no legitimate claim to Fifth Amendment protection with respect to the testimony that Mr. Sockwell sought to elicit." Pet. ¶ 84. He also alleges that any implicit decision by the ASC that any error by the trial court was harmless also unreasonably applied clearly established federal law because Harris's testimony "could well have created a reasonable doubt that Mr. Sockwell was guilty of any murder, let alone of capital murder." *Id*. at ¶¶ 85–89.

e. Application

Claim Two is due to be denied for at least four reasons: i) the ASC did not unreasonably apply clearly established federal law because, at the time the ASC issued its decision, there was no Supreme Court holding clearly establishing the procedure a state court is to follow when balancing a criminal defendant's Sixth Amendment compulsory process rights against a witness's invocation of her Fifth Amendment privilege; ii) the ASC did not unreasonably apply the clearly established federal law that petitioner has identified as governing his claim; iii) the ASC reasonably could have concluded that any error committed by the trial court as described in Claim Two was harmless; and iv) any error committed by the trial court was harmless pursuant to *Brecht*.

i. Petitioner has not identified applicable clearly established federal law that the ASC could have unreasonably applied.

The petition identifies two Supreme Court decisions as reciting the clearly established principles of federal law that, petitioner alleges, the ASC unreasonably applied: *Washington v. Texas* and *Hoffman v. United States*. *See* Pet. ¶¶ 79, 81. Both of these decisions are inapposite.

As discussed previously, *Washington* involved a criminal defendant's challenge to state statutes that prevented him from presenting accomplice testimony in his own defense. The Supreme Court concluded that the state statutes violated the Sixth Amendment because they permitted the State to "arbitrarily" deny the accused's "right to put on the stand a witness who was physically and mentally capable of testifying to

events that he had personally observed, and whose testimony would have been relevant and material to the defense." 388 U.S. at 19, 23. In *Hoffman*, as also noted previously, a grand jury witness convicted of criminal contempt challenged his conviction on Fifth Amendment grounds, arguing that his privilege against self-incrimination protected his refusal to answer certain questions before the grand jury. Neither decision addressed the standards to be applied and the procedure to be followed when a trial court is confronted with a defense witness's invocation of her Fifth Amendment privilege at a criminal trial.

Petitioner therefore has pointed to no Supreme Court holding addressing the scenario his claim presented to the ASC. He argues that he need not do so because his "right to present witnesses in his defense" is clearly established and AEDPA does not require him "to identify clearly established Supreme Court precedent demonstrating the inapplicability of an *exception* to that constitutional right." Doc. 26 at 10 (emphasis petitioner's). Thus, he maintains, "because no legitimate invocation of the Fifth Amendment occurred[], this case is not materially distinguishable from *Washington v. Texas*[.]" *Id*. at 11.

Petitioner cites no case in the petition concluding that *Washington* and *Hoffman* constitute clearly established federal law binding on a state court in the factual scenario presented by Claim Two. There is, however, persuasive federal appellate authority that runs counter to his claim. In *Davis v. Straub*, 430 F.3d 281 (6th Cir. 2005), the Sixth Circuit rejected a habeas petitioner's similar claim that *Washington* and *Hoffman* provide a predicate of clearly established federal law that was unreasonably applied by Michigan's state courts. Much like petitioner here, the

petitioner in *Davis* argued that "*Hoffman* clearly established that witnesses must invoke their Fifth Amendment privilege in response to each posed question and that *Washington* required the trial court to compel [a witness who invoked his Fifth Amendment privilege] to testify because, otherwise, Davis would have been arbitrarily deprived of his right to a fair trial." *Id*. at 288. The Sixth Circuit rejected both contentions, concluding that "*Hoffman* and *Washington* did not clearly establish how to resolve the conflict between a witness's Fifth Amendment privilege and a defendant's right to present his defense. Because these cases do not resolve the issue, the state courts necessarily could not have acted contrary to clearly established Supreme Court precedent." *Id*.

The Sixth Circuit found *Hoffman* inapplicable for several reasons, including the following: the Supreme Court "did not consider the relationship between the witness's privilege against self-incrimination and the defendant's right to put on his defense[;]" the decision "announced no rule proscribing the blanket assertion of the privilege against self-incrimination[;]" and the decision "clearly does not hold[] that defense witnesses must always take the stand to invoke the privilege" on a question-by-question basis. *Id*. at 288–89.

As for *Washington*, the Sixth Circuit found that the decision "does not hold that a defendant has the right to present any and all witnesses." *Id*. at 290. Rather, "entirely outside the Fifth Amendment self-incrimination context," *Washington* "clearly established that, under the Sixth Amendment, a state may not arbitrarily deny a defendant the right to call a witness whose testimony is relevant and material to the defense." *Id*. "Because the Court did not consider the

question of a witness's Fifth Amendment privilege against self-incrimination anywhere in its opinion, it cannot be said that the Court created clearly established law against a blanket assertion of the privilege or resolved how courts should treat the tension between the witness's and the defendant's interests." *Id*.

Because the decisions petitioner has cited in his petition, *Washington* and *Hoffman*, do not create clearly established federal law on the question of how a trial court is to reconcile the competing interests when a criminal defendant calls a witness who invokes her Fifth Amendment privilege against self-incrimination, he has failed to show that the ASC unreasonably applied clearly established federal law in its rejection of Claim Two.

ii. The ASC did not unreasonably apply the authorities petitioner has posited as providing clearly established federal law governing Claim II.

Notwithstanding the foregoing, and assuming that *Washington* and *Hoffman* do create clearly established law applicable to petitioner's claim, this court is unable to conclude that the ASC unreasonably applied those decisions. This is so because, even if the trial court failed to adequately inquire into whether Harris's invocation of her Fifth Amendment privilege was reasonable and legitimate, the ASC reasonably could have found that petitioner's Sixth Amendment compulsory process right still was not violated.

To be sure, *Hoffman* stresses that a witness's "say-so does not of itself establish the hazard of incrimination." 341 U.S. at 486. Rather, "it is for the

court to say whether his silence is justified, and to require him to answer if it clearly appears to the court that he is mistaken." *Id*. In making this judgment, the trial court "must be governed as much by [its] personal perception of the peculiarities of the case as by the facts actually in evidence." *Id*. at 487 (citation and quotation omitted). Here, the ASC reasonably could have concluded that the trial judge's "personal perception of the peculiarities of the case" plainly demonstrated that no inquiry was needed and would have been futile if attempted. Such judgment would be amply supported by the record considering that Harris's attorney unequivocally stated that Harris would not be answering any questions relevant to the case for which petitioner was on trial, the trial court had no means of forcing Harris to answer any questions, and, recognizing this practical reality, the defense acquiesced to Harris's invocation of her Fifth Amendment privilege.

Recall that Harris's attorney advised the court during jury selection that Harris was unwilling to testify. While adamant that Harris's invocation of her Fifth Amendment privilege was not valid because she had waived the privilege, and that her privilege extended only to answers that might incriminate her, the defense recognized that the trial court's toolkit to force Harris to answer questions was bare: "she hasn't got to testify if she don't want to by other grounds, . . . but if she refuses all you can do is put her in jail and she's there already." R. at 191–92. Hence, when Harris was called to the stand and her attorney intervened and stated that Harris "refuses to answer any and all questions relevant to this case based on her Fifth Amendment Right[,]" R. at 813, there was little the defense or the trial court could do to force her to testify. Accordingly, the defense confirmed its "respect" for

Harris's privilege and the trial judge excused her from the stand. R. at 813.

Petitioner has cited no clearly established federal law that would require the trial court to ignore these obviously determinative circumstances and, *sua sponte*, force the defense to query the witness so that the trial court can make rulings, question by question, on whether the witness's invocation of her privilege is reasonable. In the circumstances described above, such an exercise plainly would have been futile.[12] More importantly, considering the defense's overriding request that Harris be made to invoke the privilege before the jury, it would have deprived the defense of the limited strategic advantage it realistically hoped to gain by placing Harris on the stand.[13] *Hoffman*

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[12] For a demonstration of this futility, see *Douglas v. State of Alabama*, 380 U.S. 415 (1965), which was cited by the prosecutor in arguing that Harris should be made to invoke her privilege outside the presence of the jury. There, a previously convicted codefendant called by the State at the defendant's trial invoked his Fifth Amendment privilege and repeatedly refused to answer the State's questions even after the trial judge ruled that the codefendant "could not rely on the privilege because of his conviction and ordered him to answer." *Id*. at 416. As will be further discussed in this order's discussion of Claim Three, *Douglas* was concerned with whether or not the defendant's Confrontation Clause rights were violated when the trial court permitted the prosecution to examine the codefendant-witness about his out-of-court statement. For present purposes, *Douglas* illustrates the futility of trying to force a recalcitrant, already incarcerated witness—like Louise Harris—to testify over the witness's invocation of her Fifth Amendment privilege.

[13] Recall that the prosecution and defense were at odds over whether the defense could put Harris on the stand before the jury knowing her intent to invoke the Fifth Amendment. The defense argued it was essential that she be made to invoke her privilege before the jury due to other evidence that had been admitted. With no prospect of actually obtaining Harris's testimony, a

imparts no holding requiring the trial court to proceed under such circumstances and *Washington* cannot be read to hold that a trial court's failure to do so constitutes an "arbitrary" denial of a criminal defendant's Sixth Amendment right to compulsory process in his defense. Thus, the ASC did not unreasonably apply *Hoffman* or *Washington* in its rejection of Claim Two.

iii. The ASC reasonably could have concluded that any error by the trial court was harmless.

Notwithstanding the above, the ASC also reasonably could have concluded that any error by the trial court in permitting Harris to invoke her Fifth Amendment privilege was harmless. Petitioner concedes that the ASC's "summary decision potentially may have rested on a determination that any constitutional error was harmless[,]" but he maintains that he is entitled to relief because the trial court's error satisfies the harmless error standard of *Brecht*. Pet. ¶ 85.

There are two standards of harmless error that are relevant in federal habeas proceedings. The *Brecht* standard, discussed previously and referenced by petitioner, is independent of any state court adjudication of claims and must be satisfied before relief may be granted in habeas corpus. There is also the harmless error standard that is applicable on direct

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question-by-question inquiry into the reasonableness of her invocation of the privilege almost certainly would have to be held, as the prosecution argued, outside the presence of the jury. *See, e.g., United States v. Melchor-Moreno*, 536 F.2d 1042, 1046 (5th Cir. 1976) (observing the accepted practice, post-*Hoffman*, whereby, "outside the presence of the jury," the judge examines the witness to "determine whether there is reasonable ground to apprehend danger to the witness from his being compelled to answer").

review of a conviction, which, when applied by a state appellate court, a federal court reviews through the prism of AEDPA.

> In *Chapman v. California*, 386 U.S. 18 (1967), the Supreme Court held that on direct review, a federal constitutional error is harmless only if the reviewing court is "able to declare a belief that it was harmless beyond a reasonable doubt," *id*. at 24. Under AEDPA's unreasonable application prong, 28 U.S.C. § 2254(d)(1), federal habeas relief may only be granted if the state court's application of the *Chapman* harmless error standard on direct review was "objectively unreasonable." For ease of exposition, we refer to this standard as the "AEDPA/*Chapman*" standard.

Mansfield v. Sec'y, Dep't of Corr., 679 F.3d 1301, 1307 (11th Cir. 2012) (citations omitted). Although petitioner cites authority in the petition postulating that the "AEDPA/*Chapman*" standard is "subsumed" by the *Brecht* standard, *see* Pet. ¶ 85, intervening authority makes clear that the two standards are functionally distinct and that, in order to obtain relief, petitioner must satisfy both. *See Brown v. Davenport*, 596 U.S. __, 142 S. Ct. 1510, 1524 (2022). While petitioner argues that his claim satisfies even the ostensibly more demanding harmless error standard of *Brecht*, he has not shown, pursuant to AEDPA, that any determination by the ASC that any error was harmless under *Chapman* was unreasonable.

To the extent petitioner's claim challenges the ASC's implicit harmless error determination as an unreasonable application of *Chapman*, he faces a high burden:

> *Chapman* merely announced the default burden of proof for evaluating constitutional errors on direct appeal: The prosecution must prove harmlessness beyond a reasonable doubt. And this Court has repeatedly explained that, when it comes to the AEDPA, "the more general the [federal] rule[,] . . . the more leeway [state] courts have in reaching outcomes in case-by-case determinations" before their decisions can be fairly labeled unreasonable.

Brown, 142 S. Ct. at 1530 (quoting *Renico v. Lett*, 559 U.S. 766, 776 (2010)). Thus, to succeed under the AEDPA/*Chapman* standard, petitioner must demonstrate to this court that, despite the substantial "leeway" afforded the ASC in applying *Chapman*, no fairminded jurist could agree with the ASC's decision that any error was harmless. *Id*.

To meet his burden, petitioner argues as follows:

> Ms. Harris's refusal to testify was far from harmless: her testimony would have provided the jury with corroborating evidence that Mr. Sockwell had not been paid $50—a facially suspect amount for murderfor-hire—to kill Isaiah Harris, and thus had not committed murder for pecuniary gain. This testimony could well have created a reasonable doubt that Mr. Sockwell was guilty of any murder, let alone of capital murder.

Pet. ¶ 89. In his brief, he argues that the prosecution's evidence that petitioner committed a murder for pecuniary gain "rested on a credibility contest in which the prosecution did not have a clear upper hand." Doc. 26 at 21. He asserts the jury reasonably could have

found Harris's testimony more compelling than Freddie Patterson's testimony that petitioner expected to get more money after the shooting. *Id*. Thus, he maintains, "Harris's testimony would have at least called into doubt the prosecutor's allegation that Sockwell committed murder for $50—a facially suspect amount." *Id*. at 22.

The ASC reasonably could have concluded that the trial court's failure to somehow pry free Harris's testimony over her Fifth Amendment invocation was harmless. Several points would have reasonably supported this judgment, including the following: Freddie Patterson's testimony that petitioner stated "'he had to shoot him' and that 'he was gonna . . . get his money'" (*Sockwell*, 675 So. 2d at 13); petitioner's own admission in his police statement that he received a share of a hundred dollars, passed from Harris through McCarter before the shooting, for the killing of her husband before the shooting, with the prospect of more to be paid after the shooting (*see* Doc. 14-7 at 84–86; *id*. at 100 ("She was talking about killing me 'cause she had gave us a hundred dollars to shoot him first")); and the lack of any reason to believe that the jury at petitioner's trial would have found Harris's self-serving testimony more credible than did the jury that first heard the testimony and convicted Harris of capital murder.

To be sure, as petitioner argues, Harris's testimony would have constituted an evidentiary point on the opposite side of the scale. But he presents no reason why Patterson's testimony about what he heard from petitioner was not credible. He asserts only that Patterson "had no first-hand knowledge of the facts surrounding the payment allegedly given" to petitioner and Patterson had his own "serious credibility

problems" "because he was in the car with [petitioner and his codefendants] on the night of the shooting." Doc. 26 at 21. But the jury apparently found Patterson credible notwithstanding his presence in the car with McCarter, Hood, and petitioner, and Harris's testimony that she had paid petitioner for a car repair rather than a murder would not have undermined Patterson's testimony about what he heard petitioner say because, as petitioner acknowledges, Patterson did not profess "first-hand knowledge" about from whom petitioner expected to "get his money." *See* R. at 511 (Patterson denying that petitioner "refer[red] to anybody while he was talking about" getting his money).

At bottom, in the "credibility contest" petitioner describes, he was badly outmatched. Arrayed against Harris's self-serving, and already once repudiated, testimony was Patterson's testimony and petitioner's own statement against his interests in which he admitted to the essential elements of the capital murder charge. Hence, the ASC was not unreasonable in concluding that the failure to force Harris to testify over her Fifth Amendment invocation was harmless. Put another way, considering the substantial "leeway" due the ASC when applying *Chapman*, "[e]ven if some fairminded jurist applying *Chapman* could reach a different conclusion, [this court] cannot say that every fairminded jurist must." *Brown*, 142 S. Ct. at 1530. Accordingly, petitioner cannot satisfy the AEDPA/*Chapman* standard governing the ASC's implicit conclusion that any error described in Claim Two was harmless.

iv. Any error was harmless under Brecht.

Finally, even if petitioner could satisfy the AEDPA/*Chapman* standard, he cannot show that such error caused him actual prejudice under *Brecht*. As stated previously, actual prejudice under *Brecht* results when the error "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 637. In general, the *Brecht* standard "is more favorable to and less onerous on the state, and thus less favorable to the defendant than the *Chapman* harmless beyond a reasonable doubt standard." *Mansfield*, 679 F.3d at 1307 (quotation marks omitted). "To show prejudice under *Brecht*, there must be more than a reasonable possibility that the error contributed to the conviction or sentence." *Mason v. Allen*, 605 F.3d 1114, 1123 (11th Cir. 2010). "To determine the effect on the verdict of a constitutional error, the Court must consider the error 'in relation to all else that happened' at trial." *Trepal v. Sec'y, Florida Dep't of Corr.*, 684 F.3d 1088, 1114 (11th Cir. 2012) (quoting *Kotteakos v. United States*, 328 U.S. 750, 764 (1946)). "The question turns on whether the Court can 'say, with fair assurance,' that the verdict 'was not substantially swayed by the error[.]'" *Id*. (quoting *O'Neal v. McAninch*, 513 U.S. 432, 437–38 (1995)).

In arguing that Harris's testimony would have provided alternative evidence probative of the pecuniary gain aspect of petitioner's capital murder charge—*i.e*., that Harris's testimony "would have at least called into doubt" the prosecution's theory—petitioner has, at most, raised only a "reasonable possibility" that the absence of Harris's testimony swayed the jury's verdict. Even if credited, that

showing is insufficient to demonstrate actual prejudice under *Brecht*. For the reasons discussed previously, this court cannot conclude that any error by the trial court in permitting Louise Harris to refuse to testify substantially swayed the jury's verdict at petitioner's trial. It is not likely that the jury would have credited Harris's self-serving testimony, already repudiated by one jury, over the damning testimony of Patterson and petitioner's own admission that he received money from Harris for the murder of her husband. Accordingly, petitioner cannot show actual prejudice under *Brecht*.

3. Claim Three

Claim Three is petitioner's claim that the prosecutor's repeated references in her rebuttal closing argument to out-of-court inculpatory statements made by McCarter and Hood, who did not testify at petitioner's trial,[14] violated the Confrontation Clause of the Sixth Amendment. This claim was presented on direct appeal to the ACCA, which denied the claim in a reasoned decision in which it found any Confrontation Clause violation harmless. *See Sockwell*, 675 So. 2d at 34–35. Petitioner then presented the claim to the ASC, which, as previously discussed, summarily denied the claim. *Ex parte Sockwell*, 675 So. 2d at 42. Accordingly, this court reviews the state court's decision pursuant to AEDPA.

a. Clearly Established Federal Law

The Sixth Amendment confers on the defendant in a criminal prosecution the right "to be confronted with

[14] Hood was called by the defense at petitioner's trial, but, like Louise Harris, invoked his Fifth Amendment privilege and refused to answer any questions beyond providing his name. R. at 813–14.

the witnesses against him[.]" U.S. CONST. amend. VI. Petitioner identifies three Supreme Court decisions as comprising the clearly established federal law governing his claim. *See* Pet. ¶¶ 98–100.

First, in *Douglas v. State of Alabama*, 380 U.S. 415 (1965), a criminal defendant, Douglas, challenged on Sixth Amendment grounds a "procedure" by which the prosecution read the substance of a co-defendant's out-of-court inculpatory statement to the jury in response to the co-defendant's invocation of his Fifth Amendment privilege against self-incrimination. When the prosecution first called the co-defendant, Loyd, to the stand, Loyd's attorney objected and asserted Loyd's Fifth Amendment privilege. *Id*. at 416. The trial court overruled the objection and questioning proceeded. Loyd "refused to answer any questions concerning the alleged crime." *Id*. The trial judge ruled that Loyd could not assert the privilege because of his prior conviction "and ordered him to answer," but Loyd "persisted in his refusal." *Id*.

The trial judge then permitted the prosecutor to cross-examine Loyd as a "hostile witness." *Id*. The prosecutor proceeded to read from Loyd's out-of-court statement, stopping repeatedly to ask whether Loyd made each statement that the prosecutor read aloud. *Id*. Loyd continued to assert his privilege throughout this exchange. *Id*. Among the statements from the document read by the prosecutor was Loyd's charge that Douglas was the triggerman in the "assault with intent to murder" for which he was on trial. *Id*.

The Supreme Court held that this "procedure" violated the Sixth Amendment:

> [Douglas's] inability to cross-examine Loyd as to the alleged confession plainly denied him

> the right of cross-examination secured by the Confrontation Clause. Loyd's alleged statement that [Douglas] fired the shotgun constituted the only direct evidence that he had done so; coupled with the description of the circumstances surrounding the shooting, this formed a crucial link in the proof both of [Douglas's] act and of the requisite intent to murder. Although the Solicitor's reading of Loyd's alleged statement, and Loyd's refusals to answer, were not technically testimony, the Solicitor's reading may well have been the equivalent in the jury's mind of testimony that Loyd in fact made the statement; and Loyd's reliance upon the privilege created a situation in which the jury might improperly infer both that the statement had been made and that it was true.

380 U.S. at 419. Because "effective confrontation of Loyd was possible only if Loyd affirmed the statement as his[,]" and Loyd refused to do so, Douglas was deprived of any opportunity to challenge "a fundamental part of the State's case against" him. *Id*. at 420.

Second, in *Ohio v. Roberts*, 448 U.S. 56, 62 (1980), the Supreme Court was "called upon to consider the relationship between the Confrontation Clause and the hearsay rule with its many exceptions." Specifically, the question was whether the State may introduce at a criminal trial the transcript of a witness's testimony at a preliminary hearing because the witness was not available to testify at trial. The Supreme Court outlined the following test for the admission of hearsay statements where the Confrontation Clause is implicated:

> In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

Id. at 66.[15]

Third, in *Lee v. Illinois*, 476 U.S. 530 (1986), the defendant-petitioner, Lee, was jointly tried with a co-defendant, Thomas, in a bench trial on charges of double murder. Both Lee and Thomas gave statements to police. The statements had several "parallels," but differed especially on how Thomas and Lee "came to commit the murders." *Id*. at 535. Specifically, Thomas's statement described Lee's participation in a "premeditated plan to kill." *Id*. Lee, by contrast, stated that Thomas had been provoked to murder and "snapped," and she confessed no premeditation or prior planning of the murders. At the bench trial, "[n]either defendant testified" and "both the prosecution and the defendants relied heavily on the confessions." *Id*. at 536. In finding Lee guilty, the trial judge rejected exculpatory

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[15] *Ohio v. Roberts* was abrogated by *Crawford v. Washington*, 541 U.S. 36 (2004). *Crawford* was decided after direct review of petitioner's conviction was complete, and it is not retroactive to cases on collateral review. *See Whorton v. Bockting*, 549 U.S. 406, 409 (2007). Hence, the test articulated in *Roberts* remains "clearly established federal law" for AEDPA purposes at the time of the state court decisions in this matter.

statements in Lee's confession and, instead, "expressly relied on Thomas' confession and his version of the killings" to discount Lee's version. *Id*. at 538.

The Supreme Court observed in *Lee* that it confronted a scenario "strikingly similar to *Douglas*[,]" because, "as in *Douglas*, the State sought to use hearsay evidence as substantive evidence against the accused. In both cases, the hearsay in question was a confession made by an alleged accomplice, and in neither case was the defendant able to confront and cross-examine the declarant." *Id*. at 542. The only material contrast with *Douglas* observed by the Court favored Lee because Thomas's inculpatory statement was "admitted into evidence by the judge" whereas the "procedure" condemned in *Douglas* did not result in the "technical" admission of evidence. *Id*. at 542–43. Accordingly, the Court found that Lee's Confrontation Clause right was violated. The Court further held that Thomas's statement was not admissible under *Robert*s because it lacked adequate indicia of reliability. *Id*. at 544–45.

b. Proceedings in the Trial Court

Although petitioner alleges that the prosecution's "repeated references" to the inculpatory statements of McCarter and Hood in her rebuttal closing argument violated the Sixth Amendment, it is important to observe that the prosecutor's rebuttal closing argument was not the first time the jury heard about McCarter's and Hood's statements. Indeed, McCarter's and Hood's identifications of petitioner as the shooter were referenced several times during trial and were also the subject of speculation in the defense's own closing argument.

To begin with, petitioner's own out-of-court statement, which was admitted into evidence in video, audio, and written transcript formats, references McCarter's and Hood's inculpatory statements identifying petitioner as the shooter. *See* Doc. 14-7 at 94. Specifically, Bruce Huggins, the Montgomery County Sheriff's Department investigator who obtained petitioner's statement, advised petitioner during his interview that both McCarter and Hood had identified him as the shooter. When Huggins testified at petitioner's trial, on cross-examination, defense counsel elicited Huggins's testimony that, as reflected in petitioner's statement, both McCarter and Hood told Huggins that petitioner was the shooter. R. at 668. The defense elicited this fact again still later in its cross-examination of Huggins when it confirmed Huggins's belief that McCarter and Hood had been truthful about petitioner's role as the shooter. R. at 673–74.

More references to McCarter's and Hood's inculpatory statements followed when petitioner testified in his own defense. During petitioner's direct examination, he testified that he confessed to shooting Isaiah Harris because he was scared and because Huggins told petitioner McCarter and Hood had already identified him as the shooter and he "was gonna get blamed for it anyway." R. at 830. Petitioner also referenced Huggins's assertion that McCarter and Hood had identified him as the shooter on cross-examination. R. at 893, 906. Finally, to complete her cross-examination, the prosecutor asked petitioner if he could explain why Hood, Patterson, McCarter, and Gilmore all implicated him as the shooter. R. at 912.

In the prosecution's initial closing argument, while summarizing the course of the investigation, the prosecutor referenced both McCarter's and Hood's

identifications of petitioner as the shooter. R. at 958. Then, still later, the prosecutor argued that, "[w]ell, everybody in the car said he did it, his roommate said he did it, Bobo McCarter said he did it, Kenneth Gilmore, one of his best friends that he grew up with said he did it, and he said he did it the day after he did. All four people in that car said he did it and he said yes, I did it." R. at 968. The prosecutor then repeated that "[e]verybody in the car says he did it" once more before resting. R. at 969.

In the defense's closing argument, counsel immediately reminded the jury that neither McCarter nor Hood had accused petitioner of being the shooter "from the witness stand." R. at 970. The defense later emphasized that the jurors had heard direct evidence about the shooter from only two people who were there that night: Patterson and petitioner. R. at 973. The defense later again referenced the part of petitioner's statement in which Huggins informed petitioner that McCarter and Hood had identified him as the shooter. R. at 992. Still later in closing, the defense asked the jury to ponder "why would Bobo McCarter, Al Hood, confess to the police that they were involved in it or tell 'em that Michael Sockwell did it if he didn't?" R. at 995. The defense posited that both were motivated to admit their involvement while pointing to petitioner as the shooter in order to obtain favorable treatment because, they must have believed, "as long as you didn't' pull the trigger you're not guilty so I'm gonna say Sockwell pulled the trigger." R. at 995–96.

All of this set the stage for the prosecution's rebuttal closing argument. When the prosecutor mentioned McCarter's statement and the defense's argument about his treatment by prosecutors, the following exchange occurred:

Then they want to tell you well, State's cut a deal. They've got Lorenzo McCarter. My goodness. I think he used the term wool was pulled over our eyes. Ladies and gentlemen, the testimony is uncontradicted that on the night -- the day he was arrested, Lorenzo McCarter gave a statement to law enforcement officials. It is uncontradicted that Lorenzo McCarter then said the shooter was Michael Sockwell. March 11th, 1988 his statement.

MR. WISE: Your honor, I object. There's been no testimony from Mr. Lorenzo McCarter.

MS. BROOKS: No need for any testimony.

THE COURT: Sustained.

MS. BROOKS: Is there? It's uncontradicted what he said.

MR. WISE: Your Honor, I ask the Court to instruct the jury to disregard it.

THE COURT: Sustained.

MS. BROOKS: And Mr. Wise is upset –

THE COURT: Sustained.

MS. BROOKS: Excuse me, Judge.

THE COURT: Jury will disregard anything about the times you said it.

MS. BROOKS (continuing:)

Y'all will remember that it was uncontradicted that Bruce Huggins and Mark Thompson, from this witness stand under oath, told you at the request of the Defense

attorneys that they had, at the time they took the statement of the defendant on this video statement, statements from McCarter and Hoods [sic] that this defendant was the shooter. They had that. March 11, 1988.

. . .

Now they want to talk about the Fifth Amendment. Remember we had, very briefly, Alex Hood come in. They called him. Mr. Hood, as he has a right to do, took the Fifth Amendment. The State of Alabama cannot make him testify. You probably would have liked to have heard his story. We could not force him to testify. We do know that it's undisputed that he said Michael Sockwell did it. Now, Louise Harris, remember she came in and said she was from Tutwiler, gave her name and then said Fifth Amendment. Can't make her testify either. And somehow that's the State's fault? How does that prove the defendant didn't do it? I submit to you, and they have a right to, and they took the Fifth Amendment because what they said would tend to incriminate them because they were involved with the defendant, Michael Sockwell. Louise Harris didn't pull the trigger, Lorenzo McCarter didn't pull the trigger, Alex Hood didn't pull the trigger. They were involved. Who supplied the car? Hood. Who paid 'em the money? McCarter. Who provided the money and planned it and stood to benefit the most financially? Louise Harris. They're just as guilty, and their guilt does not mean Michael Sockwell is not guilty.

R. at 1010–14. Still later in the rebuttal closing, the prosecutor again mentioned Hood's identification of petitioner as the shooter. R. at 1018–19. Finally, in concluding her rebuttal closing, the prosecutor once again obliquely referenced the statements of McCarter and Hood when she argued that the reason petitioner lied at various points in his police statement and in statements attributed to him by other witnesses was because "[he] has a reason to. He is the only one who claims anyone other than himself did it, did the shooting. He's the only one." R. at 1026.

c. State Court Appellate Review

In petitioner's supplemental brief on appeal to the ACCA, he argued that the prosecutor "repeatedly argued and elicited from witnesses inadmissible, inculpatory out-of-court statements by [petitioner's] non-testifying codefendants." Doc. 14-9 at 165. Petitioner cited *Lee* and *Douglas* for the proposition that "the uncross-examined statements of codefendants are incompetent, grossly unreliable evidence[,]" and argued that the references to their inculpatory statements violated the Sixth Amendment. *Id*. at 168–169.

In its opinion, the ACCA acknowledged *Douglas*'s Sixth Amendment holding but further noted that Confrontation Clause violations "are subject to harmless error analysis." *Sockwell*, 675 So. 2d at 34 (citing *Delaware v. Van Arsdall*, 475 U.S. 673 (1986)). The ACCA also noted the defense's objection to the prosecutor's references to the statements of McCarter and Hood, and the trial court's instruction that the jury "disregard the prosecutor's references." *Id*. The ACCA then concluded that any error was harmless:

> In this case, ample evidence was presented to show that the appellant was the shooter.

> Patterson testified that the appellant was the shooter. The appellant was known to be carrying a shotgun in Hood's vehicle. Gilmore testified that the appellant told him that he shot someone in the face. Additionally, the appellant, in his statement to Investigator Huggins, stated that he shot the victim. Thus, in light of the overwhelming evidence and in light of the instruction that the trial judge gave to the jury when defense counsel objected, the prosecutor's argument to the jury during closing argument that Hood and McCarter stated to the police that the appellant was the shooter was harmless error.

Id. at 35.

In his brief in support of his petition for certiorari to the ASC, petitioner repeated his Confrontation Clause claim, with some additional references to portions of the record not highlighted in his briefing before the ACCA. *See* Doc. 14-12 at 91–97. As discussed previously, the ASC summarily denied the claim. *Ex parte Sockwell*, 675 So. 2d at 42.

d. Petitioner's arguments pursuant to § 2254(d)

Petitioner argues that "this Court must presume that the [ASC]'s decision rested on the [ACCA]'s harmless error analysis, and that the [ASC] accepted the apparent conclusion of (or at least the assumption without decision) of the [ACCA] that the prosecutor's conduct violated the Sixth and Fourteenth Amendments." Pet. ¶ 96. He asserts that any determination by a state court that his Confrontation Clause rights were not violated "would be an unreasonable application of clearly established federal law." *Id*. at

¶ 102. He further alleges that the constitutional error was not harmless, as found by the state courts. *Id*. at ¶¶ 103–111.

e. Application

Claim Three is due to be denied for at least two reasons: 1) the ACCA's decision finding any Confrontation Clause error harmless is not contrary to, or an unreasonable application of, clearly established federal law, and is not based upon an unreasonable finding of fact;[16] and 2) any error was harmless under *Brecht*.

i. Petitioner cannot satisfy the AEDPA / Chapman *standard.*

Petitioner can obtain relief only if he can show that the ACCA's decision finding any error harmless was "objectively unreasonable." *Mansfield*, 679 F.3d at 1307. As discussed previously, he faces a high burden in this endeavor because the applicable clearly established federal law, *Chapman*, supplies a "general" rule that affords state courts considerable "leeway" in its application. *Brown*, 142 S. Ct. at 1530. That standard is simply that a constitutional error is harmless if the reviewing court is "able to declare a belief that it was harmless beyond a reasonable

[16] Because the ASC issued a summary decision affirming the ACCA's reasoned disposition of Claim Three, this court presumes that the ASC relied upon the ACCA's reasoning and "looks through" its summary decision to apply AEDPA's standard of review to the ACCA's reasoned decision. *See Wilson v. Sellers*, 584 U.S. __, __, 138 S. Ct. 1188, 1192 (2018) ("We hold that the federal court should 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale. It should then presume that the unexplained decision adopted the same reasoning.").

doubt." *Chapman*, 386 U.S. at 24. *See also United States v. Nicholson*, 24 F.4th 1341, 1354 (11th Cir. 2022) (internal quotations and citations omitted) ("A constitutional error is harmless when the government proves beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. To say that an error did not contribute to the verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record."). In essence, then, petitioner must show that no "fairminded jurist" could agree with the ACCA's determination that any error did not contribute to the jury's verdict. For the following reasons, he cannot do so.

The strongest reason that fairminded jurists can agree with the ACCA's harmless error decision is that, as the ACCA found, the evidence establishing that petitioner was the shooter was "ample." That evidence included Patterson's testimony directly identifying petitioner as Harris's shooter, Gilmore's testimony that petitioner admitted having shot someone in the face, and petitioner's own statement admitting to the crime. While petitioner contests each of these evidentiary points, his arguments suggest, at most, why a fairminded jurist might disagree with the ACCA's conclusion. He falls far short of demonstrating that a fairminded jurist *could not* agree with the ACCA's conclusion. This is insufficient to meet his burden. *See Brown*, 142 S. Ct. at 1530 ("Even if some fairminded jurist applying *Chapman* could reach a different conclusion, [this court] cannot say that every fairminded jurist must.").

For example, petitioner again alleges that Patterson had his own credibility issues because he was in the car with McCarter, Hood, and petitioner and,

therefore, was substantially motivated to "exculpate himself from criminal liability." Pet. ¶ 107. Fair enough, but Patterson testified and was subject to cross-examination. Petitioner points to nothing in the record showing that his testimony was incredible or that the ACCA unreasonably relied upon his testimony in its harmless error analysis.

Petitioner next impugns Gilmore's testimony about petitioner's admission that he shot someone because that person "slapped him," arguing that such "testimony was *inconsistent* with the prosecution's theory that Mr. Sockwell shot the victim 'without notice'" and that there was "no other evidence of any altercation between the victim and Mr. Sockwell or that the victim 'slapped' Mr. Sockwell." *Id*. (emphasis petitioner's). But that establishes, at most, only that petitioner may have lied to Gilmore about the reason that he shot Harris; it does not materially impeach Gilmore's testimony that petitioner admitted to shooting someone, much less show that the ACCA was unreasonable in relying on it in its harmless error analysis.

Finally, petitioner alleges that his own confession was unreliable because it was coerced and "contained factual inaccuracies." *Id*. These points were argued at trial and the jury plainly rejected them. The ACCA was not unreasonable in concluding that the jury's rejection of these points was not attributable to the prosecution's references to McCarter's and Hood's statements incriminating petitioner.

The record reveals other reasons why the ACCA reasonably concluded that the prosecution's references to McCarter's and Hood's inculpatory statements were harmless beyond a reasonable doubt. *First*, just as petitioner has argued with respect to Patterson, to the

extent the jury might have put any stock in the hearsay references to their statements, the jury surely would have understood that McCarter and Hood also were highly motivated to shift blame onto petitioner and away from themselves. As reviewed above, the defense argued this point in its own closing argument.

Second, the defense was able to argue that McCarter's and Hood's statements were unreliable because—unlike petitioner's statement to investigators—they did not indicate that a fourth person, Patterson, was in the car around the time of the murder. In other words, the defense was able to show that McCarter and Hood had lied, at least by omission, in their statements to Huggins. The defense elicited this fact in cross-examination of Huggins, R. at 668, and argued it in its own closing argument. *See* R. at 981–82.

Third, the defense repeatedly made the point that neither McCarter nor Hood had testified from the stand about petitioner. The defense's objection to the prosecution's references to the out-of-court statements during rebuttal closing was sustained, and the jury was instructed to disregard the prosecutor's remarks. No doubt, the trial court's curative instruction could have been more comprehensive, but it cannot be said that the jury was left with the unfettered impression that it should treat any referenced statements by McCarter and Hood as evidence against petitioner. Considering all of these circumstances, the ACCA reasonably concluded that the prejudicial effect of the prosecution's references to the out-of-court statements was sufficiently blunted such that any Confrontation Clause error did not contribute to the jury's verdict.

ii. Any error was harmless under Brecht.

Even if petitioner could satisfy the AEDPA/*Chapman* standard, he cannot show that any Confrontation Clause violation "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 637. To reiterate, the *Brecht* standard "is more favorable to and less onerous on the state, and thus less favorable to the defendant than the *Chapman* harmless beyond a reasonable doubt standard." *Mansfield*, 679 F.3d at 1307 (quotation marks omitted). Petitioner must show "more than a reasonable possibility that the error contributed to the conviction or sentence." *Mason*, 605 F.3d at 1123.

For the reasons already given—namely, the "ample" evidence of petitioner's guilt, the defense's capable argument that any statements by McCarter and Hood were unreliable, the defense's emphasis that the jury had received no evidence from McCarter and Hood, and the trial court's prompt, albeit imperfect, curative instruction when the defense objected—this court cannot conclude that there is more than a reasonable possibility that the prosecutor's references to McCarter's and Hood's statements during rebuttal closing contributed to the jury's guilty verdict. Accordingly, this claim is due to be denied.

4. Claim Four

Claim Four is petitioner's claim that the trial court violated his rights under the Eighth and Fourteenth Amendments by overriding the jury's recommendation of life imprisonment and sentencing him to death on the basis of extra-record information. Pet. ¶¶ 112–13. Specifically, he alleges the trial court's written sentencing order, issued nearly a year after his death

sentence was announced at the sentencing hearing, contained "numerous inflammatory references to evidence from the trial of Louise Harris that had never been presented at Mr. Sockwell's trial, and that Mr. Sockwell had no opportunity to challenge or rebut." *Id*. at ¶ 113.

a. Clearly Established Federal Law

Petitioner identifies one United States Supreme Court decision, *Gardner v. Florida*, 430 U.S. 349 (1977), as comprising the clearly established federal law governing his claim for AEDPA purposes. Pet. ¶¶ 116–21. In *Gardner*, the defendant, Gardner, was convicted of first-degree murder for beating his wife to death with a "blunt instrument." *Id*. at 351. While the jury deliberated his sentence, the trial judge ordered the completion of a presentence investigation report ("PSI"). *Id*. at 352. The jury then returned its advisory verdict, finding that the mitigating circumstances outweighed the aggravating and that, accordingly, Gardner should be sentenced to life. *Id*. at 352–53. A little more than two weeks after trial, the PSI was completed, and two days after completion the trial judge entered his "findings of fact and judgment sentencing petitioner to death." *Id*. at 353. The trial judge found one aggravating circumstance, that the murder was especially heinous, atrocious, and cruel, and found no mitigating circumstances. *Id*. The judge therefore concluded that the aggravating circumstances outweighed the mitigating and sentenced Gardner to death.

"As a preface to that ultimate finding, [the trial judge] recited that his conclusion was based on the evidence presented at both stages of the bifurcated proceeding, the arguments of counsel, and his review of 'the factual information contained in said pre-

sentence investigation.'" *Id*. (citation omitted). The PSI "contained a confidential portion which was not disclosed to defense counsel." *Id*. "The trial judge did not comment on the contents of the confidential portion. His findings do not indicate that there was anything of special importance in the undisclosed portion, or that there was any reason other than customary practice for not disclosing the entire report to the parties." *Id*.

The plurality opinion in *Gardner* held that, to the extent it allowed "a trial judge to impose the death sentence on the basis of confidential information which is not disclosed to the defendant or his counsel[,]" *id*. at 358, this procedure violated due process of law. The opinion identified two principle rationales in support. *First*, the plurality opinion remarked that, because "death is a different kind of punishment from any other which may be imposed[,]" "[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Id*. at 357–58. *Second*, the plurality opinion recognized that "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." *Id*. at 358. This is so because the "defendant has a legitimate interest in the character of the procedure which leads to the imposition of the sentence even if he may have no right to object to a particular result of the sentencing process." *Id*. (citation omitted).

Justice White's concurring opinion explained why Florida's procedure violated the Eighth Amendment, and why that conclusion warranted relief without the need of any due process analysis:

> Here the sentencing judge indicated that he selected petitioner Gardner for the death penalty in part because of information contained in a presentence report which information was not disclosed to petitioner or to his counsel and to which petitioner had no opportunity to respond. A procedure for selecting people for the death penalty which permits consideration of such secret information relevant to the character and record of the individual offender, fails to meet the need for reliability in the determination that death is the appropriate punishment[.] . . . This conclusion stems solely from the Eighth Amendment's ban on cruel and unusual punishments[,] . . . and my conclusion is limited . . . to cases in which the death penalty is imposed. I thus see no reason to address in this case the possible application to sentencing proceedings in death or other cases of the Due Process Clause, other than as the vehicle by which the strictures of the Eighth Amendment are triggered in this case.

430 U.S. at 363–64 (internal quotations and citations omitted).

The Supreme Court has subsequently "adopted Justice White's concurrence as the rule of *Gardner* and explained that the holding of *Gardner* is that "'[a] procedure for selecting people for the death penalty which permits consideration of . . . secret information relevant to the character and record of the individual offender' violates the Eighth Amendment's requirement of 'reliability in the determination that death is the appropriate punishment.'" *Muhammad v. Sec'y, Florida Dep't of Corr.*, 733 F.3d 1065, 1073–74 (11th

Cir. 2013) (quoting *O'Dell v. Netherland*, 521 U.S. 151, 162 (1997)).

b. Proceedings in the Trial Court

After the jury returned its 7-5 recommendation that petitioner be sentenced to life, the trial court scheduled a separate sentencing hearing as required by Alabama law. At that hearing, held a few weeks after trial concluded, prosecutors presented additional witness testimony about a previous incident involving petitioner's use of a firearm. Following the witness testimony and summary argument by the parties, the trial court sentenced petitioner to death. R. at 1262. Several months later, the State filed a proposed sentencing order. The trial court entered the proposed sentencing order on February 28, 1991, almost one full year following the trial court's pronouncement of sentence on March 2, 1990.

The trial court prefaced the sentencing order by articulating the sources upon which it drew in making its findings:

> The findings contained in this order are based upon the evidence presented at trial, the evidence presented at the sentencing hearing before the jury, the presentence report with the exception of the victim impact statement which the Court has not read and will not consider, and the evidence presented at the sentencing hearing before this Court. The Court has considered all contentions made by the parties. The Court has also considered the jury's advisory verdict.

Doc. 14-8 at 38. In a section titled, "General Findings Concerning the Defendant and the Crime," the sentencing order included several findings relating to

Louise Harris that were not in evidence or otherwise part of the record. The petition summarizes these "findings" as follows:

> Among other things, the order stated that Louise Harris had never obtained a divorce from the victim; that she asked Mr. McCarter to hire someone to kill her husband; that she engaged in an extramarital affair with Mr. McCarter; that she did not express concern for her husband when his employer called to inquire why he was not at work; that she also did not express grief when the police informed her that her husband had been murdered; and that she said Mr. McCarter "made love to her like nobody else could."

Pet. ¶ 113. *See also* Doc. 14-8 at 39–40.[17]

The sentencing order then proceeded to discuss aggravating and mitigating circumstances. Specifically, the trial court found one aggravating circumstance supported by the evidence: that the murder was committed for pecuniary gain. Doc. 14-8 at 41. Balanced against this was the statutory mitigating circumstance that petitioner had no prior felony

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[17] Upon review and comparison, it is evident that the "General Findings Concerning the Defendant and the Crime" section of the trial court's sentencing order was a "cut-andpaste" of the same section in the sentencing order previously entered by the same trial court in the Louise Harris prosecution. *See* Doc. 24, Exh. A, C.R. 1254, *Harris v. Thomas*, 2:11 cv-552-WKW-SRW. There are minor edits to convey unique biographical information about each defendant, but, in all other respects, including the "inflammatory" information about Harris described in the instant petition, the description of the crime is the same in the Harris and Sockwell sentencing orders. Petitioner highlighted this comparison in his brief before the ASC. *See* Doc. 14-12 at 126–27.

convictions, as well as evidence of non-statutory mitigating circumstances, including petitioner's familial connections, commendable work record, his good behavior after his arrest, and that he "appeared somewhat remorseful and cooperative." *Id*. at 42. Ultimately, the trial court determined "that the one statutory aggravating circumstance found and considered far outweighs all of the statutory and non-statutory mitigating circumstances, and that the sentence ought to be death." *Id*. at 43.

c. State Court Appellate Review

On direct appeal to the ACCA, petitioner claimed that the trial court erred at sentencing in "considering arbitrary factors in imposing the death sentence" and, in support, identified the several "findings" regarding Louise Harris that were previously described. Doc. 14-9 at 107–08. He argued that the sentencing order shows that the trial judge "allowed extra-judicial matter to interfere with his duty as a judge." *Id*. at 109.[18]

The ACCA rejected the claim, ultimately finding any error harmless. The ACCA described the facts pertaining to Harris included in the sentencing order, but further observed "that several of the general facts as set forth in the trial court's sentencing order are reasonable inferences from the evidence produced at trial." *Sockwell*, 675 So. 2d at 30. While acknowledging

[18] As discussed previously, petitioner also raised a constitutional challenge to the trial court's sentencing order in his supplemental brief in the ACCA, in which he argued that, pursuant to *Gardner*, the trial court's consideration of evidence that was not presented at his trial violated his "right, as a capital defendant, to be confronted with and to respond to any evidence, argument, or other information presented to the sentencer." *See* Doc. 14-9 at 139–40.

that some of the facts set forth in the order "were not based upon evidence contained in the record," the ACCA held "that error in the trial court's sentencing order is not so egregious as to require a new sentencing order." *Id*. In support, the ACCA found that "there was ample evidence and facts adduced from that evidence in this case that the murder was committed for pecuniary gain, justifying the imposition of a death sentence." *Id*. The ACCA then articulated its harmless error analysis:

> While the trial court refers to some extraneous matters in the sentencing order, it is clear that the trial court considered the statutory and nonstatutory mitigating circumstances in imposing sentence upon the appellant. Additionally, the trial court found only one aggravating circumstance—that the murder was committed for pecuniary gain. The sentencing order reflects that the trial court weighed the mitigating circumstances and the aggravating circumstance and there is no evidence that the trial court failed to consider the mitigating circumstances. The sentencing order does not reflect that the court considered any extraneous matter in imposing sentence against the appellant. Therefore, because the extraneous matters did not affect the trial court's proper weighing of the aggravating and mitigating circumstances, we find that the court's referral to some extraneous matter in its sentencing order was harmless error.

Id.

On appeal to the ASC, petitioner again challenged the trial court's reliance on extra-record information

about Harris in the sentencing order. Citing *Gardner*, he argued that he was deprived of his right "to be confronted with and to respond to any evidence, argument or other information presented to or relied on by the sentencer." Doc. 14-12 at 129. He also argued that, because he was sentenced to death, at least in part, on evidence that was applicable only to Harris, he was deprived of an individualized determination of sentence, as required by the Eighth Amendment. *Id*. at 130. He also argued, again citing *Gardner*, that the ACCA's harmless error analysis was "legally flawed and factually untenable." *Id*. at 131–33. The ASC summarily denied petitioner's claim on the merits. *See Ex parte Sockwell*, 675 So. 2d at 42.

d. Petitioner's Argument Pursuant to § 2254(d)(1)

Petitioner argues that the ACCA's harmless error analysis is subject to review under the AEDPA and that any implicit determination that his constitutional rights were not violated "involved an unreasonable application of clearly established federal law." Pet. ¶ 115.

e. Application

As discussed previously, there is some ambiguity about whether petitioner presented Claim Four in the ACCA. While this ambiguity has no bearing on whether the claim is procedurally defaulted, it potentially determines which state court decision is subject to AEDPA's standard of review in this court. If, as the parties appear to have agreed, the constitutional claim was first presented to the ASC, which summarily denied it, then there is no reasoned state court appellate decision addressing the constitutional claim. In that circumstance, this court "must determine

what arguments or theories supported, or . . . could have supported the state court decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of" the Supreme Court. *Harrington*, 562 U.S. at 102. In that review, this court would consider whether the ASC reasonably could have determined that there was no constitutional violation under *Gardner*, or whether the ASC reasonably could have determined that any *Gardner* error was harmless beyond a reasonable doubt under *Chapman*.

If, on the other hand, the constitutional claim was presented to the ACCA, which denied it on harmless error grounds, and then was presented to the ASC, which summarily affirmed the ACCA, then this court is to presume that the ASC relied upon the ACCA's reasoning and "look through" its summary decision to apply AEDPA's standard of review to the ACCA's reasoned decision. *Wilson*, 138 S. Ct. at 1192. Because the ACCA applied harmless error analysis and did not plainly determine whether a constitutional violation under *Gardner* occurred, there is no adjudication of that constitutional question to which this court would apply AEDPA's standard of review. Instead, this court would review the ACCA's harmless error analysis pursuant to the AEDPA/*Chapman* standard.

Ultimately, this court need not hack its way out of this thicket because, no matter which state court decision is operative for AEDPA purposes, petitioner cannot show that any error under *Gardner* had a substantial and injurious effect or influence on the

trial judge's determination of his sentence.[19] Because he cannot show that any error was not harmless under *Brecht*, Claim Four may be denied irrespective of any AEDPA review of the decisions of the state courts. *See, e.g., Mansfield*, 679 F.3d at 1308 ("Similarly, a federal court may deny habeas relief based solely on a determination that the constitutional error is harmless under the *Brecht* standard.").

Several circumstances demonstrate that the paramount concerns of *Gardner* were not necessarily implicated by the trial court's sentencing order. Start with what has come to be recognized as the applicable rule of *Gardner*. Justice White's concurring opinion was concerned with a "'procedure for selecting people for the death penalty which permits consideration of . . . *secret information relevant to the character and record of the individual offender*[.]'" *O'Dell*, 521 U.S. at 162 (quoting *Gardner*, 430 U.S. at 364) (emphasis supplied).

Here, even if the facts about Louise Harris included in petitioner's sentencing order could be described as "secret," in that they were not revealed to petitioner in a manner that allowed him to rebut them before he was sentenced, it cannot be argued that they are "relevant to the character and record" of petitioner. Were the extra-record facts included in the sentencing order even arguably "relevant" to petitioner, the ambiguity about what the sentencer considered that was determinative in *Gardner* would be conspicuous.

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[19] *Gardner* error is subject to harmless error review under *Brecht*. *See Vining v. Sec'y, Dep't of Corr.*, 610 F.3d 568, 570–71 (11th Cir. 2010); *id.* at 571 n.3 (recognizing that, although *Brecht* describes a "prejudicial impact on the jury," the same analysis applies "in cases where the judge may accept or reject a jury recommendation").

Here, however, the Harris facts that are not reasonable inferences from the record—namely, the status of her marriage, her callous indifference to her husband's death, her comments about McCarter's sexual prowess—plainly have nothing to do with *petitioner*. It is therefore more plausible here than in *Gardner* that a reviewing court can separate the wheat from the chaff and reliably discern whether the facts pertaining exclusively to petitioner's "character and record" are those that that the sentencing court actually relied upon in imposing the sentence. This circumstance distinguishes petitioner's claim from both the due process and Eighth Amendment rationales underpinning the separate opinions in *Gardner*.

More important, the overall purpose, structure, and content of the sentencing order make clear that any *Gardner* error was harmless under *Brecht*. As indicated by the ACCA, the sentencing order's ultimate function is "to allow an appellate court to review a death sentence." *Sockwell*, 675 So. 2d at 30. Under Alabama law, it is the presence, or absence, of aggravating and mitigating circumstances, and their relative weighing, that determines whether a defendant may be sentenced to death. It is apparent here that the sentencing order's inclusion of extraneous facts about Louise Harris did not intrude upon the trial court's findings respecting the presence of the pecuniary gain aggravating circumstance. The sentencing order's findings respecting the aggravating circumstance are separately situated from the "general findings" about Louise Harris and in no way rely upon or relate to any of the extraneous facts about Harris. *See* Doc. 14-8 at 40. Likewise, the sentencing order's weighing of aggravating and mitigating circumstances does not suggest any improper consideration of facts about Harris. The sentencing order is explicit that "the Court

is convinced that the one statutory aggravating circumstance found and considered far outweighs all of the statutory and non-statutory mitigating circumstances, and that the sentence ought to be death." *Id*. at 42–43.

Petitioner's answer to this circumstance is that the same argument could be made about *Gardner*, "where the trial judge did not comment on the contents of the confidential portion" of the PSI or "indicate that there was anything of special importance in the undisclosed portion." Doc. 26 at 27 (quotations and citation omitted). This argument has at least two flaws, however. *First*, *Gardner* was not before the Supreme Court on habeas review and the error identified in *Gardner* was not subject to *Brecht*'s harmless error standard. *Second*, in *Gardner* the sentencer did say that he relied upon the PSI, with no qualification that he relied upon only the non-confidential portion of the document. Thus, there simply was no way to know whether anything in the confidential portion was germane to the sentence. Here, by contrast, the essential findings supporting the sentence—the presence of aggravating and mitigating circumstances, and their relative weight—are in no way predicated on any "secret," or previously undisclosed, facts about Louise Harris.

Petitioner concludes by arguing that "there is simply no conceivable reason (and respondent provides none) why the trial judge would include extra-record information in his sentencing order if he did not even *consider* it in determining the sentence." Doc. 26 at 28 (emphasis petitioner's). On the contrary, there is a conceivable—even practical—reason, and, while it does not commend the trial court's diligence, it most likely explains what happened. The reason Sockwell's

sentencing order includes the extra-record information about Louise Harris is that it was constructed from the template of the Louise Harris sentencing order, with only minor edits to reflect Sockwell's unique biographical information. The scrivener's attention to Sockwell's respective biographical information unfortunately did not extend to a scrupulous description of the "General Findings" about "The Crime" limited to the evidence admitted at Sockwell's trial.

No doubt, this level of inattention in capital sentencing should not be condoned. But apparent inattention does not mean that petitioner was sentenced to death because of, or for the same reasons as, Louise Harris, or that any error in including extra-record information about Harris influenced the trial court's sentence. Petitioner was accused of shooting Isaiah Harris in the face with a shotgun in exchange for $50 and the hope of further payment after the deed. The jury convicted him of capital murder for pecuniary gain. The jury's verdict established the only aggravating circumstance the trial court relied upon in its sentencing determination. The trial court simply disagreed with the advisory jury's weighing of aggravating and mitigating circumstances. Considering these facts against what reasonably appears to be the trial court's failure to properly scrutinize a proposed sentencing order, this court can say, "with fair assurance," that the trial court's sentencing determination was not "substantially swayed" by consideration of any extraneous, albeit "inflammatory," facts about *Louise Harris*. *O'Neal*, 513 U.S. at 437–38. Accordingly, petitioner cannot show actual prejudice pursuant to *Brecht*.

5. Claim Five

Claim Five is petitioner's claim that he cannot constitutionally be sentenced to death because he is intellectually disabled. He first presented this claim to the state court in collateral review pursuant to Rule 32 of the Alabama Rules of Criminal Procedure. *See* Doc. 14-18 at 15–16. The operative amended Rule 32 petition presenting this claim was summarily denied by the Circuit Court of Montgomery County. *See* Doc. 14-25 at 159–160. The ACCA affirmed in a reasoned decision. Doc. 14-25 at 180–183. The ASC denied certiorari. *Ex parte Sockwell*, 140 So. 3d 945 (Ala. 2013). The parties are in agreement that the ACCA's decision rejected petitioner's claim on the merits, and that, accordingly, AEDPA's standard of review governs Claim Five. *See* Pet. ¶¶ 130–31; Ans. (Doc. 13) ¶ 66.

a. Clearly Established Federal Law

In *Atkins v. Virginia*, 536 U.S. 304, 321 (2002), the Supreme Court held that the Eighth Amendment forbids the execution of intellectually disabled persons. *Atkins* defined intellectual disability by reference to the American Association of Mental Retardation's definition:

> Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18.

Id. at 308 n.3 (emphasis removed).

The Court in *Atkins* "granted the states some discretion to develop standards for assessing whether an offender is intellectually disabled." *Smith v. Comm'r, Alabama Dep't of Corr.*, 67 F.4th 1335, 1344 (11th Cir. 2023) (citation omitted). Shortly after *Atkins*, the ASC adopted "the broadest definition of mental retardation" for resolving *Atkins* claims in Alabama:

> [A] defendant, to be considered mentally retarded, must have significantly subaverage intellectual functioning (an IQ of 70 or below), and significant or substantial deficits in adaptive behavior. Additionally, these problems must have manifested themselves during the developmental period (i.e., before the defendant reached age 18).

Ex parte Perkins, 851 So. 2d 453, 456 (Ala. 2002). In addition, the defendant must show that these "problems" were present at the time the crime was committed. *Smith v. State*, 213 So. 3d 239, 252 (Ala. 2007).

b. Proceedings in the Rule 32 Court

The operative amended Rule 32 petition presented petitioner's *Atkins* claim in seven numbered paragraphs. *See* Doc. 14-18 at 15–16. Only two of these paragraphs arguably alleged any discrete facts, as opposed to conclusions, in support of petitioner's *Atkins* claim. The third paragraph alleged as follows: "Alabama Lunacy Commission reports prepared after Petitioner's arrest, from November 1988, showed him as having a 'borderline intelligence.' Petitioner's Montgomery Public School records from September 1974 indicate Petitioner's IQ at 64." The fifth paragraph alleged that petitioner's intellectual disability "prevented him, in

this case, from providing any meaningful assistance to counsel during the trial." The remainder of the paragraphs generally described the holding and rationale of *Atkins* and allege that petitioner is entitled to *Atkins* relief.

The Circuit Court granted the State's motion to dismiss the Rule 32 petition without affording an evidentiary hearing. On the *Atkins* claim, the Circuit Court concluded that petitioner "is not mentally retarded." Doc. 14-25 at 159. The Circuit Court recited Alabama's definition of intellectual disability and ruled as follows: "Sockwell has failed to allege or provide any evidence of 'significant or substantial deficits in adaptive behavior.' In as much as Sockwell's second amended petition has failed to support his claim, this petition is insufficiently pleaded and, therefore, DISMISSED." *Id*. at 160 (citations omitted).

c. State Court Appellate Review

The ACCA affirmed the Rule 32 court's summary dismissal of petitioner's *Atkins* claim:

> Sockwell argues that the trial court should not have held that he failed to adequately plead the second and third prongs set forth in Ex parte Perkins because, he says, "[T]he common thread that is pleaded in Petitioner's Rule 32 [petition] is one of adaptive deficits and mental impairment beginning around age 12." A postconviction petition "must contain a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds." Rule 32.6(b), Ala. R. Crim. P. To satisfy Rule 32.6(b), Sockwell was required to plead full facts to support each individual

> claim. Thus, contrary to what Sockwell now argues, it is not sufficient that the facts necessary to support this claim might somehow be gleaned from other parts of the petition that raise other claims and pieced together to form a fully-pleaded claim. Sockwell pleaded a conclusion that he is mentally retarded. In this claim the only facts Sockwell alleged in support of the claim are: "Alabama Lunacy Commission reports prepared after Petitioner's arrest, from November 1988, showed him as having a 'borderline intelligence'. Petitioner's Montgomery Public School records from September 1974 indicate Petitioner's IQ at 64."
>
> Sockwell clearly failed to plead facts on which an Atkins claim can be based. An allegation of borderline intellectual functioning actually contradicts an Atkins claim. The remaining allegation – a subaverage IQ score in public school -- is not sufficient to plead any of the three prongs of Ex parte Perkins. Therefore, the trial court correctly found this claim to be insufficiently pleaded, and correctly summarily dismissed it. Sockwell is not entitled to relief as to this claim.

Doc. 14-25 at 182–83 (quotations and citations omitted). Because the ACCA affirmed the Rule 32 court's summary dismissal due to petitioner's insufficient pleading of his *Atkins* claim, the ACCA declined to "address the trial court's alternative holding that Sockwell could not establish" intellectual disability. *Id*. at 183 n.5. As noted previously, the ASC denied petitioner's request for certiorari review. Doc. 14-25 at 214–16.

d. Petitioner's Argument Pursuant to § 2254(d)(1)

Petitioner alleges that the ACCA's conclusion that he did not plead sufficient facts to support his *Atkins* claim is an adjudication of the merits of the claim. Pet. ¶ 130. He maintains that the ACCA unreasonably applied *Atkins* because he alleged in his Rule 32 petition that he received an IQ score of 64 when he was twelve, "clearly indicating significantly subaverage intellectual functioning." *Id*. at ¶ 131. He further alleges that his Rule 32 petition "pleaded a number of facts indicating significant or substantial deficits in adaptive behavior[.]" *Id*. He appears to concede, however, that these facts were alleged in disparate portions of the Rule 32 petition as factual support for unrelated claims. *Id*. Nevertheless, he argues the ACCA unreasonably failed to recognize these factual allegations in its assessment of the sufficiency of his pleading of the *Atkins* claim. *Id*. He also argues that he is entitled to an evidentiary hearing in this court because he "was improperly hamstrung in the state courts from further developing his *Atkins* claim[.]" *Id*. at ¶ 132.

e. Application

The ACCA's conclusion that petitioner failed to adequately plead facts to support his *Atkins* claim was not contrary to, or an unreasonable application of, *Atkins*, and was not based upon an unreasonable determination of fact. Petitioner plainly did not plead in the relevant part of his petition facts establishing that, both before the age of eighteen and at the time of the crime, he had significant or substantial deficits in adaptive behavior. Petitioner does not even argue that he pleaded such facts in his *Atkins* claim in his amended Rule 32 petition. Instead, he argues that

stray factual allegations taken from other portions of the amended Rule 32 petition could have provided the requisite allegations about deficits in adaptive functioning. *See* Pet. ¶ 131.

For example, petitioner cites the amended Rule 32 petition's allegations that, *inter alia*, petitioner "is illiterate, grew up in poverty, was recommended for special education classes (which his mother refused to allow), left school after the ninth grade, and had an IQ in the low 60s." Doc. 14-17 at 131–32. But these allegations were presented as part of the "Factual Innocence" section of Claim One of the amended Rule 32 petition, which alleged as follows:

> THE PROSECUTION FAILED TO PROVE PETITIONER'S GUILT BEYOND A REASONABLE DOUBT AS TO THE CHARGE OF CAPITAL MURDER AND MURDER, AND THE CONVICTION HEREIN AND SENTENCE OF DEATH THERFORE DEPRIVED PETITIONER OF HIS RIGHT TO DUE PROCESS, IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE CONSITUTION OF THE UNITED STATES, AND THE CONSITUTTION AND LAWS OF ALABAMA.

Id. at 129. Furthermore, these allegations appear to have been offered, not as proof of intellectual disability, but as a predicate to support petitioner's claim that his inculpatory statement to investigators was false.

Petitioner also cites the Rule 32 petition's allegation that he "has a long, well documented history of mental retardation and impairment." Doc. 14-17 at 134. But this allegation was presented in his claim alleging that counsel was ineffective in pretrial investigation of

petitioner's background and "mental impairments." *Id*. Likewise, petitioner points to the amended Rule 32 petition's allegation that counsel "did not present school records to reflect [his] mental retardation, adjustment problems, need for special education placement." *Id*. at 144. But, again, these allegations were presented in support of the Rule 32 petition's claim that counsel rendered ineffective assistance at the penalty phase of trial.

Even if all of the above scattered Rule 32 allegations describing petitioner's impairments adequately alleged significant or substantial deficits in adaptive behavior pursuant to *Perkins*, and this court does not conclude that they do, petitioner has pointed to no authority that would require a state court to scour a lengthy petition in search of allegations that might support an *Atkins* claim that the petitioner otherwise failed to properly support with clear, relevant factual allegations. As the ACCA observed, Rule 32.6(b) certainly requires more, and nothing in *Atkins* or any other clearly established federal law renders that conclusion unreasonable.

At bottom, the *Atkins* claim in petitioner's amended Rule 32 petition makes no reference to the definition of intellectual disability adopted by the Alabama Supreme Court and does not even arguably present any factual allegations to establish at least one of the three requirements of Alabama's test. Instead, apart from a single allegation about petitioner's IQ score from school records and an assessment after his arrest that he functioned in the "borderline" range of intelligence, the Rule 32 petition only presents several conclusory statements that petitioner is "mentally retarded" and due to have his sentence vacated.

Hence, the ACCA did not unreasonably apply *Atkins* in concluding that petitioner failed to plead sufficient facts to substantiate his claim. *See Powell v. Allen*, 602 F.3d 1263, 1272 (11th Cir. 2010) (concluding that the state court did not unreasonably apply *Atkins* when it summarily dismissed *Atkins* claim for insufficient pleading because the Rule 32 petition alleged only that the petitioner "was diagnosed as mildly mentally retarded in the fifth grade"). *See also Smith v. Campbell*, 620 F. App'x 734, 748 n.20 (11th Cir. 2015) (remarking, "where a state court accurately identifies what allegations were included in a petition and concludes that those allegations failed to meet a pleading requirement, that is a legal conclusion, which is subject to review under § 2254(d)(1)). Nor is the ACCA's factual determination that petitioner only "pleaded a conclusion that he is mentally retarded" an unreasonable determination of the facts based upon the record before the ACCA. *See Smith*, 620 F. App'x at 748–49 (state court's "factual determination about whether" Rule 32 petition's *Atkins* claim "recounted any facts at all or only conclusory allegations" is reviewed pursuant to § 2254(d)(2)).

Finally, because petitioner has not demonstrated that the ACCA's decision was contrary to, or an involved an unreasonable application of, clearly established federal law, and was not based upon an unreasonable determination of fact, his request for an evidentiary hearing in this court must be denied. This court is required to deny habeas relief on petitioner's *Atkins* claim if he cannot satisfy AEDPA's standard of review. § 2254(d). In that review, this court is permitted to consider only the record that was before the state court at the time it rendered its decision denying the *Atkins* claim on the merits. *Cullen v. Pinholster*, 563 U.S. 170, 181–82 (2011). Because, for

the reasons given above, petitioner cannot satisfy AEDPA's standard of review, he is not entitled to a federal evidentiary hearing on his *Atkins* claim. *See, e.g., Jenkins v. Comm'r, Alabama Dep't of Corr.*, 963 F.3d 1248, 1278 n.16 (11th Cir. 2020).

V. CERTIFICATE OF APPEALABILITY

In pertinent part, Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts provides as follows: "The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. . . . If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2)."

A certificate of appealability is necessary before a petitioner may pursue an appeal in a habeas corpus proceeding. 28 U.S.C. § 2253. To mandate the issuance of a certificate of appealability, a petitioner must make a "substantial showing of the denial of a constitutional right." § 2253(c)(2); *see also Barefoot v. Estelle*, 463 U.S. 880, 893 (1983). Generally, such a showing requires something more than absence of frivolity, and it is a higher standard than the good faith requirement of 28 U.S.C. § 1915(d). *See Clements v. Wainwright*, 648 F.2d 979, 981 (5th Cir. 1981). In short, a petitioner must show "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot*, 463 U.S. at 893 and n.4) (internal quotations omitted). Based upon careful consideration, petitioner has made a substantial showing of the denial of a constitutional right on the following issue:

Whether the State exercised its peremptory challenge of veniremember Eric Davis in a racially discriminatory manner.

Accordingly, it is ORDERED that a Certificate of Appealability is granted as to the issue listed above.

VI. CONCLUSION

For the foregoing reasons, it is ORDERED that Sockwell's petition for writ of habeas corpus is DISMISSED without an evidentiary hearing.

An appropriate final judgment will follow.

DONE this 29th day of September, 2023.

/s/ W. Keith Watkins
UNITED STATES DISTRICT JUDGE

APPENDIX C

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 Decision, 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*.

SUPREME COURT OF ALABAMA

OCTOBER TERM, 1995-96

1930754

EX PARTE MICHAEL A. SOCKWELL

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS

(IN RE: MICHAEL ANTHONY SOCKWELL

v.

STATE OF ALABAMA)

(Montgomery Circuit Court, CC-88-1244;
Court of Criminal Appeals, CR-89-0225)

BUTTS, JUSTICE.

Michael Sockwell was convicted of murder made capital by Ala. Code 1975, § 13A-5-40(a)(7), based on

the shooting death of Isaiah Harris. After a sentencing hearing, the jury recommended life imprisonment without the possibility of parole; however, the trial court overrode that recommendation and sentenced Sockwell to death by electrocution. The Court of Criminal Appeals affirmed the conviction and sentence. *Sockwell v. State*, [Ms. CR-89-0225, Dec. 30, 1993] __ So.2d __ (Ala. Crim. App. 1993). The Court of Criminal Appeals, in its opinion, provided a detailed description of the facts.

Having carefully reviewed the record, along with the extensive briefs from Sockwell and the State, we conclude that the Court of Criminal Appeals correctly resolved the issues discussed in its opinion. We do, however, find it necessary to examine that court's rationale for its disposition of one of the issues concerning whether the State improperly used its peremptory strikes to remove prospective black jurors from the venire in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). Additionally, we will consider a second Batson issue that Sockwell raised in his appeal before the Court of Criminal Appeals, which that court failed to address.

The venire had 10 black members; the State peremptorily struck 8 of them. Sockwell objected to those strikes, pursuant to Batson. Although the trial court did not make a finding of prima facie discrimination, it nevertheless ordered the prosecutor to give the reasons for her strikes. As she gave her answers regarding each veniremember she had struck, the prosecutor first identified the race and sex of the veniremember as an introduction, then gave the reason or reasons for striking that veniremember. As to E.D., juror number 112, the prosecutor stated:

> "We then struck number 112, who was a black male, according to our records 23 years old. He was extremely vague to the Court's questions about what he had heard. You might remember he said, 'Well, I just heard a little something,' and he kept—well, what did you hear? Where did you hear it? He said, 'Well, in the paper, or something.' The Court then asked him again. He was unclear and then finally he said, 'Well, some people were talking about it. I never really read the paper.' He could not remember what he heard. He said that he could go either way but he was not pro death penalty and personal observations of the attorneys [sic]."

Sockwell's attorney then cross-examined the prosecutor:

> "A. Your reasons again for striking [E.D.]?
>
> "Q. You want me to repeat them?
>
> "A. Yes, ma'am.
>
> "Q. Okay, [E.D.], according to my notes is a black male, approximately 23 years of age, which would put him very close to the same race, sex, and age of the defendant. He had said to the Court he had heard a little something. The Court questioned him further and he finally said, 'Well, I heard it from the paper, or something.' The Court questioned him further. He was very vague and unclear in his answer. The Court asked him more about it and he said, 'Well, some people were talking about it. I didn't actually read it.' He could not remember what had been said nor anything about—anything further about

> those. His answers to the death penalty did not give me a lot of clues either way as to how he felt. In fact, I think the words he used were 'I could go either way.'"

In reviewing that exchange, the Court of Criminal Appeals wrote, "The prosecutor stated that in addition to the fact that he was the same age and gender as the appellant and his vague responses in regard to pretrial publicity, *E.D.'s race was part of the reason for striking him.*" __ So.2d at __ (emphasis added). The Court of Criminal Appeals then held that, although this "reason" was based on race, the fact that the prosecution articulated another, race-neutral, reason for the strike made the strike acceptable under *Batson.*

We do not agree with the Court of Criminal Appeals that the prosecutor's opening remark identifying E.D. as a black man was given as a *reason for striking him* from the venire; on the contrary, given the context of the entire exchange, we conclude that this was merely a descriptive identification of the veniremember based on the prosecutor's notes. When the prosecutor gave the reasons for striking a veniremember, either white or black, she first prefaced her remarks by stating the veniremember's race and sex, as she did with E.D. The only *reasons* the prosecutor gave for striking E.D. were his vagueness and lack of candor in stating what he had already heard about the trial, from what source he has gotten this information, and whether he could be willing to recommend the death penalty.

We emphasize our disagreement with the Court of Criminal Appeals' inference that a peremptory strike may be upheld if it is based only *partly* on race, that is, if the prosecutor articulates both a racially motivated reason and a race-neutral reason for a strike. We note that the Court of Criminal Appeals had previously

addressed this issue in *Owens v. State*, 531 So.2d 22 (Ala. Crim. App. 1987), wherein it reversed a capital murder conviction based on improper peremptory strikes of black veniremembers. The court noted, "Simply because race is incidentally mentioned by the prosecutor in his rendition of reasons for exercising his strikes as he did does not, as a matter of law, establish purposeful discrimination." *Owens*, 531 So.2d at 25 (emphasis omitted). There, however, the prosector admitted that race was a "reason" and a "factor" that was considered along with race-neutral reasons for the strike. *Owens*, 531 So.2d at 24-25. The court held that the strikes were not permissible, because one of the *reasons* for the strikes was race.

As stated, the Court of Criminal Appeal incorrectly construed the prosecutor's mention of Sockwell's race as a *reason* for the strike, rather than as part of the same predicate of identification that she mentioned for all the veniremembers she had struck, both white and black. It then incorrectly construed *Owens* as support for the proposition that it is permissible to allow a peremptory strike that is based on both race-neutral and non-race-neutral reasons. We hold that *Owens* cannot be read to suggest that a nonrace-neutral *reason* given for a peremptory strike will "cancel out" a race-based reason; rather, *Owens* recognizes only that the mere *mention* of race, like that made here by the prosecutor as a means of identifying the veniremember, does not necessarily establish that a peremptory strike was based on a racially motivated reason and was the product of purposeful discrimination.

The trial court, which must be given great discretion in determining the context in which race was mentioned, found that the strike was race-neutral. After considering the entire context of the prosecutor's

explanation, we find no abuse of this discretion. The Court of Criminal Appeals' disposition of this issue was correct, although its rationale was not.

Sockwell next argues that the reasons given for striking several other black veniremembers were pretextual or were not supported by the record. He challenges the prosecutor's striking of veniremembers P.S., B.E., U.C., and L.H.

The prosecutor stated that she struck P.S. because she felt that P.S. did not understand her questions concerning the death penalty. The prosecutor stated that this impression arose because, she said, P.S. shrugged and vaguely waved her arms when asked about the death penalty. Additionally, P.S. had reported a rape in 1989 and the charge against her alleged assailant had been nol-prossed. The prosecutor stated that she feared P.S. would hold this against the State, and she said she also questioned P.S.'s credibility.

The prosecutor stated that she struck L.H. because she perceived L.H. to be "extremely hesitant" on death penalty questions, because he did not answer when his name was called on the roll call of venirepersons, and because he appeared "extremely weak in the way he responded, his voice and his mannerisms."

The prosecutor stated that she struck B.E., an 81-year-old black man, because he appeared to have a visual impairment and because he stated that he was generally opposed to the death penalty.

The prosecutor stated that she struck U.C. because he had prior criminal convictions and because he stated that he was opposed to the death penalty in general and did not feel that he could recommend it.

Sockwell argues that the reasons for those strikes were pretextual because, he says, white veniremembers with similar characteristics were not struck. He points out that two white veniremembers the prosecutor did not strike had criminal records, just as U.C. did; however, the record reveals that the criminal offenses of one white juror were remote in time and that that juror had returned a verdict for the plaintiff in a civil case, and that the other white juror expressed strong views in favor of the death penalty. These facts establish that the two white jurors exhibited characteristics that were favorable to the prosecution and that could counterbalance the negative characteristic of their criminal records, while U.C. did not exhibit characteristics favorable to the prosecution.

Sockwell also argues that two white veniremembers expressed doubt as to whether they could recommend the death penalty, but were not struck for this reason. The record reveals, however, that those two white veniremembers did not initially hear the question concerning their views on the death penalty and that when the question was clarified, they both answered that they could impose it.

After carefully reviewing the record as it relates to the prosecutor's peremptory strikes, we must conclude that it does not establish that the prosecutor engaged in disparate treatment in the striking of black persons and the striking of white persons.

We note that Sockwell has raised in this Court issues that either were not before the Court of Criminal Appeals or were not addressed in its opinion. In a capital case, this Court may consider any issue concerning the propriety of the conviction and the death sentence, and we have thoroughly considered each issue Sockwell has raised. We have also inde-

pendently searched the record for reversible error, considering the applicable law as it relates to the facts of this case, and have found none.

The judgment of the Court of Criminal Appeals is affirmed. AFFIRMED.

Maddox, Shores, Houston, and Ingram,* JJ., concur.

Hooper, C. J.,* and Kennedy and Cook, JJ., dissent.

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* Chief Justice Hooper and Justice Ingram did not sit at oral argument of this case. However, Chief Justice Hooper listened to the tape of oral argument on November 16, 1995, and Justice Ingram listened to the tape of oral argument on November 7, 1995.

Ex parte Michael As Sockwell

KENNEDY, JUSTICE (dissenting).

I believe the State violated the principles of *Batson v. Kentucky*, 476 U.S. 79 (1986), and its progeny; therefore, I must dissent.

Michael Anthony Sockwell was convicted of the murder of Isaiah Harris, made capital because it was committed for pecuniary gain or for valuable consideration, or pursuant to a contract for hire. § 13A-5040(7), Ala. Code 1975. The jury recommended life imprisonment without the possibility of parole, by a seven-to-five vote. The trial judge considered the recommendation; however, he sentenced Sockwell to death, after weighing the aggravating and mitigating circumstances.

The determinate issue is whether the district attorney exercised her peremptory challenges in a racially discriminatory manner in violation of Batson.

There were 42 persons on the qualified venire. Ten of those 42 were black. The State had 15 peremptory challenges, and it used 8 of them to strike blacks from the jury.

Sockwell's counsel timely made a *Batson* motion. The trial court did not make a finding as to whether there was a prima facie case of racial discrimination. Nevertheless, the trial court required the prosecutor to give reasons for her peremptory challenges. The district attorney testified as follows with regard to prospective juror E.D.:

> "We then struck number 112, [E.D.,] who was a black male, according to our records 23 years old. He was extremely vague to the Court's questions about what he had heard.

> You might remember he said 'Well, I just heard a little something,' and he kept – well, what did you hear? Where did you hear it? He said, 'Well, in the paper or something.' The Court then asked him again. He was unclear and then finally he said, 'Well, some people were talking about it. I never really read the paper.' He could not remember what he heard. He said that he could go either way but he was not pro death penalty and personal observations of the attorneys [sic]."

(R.T. 407.)

The trial court then allowed Sockwell's counsel to question the prosecutor with regard to her peremptory challenges:

> "[Sockwell's counsel:] Your reasons again for striking [E.D.]?
>
> "[Prosecutor:] You want me to repeat them? "[Counsel:] Yes, ma'am.
>
> "[Prosecutor:] Okay, [E.D.], according to my notes is a *black male. approximately 23 years of age*, *which would put him very close to the same race*, *sex. and age of the defendant.* He had said to the Court he had heard a little something. The Court questioned him further and he finally said 'Well, I heard it from the paper, or something.' The Court questioned him further. He was very vague and unclear in his answer. The Court asked him more about it and he said, 'Well, some people were talking about it. I didn't actually read it.' He could not remember what had been said for anything about – anything further about those. His answers to the death penalty did

> not give me a lot of clues either way as to how he felt. In fact, I think the words he used were 'I could go either way.'"

(R.T. 427) (emphasis added.)

Sockwell's counsel then questioned the prosecutor further with regard to E.D. Subsequently, counsel stated that the prosecutor had not given satisfactory race-neutral reasons for striking E.D. and moved to quash the venire. The trial court denied the motion.

The Court of Criminal Appeals held that the simple fact that the prosecutor mentioned race in her rendition of reasons for exercising her strikes does not, as a matter of law, establish purposeful discrimination. The court held that the prosecutor's belief that E.D. was vague in his response as to what information he knew about the case and where he had received the information was a sufficiently race-neutral reason for striking E.D.

I disagree with the Court of Criminal Appeals. I would grant Sockwell a new trial based on what I consider to be an unconstitutional use of peremptory challenges.

Under *Batson* and its progeny, once the party objecting to a peremptory challenge makes out a prima facie case of racial discrimination, the burden shifts to the party striking to give a race-neutral explanation for the strike. The second step of the process does not demand an explanation that is "persuasive, or even plausible. 'At this [second] step of the inquiry, the issue is the facial validity of the prosecutor's explanation. *Unless a discriminatory intent is inherent in the prosecutor's explanation*, *the reason offered will be deemed race neutral.*'" *Furkett v. Elem*, U.S. ___, 115 S. Ct. 1769, 1771 (1995), quoting *Hernandez v. New*

York, 500 U.S. 352, 360 (1991) (emphasis added). If a race-neutral explanation is given, the trial court then proceeds to the third step, wherein it must decide whether the party objecting to the strike has shown purposeful discrimination. *Purkett.*

The prosecutor stated that she struck E.D. because he was vague in his response as to pretrial publicity and imposition of the death penalty. Striking a juror who may have gained pretrial publicity about the case to be tried can be a race-neutral reason for a strike. *Shelton v. State*, 521 So.2d 1035 (Ala. Crim. App.), *cert. denied*, 521 So.2d 1038 (Ala. 1987). Also, striking a juror who is vague regarding his or her ability to impose or recommend the death penalty can be racially neutral on its face. *Stephens v. State*, 580 So. 2d 11 (Ala. Crim. App. 1990), affirmed, 587 So. 2d 26 (Ala.), cert. denied, 502 U.S. 859 (1991).

When cross-examined, the first thing the prosecutor stated was that one of her reasons for striking E.D. was that he is of the same race as the defendant. The prosecutor's reasons failed to satisfy the burden in step 2 of articulating a nondiscriminatory reason for the strike. Accordingly, there is no reason to proceed to step 3. The prosector's blatant comparison of E.D.'s race with that of the defendant as a reason for peremptorily challenging E.D. violates the very premise of Batson, which held that under the law a person's race is unrelated to his or her fitness as a juror.

E.D.'s race was not "incidentally mentioned" by the prosecutor in her rendition of the reasons for exercising the State's peremptory challenges. Cf. *Owens v. State*, 531 So.2d 22 (Ala. Crim. App. 1987). Rather, the crux of the prosecutor's reason was that the juror's race influenced her decision to strike him from the jury. Notably, the prosecutor mentioned age and sex

at the same time she mentioned race. However, no veniremember was questioned as to any age-based biases, and the prosecutor did not strike any white males of a similar age. Additionally, gender-based strikes are no longer permissible. See *J.E.B. v. Alabama*, U.S. __, 114 S. Ct. 1419 (1994). Even though *J.E.B.* had not been decided when the Court of Criminal Appeals issued its opinion in this case, the court noted that the prosecutor had failed to show that gender was relevant to the case and, therefore, found that gender was not an appropriate basis for striking E.D.

Regardless of whether some of the prosecutor's other reasons for striking E.D. may have been plausible and nondiscriminatory, this Court cannot permit "moderate" discrimination based on race. The harm from racial bias in jury selection is that it discriminates against the excluded juror and undermines public confidence in the legal system. *Batson*, 476 U.S. at 87. The color of a person's skin, as a party might think it relates to the person's fitness to serve on a jury, cannot be the basis for a peremptory strike, and it cannot be part of the basis for a peremptory strike. Even moderate discrimination based on race violates the equal protection guarantees provided by the Alabama constitution and the United States Constitution. Applying *Purkett*, I conclude that the prosecutor's remarks made as she was examined regarding the basis for peremptorily striking veniremember E.D. reflect an inherently discriminatory intent and cannot be deemed race neutral.

Based on the foregoing, I believe the trial court clearly erred in denying Sockwell's *Batson* motion. I would reverse the judgment of the Court of Criminal Appeals.

Hooper, C. J., and Cook, J., concur.

APPENDIX D

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT
THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1993-94

CR-89-225

MICHAEL ANTHONY SOCKWELL

v.

STATE

Appeal from Montgomery Circuit Court
(CC-88-1244)

MONTIEL, JUDGE

The appellant, Michael Anthony Sockwell, was indicted for the murder of Isaiah Harris, made capital because it was committed for pecuniary gain or for valuable consideration or pursuant to a contract or for hire. See §13A-5-40(7), Code of Alabama 1975. The jury found the appellant guilty of capital murder. By a vote of seven to five, the jury recommended that the appellant be sentenced to life imprisonment without parole. The trial judge overrode the jury's recommendation and sentenced the appellant to death by electrocution.

The facts adduced at trial tend to establish the following. In the late evening hours of March 10, 1988, Isaiah Harris, a deputy sheriff in Montgomery County, Alabama, was shot in the head while he was driving to

work. Perry Bullard, a police officer with the Montgomery police department, testified that Harris's vehicle was found on the Troy Highway, at a point across from Cherry Hill Road.

Freddie Patterson testified that he knew the appellant, and the co-defendants Lorenzo (Bo Bo) McCarter and Alex Hood. Patterson testified that during the early part of the day on March 10, 1988, the appellant, Hood, and he drove around and drank beer and that later they went to Hood's house and drank and talked. According to Patterson, after 9:00 p.m. that night, he, the appellant, and Hood went to pick up McCarter at work. Patterson stated that when they arrived, McCarter was talking to someone in another vehicle. McCarter finished talking to the other person and then got into Hood's car. The four went to a store to buy more alcohol and then went to Hood's house for a while, according to Patterson.

Patterson stated that after 10:00 p.m. they left Hood's house and drove out to Troy Highway in Hood's vehicle, which McCarter was driving. Patterson stated that he and Hood rode in the backseat of the vehicle and that the appellant rode in the front seat. Patterson testified that they turned into the Regency Park subdivision and went around a block in that subdivision. According to Patterson, as they passed a certain house on the block with a car in the driveway, someone in the vehicle stated "that's the car." Patterson stated that at that time, the appellant got out of Hood's vehicle carrying a shotgun and some clothes. Patterson further stated that the three remaining in the vehicle drove across the street and parked at an auto parts store facing Cherry Hill Road. Patterson stated that in a few minutes, a pager that was in the car beeped and a voice transmitted over the pager said something to

the effect of "He's leaving now." Patterson stated that he then heard a loud noise, after which they left the parking lot of the auto parts store and picked up the appellant, who got into the backseat with a gun and some clothes. Patterson further testified that after the appellant got back into the car, he stated that he "had to shoot him" and that "he was gonna . . . get his money." Patterson testified that the four of them drove to a bridge and that the appellant threw the gun and the clothes over the railing of the bridge.

Bruce Huggins, an investigator with the Montgomery County Sheriff's Department testified that he had observed what appeared to be an abandoned vehicle near the scene of the murder and that he determined that the vehicle belonged to Lorenzo McCarter. He was informed that McCarter was having an affair Isaiah Harris's wife. The State presented evidence that the wife, codefendant Louise Harris, could have received a substantial sum of money in insurance proceeds as a result of Isaiah Harris's death.

Kenneth Gilmore a friend of the appellant, testified that he and the appellant had made arrangements to go fishing on March 11, 1988, the day after the shooting. Gilmore testified that when he met the appellant that the appellant was with codefendant Hood. He further stated that he went with the appellant and Hood to pick up some money at a house on Pineleaf Street. According to Gilmore, afterwards, the individuals went to a store, where they drank some beer. Gilmore said that, after they left the store and were riding in Hood's car, the appellant said that, "some nigger slapped him and he shot him and blowed half of his face off." The appellant was arrested that day.

I

The appellant contends that the statement he gave to Investigator Huggins was due to be suppressed because, he says, it was the fruit of an illegal arrest and because, he says, it was not voluntary.

A

Specifically, the appellant argues that the police had no probable cause to arrest him without a warrant and, therefore, any statement made by him after the illegal arrest was due to be suppressed. We disagree.

Section 15-10-3(3), Code of Alabama 1975, provides that an officer may arrest an individual without a warrant when a felony has been committed and he has reasonable cause to believe that the individual arrested committed the felony. "Reasonable cause is equated with probable cause." *Daniels v. State,* 534 So.2d 628, 651 (Ala. Crim. App. 1985), *aff'd,* 534 So.2d 656 (Ala. 1986), *cert. denied,* 479 U.S. 1040, 107 S.Ct. 898, 93 L.Ed.2d 850 (1987); *State v. Calhoun,* 502 So.2d 795 (Ala. Crim. App.), *rev'd in Dart,* 502 So.2d 808 (Ala. 1986). Probable cause is knowledge of circumstances that would lead a reasonable person of ordinary caution, acting impartially, to believe that the person arrested is guilty. *Harrell v. State,* 475 So.2d 650 (Ala. Crim. App. 1985). In making the determination as to whether probable cause exists for a warrantless arrest, we must examine the totality of the circumstances surrounding the arrest. *Daniels,* 534 So.2d at 651.

Investigator Huggins testified at a suppression hearing that at the time of the appellant's arrest he had the following information: that a deputy sheriff had been killed; that McCarter, a codefendant, was having an affair with the victim's wife; that during the

months preceding the killing McCarter had been trying to hire someone to kill the victim; that the appellant and codefendant Hood were with McCarter at 5:00 p.m. on the afternoon of the murder; that the appellant, Hood, and McCarter were seen in Hood's automobile on the afternoon of the murder; that a shotgun was used to kill the victim; and that the appellant was known to own and was known to have carried a shotgun with him in Hood's automobile. The day after the murder, the appellant, Hood, and McCarter were seen in Hood's vehicle and Investigator Huggins stopped the vehicle and arrested the individuals in the vehicle.

The knowledge that Investigator Huggins had at the time of the appellant's arrest was sufficient for a reasonable person to believe that the appellant had participated in the murder. Therefore, the warrantless arrest was legal and the statement was not due to be suppressed on the basis that it was the fruit of an illegal arrest.

B

The appellant further argues that his statement was due to be suppressed because, he says, it was not voluntarily given. The appellant acknowledges that he was read his *Miranda* rights at the time of his arrest. However, he argues that he was coerced into making a statement because, he says, after his arrest he was held at the Montgomery County jail for over six hours, during which time he was not given any food or water, his request for a blanket was denied, and he was threatened by jailers who were friends of the victim when he refused to make a statement. The appellant argues that after he had been held at the county jail for over six hours under these conditions, two investigators approached him and the appellant indicated

that he was willing to make a statement. One of the investigators informed the appellant again of his *Miranda* rights, including his right to an attorney, but neglected to tell the appellant that if he could not afford an attorney, the State would appoint one for him. The appellant said to the investigator, "I shot him." The investigators did not ask him any questions, instructed the appellant not to say anything further, and took him to the investigative division so that the appellant could give his statement to Investigator Huggins.

At this time, Investigator Huggins said that he again advised the appellant of his *Miranda* rights and that the appellant signed a waiver of rights form. The appellant's statement was videotaped and audiotaped. Huggins testified that the appellant was not coerced or threatened into making the statement and that the appellant did not ask to speak to an attorney and did not request any food or a blanket.

The determination as to whether a statement is voluntary rests within the sound discretion of the trial court and that determination will not be disturbed on appeal unless it is palpably contrary to the great weight of the evidence. *Uber v. State,* 596 So.2d 608, 612 (Ala. Crim. App. 1991); *Stariks v. State,* 572 So.2d 1301, 1304 (Ala. Crim. App. 1990). Whether a statement was voluntary is to be determined under the totality of the circumstances. *Rogers v. State,* 417 So.2d 241, 248 (Ala. Crim. App. 1982) (citations omitted).

The investigators denied that the appellant was mistreated or coerced into making his statement. They also said that the appellant never asked for food or a blanket. Because of the conflicting evidence, we cannot hold that the trial court's determination that the

statement was voluntary was contrary to the great weight of the evidence.

Furthermore, we find no error in the trial court's denying the appellant's motion to suppress the statement on the basis that the investigator at the jail failed to inform the appellant of his right to have an appointed attorney. The State correctly asserts in its brief that *Ingram v. State,* 541 So.2d 78 (Ala. Crim. App. 1989), is diapositive of this issue. In *Ingram,* this Court held that the mere fact that an accused was not advised of the right to appointed counsel immediately before his confession does not render it involuntary. 541 So.2d at 78. It is not necessary to repeat *Miranda* warnings at the beginning of each interview. *Id.* The appellant was read his *Miranda* rights at the scene of his arrest. The evidence presented in this case leads us to conclude that the trial court's determination that the appellant's statement was voluntary was not palpably contrary to the great weight of the evidence.

II

The appellant argues that he was denied the right to an impartial jury because the trial court did not grant a motion for change of venue for the trial, and because, he says, the trial court did not permit defense counsel to question prospective jurors regarding pretrial publicity.

A

The trial court did not err in denying the appellant's motion for a change of venue on the ground of extensive pretrial publicity. "The granting of an accused's motion for a change of venue rests in the sound discretion of the trial court, and its ruling thereon will not be disturbed except for gross abuse." *Mullis v. State,* 545 So.2d 205, 209 (Ala. Crim. App.

1989) (citing *Kniqhten v. State,* 507 So.2d 1015, 1021 (Ala. Crim. App. 1986)). Widespread publicity, alone, will not support a change in venue. *Ex parte Grayson,* 479 So.2d 76, 80 (Ala.), *cert. denied,* 474 U.S. 865, 106 S.Ct. 189, 88 L.Ed.2d 157 (1985); *Leonard v. State,* 551 So.2d 1143, 1149 (Ala. Crim. App. 1989).

The appellant must establish that he has been prejudiced by the pretrial publicity by presenting evidence that, given the facts and circumstances, it would be practically impossible to secure an impartial jury. *Mullis,* 545 So.2d at 208; *Kennedy v. State,* 472 So.2d 1092, 1095 (Ala. Crim. App. 1984), *aff'd,* 472 So.2d 1106 (Ala.), *cert., denied,* 474 U.S. 975, 106 S.Ct. 340, 88 L.Ed.2d 325 (1985). "The accused must affirmatively show that pretrial publicity has so saturated the community as to have a probable impact on the prospective jurors or that there is a connection between publicity generated and the existence of actual juror prejudice." *Mullis,* 545 So.2d at 208.

In this case, the veniremembers who indicated that they had read or had heard about the appellant's case from the news media either stated that they could be impartial and base their decision on the evidence presented at trial or were excused by the trial court because they said that they could not lay aside their preformed beliefs. "A qualified juror need not be totally ignorant of the facts in the case." *Mullis,* 545 So.2d at 209-10 (citing *Peoples v. State,* 510 So.2d 554, 563 (Ala. Crim. App. 1986), *aff'd,* 510 So.2d 574 (Ala.), *cert. denied,* 484 U.S. 933, 108 S.Ct. 307, 98 L.Ed.2d 266 (1987). We cannot hold the trial court abused its discretion in denying the appellant's motion for a change of venue because the appellant has failed to establish actual prejudice or specific facts and

circumstances sufficient to support a change in venue because of an adverse impact on the veniremembers.

The trial court did not err in refusing to permit defense counsel to conduct individual voir dire of the veniremembers in regard to pretrial publicity. Whether to allow individual voir dire is a matter left to the sound discretion of the trial court. *Hagood v. State,* 588 So.2d 526 (Ala. Crim. App. 1991); *Parker v. State,* 587 So.2d 1072 (Ala. Crim. App. 1991), *after remand,* 610 So.2d 1171 (Ala. Crim. App. 1992), *aff'd* 610 So.2d 1181 (Ala. 1992), *cert. denied,* __ U.S. __, 113 S.Ct. 3053, 125 L.Ed.2d 737 (1993).

The trial court questioned the veniremembers in regard to any information they may have heard or read about the case as a result of pretrial publicity. Moreover, the trial court inquired of the veniremembers as to whether they had preconceived opinions as to the guilt or innocence of the accused and whether they could lay aside any information regarding the case they had obtained from the news media and make their decision based only on the evidence presented. In this case, there is no indication that the individual voir dire conducted by the trial court was inadequate or that any pretrial publicity prejudiced the jury venire. We cannot hold that the trial court abused its discretion by denying defense counsel the opportunity to conduct individual voir dire in regard to the pretrial publicity. *Parker v. State,* 587 So.2d 1072 (Ala. Crim. App. 1991); see also *Kuenzel v. State,* 577 So.2d 474 (Ala. Crim. App.), *aff'd,* 577 So.2d 531 (Ala. 1990), *cert. denied,* __ U.S. __, 112 S.Ct. 242, 116 L.Ed.2d 197 (1991).

III

The appellant contends that because he was accused of murdering a deputy sheriff, the trial court erred in allowing bailiffs associated with the sheriff's department to remain in the courtroom during his trial. He argues that the presence of the bailiffs denied him a fair trial. The appellant cites *Turner v. Louisiana,* 379 U.S. 466, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965), in support of his contention. In *Turner,* two deputy sheriffs who testified for the State served as the jury's escorts. In this case, the record does not reflect that any bailiff was a witness for the State.

In *Holloway v. State,* 477 So.2d 487,488 (Ala. Crim. App. 1987), *overruled on other grounds, Ex parte McCree,* 554 So.2d 336 (Ala. 1988), this Court stated, "Absent a clear showing that the sheriff or deputies who managed the jury were in fact the same individuals who testified at trial and a showing of some prejudicial injury to the appellant, reversible error will not be found." See also *Harris v. State,* [Ms. 3 Div. 332, June 12, 1992] __ So.2d__ (Ala. Crim. App. 1992), *aff'd,* [Ms. 1920374, June 25, 1993] __ So.2d __ (Ala. 1993). Because the appellant cannot establish that any of the bailiffs who escorted the jury was a witness for the State and that he was prejudiced as a result, we find no error.

IV

The appellant contends that the trial court's alleged errors during the jury selection process require reversal of his conviction.

A

The appellant argues that the trial court erred in refusing to allow adequate voir dire of prospective

juror, G. D., or to grant a strike for cause, because, he says, *G.* D. was a law enforcement officer who said, at the time of trial, that he was investigating another client of the appellant's attorney for alleged criminal misconduct.

During individual voir dire, G. D. acknowledged that he knew one of the appellant's attorneys because as an agent for the United States Treasury Department he was investigating another client of that attorney. Defense counsel, however, argued that G. D. had questioned the attorney's other client about a fee the client had paid to the attorney and about whether the attorney had reported the fee properly to the Internal Revenue Service. In other words, defense counsel argued that he, and not one of his clients, was the subject of G. D.'s investigation and that that fact would influence G. D. However, G. D. told the trial court that any adversarial relationship he had had with defense counsel, which G. D. maintained was through another client, would not affect his ability to render an impartial verdict in the appellant's case. Thereafter, defense counsel did not request further individual voir dire of G. D. and he challenged G. D. for cause.

The trial court did not err in denying the challenge for cause. "To justify a challenge of a juror for cause there must be a statutory ground (Ala. Code Section 12-16-150 (1975)), or some matter which imports absolute bias or favor, and leaves nothing to the discretion of the trial court." *Nettles v. State,* 435 So.2d 146, 149 (Ala. Crim. App.), *aff'd,* 435 So.2d 151 (Ala. 1983). The fact that an officer investigated another of defense counsel's clients is no statutory ground for eliminating that officer from a jury. When no statutory ground exists to challenge the prospective juror for cause, an absolute bias on the part of the prospective

juror must be established. *Humphrey v. State,* 591 So.2d 583, 585 (Ala. Crim. App. 1991).

> "'"Ultimately, the test to be applied is whether the juror can set aside [his] opinions and try the case fairly and impartially, according to the law and the evidence. *Tidmore v. City of Birmingham,* 356 So.2d 231 (Ala. Crim. App. 1977), cert. denied, 356 So.2d 234 (Ala.), cert. denied, 439 U.S. 836, 99 S.Ct. 120, 58 L.Ed.2d 132 (1978); see *Willingham v. State,* 262 Ala. 550, 80 So.2d 280 (1955); *Mahan v. State,* 508 So. 2d 1180 (Ala. Crim. App. 1986). This determination again is to be based on the juror's answers and demeanor and is within the discretion of the trial judge. Thus, a prospective juror should not be disqualified for prejudices or biases if it appears from his or her answers and demeanor that the influence of those prejudices and biases can be eliminated and a verdict rendered according to the evidence.'" *Mann v. State,* 581 So.2d 22, 25 (Ala. Crim. App. 1991). (Citations omitted.)"

591 So.2d at 585.

The trial court's denial of a challenge for cause should not be reversed unless the answers of the prospective juror, taken as a whole, establish a fixed opinion that would bias his verdict. *Perryman v. State,* 558 So.2d 972, 977 (Ala. Crim. App. 1989). In this case, we cannot hold that the trial court abused its discretion in denying the appellant's challenge for cause in light of the fact that G. D. stated that he was investigating another client of defense counsel and that that investigation would not affect his ability to render a fair and impartial verdict in the appellant's

case. The trial judge observed G. D.'s demeanor in responding to voir dire questions and is in the best position to determine whether G. D. could remain impartial. G. D.'s answers, viewed in their entirety, do not indicate that he had a fixed opinion or a bias sufficient to justify a challenge for cause.

B

The appellant contends that the trial court erred in striking potential juror, W. F., for cause. During voir dire, the trial judge asked the veniremembers if they knew of any reason that they could render a fair and impartial verdict. W. F., in response, stated that he worked for the Capital Representation Resource Center, a group that actively opposes the death penalty and seeks representation of defendants accused of capital crimes. Additionally, during individual voir dire of W. F., he stated that he was opposed to the death penalty and that there were no circumstances under which hi could vote to sentence someone to death. W. F. further acknowledged that his opposition to the death penalty would substantially impair his keeping his oath as a juror. In *Wainwright v. Witt,* 469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), the United States Supreme Court held that the proper standard for determining whether a veniremember may be excluded from the jury for cause because of his opposition to the death penalty is whether the veniremember's views would "'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" In this case, W. F. clearly responded that his opposition to the death penalty would prevent him from performing his duties as a juror. We find no error in the trial court's granting the State's challenge for cause against W. F.

C

Next, the appellant contends that the trial judge's voir dire questions regarding the veniremembers' views on the death penalty established that he was participating with the State in selecting more prone to convict a capital defendant. We disagree.

As stated in *Wainwright,* the test for determining whether a potential juror should be excluded for cause based on his views regarding the death penalty is whether those views would prevent or substantially impair the veniremember's performance of his duties according to his instructions and oath. 469 U.S. at 424. The appellant asserts that the trial judge erred in failing to ask a question he had requested regarding whether the potential jurors would automatically vote for a sentence of death in the event the appellant was found guilty. The appellant's requested voir dire question is not in conformity with the test set forth in *Wainwright.* We have reviewed the trial judge's voir dire questioning and hold that the questions posed were sufficient to determine whether the veniremembers' views on the death penalty would prevent their rendering a verdict according to their instructions and oaths or substantially impair their ability to render a such verdict.

D

The appellant also contends that the trial court erred in failing to quash the jury venire because, he argues, the prosecutor acknowledged that she had challenged by peremptory strikes those veniremembers who had expressed a hesitancy to impose the death sentence, and thus, he argues, she was seeking a jury more prone to convict a capital defendant. This argument is without merit.

In *Lockhart v. McCree,* 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986), the Supreme Court held that the Constitution does not prohibit states from "death qualification" of juries in capital cases and that so qualifying a jury does not deprive a defendant of an impartial jury. 476 U.S. at 173. Alabama courts have consistently held likewise. See *Williams v. State,* 556 So.2d 737 (Ala. Crim. App. 1986), *rev'd in part,* 556 So.2d 744 (Ala. 1987); *Edwards v-. State,* 515 So.2d 86, 88 (Ala. Crim. App. 1987); *Martin v. State,* 494 SO.2d 749 (Ala. Crim. App. 1985).

Moreover, it is not improper for a prosecutor to use peremptory challenges to remove veniremembers because they have expressed strong opposition to the death penalty, regardless of whether their opposition would be sufficient to support a challenge for cause. *Fisher v. State,* 587 So.2d 1027, 1036-37 (Ala. Crim. App. 1991), *cert. denied,* __ U.S. __, 112 S.Ct. 1486, 117 L.Ed.2d 628 (1992) (citations omitted).

We note that the jury in this case recommended that the appellant be sentenced to life imprisonment without parole; thus, it cannot be said that the jury was "death prone."

E

The appellant argues that "death qualification" of the jury violated the fair cross-section requirement of the Sixth Amendment. This argument lacks merit.

The State, in its brief, correctly cites *Ex carte Ford,* 515 So.2d 48 (Ala. 1987), *cert. denied,* 484 U.S. 1079, 108 S.Ct. 1061, 98 L.Ed.2d 1023 (1988), as dispositive of this issue. In *Ford,* the Alabama Supreme Court, relying upon *Lockhart,* held that groups defined solely by a shared attitude, such as opposition to the death penalty, are not "distinctive groups" for fair cross-

section purposes. 515 So.2d at 52-5. Therefore, exclusion of veniremembers who have expressed their opposition to the death penalty does not violate the fair cross-section requirement.

F

The appellant also argues that the trial court erred in failing to ask the veniremembers, pursuant to *Witherspoon v. Illinois,* 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), whether they would automatically impose the death penalty if the appellant was found guilty of the crime. As stated, the jury in this case recommended that the appellant be sentenced to life imprisonment without parole. We have held that where a jury recommends life imprisonment without parole, *Witherspoon* is not applicable. *Bracewell v. State,* 506 So.2d 354, 358 (Ala. Crim. App. 1986); *Neelley v. State,* 494 So.2d 669, 680 (Ala. Crim. App. 1985), *aff'd,* 494 So.2d 697 (Ala. 1986), *cert. denied,* 480 U.S. 926, 107 S.Ct. 1389, 94 L.Ed.2d 702 (1987).

V

The appellant argues that his conviction is due to be reversed, because, he says, the prosecutor exercised her peremptory challenges in a racially discriminatory manner in violation of *Batson v. Kentucky,* 476 U.S. 79 (1986). The record indicates that the qualified jury venire consisted of 42 people, 10 (23.8%) of whom were black. The State had 15 peremptory challenges and used 8 of its peremptory challenges to strike black veniremembers. The appellant did not strike any black veniremembers. Thus, 2 black jurors (16.6%) served on the petit jury. The prosecutor used 53.3% of her peremptory challenges to remove 80% of the blacks from the venire.

In *Ex parte Branch,* 526 So.2d 609 (Ala. 1987), the Alabama Supreme Court set forth guidelines for considering a *Batson* motion. The initial burden is Upon the party alleging a discriminatory use of peremptory challenges to establish a prima facie case of discrimination. The following evidence can be used to raise the inference of discrimination: evidence that the blacks stricken – other than the fact they were black – were as heterogenous as the community as a whole; a pattern of strikes against black jurors on a particular venire; the past conduct of the State's attorney in using peremptory challenges to strike all black veniremembers; the questions of the State's attorney during voir dire, including nothing more than desultory voir dire; the questions propounded to the challenged veniremember during voir dire, including a lack of questions or meaningful questions; disparate treatment of white members of the venire with the same characteristics as the challenged black members; and evidence that the State used peremptory challenges to dismiss all or almost all of the blacks from the jury. *Id.* at 622-23. Once the defendant has established a prima facie case of discrimination, the burden shifts to the State to provide clear, legitimate, race-neutral reasons for peremptory challenges of black veniremembers. *Id.* The defendant may then offer evidence to establish that the reasons given by the State were pretextual. *Id.*

In this case, the appellant timely made his *Batson* motion, but the trial court did not make a finding with regard to whether the appellant had presented a prima facie case of racial discrimination. However, the trial court required the prosecutor to give the reasons for her peremptory challenges. Therefore, this Court will review the sufficiency of the reasons given by the prosecutor for the strikes. *Davis v. State,* 596 So.2d 626

(Ala. Crim. App. 1991); *McLeod v. State,* 581 So.2d 1144, 1154-55 (Ala. Crim. App. 1990); *Thomas v. State,* 555 So.2d 320, 322 (Ala. Crim. App. 1989); *Currin v. State,* 535 So.2d 221, 223 (Ala. Crim. App.), *cert. denied,* 535 So.2d 225 (Ala. 1988).

Once the trial court requires the prosecutor to justify the peremptory challenges, it does not matter whether the appellant has made a prima facie showing of discrimination. *Johnson v. State,* 601 So.2d 1147, 1148 (Ala. Crim. App. 1992). However, the strength of the prima facie showing is relevant in determining whether the prosecutor's reasons were sufficient to rebut the presumption of racial discrimination. *Ex parte Bird,* 594 So.2d 676, 680 (Ala. 1991). In this case, defense counsel cited the number of the prosecutor's peremptory challenges against black veniremembers and the prosecutor's past practice of challenging black veniremembers in other cases as evidence of racial discrimination.

As a reason for most of her strikes, the prosecutor explained that she believed the challenged veniremembers would be hesitant to impose the death penalty. This is a valid, race-neutral reason for a peremptory challenge. *McGahee v. State,* 554 So.2d 454 (Ala. Crim. App.), *aff'd,* 554 So.2d 473 (Ala. 1989). Further, we note that the prosecutor also struck white veniremembers who she believed would be hesitant to impose the death penalty.

However, with regard to potential juror E. D., a black male, the prosecutor stated that she struck him because she felt that he did not respond adequately and that he was vague when answering the trial court's questions with regard to the publicity surrounding the appellant's case.

After the prosecutor gave explanations for each of her peremptory challenges, defense counsel questioned the prosecutor with regard to her peremptory challenges in an attempt to establish that the reasons given by the prosecutor were pretextual. With regard to potential juror E. D., the following conversation occurred:

> "Q [defense counsel]: Your reasons again for striking [E. _D.1?
>
> A [prosecutor]: You want me to repeat them?
>
> Q: Yes, ma'am.
>
> A: Okay, [E. D.], according to my notes, is a black male, approximately 23 years of age, *which would put him very close to the same race, sex, and age of the defendant.* He said to the Court he had heard a little something. The Court questioned him further and he finally said, 'Well, I heard it from the paper, or something.' The Court questioned him further. He was very vague and unclear in his answer. The Court asked him more about it and he said, 'Well, some people were talking about it. I didn't actually read it.' He could not remember what had been said nor anything about – anything further about those. His answers to the death penalty did not give me a lot of clues either way as to how he felt. In fact, I think the words he used were 'I could go either way.'"

The prosecutor stated that in addition to the fact that he was the same age and gender as the appellant and his vague responses in regard to pretrial publicity, E. D.'s race was part of the reason for striking him. In *Batson,* the Supreme Court of the United States

held that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors *solely* on account of their race." 476-U.S. at 89 (emphasis added)- This Court has held that "simply because race is incidentally mentioned by the prosecutor in his rendition of the reasons for exercising his strikes as he did does not, *as a matter of law,* establish purposeful discrimination." *Owens v. State,* 531 So.2d 22, 25 (Ala. Crim. App. 1987) (emphasis in original). A trial court's decision with regard to a *Batson* motion is to be reversed only if the decision is clearly erroneous. *Branch,* 526 So.2d at 625; *Jackson v. State,* 594 So.2d 1289 (Ala. Crim. App. 1991). Thus, we must determine whether the trial court's decision that the State's reasons for challenging E.D. were racially neutral was clearly erroneous.

Mere allegations that a veniremember is approximately the same age and sex of the appellant, when that fact does not relate to the case to be tried are not sufficient to rebut the prima facie case of race discrimination established by the appellant. *Owens v. State,* 531 So.2d 22 (Ala. Crim. App. 1987). In this case, no veniremember was questioned in regard to any age-based biases. Therefore, we cannot hold that E. D.'s age was a legitimate reason for striking him. Additionally, E. D.'s gender was not shown to be an appropriate basis for peremptorily challenging him because the prosecution failed to establish that gender was relevant to the case. We note that the prosecution did not strike white males of a similar age.

However, the prosecutor's belief that E.D. was vague in response to what information about the case and from where he had received information about the case, is a sufficiently race-neutral reason for a peremptory challenge. The fact that E. D. made vague

responses during voir dire was an articulate and specific reason for challenging him. Also, the fact that E. D. may have gained information from pretrial publicity related to the facts of the case to be tried and is a race-neutral reason for a strike. See *Shelton v. State,* 521 So.2d 1035 (Ala. Crim. App), *cert. denied,* 521 So.2d 1038 (Ala. 1987). Unlike other veniremembers, E. D. appeared to be less than candid in regard to his exposure to pretrial publicity. Specifically, E. D. first stated that he had read about the case and then stated that he had heard about the case. Nevertheless, E. D. did not state what he had heard, although he was questioned in this regard. Therefore, the State presented a sufficient race-neutral explanation for striking E. D.

Because the prosecutor presented specific and articulate race-neutral explanations for her challenges against the black veniremembers, the trial court's denial of the appellant's *Batson* motion was not clearly erroneous.

VI

The appellant contends that trial court erred in allowing the State to admit photographs of the victim both before his death and after his death so that the victim's sister could identify the victim for the jury.

The appellant argues that the photographs were irrelevant, immaterial, and were introduced only to inflame and prejudice the jury. The appellant's argument is without merit.

> "Generally photographs are admissible into evidence in a criminal prosecution 'if they tend to prove or disprove some disputed or material issue, to illustrate or elucidate some other relevant fact or evidence, or to corrobo-

> rate or disprove some other evidence offered or to be offered, and their admission is within the sound discretion of the trial judge.' *Maywood v. State,* 494 So.2d 124, 141 (Ala. Crim. App. 1985), *aff'd,* 494 So.2d 154 (Ala. 1986), *cert. denied,* 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 588 (1987). See also *Woods v. State,* 460 So.2d 291 (Ala. Crim. App. 1984); *Washington v. State,* 415 So.2d 1175 (Ala. Crim. App. 1982); C. Gamble, *McElrov's Alabama Evidence* §207.01(2) (3d ed. 1977).

Bankhead v. State, 585 So.2d 97, 109 (Ala. Crim. App. 1989), *remanded on other grounds,* 585 So.2d 112 (Ala.), *on remand,* 585 So.2d 133 (Ala. Crim. App. 1991).

The State had the burden of proving that the person named in the indictment as being the victim of the offense was, in fact, the victim. In this case, any photograph of the victim before he was shot was relevant to establishing the victim's identity. This is especially true in this case because the gunshot wound destroyed facial features. Thus, pictures of the victim before his death were admissible and the trial court did not abuse its discretion in allowing them into evidence.

With regard to photographs of the victim taken after he had been shot, even though they are cumulative and pertain to undisputed matters, generally photographs that depict the external wounds on the body of the victim are admissible. *Bankhead,* 585 So.2d at 109. As we held in *Jenkins v. State,* [Ms. CR-90-1044, February 28, 1992], __ So.2d __ (Ala. Crim. App. 1992), *aff'd* [Ms. 1911144, May 28, 1993] __ So.2d __ (Ala. 1993), "[t]he state [has] the burden of proving that the victim [is] dead, and [photographs are] direct evidence

on that point. Perpetrators of crimes that result in gruesome scenes have reason to expect that photographs of those gruesome scenes will be taken and admitted into evidence." The trial court did not abuse its discretion in admitting photographs of the victim after he had been killed.

VII

The appellant argues that the trial court erred in not granting his motion for a judgment of acquittal because, he says, the State did not present sufficient evidence that the killing was accomplished pursuant to a contract or for pecuniary or other valuable consideration independent of his confession. This argument lacks merit.

"The corpus delicti consists of two elements: '(1) That a certain result has been produced, . . . and (2) that some person is criminally responsible for the act.' C. Gamble, *McElrov's Alabama Evidence* §304.1 (3d ed. 1977)." *Johnson v. State,* 473 So.2d 607, 608 (Ala. Crim. App. 1985). While it is true that a confession alone may not support a conviction, *see,* l., at 609, in this case, the State presented sufficient evidence independent of the appellant's confession to support the appellant's conviction for murder for hire or pecuniary gain.

The corpus delicti may be established by circumstantial evidence. *Spear v. State,* 508 So.2d 306, 308 (Ala. Crim. App. 1987), *cert. denied,* 537 So.2d 67 (Ala. 1988); *Johnson,* 473 So.2d at 610. The evidence in this case established that the victim's wife, codefendant Louise Harris, stood to gain thousands of dollars in insurance proceeds as a result of her husband's death. This fact was stipulated to by the parties in this case. The appellant argues, however, that there was no independent evidence that he would gain any money

or other consideration as a result of the victim's death. However, Patterson testified that after the voice on the pager stated that the victim was leaving and again after the shooting when the appellant returned to Hood's vehicle and said that "he was gonna get his money." Clearly, this circumstantial evidence coupled with the other evidence that McCarter had been trying to hire someone to kill the victim was sufficient to establish that the appellant shot the victim for pecuniary gain.

This evidence warranted the submission of the case to the jury for determination. Thus, the trial court did not err in denying the appellant's motion for a judgment of acquittal.

VIII

The appellant argues that the trial court's guilt-phase jury instructions violated his constitutional rights as set forth in the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and in Article I §§ 1, 6, 12, and 15 of the Alabama Constitution.

A

The appellant contends that the trial court erred in instructing the jury as to the reasonable doubt standard. Specifically, the appellant, contends that the trial court's instruction on reasonable doubt permitted the jury to find the appellant guilty based upon a lesser degree of proof, in violation of the Supreme Court's holding in *Cage v. Louisiana,* 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990). We disagree.

The trial court gave the following instruction regarding reasonable doubt:

"In this indictment the official charge is capital murder which includes, by law, the charge of murder. Now the defendant has pled not guilty, and any time a defendant pleads not guilty in a case under our system of criminal justice, the burden – the responsibility of proving that guilt – is placed on the state by and through its representatives from the district attorney's office, and that burden of proof is beyond a reasonable doubt and to. a moral certainty. It's important that you try to understand as much as possible what those terms mean – beyond a reasonable doubt and to a moral certainty – for under our system those terms and what they mean are the measuring stick that you, the jury, are given to take and apply to the evidence to determine whether or not you've been convinced to the measure of proof that the law requires. So let me go over those terms with you and try to, as much as possible, let you glean and grasp an understanding of what they mean.

"The first thing I'd say to you about beyond a reasonable doubt and to a moral certainty is that the terms mean what they say – beyond a reasonable doubt and to a moral certainty. Now, the importance that is attached to them in Court is a lot more important than the way that we may use them in our every day world or life, but basically they mean what they say. A reasonable doubt is a fair doubt based upon reason and common sense and arising from the state of the evidence or lack of evidence. While it is rarely possible to prove anything to an absolute certainty, you cannot base any kind of a decision on suspicion or mere

conjecture. A reasonable doubt may arise not only from the evidence produced but also from the lack of evidence or any part of the evidence. The burden is on the State to prove the defendant guilty beyond a reasonable doubt of every essential element of the crime that the defendant is charged with. The defendant has the right to rely upon the failure of the prosecution to establish such proof. The defendant may rely *upon* evidence brought out on cross-examination of witnesses for the prosecution and upon evidence presented on behalf of the defendant himself. The law never imposes upon *a* defendant in a criminal case the burden or duty of producing any evidence. A reasonable doubt exists in any case when after a careful and impartial consideration of all of the evidence in the case the jurors do not feel convinced to a moral certainty that the defendant is guilty of the charge or any lesser included charge. Upon considering all the evidence or lack of evidence or any part of the evidence, if you have a reasonable doubt about the defendant's guilt arising out of any part of the evidence or lack of evidence then you would have to find the defendant not guilty.

"The doubt which would justify an acquittal must be an actual and substantial doubt. It's not some mere guess or surmise and it's not a forced or capricious doubt. If after considering all the evidence in the case you have an abiding conviction of the truth of the charge then you are convinced beyond a reasonable doubt and it would be your duty to convict the defendant. The reasonable doubt which

entitles an accused to an acquittal is not some mere fanciful, vague, conjectural or speculative doubt, but it's a reasonably substantial doubt arising from the evidence or lack of evidence or any part of the evidence and remaining after you've given a careful consideration of the testimony and all of the exhibits such as any reasonable, fair minded, conscientious man or woman would entertain under all the circumstances.

"Now you will observe that it is not the State's burden to prove a defendant's guilt beyond all doubt, but simply beyond all reasonable doubt. Now once again, if after comparing and considering all of the evidence in the case or lack of evidence or any part of the evidence your minds are left in such a condition that you cannot say that you have an abiding conviction to a moral certainty of the truth of the charge then you are not convinced beyond a reasonable doubt and. it would be your duty to find the defendant not guilty. A jury is said to be so satisfied when it or its members are satisfied from the evidence that they would be – or so satisfied from the evidence that they would be willing to act upon that degree of conviction in matter of highest importance to themselves personally.

"Your decision in this matter is to be one based on the evidence and the evidence alone. We know what the measuring stick is now – beyond a reasonable doubt and to a moral certainty."

Defense counsel did not object to the trial court's instruction on reasonable doubt and the appellant

raises this issue for the first time on this appeal. Therefore, we review this issue pursuant to the plain error rule. Rule 45(A), Ala. R. App. P. Plain error occurs only if it is "so obvious that the failure to notice it would seriously affect the fairness or integrity of the judicial proceedings." *Ex parte Womack,* 435 So.2d 766, 769 (Ala. 1983), *cert. denied,* 464 U.S. 986, 104 S.Ct. 436, 78 L.Ed.2d 367 (1983).

In *Cage v. Louisiana,* the United States Supreme Court found that if the instruction equated "reasonable doubt" to "grave uncertainty" and "actual substantial doubt," and stated that what was required was "moral certainty," a reasonable juror could interpret the instruction to allow a lesser degree of proof to convict than that required by the Due Process Clause. It was the use of all three phrases in conjunction with each other that the Supreme Court determined was unconstitutional in *Cage.* See *Gaskins v. McKellar,* __ U.S. __, 111 S.Ct. 2277, 114 L.Ed.2d 728 (1991). In construing any of the trial court's instructions, we do so in the context of the charges as a whole. *Haney v. State,* 603 So.2d 368, 411 (Ala. Crim. App. 1991), aff'd, 603 So.2d 412 (Ala. 1992), *cert. denied,* __ U.S. __, 113 S.Ct. 1297, 122 L.Ed.2d 687 (1993). In this case, the trial court included the phrases "actual and substantial doubt" and "moral certainty" in its charge to the jury regarding reasonable doubt. As this Court stated in *Haney,* use of some, but not all, of the phrases condemned in *Cage* does not necessarily constitute reversible error. 603 So.2d at 412. In this case, we find that the charge does not contain the same flaw as that in *Cage.* The trial court's definition of reasonable doubt correctly conveyed the meaning of the term and did not tend to confuse or mislead the jury. Rather, the trial court's instructions on the presumption of innocence, the burden of proof,

and the responsibilities of the jury in weighing the evidence establish that the instructions were proper as to the reasonable doubt standard. See e.g., *Haney,* 603 So.2d at 412; *McMillian v. State,* 594 So.2d 1253, 1283 (Ala. Crim. App. 1991). We find no plain error in the trial court's instructions in regard to reasonable doubt.

B

The appellant contends that the trial court's instructions permitted the jury to convict him of capital murder regardless of whether the jurors believed that he possessed an intent to kill. Specifically, he contends that the trial court's instructions on accomplice liability and on intent suggested to the jury that it could return a guilty verdict even if it believed that the appellant did not have a particularized intent to kill the victim.

With regard to the particularized intent necessary to find the appellant guilty of the offense charged the trial court stated:

> *"A defendant commits murder of the intentional killing-type if with the intent to cause the death of another person he causes the death of the person or another person. A person acts intentionally with respect to a result or conduct when his purpose is to cause the result or engage in that conduct. The defendant must intentionally, as opposed to negligently, accidentally, or recklessly, cause the death of the deceased in order to invoke the capital statute.* I'll say that once again. The defendant must intentionally, as opposed to negligently, accidentally, or recklessly – accidentally, excuse me, or recklessly cause the death of the deceased in order to invoke

> the capital statute. *The intent to kill must be real and specific in order to invoke the capital statute."* (Emphasis added.)

In instructing the jury with regard to determining the appellant's guilt or innocence if the jury did not find that the appellant actually committed the shooting, the trial court stated, in relevant part:

> "In order to prove a defendant guilty of a particular crime it is not necessary – not necessarily required – that the State prove that the defendant himself personally committed the crime. Instead, in certain circumstances the law makes a defendant responsible for the criminal acts of another. More specifically, the law provides that a person is responsible for the criminal acts of another person if the defendant intentionally procured, induced or caused the other person to commit the act, or if the defendant intentionally aided and abetted another person's commission of the act. . . . If you find that the murder of Isaiah Harris was committed by some person or persons other than the defendant, the defendant would be guilty of that murder if you find beyond a reasonable doubt and to a moral certainty either that the defendant intentionally procured, induced or caused the other person or persons to commit the murder; or that the defendant intentionally aided or abetted the other person or persons in committing the murder. . . . Likewise, if you find that a murder of the intentional killing-type was committed by some person or persons other than the defendant, the defendant would be guilty of

> that intentional killing-type of murder if, but only if, you find beyond a reasonable doubt that the defendant intentionally procured, induced or caused the other person or persons to commit the murder, or that the defendant intentionally aided or abetted the other person or persons in the commission of the murder. Only if you are convinced beyond a reasonable doubt that either or both of those situations exist as a fact beyond a reasonable doubt and to a moral certainty can you find the defendant guilty of an intentional killing murder which he did not personally commit or that he did not personally commit himself."

The trial court clearly instructed the jury that the appellant had to possess a particularized intent to kill and it defined an intentional killing. Further, the trial court properly instructed the jury with regard to accomplice liability and aiding and abetting if the jury determined that the appellant did not shoot the victim himself.

The instructions in this case do not contain the same flaw as the instructions in *Russaw v. State,* 572 So.2d 1288 (Ala. Crim. App. 1990), as the appellant argues. In *Russaw,* the trial court failed to instruct the jury that in the capital offense for robbery-murder, it had to find that the defendant had a particularized intent to kill. *Id.* at 1289. The trial court in this case plainly charged the jury that it had to find a "real and specific" intent on the part of the appellant in order to invoke the capital statute.

Additionally, we do not find the instructions of the trial court confusing in regard to the doctrine of accomplice liability as we did in *Russaw.* The trial court properly charged the jury on what it would have

to find as to the appellant's intent if it determined that he did not actually shoot the victim.

C

The appellant argues that the trial court's instructions on accomplice liability improperly suggested that he could be found guilty of capital murder even if he did not act for his own pecuniary gain, pursuant to a contract, or for hire. This argument is without merit.

At the outset, we note that the appellant did not object to the trial court's instructions on accomplice liability. Therefore, we review this issue pursuant to the plain error rule. Rule 45(A), Ala. R. App. P.

We agree with the State that the §13A-5-40(7), Code of Alabama 1975, requires proof (1) of an intentional murder, and (2) that the murder was committed for pecuniary gain, pursuant to a contract, or for hire. The statute does not require the State to establish that the appellant, himself, rather than his accomplices, received the pecuniary gain, only that the murder was committed for pecuniary gain. In this case, the parties stipulated that Louise Harris stood to receive thousands of dollars in insurance proceeds as a result of her husband's death.

In this case, as previously stated, there was sufficient evidence to establish that the appellant acted for his own pecuniary benefit. Clearly, the evidence presents a case of murder done pecuniary gain, pursuant to a contract, or for hire. The trial court correctly instructed the jury on accomplice liability. Because the evidence was sufficient for the jury to find that the appellant was an active participant in the murder, either as the "trigger man" or as an accomplice, the jury was entitled to find that the appellant committed the murder for pecuniary gain

regardless of whether he actually received remuneration. See *Tomlin v. State,* 443 So.2d 47, 53 (Ala. Crim. App. 1979), aff'd, 443 So.2d 59 (Ala. 1983), *cert. denied,* 466 U.S. 954 (1984), *aff'd on return to remand,* 516 So.2d 790 (Ala. Crim. App. 1986), aff'd, 516 So.2d 797 (Ala. 1987), *on reh'a, rev'd on other arounds,* 540 So.2d 668 (Ala. 1988). The trial court's accomplice liability instructions did not rise to the level of plain error.

D

The appellant argues that the trial court did not adequately instruct the jury that it had the option of convicting him of the lesser included offense of murder if it found that the appellant did not kill for pecuniary gain or pursuant to a contract or for hire and that the trial court failed to instruct on the appellant's intoxication as it may have affected his ability to form the specific intent to commit murder. Additionally, the appellant argues that the trial court should have instructed the jury on the lesser included offense of reckless murder pursuant to §13A-6-2, Code of Alabama 1975. Defense counsel did not object to the trial court's instructions in regard to any lesser included offenses. Thus, we must examine these issues under the plain error rule. Rule 45(A), Ala. R. App. P.

D-1

The trial court clearly instructed the jury on the lesser included offense of intentional murder by stating: "A person commits the crime of murder if he causes the death of another person and in performing the act or acts which cause the death he intends to kill that person." The trial court went further and distinguished between capital murder and murder. The trial court defined the intent necessary to commit murder. The trial court properly instructed the jury

that it could render one of three possible verdicts: guilty of capital murder, guilty of murder, or not guilty. Viewing the trial court's instructions as a whole, as we are required to do, *Ex parte Kennedy,* 472 So.2d 1106 (Ala. 1985), we find no plain error in the trial court's instruction on murder as a lesser included offense to capital murder in this case.

D-2

The appellant contends that the trial court should have charged the jury as to intoxication as a defense to intentional murder, because, he says, there was evidence that he was intoxicated on the night of the murder and that he was therefore incapable of forming the specific intent required to commit capital murder. Again, because there was no objection on the failure to give such a charge we review this issue under the plain error rule. Rule 45(A), Ala. R. App. P.

"[D]runkenness due to liquor or drugs may render [a] defendant incapable of forming or entertaining a specific intent or some particular mental element that is essential to the crime.' Commentary to Ala. Code 1975, §13A-3-2." *Fletcher v. State,* 621 So.2d 1010, 1019 (Ala. Crim. App. 1993). Thus, when the crime charged requires specific intent as an element and there is evidence of intoxication, the trial court should instruct the jury on the lesser included offense of manslaughter. *Id*.; *McNeill v. State,* 496 So.2d 108, 109 (Ala. Crim. App. 1986).

However, a charge on a lesser included offense is not warranted where the lesser included offense is incompatible with the defenses to the case. See, e.g., *Gurley v. State,* [Ms. CR-87-0489, October 22, 1993] __ So.2d __ (Ala. Crim. App. 1993) (no [plain error in failing to give intoxication instruction where defendant

relied on convincing the factfinder that his "intentional decision to defend himself by killing Bentley was justified, rather than on persuading the factfinder that he was unable to form the intent to kill due to intoxication); *Lacy v. State,* [Ms. CR-91-281, January 22, 1993] __ So.2d __ (Ala. Crim. App.), *cert. denied,* [Ms. 1920871, August 30, 1993] __ So.2d__ (Ala. 1993) (self-defense negates argument that accused acted recklessly because he intended to defend himself).

In this case, we hold that there was no plain error *in* the trial court's failure to charge the jury in regard to the appellant's intoxication. The appellant failed to establish that intoxication rendered him unable to form the necessary intent for murder. Rather, the appellant testified on his own behalf that his codefendant, Lorenzo (Bo Bo) McCarter actually killed the victim. The appellant, during cross-examination, was specific and detailed in regard to what he saw and heard on the night of the shooting. In fact, during cross-examination, the appellant agreed that there was "no doubt in [his] mind about who did what," and further agreed that "alcohol hadn't fuzzed his brain." Clearly, for the appellant to assert that he was intoxicated to the extent that he could not have formed the necessary intent to murder is inconsistent with his defense that someone else committed the murder and that he observed the murder and recalled the specific details surrounding it. Unlike the facts presented in *Owens v. State,* 611 So.2d 1126 (Ala. Crim. App. 1992) (Montiel, J., dissenting), the facts of this case do not warrant an instruction the effects of intoxication when the accused plainly testifies that alcohol or drugs did not hamper his ability to recall events surrounding the crime or that alleged intoxication did not play a role in the commission of the offense.

Because no objection was raised to the failure to charge on the appellant's intoxication and the appellant's intoxication was incompatible with his defense, we hold that no plain error occurred.

D-3

In a footnote to his supplemental brief the appellant argues that the trial court erred in failing to instruct the jury on reckless murder. §13A-6-2, Code of Alabama 1975. No objection was raised on this ground and we examine this issue under the plain error rule. Rule 45(A), Ala. R. App. P. The trial court's failure to give such an instruction was not plain error.

The evidence presented during the trial clearly does not support a charge on reckless murder. A person commits the crime of reckless murder if "[u]nder circumstances manifesting extreme indifference to human life, he recklessly engages in conduct which creates a grave risk of death to a person other than himself, and thereby causes the death of another person." §13A-6-2(a)(2), Code of Alabama 1975. In *Northington v. State,* 413 So.2d 1169 (Ala. Crim. App. 1981), *cert. quashed,* 413 So.2d 1172 (Ala. Crim. App. 1982), this Court held that a reckless murder charge does not apply where the defendant's acts are directed towards a particular person and no other. In this case, the appellant's acts were specifically directed towards Isaiah Harris and no one else.

Where the evidence does not support an instruction on the lesser included offense of reckless murder, the instruction need not be given. *Johnson v. State,* 620 So.2d 679 (Ala. Crim. App. 1992), *rev'd on other grounds,* 620 So.2d 709 (Ala.), *cert. denied,* __ U.S. __ 114 S.Ct. 285 (1993). In this case, there is absolutely no evidence to support a finding that the appellant

committed reckless murder. See also *Harris v. State,* [Ms. 3 Div. 332, June 12, 1992] __ So.2d __ (Ala. Crim. App. 1992), *aff'd*, [Ms. 1920374, June 25, 1993] __ So.2d __ (Ala. 1993).

E

The appellant contends that the trial court's instructions permitted the jury to convict him of capital murder without arriving at a unanimous verdict. Specifically, the appellant argues that the different elements of §13A-5-40(a)(7), Code of Alabama 1975, which make murder a capital offense if the murder is committed for pecuniary gain or other valuable consideration or pursuant to a contract or for hire, permitted the jury to convict him even if the jurors did not agree which element of the statute made the offense a capital one.

First we note that the trial court clearly and thoroughly instructed the jury that its verdict had to be unanimous. Additionally, the trial court's instructions sufficiently tracked the language of §13A-5-40(a)(7). "Charges which track the language of a Code section are sufficient." *Harris v. State,* [Ms. 3 Div. 132, June 12, 19921 __ So.2d __ (Ala. r'rim. App. 1992), *aff'd,* [Ms. 1920374, June 25, 1993] __ So.2d __ (Ala. 1993) (citing *Salter v. State,* 578 So.2d 1092, 1096 (Ala. Crim. App. 1990), writ *denied,* 578 So.2d 1097 (Ala. 1991).

Moreover, in *Harris,* we addressed this precise issue. Where the indictment charges, in a single count, alternative methods of proving the same crime, it is not duplicitous and does not permit the jury to reach a nonunanimous verdict. __ So.2d at __.

> "'In effect, the indictment charged, in a single count, alternative methods of proving

> the same crime. See *Sisson v. State,* 528 So.2d 115 (Ala. Crim. App. 1987), affirmed, *Ex parte State,* 528 So.2d 1159 (Ala. 1988) ("Section 32-5A-191(a) (1) and (2) are merely two different methods of proving the same offense – driving under the influence.") "When an offense may be committed by different means or with different intents, such means or intents may be alleged in an indictment in the same count in the alternative." Alabama Code 1975, § 15-8-50. *Chappell v. State,* 52 Ala. 359, 360-61 (1875), held that in an indictment for common law robbery, the taking of the property from the victim may be charged to have been "against his will, by violence to his person" or "by putting him in such fear as to cause him] unwillingly to part with the same" in different counts or in the same count in the alternative.' *Williams v. State,* 538 So.2d 1250, 1252 (Ala. Crim. App. 1988)."

__ So.2d at __.

We adhere to our holding in *Harris* that merely giving a charge that includes the different elements that could ma a murder capital does not inevitably lead to a nonunanimous verdict and does not render the indictment duplicitous. Therefore, the trial court's instructions on the capital murder statute were proper.

F

The appellant argues that several phrases in the trial court's instructions to the jury require reversal.

F-1

While giving his instructions to the jury, the trial judge stated, "The defendant is guilty of the crime of

murder – the reason a defendant is guilty of the crime of murder is because of the act of the principals . . . ." The trial judge rephrased his sentence when describing accomplice liability to the jury to refer to a defendant generally. Viewing the instructions on accomplice liability as a whole, and considering that the trial judge immediately referred to a defendant in general terms in mid-sentence upon noticing a potential problem, we hold that there was no error. The trial judge instantly corrected his error and once completed, the only reasonable construction of the sentence is as a reference to a defendant generally rather than as a statement that the appellant was guilty of the acts of his accomplices.

F-2

The appellant further argues that the trial judge "raised the specter of the 'people of the community' and 'the State of Alabama' being 'figuratively' present in the courtroom, seeking 'enforcement of their laws' from the jury," and contends that the trial judge condoned the prosecutor's appeals to the jury in regard to matters having nothing to do with his guilt or innocence. No objection was made with regard to this matter and, thus, we review this issue under the plain error rule. Rule 45(A), Ala. R. App. P.

When taken in context, it is clear that the trial judge in the disputed comments was telling the jurors that the appellant's life was at stake and that the State of Alabama required the jurors not to take their task lightly and that in reaching a verdict they must protect the appellant's rights and enforce the laws of Alabama. We hold that when viewed in context, these comments, explaining to the jurors the seriousness of the case, do not rise to the level of plain error.

The appellant argues that the trial judge improperly urged the jurors to look to God for guidance in reaching their verdict. The trial judge, in his last remarks to the jury, stated:

> "My prayer is that the Lord will give each member of this jury an understanding and hearing heart to judge this matter, and I pray that you will be given understanding and wisdom to discern between good and bad and between what is truth and what is not truth so that your judgment and your verdict will speak the truth."

This Court has held that:

> ""'Remarks by the trial judge may be open to criticism, but they are not error unless they may have affected the result of the trial. . . . It is not every erroneous expression of opinion by a trial judge, during trial, that will furnish a ground for reversal. To do so it must, in some manner, influence the result of the cause, or be supposed to do so. . . . Each case rests upon its own peculiar facts and circumstances." (Citations omitted.)

Morgan v. State, 589 So.2d 1315, 1318-19 (Ala. Crim. App. 1991).

We find no harm to the appellant by the trial judge's remarks. Again, *when* viewed in the entire context in which they were made, the remarks of the trial judge explained to the jurors the importance of their factfinding and their verdict. The trial judge was expressing his desire that the verdict of the jury be a true verdict. The trial judge did not urge the jurors to

look to God for guidance in arriving at their verdict as the appellant argues. We cannot find that the jurors were improperly influenced by the trial judge's desire for them to reach a true verdict.

IX

The appellant contends that his sentence is unconstitutional because, he says, the element that made the offense capital," – that the murder was done for pecuniary gain – is vague, arbitrary, and discriminatory in violation of the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

A

First, the appellant contends that the "pecuniary gain" aggravating circumstance has not been adequately defined. We disagree. In *Henderson v. State,* 584 So.2d 841, 859 (Ala. Crim. App. 1988), *remanded on other grounds,* 584 So.2d 862 (Ala.), aff'd *on remand,* 587 So.2d 1071 (Ala. Crim. App. 1991), *cert. denied,* __ U.S. __, 113 S.Ct. 1297, 122 L.Ed.2d 687 (1993), this Court stated that "'pecuniary gain' as used in the language stating the aggravating circumstance, encompasses more than just money and can include anything that results in an economic gain." "Pecuniary gain" is similar to "pecuniary benefit" which is defined as "[b]enefit in the form of money, property, commercial interests or anything else the primary significance of which is economic gain. . . ." *Id.*; §13A-10-60(b)(2), Code of Alabama 1975.

Thus, we hold that the Code and Alabama case law adequately define the term "pecuniary gain" as it applies as an element of the capital offense of murder for hire and as an aggravating circumstance in a capital murder case.

B

The appellant also contends that this Court has not determined whether the death penalty is constitutionally applied in a situation where the only aggravating circumstance is that the murder was committed for pecuniary gain.

However, the State, in its brief, correctly notes that in *Henderson v. State, supra,* the only aggravating circumstance was that the offense was committed for pecuniary gain.[1]

Implicit in our holding in *Henderson* is that the element that a murder was committed for pecuniary gain, is, alone, sufficient to support the death penalty so long as that aggravating circumstance outweighs any mitigating circumstances. In this case, the trial court rejected the jury's recommendation that the appellant be sentenced to life imprisonment without parole. It is apparent that the trial court carefully weighed the aggravating circumstance and the mitigating circumstances in this case. Because we do not believe the trial court abused its discretion in sentencing the appellant, we hold that the trial court constitutionally applied the death penalty where the sole aggravating circumstance was that the murder was committed for pecuniary gain.

C

The appellant also asserts that there was no evidence presented that he would receive any financial

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[1] In *Henderson,* we noted that when the trial court was instructing the jury as to the weighing process at the sentencing phase, the "trial court then instructed the jury as to the one aggravating circumstance, that the capital offense was committed for pecuniary gain . . . .'

benefits as a result of the victim's death; and therefore, he says, the trial court erred in applying the pecuniary gain aggravating circumstance to him. The appellant also argues that the trial court considered the pecuniary benefit that codefendant Louise Harris stood to receive and improperly attributed that benefit to him. We disagree.

As we noted when addressing the appellant's argument concerning the issue of whether the State proved the corpus delicti of the crime, the evidence in this case established that the victim's wife, codefendant Louise Harris, stood to gain thousands of dollars *in* insurance proceeds as a result of her husband's death. Additionally, Patterson testified that after the shooting, the appellant returned to Hood's vehicle and said that "he was gonna get his money." This evidence, associated with the other evidence that McCarter had been trying to hire someone to kill the Harris was sufficient to allow the application of the aggravating circumstance that the murder was committed for the appellant's own pecuniary benefit.

It is apparent that the trial court used the evidence presented in this case that the appellant, himself, stood to derive pecuniary gain for shooting the victim in this case. Therefore, we conclude that the trial court did not rely on the pecuniary gain that codefendant Harris was to receive in applying the aggravating circumstance to the appellant.

D

With regard to the aggravating circumstance that the murder was committed for pecniary gain, the appellant also contends that it does not pertain to the "hiree" in a murder for hire case, and that, therefore,

he argues, the circumstance does not apply to him. This argument is without merit.

In *Haney v. State,* 603 So.2d 368 (Ala. Crim. App. 1991), *aff'd,* 603 So.2d 412 (Ala. 1992), *cert. denied,*__ U.S. __, 113 S.Ct. 1297, 122 L.Ed.2d 687 (1993), we held that in applying the aggravating circumstance that the murder was committed for pecuniary gain to a capital offense the legislature did not intend to distinguish between the "hirer" and the "hiree." In *Haney,* we held that the hirer was as guilty as the hires. The reverse is also true. In this case, the pecuniary gain aggravating circumstance applies to the appellant – the hires – equally as it applies to codefendant Harris – the hirer.

X

The appellant next argues that the trial court erred in considering arbitrary factors in overriding the jury's recommendation of life imprisonment without parole and in imposing the death sentence and that the trial court erred in finding that the pecuniary gain aggravating circumstance outweighed the statutory and nonstatutory mitigating circumstances.

A

The appellant contends that the trial court improperly rejected the jury's recommended sentence of life imprisonment without parole. We disagree.

The jury's recommendation must be considered, but it is not binding upon the trial court. §13A-5-47(e), Code of Alabama 1975. "The trial court and not the jury is the sentencing authority." *Freeman v. State,* 555 So.2d 196, 213 (Ala. Crim. App. 1988), *aff'd*, 555 So.2d 215 (Ala. 1989); see also *Harris,* __ So.2d at __.

The appellant argues that the trial court considered extrajudicial factors from the trial of his codefendant which, he says, is reflected in the sentencing order in his case.[2] Specifically, under the heading "General Findings Concerning the Defendant and the Crime," the sentencing order refers to such things as co-defendant Louise Harris's extramarital affair with codefendant Lorenzo McCarter, Louise Harris's lack of concern for her husband when his supervisors called her because he was late for work, Louise Harris's lack of grief when she discovered her husband had been killed, and Louise Harris's admission of the affair with Lorenzo McCarter and her statement that McCarter made love to her like nobody else could. The appellant asserts that because these matters referred to in the trial court's sentencing order were not evidence at his trial, the trial court's decision was based upon arbitrary and capricious factors.

We note that several of the general facts as set forth in the trial court's sentencing order are reasonable inferences from the evidence produced at trial. While some of the factual matters in the trial court's sentencing order were not based upon evidence contained in the record, we hold that error in the trial court's sentencing order is not so egregious as to require a new sentencing order.

The purpose of requiring a trial court to issue a sentencing order in a capital case is to allow an appellate court to review a death sentence. See *Fortenberry v. State,* 545 So.2d 129, 144 (Ala. Crim. App. 1988), *aff'd,* 545 So.2d 145 (Ala. 1989). "'As long as the trial judge properly exercises his discretion and

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[2] The circuit court judge who presided over the appellant's trial also presided over codefendant Louise Harris's trial.

the facts indicating the death penalty are "so clear and convincing that virtually no reasonable person could differ," a harmless error analysis can be used.'" *Id.* (citations omitted). In this case, there was ample evidence and facts adduced from that evidence in this case that the murder was committed for pecuniary gain, justifying the imposition of a death sentence. Therefore, we must determine whether the trial court's referral to nonrecord evidence was harmless error.

While the trial court refers to some extraneous matters in the sentencing order, it is clear that the trial court considered the statutory and nonstatutory mitigating circumstances in imposing sentence upon the appellant. Additionally, the trial court found only one aggravating circumstance – that the murder was committed for pecuniary gain. The sentencing order reflects that the trial court weighed the mitigating circumstances and the aggravating circumstance and there is no evidence that the trial court failed to consider the mitigating circumstances. The sentencing order does not reflect that the court considered any extraneous matter extraneous matter in imposing sentence against the appellant. Therefore, because the extraneous matters did not affect the trial court's proper weighing of the aggravating and mitigating circumstances, we find that the court's referral to some extraneous matter in its sentencing order was harmless error.

B

The appellant argues that the trial court erred in finding that the pecuniary gain aggravating circumstance outweighed the statutory and nonstatutory mitigating circumstances, because, he says, there was no evidence to establish beyond a reasonable doubt

that he would receive pecuniary gain as a result of the victim's death. In Part VII and Part IX.D of this opinion, we addressed the propriety of the finding that the appellant committed this crime for his own pecuniary benefit. Therefore, we find no error in the trial court applying the pecuniary gain aggravating circumstance in this case for purposes of sentencing.

C

The appellant also contends that the trial court specifically found that the appellant was the "trigger man" when this evidence was disputed and when the jury made no such specific finding. The lopellant contends that. as a result of this allegedly false assumption, the trial court erred in finding that mitigating circumstances that his participation was minor, that he acted under substantial domination of another, and that his capacity to appreciate the criminality of his conduct were not present.

The trial court's sentencing order was not improper. Pursuant to §13A-5-47(d), Code of Alabama 1975, the trial judge must review the evidence and is required to "enter written findings of fact summarizing the crime and the defendant's participation in it" when the death penalty is imposed. The trial court's finding that the appellant was the "trigger man," while perhaps based upon disputed evidence and while the jury did not specifically so find, was amply supported by the evidence. "There is no requirement under Alabama's new capital felony statute that the jury make specific findings as to the existence of aggravating circumstances during the sentencing phase of the proceedings. The jury's verdict whether to sentence a defendant to death or to life without parole is advisory only." *Bush v. State,* 431 So.2d 555, 559 (Ala. Crim. App. 1982), *aff'd,* 431 So.2d 563 (Ala. 1983), *cert. denie4,* 464

U.S. 865, 104 S.Ct. 200, 78 L.Ed.2d 175 (1983). The trial court must issue written findings of fact setting forth its determination of the appellant's sentence. *Whisenhant v. State,* 482 So.2d 1225, 1239 (Ala. Crim. App. 1982), *aff'd in Dart and remanded with directions,* 482 So.2d 1241 (Ala. 1985).

Assuming that, based upon the evidence, the trial court found as a fact that the appellant was the "trigger man" and used this finding in weighing the aggravating circumstance and the mitigating circumstances, we find no error. The trial court was required to make that finding based upon the evidence presented at trial, and, although the trial court may have determined that the appellant was the "trigger man," it did not determine that being the "trigger man" was an aggravating circumstance. The trial court found that the only aggravating circumstance was that the murder was committed for pecuniary gain.

The appellant also contends that the trial court erred in imposing the death penalty because, he says, it did not give adequate weight to the jury's advisory sentence of life imprisonment without parole. This argument lacks merit.

In determining the sentence to be imposed in a capital case, the trial court is to consider the advisory verdict of the jury. §13A-5-57(e), Code of Alabama 1975. However, the jury's recommendation to the trial court that the appellant should be sentenced to life imprisonment without parole is not binding upon the trial court. *Hooks v. State,* 534 So.2d 329 (Ala. Cris. App. 1987), aff'd, 534 So.2d 371 (Ala. 1988), cert. denied, 488 U.S. 1050, 109 S.Ct. 883, 102 L.Ed.2d 1005 (1989); *Bush,* 431 So.2d at 559. We find no Alabama

law that specifies the weight a trial court is to accord to the jury's advisory sentence.[3]

In this case, the trial court, in its sentencing order, clearly stated that it considered the jury's advisory verdict. Because the trial court considered the jury's recommendation, there is no error in this regard.

XI

The appellant argues that his sentence of death is disproportionate to sentences imposed on similar defendants under similar circumstances.

The appellant was eligible to be sentenced to death as a result of his conviction for murder for pecuniary gain. §13A-550(7), Code of Alabama 1975. Additionally, the death penalty has been imposed upon defendants in similar cases. See *Parker v. State,* 587 So.2d 1072 (Ala. Crim. App. 1991), *after remand,* 610 So.2d 1171 (Ala. Crim. App. 1992), *cert. denied,* __ U.S. __, 113 S.Ct. 3053, 125 L.Ed.2d 737 (1993); *Hubbard v. State,* 500 So.2d 1204 (Ala. Crim. App. 1986), aff'd, 500 So.2d 1231 (Ala. 1986), *cert. denied,* __ U.S. __, 112 S.Ct. 896, 116 L.Ed.2d 798 (1992). We have recently affirmed the death sentence imposed upon the appellant's codefendant, Louise Harris, who, through codefendant

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[3] The appellant urges this Court to adopt the Florida standard set forth in *Tedder v. State,* 322 So.2d 908, 910 (Fla. 1975), holding that a jury's recommendation of life imprisonment without parole may be rejected only if the facts suggesting a death sentence are "so clear and convincing that no reasonable person could differ." However, the United States Supreme Court has clearly held that the nonbinding advisory verdict system is constitutional. *Proffit v. Florida,* 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). Thus, we have declined to adopt the *Tedder* standard. See, e.g., *Harris v. State,* [Ms. 3 Div. 332, June 12, 1992] __ So.2d __ (Ala. Crim. App. 1992); *Murry v. State,* 455 So.2d 53 (Ala. Crim. App. 1983).

McCarter, hired the appellant to commit the murder. *Harris,* __ So.2d at __. Because there was ample evidence presented that the appellant participated in this crime for his own pecuniary gain and was the "trigger man," we hold that his sentence of death is proportionate to the sentences imposed on his accomplices and the sentences imposed upon others under similar circumstances.

XII

The appellant claims that several errors in the trial court's sentencing considerations and in the trial court's sentencing order require this Court to vacate his death sentence.

A

The appellant argues that the process by which the trial judge overrode the jury's recommendation was arbitrary because, he says, the trial court adopted the State's proposed sentencing order verbatim and, he says, it denied him the right to confront and rebut evidence against him. These arguments lack merit.

In *Bell v. State,* 593 So.2d. 123, 126 (Ala. Crim. App. 1991), *cert. denied,* __ U.S. __, 112 S.Ct. 2981, 119 L.Ed.2d 599 (1992), this Court stated:

> "While the practice of adopting the state's proposed findings and conclusions is subject to criticism, the general rule is that even when the court adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous. *Anderson v. City of Bessemer City. N.C.,* 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985); *Hubbard v. State,* 584 So.2d 895 (Ala. Crim. App. 1991); *Weeks v. State,* 568 So.2d

> 864 (Ala. Crim. App-1989), cert. denied, __ U.S., __, 111 S.Ct. 230, 112 L.Ed.2d 184 (1990); *Morrison v. State,* 551 So.2d 435 (Ala. Crim. App.), cert. denied, 495 U.S. 911, 110 S.Ct. 1938, 109 L.Ed.2d 301 (1990)."

Here, the trial court, when it adopted the State's proposed order, stated that the contents of the order accurately reflected the court's findings and conclusions. Additionally. we find that the majority of the findings and conclusions are based upon the evidence presented during the trial and the sentencing hearing. The appellant was given the opportunity to present evidence and testimony at the sentencing hearing, and thus, he had opportunity to confront and to rebut the evidence against him. The fact that the State's attorney proposed and drafted the trial court's order does not indicate that the trial court arrived at the appellant's sentence in an arbitrary manner. Any extraneous matter referred to in the sentencing order did not pertain to the weighing of the aggravating and mitigating circumstances, as we addressed in Part X.A. of this opinion and, thus, was not error. Therefore, although we do not condone the practice of adopting the State's proposed order verbatim, we cannot hold that the trial court's action was clearly erroneous.

B

The appellant argues that the trial judge was without jurisdictional authority to enter his written findings and sentencing order because, he says, when the trial court did so his case was already on appeal to this Court.

On March 2, 1990, the trial court conducted a sentencing hearing, during which evidence and arguments by counsel were presented. At the close of

the sentencing hearing, the trial court orally sentenced the appellant to death. At that time, the trial court did not enter written findings in regard to the appellant's sentence. On November 13, 1990, after the record on appeal had been filed, but prior to the submission of briefs, the State filed a proposed sentencing order with the trial court and served copies of the proposed order on defense counsel. On November 16, 1990, defense counsel objected to the proposed sentencing order on the basis that the trial court did not have jurisdiction to enter a sentencing order at that time. On February 28, 1991, after a hearing, the trial court granted the State's Rule 10(f), Ala. R. App. P., motion to supplement the record on appeal so that the record would contain the trial court's written findings and sentencing order. As of February 28, 1991, the appellant's brief was not due. We hold that the trial court had jurisdiction to supplement the record in this case, under Rule 10(g), rather than Rule 10(f), Ala. R. App. P., which provides that the appellee may timely file a motion to supplement the record with the trial court within 14 days after the appellant's brief has been submitted.

The appellant argues that the process by which the trial court's written findings were submitted to this Court through supplementation establishes that the trial court sentenced him to death in an arbitrary manner. However, if the trial court had failed to enter written findings with regard to the appellant's sentence, this Court would have remanded the appellant's case to the trial court for the trial court to enter written findings in regard to the appellant's sentence. A new sentence hearing would not have been required. Therefore, we find that the error of failing to submit the written findings before the record on appeal was completed was harmless.

C

The appellant further argues that the trial court refused to allow him to present mitigating evidence of his good behavior while he was in jail. We disagree.

During the sentencing phase of the trial, the defense presented the testimony of Lee Green, Jr., the chief jailor of prison facility in Dallas County, where the appellant was held while awaiting his trial. Green testified that the appellant presented no discipline problems while he had been incarcerated. Clearly, the appellant was permitted and did present mitigating evidence of his good behavior *while* he was in jail. The appellant's argument that he was entitled to present additional evidence at the hearing on the motion to supplement the record is without merit.

D

The appellant argues that the trial court failed to consider nonstatutory mitigating evidence of his intoxication from alcohol at the time of the offense, his history of alcoholism, and his low level of intelligence, in violation of *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

The record reveals that the trial court considered mitigating evidence presented by the appellant. "While *Lockett,* and its progeny require consideration of all evidence submitted as mitigation, whether the evidence is actually found to be mitigating is in the discretion of the sentencing authority." *Bankhead v.* State, 585 So.2d 97 (Ala. Crim. App. 1989), 585 So.2d 112 (Ala. 1991); see also *Ex parte Hart,* 612 So.2d 536, 542 (Ala. 1992), *cert. denied,* __ U.S. __, 113 S.Ct. 2450, 124 L.Ed.2d 666 (1993). "The trial court is not required to find the existence of a mitigating circumstance simply because the accused proffers evidence of a

mitigating circumstance." *Johnson,* 620 So.2d at 705 (citations omitted).

The trial court considered the mitigating evidence offered on behalf of the appellant but concluded that the mitigating circumstances were outweighed by the aggravating circumstance that the murder was committed for pecuniary gain.

E

The appellant argues that the trial court "directed a verdict" for the State by finding in its sentencing order that the pecuniary gain aggravating circumstance existed, although the jury did not necessarily decide this issue at the guilt phase. The appellant argues that the jury could have found him guilty of murder pursuant to a contract, and further argues that the word "contract" does not necessarily mean that the murder was committed for pecuniary gain or consideration; therefore, he argues, the pecuniary gain aggravating circumstance does not automatically apply *in* his case. This argument is without merit and distorts the plain meaning of §13A-5-40(7), Code of Alabama 1975.

Section 13A-5-40(7), Code of Alabama, 1975, makes "murder done for a pecuniary or other valuable consideration or pursuant to contract for hire a capital offense. Clearly, the legislature intended the term "pursuant to a contract" to define the manner in which a murder for hire situation arises. Additionally, the word "contract" connotes some form of consideration, for example, pecuniary gain. In *Harris v. State,* the indictment charged the defendant with murder for pecuniary or other valuable consideration or pursuant to a contract or for hire in the same manner as the indictment in this case charges the appellant.

Nevertheless, this Court found no plain error in automatically applying the pecuniary gain aggravating circumstance in that case. See also *State v. Lundy,* 539 So.2d 322 (Ala. 1988). Thus, the Alabama courts have implicitly recognized that the term "pursuant to a contract" as used in §13A-5-40(7) intends that pecuniary gain is to be had as a result of the murder.

Because the appellant was found guilty of capital murder either as a result of murder for pecuniary gain or other valuable consideration or pursuant to a contract or for hire, the pecuniary gain aggravating circumstance was established as a matter of law and automatically applies in sentencing considerations. *Henderson v. State,* 584 So.2d 841 (Ala. Cris. App. 1988).

XIII

The appellant argues that the prosecutor engaged in misconduct during the guilt phase and the penalty phase of his trial thereby denying him the right to a fair trial, and that, therefore, his conviction and sentence must be reversed.

A

The appellant asserts that the prosecutor argued and attempted to elicit inculpatory out-of-court statements made by his codefendants who did not testify, which denied him the right to a fair trial. Codefendants McCarter, Hood, and Harris did not testify during the appellant's trial. However, during cross-examination of the appellant and during closing arguments, the prosecutor alluded to the substance of statements made by the codefendants to the investigators.

The following transpired during closing argument at the guilt phase of the trial:

> "[By Ms. Brooks, prosecutor] . . . Ladies and gentlemen, the testimony is uncontradicted that on the night – the day he was arrested, Lorenzo McCarter gave a statement to law enforcement officials. It is uncontradicted that Lorenzo McCarter said the shooter was Michael Sockwell. March 11, 1988, his statement.
>
> "MR. WISE [defense counsel]: Your Honor, I object. There's been no testimony from Lorenzo McCarter.
>
> "MS. BROOKS: No need for any testimony. "THE COURT: Sustained.
>
> "MS. BROOKS: Is there? It's uncontradicted what he said.
>
> "MR. WISE: Your Honor, I ask the Court to instruct the jury to disregard it.
>
> "THE COURT: Sustained.
>
> "MS. BROOKS: And Mr. Wise is upset –
>
> "THE COURT: Sustained.
>
> "MS. . BROOKS: Excuse me, Judge.
>
> "THE COURT: Jury will disregard anything about the times you said it."

After reviewing the record, we find that when defense counsel objected to the prosecutor's improper conduct, the trial court sustained the objection and instructed the jury to disregard the prosecutor's references.

In *Douglas v. Alabama,* 380 U.S. 415, 35 S.Ct 1074, 13 L.Ed.2d 934 (1965), the Supreme Court held that where a codefendant refuses to testify, the prosecutor's references to the substance of the codefendant's

inculpatory statement given to the police violates the defendant's Sixth Amendment right to confront witnesses against him. However, violations of the Confrontation Clause of the Sixth Amendment are subject to harmless error analysis. *Delaware v. Van Arsdall,* 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); see also *Busby v. State,* 412 So.2d 837 (Ala. Crim. App. 1982). "The correct inquiry is whether, assuming that the damaging potential of the . . . [statement] were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." *Hooper v. State,* 585 So.2d 142, 146 (Ala. Crim. App. 1991), *cert. denied,* 112 S.Ct. 1295, 117 L.Ed.2d 517 (1992) (quoting *Van Arsdall,* 475 U.S. at 684). The inquiry is conducted on a case-by-case basis, to determine whether, in light of all of the surrounding circumstances, harmless error occurred. *Husby,* 412 So.2d at 843.

In this case, ample evidence was presented to show that the appellant was the shooter. Patterson testified that the appellant was the shooter. The appellant was known to be carrying a shotgun in Hood's vehicle. Gilmore testified that the appellant told him that he shot someone -in the face. Additionally, the appellant, in his statement to Investigator Huggins, stated that he shot the victim. Thus, in light of the overwhelming evidence and in light of the instruction that the trial judge gave to the jury when defense counsel objected, the prosecutor's argument to the jury during closing argument that Hood and McCarter stated to the police that the appellant was the shooter was harmless error.

The appellant contends that the prosecutor, during rebuttal argument at the guilt stage, urged the jurors to ignore the reasonable doubt standard. The

prosecutor made the following remarks during her closing arguments:

> "[R]easonable doubt, that's something that is common with defense attorneys. Reasonable doubt is the same in this case as in all criminal cases of anybody who has ever gone to prison. Anybody convicted of murder, capital murder, has had that same benefit of reasonable doubt. It's not beyond all doubt but merely beyond a reasonable doubt. Don't be frightened away by thinking well, my goodness, how can I know for sure. You know unless God comes down here and says this is what happened we must rely on our common sense on circumstances, on witnesses, on material exhibits, photographs, and use your good sense in weighing this evidence."

The appellant argues that these remarks implied that because defense counsel in other cases reminded the jurors of the reasonable doubt standard and the defendants in other cases were found guilty, that the appellant must be guilty because defense counsel in his case reminded the jurors of the reasonable doubt standard. This argument is without merit.

At the outset, we note that defense counsel did not object to these remarks. Therefore, we decide this issue under the plain error rule. See Rule 45(A), Ala. R. App. P.; *Keunzel v. State.* While failing to object does not preclude.our review of the alleged error in a capital case, it does weigh against any alleged harm that the appellant may have suffered. *Williams v. State,* 601 So.2d 1062 (Ala. Crim. App. 1991).

During closing arguments before the prosecution's rebuttal, defense counsel argued to the jury that the

State had to prove the appellant's guilt beyond a reasonable doubt, which was a "high burden." The prosecutor's remarks must be examined in light of the circumstances or in the context in which they were made. *Johnson v. State,* 620 So.2d 679 (Ala. 1991). The comments made by the prosecutor in rebuttal were replies to the remark made by defense counsel that the reasonable doubt standard was a "high burden." Statements made during closing arguments which are in reply to arguments made by opposing counsel are not grounds for reversal. *Stephens v. State,* 580 So.2d 11 (Ala. Crim. App. 1990), *aff'd,* 580 So.2d 26 (Ala. 1991), *cert. denied,* __ U.S. __, 112 S.Ct. 176, 116 L.Ed.2d 138 (1991). Therefore, we hold that no plain error occurred.

C

The appellant argues that the prosecutor, during rebuttal at the guilt phase, improperly urged the jurors to "send a message" to the people in the county and the state by convicting him. The following transpired:

> "Send a message. Michael Sockwell, we find you guilty. We do not buy your lies. The evidence is overwhelming against you and we will not allow people in our county to take $50 and a hope for more to blow away [the] Isaiah Harris[es] of this world. This is a county and country of law and order. We need you to enforce our laws. Without you we can do nothing about these kinds of-cases.

In *Henderson,* 584 So.2d at 858, this Court upheld the prosecution's right to make a general appeal for law enforcement. An abundance of case law exists holding that urging the jury to render a verdict in such

a manner as to punish crime, protect the public from similar offenses, and deter others from committing similar offenses is not improper argument. See *Ex parte Waldrop,* 459 So.2d 959, 962 (Ala. 1984), *cert. denied,* 471 U.S. 1030, 105 S.Ct. 2050, 85 L.Ed.2d 323 (1985); *Kinder,* 515 So.2d at 68; *Orr v. State,* 462 So.2d 1013, 1016 (Ala. Crim. App. 1984).

The prosecutor's remarks in this case were clearly an appeal for law enforcement when viewed in the context in which they were made. Therefore, the remarks were not improper.

D

The appellant contends that the prosecutor introduced inadmissible evidence of the his prior bad acts to the jury and the trial court at the sentence phase of the trial and urged the jury and trial court to sentence the appellant to death on the basis of the inadmissible evidence as a nonstatutory aggravating circumstances. Additionally, the appellant argues that the prosecutor urged the trial court to consider the evidence presented in codefendant Louise Harris's case to override the jury's recommendation and sentence the appellant to death. The appellant contends that this alleged prosecutorial misconduct requires reversal of his sentence. The appellant's arguments lack merit.

With regard to any .alleged error at the penalty phase and its affect upon the jury, we hold that the error, if any, was harmless because the jury returned a recommendation that the appellant be sentenced to life without parole. Likewise, any evidence presented to the trial court by the prosecution regarding the appellant's prior bad acts amounted to harmless error, if any. Again, the trial court found that the only

aggravating circumstance was that the murder was committed for pecuniary gain. Additionally, the trial court found that the appellant had no significant prior criminal history and considered this mitigating circumstance in determining the appellant's sentence. Clearly, the trial court weighed the aggravating circumstance and mitigating circumstances in determining that the appellant should be sentenced to death.

No prior bad acts of the appellant are referred to in the trial court's sentencing order and any references to facts presented in Louise Harris's case were not a part of the trial court's weighing the aggravating circumstance and the mitigating circumstances established in the appellant's case.

Therefore, because the sentencing order reflects proper weighing of the aggravating circumstance and the mitigating circumstances, we apply the doctrine that the trial judge is presumed to disregard any inadmissible evidence and improper factors in sentencing. See *Lightbourne v. Dugger,* 829 F.2d 1012 (11th Cir. 1987), *cert. denied,* 488 U.S. 934, 109 S.Ct. 329, 102 L.Ed.2d 346 (1988); *Whisenhant v. State,* 555 So.2d 219, 229 (Ala. Crim. App. 1988), *aff'd,* 355 So.2d 235 (Ala. 1989), *cert. denied,* 496 U.S. 943, 110 S.Ct. 3230. 110 L.Ed.2d 676 (1990). Cf *Haney v. State,* 603 So.2d 368 (Ala. Crim. App. 1991), *cert. denied,* __ U.S. __ 113 S.Ct. 1297, 122 L.Ed.2d 687 (1993) (The trial court acknowledge in its finding that it carefully considered a presentence report which contained a substantial victim impact statement that had been previously ruled inadmissible). In this case, the record does not reflect that prosecutorial misconduct, if any, influenced the trial court's sentencing decision.

XIV

The appellant argues that the trial court erred in failing to inquire further into a potential conflict of interest that defense counsel may have had in representing him, in violation of the United States Constitution and the Constitution of Alabama, and, thus, his conviction must be reversed.

After the jury had returned a verdict finding the appellant guilty of capital murder but before the sentencing phase of the trial began, the following transpired:

> "MR. WOOD [defense counsel]: . . . I was advised this morning, as your Honor knows, my law firm has a lawyer in it named-Charles K. Parnell [III]. My secretary advised me this morning that Charles N. Parnell [III], on behalf of Baptist Hospital, has sued Michael Sockwell on two occasions and that there are active files in my office where he is a defendant. I did not know about either of these until today and I wanted to *make* the Court aware of it. Of course, Sockwell has not been made aware of it until now. I don't know of any basis for my having told him earlier, but those matters exist and out of an abundance of caution I bring it to the Court's attention.
>
> "THE COURT: I see no problem in it at this stage. Anything else?"

Defense counsel did not learn of the potential conflict until after the jury had returned its verdict. Because defense counsel did not know that a potential conflict existed the trial court was permitted to assume that defense counsel adequately represented the appellant's

interests during the guilt phase of the trial. See *Cuyler v. Sullivan,* 446 U.S. 335, 347, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980).

Moreover, "[i]n order to demonstrate a violation of his Sixth Amendment rights, a defendant must show that an actual conflict of interest adversely affected his lawyers performance." *Id.* at 350. "An actual conflict of interest exists when an attorney owes loyalty to a client whose interests are adverse to another client." *Self v. State,* 564 So.2d 1023, 1033 (Ala. Crim. App. 1989), cert. *quashed,* 564 So.2d 1035 (Ala. 1990).

While it may be that defense counsel's law' partner represented Baptist Hospital in a civil matter against the appellant, we hold that, under the circumstances of this case, an actual conflict of interest did not exist at the time of defense counsel's representation of the appellant. The appellant's interests during the trial were not adverse to Baptist Hospital's interests. The appellant's interests were to be found not guilty, and, if found guilty to be given the smallest sentence. Baptist Hospital's interests were apparently financial – to collect a money judgment from the appellant. Baptist Hospital's interests would not likely be serves if the appellant were convicted because any judgment could not be collected while the appellant is in prison or sentenced to death upon a guilty verdict. The possibility of a conflict is not sufficient to set aside a criminal conviction.

The interests of the appellant and the interests of Baptist Hospital cannot be shown to be adverse to the detriment of the appellant. The appellant argues that prejudice is to be presumed in this case. However, prejudice is presumed when an actual conflict is shown. *Cuyler,* 446 U.S. at 2067. *Browning v. State,* 607 So.2d 339, 342 (Ala. Crim. App. 1992). Because no

actual conflict of interests existed in this case, prejudice is not presumed.

In this case, the appellant cannot demonstrate any prejudice to him as a result of the fact that defense counsel's law partner represented Baptist Hospital. Defense counsel did not know of his law partner's representation until after the jury had found the appellant guilty of capital murder. Additionally, the appellant cannot establish by any evidence that his attorney's performance was adversely affected. The appellant must make a factual showing that his attorney "made a choice between possible alternative courses of action, such as eliciting (or failing to elicit) evidence helpful to one client but harmful to the other." Self, 564 So.2d at 1033 (citations omitted.)

Therefore, the appellant was not denied effective assistance of counsel or a fair trial because of an alleged conflict of interest.

XV

In accordance with §13A-5-53, Code of Alabama 1975, we have reviewed the record. including the pretrial, guilt, and sentencing proceedings, for any error that adversely affected the rights of the appellant. Although the record seems to reflect that the appellant was not personally present during all pretrial proceedings, a majority of this Court has held that an accused's absence at pretrial proceedings does not constitute reversible error absent a showing of prejudice to the accused. *Harris,* __ at __ (Montiel, J., dissenting). The Alabama Supreme Court, in affirming this Court's opinion in *Harris,* stated:

> "We do note, however, the issue on which Judge Montiel dissents – whether Harris had an absolute right to be present at 'all pretrial

> proceedings relating to [her] case' (i.e., proceedings involving questions of law, questions of procedure, or questions regarding the removal of Harris's counsel), pursuant to the guarantees of the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fifth Amendment of the United States Constitution and because every criminal defendant, particularly a defendant in a capital murder case, has the fundamental right to participate in the preparation of her defense. Suffice it to say, without further discussion, that after thoroughly reviewing the record and the applicable law, we are satisfied that the Court of Criminal Appeals adequately addressed and correctly resolved this issue."

Ex parte Harris, [Ms. 1920374, June 25, 1993] __ So.2d __, __ (Ala. 1993). Therefore, although the Alabama Supreme Court appears to acknowledge the fundamental right of an accused to be present at pretrial proceedings, the Court's discussion of the issue, quoted above, indicates that the defendant must show that he was prejudiced as a result of a violation of that fundamental right. Thus, even under the Alabama Supreme Court's analysis of the issue, this Court cannot hold that the appellant's absence from pretrial proceedings in his case rises to the level of plain error.

Further, we find no evidence that the sentence was imposed under any bias, passion, prejudice, or any other arbitrary factor. The trial court properly found the existence of one aggravating circumstance, that the murder was committed for pecuniary gain. The trial court adequately addressed the mitigating circumstances, and did not err in finding that the only

statutory mitigating circumstance that was present was that the appellant had no significant prior criminal history. Ala. Code, §13A-5-51(l). The trial court noted that it considered all of the evidence in which defense counsel presented nonstatutory mitigating circumstances.

The trial court's order reflects that it carefully considered and weighed the aggravating circumstance and the evidence offered in mitigation. After an independent weighing of the aggravating circumstance and the mitigating circumstances presented in this case, we hold that the evidence supports the trial court's order and indicates that the appellant's death sentence was proper. The sentence imposed upon the appellant in this case is not disproportionate to the sentences imposed in similar cases when both the crime and the defendant are considered. Thus, we find no plain error and the appellant's conviction and sentence are proper. The judgment of the trial court is affirmed.

AFFIRMED.

All the Judges concur.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 23-13321

MICHAEL SOCKWELL,

Petitioner-Appellant,

versus

COMMISSIONER,
ALABAMA DEPARTMENT OF CORRECTIONS,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Alabama
D.C. Docket No. 2:13-cv-00913-WKW-KFP

Before LUCK, ABUDU, and WILSON, Circuit Judges.

PER CURIAM:

The Petition for Panel Rehearing filed by Appellee is DENIED.

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 23-13321

MICHAEL SOCKWELL,

Petitioner-Appellant,

versus

COMMISSIONER,
ALABAMA DEPARTMENT OF CORRECTIONS,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Alabama
D.C. Docket No. 2:13-cv-00913-WKW-KFP

ORDER

Before LUCK, ABUDU, and WILSON, *Circuit Judges.*

Appellee-Defendant Commissioner of the Alabama Department of Corrections (Commissioner) moves to stay the issuance of the mandate pending a petition for writ of certiorari. To stay the issuance of the mandate pending a petition for writ of certiorari, the Commissioner "must show that the petition would present a substantial question and that there is good cause for a stay." Fed. R. App. P. 41(d)(1). To establish good cause for a stay, "there must be a likelihood of irreparable harm if the judgment is not stayed." *Phillip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1302

(2010) (Scalia, J., in chambers). Because we find that the Commissioner cannot show good cause, we deny the motion.

The Commissioner provides two arguments to show that it will suffer irreparable harm absent a stay. Neither is persuasive.

First, the Commissioner argues Alabama has an interest in keeping prisoners in custody who pose a danger or a risk of flight. The Commissioner explains that Sockwell was convicted of capital murder, and before his conviction, he was a flight risk and danger to the public, and "there is no reason to think otherwise today." But as counsel for Appellant-Petitioner Michael Sockwell explained in its response, Sockwell is not the same man from thirty-five years ago. Sockwell has experienced significant health issues that require him to reside in the prison infirmary permanently.[1]

Second, the Commissioner also claims that its certiorari petition risks becoming moot "if [Sockwell's] conviction were vacated, Sockwell's federal habeas petition would no longer provide effective relief, and the State's appeal might not be able to reinstate the conviction and sentence." But even if Sockwell is retried or agrees to a plea agreement for life without parole before the Supreme Court resolves the Commissioner's petition for writ of certiorari, "neither

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[1] The opinion did not vacate Sockwell's criminal charge. All it did was require that he be retried. Whether Sockwell is to be released pending retrial is a state law determination that needs to be made by the Alabama trial court. *See* Ala. Code § 15-13-3 ("A defendant is not eligible for bail when he or she is charged with capital murder pursuant to Section 13A-5-40, if the court is of the opinion, on the evidence adduced, that he or she is guilty of the offense.").

the losing party's failure to obtain a stay preventing the mandate of the Court of Appeals from issuing nor the trial court's action in light of that mandate makes the case moot." *Kernan v. Cuero*, 138 S. Ct. 4, 7 (2017). Rather, the Supreme Court could still "undo what the *habeas corpus* court did" if it so desires. *Id*. (quoting *Eagles v. United States ex rel. Samuels*, 329 U.S. 304, 308 (1946)); *see also Calderon v. Moore*, 518 U.S. 149, 150 (1996) (per curiam).

The Commissioner's motion to stay the issuance of the mandate pending a petition for writ of certiorari is DENIED.

LUCK, *Circuit Judge*, dissenting:

The state of Alabama has moved to stay issuance of our mandate so it can seek certiorari review before Sockwell's conviction is vacated and he is retried. Normally, under our rules, a single judge passes on a mandate stay motion. *See* 11th Cir. R. 27-1(d)(8). But the majority has done the abnormal by taking the motion for itself and then denying it because the state has not shown good cause for the stay.

I respectfully dissent because there's good cause for a stay. The state may suffer irreparable harm without one. *See Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) ("To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show . . . a likelihood that irreparable harm will result from the denial of a stay."). The majority instructed the district court to issue a writ of habeas corpus conditioned on the right of the state to retry Sockwell. *Sockwell v. Comm'r, Ala. Dep't of Corr.*, 141 F.4th 1231, 1248 (11th Cir. 2025). Absent a stay, the writ will result in the state court's vacating Sockwell's conviction and retrying him. And once that happens, "the vacatur . . . render[s] the [s]tate's appeal moot under Article III of the Constitution." *Brown v. Vanihel*, 7 F.4th 666, 670 (7th Cir. 2021).

As the Seventh Circuit explained in *Brown*, if the Supreme Court ruled in favor of the state and concluded that we "erred by granting the writ of habeas corpus, there is no meaningful relief that [it] could provide to the [s]tate" after the defendant's conviction is vacated and he is retried. *Id.* at 671 (quotation omitted). "At best for the [s]tate," the Supreme Court "could issue an advisory opinion saying that [we] had erred in issuing the writ with which the state courts had already complied." *Id.* at

671. "But such an advisory opinion would not be meaningful relief. Federal courts are not in the business of offering advice to their colleagues in state courts." *Id.* (quotation omitted).

To highlight the problem, the Seventh Circuit set out a hypothetical. "[S]uppose that while th[e] appeal is pending, [the defendant] is retried in state court and acquitted." *Id.* at 672. Under those circumstances, "[w]e could not reinstate his original conviction, which the state courts had vacated." *Id.*

To avoid this result, the Seventh Circuit suggested that the state do exactly what it did here—seek "a stay of the writ pending the conclusion of the appeal." *Id.* at 671. The "problem is entirely avoidable if a state in such a case seeks and obtains a stay before a new trial." *Id.* at 672. That's why "the prospect of mootness is certainly something that [we] should consider when deciding whether to stay conditional writs pending appeal." *Id.* at 671. The prospect that the state's certiorari petition would become moot is certainly something I would consider in granting the state's stay motion.

Kernan v. Cuero, 583 U.S. 1 (2017) and *Calderon v. Moore*, 518 U.S. 149 (1996), relied on by the majority, are not to the contrary. In *Kernan*, the state court did not vacate the defendant's conviction—only his sentence—so the Supreme Court did not consider whether vacating the conviction and retrying the defendant mooted the habeas appeal. *Cf id.* at 6 ("The Ninth Circuit has already issued its mandate in this case. And the state trial court, in light of that mandate, has resentenced Cuero."). And, in *Calderon*, "[w]hile the administrative machinery necessary for a new trial ha[d] been set in motion," the habeas appeal was not moot because "that trial ha[d] not yet even

begun, let alone reached a point where the court could no longer award any relief in the [s]tate's favor." 518 U.S. at 150; *see also Garding v. Mont. Dep't of Corr.*, 105 F.4th 1247, 1256 (9th Cir. 2024) ("The state court's vacatur of Garding's conviction did not moot this case. The new trial against Garding has not yet begun, and by reversing the district court's order, we can provide Montana with relief.").

Here, to avoid the point where the state can no longer be awarded any relief, we should stay the issuance of the mandate so the state can seek certiorari review from the Supreme Court.