

***** CAPITAL CASE *****

No. _____

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

JEFFERY LEE,
PETITIONER,
v.

GREG LOVELACE, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,
AND TERRY RAYBON, WARDEN, HOLMAN CORRECTIONAL FACILITY,
RESPONDENTS.

**EXECUTION SCHEDULED FOR SEPTEMBER 17, 2026
AT 12 A.M. CDT TO SEPTEMBER 18, 2026 AT 6 A.M. CDT**

PETITION FOR A WRIT OF CERTIORARI

PETITIONER'S APPENDIX --- VOLUME II (APP'X I-O)

PAIGE H. SHARPE

Counsel of Record

ARNOLD & PORTER KAYE SCHOLER LLP

601 Massachusetts Avenue, NW

Washington, DC 20001

T: (202) 942-5000

F: (202) 942-5999

paige.sharpe@arnoldporter.com

ANNA K. THOMPSON

KEVIN A. CLINE

JOCELYN A. WIESNER

anna.thompson@arnoldporter.com

kevin.cline@arnoldporter.com

jocelyn.wiesner@arnoldporter.com

Counsel for Petitioner

September 11, 2026

TABLE OF CONTENTS

APPENDIX	DOCUMENT	PAGE
Appendix A	Order of the United States Court of Appeals for the Eleventh Circuit (Denying Stay of Execution) <i>Lee v. Commissioner, Alabama Department of Corrections</i> , No. 26-12710, Doc. 27-2 (11th Cir. Sept. 9, 2026)	1a
Appendix B	Order of the United States District Court for the Middle District of Alabama (Denying Motion to Amend Judgment) <i>Lee v. Lovelace</i> , No. 2:25-cv-680-ECM, DE 209 (M.D. Ala. July 22, 2026)	15a
Appendix C	Memorandum Opinion and Order of the United States District Court for the Middle District of Alabama (On Remand) <i>Lee v. Lovelace</i> , No. 2:25-cv-680-ECM, DE 187 (M.D. Ala. June 9, 2026)	31a
Appendix D	Opinion of the United States Court of Appeals for the Eleventh Circuit (Reversing and Remanding) <i>Lee v. Commissioner, Alabama Department of Corrections</i> , No. 26-11864, Doc. 41-1 (11th Cir. June 8, 2026)	57a
Appendix E	Memorandum Opinion and Order of the United States District Court for the Middle District of Alabama (Initial Judgment) <i>Lee v. Lovelace</i> , No. 2:25-cv-680-ECM, DE 176 (M.D. Ala. May 28, 2026)	78a
Appendix F	Order of the United States District Court for the Middle District of Alabama (Denying Stay of Injunction) <i>Lee v. Lovelace</i> , No. 2:25-cv-680-ECM, DE 194 (M.D. Ala. June 10, 2026)	136a
Appendix G	Order of the United States Court of Appeals for the Eleventh Circuit (Denying Stay/Vacatur of Injunction)	139a

APPENDIX	DOCUMENT	PAGE
	<i>Lee v. Commissioner, Alabama Department of Corrections</i> , No. 26-12027, Doc. 17-1 (11th Cir. June 10, 2026)	
Appendix H	Order of the Supreme Court of the United States (Denying Application for Stay or Vacatur) <i>Lovelace v. Lee</i> , No. 25A1381 (U.S. June 11, 2026)	168a
Appendix I	Mr. Lee's Written Election of Nitrogen Hypoxia <i>Lee v. Dunn</i> , No. 1:16-cv-00473-WS-B, Doc. 37-1 (S.D. Ala. July 19, 2018)	169a
Appendix J	Joint Motion to Dismiss <i>Lee v. Dunn</i> , No. 1:16-cv-00473-WS-B, Doc. 37 (S.D. Ala. July 19, 2018)	171a
Appendix K	Order Dismissing Action as Moot <i>Lee v. Dunn</i> , No. 1:16-cv-00473-WS-B, Doc. 38 (S.D. Ala. July 20, 2018)	174a
Appendix L	Reply of Petitioner Gobble to State's Answer and Motion to Dismiss Second Amended Rule 32 Petition <i>State of Alabama v. Gobble</i> , No. 38-CC-2005-299.60, Doc. 166 (Houston Cnty. Cir. Ct. Aug. 21, 2026)	175a
Appendix M	State's Reply to Gobble's Response <i>State of Alabama v. Gobble</i> , No. 38-CC-2005-299.60, Doc. 168 (Houston Cnty. Cir. Ct. Aug. 28, 2026)	253a
Appendix N	State of Alabama's Motion to Withdraw Motion to Set an Execution Date <i>Ex parte Jarrod Taylor</i> , No. 1991307 (Ala. Aug. 2, 2019)	287a
Appendix O	Excerpt of Evidentiary Hearing Transcript (pp. 1–2, 147–148) <i>Miller v. Hamm</i> , No. 2:22-cv-506-RAH, Doc. 58 (M.D. Ala. Sept. 15, 2022)	289a

EXHIBIT A

ELECTION TO BE EXECUTED BY NITROGEN HYPOXIA

Pursuant to Act No. 2018-353, if I am to be executed, I elect that it be by nitrogen hypoxia rather than by lethal injection.

This election is not intended to affect the status of any challenge(s) (current or future) to my conviction(s) or sentence(s), nor waive my right to challenge the constitutionality of any protocol adopted for carrying out executions by nitrogen hypoxia.

Dated this 26th day of June, 2018.

JEFFERY LEE / Z-674
Name / Inmate Number

Jeffery Lee
Signature

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

JEFFERY LEE,

Plaintiff,

v.

JEFFERSON S. DUNN, Commissioner,
Alabama Department of Corrections, in his
official capacity;

CYNTHIA STEWART, Warden, Holman
Correctional Facility, in his or her official
capacity; and

OTHER UNKNOWN EMPLOYEES AND
AGENTS of Alabama Department of
Corrections and Holman Correctional
Facility, in their official capacities,

Defendants.

DEATH PENALTY CASE
NO EXECUTION DATE PENDING

Case No. 16-cv-473

JOINT MOTION TO DISMISS

Come now the Plaintiff and all Defendants in this action and respectfully request that this Honorable Court dismiss this lawsuit without prejudice because the causes of action asserted in the complaint have been rendered moot. As grounds, the parties provide the following:

1. On September 8, 2016, Plaintiff filed a complaint, pursuant to 42 U.S.C. § 1983, in which he alleged that Defendants would violate his constitutional rights by carrying out his execution under Defendants' current lethal-injection protocol. Doc. 1.

2. On March 22, 2018, Alabama Governor Kay Ivey signed Senate Bill 272 (enrolled as 2018 Alabama Laws Act 2018-353), which amended Section 15-18-82.1 of the Code of Alabama to introduce nitrogen hypoxia as a statutorily approved method of execution in Alabama. Under the amended statute, lethal injection remains the primary method of execution in Alabama, but inmates sentenced to death are provided one opportunity to elect to be executed by nitrogen hypoxia. See Ala. Code § 15-18-82.1. For

inmates whose death sentences became final prior to the effective date of the act, such as Plaintiff, the election must be made in writing and delivered to the warden of their correctional facility within thirty days of the effective date of the act adding this language to Section 15-18-82.1. *Id.* According to the terms of the legislation, Act 2018-353 became effective on June 1, 2018. Thus, Plaintiff had until June 30, 2018, to make the necessary election of nitrogen hypoxia, or that alternative method of execution was waived under Alabama law.

3. Prior to June 30, 2018, Plaintiff, submitted paperwork to the Warden of Holman Correctional Facility, in which he elected to be executed by nitrogen hypoxia. See Exhibit A.

4. On June 5, 2018, the parties jointly moved that Plaintiff be given leave to file an amended complaint following his election under the new statutory provision, which motion the court granted. Doc. 35. Since Plaintiff's election, the parties have conferred and have agreed that the more appropriate course is the dismissal, without prejudice, of this action.

5. Because of Plaintiff's election, all claims in Plaintiff's current complaint are moot because all claims relate to Defendants' current lethal-injection protocol. *Najjar v. Ashcroft*, 273 F.3d 1330, 1336 (11th Cir. 2001) ("If events that occur subsequent to the filing of a lawsuit or an appeal deprive the court of the ability to give the plaintiff or appellant meaningful relief, then the case is moot and must be dismissed."); *Thompson v. Alabama*, 293 F. Supp.3d 1313, 1328 (M.D. Ala. 2017) ("When a claim is moot, the court lacks subject-matter jurisdiction to adjudicate the claim.").

6. Here, Plaintiff's complaint seeks to enjoin Defendants from carrying out his execution through Defendants' current three-drug midazolam lethal-injection protocol. Because Plaintiff has elected to be executed by nitrogen hypoxia, rather than lethal injection, pursuant to Section 15-18-82.1, Plaintiff's claims and causes of action are now moot

because if he is to be executed, Defendants will carry out that execution by nitrogen hypoxia.

WHEREFORE the premises considered, the parties jointly request that this Court dismiss all claims in Plaintiff's complaint without prejudice.

DATED this 19th day of July, 2018.

s/John Anthony Palombi

John Anthony Palombi
Assistant Federal Defender
Federal Defenders
Middle District of Alabama
817 South Court Street
Montgomery, Alabama 36104
Telephone: 334.834.2099
Facsimile: 334.834.0353
Email: John_Palombi@fd.org
KY Bar No. 86784

David J. Burman
DBurman@perkinscoie.com
Nicholas P. Gellert
NGellert@perkinscoie.com
David A. Perez
DPerez@perkinscoie.com
PERKINS COIE LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone: 206.359.8000
Facsimile: 206.359.9000
Pro hac vice

Attorneys for Plaintiff

s/Thomas R. Govan

Thomas R. Govan
Deputy Attorney General
Lauren A. Simpson
Assistant Attorney General
Office of the Attorney General
Capital Litigation Division
501 Washington Avenue
Montgomery, AL 36130
Telephone: 334.242.7455
Facsimile: 334.353.3637
Email: tgovan@ago.stgate.al.us
lsimpson@ago.state.al.us

Attorneys for Defendants

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

JEFFERY LEE,

Plaintiff,

V.

**JEFFERSON S. DUNN, Commissioner,
Alabama Department of Corrections, et al.,**

Defendants.

CIVIL ACTION 16-0473-WS-B

ORDER

This matter comes before the Court on the parties' Joint Motion to Dismiss (doc. 37).

Plaintiff, Jeffery Lee, an Alabama death row inmate, brought this § 1983 action in September 2016 to challenge the constitutionality of Alabama’s three-drug lethal injection protocol. Under a recently-enacted Alabama law, however, Lee received an opportunity to elect to be executed by nitrogen hypoxia, rather than lethal injection. The parties agree that Lee timely availed himself of that option by submitting paperwork to the Warden of Holman Correctional Facility prior to June 30, 2018, confirming his election to be executed by nitrogen hypoxia. In light of these developments, the parties jointly represent that “Plaintiff’s claims and causes of action are now moot because if he is to be executed, Defendants will carry out that execution by nitrogen hypoxia,” not the three-drug lethal injection protocol at issue in this litigation. (Doc. 37, at 2-3.)

The Court agrees that this action is now moot. Accordingly, for cause shown, the Joint Motion to Dismiss is **granted** pursuant to Rule 41(a)(1)(A)(ii), Fed.R.Civ.P. This action is hereby **dismissed without prejudice**.

DONE and ORDERED this 20th day of July, 2018.

s/ WILLIAM H. STEELE
UNITED STATES DISTRICT JUDGE



AlaFile E-Notice

38-CC-2005-000299.60

Judge: M. JOHN STEENSLAND III

To: MATTHAEI COLIN JOSEPH
cmatthaei@lightfootlaw.com

NOTICE OF ELECTRONIC FILING

IN THE CIRCUIT CRIMINAL COURT OF HOUSTON COUNTY, ALABAMA

STATE OF ALABAMA V. GOBBLE TIERRA CAPRI
38-CC-2005-000299.60

The following matter was FILED on 8/21/2026 6:50:44 PM

D001 GOBBLE TIERRA CAPRI

STATE'S ANSWER & MOTION TO DISMISS PETITIONER'S SECOND AMENDED R32 PETITION
[Filer: SMITHART MARGARET WESLEY]

Notice Date: 8/21/2026 6:50:44 PM

CARLA H. WOODALL
CIRCUIT COURT CLERK
HOUSTON COUNTY, ALABAMA
P.O. DRAWER 6406
DOTHAN, AL, 36302

334-677-4858

No. CC-05.299.60

the pleading standard with the standard of proof – again, an inquiry not appropriate at this stage of the proceedings. Third, in response to several claims, the State introduces counter-factual allegations, which create disputes of fact for this Court to assess at an evidentiary hearing, but which the State asserts are a basis for summary dismissal. Fourth, when discussing both lay witnesses and experts, the State introduces issues of credibility as the basis for summary dismissal where such credibility assessments are appropriate for this Court to determine at an evidentiary hearing. Fifth, the State’s Answer repeatedly asserts arguments related to the admissibility of evidence – another question which is not to be determined at the pleading stage. Sixth, contrary to Alabama’s pleading standards and the test for ineffectiveness outlined in *Strickland*, the State asserts that to “adequately plead deficient performance in trial counsel’s argument, a petitioner must offer **superior** alternative arguments.” (Answer at 7) (emphasis added). Finally, the State repeatedly classifies Ms. Gobble’s ineffective assistance of counsel claim as “separate” and “distinct” claims and analyzes them individually, contrary to both United States Supreme Court and Alabama precedents. Each of these overarching issues are addressed more fully below, as well as identified within the discussion of the claims.

2. **First**, the State’s Answer alleges that Ms. Gobble’s 289-page Second Amended Petition, accompanied by 1023 pages of supporting exhibits, should be dismissed because “there is not a single facially meritorious claim in Gobble’s second amended Rule 32 petition.” (Answer at 10.) As an initial matter, this Court has already determined that Ms. Gobble’s prior petition set forth facially meritorious claims, by setting the case for an evidentiary hearing. (Doc. 28.) This Court is no doubt aware that only those claims which are not dismissed are set for a hearing. *See* Ala. R. Crim. P. 32.9(a) (“Unless the court dismisses the petition, the petitioner shall be entitled to an evidentiary hearing to determine disputed issues of material fact . . .”). Further, a determination that a claim in a Rule 32 Petition is “facially meritorious” is not a merits determination. Instead, the assessment of

whether a claim is “facially meritorious” is focused on whether a petitioner satisfies the threshold pleading requirements: “A petition is ‘meritorious on its face’ [] if it contains a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the facts relied upon (as opposed to a general statement concerning the nature and effect of those facts) sufficient to show that the petitioner is entitled to relief if those facts are true.” *Young v. State*, 407 So.3d 1139, 1157 (Ala. Crim. App. 2023) (internal citations and quotations omitted). When assessing whether claims are facially meritorious the court is required to assume the Petitioner’s allegations are true. *Bryant v. State*, 181 So.3d 1087, 1102 (Ala. Crim. App. 2011). Here, as to each claim, Ms. Gobble (1) “sufficiently pleaded [the claim] in accordance with Rule 32.3 and Rule 32.b(6)” by laying out clear, specific factual grounds on which each claim was based; (2) ensured that each claim was “not precluded by one of the provisions in Rule 32.2”; and (3) contains detailed “factual allegations that, if true, would entitle [her] to relief.” *Woodward v. State*, 276 So.3d 713, 734 (Ala. Crim. App. 2018) (quoting *Kuenzel v. State*, 204 So.3d 910, 914 (Ala. Crim. App. 2015)). Accordingly, the appropriate inquiry to determine whether Ms. Gobble’s claims are “facially meritorious” is an assessment of whether Ms. Gobble has provided a full factual basis for her claims – not whether these claims will ultimately be meritorious.

3. **Second**, throughout its Answer, the State repeatedly asserts Ms. Gobble’s claims should be dismissed because she “fails to plead sufficient facts” that “*would* have changed the outcome of the trial.” (Answer at 69 (emphasis added)); *see also* (Answer at 19) (“[I]t is by no means clear that the availability of a report would have changed the outcome of Gobble’s motion.”) “The State’s argument confuses and conflates the requirements of pleading and proof.” *Ex parte Hodges*, 147 So.3d 973, 977 (Ala. 2011). In asking this Court to determine that the pled facts fail to overcome a presumption outlined in *Strickland*’s test for determining ineffectiveness, the State is making an argument as to the required burden of proof. However, “[c]ontrary to the State’s assertion in its

motion to dismiss, at the pleading stage of Rule 32 proceedings, a Rule 32 petitioner does not have the burden of proving his claims by a preponderance of the evidence.” *Ford v. State*, 831 So.2d 641, 644 (Ala. Crim. App. 2001); *see also Johnson v. State*, 835 So.2d 1077, 1080 (Ala. Crim. App. 2001) (“A claim may not be summarily dismissed because the petitioner failed to meet his burden of *proof* at the initial pleading stage, a stage at which the petitioner has only a burden to *plead*.”) (emphasis in original). “Rather, at the pleading stage, a petitioner must provide only a clear and specific statement of the grounds upon which relief is sought.” *Id.* at 1079 (internal quotations and citations omitted.) As outlined in her Second Amended Petition and accompanying exhibits, Ms. Gobble provided “clear and specific statements of the grounds upon which relief is sought” for each claim. Ala. R. Crim. App. Rule 32.6(b). Since Ms. Gobble has met her “burden of pleading so as to avoid summary disposition pursuant to Rule 32.7(d), Ala. R. Crim. P., [she] is [now] entitled to an opportunity to present evidence in order to satisfy [her] burden of proof.” *Ford*, 831 So.2d at 644.

4. **Third**, the State’s Answer also asserts multiple counter-allegations which invite this Court to resolve the factual disputes.² But, resolution of factual disputes are not appropriate at the pleading stage: only “after it is determined that a claim has been sufficiently pleaded, a Petitioner has the burden of actually presenting proof, pursuant to a method provided in Rule 32.9, Ala. R. Crim. P., that establishes the truth of a sufficiently pleaded claim.” *Beamon v. State*, 204 So.3d 1, 7 (Ala. Crim. App. 2014).³ Accordingly, any argument which asks this Court at the pleading stage to

² There are two scenarios where a court may dispose of allegations that are facially meritorious prior to an evidentiary hearing: “First, if it has before it ‘facts supporting the position of each party [that] are fully set out in . . . supporting affidavits.’ *Johnson v. State*, 564 So.2d 1019, 1021 (Ala. Crim. App. 1989) . . . Second, if the events that serve as the basis of the . . . allegation were observed by the same judge who rules on the Rule 32 petition.” *Burton v. State*, 728 So.2d 1142, 1145 (Ala. Crim. App. 1997). Neither exception applies here.

³ Rule 32 discovery rules also support this principle. *Ex parte Land*, 775 So.2d 847, 855 (Ala. 2000); *see also Ex parte Boatwright*, 471 So.2d 1257, 1258-59 (Ala. 1985) (“[A]n evidentiary hearing must be held on a coram nobis petition which is meritorious on its face, i.e., one which contains matters and allegations (such as ineffective assistance of counsel) which, if true, entitle the petitioner to relief.”); Ala. R. Crim. P., Rule 32.3, 32.9(a).

weigh evidence, solve a factual dispute, or determine whether Ms. Gobble has overcome a necessary presumption for success on the merits unlawfully increases Ms. Gobble's burden under Rule 32.6(b).

5. **Fourth**, when discussing both lay witnesses and experts, the State's Answer introduces issues of credibility as the basis for summary dismissal. But "[t]he credibility of witnesses is for the trier of fact[.]" *Bryant v. State*, 181 So.3d 1087, 1132 (Ala. Crim. App. 2011) (internal citations and quotations omitted). Any question regarding the weight or credibility of witness testimony is appropriately addressed when assessing Ms. Gobble's burden to prove – not plead. Further, these credibility assessments should not be resolved without this Court considering the testimony at issue, either in person or via affidavit, and the presentation of other support evidencing. *Ex parte Coleman*, 71 So.3d 627, 631 (Ala. 2010); *Ex parte Hodges*, 147 So.3d 973, 976-77 (Ala. 2011).

6. **Fifth**, the State's Answer asserts that well-pled claims should be summarily dismissed because the underlying evidence supporting these claims is inadmissible. The question as to whether a Petitioner's outlined evidence is admissible is a question about whether a Petitioner can meet their burden of proof. *Johnson*, 835 So.2d at 1080. At the pleading stage, this Court is required to assume the evidence and factual bases outlined in the Petition – including that contained in affidavits – are true when assessing whether the pled claims would entitle the Petitioner to relief. *Ex parte Boatwright*, 471 So.2d at 1258. The question of whether a Petitioner can prove their claim, through admissible evidence, is a question properly assessed at an evidentiary hearing, where for the first time a Petitioner is required to prove their claim. *See Ex parte Coleman*, 71 So.3d at 631.

7. **Sixth**, the State also asserts that to "adequately plead deficient performance in trial counsel's argument, a Petitioner must offer superior alternative arguments." (Answer at 7.) Neither in the case cited as support for this proposition nor any other case law can Ms. Gobble find a "superior alternative" pleading requirement. Rather, a Petitioner alleging ineffective assistance of counsel "must identify the acts or omissions of counsel that are alleged not to have been the result

of reasonable professional judgment,” *Strickland v. Washington*, 466 U.S. 668, 690 (1984). While a Petitioner may be required to identify witnesses by name or set out specific arguments or testimony, *see Brooks v. State*, 340 So.3d 410 (Ala. Crim. App. 2020), “[t]he object of an ineffectiveness claim is not to grade counsel’s performance” but to ascertain whether counsel’s representation was unreasonable under prevailing professional norms. *Strickland*, 466 U.S. at 697.

8. **Finally**, the State classifies Ms. Gobble’s ineffective assistance of counsel claim as “separate” and “distinct” claims and analyzes them individually, contrary to both United States Supreme Court and Alabama precedents. (Answer at 12, 13, 105-106.) Ms. Gobble’s Second Amended Petition divided the allegations supporting the categories of errors, failures of counsel, and their prejudicial effect upon her case. Each section was preceded by introductory headings highlighting the aspect of attorney error being discussed. That division was done for clarity, and for this Court’s convenience. It did not, and does not, constitute a division of a unified claim into distinct ones. However, the State repeatedly classifies Ms. Gobble’s ineffective assistance of counsel claim as “separate” and “distinct” claims and analyzes them individually. But neither the United States Supreme Court nor Alabama courts have separated a defendant’s Sixth Amendment right to effective counsel into distinct rights to an effective investigation, effective cross examination, effective objections, or the effectiveness of any other aspect of a defense counsel’s duty to provide competent representation. Rather, under *Strickland*, the Petitioner “making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged [to have been deficient].” 466 U.S. at 690. “The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.” *Id.*⁴ The State also argues that Ms. Gobble incorrectly asserts that “this Court should consider the

⁴ *See, e.g., Wiggins v. Smith*, 539 U.S. 510, 516 (2003) (petitioner’s claims that counsel failed to retain mitigation expert and obtain evidence of childhood poverty, physical and sexual abuse, and multiple foster homes, from “state social services, medical, and school records, as well as interviews with

cumulative effect of her counsel’s alleged errors” because “Alabama does not recognize a “cumulative effect” analysis for ineffective-assistance of counsel claims.” (Answer at 145.) By pluralizing “acts” and “omissions” in describing how a court must analyze whether attorney errors “were outside the wide range of professionally competent assistance,” the United States Supreme Court has recognized situations may arise where defense counsel’s repeated errors could deprive an individual of their constitutional right to effective assistance of counsel. Accordingly, “[t]he cumulative error doctrine provides that an aggregation of non-reversible errors (i.e., plain errors failing to necessitate reversal and harmless errors) can yield a denial of the constitutional right to a fair trial, which calls for reversal.” *Tramel v. Sec’y Dep’t of Corr.*, 2025 WL 2650864, at *4 (11th Cir. 2025) (internal citations and quotations omitted). While “cumulative error is not an independent ground for relief separate from the underlying constitutional errors, such as trial court error, prosecutorial misconduct, invalid jury instructions, or ineffective assistance of counsel[.]” cumulative error may be established where “each alleged incident . . . constitute[s] error in itself, though [each individual error is] not necessarily so great as to warrant reversal.” *United States v. Murray*, 154 F. App’x 740, 745 (11th Cir. 2005); *see also Harris v. Thomas*, No. 2:11-CV-552-WKW, 2015 WL 5254204, at *48 (M.D. Ala. Sept. 9, 2015), *aff’d sub nom. Harris v. Comm’r, Alabama Dep’t of Corr.*, 874 F.3d 682 (11th Cir. 2017) (“A cumulative error argument is actually no more than an extended harmless error analysis. Consequently, cumulative error is not an independent ground for relief separate from the underlying constitutional errors, such as trial court error, prosecutorial misconduct, invalid jury instructions, or ineffective assistance of counsel.”).

ANALYSIS

petitioner and numerous family members,” addressed by Court as single claim.); *Rompilla v. Beard*, 545 U.S. 374, 378-83 (2005) (petitioner alleged that trial counsel ineffective for “failing to present significant mitigating evidence about Rompilla’s childhood, mental capacity and health, and alcoholism” obtainable from “[s]chool records,” “juvenile and adult incarcerations,” and “history of dependence on alcohol,” addressed by Court as single claim).

I. MS. GOBBLE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT ALL STAGES OF HER TRIAL AND DIRECT APPEAL, INCONSISTENT WITH THE REQUIREMENTS OF *STRICKLAND V. WASHINGTON*, AND IN VIOLATION OF MS. GOBBLE’S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ARTICLE I, SECTION 6 OF THE ALABAMA CONSTITUTION, AND ALABAMA LAW.

9. As outlined in Ms. Gobble’s Second Amended Rule 32, “[t]here was not physical or forensic evidence linking Ms. Gobble to the death of Phoenix.” (Pet. at 32.) Rather, “[t]he State’s only evidence consisted of her in-custody statements.” (*Id.*) While “[i]t is firmly established that a court must consider the strength of the evidence in deciding whether the *Strickland* prejudice prong has been satisfied[.]” *McWhorter v. State*, 142 So.3d 1195, 1231 (Ala. Crim. App. 2011) (quoting *Buehl v. Vaughn*, 166 F.3d 163, 172 (3d Cir.1999)), the State’s Answer does not address the evidence – its strength or lack thereof. Accordingly, Ms. Gobble’s claims regarding the impact the lack of direct evidence has on the *Strickland* analysis remain unrebutted. *See* (Pet. at 32-33, 78, 100, 123-24, 149, 150, 153, 159, 166-67, 196-97, 242.)

I(A)(1)(a) Trial Counsel Failed to Locate and Interview, and Then Call as a Witness, Don Parrish, the EMT First Responder to the 911 Call.

10. Ms. Gobble alleged that, had her trial counsel conducted a reasonable pre-trial investigation, they would have immediately seen a glaring inconsistency between Edgar Parrish’s statement to the police and what Edgar told the EMT specialist who was the first responder to the scene, Don Parrish. Specifically, that Edgar told investigators that he did not check on Phoenix during the night but told the EMT that he had last seen the baby at 5:00 a.m. when he had given him a bottle. (Pet. at 34.)

11. The State argues this sub-claim is “without merit” and “denied” because “it is totally unclear from the petition why the proposed testimony would have been given any weight by the jury in light of the fact that the information materially conflicts with the EMT report.” (Answer at 14.)

Because this claim was pled with sufficient specificity and involves material disputes of fact and law, summary dismissal is not appropriate.

12. The State argues that, because the affidavit and Mr. Don Parrish's EMT report contains purportedly conflicting information, "it is totally unclear why the proposed testimony would have been given any weight by the jury[.]" (Answer at 14.) But "[t]he credibility of witnesses is for the trier of fact[.]" *Bryant v. State*, 181 So.3d 1087, 1132 (Ala. Crim. App. 2011). Any question regarding the weight of Mr. Parrish's testimony is appropriately addressed when assessing Ms. Gobble's burden to prove – not plead – and should not be resolved without this Court considering Mr. Parrish's testimony, either in person or via affidavit, and the presentation of other supporting evidencing. *Coleman*, 71 So.3d at 631; *Hodges*, 147 So.3d at 976-77.

13. The State's argument regarding the consistency of Ms. Gobble's Second Amended petition is inaccurate. For example, the State claims it is inconsistent that Mr. Parrish would say in the EMT report that Edgar was performing some rescue breathing, while in his affidavit stating that Edgar was just standing over and looking at Phoenix. (Answer at 14.) However, there is nothing inconsistent with Mr. Parrish having observed both at different points: The point of Mr. Parrish's testimony on this aspect of his observations was that Edgar, in Mr. Parrish's disinterested estimation, was showing no emotion. Even if Edgar were performing some rescue breathing, that is not inconsistent with him showing a lack of emotion. Thus, the State's conclusion that the EMT report contradicts Mr. Parrish's available testimony is without merit.

14. The State also asserts that "the inconsistency between Edgar's statements to EMT Parrish and to investigators is of little significance." (Answer at 15.) On the contrary, the question of who was the last person to see Phoenix alive was central to the case – particularly, where there was no forensic evidence to tie any one of the four adults in the trailer to his death. Indeed, evidence that Ms. Gobble was not the last person to see Phoenix alive could have proven exculpatory. *Williams*

v. Taylor, 529 U.S. 362, 396 (2000); *Caldwell v. Lewis*, Nos.08-5156, 08-5157, 2011 WL 915764, at *6 (6th Cir. Mar. 16, 2011) (“[A]n attorney’s failure to present available exculpatory evidence is ordinarily deficient, unless some cogent tactical or other consideration justified it.”) (citing *Pavel v. Hollins*, 261 F.3d 210, 220 (2d Cir. 2001)).

15. Additionally, the State fails to address numerous factual allegations specifically outlined in the Second Amended Petition: that Don Parrish’s testimony would have impeached the testimony of Dr. Salne and offered an alternative explanation for Phoenix’s torn frenulum (Pet. at 39); that trial counsel never contacted, much less interviewed, the first responder at the scene (Pet. at 36-37); that the inconsistency in Edgar Parrish’s statements were material given the prosecution’s attempt to undermine Ms. Gobble’s reliability for providing an inconsistent timeline of that morning months – not mere hours – after Phoenix’s death (Pet. at 37-38; Vol. 17, R. 770-71); or that Edgar Parrish’s demeanor following Phoenix’s death was material given the prosecution’s attempts to draw the jury’s attention to Ms. Gobble’s demeanor and appearance, which the State adduced was evidence of guilt in closing arguments. (Pet. at 37.)

16. Had Mr. Brantley introduced the testimony and report of Don Parrish, he could have pointed out that another member of the household, Edgar Parrish, gave an even more variable account of when he last saw Phoenix, denying to the police he saw the child during the night, yet telling the EMT he not only saw him at 5:00 a.m., but took the time to give him a bottle. Given the prosecution’s reliance on the statement provided by Edgar during his interrogation, any reasonable attorney would have presented impeaching statements to the jury, as there would have been no strategic value in not doing so.

17. Additionally, it cannot be said that the choice to not interview or call Don Parrish was the result of an informed strategic decision, where (1) trial counsel failed to even interview him, despite his importance as the first responder on the scene, *see Wiggins*, 539 U.S. at 533 (“[S]trategic

choices made after less than complete investigation are reasonable’ only to the extent that ‘reasonable professional judgments support the limitations on investigation. A decision not to investigate thus ‘must be directly assessed for reasonableness in all the circumstances.’”) (quoting *Strickland*, 466 U.S. at 690-691); (2) where the testimony of Don Parrish would have impeached the statements of Edgar Parrish, which the State explicitly relied upon in constructing their theory and timeline of the case (Pet. at 38); and (3) where the testimony of Don Parrish was consistent with trial counsel’s meager strategic attempts to undermine Edgar’s credibility. *See* (Vol. 17, R. 783.)⁵

I(A)(1)(b) Trial Counsel Failed to Locate and Interview, and Then Call as a Witness, Mr. Walter Jordan.

18. The State argues this subclaim is “without merit” and “denied.” (Answer at 16, 18.) Again, there exist disputes of material fact, or mixed fact and law, summary dismissal is prohibited, and a hearing required. Ala. R. Crim. P. 32.9(a).

19. The State asserts the testimony of Mr. Jordan is “not material and does not undermine confidence in the verdict” and “neither exculpates nor inculpates any other person in the death of Phoenix Parrish.” (Answer at 16.) It is improper for this Court to determine whether trial counsel’s failure to interview and call Mr. Jordan undermined confidence in the verdict at the pleading stage. Again, only “after it is determined that a claim has been sufficiently pleaded, a Petitioner has the burden of actually presenting proof, pursuant to a method provided in Rule 32.9, Ala. R. Crim. P., that establishes the truth of a sufficiently pleaded claim.” *Beamon v. State*, 204 So.3d 1, 7 (Ala. Crim. App. 2014). Similarly, the State characterizes Mr. Jordan’s outlined testimony as “nothing more than speculation.” (Answer at 16.) However, at the pleading stage, all sufficiently pled facts must be accepted as true and material disputes are appropriately resolved when this Court assesses Ms.

⁵ Even where the State does engage with the factual allegations underlying this section of the IAC claim, its Response creates disputed issues of credibility and fact. Thus, summary dismissal is inappropriate, and a hearing is required. Ala. R. Crim. P. 32.9(a).

Gobble's burden to prove. *See Daniel v. Comm'r*, 822 F.3d 1248, 1261 (11th Cir. 2016) (outlining that "facts [Ms. Gobble] alleged in [her] Amended Rule 32 petition and supporting exhibits are assumed to be true under Alabama law.").

20. The State also asserts that Mr. Jordan's statement regarding Tori Jordan "has little, if any, weight for purposes of impeaching Tori's testimony." (Answer at 17.) Again, it is for this Court to weigh credibility of witnesses and questions regarding the weight of evidence are questions regarding the burden to prove – not plead.

21. Next, while "an attorney's failure to present available exculpatory evidence is ordinarily deficient," *Caldwell v. Lewis*, Nos.08-5156, 08-5157, 2011 WL 915764, at *6 (6th Cir. Mar. 16, 2011), this Court is not required to find that evidence was inculpatory or exculpatory in order to determine that counsel rendered ineffective assistance of counsel. *See State v. Terry*, 601 So.2d 161, 164 (Ala. Crim. App. 1992) (holding counsel was ineffective for failing to investigate and call witnesses). Indeed, Ms. Gobble outlined in her Second Amended Petition that trial counsel's deficient representation included the failure to conduct a proper investigation to locate and interview Mr. Jordan, and that these failures left unrebutted the state's positive characterization Edgar Parrish as a protector of children, (Vol. 16, R. 569; Vol.17, R. 772, 803), negative characterization of Ms. Gobble as an abusive mother (Vol. 17, R. 771-73), and credibility of the State's witness, Tori Jordan. (Vol. 18, R. 1002.)

22. While the State asserts that the purportedly speculative nature of Mr. Jordan's testimony "buttresses the presumption that counsel exercised reasonable professional judgment," (Answer at 16), the decision to not call Mr. Jordan as a witness could not have been based on counsel's "reasonable professional judgment," when they failed to conduct a proper – and necessary – investigation into one of the four adults who lived in the trailer. Additionally, Ms. Gobble's trial counsel themselves filed a motion to *compel* Mr. Jordan to appear for the defense (Pet. at 40), but

failed to follow-up on the Motion, investigate, or interview Mr. Jordan, despite Ms. Gobble's father informing trial counsel of Mr. Jordan's home and place of employment. (Pet. at 40; Ex. H, ¶ 24.) Mr. Jordan's available testimony was also consistent with trial counsel's own – but unsupported – attempts in closing arguments to cast doubt on Ms. Gobble's culpability given the three other adults in the home. (Vol. 15, R. 481-82.)

23. The State's Answer also fails to address numerous facts, including relevant portions of Mr. Jordan's available testimony, outlined in Ms. Gobble's claim. Critically, the State fails to address the factual allegations that Mr. Parrish uncharacteristically offered Mr. David Hunter, Ms. Gobble's boyfriend, a ride to work on the day Phoenix was found dead, and made sure that he and Mr. Hunter were out of the home when the child was found. (Ex. H, ¶ 12.) Or that Mr. Jordan also would have testified that David Hunter slept directly next to Phoenix's bedroom, and that it was inconceivable that Mr. Hunter would not have heard the baby crying if someone had been in the room abusing the child. (Ex. H, ¶ 11.) Importantly, Walter Jordan's testimony would also have explained why Ms. Gobble left the trailer home to go to Wal-Mart, countering the State's argument that "[t]he only thing [Ms. Gobble] was scared about was saving her own neck and getting out of there so she wouldn't be arrested." (Vol. 17, R. 778.)

24. Where the State does address Mr. Jordan's available testimony, it creates disputes of facts and law. For example, while the State characterizes Mr. Jordan's available testimony as "evidence that Edgar was 'mean' to Hunter," (Answer at 17), Mr. Jordan's affidavit outlined that he had witnessed "Mr. Parrish physically abuse David from the time he was 10 years old," and that "[s]everal restraining orders had been taken out against Mr. Parrish because of his abuse toward David." (Ex. H, ¶ 19.) Or, while the State asserts that "Tori herself testified that she and Gobble did not get along and she did not testify that the two had an extensive relationship" (Answer at 17), the prosecutor acknowledged on the record that he had "laid a predicate [that Ms. Jordan] had seen

them, talked to them, knew where they lived” and that he was “trying to show the relationship.” (Vol. 14, R. 262-63.) Mr. Jordan’s available testimony would undermine the veracity of the relationship the State presented and cast doubt on Ms. Jordan’s credibility:

However, about a month prior to the trial, Mr. Valeska told me that I would not be testifying. He told my daughter-in-law Tori Jordan, who testified for the prosecution, that he did not want me to testify because I had too much baggage. . . . Tori and Tierra never really got along, and Tori made disparaging remarks to the prosecution about Tierra’s character. I believe that those remarks prompted the prosecution to use Tori as a witness instead of me, even though Tori and Tierra did not know each other very well.

(Ex. H, ¶ 18.) The difference in the characterization of the presented and available testimony and the credibility assigned to this testimony also creates material disputes for this Court to resolve and makes summary dismissal inappropriate at this stage.

25. Accordingly, the State’s Answer fails to engage with allegations regarding counsels’ failure to conduct a reasonable investigation, ignores powerful aspects of the available testimony, and sets up disputed issues of credibility and fact.⁶

I(A)(1)(c) Trial Counsel Were Ineffective for Failing to Obtain and Present a Pediatric Forensic Specialist.⁷

26. Ms. Gobble alleged that her trial counsel were ineffective failing to obtain, in a timely manner, a medical expert to challenge the state’s autopsy report and testimony; failing to adequately argue for the final continuance motion on the matter; and failing to file a mandamus petition to the Court of Criminal Appeals challenging the trial court’s denial of the motion to continue. (Pet. at 51.) The State asserts in its Answer that this claim “is not facially meritorious” because “trial counsel had

⁶ As discussed above, even if this Court were to believe that Mr. Jordan’s testimony, standing alone, would not have changed the outcome of the trial, it must be viewed cumulatively with all the other evidence trial counsel should have discovered and introduced. *See Woods*, 789 So.2d at 943 n.1; *Strickland*, 466 U.S. at 690.

⁷ As discussed above, the State’s new Answer and Motion to Dismiss ignore the fact this Court, while not prejudging the matter, expressed significant concern that either Ms. Gobble received ineffective assistance of trial counsel for failure to procure a pediatric forensic specialist, or direct appeal counsel were ineffective for failing to explain properly why such an expert was needed. (Doc. 64 at 27-29.)

retained a pathologist, Dr. George McCormick, who was available to testify on [Ms.] Gobble’s behalf on the original trial date of September 12, 2005.” (Answer at 19.) According to the State, “[i]t was a change in the trial date, not IAC on counsel’s part, that resulted in Dr. McCormick’s withdrawal.” (*Id.*) Taken to its logical extreme, the State asks this Court to find that trial counsel in a capital case may never be found ineffective if at any point – even mere days before trial – they obtained a central expert, regardless of the expert’s qualifications or availability.

27. The State’s request that this Court impose a reasonableness inquiry solely on the question of whether an expert was or was not hired at all, ignores *Strickland*’s guidance that “a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury.” *Id.* at 695. Here, that totality of circumstances must include an analysis of the entire record, which demonstrates that the trial court had clarified in no uncertain terms in March that it would *not* entertain continuances for experts; that trial counsel should seek funds for needed experts promptly and those funds would be granted; and that trial counsel should ensure the experts were available for the trial well ahead of time. Instead, though the need for a pediatric forensic specialist was evident from the outset, trial counsel waited until September – the month following when the trial court had initially estimated scheduling the trial – to file a motion for funds for an expert. (Vol. 1, C. 6.) Indeed, Ms. Gobble’s Second Amended Petition lays out a multi-page timeline, supplemented by quotes from the record, which details the delays of trial counsel in seeking this crucial expert in a death penalty case. The instructions by the trial court and the repeated delays by trial counsel detailed in the Second Amended Petition must be considered in this Court’s analysis.

28. This analysis, which requires an assessment of the totality of evidence, is not appropriately considered at the pleading stage. Similarly, while the State argues “it is by no means clear that the availability of a report would have changed the outcome of [Ms.] Gobble’s motion [for

a continuance]” (Answer at 19), again, the question of whether Ms. Gobble has carried her burden of proof under *Strickland* is not to be assessed by this Court at the pleading stage.

29. Further, the question of trial counsel’s ineffectiveness and its impact is not limited to the motion for continuance: the overarching question raised by this claim is whether trial counsel’s failure to obtain and present the testimony of a forensic pathologist “so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Strickland*, 466 U.S. at 686. In answering this question, this Court is also presented with factual allegations from the prosecution that trial counsel had failed to call, ask for, or retrieve the medical records it was requesting for expert review and that this failure was intentional because trial counsel wanted a continuance. (Vol. 12, August 19, 2005, Hr’g, at 10-11, 16.) The State’s Answer does not address these failures.

30. The State also fails to address how trial counsel’s failure to retain and present an expert also left unrebutted the testimony from the E.R. doctor, Dr. Salne. Because Dr. Salne did not conduct the autopsy that was introduced through him, his testimony was particularly vulnerable to cross-examination by a qualified expert. Most importantly, the State does not engage with trial counsel’s own admission that they could not “effectively represent her” absent an expert being available to challenge the State’s case. (Vol. 12, August 19, 2005, Hr’g, at 11.) By trial counsel’s own admission, the decision to not present a qualified forensic pathologist was ineffective.

31. The State further asserts that “the record does not show what Dr. McCormick’s report would have contained and the petition does not contain any allegation regarding what the report contained.” (Answer at 20.) This failure is not the result of Ms. Gobble’s failure to plead, but rather the result of trial counsel’s ineffectiveness as Dr. McCormick had not yet even prepared a report since he had only been hired less than three weeks before the trial date. As outlined in the Second Amended Petition, on direct appeal, the ACCA denied relief on a claim that the trial court erred in

not granting a continuance on this matter. However, it did so because “Gobble did not inform the court of the content of the expert’s expected testimony, did not attempt to reschedule Dr. McCormick, and did not inform the court what evidence, if any, a new pathologist could present at trial.” *Gobble v. State*, 104 So.3d 920, 940 (Ala. Crim. App. 2010). Had trial counsel responsibly procured an expert in a timely manner, all this information could have been provided to both to the trial court and on appeal.

32. Further, Dr. McCormick is deceased and died during Ms. Gobble’s trial. Ms. Gobble cannot be faulted for failing to consult with him on what testimony he could have provided. Had he still been living, undersigned counsel would have had him review the materials and testimony and asked him to discuss that to which he would have been able to testify. As Dr. McCormick was never available to appellate counsel, Dr. Seibel, a qualified expert, was consulted to determine the available testimony of a credible expert.

33. The State next argues this portion of Ms. Gobble’s ineffective assistance of counsel claim is “not facially meritorious” as to any prejudice flowing from trial counsel’s ineffectiveness. (Answer at 22.)⁸ In doing so, the State again asks this Court to engage in a prejudice analysis which is not appropriate at the pleading stage. The State, in addressing Dr. Seibel’s testimony that the autopsy report did not show that the wounds had taken place over the course of time, claims the State’s closing argument “did not assert that [Ms.] Gobble was a serial abuser or that her attack on Phoenix was not a ‘one time incident.’” (Answer at 24 (citing R. 768-780).) However, the prosecution asked Dr. Salne, in reference to injuries on Phoenix, whether they were “[f]resh or old?” (Vol. 15, R. 452), or received at the same time, no less than ten times. *See also* (Vol. 15, R. 443, 444, 447, 451,

⁸ Again, the State attempts to confuse this subclaim by parsing it from the overall IAC claim and by dissecting the subclaim itself into four separate subsections. Thus, the State makes the same arguments about prejudice in separate subsections of its response to this subclaim. In the interest of judicial economy, Ms. Gobble offers this singular response to both the State’s repetitious attempts to undermine the prejudice flowing from trial counsel’s failure to procure such a specialist.

452, 453, 459, 463, and 465.) The State’s Answer, therefore, creates a material dispute of fact not yet ripe for this Court’s merits analysis.

34. The State also claims Dr. Seibel’s conclusions are irrelevant because even “Shaken Baby Syndrome is not ‘accidental’ in nature.” (Answer at 25.) However, simply because something is not “accidental” does not mean the assailant had a particularized intent to kill, and such intent is a necessary element for a capital conviction, and the aggravating circumstance of the crime being particularly heinous, atrocious or cruel. *See Kennedy v. State*, 472 So.2d 1092, 1105 (Ala. Crim. App. 1984). This merely introduces another question for this Court to resolve after Ms. Gobble has an opportunity to present evidence.

35. The State also asks this Court to weigh expert credibility. For example, the State contends that Ms. Gobble would not have been aided by Dr. Seibel’s testimony that the autopsy report did not show that injuries to Phoenix’s arms were caused by any form of “twisting,” because Dr. Salne’s conclusions regarding the “twisting” were not inconsistent with the autopsy report. (Answer at 24.) But, as detailed in the Second Amended Petition, Dr. Seibel would testify that the autopsy report failed to indicate a “spiral fracture,” which would have been present if a bone had been broken by “twisting,” as Dr. Salne speculated. (Vol. 15, R. 441-42, 463; Vol. 17, R. 776.) Further, Dr. Wong, the Medical Examiner who performed the autopsy, would testify that the autopsy excludes “twisting” due to the absence of any spiral fractures, and that he would have noted spiral fractures in his report had he discovered any. (Ex. K, ¶¶ 11-12.)

36. The State further argues Dr. Seibel’s testimony “regarding the possibility that intubation caused Phoenix’s [torn frenulum] would be of little weight or value to the defense” and that Ms. Gobble “concedes that Dr. Salne’s answer to the State’s hypothetical is accurate.” (Answer at 26 (emphasis in original).) This confuses the issue: Although a torn frenulum could have been caused by any number of activities, including a baby bottle being thrust into the child’s mouth with

force, or by intubation, as Dr. Wong attests, any testimony suggesting the specific cause would represent mere speculation. (Ex. K.) Trial counsel's failure to prepare and present an expert left the jury with an image of Ms. Gobble slamming a baby bottle into Phoenix's mouth, with no counter testimony explaining that the frenulum could well have been torn when the EMTs twice attempted intubation. Any assessment of expert credibility and weight is not appropriate at the pleading stage.

37. On the merits, the State contends mandamus is not available to challenge a trial court's refusal to grant a continuance. (Answer at 21.) Although this is generally the case, it is incorrect given the capital nature of Ms. Gobble's trial. As asserted in the Second Amended Petition, Ms. Gobble was imperiled by her trial counsel's many failures about this issue, including failing to immediately challenge the denial of a continuance with mandamus. "A decision to deny a motion for continuance is within the sound discretion of the trial court." *Ex parte Med. Assurance Co.*, 862 So.2d 645, 649 (Ala. 2003). But a writ of mandamus may issue "where an abuse of discretion is shown." *Ex parte Speedee Cash*, 806 So.2d 389, 392 (Ala. 2001).

38. Relying on *Ex parte Price*, 715 So.2d 856 (Ala. Crim. App. 1997), the State insists mandamus review was not available to Ms. Gobble, and this portion of the IAC claim should be summarily dismissed. (Answer at 21.) The State's reliance is misplaced because the circumstances in *Price* materially differ from Ms. Gobble's capital trial. *Price* was a white-collar embezzlement case, and, upon review of the less serious circumstances in *Price*, the ACCA determined that the continuance issue "may be adequately reviewed by direct appeal." 715 So.2d at 857.

39. Yet, the United States Supreme Court has acknowledged there is a "qualitative difference between death and all other penalties." *Harmelin v. Michigan*, 501 U.S. 957, 995 (1991). "The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is

embodied in our concept of humanity.” *Id.* at 995-96 (quoting *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J. concurring)). The denial of a continuance in an embezzlement trial is likewise substantially different from the denial of a continuance necessary to adequately prepare for a capital murder trial, in which the punishment is irrevocable.

40. In *Ex parte Spears*, 621 So.2d 1255 (Ala. 1993), upon which the *Price* court relied (715 So.2d at 857), the defendant sought mandamus review from the trial court’s denial of a double jeopardy challenge. 621 So.2d at 1256. The Alabama Supreme Court held that mandamus was inappropriate in a criminal matter, reasoning that appellate review could fully and adequately address any error. *Id.* at 1258. However, the Court further explained that “mandamus review will generally be restricted in the future to those cases where one of the recognized exceptions applies, or to those extraordinary cases where the rights of the parties cannot be adequately protected by appellate review of a final judgment.” *Id.* (emphasis added). While in *Spears*, there was no risk that the appellate court could not adequately vindicate the defendant’s rights, based solely on the record before it, the same cannot be said in *Ms. Gobble’s* here. Because *Ms. Gobble’s* attorneys did not put on an expert, the record on appeal was silent as to how the evidence presented to the jury through Dr. Salne would have been challenged. *See Owens v. Hooters Restaurant*, 41 So.3d 743, 744 (Ala. 2009) (“Appellate courts are not permitted to consider matters outside the record.” (citations omitted) (Cobb, C.J., concurring)).

41. Moreover, the ASC has never held that mandamus is per se unavailable to challenge denials of motions to continue. Rather, the ASC, and other Alabama courts, have repeatedly and routinely entertained mandamus petitions asserting that trial courts had exceeded their discretion by denying motions to continue. *See Ex parte Med. Assurance Co.*, 862 So.2d 645 (Ala. 2003) (mandamus review of trial court’s denial of motion to continue trial); *Ex parte Walker Reg’l Med. Ctr.*, 825 So.2d 741 (Ala. 2001) (mandamus review of trial court’s order granting continuance of motion to compel

arbitration pending discovery); *Ex parte Sparks*, 699 So.2d 1268 (Ala. Civ. App. 1997) (consolidated mandamus review and appellate review challenging denial of motion to continue trial); *see also Braden v. Jim Bishop Chevrolet*, 897 So.2d 1040, 1042 (Ala. 2004) (noting earlier mandamus review of denial of motion to stay proceedings); *McDonald v. U.S. Die Casting & Dev. Co.*, 612 So.2d 1161, 1162 (Ala. 1993) (noting earlier mandamus review of denial of motion to continue trial). While the above cases are civil, it is well established that criminal defendants are entitled to greater - not less - procedural protection than civil litigants, as imprisonment is a more severe punishment than civil liability. *See Ashe v. Swenson*, 397 U.S. 436, 443 (1970) (“As Mr. Justice Holmes put the matter . . . , ‘It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt.’” (quoting *United States v. Oppenheimer*, 242 U.S. 85, 87 (1916))); *see also Hamilton v. State*, 680 So.2d 987, 990 (Ala. Crim. App. 1996) (noting earlier mandamus review of trial court’s denial of motion to continue murder trial).⁹

42. Finally, the State asserts that trial counsel’s failure to interview Dr. Song Wong, the pathologist who conducted the autopsy on Phoenix, is not “facially meritorious” because “[t]rial counsel reasonably decided not to rely on Dr. Wong, a State Medical Examiner.” (Answer at 28.) But trial counsel failed even to investigate or interview Dr. Wong despite the centrality of his conclusions regarding Phoenix’s injuries and cause of death to the case. Therefore, the appropriate inquiry is whether trial counsel were reasonable in failing to *investigate* Dr. Wong, as “‘strategic choices made after less than complete investigation are reasonable’ only to the extent that

⁹ Decisions from other jurisdictions confirm that mandamus review remains available to challenge denials of motions to continue trial. *See Romero v. Drummond Co.*, 522 F.3d 1303, 1313 (11th Cir. 2008) (noting earlier mandamus review of denial of motion to continue trial); *United States v. Santos*, 201 F.3d 953, 960-61 (7th Cir. 2000) (reasoning that mandamus is an appropriate remedy for the denial of a continuance of trial where the “abuse of discretion by the trial judge cannot effectively be remedied by appealing the final decision”).

‘reasonable professional judgments support the limitations on investigation.’ *Wiggins*, 539 U.S. at 533 (quoting *Strickland*, 466 U.S. at 690-91.)

I(A)(1)(d) Trial Counsel Were Ineffective for Failing to Review and Introduce Florida Department of Child Services Records.¹⁰

43. As alleged in Ms. Gobble’s Second Amended Petition, despite the centrality of the Florida Department of Child Services (“DCF”) records to the case, trial counsel informed the court a month before trial that they still needed to file a petition to get the non-redacted documents. (Vol. 12, August 19, 2005, Hr’g, at 7-8.) Given trial counsel’s delay in retrieving and reviewing the records, they were unable to select specific records, page numbers, or findings contained in them to rebut the State’s central theory that Ms. Gobble was an abusive, uninterested mother who did not participate in caretaking. (Pet. at 62-63.) Instead, trial counsel entered over a thousand pages of records into evidence for the jury to sort through themselves. (Vol. 2-11, C. 434-1968.)

44. The State asserts that the alleged facts are not “facially meritorious” because trial counsel did introduce DCF records (Answer at 30), directed the jury to “multiple filings” contained in the record (Answer at 31), and that the information contained in the DCF records was cumulative of Ms. Gobble’s testimony. (Answer at 34.)

45. First, the State’s Answer fails to address non-cumulative testimony that counsel failed to introduce at trial. In particular, counsel failed to point out that the initial safety assessment conducted after Edgar Parrish made the call to DCF found that the “overall risk to the child is low” and “none of the allegations appeared to have any truth to them. The child is being well cared for.” (Vol. 2, C. 357.) In a case with no forensic evidence tying any of the four adults present in the trailer to Phoenix’s death, the initial finding that Mr. Parrish’s allegations against Ms. Gobble did not appear

¹⁰ At the outset, Ms. Gobble acknowledges that they indeed made an error in attributing the “mother” discussed by trial counsel during the judicial sentencing to Ms. Tierra Gobble, when it was indeed a reference to Ms. Lori Gobble. Ms. Gobble withdraws this factual allegation based on this inaccuracy but maintains that the claim is still sufficiently pleaded without this basis.

to have “any truth to them” was critical not only for assessing both Mr. Parrish’s credibility (as the state relied on his interrogation statements), but also provided rebuttal evidence to the State’s contention that Ms. Gobble “couldn’t take care of the first child. She didn’t feed him. She kept poor conditions. She didn’t change the diapers.” (Vol. 17, R. 772.) Other non-cumulative evidence contained in the DCF records included that Ms. Gobble did have visitation with Jewel and the visitation observation report only documented positive behavior and interactions (Vol. 2, C. 382; Vol. 4, C. 604) – contrary to the State’s assertion that Jewell wouldn’t “even go to [Ms. Gobble]” and that “she wanted nothing to do with [Ms. Gobble], because she was afraid of [her].” (Vol. 16, R. 721.) The jury’s attention was not directed to this evidence which went to the crux of the State’s theory and characterizations of Ms. Gobble as an abusive mother.

46. Second, because trial counsel did not conduct a proper investigation into the record – as evidenced by their failure to even move to be provided the unredacted records until the middle of the month that the court had intended to start the trial – the appropriate inquiry is again not whether the manner in which trial counsel introduced evidence was reasonable, but whether the decision to not investigate the DCF records and the allegations contained in them, in order to show them in a proper light, was reasonable. *See Wiggins*, 539 U.S. at 533. Relatedly, the State’s contention that Ms. Gobble rebutted many of the characterizations of the State through her own testimony fails to consider how records, by an independent third party, could have been weighed differently by a jury than the accused’s own testimony. Had trial counsel conducted a proper investigation into the DCF records, and the allegations contained in them, they would have been positioned to make a reasoned judgment as to whether Ms. Gobble was the best vehicle for introducing this rebuttal testimony. Or, whether it was unreasonable to direct the jury to the records to provide credibility to their central witness whose reliability was repeatedly brought into question by the prosecution. These questions merit consideration where the jury deliberated for less than two hours before convicting

Ms. Gobble of capital murder – hardly enough time to read through over a thousand pages of records to identify this information on their own. (Pet. at 23.)

47. Accordingly, the State fails to address critical factual allegations, and where it does address the facts, its arguments create material disputes of law and fact. Therefore, summary dismissal is not appropriate.

I(A)(2)(a) Trial Counsel Were Ineffective for Failing to Investigate Samuel David Hunter.

48. As pled in Ms. Gobble’s Second Amended Petition, trial counsel failed to conduct even a cursory investigation into Samuel David Hunter’s (“David”) life, which would have revealed evidence of prior abusive behavior. The State argues that this claim is not “facially meritorious” because trial counsel introduced records which are cumulative of this evidence (Answer at 35), Ms. Gobble failed to plead how “counsel would have obtained and admitted the evidence,” (Answer at 36), and she fails to allege how counsel would have obtained this evidence, witnesses who could have testified, the content of the witnesses testimony, and “specific new facts” that this evidence would have provided. (*Id.*)

49. Again, the State’s Answer frames counsel’s failures as strategic choices, when the allegations pertain to trial counsel’s failure to investigate and prepare. Trial counsel had an absolute obligation “to conduct a ‘substantial investigation into each of the plausible lines of defense.’” *Ex parte Womack*, 541 So.2d 47, 71 (Ala. 1988).

50. The State fails to address the non-cumulative evidence pled by Ms. Gobble. In particular, the State does not mention the allegations that David had previously sexually molested children. (Pet. at 67.) This was critical as the prosecution implied in their case in chief that Ms. Gobble had not only physically harmed her son, but also sexually abused him. *See* (Vol. 15, R. 402-04, R. 459.) In fact, the prosecution asserted in their closing argument that the DCF records contained “no stinking indicators about Samuel David Hunter sexually abusing anyone” and

challenged the jury to “spend the next week looking for them” because “[i]t ain’t there.” (Vol. 17, R. 802-03.) In reality, the investigative decision summary alone contained three separate pieces of evidence that David had sexually abused children: (1) “In the past, Dad was accused of sexually molesting a child.” (Vol. 9, C. 1665); (2) “[T]he aunt told stories about him molesting a child at 8 or 9 years of age to get him committed and get more money from the state. The uncle, Edgar Parrish, verified that there were reports about this but does not know how true they were.” (*Id.*); and (3) “Uncle reports that the child was put away several times because he was accused of sexually molesting a child.” (*Id.* at 1666). These allegations also outline how trial counsel could have obtained and admitted such evidence – through interviews with David’s aunt, Johanna Williams (the guardian ad litem), or DCF caseworkers – and investigation into state commitment records, juvenile records, and CPS records. (Pet. at 68.)

51. The State’s Answer demonstrates why Ms. Gobble’s choice of organization should not be viewed as dividing ineffective assistance of trial counsel claims into distinct claims. While the State alleges that Ms. Gobble fails to plead witnesses who could have testified to David’s life, the affidavits of Walter Jordan (Ex. H), April Hunter (Ex. M), Tina McGuire (Ex. N), Bordie Gobble (Ex. P), and Teena Thomas (Ex. Q), all contain available testimony regarding David’s life, behavior, or allegations regarding violence.

52. Accordingly, this issue is not appropriate for summary dismissal because it has been sufficiently pled and any arguments introduced through the State only create material disputes of fact and law.

I(A)(2)(b) Trial Counsel Were Ineffective for Calling Ms. Gobble to the Stand, and for Failing to Prepare her for her Testimony.

53. Ms. Gobble alleged that trial counsel was ineffective for calling her to the stand given her mental state and for failing to conduct any preparation with her prior to her testimony. The State argues this subclaim is “without merit” and “denied” because trial counsel “conducted an extensive

and effective direct examination of his client,” and argues that putting her on the stand “reflected a strategic choice by trial counsel to deflect suspicion onto other occupants of the home where Phoenix died.” (Answer at 38.)

54. The State asks this Court to evaluate the relative weight of the claim, given the State’s own interpretation of the record. However, for this Court to properly weigh Ms. Gobble’s allegations, it would need to hear her testimony regarding how she was, and was not, prepared, and judge the weight of her testimony – as is this Court’s place, not the State’s, to do. Again, this assessment is inappropriate at the pleading stage.

55. The State fails to engage with the other factual allegations pled in support of Ms. Gobble’s claim, as well. For example, the State’s assertion that trial counsel’s failure to prepare her for her testimony is “refuted on the face of the record,” ignores the factual dispute presented through the pled available testimony of trial counsel’s own mitigation expert, Ms. Joanne Terrell. After discovering information about Ms. Gobble’s abusive childhood, and having the chance to meet with Ms. Gobble, Ms. Terrell strongly advised trial counsel not to put her on the witness stand. (Ex. C, ¶ 13.) Ms. Terrell informed trial counsel that, because Ms. Gobble was suffering from post-traumatic stress disorder (PTSD), if he put her on the stand, she would exude a flat affect and would come across to the jury as a woman indifferent to the death of her child. (*Id.*).

56. Notably, trial counsel himself admitted that the choice to put Ms. Gobble on the stand was not based on a reasoned strategic decision: As pled by Ms. Gobble, Ms. Terrell showed up to court, she confronted Mr. Brantley and asked him why he put Ms. Gobble on the stand, to which Mr. Brantley replied that he just had no idea of what else to do. (*Id.*). The relative weight of these allegations, again, are decisions that reside with this Court, not the State’s conclusory assertions.

57. Finally, the State contends this portion of Ms. Gobble’s ineffectiveness claim is “fatally flawed,” because it is based in part on an affidavit from a juror which, the State contends, would be

inadmissible. (Answer at 39-40.) However, the State is again confusing Ms. Gobble's burden to plead her claim with her burden to prove it at an evidentiary hearing. As detailed earlier in this Reply, the State's reliance on a rule of weight or admissibility of a claim, or portion thereof, at this pleading stage of proceedings is improper. Questions of admissibility are to be answered, where Petitioner will have to prove her claim, not in her Petition, where she is required only to plead that claim. *See Coleman*, 71 So.3d at 631.

I(A)(2)(c) Trial Counsel Were Ineffective for Failing to Investigate, Interview, Locate, and Present Key Witnesses¹¹ at Trial to Support a Defense of Ms. Gobble.

April Hunter.

58. As outlined in Ms. Gobble's Second Amended Petition, no member of the defense team ever spoke with April Hunter, David's older sister, who also spent a portion of her childhood in the care of Edgar and Walter. (Pet. at 76.) The State contends this claim is "without merit" because the testimony "amounts solely to prior bad acts testimony against Edgar Parrish that do not relate to the res gestae of the crime, do not exclude Gobble as a perpetrator, and would not have been admissible if Edgar was on trial." (Answer at 40.)

59. The State fails to recognize that the initial inquiry is whether trial counsel was ineffective for failing to adequately investigate, which precluded them from making informed strategic trial decisions. *See Wiggins*, 539 U.S. at 521-22. Next, while the State asserts that the testimony only amounts to inadmissible "bad acts testimony," the prosecution put Edgar's character at issue – not the defense – in describing him as a loving parental figure, thus opening the door to such evidence, had Ms. Gobble's trial counsel made himself aware of it. In closing statements, the prosecution went as far as to say that if Ms. Gobble had not returned, Phoenix would have remained

¹¹ Again, even if this Court were to believe that each individual's testimony, standing alone, would not have changed the outcome of the trial, it must be viewed cumulatively with all the other evidence trial counsel should have discovered and introduced. *See Woods*, 789 So.2d at 943 n.1; *Strickland*, 466 U.S. at 690.

unharmed in Edgar’s custody: “[A]ll she had to do was walk away, and say, Edgar, you have physical placement of Cody.” (Vol. 17, R. 806.) Finally, the State’s reliance on a rule of weight or admissibility of a claim, or portion thereof, at this pleading stage of proceedings is improper. Questions of admissibility are to be answered, where Petitioner will have to prove her claim, not in her Petition, where she is required only to plead that claim. *See Coleman*, 71 So.3d at 631.

I(A)(2)(d) Tina McGuire.

60. The State again argues this section of the ineffectiveness claim is “without merit” and “denied” because the available testimony of Tina McGuire would be “cumulative” of the testimony offered by Dallas and Carmen Gobble. (Answer at 42.)

61. The State again fails to address whether trial counsel was ineffective for failing to adequately investigate, which precluded them from making informed strategic trial decisions about calling witnesses like Ms. McGuire. *See Wiggins*, 539 U.S. at 521-22. Next, Ms. McGuire’s testimony included non-cumulative testimony, including that she observed the interactions between Ms. Gobble and Mr. Hunter, and that Mr. Hunter was the dominant partner in the relationship. This testimony was relevant because it would have rebutted the prosecution’s introduction of Tori Jordan’s testimony that Ms. Gobble was the dominant person in the relationship. (Vol. 14, R. 263.)

62. Finally, the State’s answer fails to contemplate that Ms. McGuire, being unrelated to Ms. Gobble, may have had a greater level of credibility with the jury than Ms. Gobble’s own parents. As with the previous sections, this portion of Ms. Gobble’s claim involves disputed issues of credibility and fact.

I(A)(2)(e) Dallas Gobble Jr., Bordie and Beth Gobble.

63. The three witnesses identified in this claim would have testified about David Hunter throwing Dallas Gobble, Jr., a child at the time, through a sheetrock wall. (Vol. 15, R. 497-99.) The State again argues this portion of the IAC claim is “without merit” and “denied” because the alleged

available testimony would have been inadmissible under Ala. R. Evid. R 404(b) and “there is no possibility that it would have changed the result of Gobble’s trial.” (Answer at 43.)

64. First, the State’s argument regarding the admissibility of such evidence again represents a dispute regarding a mixed question of fact and law. The State’s reliance on a rule of weight or admissibility of a claim, or portion thereof, at this pleading stage of proceedings is improper because such questions are to be answered at such a hearing, where Ms. Gobble will have to prove her claim. *See Coleman*, 71 So.3d at 631; *Hodges*, 147 So.3d at 976-77. Even if this testimony did implicate a rule of evidence, the State’s argument would still fail because the United States Supreme Court has long recognized that if evidence is necessary to the defendant’s case, the defendant’s due process rights take precedence, and the evidence should be admitted. *See Davis v. Alaska*, 415 U.S. 308, 319 (1974) (holding that due process requires the admittance of witness’s juvenile records to impeach the witness, even though those records are inadmissible under the rules of evidence); *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) (hearsay evidence admissible to establish that another person committed the offense for which defendant is charged). Testimony showing that another member of the household with the opportunity to have killed Phoenix was abusive, and had physically assaulted another minor child, would have been both relevant and admissible.

65. Second, the State fails to contend with multiple factual allegations: including that due to trial counsel’s failure to prepare Dallas Gobble, he was unaware that he had not personally witnessed the incident, leading to sustained objections (Vol. 15, R. 498-99); that trial counsel had never contacted Bordie Gobble prior to him coming to Dothan for the trial (Ex. P, ¶ 13); and that trial counsel only learned that Bordie Gobble had witnessed the incident when they met at the trial. (*Id.*) Again, these factual pleadings not only relate to trial counsel’s failure to call witnesses, but also to conduct a reasonable investigation which would have allowed them to make strategic trial decisions. *See Wiggins*, 539 U.S. at 521-22.

I(A)(2)(f) Teena Thomas.

66. As with the preceding portion of the global ineffectiveness claim, the State argues that Ms. Thomas's testimony would have been inadmissible, was "cumulative, and is "without merit" and "denied." (Answer at 44.) As detailed in the prior section, the State's arguments respecting the weight or admissibility of the allegation create a dispute of a mixed question of fact and law, which is not a question for this Court to resolve at the pleading stage. *See Coleman*, 71 So.3d at 631; *Hodges*, 147 So.3d at 976-77. Also as in the prior section, if evidence is necessary to the defendant's case, due process rights take precedence, and the evidence must be admitted. *Davis*, 415 U.S. at 319; *Chambers*, 410 U.S. at 302.

67. Evidence that Ms. Gobble's father ran a strict military household, and that Ms. Thomas regularly witnessed Ms. Gobble making statements such as "I am responsible," even when she was not at fault would have supported Ms. Gobble's case that her "confession"¹² was not cumulative of prior testimony. And, contrary to the State's argument that Ms. Thomas' "speculation about why Gobble admitted responsibility for Phoenix's is irrelevant," (Answer at 44), Ms. Thomas' testimony went to the heart of Ms. Gobble's defense: her "confession" was merely an instinctive reaction, impressed into her from a young age, to take full responsibility for all matters over which one might have exerted more control. Given that trial counsel argued in closing that Ms. Gobble may have taken such responsibility and told the investigators what they wanted to hear (Vol. 17, R. 796-97), there would have been no strategic value in not putting Ms. Thomas on the stand to help provide important context as to why Ms. Gobble would have been susceptible to being induced into making such a "confession."

I(A)(2)(g) Lori Gobble, Dorothy "Dottie" Gates, Glori Snow and Charlotte Miller.

¹² Again, the "confession" in question was an, "I guess I must have," and never an actual admission of guilt which came only after hours of police interrogation.

68. The State reiterates arguments, as put forth previously, in response to this claim – that it is “without merit” and “denied” because the available testimony of the above witnesses is “speculative,” “irrelevant,” and therefore “inadmissible.” (Answer at 44-47.)

69. Here, again, the State’s Answer again fails to address whether trial counsel was ineffective for failing to adequately investigate, which precluded them from making informed strategic trial decisions about calling witnesses the above witnesses. *See Wiggins*, 539 U.S. at 521-22. Next, the State’s arguments regarding the admissibility of the allegation create a dispute of a mixed question of fact and law, which is not a question for this Court to resolve at the pleading stage. *See Coleman*, 71 So.3d at 631; *Hodges*, 147 So.3d at 976-77.

70. Finally, the State’s assertion that the available testimony is “irrelevant” is refuted by the record. For example, while the State contends that “none” of Lori Gobble’s alleged testimony is “relevant to the question of whether Gobble murdered Phoenix,” it went both to how Ms. Gobble’s childhood of chronic abuse and neglect made her more vulnerable to a false confession and to being under the domineering hand of men like Edgar and David. This evidence would have rebutted the prosecution’s characterization of Ms. Gobble as “dominant” and supported rebutting the only direct evidence in the entire case: her “confession.” Similarly, Dorothy Gates’ testimony that as a result of the persistent abuse she experienced, Ms. Gobble would “just admit to things . . . even if it was obvious she had not done what she was being accused of,” (Ex. S, ¶ 8), again went to the heart of understanding why she may have made a false confession.

71. Finally, much of what the State considers “irrelevant,” goes directly to characterizations that the prosecution itself offered as relevant given the lack of direct or forensic evidence in the case. For example, during closing argument, it was the prosecution that characterized Ms. Gobble as believing her former boyfriend was a “vampire” while the defense “want to talk about God and she is wearing a cross.” (Vol. 17, R. 801.) The testimony of Charlotte Miller and

Glori Snow was made relevant through the prosecution's introduction of evidence that Ms. Gobble had a "gothic" lifestyle.

I(A)(2)(h) Trial Counsel Were Ineffective for Failing to Investigate, Argue, and Present Expert Psychologist Testimony at Trial to Support a Defense of Ms. Gobble.

72. The State contends that this claim is "not facially meritorious" because Alabama law does not recognize a diminished-capacity defense, (Answer at 48), that Ms. Gobble "fails to plead deficient performance" (Answer at 54), and "fails to demonstrate prejudice." (Answer at 55.)

73. The State's argument misconstrues the proposed testimony as a diminished-capacity defense. But Ms. Gobble argues that the testimony of a psychologist would focus on showing that the State did not prove that Ms. Gobble had a "particularized intent to kill." *Kennedy*, 472 So.2d at 1105. The State had the burden in a capital murder trial to prove intent: this evidence would be offered to undermine the jury's confidence that the prosecution had proved a necessary element of the conviction.

74. Next, while the State asserts that "it was not counsel's fault for Dr. Brodsky's sudden exit," (Answer at 53), Ms. Gobble pled that Dr. Brodsky's last-minute withdrawal "happened in large part due to counsel's deficiency in failing to provide materials to the prior doctor in a timely manner, failing to give him enough time to complete his assessment in a professional manner." (Pet. at 232.) Thus, trial counsel was forced to hire psychologist, Dr. Ghostly, who was new and inexperienced. As to Dr. Ghostly, the State asserts that Ms. Gobble's "petition fails to plead why Dr. Ghostly's time with the case was insufficient." (Answer at 53.) But, as pled in the Second Amended Petition, Dr. Ghostly *himself* admits that he was not properly qualified to perform the assessment that should have been performed; that he was not asked to perform anything but a "drive-by" evaluation; and that, had he been prepared and told about all aspects of the case and Ms. Gobble's background, he would have recommended that trial counsel obtain additional, more qualified, experts. (Pet. at 235.) By his own admission, there was no chance that Dr. Ghostly could have performed adequately on

behalf of Ms. Gobble, and he would have recommended that trial counsel obtain two experts exactly as how now been done in this post-conviction proceeding: a false confession expert and a trauma specialist.

75. Therefore, this is not a case where two qualified psychologists were retained, counsel did a reasonable job preparing them, and now - years later - Ms. Gobble simply states that they should have hired someone “better.” Rather, this is a case where the first expert withdrew because trial counsel woefully failed to prepare him or give him enough time to complete an assessment, and the second expert admits he was woefully unprepared by trial counsel, was not given what he needed, was not qualified even to perform mitigation assessments, was not even asked to assess for mitigation and would have recommended more qualified experts. Therefore, Dr. Franklin is not being offered merely as a “better” expert, but rather as the expert Dr. Ghostley himself will testify trial counsel should have obtained.

76. As to the remainder of this portion of the claim, the State argues that Dr. Franklin’s proposed testimony “would have been inadmissible during the guilt phase” because the “proposed testimony opines” on “diminished capacity.” (Answer at 56.) First, the State’s arguments respecting the admissibility of the testimony creates a dispute of a mixed question of fact and law, which is not a question for this Court to resolve at the pleading stage. *See Coleman*, 71 So.3d at 631; *Hodges*, 147 So.3d at 976-77. Second, as discussed above, Dr. Franklin’s testimony was not provided for the purpose of a diminished capacity defense. Rather, her testimony would have included a “range of clinical diagnoses and conclusions” that would have “assisted the jury in both the guilt and penalty phases of the trial” including that Ms. Gobble’s psychological state made her confession “highly unreliable” (Pet. at 237-239), rebutted the State’s characterization of her immobility as a sign of guilt (*Id.*), and that the trauma she experienced made her “passive and dependent on others – including

her parents, her boyfriend, her boyfriend uncle and his partner – to tell her what to do.” (Pet. at 238).

77. The State also asserts that the testimony of Dr. Marti Loring regarding Battered Women’s Syndrome (“BWS”) and Post-Traumatic Stress Disorder (“PTSD”) is not “facially meritorious” because the evidence would not be admissible and “directly contradicted trial counsel’s defense theory of actual innocence.” (Answer at 57.)

78. The admissibility of Dr. Loring’s testimony creates a dispute of a mixed question of fact and law, which is not a question for this Court to resolve at the pleading stage. Next, the State again fails to address whether trial counsel was ineffective for failing to adequately investigate the full scope of Ms. Gobble’s background – including the relationship dynamic she shared with David, which precluded them from making informed strategic trial decisions about calling the above witnesses. *See Wiggins*, 539 U.S. at 521-22.

79. Finally, the State asserts that there is no reasonable probability that Dr. Loring’s testimony would have changed the outcome of the guilt phase because “[e]vidence of a defendant’s past trauma or domestic environment does not rebut the physical evidence of the victim’s injuries.” (Answer at 58-59.) But Dr. Loring’s testimony was not offered to rebut the physical evidence of Phoenix’s injuries. Rather, Dr. Loring’s testimony was pled to “rebut the testimony of the State’s witnesses that Ms. Gobble was the dominant person in her relationship with David” (Pet. at 97), how “Ms. Gobble’s PTSD would have impacted her behavior immediately following Phoenix’s death, the police interrogation and trial,” to rebut “the State’s contention that Ms. Gobble was ‘[h]iding out’ after Phoenix’s death because she ‘[d]idn’t care at all’” (Pet. at 98), and “why Ms. Gobble could have accepted blame for Phoenix’s death, even if she did not cause his fatal injuries.” (*Id.*) This testimony goes directly to the State’s theory of the case, characterization of Ms. Gobble, and the reliability of her in-custody statements. *See Morris v. State*, 956 So.2d 431, 447 (Ala. Crim.

App. 2005) (emphasizing that mental health testimony is not only admissible, but highly important, regarding any “issues relevant to the defense.”).

I(A)(2)(i) Trial Counsel Were Ineffective for Failing to Cast Doubt on the Reliability of Ms. Gobble’s Custodial Statements by Failing to Obtain a Psychologist Trained in False Confession Analysis.

80. Besides simply denying these allegations, the State argues they are “without merit” and contends that the testimony from a false confession expert would have been inadmissible “because the expert’s testimony would not assist the trier of fact in understanding a fact outside the common knowledge of the jury as lay people.” (Answer at 60.) However, beyond finding false confession testimony admissible, the CCA has upheld a circuit court’s finding of ineffective assistance of counsel and reversed a capital murder conviction based on, *inter alia*, “extensive findings regarding the lack of any expert testimony in the area of false confessions.” *State v. Smith*, 85 So.3d 1063, 1080 (Ala. Crim. App. 2010). The court noted that “the general premise that defense counsel should have been aware of the need for such an expert in this case, and the resources available at the time, do support the circuit court’s findings that counsel did not adequately prepare with regard to this issue.” *Id.* at 1080 n.6; *see also United States v. Hall*, 93 F. 3d 1337, 1345 (7th Cir. 1996) (holding that trial court reversibly erred in excluding testimony of a false confession expert because the defendant was “entitled to present his own theory” to the jury about the validity of the confession); *Boyer v. State*, 825 So.2d 418, 420 (Fla. Dist. Ct. App. 2002) (holding that trial court reversibly erred in excluding testimony of false confession expert because the testimony “went to the heart” of the appellant’s defense).

81. Once again, the State confuses admissibility with the matter of whether a petition states a claim. “We must keep in mind that this is an ineffective assistance claim. The issue is not whether the evidence could have come in, but whether . . . counsel, by not offering [an expert’s testimony on false confessions], fell below an objective standard of reasonableness as measured against

prevailing professional norms.” *Ray v. State*, 80 So.3d 965, 992 (Ala. Crim. App. 2011) (internal citation and quotation omitted).

82. The State also inconsistently asserts that false confession expert testimony would be inadmissible because it would embrace an ultimate issue to be decided by the trier of fact, while simultaneously attempting to distill the subclaim as asserting: “Dr. Davis would not testify that Ms. Gobble gave a false confession, but rather that ‘Ms. Gobble would be at risk of false confession.’” (Answer at 62 (quoting Pet. ¶ 325).) Dr. Davis, as an expert in psychology, could have assisted the jury in understanding the psychological dynamics behind false confessions, and how many of those dynamics were present in Ms. Gobble’s case and interrogation. However, the ultimate determination as to whether her confession was false would have remained with the jury.

83. Finally, Respondent argues that Ms. Gobble was not prejudiced by the lack of a false confession expert, because the jury had heard that Ms. Gobble was “led” to admit that she “must have” hit Phoenix’s head on the crib, and that Ms. Gobble had testified that she was pushed to confess and, that if she “told them what they wanted to hear, they’d leave me alone.” (Answer at 62-63.) This, however, supports Ms. Gobble’s argument: the average juror may struggle with believing that anyone, even under extreme stress, could ever admit to doing something that she did not do. A “defendant’s own confession is probably the most probative and damaging evidence that can be admitted against him [T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct.” *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) (citing *Bruton v. United States*, 391 U.S. 123, 139- 40 (1968) (White, J. dissenting)). However, the testimony of a qualified false confession expert can assist jurors in understanding the causes and occurrence of false confessions, particularly when an expert can give numerous examples of cases in which convincing confessions have been given, only to be later definitively disproved by scientific evidence.

84. Ms. Gobble’s trial counsel were ineffective in failing to consult a false confession expert because the circumstances of Ms. Gobble’s case are identical to those which courts have determined warrant the services of such experts. The extensive length and forceful nature of Ms. Gobble’s interrogations alerted trial counsel that her statements may have been coerced, but even with this knowledge trial counsel failed to seek an expert to help explain how such false confessions can, and do, occur. *See Lunbery v. Hornbeak*, 605 F.3d 754, 760 (9th Cir. 2010) (reasoning that, where petitioner was subjected to a lengthy and intense interrogation, counsel’s failures to investigate the validity of her confession and present testimony of false confession expert “constitute errors requiring the grant of the [post-conviction] petition”).

I(A)(2)(j) Trial Counsel Were Ineffective for Failing to Cast Doubt on the Reliability of Ms. Gobble’s Custodial Statements by Failing to Obtain a Forensic Linguist.

85. Similarly, the State asserts that Ms. Gobble’s allegations regarding trial counsel’s failure to hire a forensic linguist is “without merit” because “[w]hether an investigator is being aggressive, interrupting a suspect, or offering ‘closed-choice’ questions are matters of basic human communication and social interaction.” (Answer at 64.) Additionally, the State asserts that Ms. Gobble failed to plead that the expert field was a generally accepted scientific field in Alabama criminal courts in 2005. (*Id.*)

86. The question of admissibility is not properly before this Court at the pleading stage. *See Coleman*, 71 So.3d at 631; *Hodges*, 147 So.3d at 976-77. Second, as outlined in Dr. Leonard’s report and curriculum vitae, he was willing and available to testify at Ms. Gobble’s trial in 2005, and had been qualified as an expert in state and federal court previously. (Pet. at 121.) Third, while the State argues that Dr. Leonard’s conclusions go to the “ultimate issue of voluntariness reserved for the court and the jury” (Answer at 66), Dr. Leonard’s report did not include conclusions regarding whether Ms. Gobble’s statements were voluntary. Rather, Dr. Leonard described the techniques utilized by the interrogators – specifically the Reid method – to demonstrate the differences in the

ways law enforcement interrogated Ms. Gobble, as opposed to the three other adults in the trailer. (Pet. at 122-23.) The State argues trial counsel reasonably decided to avoid evidence that, even if the jury believed Ms. Gobble might have taken the actions that led to Phoenix's death, she did not have the intent to kill. (Answer at 65.) However, this is not reasonable given the facts of Ms. Gobble's case, and trial counsel's otherwise deficient defense.

87. Finally, as discussed above, both state and federal courts have repeatedly rebutted the State's assertion that issues regarding false confession are not beyond the understanding of the average juror. (Answer at 64.) To the contrary, expert testimony is needed because "substantial research has shown that even where strongly coercive interrogation techniques are used to elicit a confession, jurors presume that the confession clearly indicates guilt." (Pet. at 105.) "In other words, jurors do not appear to understand, in the absence of expert testimony: 1) that false confessions do occur; 2) why they occur, and what police behaviors and other factors might promote false confession; 3) how an innocent suspect could provide such a detailed and apparently accurate description of what happened if (s)he was not present during the crime or involved; 4) what kinds of suspects might be particularly susceptible to making a false confession; and 5) how to tell the difference between true and false confessions." (*Id.*)

I(A)(3) Trial Counsel Were Ineffective for Failing to Convey During Closing Statements that a Capital Conviction Requires Not Only Intent to Have Committed the Act that Brought about Death, but that it also Requires a Particularized Intent to Kill.

88. The State argues this portion of the ineffectiveness claim is "not facially meritorious," and "denied." (Answer at 70-71.) Thus, there again exist disputes of material fact, or mixed fact and law, and summary dismissal is prohibited. Ala. R. Crim. P. 32.9(a).

89. On the merits, Respondent cites to the portion of the closing argument where counsel stated "it's each and every one of you have got to be convinced that we've got a death, we do; that she's the one that killed the baby. But you have got to be convinced of that beyond a reasonable

doubt; and, Number Three, that she intended to do it.” (Answer at 70 (citing Volume 17 at R. 791)). But this statement still conveyed merely that the jury had to find that Ms. Gobble “intended to do it” (Vol. 17 at R. 791), while failing to convey that the jury had to find beyond a reasonable doubt that Ms. Gobble also had to specifically intend his death, not merely the actions that led to it. One juror has provided an affidavit testifying he did not believe Ms. Gobble had any intent to kill her child. (Ex. FF, ¶ 6.) Thus, this Court was rightly concerned about direct appeal counsels’ failure to argue this claim much more thoroughly, and the State’s contention this subclaim is without merit is unavailing.

I(A)(4)(a) Trial Counsel Were Ineffective for Failing to Object to the Trial Court’s Improper Jury Instructions Describing the Difference Between Capital Murder and Manslaughter.

90. In instructing the jury, although the trial court initially explained that a verdict of capital murder required an intent to kill, (Vol. 17 at R. 815), the trial court shortly thereafter confused this standard by instructing the jury that a capital murder verdict only required “intentional conduct.” (*Id.* at 817-18.) The State relies merely on the fact that some portions of the trial court’s instructions were correct and, thus, argues this portion of the IAC claim is without merit. (Answer at 71-72.) However, as the State concedes, juries are presumed to follow the court’s instructions. (Answer at 72 (citing *Ex parte Stewart*, 659 So.2d 122, 127 (Ala. 1993)). Here, the instructions were in conflict. Therefore, the jury may have followed the incorrect explanation.

91. In describing the difference between manslaughter and capital murder, the Court instructed:

Basically, ladies and gentlemen, the difference in this is between manslaughter and capital murder. In capital murder there is intentional conduct. In manslaughter, we call it reckless. And I’ve given you that reckless conduct. And I’ve given you that definition.

(Vol. 17, R. 817-818.)

92. This is not correct, confused the jury, and warranted an objection. A jury following this instruction may well have believed that Ms. Gobble's conduct was intentional (believed that she intended to strike, shake and otherwise harm the child) rather than simply reckless, and thus believed that capital murder was more appropriate than mere reckless manslaughter. Again, however, this would not be the appropriate verdict if a juror believed her *conduct* was intentional, but that she did not intend to kill. *Kennedy*, 472 So.2d at 1105.

93. Here, there is more than a reasonable probability a juror could have had such confusion and acted upon it. Juror S. D. would testify at a Rule 32 hearing that, although he is a firm believer in the death penalty, and does not believe it is used enough, he voted for a life sentence for Ms. Gobble. (Ex. FF, ¶¶ 3-4). Juror S. D. will further testify that the reason he did not vote for death was because he did not believe that Ms. Gobble had any intent to kill the baby. (Ex. FF, ¶ 6.) He believed that she intended to commit the acts that caused the death but did not believe that she actually intended to kill the child.

94. Had trial counsel appropriately objected, and had this matter clarified to the jury with an appropriate follow up instruction containing the information outlined, there is a reasonable probability that the outcome of the trial would have been different.

I(A)(4)(b) Trial Counsel Were Ineffective for Failing to Object to the Trial Court's Refusal to Give a Lesser-Included Offense of Non-capital Murder-Extreme Indifference to Human Life Instruction.

95. The State argues that case law makes an extreme-indifference-to-human-life instruction unwarranted, and accordingly counsel could not be ineffective for failing to make arguments about why the instruction should have been given. (Answer at 73-74.) However, although precedent would have still allowed the court to deny giving such an instruction, the plain language of the Alabama statutes demonstrates the court was not required to do so. Additionally, because the Court was itself confused about how the instruction could apply, had counsel made this argument

effectively, there is a reasonable probability that the instruction would have been given, and followed.

96. As detailed more thoroughly in the Second Amended Petition, in denying the instruction, the Court incorrectly reasoned:

Of course, the evidence, even under Mr. Brantley's example is going to have to support a reasonable theory on the charge. And your client has denied even doing anything, whether it was reckless or intentional or anything.

(Vol. 17, R. 761.)

97. Essentially, the Court determined that, because Ms. Gobble denied doing anything, there was no reasonable theory to support a charge of murder by reckless indifference. (Vol. 17, R. 761). However, this is incorrect. If a jury believed Ms. Gobble's testimony that, not only did she not intend to kill the child, but also took no actions that would have caused it, then there would have been no rational basis for the charge. However, Mr. Brantley was essentially correct when he argued, "But they may not believe her is what I am saying." (Vol. 17, R. 761.) Mr. Brantley should have argued more clearly that, if the jury believes that she intended to take the actions that caused the death of the baby (grabbing and shaking the baby, and likely hitting his head on a hard object in doing so) but did not believe she intended to kill the baby, then there would be a rational basis for a charge of murder due to extreme indifference to human life.

98. Under Ala. Code § 13A-6-2(a)(1) (1975), a person commits the crime of murder if: "With intent to cause the death of another person, he or she causes the death of that person or of another person." However, under § 13A-6-2(a)(2), a person also commits the crime of murder if: "Under circumstances manifesting extreme indifference to human life, he or she recklessly engages in conduct which creates a grave risk of death to a person other than himself or herself, and thereby causes the death of another person."

99. Under Ala. Code § 13-A-1-9 (1975): A defendant may be convicted of an offense included in an offense charged. An offense is an included one if:

It is established by proof of the same or fewer than all the facts required to establish the commission of the offense charged; or

It consists of an attempt or solicitation to commit the offense charged or to commit a lesser included offense; or

It is specifically designated by statute as a lesser degree of the offense charged; or

It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interests, or a lesser kind of culpability suffices to establish its commission.

The only proscription on instructing the jury on a lesser included offense is that there must be “a rational basis for a verdict convicting the defendant of the included offense.” Ala. Code § 13-A-1-9 (1975) (b).

100. In Ms. Gobble’s case, there was a rational basis for a verdict under § 13A-6-2(a)(2). Such an instruction should have been given, and Ms. Gobble’s counsel should have argued more forcefully for it and clearly objected when the instruction was not offered. Under § 13A-6-2(a)(2), a jury could have found that Ms. Gobble did not intend to kill Phoenix, and yet still believe that she took the actions that, with extreme recklessness, caused his death.

I(A)(4)(c) Trial Counsel Were Ineffective for Failing to Request a Jury Instruction on the Lesser-Included Offense of Non-Capital Felony Murder.

101. The State concedes that “[n]on-capital felony murder includes causing the death of another person while committing aggravated child abuse.” (Answer at 75.) However, the State then argues merely that such an instruction “was completely inconsistent with the facts of the case” because Ms. Gobble denied assaulting Phoenix. (*Id.*) This, however, does not change that the prosecution’s proffered “facts of the case,” if believed by the jury, would have been consistent with non-capital, felony, murder via aggravated child abuse, so long as the jury did not believe Ms. Gobble harbored a particularized intent to kill, as required to sustain a capital conviction.

102. Trial counsel had even recognized to the Court, in arguing for the reckless indifference to human life instruction, discussed in the prior section, that the jury “may not believe” Ms. Gobble, in terms of some of her testimony. (Vol. 17, R.761.) Recognizing that, a reasonable trial counsel would have done everything in his power to ensure the jury was offered as many reasonably supportable alternative judgments to capital murder as possible. Again, one juror will testify that he did not believe Ms. Gobble intended to kill Phoenix. Accordingly, a non-capital felony murder instruction was not only warranted, but there is also a reasonable probability that, had it been requested and properly given, Ms. Gobble would have been convicted of the non-capital offense.

I(A)(5) Trial Counsel Unreasonably Waived Ms. Gobble’s Rights Under the Confrontation Clause of the Sixth Amendment.

103. Ms. Gobble’s Sixth Amendment rights were violated when her trial counsel agreed to the admission of: (1) the autopsy report and related testimony without the medical examiner, who conducted the autopsy and wrote the report thereof, testifying at trial, and (2) Ms. Gobble’s hearsay statements in interrogation videos. The State again argues this IAC subclaim is not facially meritorious. (Answer at 77.) A review of the claim as pled in Ms. Gobble’s Second Amended Petition shows this conclusory statement is simply wrong.

104. Ms. Gobble’s Second Amended Petition sets forth a well-pleaded IAC subclaim. It alleges “[a] reasonably prudent capital defense attorney would have recognized that consenting to the admission of the testimonial hearsay embodied in the autopsy report would disadvantage his client by waiving her constitutionally-guaranteed right to confront the witness against her.” (Pet. at 143.) Inexplicably, the State asserts Ms. Gobble’s subclaim fails because “before this Court is not whether a viable objection could have been made to the admission of the autopsy report, but whether no reasonable counsel would stipulate to its admission.” (Answer at 77.) Nowhere in the text of this claim does Ms. Gobble argue that the proper standard merely is whether a “viable objection could have been made.”

105. Ms. Gobble identified the witnesses who were impermissibly allowed to testify about the autopsy: Investigator Tracy McCord of the Houston County Sheriff's Department and Dr. Jonas R. Salne, the emergency room physician at the hospital. (Pet. at 142-49.) She also identified the objectionable testimony at trial: the autopsy report describes Phoenix's injuries in detail and includes several disturbing drawings depicting the corpse of a child; the report was critical in establishing the State's theory of Phoenix's death, concluding that the "manner of death" was "homicide." (Pet. at 143.)

106. Of central importance to not only a conviction, but a capital conviction, the State had to present evidence that Ms. Gobble harbored a "particularized intent to kill." *Kennedy*, 472 So.2d at 1105. Thus, expert forensic testimony was more important than simply "cast considerable doubt on the prosecution's theory that the injuries occurred sometime during the middle of the night," (Ex. II at 60-61), as direct appeal counsel argued. Such testimony was crucial to challenging the State's portrayal of on-going abuse, frequent broken bones, sadistic twisting and breaking of wrists, and the jamming of baby bottles into the child's mouth so hard as to tear flesh, all detailed in Section I(3)(A), *supra*.

107. As a result of trial counsel's waiver of her Confrontation Clause rights, Ms. Gobble could not cross-examine Dr. Wong. Dr. Wong would have also testified that, in performing his autopsy, he found no basis to conclude that injuries happened over the course of time. (Ex. K). Rather, there was only evidence of fresh, acute injuries. (*Id.*) Dr. Wong also would have testified there was no basis to conclude that the wrist fractures occurred due to any sadistic "twisting," and would testify that Dr. Salne's testimony that the torn frenulum was consistent with someone jamming a baby bottle into Phoenix's mouth with tremendous force was irresponsible speculation. These facts would have shown the jury that the State's case against Ms. Gobble was fundamentally flawed, and the jury would have found that reasonable doubt existed.

108. The State cites no precedential support for the proposition that a reasonable capital trial counsel would waive his client's Sixth Amendment right to confront her accusers in circumstances like Ms. Gobble's. In contrast, Ms. Gobble analyzed United States Supreme Court precedent, decided before Ms. Gobble's capital trial, and applied it to the facts of her case. This precedent established the standard for determining when a defendant's Confrontation Clause rights are implicated. *See Cranford v. Washington*, 541 U.S. 36, 54 (2004). *Cranford* was controlling during Ms. Gobble's trial. Trial counsel is presumed to know the law. *See Johnson v. Sorenson*, 914 So.2d 830, 838-39 (Ala. 2005). Failing to challenge the State's ability to admit the autopsy without the medical examiner's testimony - when she had an absolute right to do so - was deficient performance and prejudiced Ms. Gobble.

109. Besides *Cranford*, Ms. Gobble also cited later-decided precedent to buttress her *Strickland* deficiency argument. She did not, as the State argues, "rel[y] heavily on the Supreme Court's decision in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 309 (2009)," (Answer at 77), to establish a legal basis for her claim. The State neither responds to, nor counters, Ms. Gobble's assertion that *Cranford* was controlling during Ms. Gobble's trial and counsel should have known that she had the constitutional right to challenge the State regarding the admission of this testimonial report.

110. Having fallen short on its assertion this claim is not facially meritorious, the State next argues that because the ACCA's decision on Ms. Gobble's direct appeal found the autopsy report was non-testimonial and no *Cranford* violation occurred, trial counsel cannot be found to have rendered deficient performance. (Answer at 78.) This argument misses the mark. There is a clear difference in consenting to the admission of evidence and the court overruling an objection as to its admission. Counsel should have known had he objected, there was a reasonable probability that his objection would have been sustained. The deficiency in trial counsel's performance was that the

autopsy was unchallenged, not that it was inadmissible per se. Therefore, even if the autopsy was admissible, trial counsel had even more reason to call Dr. Wong to question the veracity of the findings.

111. The State contends Ms. Gobble was not prejudiced by the testimony of Dr. Salne, the emergency room physician. (Answer at 79.) However, trial counsel's concession resulted in Ms. Gobble being unable to cross-examine Dr. Wong about the facts surrounding the autopsy and whether any mistakes were made. Dr. Salne did not participate in the autopsy and has no expertise in autopsies. But he testified with purported authority on an area of medicine in which he has no particular training. This was deficient performance and Ms. Gobble was prejudiced, again, for the reasons detailed in Section I(3)(A), *supra*, incorporated herein.

112. Ms. Gobble asserted that: as part of its case in chief, the State played three videotaped interrogations of Ms. Gobble conducted by Lieutenant Valenza and Investigator McCord. (Pet. at 109 (citing (Vol. 14, R. 303-04, 307; Vol. 15, R. 383).) During those interrogations, the officers made repeated references to allegations Edgar Parrish, Walter Jordan, and Samuel David Hunter - the three other adults in the small trailer home the day Phoenix was injured- allegedly made to them regarding the events leading to Phoenix's death. In response to Ms. Gobble's second subclaim, the admission of hearsay statements in police interrogation videos, the State likewise argues this claim is not facially meritorious. (Answer at 80.)

113. However, Ms. Gobble detailed the testimonial facts that prejudiced her and why counsel's performance was deficient. (Pet. at 150-54.) Specifically, Ms. Gobble took issue with the line of questioning regarding a "patting sound" or "clapping" or "slapping" including questioning by Officer McCord where he "repeated damaging hearsay statements that Hunter made during his police interview: "David says he heard a patting noise. He thought it was kind of rough." (Pet. at 151-52; Ex. B, 96) and "David told him that 'the bruises were not there when he put him into bed.'"

(Pet. at 152 (citing (Ex. B, 32))). As trial counsel failed to object, the testimony went uncontroverted even though Ms. Gobble had a constitutional right to confront her accusers.

114. In the alternative, the State argues that the statements “were not hearsay” and this claim – as a substantive claim – was rejected on direct appeal. (Answer at 80.) However, the State conceded, as it must, that because the ACCA did find error in admitting this hearsay evidence, albeit harmless error, that a *Strickland* prejudice finding is not foreclosed. (*Id.*) Nonetheless, the State asserts that with “the evidence of the severity of Phoenix’s injuries and Gobble’s confession” she cannot show prejudice. (Answer at 81.) This argument is fatally flawed as the evidence of the severity of Phoenix’s injuries is not dispositive; Ms. Gobble could have shown those injuries were caused by someone else during cross-examination of the three men. Unable to do so because of her trial counsel’s deficient performance, Ms. Gobble was prejudiced.

I(A)(5)(c) Trial Counsel Were Ineffective for Failing to Produce Their Own Redacted Videotape and Transcripts of Ms. Gobble’s Interrogation Statements.

115. During Ms. Gobble’s trial, due to trial counsel’s ineffectiveness, the State was able to show the jury the entirety of Ms. Gobble’s videotaped statements to police, even though the statements contained numerous objectionable portions. The Court would have been willing to entertain any viable method of keeping the objectionable portions of the transcript out. However, due to trial counsel’s total failure to prepare, they were left with the choice of either having the jury see the intimidating nature of the interrogation, but hear the objectionable statements, or not hear the objectionable statements, but only have a redacted transcript read into the record.

116. In responding to this subclaim, the State asserts that the objectionable portions of the interview were not hearsay and, thus, not inadmissible. (Answer at 80.) As an initial matter, once again, questions of admissibility are to be answered at the hearing, where Ms. Gobble will have to prove the claim, not in the Petition, where she is required only to plead that claim. *See Coleman*, 71 So.3d at 631.

117. The State’s argument also fails to address that, due to counsel’s failure to make such a redacted videotape, the jury heard the officer inform Ms. Gobble she had been charged with domestic violence; heard reference to the officer saying the jury would think she was a “cold blooded mother;” and heard the officer tell Ms. Gobble that “a person in [her] position can’t go on with their [sic] life and get any kind of peace . . . this is something that’s gonna be on your conscience for the rest of your life, you understand?” (Vol. 2, C. 325, SR.1, 221.) The prosecution even recognized that these statements were admissible as they argued repeatedly that allowing the fullness of the video into evidence would be inviting appealable error. (Vol. 15, R. 356-57, 377-79.)

118. Trial counsel’s performance was so objectively deficient that the trial court suggested that it believed counsel even had not listened to the videotape. (Vol. 15, R. 350, 360-62.) Patently, the court was willing to keep the objectionable portions redacted, had trial counsel either provided their own transcript or, if they wanted the jury to see the intimidating aspects of the interrogation, created a redacted video.

I(A)(6) Trial Counsel Were Ineffective for Failing to Object to Numerous Irrelevant and Inflammatory Questions and Arguments Made by the State, and to the State’s Inappropriate Characterization of Ms. Gobble’s Statements During Closing Argument.

119. The State asserts that “the first allegedly improper” challenge by Ms. Gobble regarded the prosecutor’s references to her “laughter” during questioning about her son’s autopsy. (Answer at 84.) This is incorrect. The first challenge Ms. Gobble raised to counsel’s performance was that he allowed the prosecutor to mischaracterize Ms. Gobble’s alleged “confession.” *See* (Pet. at 122.)

120. During closing argument, the District Attorney looked straight at the jury and characterized Ms. Gobble as having admitted in her statements to the police when asked who did it, that she said “I’m the one. I did it.” (Vol. 17, R. 780.) Trial counsel should have immediately objected to this characterization, given that Ms. Gobble never once actually stated that she committed the

crime, but rather only stated out of exasperation and confusion that she “must have.” Because the State does not deny this was deficient performance that prejudiced Ms. Gobble, it should be taken as admitted. However, to the extent the State simply “denie[s]” the entire claim, it fails to address aspects of the claim, likely because there is no defense for trial counsel’s failure to object and clarify this highly prejudicial fabrication.

121. As to the “laughter,” the State claims this portion of the subclaim is without merit because Ms. Gobble “does not deny the fact that she laughed.” (Answer at 84.) This misrepresents Ms. Gobble’s argument. Ms. Gobble did not contend that she did not laugh or giggle in any manner, but rather that her laugh was one of exasperation, rather than related to the fact that her child had died. As pleaded:

[I]t is evident that the question itself came across as rather strange. After all, Ms. Gobble was a mother who just lost her child. Yet, the investigator tells her they went to the Department of Forensic Science, ‘who does the autopsy’ and asks her, ‘Are you interested in hearing the results?’ Rather than ‘giggling,’ Ms. Gobble was letting out a mild, momentary, exasperated laugh - almost as if to indicate that of course, there was a large part of her that does not want to hear about the subject matter, but at the same time, she needs to know. Thus, her answer was, ‘Yes and no, to be honest.’

(Pet. at 163 (citing (Ex. B, 63).)

122. Thus, Ms. Gobble’s argument is that the State was implanting the idea into the minds of the jurors before they watched the tape, that Ms. Gobble was “laughing” about her child’s death, rather than about the ridiculousness of the question. So, Ms. Gobble did not, in her pleading, “concede” that she “laughed” at the fact that her child had died. Rather, she only conceded that she laughed in response to the question posed to her about her child’s death. There is a major difference. Trial counsel were ineffective for failing to object to the prosecution’s mischaracterization of this evidence and were ineffective for failing to counter it with the compelling evidence of the tape itself.

123. Further, the State contends that trial counsel were not ineffective for failing to challenge the prosecutor’s irrelevant and prejudicial references to “vampir[ism].” (Answer at 142-

43.) The State argues the case Ms. Gobble cites, *Dawson v. Delaware*, 503 U.S. 159, 168 (1992) differs because the cited case involved the use of evidence that *Dawson* was affiliated with “the Aryan Brotherhood despite the absence of any link between the Aryan Brotherhood and the crime” (Answer at 143.) However, simply because Ms. Gobble’s case involved an accusation of vampirism does not render the case materially distinguishable, because there is—as in *Dawson*, no cognizable link between the highly prejudicial assertion of vampirism and the death of Phoenix.

124. The State also argues that Ms. Gobble’s relationship to a man who went by the name of “Wolf,” “was legitimate to rebut her direct testimony about her love for Hunter and her desire to be with her children.” (Answer at 85-86.) As an initial matter, it is arguable whether even the questioning regarding her relationship with another man was unduly prejudicial. However, even if that portion of the questioning was minimally relevant in rebuttal, there was absolutely no relevance to accusing Ms. Gobble of “vampir[ism],” and the implications were wildly prejudicial. Thus, *Dawson* applies because the prosecutor interjected irrelevant and inflammatory associations, which the United States Supreme Court has found to be unconstitutional if there is no evidentiary link between the alleged association and the crime.

125. In closing, the State again referenced the prejudicial vampire evidence, arguing:

She was living with someone by the name of Wolf. And according to the diary entries, she believes he’s a vampire. She comes into this Courtroom, and they want to talk about God and she is wearing a cross. And that is how she takes care of her children. And she says she is a vampire. My goodness, what kind of mother is that?

(Vol. 17, R. 801.) Throughout all of this, trial counsel raised no objection. However, this argument and line of questioning were irrelevant and unconstitutional, absent some relevant, admissible evidence that Ms. Gobble’s supposed association with “vampires” had anything to do with the crime. Thus, the admission of this type of evidence and argument against a defendant is unconstitutional under the First and Fourteenth Amendments to the United States Constitution. *See Dawson*, 503 U.S. at 168.

126. Additionally, the State contends trial counsel were not ineffective for failing to object to the prosecutor's attempts to portray Ms. Gobble as promiscuous. (Answer at 85.) The State argues that any attempt by trial counsel to object to that characterization would have only drawn attention to it. (*Id.*) However, this ignores that fact that the prosecution did not simply present, as the State attempts to portray it the "bare fact that she was sexually active." (*Id.*) Nor was the jury merely, as the State shamelessly attempts to portray it, "aware that [Ms.] Gobble had two children born out of wedlock and was certainly aware of the activities required to produce that result." (*Id.*) Rather, the prosecutor engaged in repeated, irrelevant, attempts to portray Ms. Gobble as a woman of ill-repute.

127. As pleaded: early in the trial, the State asked witness Tori Jordan, "Did you see Samuel David Hunter, his appearance change, or the way he acted when he started dating and living and sleeping with Tierra Gobble?" (Vol. 14, R. 285.) The question of whether David was "sleeping with Tierra Gobble" was irrelevant to the question and designed to malign Ms. Gobble's character. Further, during the State's cross-examination of Ms. Gobble, the State asked her about a boyfriend she had dated who went by the nickname "Wolf." (Vol. 16, R. 690.) When the prosecutor asked if she lived with him, trial counsel objected that the question was irrelevant. (*Id.*) However, the Court did not rule. (*Id.*) Trial counsel failed to renew the objection and the questioning continued. The prosecutor asked Ms. Gobble, "You never slept with him?" (*Id.*) Even though Ms. Gobble admitted she had done so, the prosecutor asked again, "Had sexual intercourse with him?" (*Id.*) Not only was this irrelevant, but it also had been asked and answered. Finally, the prosecutor pushed the envelope even further, asking "You wrote about how much you enjoyed having sex with him in your diary, right?" (*Id.* at 691.) No objections were lodged.

128. The crux of Ms. Gobble's ineffectiveness claim is that counsel failed to object and stop this line of irrelevant and highly prejudicial questioning. Thus, the State's contentions, including

characterizing the prosecutor's blatantly improper tactics as "brief questioning," (Answer at 85), should be disregarded.

I(A)(7)(b) Trial counsel Failed to Object to Ms. Gobble Appearing Before the Venire in Prejudicial Attire.

129. The State asserts this claim was insufficiently pleaded because Ms. Gobble "has not pleaded facts that would show deficient performance or that she was actually prejudiced." (Answer at 89-90.) In support of this argument, the State cites a distinguishable case (*McWhorter v. State*, 142 So.3d 1195 (Ala. Crim. App. 2011)), decided after Ms. Gobble's conviction. Unlike *McWhorter*, Ms. Gobble pleaded specifically as to what she wore and how it was prejudicial and then provided comments made by specific jurors who saw her in prison garb and street attire. At least two jurors – one who served and the other an alternate – both admitted that they saw her in an orange jumpsuit with her prison number. Another juror saw her in the street clothes she was wearing the day she was arrested and commented that her "demeanor" did not show a good "outlook" and implied that wearing jeans to her own murder trial was an outward sign of not taking the proceedings seriously. (Vol. 14, R. 199).

130. The State also asserts this claim is "not facially meritorious" because any prejudicial comments that could be attributed to Juror S. B. are inadmissible and excluded as the basis for a prejudice claim. (Answer at 92.) Questions of admissibility are to be answered at an evidentiary hearing, where Ms. Gobble will have to prove her claim, not in her Petition, where he is required only to plead that claim. *See Coleman*, 71 So.3d at 631.

131. Ms. Gobble has raised a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds; therefore, she has satisfied Rule 32's pleading requirements.

I(A)(7)(c) Trial Counsel Failed to Properly Question and Object to the Removal of a Prospective Juror who Did Not Favor the Death Penalty.

132. Trial counsel failed to adequately question prospective juror R. B., who was challenged by the State based on a fixed opinion against the death penalty, and marshal arguments that the trial court erred in removing juror R. B. from the venire (Vol. 13, R. 48-50.) The jury in Ms. Gobble's case recommended death by a vote of ten for death to two for life. In any case, "[i]f there is a reasonable probability that one juror would change his or her vote, there is a reasonable probability that a jury would change its recommendation." *Bertolotti v. Dugger*, 883 F.2d 1503, 1519 n.12 (11th Cir. 1989). This is all the relevant in Ms. Gobble's case, where an additional vote for life would have prevented a death recommendation.

133. The State maintains this claim is not facially meritorious because the juror, R. B., made two statements during voir dire, that her answers were unequivocal and the State could strike her from the jury for cause. (Answer at 94.) However, that is not the claim before the court. The claim is that trial counsel was ineffective for failing to rehabilitate the juror so she could serve on the jury - using a method commonly accepted in capital cases. The Answer fails to address this argument.

I(A)(7)(d) Trial counsel Failed to Conduct an Adequate Voir Dire.

134. Trial counsel unreasonably diminished the effectiveness of their limited questioning by failing to follow up with prospective jurors whose answers evinced potential sources of bias. The State argues this claim is insufficiently pleaded because "Gobble does not specifically allege that any juror was actually biased against her or that discovery of additional information would have actually caused trial counsel to exercise a peremptory strike of any particular venire member." (Answer at 95.) Review of the Second Amended Petition, however, shows that Ms. Gobble identified, by name, five jurors who had shown a predilection towards bias based on information that could have and should have been questioned by trial counsel. (Pet. at 188-90.) Accordingly, this claim is sufficiently pleaded and facially meritorious.

I(A)(7)(d) Trial Counsel Failed to Properly Respond to Biased Veniremembers who Should Have Been Removed for Cause.

135. In this final sub-claim of ineffective assistance of trial counsel during jury selection, Ms. Gobble asserts that counsel failed to effectively articulate reasons to strike biased veniremembers for cause. (Pet. at 190-94.) Like all the claims before it, the State again asserts this sub-claim was insufficiently plead, or without merit, or is belied by the record. (Answer 96-98.) The State asserts that “the bare allegation that trial counsel ‘could’ have done so is insufficient to specifically plead prejudice.” (Answer at 97.) However, as addressed above, Ms. Gobble has pleaded her claim with the requisite specificity: she identified the jurors by name, quoted the exact dialogue in the transcript which shows the objectionable responses, and articulated the precise basis for an objection that should have been made and how failing to do so prejudiced her. This claim was properly pleaded and is not subject to summary dismissal.

I(A)(7)(f) Trial Counsel Unreasonably Failed to Request a Jury Instruction Regarding the Voluntariness of Ms. Gobble’s Statements.

136. Here, Ms. Gobble made purportedly inculpatory statements to investigators during three lengthy interviews, which were central to the State’s case against her. While Ms. Gobble’s trial counsel moved to suppress her statements because they were involuntary, the trial court denied the motion and counsel unreasonably failed to request a jury instruction on voluntariness. Absent a request for instruction, the ACCA could only review for plain error.

137. The State responded that this claim is not facially meritorious because the ACCA found that the absence of an instruction on voluntariness was not plain error. (Answer at 99 (citing *Gobble*, 104 So.3d at 942-43).) The State acknowledges that “a finding of no plain error on direct appeal does not ‘automatically foreclose the determination of the existence of the prejudice required under *Strickland*,’” but argues “it is only in a ‘rare case’ that prejudice can be shown despite a finding of no plain error.” (Answer at 81 (citing *Lee v. State*, 44 So.3d 1145, 1162-63 (Ala. Crim. App. 2009)) (internal alterations and citations omitted). However, a finding of plain error is but “one factor to

be assessed when determining whether counsel's performance was ineffective." *Lee*, 44 So.3d at 1163.

138. Ms. Gobble raises this claim as one of *Strickland* ineffective assistance of counsel; therefore, a finding of plain error by an appellate court on direct review when trial counsel failed to make an objection is not the true measure of deficiency or prejudice. The analysis should be viewed as though trial counsel had made an objection and the trial court proceeded as it must. Correctly stated, whether a confession was voluntary rests initially with the trial court; once the trial court makes the preliminary determination that the confession was voluntary, it then becomes merely admissible into evidence. The jury determines voluntariness as affecting the weight and credibility to be given the confession. *See Lewis v. State*, 329 So.2d 599 (Ala. 1976).

139. As this case was largely circumstantial and the confession was far from voluntary, Ms. Gobble was prejudiced by the jury not being informed properly that it was free to give little weight or credibility to her "confession." As trial counsel in Alabama, it was deficient to not seek a well-known and clearly applicable jury instruction. Ms. Gobble was prejudiced by this failure.

I(A)(7)(g) Trial Counsel Were Ineffective for Failing to Object to the Prosecutor's Use of Peremptory Strikes in a Discriminatory Manner on the Basis of Both Race and Sex.

140. The State contends merely that this subsection of the IAC claim should be denied because it was raised and rejected on direct appeal, and "the record does not establish prima facie grounds for raising objections under either *Batson* or *J.E.B.*" (Answer at 104.) But that is the crux of Ms. Gobble's ineffectiveness claim: trial counsel failed to make the valid objections and, thus, on direct appeal, the matter was only reviewed for plain error - a high burden. *See Ex parte Taylor*, 10 So.3d 1075, 1078 (Ala 2005) (holding that a claim of ineffective assistance of counsel stemming from a substantive claim denied under plain error does not automatically fail in Rule 32 proceedings). For the reasons outlined in the Second Amended Petition, which the State does not address, had counsel made the valid objections and arguments, the trial court likely have found a prima facie case had

been made. Ms. Gobble, at the very least, deserves a ruling that a prima face case was made and at an evidentiary hearing, the prosecutor should have to set forth the purported race and sex neutral reasons for the strikes.

I(B) MS. GOBBLE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL DURING THE PENALTY PHASE OF HER TRIAL IN VIOLATION OF THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ARTICLE 1, SECTION 6 OF THE ALABAMA CONSTITUTION, AND ALABAMA LAW.

I(B)(1) Trial Counsel Were Ineffective for Failing to Investigate, Locate, Call, and prepare as Witnesses,¹³ Multiple Individuals Who Could Have Presented a Compelling Portrait of Ms. Gobble's Life Circumstances.

141. The State again classifies this portion of the claim as containing multiple separate and distinct subclaims. Again, this argument fails to recognize that all the aspects of trial counsel's ineffectiveness constitute a single claim. *See Ex parte Woods*, 789 So.2d at 943 n.1; *Strickland*, 466 U.S. at 690.

I(B)(1)(a) Lori Gobble.

142. The State asserts that this claim is "not facially meritorious" because the testimony is "cumulative" (Answer at 107) and defectively pled as Ms. Gobble failed "to plead specific facts showing that trial counsel's decision to present this mitigation through a professional expert, rather than through an admittedly violative and abusive witness like Lori Gobble, fell below an objective standard of reasonableness." (Pet. at 108.)

143. Again, the State's Answer again fails to address whether trial counsel was ineffective for failing to adequately investigate, which precluded them from making informed strategic trial decisions about calling Lori Gobble to present this testimony. *See Wiggins*, 539 U.S. at 521-22. The

¹³ And once again, even if one witnesses testimony, standing alone, would not reasonably have altered the outcome of the sentencing, it must be viewed in the light of all the information that could have been, but was not, provided due to counsel's deficient performance. *See Woods*, 789 So.2d at 943 n.1; *Strickland*, 466 U.S. at 690.

question is not whether trial counsel's choice to "avoid the 'double-edged-sword' of Lori's live testimony was a sound trial strategy," but whether trial counsel's choice to not investigate, contact, or interview the Defendant's biological mother, was a sound trial strategy. Next, the State's arguments describing Lori as "an admittedly violative and abusive witness" creates a question of witness credibility, which is not a question for this Court to resolve at the pleading stage.

144. Finally, Lori's available testimony includes information that is not cumulative of Ms. Terrell's testimony, including: her consumption of alcohol and cigarettes while pregnant (Pet. at 216); her PCP, acid, weed, and cocaine use – potentially while pregnant with Ms. Gobble (*Id.*); that Dallas Sr. was abusive towards Lori, including an incident when he came at her with a knife (Pet. at 217); and that Ms. Gobble witnessed men coming in and out of the home to sleep with Lori. (Pet. at 218.)

I(B)(1)(b) Bordie Gobble.

145. The State asserts testimony from Bordie Gobble would have been cumulative to the testimony from Ms. Terrell and Dr. Ghostley. (Answer at 110.) However, this contention ignores two major factors. First, much of the specific information Bordie Gobble could have testified about was not cumulative. For example, while the jury heard that Ms. Gobble experienced "severe and pervasive abuse and neglect" as a child, it is another matter to hear that Bordie witnessed Lori stab Ms. Gobble's hand "hard enough to draw blood." (Ex. P, ¶ 4.) Or, that when Beth and Bordie planned to deliver Christmas presents to the children, they arrived to find Ms. Gobble alone, but Dallas Jr., who was not even five years old, was nowhere to be found. (*Id.*) After searching the neighborhood with Ms. Gobble and locating Dallas Jr., they returned home to find that Lori had one man in her bedroom, and another man was waiting on the couch. (*Id.*)

146. The State asserts that "[a] reasonable attorney could conclude that presenting such visceral, disturbing accounts through an emotional family member risked distracting the jury with

parental ‘monstrosity’ rather than focusing on the defendant’s own psychological mitigation.” (Answer at 111.) But providing the jury with insight into the “parental monstrosity” that Ms. Gobble faced to evaluate her culpability is precisely the purpose of mitigation testimony.

147. Second, Ms. Terrell specifically advised counsel to speak with, and call as witnesses, various family members, explaining to him it is far more effective for the jury to hear the details of the client’s life story from those who have experienced them with the client. (Ex. C. ¶ 11.) These witnesses are more sympathetic than an expert who simply testifies to the categories of mitigation that were discovered during an investigation. (*Id.*) Ultimately, this portion of Ms. Gobble’s claim includes questions involving credibility and the weight of the evidence produced. The Court, not the State, should determine whether Bordie Gobble’s testimony would have been cumulative, and should determine the weight it should be accorded.

I(B)(1)(c) Dallas Gobble, Sr.

148. The State argues the testimony of Dallas Gobble, Sr., would also have been cumulative to the third-party testimony from Ms. Terrell and Dr. Ghostley. (Answer at 113.) However, this ignores the specific factual allegations Dallas would have testified to, rather than the generality that Tierra grew up with “severe and pervasive abuse and neglect.” For example, Dallas would have testified:

One time, when Tierra was 9 or 10 years old, Lori was working at a local Hardee restaurant. As often happened, Lori did not come home for a long time after her shift. So, on this particular night, I took the children with me and went to look for her at about 3:00 a.m. When we arrived at the Hardee’s Restaurant, we walked up, and all saw Lori on the front counter having sex with a male co-worker.

...

One time, I came home and found Lori having sex with two men in our bedroom. The door was open, and the children were able to see and hear what was going on. . . . I was so concerned for the children that I decided to retire early from the Navy.

...

I am convinced that whenever I was gone, men were parading in and out of the home having sex with Lori. If this happened frequently while I was living there, it could only have been worse when I was away.

(Ex. W, ¶¶ 6-10.)

149. The State asserts that this testimony is “highly inflammatory” and a “reasonable attorney could conclude that presenting such graphic, sordid details through a family member . . . risk alienating the jury or shifting their focus away from the defendant’s individual culpability.” (Answer at 114.) Again, the purpose of mitigation testimony is to illuminate how factors within the defendant’s life—particularly the sordid, inflammatory details—reduce a defendant’s individual culpability for their behavior.

150. As with the preceding portion of this claim, this part includes questions involving credibility and weight of the evidence produced. Therefore, this again represents a question of fact and credibility for this Court, not the State to determine, and summary dismissal would be inappropriate. Ala. R. Crim. P. 32.9(a).

I(B)(1)(d) Dorothy “Dottie” Gates.

151. The State asserts the “the claim is insufficiently pleaded because Gobble fails to allege that Dorothy Gates was available and willing to testify at the time of the trial in 2005. Ms. Gates’s signed declaration concludes, however, with: “I was also available [to] testify at the time of trial in 2005, and would have done so if I had been asked.” (Ex. S, at 3.)

152. Additionally, the State contends it was not deficient for counsel to have failed to locate “a former bartender from Virginia.” (Answer at 116.) This only demonstrates trial counsel’s substandard investigation: had counsel made minimal efforts to ask their client or her family members—many of which they also did not contact—for names of people who knew her while she was growing up, they would have learned that Ms. Gates played a large role in Ms. Gobble’s young life.

153. The State asserts that Ms. Gates' testimony would have also been cumulative to that provided from Ms. Terrell and Dr. Ghostley. (Answer at 115-16.) However, Ms. Terrell and Dr. Ghostley testified that Ms. Gobble was "abused." This is a far cry from hearing personal testimony that Dottie witnessed Lori strike Tierra hard - "as hard as a woman could strike a child." (Ex. S, ¶ 7), Dallas hit Tierra "much too hard" on the back of the head and yank her around by the arms aggressively (*Id.*), or that Tierra would be happy and playful, but if Lori or Dallas came into the room, she would duck and cover, or just put her head down, clam up and be quiet. (*Id.*) Such specific anecdotes, from a credible witness who observed these incidents of physical abuse, would have been far more compelling than the vague, second-hand observations of Ms. Terrell and Dr. Ghostley.

I(B)(1)(e) Steve Gates.

154. The State makes the same allegations regarding Steve Gates. While the State argues Mr. Gates's testimony, too, would have been cumulative, this again ignores the specific information he could have provided. Merely hearing from an expert that a young girl was "abused" is a far cry from hearing personal testimony that Mr. Gates once witnessed an altercation where Lori lost her temper with Tierra and threatened to beat her for something minor like misplacing something. (Ex. HH, ¶ 3.) He would also confirm that Tierra's demeanor would often change just by Lori or Dallas coming into the room. She would just suddenly, "become quiet, put her head down, or even cower or crouch down." (*Id.*)

155. And the State again contends it was not deficient for counsel to have failed to locate Mr. Gates. However, both Mr. and Ms. Gates's names could have easily been obtained had counsel made even minimal efforts to ask Ms. Gobble's family members for names of people who knew her while she was growing up. Ms. Gates played a large role in Ms. Gobble's young life, and thus her husband was not simply some difficult-to-find "husband of a bartender from Virginia." (Answer at 119.)

I(B)(1)(f) Glori Snow.

156. Contrary to the State's assertion, Ms. Snow's testimony is not cumulative as she could have demonstrated how the school system failed to intervene to help Tierra, and countered the prosecution's assertions regarding Tierra's purported "gothic" nature. Ms. Snow would have testified that Tierra confided in Ms. Snow she had been kicked out of the house, but after she reported this to the guidance counselor's office she never heard back from them if anything had been done. (Ex. T, ¶¶ 1-5.) Ms. Snow also noticed that Tierra would often be unkempt or have greasy hair or unbrushed teeth, which she took as a sign of a lack of parental involvement. However, Ms. Snow noted that, even with the lack of parental concern, Tierra was a kind and caring person, who always took the time to be helpful to others. (Ex. T, ¶¶ 6-7.)

157. Once again, not only must this evidence be viewed cumulatively, but this section also involves the credibility and weight of the evidence. Again, this represents a question of fact and credibility for this Court, not the State, to determine, and summary dismissal is inappropriate. Ala. R. Crim. P. 32.9(a).

I(B)(1)(g) Charlotte Miller.

158. The State again claims "much of this evidence was cumulative to evidence that was already before the jury." (Answer at 123-124.) However, as pled in the Second Amended Petition, Ms. Gobble had confided in Charlotte about her mother's prostitution, and even admitted to Charlotte that some men who had come into her mother's home had sexually assaulted Tierra. The jury never heard that Ms. Gobble was a victim of childhood sexual abuse. Tierra also confided in Charlotte she was a "cutter," – that she would cut herself periodically when her thoughts, or events in life, became overwhelming. (Ex. U, ¶¶ 4-5.) The jury never heard any evidence of Ms. Gobble's self-harm.

159. The State contends that counsel cannot be found to have been ineffective for failing to discover evidence of childhood sexual abuse, because Ms. Gobble did not inform counsel about it, and did not plead that she had told any other person besides Ms. Miller. (Answer at 124.) This ignores United States Supreme Court precedent. In *Rompilla v. Beard*, trial counsel interviewed Mr. Rompilla and five members of his family and requested reports from three mental health witnesses. 545 U.S. at 381–82. Their attempts to get mitigating information were thwarted because Mr. Rompilla was “uninterested in helping” and “even actively obstructive by sending counsel off on false leads.” *Id.* In *Rompilla*, the State argued, as the State does here, that counsel’s duty to present mitigation was absolved because the client did not tell them about relevant mitigation. *Id.* at 383. The United States Supreme Court, however, rejected this argument and found Mr. Rompilla’s lawyers ineffective because they failed to read prior conviction files, obtain school and prison records, and interview other family members that “destroyed the benign conception of Rompilla’s upbringing and mental capacity.” *Id.* at 389–93. Thus, *Rompilla* clarifies that trial counsel’s responsibility to investigate and prepare for a penalty-phase hearing goes beyond simply relying on their client and cursory investigation.

I(B)(2) Trial Counsel Were Ineffective for Failing to Call and Prepare Expert Witness Joanne Terrell During the Penalty Phase.

160. The State contends this subclaim “not facially meritorious and is insufficiently pleaded” is insufficiently pleaded because “Ms. Terrell testified extensively providing the jury with a comprehensive history of Gobble’s ‘severe and pervasive neglect and abuse,’ childhood trauma, and emotional problems.” (Answer at 126-127.) Rather than ineffectiveness, the State mischaracterizes the manner, method, and decision to not include specific details as “quintessential matters of trial strategy.” (*Id.*) These contentions are without merit.

161. The State again fails to evaluate that the ineffectiveness claims also include a failure to investigate. Ms. Gobble pled that Ms. Terrell will testify she provided Mr. Brantley with a list of

questions, but that he never asked the questions on it, nor did he ever review those questions with her. (Ex. C.) Mr. Brantley also never went over her mitigation report and, despite her urging, never wanted to review or prepare her testimony ahead of time. (*Id.*) Having testified in numerous trials, Ms. Terrell understood that she could not simply run on at length without inviting an objection. (*Id.*) While Ms. Terrell both expected more than a few questions, and questions allowing her to rehabilitate herself, trial counsel's lack of preparation prohibited either from occurring.

162. Further, had counsel worked with Ms. Terrell, counsel would have known what information had not yet been elicited. Reasonably prepared counsel would have listened for the information expected to be brought forth, asking follow-up questions if that information had not yet been elicited. However, because counsel failed to prepare Ms. Terrell before her testimony, he was unprepared to effectively elicit critical mitigating information.

163. The State also fails to address that Ms. Terrell would testify that trial counsel did not inform her of the negative connotations brought up about Ms. Gobble during the trial and that, had he done so, she could have provided testimony countering the prosecution's insinuations. Ms. Terrell would testify that, normally, defense attorneys keep her apprised of the issues raised during the guilt phase so she can then address them during the penalty phase of the trial. (Ex. C, ¶ 9.) However, she was never informed by Mr. Brantley of the issue raised in the guilt phase of the trial about Ms. Gobble's gothic phase in high school, or her purported interest in vampires and other gothic matters. (*Id.*) Ms. Terrell would testify that she could have helped to address that issue during the penalty phase by informing the jury that a very large percentage of teenagers she has worked with who were depressed had also gone through a gothic phase, which was often a direct manifestation of the teenagers' depression. (*Id.*)

164. Trial counsel's failure to call live witnesses, which Ms. Terrell urged him to do, who knew Ms. Gobble, and had seen her life circumstances, seriously undermined the penalty phase

presentation. This, combined with counsel's failure to prepare Ms. Terrell for her testimony, resulted in a penalty phase presentation that failed to, as Juror S. B. put it, "tell [the jurors] anything useful about Ms. Gobble." (Ex. L, ¶ 6.)

165. Ultimately, as with the preceding portions of this claim, this portion includes questions involving credibility and weight of the evidence produced, and questions regarding the reasonableness of the investigation. Therefore, this again represents a question of fact and credibility for this Court to determine, and summary dismissal is inappropriate. Ala. R. Crim. P. 32.9(a).

I(B)(3) Trial Counsel Were Ineffective for Failing to Call and Prepare an Expert Psychologist During the Penalty Phase.

166. The State erroneously characterizes this claim as alleging ineffective assistance of counsel "by failing to obtain a better, more qualified psychologist." (Answer at 129.) Instead, as described in the proceeding guilt phase subsection, Dr. Brodsky's last-minute withdrawal was the result of "counsel's deficiency in failing to provide materials to the prior doctor in a timely manner, failing to give him enough time to complete his assessment in a professional manner." (Pet. at 232.) Further, Dr. Ghostley himself admits that he was not properly qualified to perform the assessment that should have been performed; that he was not asked to perform anything but a "drive-by" evaluation; and that, had he been prepared and told about all aspects of the case and Ms. Gobble's background, he would have recommended that trial counsel obtain additional, more qualified, experts. (Pet. at 235.) By his own admission, there was no chance that Dr. Ghostley could have performed adequately and he would have recommended that trial counsel obtain two experts exactly as how now been done in this post-conviction proceeding: a false confession expert and a trauma specialist.

167. Therefore, this is not a case where two qualified psychologists were retained, counsel did a reasonable job preparing them, and now – years later – Ms. Gobble simply states that they should have hired someone "better." Rather, this is a case where the first expert withdrew because

trial counsel woefully failed to prepare him or give him enough time to complete an assessment, and the second expert admits he was woefully unprepared by trial counsel, was not given what he needed, was not qualified even to perform mitigation assessments, was not even asked to assess for mitigation and would have recommended more qualified experts.

I(B)(4) Trial Counsel Were Ineffective for Failing to Call and Prepare an Expert on Battered Women’s Syndrome and Post-Traumatic Stress Disorder During the Penalty Phase.

168. The State asserts this claim is “without merit” because the “proposed testimony of Dr. Loring is cumulative of evidence presented during the penalty phase and would not have altered the sentencing outcome.” (Answer at 131.) But Ms. Gobble is only required to plead – and later prove –there is a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Wiggins*, 539 U.S. at 534. Certainty of an altered outcome is neither required, nor appropriately assessed at the pleading stage.

169. Next, evidence introduced during the guilt phase may be introduced during the penalty phase, albeit for a different purpose, without being labeled as “cumulative.” Indeed, the prosecution in this very case incorporated by reference the evidence from the guilt phase into the penalty phase. Here, however, Dr. Loring’s testimony—specifically the assessment of David’s abuse towards Ms. Gobble – was not presented to the jury in either the guilt or penalty phase. Again, while the State asserts that “trial counsel’s decision not to focus on BWS as a primary mitigation factor was a reasonable strategic choice,” (Answer at 132), “strategic choices made after less than a complete investigation are reasonable only to the extent that reasonable professional judgments support the limitations on investigation.” *Wiggins*, 539 U.S. at 533 (internal citations and quotations omitted). Thus, there is a disputed question as to whether trial counsel’s failure to investigate the relationship dynamic between David and Ms. Gobble was in and of itself ineffective.

I(B)(5) Trial Counsel Were Ineffective for Failing to Call and Prepare a Pediatric Forensic Specialist During the Penalty Phase.

170. While the State asserts that this claim is insufficiently pled because Ms. Gobble “fails to identify any such expert, fails to plead what the expert would testify, and fails to plead facts to show how the expert’s testimony would have changed the result of the trial,” (Answer at 134), Ms. Gobble’s Second Amended Petition explicitly incorporates the detailed allegations regarding the pediatric forensic specialist from the guilt phase discussion, into the penalty phase. (Pet. at 245) (“As detailed in Section I(A)(i)(2), and incorporated herein . . .) That incorporated section specifically names Dr. Matthew Seibel, a board-certified pediatrician who specializes in the field of child abuse and neglect. (Pet. at 55.) That section also outlines Dr. Seibel’s proposed testimony. Additionally, Ms. Gobble dedicates more than two pages of her pleadings to outlining how trial counsel’s failure to retain an expert like Dr. Seibel “prejudiced Ms. Gobble in the penalty and judicial sentencing phases of her trial.” (Pet. at 245.) Accordingly, the State’s argument for dismissal is improper.

171. Beyond the State’s unsupportable contention that Ms. Gobble failed to plead the experts and evidence in contention, the State again issues a denial. (Answer at 135.) As with the preceding portions of this claim, this portion of Ms. Gobble’s claim includes questions involving credibility and weight of the evidence produced. Therefore, this again represents a question of fact and credibility for this Court, not the State to determine, and summary dismissal is inappropriate. Ala. R. Crim. P. 32.9(a).

I(B)(6) Trial Counsel Were Ineffective for Failing to Define Life Without Parole to Jurors.

172. This subclaim involves allegations that multiple jurors largely imposed the death penalty on the faulty assumptions those sentenced to life without parole lose their right to appeal, and those sentenced to life without parole are eligible for parole at some point. The jury foreman, Juror J. B., would testify that:

The decision between life without parole and the death penalty was difficult for myself and my fellow jurors. However, I distinctly remember a turning point in the deliberations. Based

on the jury instructions provided by Judge Little, and other things that were said during the trial, my fellow jurors and I believed that if we gave Ms. Gobble the death penalty, she would get an automatic appeal, but if she received a sentence of life without parole, she would not have the ability to appeal the conviction or sentence. I remember that we asked someone in a position of authority whether this was the case, and we were told that it was. Once I and my fellow jurors thought that she would not receive any further appeals if we gave her life without parole, the decision then became a slam dunk for the death penalty.

(Ex. GG, ¶ 3.) Additionally, Juror S. B. would testify he was also under the impression that a person who gets a life without parole sentence would still be eligible for parole after about thirty years. (*Id.*)

173. In urging this Court to dismiss this subclaim, the State erroneously states Ms. Gobble’s “sole allegation” of prejudice is “fatally flawed,” because the juror’s statements or testimony would be inadmissible under Ala. R. Evid. 606(b). (Answer at 135.) This contention, however, fails for three reasons. First, as discussed throughout this Reply, questions of admissibility are to be answered at an evidentiary hearing, where Ms. Gobble will have to prove her claim, not in her Petition, where she is required only to plead the claim. *See Coleman*, 71 So.3d at 631; *Hodges*, 147 So.3d at 976-77. Second, serious due process concerns can, and in a capital case involving something this erroneous should, trump rules of evidence. *See Davis*, 415 U.S. at 319; *Chambers*, 410 U.S. at 302. Third, the claim of trial counsel’s is not based “sole[ly]” on the juror’s affidavits.

174. Unfortunately, trial counsel not only failed to explain these concepts to the jury, but counsel also made an argument signaling that a person could be paroled even if given life without parole. In the final closing argument, co-trial counsel argued that Ms. Gobble was not a person like Charles Manson, and that even Manson was given “life without parole.” (Vol. 18, R. 990-91.) Yet, he then immediately said that the State of California was considering paroling him. (Vol. 18, R. 991.) This Court should make the ultimate determination regarding the admissibility of the affidavits and testimony, not the State. Thus, the State’s contentions are unavailing.

I(B)(7) Trial Counsel Were Ineffective for Failing to Object to the Prosecutor’s Irrelevant and Inflammatory Evidence and Argument.

175. The State argues this subclaim is “not facially meritorious” and denied “[f]or the reasons set out in [Respondent’s] answer to [section] I(A)(6).” (Answer at 136.) Because Ms. Gobble detailed the reasons the State’s contentions in that section lack merit, Ms. Gobble conversely refers this Court to her response in the proceeding guilt phase section. For the same reasons outlined therein, there exist disputes of material fact, or mixed questions about the facts and law. Thus, summary dismissal is prohibited and a hearing required. Ala. R. Crim. P. 32.9(a).

I(C) MS. GOBBLE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL, IN VIOLATION OF THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ARTICLE I, SECTION 6 OF THE ALABAMA CONSTITUTION, AND ALABAMA LAW.

I(C)(1) Direct Appeal Counsel Were Ineffective for Failing to Adequately Challenge the Trial Court’s Denial of a Continuance.

176. In challenging trial counsel’s error on appeal, direct appeal counsel were ineffective as they failed to assert two critical points that would have been central to the CCA’s analysis: (1) that trial counsel could not have known the specific trial date; and (2) due to the aftermath of hurricane Katrina, none of the experts who worked in the group of pathologists that their retained expert was a part of were available to stand in for the unavailable expert. (Pet. at 253-54.)

177. The State asserts this claim is not facially meritorious because “appellate counsel was not ineffective for failing to raise every argument in their challenge on appeal.” (Answer at 139.) However, the State’s argument fails to contend with Ms. Gobble’s allegations that direct appeal counsel failed to articulate why the continuance was needed, and how the trial court’s failure to grant its ultimately prejudiced Ms. Gobble. (Pet. at 253-54.) These factors are not additional arguments: they are central to a reviewing court’s decision when evaluating the claim on direct appeal. Accordingly, this subclaim is adequately pled and dismissal inappropriate.

I(C)(2) Direct Appeal Counsel Were Ineffective for Failing to Appeal the Trial Court’s Failure to Give a Jury Instruction on the Lesser-Included Offense of Non-Capital Felony Murder.

178. The State argues merely that this subclaim, virtually identical to the trial counsel ineffectiveness subclaim but applying to direct appeal counsel, lacks merit “for the reasons given with regard to [Ms.] Gobble’s counterpart” subclaim. (Answer at 139.) As with Ms. Gobble’s response to that subclaim, however, the plain language of the Alabama statutes in question renders a felony murder instruction valid. Had appellate counsel made this argument effectively, in the manner articulated above and in the Second Amended Petition, there is a reasonable probability that the Alabama courts would have granted Ms. Gobble relief. Thus, this claim remains meritorious.

I(C)(3) Direct Appeal Counsel Were Ineffective for Failing to Appeal the Trial Court’s Refusal to Instruct the Jury on the Lesser-Included Offense of Non-capital Murder-Extreme Indifference to Human Life.

179. The State argues merely that this subclaim lacks merit “for the reasons given with regard to [Ms.] Gobble’s counterpart” subclaim. (Answer at 140.) As with Ms. Gobble’s response to that counterpart contention, however, the plain language of the Alabama statutes in question renders such an instruction valid. Had appellate counsel made this argument effectively, in the manner articulated above and in the Second Amended Petition, there is a reasonable probability that the Alabama courts would have granted relief on appeal. Thus, this subclaim remains meritorious.

I(C)(4) Direct Appeal Counsel Were Ineffective for Failing to Supplement Their Appellate Pleading with Newly Decided Case Law.

180. On June 25, 2009, while Ms. Gobble’s appeal remained pending, the United States Supreme Court decided *Melendez-Diaz*, holding that forensic evidence is testimonial hearsay subject to the Sixth Amendment’s confrontation requirement. 557 U.S. 318, 321 (2009.) The State argues that appellate counsel could not have successfully invoked *Melendez-Diaz* because the report was “admitted by agreement,” therefore, any error was invited by Ms. Gobble. (Answer at 141-42.) However, this argument disregards that counsel did object to the autopsy’s use when discussing the

findings of Dr. Wong with Dr. Salne. (Vol. 15, R. 442.) This objection was ineffectual and misguided for failing to identify the Constitutional provision as opposed to the evidentiary rule governing hearsay. But, nonetheless, an objection was made so error was not invited.¹⁴

181. Accordingly, Ms. Gobble has established that appellate counsel was ineffective for failing to file a notice of supplemental authority during the pendency of her direct appeal to bring to the court's attention recently decided, and binding, Supreme Court precedent.

I(C)(5) Direct Appeal Counsel Were Ineffective for Failing to Argue that the Prosecutor's References Were Violative of the First Amendment.

182. On direct appeal, counsel raised the claim that the trial court erred in allowing the prosecutor's comments regarding "vampires," as outlined in the prior subsection, I(A)(11), and incorporated herein, because such evidence was irrelevant. However, direct appeal counsel failed to raise the argument, also outlined above, and incorporated herein, that this evidence also violated Ms. Gobble's First and Fourteenth Amendment rights. *See Dawson*, 503 U.S. at 168. In response to this subclaim of direct appeal counsel's ineffectiveness, the State makes the same attempt to distinguish *Dawson* as it did in response to the prior subclaim. (Answer at 142-43.) For the same reasons detailed above, the State's attempt to distinguish *Dawson* is unavailing. Had direct appeal counsel raised this claim, there is a reasonable probability that Ms. Gobble would have been ordered a new trial, as this prejudiced Ms. Gobble in both the guilt and penalty/sentencing phases of her trial.

¹⁴ Additionally, the ACCA's decision did not find invited error, either. Rather, the court concluded that the autopsy, while hearsay, was "nontestimonial" in nature and also subject to a business record exception. *Gobble*, 104 So.3d at 959-60 ("As the Court noted in *White*: '[w]here [the] proffered hearsay has sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule, the Confrontation Clause is satisfied.'). However, *Melendez-Diaz* is clear that the business records exception to the evidentiary hearsay rule affords forensic testimonial hearsay no exemption from the Sixth Amendment's confrontation requirement. *See Melendez-Diaz*, 557 U.S. at 324 ("Whether or not they qualify as business or official records, the analysts' statements here- prepared specifically for use at petitioner's trial- were testimony against petitioner, and the analysts were subject to confrontation under the Sixth Amendment.").

I(D) MS. GOBBLE IS ENTITLED TO A NEW TRIAL BECAUSE THE JURY CONSIDERED EXTRINSIC EVIDENCE WHICH TAINTED ITS DELIBERATIONS AND WAS SUBJECT TO JURY TAMPERING.

183. The State contends this claim was “insufficiently pleaded” because the reference to “someone in a position of authority” having injected the improper extrinsic evidence “fails to specifically identify the person who allegedly tampered with the jury.” (Answer at 147.) However, the State is again confusing Ms. Gobble’s burden to plead her claim with her burden to prove it at an evidentiary hearing. *See Coleman*, 71 So.3d at 631; *Hodges*, 147 So.3d at 976-77. Ms. Gobble has sought discovery to obtain the proof needed for this otherwise well-pleaded claim.

184. Additionally, the State contends Ms. Gobble’s claim is analogous to the dismissed claim in *Moody v. State*, 95 So.3d 827, 859 (Ala. Crim App. 2011), where the ACCA held: “Moody failed to plead what ‘extraneous’ information he believes was considered during the jury’s deliberations.” (Answer at 147.) Here, however, Ms. Gobble has detailed the extraneous information: According to juror J. B., the jurors “asked someone in a position of authority” if Ms. Gobble would be able to appeal her sentence if she was given life without parole, and was informed that she would not be able to appeal the sentence unless she received the death penalty. (Ex. GG, ¶ 3.) Ms. Gobble further detailed how this prejudiced her sentencing: Indeed, juror J. B. would testify that the decision between life and death was “difficult” prior to having received this information and that, once the information was received, “the decision then became a slam dunk for the death penalty.” (*Id.*)

I(E) IN VIOLATION OF MS. GOBBLE’S DUE PROCESS RIGHTS, THE STATE SUPPRESSED FAVORABLE FACTUAL AND IMPEACHMENT EVIDENCE, VIOLATING MS. GOBBLE’S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, THE ALABAMA CONSTITUTION, AND ALABAMA LAW.

185. Ms. Gobble alleged the State suppressed its knowledge of Walter Jordan’s exculpatory testimony, and Mr. Jordan’s location. (Pet. at 270-275.) The State contends this claim could have

been raised at trial or on direct appeal. (Answer at 148.) But by their very nature, *Brady/Giglio* claims rely on evidence which was unavailable at trial. *See, e.g., United States v. Agurs*, 427 U.S. 97, 106-107 (1976) (Prosecution has constitutional duty to disclose *Brady* material in its sole possession without request from defense counsel).

186. Where, as here, a Petitioner alleges that the State suppressed material exculpatory or impeachment evidence, she has sufficiently alleged that such evidence was not, and could not, have been presented. Further, even if Ms. Gobble's trial counsel should have known Mr. Jordan's whereabouts, and interviewed him, the State nonetheless had a duty to disclose the exculpatory evidence once it had interviewed him and discovered the exculpatory testimony he could have provided. Even had Ms. Gobble's trial counsel interviewed Mr. Jordan, there is no basis to believe that Mr. Jordan would have automatically disclosed to trial counsel he had previously given a statement to the prosecution. And, the prosecution would still have been under a duty to have disclosed the statement, as it was both exculpatory, and could have been used as impeachment of Mr. Jordan had he not testified consistent with his statements to law enforcement. Further, because evidence not presented at trial cannot be presented on appeal, *see, e.g., Owens v. Hooters Restaurant*, 41 So.3d 743, 744 (Ala. 2009) ("Appellate courts are not permitted to consider matters outside the record." (citations omitted) (Cobb, C.J., concurring)), this claim could not have been presented on direct appeal.

187. The State further alleges this claim is "without merit" and contends that the suppressed evidence was not material and would not have possibly undermined the trial. (Answer at 148.) But, as outlined in the Second Amended Petition, Mr. Jordan's testimony could have "created a doubt in the minds of the jurors regarding which of the four adults in the home may have killed Phoenix." (Pet. at 274.) Indeed, Mr. Jordan's testimony that Ms. Gobble's boyfriend's uncle, Mr. Edgar Parrish, was a dominating and abusive person, who controlled the household (Ex. H, ¶ 19), would have

conflicted with the State's characterization of Edgar as a loving figure. Further, Mr. Jordan's testimony would disrupt the State's theory of events the morning Phoenix was found dead: He would have testified that Mr. Parrish uncharacteristically offered David Hunter, Ms. Gobble's boyfriend, a ride to work on the day Phoenix was found dead and made sure that he and Mr. Hunter were out of the home when the child was found. (Ex. H, ¶ 12.) Mr. Jordan's testimony would have also explained that Ms. Gobble left the trailer home – in a complete state of shock and panic – only because Mr. Parrish ordered them to do so (Ex. H, ¶ 16), contrary to the State's assertion that Ms. Gobble's departure was “about saving her own neck.” (Vol. 17, R. 778). Finally, Mr. Jordan would have testified that his daughter-in-law, Tori Jordan, who was called by the State, had never gotten along with Tierra, and did not know Tierra well (Ex. H, ¶ 18), which would have undercut the prosecution's attempts to establish that Ms. Jordan had a long-standing relationship with Ms. Gobble and David. Again, Mr. Jordan was the only adult in the trailer who was not charged: his location, statements, and testimony were indeed central.

188. While the State argues some of Mr. Jordan's proposed testimony would have been speculative and inadmissible, questions of admissibility are to be answered at the hearing, where Petitioner will be required to prove his claim, not in his Petition, where he is required only to plead that claim. *See Ex parte Coleman*, 71 So.3d at 631.

I(F) THE STATE KNOWINGLY RELIED UPON FALSE EVIDENCE TO CONVICT MS. GOBBLE, VIOLATING MS. GOBBLE'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, THE ALABAMA CONSTITUTION, AND ALABAMA LAW.

189. Ms. Gobble alleged the State deliberately introduced false testimony by ignoring what would have been true testimony from the State's own medical examiner, who was patently more qualified to testify about the conclusions to be drawn from his report and examination, and instead putting on testimony it knew to be damaging, inflammatory, and speculative regarding the autopsy

report. (Pet. at 278.) The State argues the claim could have been raised at trial or on appeal. (Answer at 150.) However, the State's duty to pursue the truth is not obviated by trial counsels' failure to investigate and discover it. The prosecution's duty is to pursue truth and justice rather than merely the conviction of an accused. *See Brady v. Maryland*, 373 U.S. 83, 88 (1963). Additionally, as this claim was not part of the trial record, it could not have been raised on direct appeal.

190. Respondent further contends this claim is without merit, arguing the prosecutor merely "decided to offer one expert's opinion rather than another's." (Answer at 150.) However, as pled in Ms. Gobble's Second Amended Petition, Dr. Salne – who did not conduct the autopsy – interpreted Dr. Wong's autopsy report to assert that (1) the injuries were inflicted over the course of time, and (2) the arms were broken in a twisting fashion, demonstrating a certain level of viciousness and intent. (Pet. at 276-77.) But Dr. Wong – who conducted the autopsy and created the report – would testify that nothing in his report indicated either of these assertions. (Pet. at 277.) Accordingly, at minimum, there remains a factual dispute over whether the State was aware it was introducing false evidence, summary dismissal is inappropriate, and an evidentiary hearing is required. Ala. R. Crim. P., Rule 32.9(a).

I(H) ALABAMA'S METHOD OF LETHAL INJECTION CREATES AN UNREASONABLE RISK OF PAIN AND SUFFERING, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTION 15 OF THE ALABAMA CONSTITUTION.

191. The State asserts that this claim is moot because Ms. Gobble made a timely election to be executed by nitrogen hypoxia. (Answer at 153.) However, Ms. Gobble anticipated the potential that the nitrogen protocol could be declared unconstitutional and noted as much in raising this claim. (Pet. at 281 & n. 28.) Indeed, a federal court has determined that Alabama's current protocol for execution by nitrogen hypoxia violates the Eighth Amendment, *See Lee v. Lovelace*, No. 2:25-cv-00680-ECM, 2026 WL 1664095, at *10–11 (M.D. Ala. June 9, 2026), and the Alabama Department

of Corrections has set two executions by lethal injection for individuals who opted into nitrogen subsequent to the court's decision.

MS. GOBBLE MUST BE PERMITTED TO AMEND HER PLEADINGS TO CURE ANY REMAINING DEFICIENCIES.

192. To the extent this Court determines that any claims in Ms. Gobble's Second Amended Petition are insufficiently pled under Rule 32, Ms. Gobble should be permitted to amend her Petition to cure any such deficiencies, including the minor amendments proposed. Rule 32.7(d) mandates that "leave to amend shall be freely granted." Additionally, Rule 32.7(b) grants discretion to the trial court to the effect that "amendments to pleadings may be permitted at any stage of the proceeding prior to the entry of judgment."

CONCLUSION

For all the above states reasons and other such reasons as may be made upon amendment of this Petition and a full evidentiary hearing, Petitioner Tierra Capri Gobble, respectfully asks this Court to grant her the following relief:

- (a) Afford Petitioner sufficient time to file discovery motions and motions for necessary funds;
- (b) Grant Petitioner discovery and a sufficient period of time to conduct discovery, and further grant Petitioner authority to obtain subpoenas to further document and prove the facts set forth in this petition;
- (c) Provide Petitioner, who is indigent, with sufficient funds to present witnesses, experts, and other evidence, in support of the allegations contained within this petition;
- (d) Afford Petitioner sufficient time to amend this petition upon further discovery;
- (e) Afford Petitioner an opportunity to reply to any responsive pleadings filed by Respondent;
- (f) Grant Petitioner an evidentiary hearing at which proof may be offered to support the allegations set forth in this petition;

(g) Grant Petitioner relief from her unconstitutionally obtained conviction and sentence of death; and

(h) Grant Petitioner any such additional relief as it is just, equitable, and proper under federal and state law.

/s/ M. Wesley Smithart
One of the Attorneys for Tierra Capri Gobble

OF COUNSEL:

M. Wesley Smithart (SMI393)

wsmithart@lightfootlaw.com

Anne C. Hughes (HUG079)

ahughes@lightfootlaw.com

Colin J. Matthaeci (MAT084)

cmatthaeci@lightfootlaw.com

LIGHTFOOT, FRANKLIN & WHITE, LLC

The Clark Building

400 20th Street North

Birmingham, Alabama 35203

(205) 581-0700

Allison Mollman

amollman@aclualabama.org

ACLU of Alabama

P.O. Box 6179

Montgomery, Alabama 36106

CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2026, a true and correct copy of the foregoing was filed electronically with the Clerk of Court, which will send notification of the foregoing to all counsel of record:

Steve Marshall
Steve.marshall@alabamaAG.gov
Talmadge Butts
Talmadge.butts@alabamaAG.gov
Office of The Attorney General
Capital Litigation Division
501 Washington Avenue
Montgomery, Alabama 36130

/s/ M. Wesley Smithart
Of Counsel



AlaFile E-Notice

38-CC-2005-000299.60

Judge: M. JOHN STEENSLAND III

To: SMITHART MARGARET WESLEY
wsmithart@lightfootlaw.com

NOTICE OF ELECTRONIC FILING

IN THE CIRCUIT CRIMINAL COURT OF HOUSTON COUNTY, ALABAMA

STATE OF ALABAMA V. GOBBLE TIERRA CAPRI
38-CC-2005-000299.60

The following matter was FILED on 8/28/2026 1:17:17 PM

C001 STATE OF ALABAMA
STATE'S REPLY TO GOBBLE'S RESPONSE
[Filer: BUTTS TALMADGE]

Notice Date: 8/28/2026 1:17:17 PM

CARLA H. WOODALL
CIRCUIT COURT CLERK
HOUSTON COUNTY, ALABAMA
P.O. DRAWER 6406
DOTHAN, AL, 36302

334-677-4858



IN THE CIRCUIT COURT OF HOUSTON COUNTY, ALABAMA

TIERRA CAPRI GOBBLE,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. CC-2005-299.60
	)	
STATE OF ALABAMA,	)	
	)	
Respondent.	)	

STATE'S REPLY TO GOBBLE'S RESPONSE

COMES NOW the State of Alabama, Respondent in the above-styled cause, and respectfully replies to Petitioner's Tierra Gobble's Response to the State's Answer and Motion to Dismiss. (Doc. 166.) The State maintains that Gobble's second amended Rule 32 petition is due to be dismissed for the reasons set forth in the State's Answer and Motion to Dismiss. (Doc. 156.) This reply specifically addresses Gobble's general arguments raised, claims not addressed by Gobble, Gobble's claim-specific responses, as well as her request for discovery, which should be denied as a matter of law. In support, the State offers the following:

I. Reply to Gobble’s General Arguments

1. **First.** At the outset, Gobble’s claim that “this Court has already determined that Ms. Gobble’s prior petition set forth facially meritorious claims, by setting the case for an evidentiary hearing[] (Doc. 28),” overstates the record. The cited Court order was issued July 7, 2014, the same day as an order setting hearing on a motion for discovery (Doc. 27.) Upon Gobble’s motion to continue the evidentiary hearing as premature (Doc. 30), the Court ordered that the same would be heard at the August 21 hearing (Doc. 31.) At that hearing, the Court withheld judgment on the State’s motion to dismiss, ordered the parties to submit supplemental briefing, and noted that the evidentiary hearing set for October 22, 2014, would be continued. (Doc. 64.) It is clear from the record that the Court’s order setting the October 22 “Rule 32 Petition hearing” was not a determination on the merits of Gobble’s petition, but rather a tentative date.

2. Additionally, Gobble’s assertion that “the appropriate inquiry to determine whether Ms. Gobble’s claims are ‘facially meritorious’ is an assessment of whether Ms. Gobble has provided a full factual basis for her claims—not whether these claims will ultimately be meritorious,”

(Doc. 166, ¶ 2), mischaracterizes Rule 32. The decisions *Gobble* relies upon, *Young v. State*, 407 So. 3d 1139 (Ala. Crim. App. 2023), and *Woodward v. State*, 276 So. 3d 713 (Ala. Crim. App. 2018), establish what a petitioner must plead; they do not hold that factual specificity is the only thing a circuit court may consider. Rule 32.7(d) authorizes summary dismissal where “no material issue of fact or law exists” and “no purpose would be served by any further proceedings.” Ala. R. Crim. P. 32.7(d) (emphasis added). A claim foreclosed by controlling authority presents no material issue of law, and no quantity of factual detail can cure it. Indeed, *Woodward* itself states the requirement conjunctively: a claim must be sufficiently pleaded under Rules 32.3 and 32.6(b), must not be precluded under Rule 32.2, and must contain factual allegations that, if true, would entitle the petitioner to relief. 276 So. 3d at 734. *Gobble* quotes that formulation and then presses only its first element. Her construction would read the words “or law” out of Rule 32.7(d).

3. **Second.** As to *Gobble*’s assertion that the State conflates a Rule 32 petitioner’s burden of pleading vis a vis her burden of proof, (Doc. 166, ¶ 3), she is mistaken. The Alabama Court of Criminal Appeals has

explained the full pleading and specificity requirements of Rules 32.3 and 32.6(b):

An evidentiary hearing on a [Rule 32] petition is required only if the petition is “meritorious on its face.” A petition is “meritorious on its face” only if it contains a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the facts relied upon (as opposed to a general statement concerning the nature and effect of those facts) sufficient to show that the petitioner is entitled to relief if those facts are true.

Van Pelt v. State, 202 So. 3d 707, 732-33 (Ala. Crim. App. 2015) (emphasis added) (citation modified). Gobble’s conception of her pleading burden downplays her burden to plead facts that, if true, would entitle her to relief. The State’s recognition of this aspect of Gobble’s pleading burden is not “making an argument as to the required burden of proof,” (Doc. 166, ¶3), but rather highlighting the Strickland test’s “strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” Van Pelt, 202 So. 3d at 725.

4. Gobble’s caselaw support for this blanket assertion does not indict the State. Ex Parte Hodges, 147 So. 3d 973 (Ala. 2011), involved a juror misconduct claim that the State asserted a procedural bar against. The Court of Criminal Appeals held that because the petitioner asserted in response to the State’s preclusion defense that his counsel could not

have known about the alleged juror misconduct in time to raise it at trial or on appeal and that the case featured a cold record, the petitioner had met his pleading burden. Id. at 977.

5. Ford v. State, 831 So. 2d 641, likewise does not support Gobble's blanket assertion that the State has conflated her burdens of pleading and proof. In Ford, the Court of Criminal Appeals reviewed an involuntary guilty plea claim and the effect of the Court's holding in Ex parte Blackmon, 734 So. 2d 995 (Ala. 1999) on such claims. Id. The State argued that the petitioner's guilty plea colloquy and Ireland form indicating a voluntary plea refuted the claim. Id. at 643. The Court held that the petitioner's allegation that his counsel misinformed him by advising that he would receive a split sentence upon pleading guilty satisfied his pleading burden and entitled him to an evidentiary hearing on the claim. Id. at 644. The Court clarified the impact of Ex parte Blackmon as holding that "*in the absence of testimony from counsel*, those documents are sufficient to refute such claims." Id. at 644 (emphasis original). Whereas the defendant in Ex parte Blackmon had the opportunity to present evidence in a hearing on his motion to withdraw,

and failed to do so, the petitioner in Ford could only present such evidence at a Rule 32 evidentiary hearing.

6. In both cases, the Court determined that the petitioner's allegations, if true, would warrant relief. Gobble's assertion that the State has misconstrued her pleading burden under Strickland is incorrect.

7. **Third.** Gobble's third argument—that the State's Answer asserts “counter-allegations” inviting this Court to resolve factual disputes (Doc. 166, ¶ 4)—rests on a conflation the record does not support. There is a difference between facts outside the record and facts within it. The State submitted no affidavits, tendered no exhibits, and offered no evidence outside the record. Every factual assertion in its Answer and motion to dismiss is drawn from the trial transcript, the clerk's record, the opinion of the Court of Criminal Appeals, or the exhibits Gobble herself attached to her petition. Gobble does not contend that any of those materials are inaccurate, incomplete, or in dispute. Where the State has reasoned from that material, it has offered argument—which is what a responsive pleading consists of—not

evidence, and argument creates no factual dispute for this Court to resolve.

8. Record facts bear on a Rule 32 petition in two distinct ways, neither of which requires this Court to weigh evidence. First, a claim contradicted by the record presents no material issue of fact and is subject to summary dismissal under Rule 32.7(d). The principle that well-pleaded allegations are assumed true does not extend to allegations the record refutes. Second, and independently, record facts bear on whether Gobble has carried her pleading burden at all. Rule 32.6(b) requires “a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds.” A petitioner does not make full disclosure of the factual basis of a claim by reciting the facts that favor her while omitting the record facts that bear directly on it. Pleading around the record is not pleading.

9. **Fourth.** Gobble’s fourth argument—that the State’s Answer relies on witness credibility as a basis for summary dismissal (Doc. 166, ¶ 5)—misdescribes both the Answer and the authority she cites. The State submitted no affidavits and no evidence, and it asks this Court to disbelieve no one. This Court may assume that every witness identified

in the second amended petition would testify precisely as Gobble's exhibits describe, and would testify truthfully. The claims fail regardless—because the proffered testimony is cumulative of what the jury heard, because it does not bear on any disputed issue, because it would have been inadmissible, or because its inclusion creates no reasonable probability of a different outcome as a matter of law. Each of those determinations is made on the assumption that the allegations are true, not against it. Determining that Tina McGuire's account covers ground already covered by Dallas and Carmen Gobble requires no view of whether McGuire is truthful; determining that Walter Jordan's proposed testimony neither exculpates nor inculpates anyone is a statement about what that testimony establishes if believed. Postconviction courts are readily capable of assessing the weight and probative force of pleaded facts against record facts in the context of Strickland. See e.g., Woods v. State, 221 So. 3d 1125, 1134 (Ala. Crim. App. 2016); Mashburn v. State, 148 So. 3d 1094, 1107 (Ala. Crim. App. 2013) (affirming circuit courts' summary dismissals of extensive Rule 32 petitions and recognizing that the circuit courts properly applied

Strickland's heavy pleading burden and did not confuse it with the burden of proof.)

10. Gobble's authorities do not hold otherwise. She quotes Bryant v. State, 181 So. 3d 1087, 1132 (Ala. Crim. App. 2011), for the proposition that "[t]he credibility of witnesses is for the trier of fact," but that passage states the standard governing appellate review of a circuit court's findings following an evidentiary hearing. It says nothing about what a circuit court may determine on the pleadings, and Gobble transplants it from a materially different posture. Ex parte Coleman, 71 So. 3d 627 (Ala. 2010), and Ex parte Hodges, 147 So. 3d 973 (Ala. 2011), are likewise inapposite because neither case discusses credibility; Coleman deals with a claim of ineffective assistance concerning his guilty plea and Hodges concerns a juror misconduct claim.

11. Gobble's rule would also gut Strickland's prejudice prong which requires a court to assess the likely effect of the pleaded evidence on the factfinder; that probability judgment is built into the standard. If assessing the probable effect of proffered testimony were an impermissible credibility determination, no ineffective-assistance claim could ever be summarily dismissed for want of prejudice—a result

irreconcilable with Rule 32.7(d), which authorizes dismissal where no purpose would be served by further proceedings. Predicting how a jury would likely have received evidence is the inquiry Strickland mandates. It is not this Court weighing witness credibility, and Gobble’s argument conflates the two.

12. **Fifth.** Gobble’s fifth argument—that the admissibility of her proffered evidence “is a question about whether a Petitioner can meet their burden of proof” and therefore cannot support summary dismissal (Doc. 166, ¶ 6)—rests on a conflation of two distinct questions. The first is whether evidence would be admissible at a Rule 32 evidentiary hearing. That question, as Gobble says, is for the hearing. The second is whether the evidence would have been admissible at her 2005 trial. That question is not a matter of proof at all; it is an element of the claim she has pleaded. A claim of ineffective assistance premised on counsel’s failure to offer evidence necessarily assumes that counsel could lawfully have offered it. It is unlikely that no competent attorney would decide against introducing evidence of questionable admissibility, and, in any event, no prejudice can flow from the absence of evidence the jury could never have heard. Where the evidentiary predicate of a claim was

categorically inadmissible, the petition fails to allege facts that, if true, would entitle Gobble to relief—and that determination requires no evidence, no hearing, and no resolution of any factual dispute.

13. Gobble’s reliance on the assumption-of-truth principle does not bridge the gap, because truth and admissibility are independent. Ex parte Boatwright, 471 So. 2d 1257, 1258 (Ala. 1985), holds that a petition meritorious on its face is entitled to a hearing; it says nothing about whether evidence supporting the petition could have been received at trial. This Court’s obligation to assume Gobble’s allegations are true is not an obligation to assume they were admissible. Rule 404(b) excludes prior bad acts precisely because a jury may credit them. Rule 606(b) excludes juror testimony about deliberations however accurate that testimony may be. Alabama’s rule governing evidence of third-party guilt excludes proof that is entirely truthful but fails to connect the third party to the offense. In each instance the exclusion operates on evidence assumed to be true. Assuming the truth of Gobble’s exhibits therefore tells this Court nothing about whether the evidence they describe could have been placed before her jury.

14. Under Gobble’s construction, a petitioner could plead that counsel was ineffective for failing to introduce polygraph results, privileged communications, or juror testimony barred by Rule 606(b), and would be entitled to an evidentiary hearing on each—because admissibility, in her view, is never a pleading-stage question. Rule 32.7(d) forecloses that result. It authorizes dismissal where no material issue of fact or law exists and no purpose would be served by further proceedings, and the admissibility of evidence at a trial concluded in 2005 is a question of law resolvable on the existing record. Nor does Ray v. State, 80 So. 3d 965, 992 (Ala. Crim. App. 2011), asserted later in her response at ¶ 81, assist her. Reading the full context of Ray,¹ the Court of Criminal Appeals reiterated that false confession expert testimony was inadmissible, and then went further to find that, even if such testimony was admissible, failing to introduce it was not ineffective assistance. Id. Gobble’s quotation takes the Ray Court’s rhetorical *a fortiori* point—that trial counsel’s decision not to offer a false confession expert ultimately turns on prevailing professional norms, rather than the admissibility of

¹ All of which is dicta regardless because the Court of Criminal Appeals disposed of the petitioner’s claim in the first instance on the basis that it was not raised in the amended petition. Ray, 80 So. 3d at 991.

such an expert—out of context to suggest that the inadmissibility of her alleged false confession expert is irrelevant to her pleading burden. However, admissibility is relevant both to an objective standard of reasonableness measured against prevailing professional norms and also to whether there is a reasonable probability of a different result. See id.

15. The claims at issue rest on categorical bars—Rule 606(b) as to the juror affidavits at Exhibits FF, GG, and L; Rule 404(b) and Alabama’s third-party guilt standard as to the proposed testimony concerning Edgar Parrish’s and Samuel David Hunter’s unrelated conduct; and the unavailability of a diminished-capacity defense in Alabama as to the proposed guilt-phase psychological testimony. None of those bars depends on a fact this Court would need a hearing to find.

16. **Sixth.** Gobble’s sixth argument—that the State incorrectly asserts that to “adequately plead deficient performance in trial counsel’s argument, a Petitioner must offer superior alternative arguments”—is a distinction without a difference. The State cited Van Pelt v. State with an explanatory quotation for this proposition: “Van Pelt fails to allege with any specificity what counsel should have argued and how those particular arguments would have changed the result of his trial.” 202 So.

3d at 735 (emphasis added). A pleaded argument that changes the result of the trial to the benefit of the petitioner is by nature a superior argument. In other words:

To sufficiently plead an allegation of ineffective assistance of counsel, a Rule 32 petitioner not only must identify the [specific] acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment, but also must plead specific facts indicating that he or she was prejudiced by the acts or omissions, i.e., facts indicating that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

Id. at 724 (alterations original) (citation modified). This is part of Strickland's prejudice prong and is a burden that Gobble is obliged to satisfy for a well-pleaded ineffectiveness claim.

17. **Seventh.** Gobble's final argument—that the State improperly treated her ineffective-assistance allegations as “separate” and “distinct” claims (Doc. 166 ¶ 8)—is answered by the language she quotes. Under Strickland, a petitioner “must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment,” and only then does a court “determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent

assistance.” 466 U.S. at 690. The identification comes first, and Rules 32.3 and 32.6(b) give that requirement procedural effect in Alabama’s postconviction scheme: Strickland governs what must be ultimately proved, while 32.6(b) governs what must be pleaded—a “clear and specific statement of the ground upon which relief is sought, including full disclosure of the factual basis of those grounds”—before a petitioner is entitled to attempt that proof at an evidentiary hearing.

18. That the Sixth Amendment right is unitary—which the State does not dispute—says nothing about whether each alleged act or omission must independently satisfy Alabama’s pleading rules. It must. Were it otherwise, a single adequately pleaded allegation would carry an entire petition past Rule 32.7(d), and no ineffectiveness claim could ever be dismissed in part. Wiggins v. Smith, 539 U.S. 510 (2003), and Rompilla v. Beard, 545 U.S. 374 (2005), do not support that result: each involved a single failure to investigate mitigation claim, resolved after evidentiary hearings, and neither addressed pleading standards at all.

19. Gobble’s cumulative-error argument fares no better, because the authority she cites supports the State’s position. She quotes United States v. Murray, 154 F. App’x 740, 745 (11th Cir. 2005), for the

proposition that “cumulative error is not an independent ground for relief separate from the underlying constitutional errors, such as . . . ineffective assistance of counsel.” That is precisely the State’s contention. Her Murray quotation also concedes the necessary predicate: aggregation is available only where “each alleged incident . . . constitute[s] error in itself.” Id. Where no individual allegation satisfies Rules 32.3 and 32.6(b), there is nothing to aggregate; the sum of insufficiently pleaded allegations is not a sufficiently pleaded claim. In any event, Alabama law is settled that “Alabama does not recognize a ‘cumulative effect’ analysis for ineffective-assistance of counsel claims.” Carruth v. State, 165 So. 3d 627, 651 (Ala. Crim. App. 2014).

20. Furthermore, Gobble’s reliance on Ex parte Woods, 789 So. 2d 941, 943 n.1 (Ala. 2001), throughout the rest of her response is misplaced. While she asserts that “even if one witness testimony, standing alone, would not reasonably have altered the outcome of the proceeding, it must be viewed in the light of all the information that could have been, but was not, provided due to counsel’s deficient performance” (Doc. 166 n.15), this is not what Ex parte Woods instructs. The footnote in Ex parte Woods addresses the cumulative effect of improper prosecutorial arguments, not

ineffective assistance of counsel. Ex parte Woods, 789 So. 2d at 943 n.1. Even in that context, the Alabama Supreme Court stated that “when no one instance amounts to error at all (as distinguished from error not sufficiently prejudicial to be reversible), the cumulative effect cannot warrant reversal. In other words, multiple nonerrors obviously do not require reversal.” Id. Regardless, the Alabama Court of Criminal Appeals has recognized that even if Alabama appellate courts applied a cumulative effect analysis to ineffective assistance, such an analysis would “not eliminate the pleading requirements established in Rule 32.” Mashburn v. State, 148 So. 3d 1094, 1117 (Ala. Crim. App. 2013) (emphasis added) (citation modified). Either way, Gobble cannot lighten her pleading burden under Rule 32 by appealing to the “cumulative effect” of alleged errors by counsel.

21. **Eighth.** Separate from the seven arguments identified in her introduction, Gobble asserts that because “the State’s Answer does not address the evidence—its strength or lack thereof,” her “claims regarding the impact the lack of direct evidence has on the Strickland analysis remain un rebutted.” (Doc. 166, ¶ 9.) The assertion is inaccurate. The State’s Answer addressed the trial evidence claim by claim, as the

prejudice inquiry requires: it identified what the jury heard, measured Gobble’s proffered evidence against it, and explained why the omission of that evidence created no reasonable probability of a different result. Gobble’s own Response quotes several of those passages in the course of disputing them. In any event, the State’s burden is not to rebut; Gobble bears the burden of pleading and proof at all times. Ala. R. Crim. P. 32.3.

22. McWhorter v. State, 142 So. 3d 1195 (Ala. Crim. App. 2011), does not assist her. That decision confirms that a court considers the strength of the evidence when determining whether Strickland prejudice has been established—a determination made by the court, on the record before it, after the petitioner has carried her pleading burden. It imposes no obligation on the State to plead the strength of its own case, and Gobble still bears her full burden of pleading under Rules 32.3 and 32.6(b). McNabb v. State, 991 So. 2d 313, 318 (Ala. Crim. App. 2007)

23. **Ninth.** Throughout her Response, Gobble asserts that the State ‘fails to address’ particular factual allegations and urges that those allegations must therefore be accepted as sufficiently pleaded. (Doc. 166, ¶¶ 9, 15, 23, 25, 29, 30, 45, 47, 50, 55, 61, 62, 65, 69, 120, 140, 143, 161, 163.) At ¶ 120 she states the premise outright: “Because the State does

not deny this was deficient performance that prejudiced Ms. Gobble, it should be taken as admitted.”

24. There is no such rule in Rule 32 practice. Rule 32.3 places the burden of pleading and proving the facts necessary to establish an entitlement to relief on Gobble. The State’s Answer denied Gobble’s claims and moved for their dismissal, which places every allegation at issue; the State was not obliged to catalogue each individual factual assertion contained in 705 numbered paragraphs across a 289-page petition in order to preserve its position. Nor is this Court’s authority limited to the grounds the State elected to emphasize. Rule 32.7(d) permits summary dismissal wherever the petition is insufficiently specific, is precluded, fails to state a claim, or presents no material issue of fact or law—and this Court may so find on the basis of the petition and the record whether or not the State addressed a particular allegation in its Answer. Gobble’s approach would invert Rule 32.3, converting the State’s responsive pleading into the measure of her own burden.

25. **Tenth.** The State notes that Gobble has withdrawn the factual allegation that trial counsel conceded at judicial sentencing that Gobble “never denied her abuse of the children,” acknowledging that the

“mother” referenced by counsel was Lori Gobble rather than Gobble herself. (Doc. 166, ¶ 43 n.10.) The State accepts the withdrawal. It requires no leave of court, and it is not an “amendment” of the kind contemplated by Rule 32.7(b). To the extent that Gobble characterizes that withdrawal as among “the minor amendments proposed” (Doc. 166, ¶ 192), such characterization therefore no support for her request for leave to amend.

II. Claims Not Addressed in Gobble’s Response

26. Gobble’s Response does not address the State’s Answer and Motion to Dismiss three claims raised in her second amended petition. She offers no response to the State’s Answer to Claim V pleaded across paragraphs 696 through 699 of the petition, that her death sentence is unconstitutional under Ring v. Arizona, 536 U.S. 584 (2002). She offers no response to the State’s Answer to Claim I(A)(7)(a), pleaded across paragraphs 437 through 462 of the petition, that trial counsel were ineffective for failing to object to the State’s arguments during voir dire. She offers no response to the State’s Answer to Claim I(A)(2)(k), pleaded across paragraphs 340 through 350 of the petition, that trial counsel were ineffective for failing to present expert testimony substantiating the

assertion that her confession was false. Each of these claims fails on the grounds set forth in the State’s Answer and Motion to Dismiss, and each is due to be dismissed under Rules 32.3, 32.6(b), and 32.7(d)

III. Gobble’s Claim Specific Responses

27. In addition to what is set forth below, the State relies on its Answer and Motion to Dismiss and preserves all bases for dismissal argued therein. Gobble’s responses to the individual claims largely restate the general arguments addressed above, and the State does not repeat its answers to those arguments claim by claim. The State addresses the following claims that warrant clarification.

A. The Penalty Phase Pediatric Forensic Specialist, Claim I(B)(5)

28. Gobble contends that this claim is adequately pleaded because her petition “explicitly incorporates the detailed allegations regarding the pediatric forensic specialist from the guilt phase discussion, into the penalty phase.” (Doc. 166, ¶ 170; see Doc. 129, ¶ 614.) That is precisely the defect. Rule 32.6(b) requires that “[e]ach claim in the petition . . . contain a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds.” (Emphasis added). The full factual basis “must be

included in the petition itself,” McNabb v. State, 991 So. 2d 313, 318 (Ala. Crim. App. 2007). A cross-reference directing this Court to allegations pleaded elsewhere, in support of a different claim and a different theory of prejudice, is not the clear and specific statement the rule demands. Guilt-phase prejudice and penalty-phase prejudice are distinct inquiries measured against different evidence and a different decision; allegations pleaded to establish the former do not, by incorporation, establish the latter. Gobble was required to plead what a pediatric forensic specialist would have testified to at the penalty phase—after the jury had already found Gobble guilty of capital murder—and how that testimony specifically bore on the aggravating and mitigating circumstances before the jury and this Court. She did not.

29. In the alternative, if the incorporated allegations are considered, the claim still fails. The expert Gobble identifies is Dr. Matthew Seibel (Doc. 166, ¶ 170; Doc. 129 at 55.) Her petition concedes that Dr. Seibel did not review the radiographic evidence in this case. (Doc. 129, ¶ 163 n.13.) Dr. Salne’s testimony concerning the mechanism of the wrist injuries rested on the x-rays he personally reviewed. (Vol. 15, R. 440-41.) An expert who has not examined that evidence supplies no basis

for contradicting an opinion drawn from it, and Gobble pleads no facts establishing a reasonable probability that his testimony would have altered either the jury's advisory verdict or this Court's sentence.

30. On remand from the Court of Criminal Appeals, this Court entered specific findings supporting the aggravating circumstance that the offense was especially heinous, atrocious, or cruel. (Record on Remand, pp. 123-24.) Those findings rest on the manner of the fatal injury—striking a four-month-old child's head against a hard surface, producing bleeding between the scalp and skin and between the skull and brain—on the fractures of the victim's fourth, fifth, and sixth ribs, and on the infliction of a brutal beating causing tremendous pain and suffering upon a child who was “helpless and unable to defend himself.” (*Id.* at 123-24.) The fractured ribs are injuries of a different nature than, and in addition to, the injury proximately causing death, which independently establishes the aggravating circumstance. Norris v. State, 793 So. 2d 847, 854 (Ala. Crim. App. 1999).

31. Nothing in Dr. Seibel's proposed testimony touches those findings. He would opine that the injuries were inflicted on a single occasion rather than over time. The findings supporting the aggravating

circumstance make no reference to the timing of the injuries, to any healing process, to the mechanism of the wrist fractures, or to the torn frenulum. Gobble's proposed expert testimony would therefore have left the aggravating circumstance intact, and she pleads no facts suggesting otherwise.

B. The Terrell Declaration Allegation in Claim I(A)(2)(b)

32. Gobble relies on the declaration of mitigation specialist Joanne Terrell in support of her claim that trial counsel were ineffective for calling her to testify (Claim I(A)(2)(b)), asserting that Terrell advised counsel against doing so and that counsel offered no reasoned basis for the decision. (Doc. 166, ¶¶ 55-56.) Assuming both allegations true, the claim fails on prejudice. Gobble's defense was that she did not kill Phoenix. She was the only witness who could testify to that, and her account of the interrogation supplied the evidentiary basis for the argument that her statements to investigators were unreliable—an argument trial counsel made in closing. (Vol. 17, R. 796-97.) Gobble pleads no facts establishing a reasonable probability that a jury which heard neither her denial nor her explanation of the confession had she not testified in her own defense would have reached a different verdict.

As set out in the State's Answer, her separate allegation of prejudice rests on a juror's assessment of the effect of her testimony on deliberations, which Rule 606(b), Ala. R. Evid., does not permit.

C. The Dr. Ghostley Declaration Allegation in Claim I(B)(3)

33. Gobble further contends that the State has mischaracterized her claim regarding Dr. Ghostley as one seeking “a better, more qualified psychologist,” and asserts that Dr. Ghostley himself acknowledges he performed only a limited evaluation and would have recommended additional experts. (Doc. 166, ¶ 166.) The characterization does not change the analysis. Counsel retained two clinical psychologists, and the expert Gobble now offers is a third located years after trial. Whether the claim is framed as counsel having hired an inadequate expert or as counsel having failed to elicit a recommendation for a different one, Gobble must plead facts showing a reasonable probability of a different sentence. The jury heard, through Dr. Ghostley and Ms. Terrell, that Gobble endured “severe and pervasive neglect and abuse” throughout her childhood and that her mental state was affected by the “deplorable and highly stressed conditions” in which she was raised. (R. 867-68, 870-71, 885, 920, 931.) Gobble pleads no facts showing that a different expert's

presentation of that same history would have altered this Court's weighing of the single aggravating circumstance against the twenty-one mitigating circumstances it found.

D. Gobble's Responses Do Not Address the State's Arguments that Gobble Failed to Plead Prejudice

34. A recurring feature of Gobble's Response warrants reply. As to a number of claims, the State's Answer established both that Gobble failed to plead deficient performance and, independently, that she failed to plead prejudice. Gobble's Response engages the former and passes over the latter. The pattern is clearest in four instances:

35. As to trial counsel's failure to interview Dr. Song Wong, Gobble argues only that the State cannot characterize counsel's conduct as reasonable where counsel never spoke with him. (Doc. 166, ¶ 42.) She does not respond to the State's answer that testimony characterizing all of the victim's wounds as fresh would itself have been damaging to her defense, that testimony disputing the precise mechanism of the wrist and arm injuries would not have changed the result, and that in either case the jury would have been left with evidence that Gobble alone inflicted violent and painful injuries on her son. (Doc. 156 at 28.)

36. As to the Florida Department of Children and Families records, she does not respond to the State's answer that the specific page citations she says counsel should have supplied were cumulative to her own testimony and added nothing material to the facts before the jury. (Doc. 156 at 34; Doc. 166, ¶¶ 43-47.)

37. As to the allegations concerning Samuel David Hunter, she does not respond to the State's answer that the records were already before the jury and that she identifies no specific new fact further investigation would have produced. (Doc. 156 at 35-36; Doc. 166, ¶¶ 48-52.)

38. Likewise, Gobble does not respond to the State's answers that she failed to plead prejudice as a matter of law. For example, the State's Answer to Claim I(A)(4)(b) established that Gobble was never entitled to an instruction under § 13A-6-2(a)(2), because that provision "requires conduct which manifests an extreme indifference to human life and not to a particular person only." Northington v. State, 413 So. 2d 1169, 1170 (Ala. Crim. App. 1981); accord Sheffield v. State, 87 So. 3d 607, 625 (Ala. Crim. App. 2010). (Doc. 156 at 73-74.) Gobble's Response argues the plain language of § 13A-6-2(a)(2), the trial court's stated reasoning, and the

rational-basis standard of § 13A-1-9(b). (Doc. 166, ¶¶ 95-100.) It does not mention Northington, Sheffield, or the universal-malice requirement on which the State's answer to this claim rests. Counsel cannot be ineffective for failing to request an instruction to which Gobble was not entitled. Hall v. State, 979 So. 2d 125, 150 (Ala. Crim. App. 2007).

39. Where Gobble does respond to the State's arguments that she failed to plead prejudice, she responds categorically rather than on the facts of the particular claim—asserting either that prejudice cannot be assessed at the pleading stage, or that any individual shortfall must be viewed cumulatively with every other alleged error. (Doc. 166, ¶ 3; id. at 11 n.6, 27 n.11, 56 n.13.) For the reasons set out in Part I above, neither assertion is correct. Rule 32.7(d) permits summary dismissal where the pleaded facts, assumed true, would not entitle the petitioner to relief, and prejudice is among the facts Rule 32.6(b) required her to plead. Allegations that independently fail to satisfy Rules 32.3 and 32.6(b) do not become sufficient in the aggregate.

IV. Gobble's Lethal Injection Claim Remains Due to Be Dismissed

40. Gobble responds to the State's answer that her lethal-injection claim is moot by invoking a decision issued after the State's

Answer was filed. (Doc. 166, ¶ 191, citing Lee v. Lovelace, No. 2:25-cv-00680-ECM, 2026 WL 1664095 (M.D. Ala. June 9, 2026).) That decision does not revive the claim, which fails for reasons independent of Gobble’s method-of-execution election.

41. First, the claim is not ripe. Gobble elected execution by nitrogen hypoxia in June 2018. The claim she pleaded challenges execution by lethal injection—a method not designated for her—and rests on the contingency that the nitrogen protocol might at some future point be invalidated and that the State might then seek to execute her by another means. She acknowledged as much in pleading the claim. (Pet. at 281, n.28.) Her reliance on Lee does not ripen her claim because the permanent injunction entered by the district court in that case applied only to the plaintiff. Lee, No. 2:25-cv-00680-ECM, 2026 WL 1664095 *11. A claim expressly framed as a hedge against a contingency that has not occurred presents no live controversy for this Court to adjudicate.

42. Second, a method-of-execution claim under federal law requires the pleading of a known and available alternative method that would substantially reduce a substantial risk of serious pain. Glossip v.

Gross, 576 U.S. 863, 877 (2015). Gobble did not plead an alternative. The claim is due to be dismissed under Rules 32.3, 32.6(b), and 32.7(d).

V. Gobble’s Request for Discovery Should Be Denied

43. Gobble asks this Court to afford her time to file discovery motions, to grant discovery and subpoena authority, and to provide funds to present witnesses and experts. (Doc. 166 at 75–76, ¶¶ (a)–(c).) The request should be denied.

44. Postconviction discovery in Alabama is governed by Ex parte Land, 775 So. 2d 847 (Ala. 2000), which Gobble cites herself. (Doc. 166, ¶ 4 n.3.) Land requires a petitioner to show good cause, and it makes clear that good cause is not established by a petitioner who seeks discovery in order to develop facts that Rule 32.6(b) required her to plead in the first instance. 775 So. 2d at 852. Discovery is available to a petitioner who has stated a facially meritorious claim; it is not a mechanism for determining whether such a claim exists.

45. Gobble’s own Response confirms that this is precisely what she seeks. Responding to the State’s answer that her jury-tampering claim fails to identify the person alleged to have communicated with the jury, she does not contend that she has pleaded that fact. She states

instead that she “has sought discovery to obtain the proof needed for this otherwise well-pleaded claim.” (Doc. 166, ¶ 183.) A claim that requires discovery to supply the identity of the alleged wrongdoer is not “otherwise well-pleaded”—it is a claim that fails the specificity requirement of Rule 32.6(b), and Land does not permit a petitioner to cure that failure through discovery. The same is true of her request for funds, which presupposes an evidentiary hearing to which she is not entitled unless and until she has satisfied her pleading burden.

46. Because none of the claims in the second amended petition are sufficiently pleaded or meritorious, no purpose would be served by discovery, and Gobble has shown no good cause for it.

CONCLUSION

47. For the reasons set forth herein and in the State’s Answer and Motion to Dismiss, the State respectfully requests that this Court dismiss Gobble’s second amended Rule 32 petition in its entirety pursuant to Rules 32.3, 32.6(b), and 32.7(d), Ala. R. Crim. P. and deny her request for discovery.

Respectfully Submitted,

Steve Marshall
Attorney General

s/ Talmadge Butts
Talmadge Butts
Assistant Attorney General
Counsel of Record

CERTIFICATE OF SERVICE

I hereby certify that on August 28, 2026, I filed this document with the clerk of court. A copy was served upon counsel for the petitioner via Alafile.

s/ Talmadge Butts
Talmadge Butts
Assistant Attorney General

State of Alabama
Office of the Attorney General
501 Washington Avenue
Montgomery, Alabama 36130
334.242.7300
Talmadge.Butts@AlabamaAG.gov

E-Filed
08/02/2019 01:37:00 PM
Honorable Julia Jordan Weller
Clerk of the Court

IN THE SUPREME COURT OF ALABAMA

EX PARTE: JARROD TAYLOR	)	
	)	
JARROD TAYLOR,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 1991307
	)	
STATE OF ALABAMA,	)	
	)	
Respondent.	)	

**STATE OF ALABAMA'S MOTION TO WITHDRAW
MOTION TO SET AN EXECUTION DATE**

COMES NOW the State of Alabama and asks this Honorable Court to permit the State to withdraw its motion of July 29, 2019, requesting that Jarrod Taylor's execution be set. As grounds, the State provides as follows:

(1) On July 29, the State moved this Court to set Taylor's execution date. That motion represented that Taylor had not made a timely election of nitrogen hypoxia.

(2) Taylor's counsel called the undersigned on July 30, claiming that Taylor had, in fact, made a timely election. Counsel offered to send supporting documentation.

(3) On July 31, counsel sent the undersigned several documents, including a copy of Taylor's signed election form (dated June 28, 2018) and contemporaneous e-mails among counsel creating a record of conversations with

Taylor concerning the election. Taylor indicated to counsel on June 29, 2018, that he had signed two copies of the election form, returned one to counsel, and given the other to a particular ADOC employee to be given to Warden Stewart.

(4) The Attorney General's Office was never given this form, and counsel for the Alabama Department of Corrections did not have this form in their files. Nevertheless, the documentation provided by Taylor's counsel supports the assertion that he made a timely election of nitrogen hypoxia. The State intends to honor that election.

(5) As the ADOC is not yet prepared to proceed with an execution by nitrogen hypoxia, the State requests that it be allowed to withdraw its previous motion.

Respectfully submitted,

Steve Marshall
Attorney General

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

Beth Jackson Hughes
Assistant Attorney General

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE MIDDLE DISTRICT OF ALABAMA
3 NORTHERN DIVISION
4
5 ALAN EUGENE MILLER,
6 Plaintiff,
7 Vs. CASE NO.: 2:22cv506-RAH
8 JOHN Q. HAMM, et al.,
9 Defendants.
10 * * * * *
11 EVIDENTIARY HEARING
12 * * * * *
13 BEFORE THE HONORABLE R. AUSTIN HUFFAKER, JR., UNITED STATES
14 DISTRICT JUDGE, at Montgomery, Alabama, on Monday,
15 September 12, 2022, commencing at 9:10 a.m.
16
17 APPEARANCES
18 FOR THE PLAINTIFF: Ms. Mara Klebaner
 Mr. Stephen Spector
19 Ms. Kelly J. Huggins
 Mr. Daniel J. Neppel
20 Attorneys at Law
 SIDLEY AUSTIN LLP
21 One South Dearborn Street
 Chicago, Illinois 60603
22
 Mr. James Bradley Peterson
23 Attorney at Law
 BRADLEY ARANT BOULT CUMMINGS
24 One Federal Place
 1819 Fifth Avenue North
25 Birmingham, Alabama 35304

PATRICIA G. STARKIE, RDR, CRR, OFFICIAL COURT REPORTER
U.S. District Court, Middle District of Alabama
One Church Street, Montgomery, AL 36104 334.322.8053

1 APPEARANCES, Continued:

2 FOR THE DEFENDANTS: Mr. James R. Houts
 3 Ms. Audrey Kathleen Jones Jordan
 4 Attorneys at Law
 5 Office of the Attorney General
 6 501 Washington Avenue
 7 Montgomery, Alabama 36130

8 * * * * *

9 Proceedings reported stenographically;
 10 transcript produced by computer

11 * * * * *

12 EXAMINATION INDEX

13 ALAN EUGENE MILLER

14 DIRECT BY MR. SPECTOR	91
15 CROSS BY MR. HOUTS	103
16 REDIRECT BY MR. SPECTOR	113
17 RECROSS BY MR. HOUTS	114

18 * * * * *

19 (The following proceedings were heard before the Honorable
 20 R. Austin Huffaker, Jr., United States District Judge, at
 21 Montgomery, Alabama, on Monday, September 12, 2022,
 22 commencing at 9:10 a.m.:)

23 (Call to Order of the Court)

24 THE COURT: All right. Good morning. We're here in
 25 the case of Alan Eugene Miller versus John Q. Hamm, Terry
 Raybon, and Steve Marshall, case number 22cv506. Let me take
 appearances from all of the lawyers.

MS. KLEBANER: Good morning, Your Honor. Mara Klebaner

PATRICIA G. STARKIE, RDR, CRR, OFFICIAL COURT REPORTER
 U.S. District Court, Middle District of Alabama
 One Church Street, Montgomery, AL 36104 334.322.8053

1 terrible procedures is why he can't. And all those procedures
2 were in place or should have been in place, according to them,
3 in June of 2018. There have been multiple instances since then
4 that would have put a reasonable person on notice that they
5 needed to protect themselves, and Mr. Miller has not done that.

6 So that's my concern, Judge. Maybe after Jarrod
7 Taylor, if it had happened, but that -- you know --

8 THE COURT: So the answer is you don't know?

9 MR. HOUTS: Because it's a hypothetical -- I don't
10 speak for the Attorney General, you know, on how he would
11 exercise his discretion, Your Honor. I mean, I usually take my
12 marching orders from the Attorney General.

13 THE COURT: And what if Mr. Miller's form was to be
14 found tomorrow in the bottom of the filing cabinet where there
15 were inmate files? Would the State honor it?

16 MR. HOUTS: Again, if Ms. Parker said, absolutely, you
17 know, here it is, it was wadded up, I believe that they would.
18 I mean, if it was absolutely no indication of manipulation of
19 the system. But, again, that's not what we have here. I
20 mean --

21 THE COURT: What if during lunch Ms. Klebaner met with
22 Mr. Miller, and they agreed to waive the attorney-client
23 privilege and produce to you an email or a letter from
24 Mr. Miller that falls within the window and say, look, here is
25 corroborating proof that his intent was to elect? Would you

PATRICIA G. STARKIE, RDR, CRR, OFFICIAL COURT REPORTER
U.S. District Court, Middle District of Alabama
One Church Street, Montgomery, AL 36104 334.322.8053

1 honor his election?

2 MR. HOUTS: His intent was to elect, but he didn't fill
3 out the form and submit it?

4 THE COURT: No. He filled out the form, but you didn't
5 get it.

6 MR. HOUTS: They got it and there's contemporaneous --
7 you're saying the same situation as Mr. Taylor? Absolutely we
8 would. Yes, Your Honor. Same situation with Mr. Taylor, we
9 would honor that.

10 THE COURT: Okay. If I was to conclude that he did
11 timely elect, do you lose or do you still win?

12 MR. HOUTS: Under which cause of action, Your Honor?

13 THE COURT: Any of them. I mean, we're here on a
14 preliminary injunction.

15 MR. HOUTS: I still don't see even a substantial
16 likelihood of proving that it ended up in ADOC custody
17 because -- versus what's in the complaint and what was in his
18 affidavit: I just stuck it in the bean hole, and I never asked
19 any follow-up questions. So at this point, I'm not even sure
20 that the correct official defendants have been named or the
21 people who -- it's a negligent loss. We've actually briefed
22 Your Honor on the fact that negligence would not support a cause
23 of action. At most you would have to show an inadequate
24 postdeprivation remedy. And I think we've proven today that if
25 Ms. Huggins would have picked up the phone or sent an email to

PATRICIA G. STARKIE, RDR, CRR, OFFICIAL COURT REPORTER
U.S. District Court, Middle District of Alabama
One Church Street, Montgomery, AL 36104 334.322.8053