APPENDIX TO THE
PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

FOR PUBLICATION [APRIL 3, 2026]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 21-13734

MARCUS BERNARD WILLIAMS,

Petitioner-Appellee,

versus

STATE OF ALABAMA,

Respondent-Appellant.

Appeal from the United States District Court
for the Northern District of Alabama
D.C. Docket No. 1:07-cv-01276-KOB

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before GRANT, LAGOA, and WILSON, Circuit Judges.

GRANT, Circuit Judge:

In *Thornell v. Jones*, the petitioner asserted that his lawyer provided ineffective assistance at sentencing in his capital murder trial by not

introducing mitigating evidence of his mental illness and childhood trauma. 602 U.S. 154, 161-62, 166 (2024). He argued that the attorney's mistakes warranted resentencing because a reasonable sentencer might have considered the omitted evidence relevant to his moral culpability. *Id.* at 165. The Ninth Circuit agreed. *Id.* at 162-63. But the Supreme Court explained that an Arizona sentencing judge almost certainly would have weighed the serious aggravating circumstances of the petitioner's crime more heavily than all his mitigating evidence, including new and corroborating evidence of psychological disorders, cognitive impairment, childhood physical and sexual abuse, and substance abuse. *Id.* at 164-71. So it rejected his ineffective-assistance-of-counsel-at-sentencing claim, concluding that he had not shown that he was prejudiced by his counsel's alleged incompetence. *Id.* at 165.

The claim here is similar, and after issuing *Thornell*, the Supreme Court vacated our first opinion in this case and remanded for reconsideration. We now conclude that Williams likewise has not shown that he was prejudiced by his trial attorneys' substandard mitigation investigation. There is no reasonable probability that the sentencer, an Alabama trial court, would not have sentenced Williams to death even had it considered his new mitigation evidence. Alabama sentencing courts generally weigh the aggravating circumstances of his crimes—burglary, rape, and murder—more heavily than the kinds of mitigating

evidence he offered, including episodic, unreported childhood sexual abuse. We therefore reverse the district court's judgment and remand for reinstatement of Williams's death sentence.

I.

A few weeks before Thanksgiving, almost 30 years ago, Williams raped and murdered his neighbor, Melanie Rowell. After crawling through her window at about 1:00 a.m., he took a knife from the kitchen counter and walked up the stairs toward her bedroom, taking his pants off along the way. He stepped over a baby gate and "peeked in" at Rowell's two toddlers, asleep in their bedroom across the hall from their mother. Williams then crossed into Rowell's room, where he climbed on top of her sleeping body. He began tearing off her clothes while holding the knife to her throat and covering her mouth with his hand to muffle her screaming. He held her down, strangling her until she stopped resisting and quit breathing. Only then did he rape her for 15 to 20 minutes.

Williams left Rowell's half-naked body sprawled on the floor of her bedroom with a smear of his semen on her abdomen. Her children were alone in the apartment until the next afternoon, when her mother came to the house, worried that Rowell had not dropped off the children that morning as usual. She found Rowell blue and cold, with her teddy-bear print nightshirt pushed up over her belly button. Rowell's 15-month-old daughter was sitting on the bed in her room; her two-year-old son did not answer

when his grandmother called, and she found him standing on his own bed across the hall "just staring" at her.

Eighteen days later, after a night of drinking and smoking marijuana, plus a minor argument with a friend, Williams again went to the home of a female neighbor in the middle of the night "with sex in mind." This time it was an older woman he had known since he was a child. At about 2:00 a.m., he took his pants off outside her home and crawled in through her window as she slept. She awoke to find him on his hands and knees by her bed with an erect penis, naked except for a shirt and gloves. He jumped on top of her, sexually assaulted her, and put his hands around her throat to choke her. She struggled and pleaded with him until dawn, when he panicked and fled.

Williams was soon arrested for that burglary and sexual assault. He eventually pleaded guilty to a first-degree burglary charge, and confessed while in custody to raping and murdering Rowell.

At his trial for Rowell's murder, the State introduced overwhelming evidence of his guilt, including his oral confession and two written ones that followed. A forensic scientist also testified that DNA analysis matched blood from Rowell's sheets and semen found on her body to Williams. The jury found him guilty of capital murder.

The same jury heard a sentencing proceeding, during which the State relied on the evidence it had introduced during the guilt phase. For his part,

Williams called two witnesses: his mother, Charlene Williams, and his great-aunt, Eloise Williams.

His mother testified that she was 16 years old and unmarried when he was born; she said Williams sometimes lived with other family members because she was so young. She added that he never had a good male role model because his father was not around. Still, he attended church regularly as a child, and played football and basketball until a devastating knee injury during his senior year. After that, his mother told the jury, he acted as though he had "lost all hope." It did not help that just before high school graduation, he learned that he was one half-credit short and could not graduate.

Though he hung out with a rough crowd after dropping out of school, Williams's mother said that after about two years he decided to "straighten up" and joined Job Corps. At first, he seemed to be doing well, but about a month before the program ended he was kicked out for fighting. After that, just two weeks before the murder, Williams "started hanging out a lot," and only wanted to "sleep all day and stay up all night."

When Williams's great-aunt Eloise took the stand, she reiterated that his childhood home life "was not very good." His mother "did not know a lot about motherhood and responsibilities" and his father was not involved, which meant Williams was moved around a lot. Williams was sad and withdrawn as a child, she said, because he wanted to be with his mother. And though he was close with

his great-grandfather and a great-uncle, they both died when he was a teenager, leaving him without any male role models.

After high school, Great-Aunt Eloise noticed a change in Williams—his dreams of "being a great ballplayer" were over and he could not find steady work. He also thought his mother did not care about him. Not long before the murder, she said, he started drinking and maybe even doing drugs. She added that after his arrest Williams told her that he was sorry for what he had done—he said that he had repented and asked the Lord to forgive him.

Alabama law at the time required the jury to weigh the aggravating and mitigating evidence and return an "advisory verdict" recommending either life in prison without parole or death. *See* Ala. Code § 13A-5-46(e) (1994). The trial court would then decide on a sentence after weighing the same evidence as the jury plus the advisory verdict, a presentence investigation report, and any additional argument or evidence presented by the parties. *Id.* § 13A-5-47. The relative weight accorded to the aggravating and mitigating circumstances was "strictly within the discretion of the sentencing authority"; the court was required to consider any evidence proffered in mitigation, but it was not obliged to find that the evidence was mitigating or to assign it any significant weight. *Smith v. State*, 908 So. 2d 273, 298-99 (Ala. Crim. App. 2000); *Ex parte Slaton*, 680 So. 2d 909, 924 (Ala. 1996).

For Williams, the jury recommended the death penalty by a vote of 11 to 1. But before imposing its sentence, the state trial court took more evidence. The State put Rowell's mother on the stand, where she explained the impact of the murder on the family, especially Rowell's children. Then Williams testified, apologizing to Rowell's family, his own family, and the court. He also submitted six character letters from family members and friends, each of whom described him as a good person, with most attributing his crimes to drug and alcohol use. One relative said that Williams "lived a terrible childhood life" before moving in with his great-aunt, describing his feeling of being abandoned by his mother and emphasizing that he did not get "the tender loving care that every child needs."

The trial court found that the jury's guilty verdict plus the other evidence established one aggravating factor: murder committed during the course of a rape, robbery, burglary, or kidnapping. *See* Ala. Code § 13A-5-49(4) (1994). But that single aggravating circumstance applied "in two ways"—murder during a rape and murder during a burglary. The court found one statutory mitigating circumstance, lack of significant prior criminal activity. It also found several nonstatutory mitigating circumstances related to his childhood, including "family problems, problems in early childhood dealing with his living arrangements, his problems resulting from the end of a promising athletic career, [and] his attainment of his GED after failing to graduate from high school." *See* Ala. Code §§ 13A-5-51, 13A-5-52. Considering all of these,

the court decided that the aggravating circumstance outweighed the mitigating circumstances. It sentenced Williams to death.

On direct appeal, both the Alabama Court of Criminal Appeals and the Alabama Supreme Court affirmed the conviction and sentence. *Williams v. State*, 795 So. 2d 753 (Ala. Crim. App. 1999), *aff'd sub nom. Ex parte Williams*, 795 So. 2d 785 (Ala. 2001). The United States Supreme Court denied his petition for certiorari. *Williams v. Alabama*, 534 U.S. 900 (2001).

Less than a year later, Williams filed a petition for postconviction relief under Rule 32 of the Alabama Rules of Criminal Procedure. He argued that his trial attorneys were ineffective during the penalty phase of his trial for failing to discover and present details of his "history of abuse and neglect," including the fact that he had been "sexually abused by an older male" when he was a child.

The state circuit court denied those claims on the merits. It explained that most of what Williams proffered in his Rule 32 petition—including evidence of neglect and abandonment by his parents, his history of living with different family members, the high school knee injury that ended his hopes for a sports career, and the deaths of his great-grandfather and great-uncle—was cumulative of testimony presented through his mother and great-aunt at trial. The court also noted that Williams failed to identify a single instance of abuse by a family member in his petition, and that his

claims of childhood physical and sexual abuse were contradicted by a pretrial mental evaluation report stating that Williams had denied any such abuse. The Alabama Court of Criminal Appeals affirmed without reviewing the merits of the ineffective-assistance claims because Williams had previously raised ineffective-assistance claims on direct appeal. *See* Ala. R. Crim. P. 32.2(a)(4). The Alabama Supreme Court denied his petition for a writ of certiorari.

Turning to federal court one week later, Williams filed for habeas corpus relief under 28 U.S.C. § 2254, claiming (among other things) that his attorneys had provided ineffective assistance by failing to investigate his background and present an adequate mitigation case during the penalty phase of his trial. The district court held an evidentiary hearing at which Williams testified and called ten additional witnesses, including family members, a childhood friend, and two psychologists.

Williams and his family members testified about his childhood, explaining that he lived with his mother until he was six years old, when he moved in with his great-aunt, Eloise, and his great-uncle, Robert. Eloise was consistent and reliable, but had strict rules and did not tolerate misbehavior.

When he was 12 or 13 years old, relatives said, Williams got tired of the rules at his great-aunt's house and moved back in with his mother. But that arrangement only lasted about a year, and Williams

spent the rest of his childhood moving from home to home with various relatives.

Williams was troubled and unhappy, the witnesses said, because he felt that his mother abandoned him. He did visit her frequently, and sometimes stayed with her for the summer, but that was not always for the best, including during the summer when he was 12. His mother's boyfriend was also living in the house, and Williams saw him abuse his mother both physically and emotionally. That included a black eye and a "busted lip," and Williams once tried to stab the boyfriend after he hit her. Another year, he lived with his mother and sisters in an old house next door to his great-grandparents, but the house had no air conditioning, no hot water, an outhouse rather than a bathroom, and a wood-burning stove for heat—electricity came from extension cords rigged to his great-grandparents' trailer.

The witnesses added that several of Williams's childhood caretakers were alcoholics, including his mother, great-grandmother, and great-uncle Robert, who drank to excess almost daily when he was not working. As for Williams, he began drinking in his early teens and increased his alcohol use as he got older.

He was also exposed to adult sexuality as a child when he shared a bed with his mother and would sometimes wake to find one of her boyfriends sleeping in the bed (though he did not witness any sexual activity). And when he was ten, an older male

cousin had Williams watch him having sex "as a way of showing [him] how to do it with a woman." That same year, Williams began having sex with a girl his age.

Williams himself testified that between the ages of four and six, he was sexually assaulted three or four times by a boy who was several years older. The boy touched Williams's "groin area," he said, and had Williams touch him too. He also "penetrate[d] me from behind," Williams said. At the time, Williams thought the sexual contact was a game, but testified that as he got older, he felt ashamed, depressed, and even suicidal over it. Still, he said, he had kept the story to himself, even denying any sexual abuse to his habeas attorney—at least at first. Years after he was convicted, he told the court, he shared the information with his attorney because he had become more comfortable with him.

Williams also called two psychologists to testify about the impact of the childhood sexual abuse and other negative events. Neither said he had PTSD at the time of the murder. One diagnosed him with "complex posttraumatic stress syndrome," and said it arose from childhood instability and inability to develop an attachment with a primary caretaker—not to mention the childhood sexual assaults and exposure to "general disinhibited behavior" from the adults in his life. The other cited the negative impact of those same three aspects of Williams's childhood, though he added that Williams likely did not perceive the sexual molestation as wrong or sexual until years later. He said his examination yielded

some posttraumatic symptoms, but short of what would be required for PTSD. Both experts agreed that the "primary negative, painful, traumatizing experiences" in Williams's life were not the childhood sexual assaults but the lack of a stable, consistent home life and the sense of abandonment and betrayal he felt when his mother left him with other relatives. Indeed, Williams himself had told one expert that his high school knee injury was the "most bothersome, upsetting" traumatic event.

The experts also testified that Williams displayed hypersexual and hyperaggressive behavior to compensate for his shame and insecurity from the sexual abuse. That behavior included a stunning 150-200 sexual partners between the ages of 10 and 21, the time of his arrest. And his "anger and the tendencies towards violence" manifested themselves in frequent fighting because he reacted violently to the slightest insult. According to one of the experts, Williams's hypersexualization, tendency toward violence, and alcohol use were the "core factors" in understanding why he committed murder. He explained that in his opinion, if Williams had not been sexually abused as a child, or if he had not been drinking on the night of his crimes, he would not have raped and murdered Melanie Rowell.

The State called a psychologist in rebuttal. He questioned the complex trauma syndrome diagnosed by Williams's expert, explaining that it did not exist in standard psychology diagnostic manuals. And Williams could not be diagnosed with posttraumatic stress disorder, the psychologist explained, because

none of his childhood experiences (including the sexual abuse) caused clinically defined trauma—that is, a reaction of horror and fear for one's own life or the life of another. Williams's troubling behaviors, he said, including the rape and murder, were because of his substance abuse.

The district court granted Williams's federal habeas petition. It held that his trial attorneys provided ineffective assistance of counsel by failing to adequately investigate and present mitigating evidence during the penalty phase of his trial. *Williams v. Alabama*, No. 1:07-CV-1276-KOB, 2021 WL 4325693, at *16-17, *52 (N.D. Ala. Sept. 23, 2021). This Court affirmed in a split decision. *Williams v. Alabama*, 73 F.4th 900, 902 (11th Cir. 2023) *cert. granted, judgment vacated*, 144 S. Ct. 2627 (2024); *id.* at 912-15 (Grant, J., dissenting). The case now returns to us after the United States Supreme Court granted Alabama's petition for certiorari, vacated the panel's earlier judgment, and remanded for reconsideration in light of *Thornell v. Jones*, 602 U.S. 154 (2024). *Alabama v. Williams*, 144 S. Ct. 2627 (2024).

II.

On appeal from a district court's judgment on a § 2254 petition, we review legal questions and mixed questions of law and fact de novo, and we review findings of fact for clear error. *Sullivan v. Sec'y, Florida Dep't of Corr.*, 837 F.3d 1195, 1204 (11th Cir. 2016). Both components of an ineffective-assistance-of-counsel claim—deficient performance and

prejudice—are mixed questions of law and fact that we review de novo. *Strickland v. Washington*, 466 U.S. 668, 698 (1984); *Jefferson v. GDCP Warden*, 941 F.3d 452, 473-74 (11th Cir. 2019).

III.

To satisfy the *Strickland* standard for evaluating ineffective-assistance-of-counsel claims, a petitioner must show both that his counsel's performance was deficient and that the deficient performance prejudiced his defense. *Strickland*, 466 U.S. at 687. If the petitioner does not meet his burden on either component, the claim fails. *Id.* at 687, 697.

To show deficient performance, a petitioner must establish that his attorneys "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. And to show prejudice, he must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. For a penalty-phase claim in a capital case, "the question is whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

Thornell clarified that the prejudice analysis requires habeas courts to weigh the aggravating and

mitigating circumstances in the same way that the state sentencing judge and appellate courts would have done. 602 U.S. at 16-65. Federal courts must give due consideration to aggravating circumstances that are weighed heavily by state courts. *Id.* at 164, 170-71. And they must be mindful that although state courts are required to consider any mitigating evidence proffered by the defendant, they are not required to find that evidence persuasive. *See id.* at 164-65, 166-70. With these points in mind, we consider Williams's claim anew.

IV.

To start, we have no doubt about our earlier holding that trial counsel's cursory mitigation investigation was deficient, so we need not revisit it. *See Williams*, 73 F.4th at 909-10; *see also id.* at 912 (Grant, J., dissenting). Even so, unless Williams can show that deficient performance prejudiced him, he cannot receive relief. *Strickland*, 466 U.S. at 687, 697.

In Alabama courts, the question of aggravating and mitigating circumstances in a capital case is about weighing—not counting. "The determination of whether the aggravating circumstances outweigh the mitigating circumstances is not a numerical one, but instead involves the gravity of the aggravation as compared to the mitigation." *Ex parte Clisby*, 456 So. 2d 105, 108-09 (Ala. 1984); *see* Ala. Code. § 13A-5-48. And the "weight to be attached to the aggravating and the mitigating evidence is strictly within the discretion of the sentencing authority."

Gobble v. State, 104 So. 3d 920, 989 (Ala. Crim. App. 2010) (citation omitted). As the Supreme Court has directed, we follow Alabama's approach in considering whether an Alabama sentencing court would have concluded that the postconviction evidence tipped the balance in favor of life rather than death. *See Thornell*, 602 U.S. at 164-65, 170.

A.

We start with "the totality of the available mitigation evidence" from both the trial and the later habeas proceeding. *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000). The sentencing court heard about Williams's unhappy childhood as he was shuffled from relative to relative: his mother's abandonment; his father's absence; the death of his great-grandfather and great-uncle; and the knee injury that ended his plans for an athletic career. It heard about his failure to graduate with his high school class; his participation in Job Corps, where he obtained his GED; his difficulty finding work after being sent home from Job Corps for fighting; and his drug and alcohol use leading up to and on the night of the murder. It also heard Williams's confessions to the police and his expression of remorse, and it considered character letters from friends and family members.

Those family members testified to many of the same facts during the federal habeas proceeding—in more detail, no argument. They also provided more information on certain topics: his mother's poverty; his exposure to domestic violence, alcohol use, and

adult sexuality; his use of drugs and alcohol as a teenager; and his extended family's troubling sexual history. Williams testified for the first time about his experience of childhood sexual abuse, and he introduced expert testimony linking the abuse to his hypersexual and increasingly aggressive behavior.

Alabama trial courts, though, frequently accord "little weight" or "very little weight" to similar evidence. That includes cases with instability, poverty, and absent parents, *see James v. State*, 61 So. 3d 357, 377 (Ala. Crim. App. 2010); parental abandonment, instability, and a deprived childhood, *McNabb v. State*, 991 So. 2d 313, 331 (Ala. Crim. App. 2007); a dysfunctional family, few positive role models, exposure to criminals and violence, PTSD, and substance abuse, *Hosch v. State*, 155 So. 3d 1048, 1066, 1121 (Ala. Crim. App. 2013); childhood rape and abuse, extreme poverty, parental abandonment, an alcoholic caretaker, domestic violence, and no positive male role models, *McMillan v. State*, 139 So. 3d 184, 268 (Ala. Crim. App. 2010); childhood rape and abuse, an alcoholic caretaker, domestic violence, and substance abuse, *Sneed v. State*, 1 So. 3d 104, 129-30 (Ala. Crim. App. 2007); instability, parental death, and drug abuse, *Flowers v. State*, 922 So. 2d 938, 961 (Ala. Crim. App. 2005); and poverty, domestic conflict, an alcoholic caretaker, and substance abuse, *Jones v. State*, 43 So. 3d 1258, 1286 (Ala. Crim. App. 2007). A difficult and unsettled childhood featuring impoverished living conditions and exposure to substance abuse and violence is, tragically, so common that it provides little mitigating value, at least as Alabama

sentencing courts see it. After all, "many people who experience similar or even worse childhoods do not grow up and commit capital murder." *James*, 61 So. 3d at 377.

What's more, the new testimony also showed that the serious disadvantages Williams suffered were at least to some degree offset by positive experiences and relationships. One of his sisters, for instance, described their mother as a "great mother," even before she quit drinking. Another sister described Great-Aunt Eloise in glowing terms. Williams's great-grandfather was also said to be a good, caring, and gentle man who helped raise Williams and had a close and loving relationship with him. His great-uncle too was a role model and a "great provider." Plus, Williams attended church and participated in sports throughout his childhood, and one of his own psychological experts cited his intelligence, athletic abilities, and supportive extended family as "protective factors" during his childhood.

We have no doubt that Williams's most significant new evidence was his testimony that he was sexually abused as a child. But episodic or isolated instances of abuse like those Williams described have not been seen by Alabama trial courts as outweighing serious aggravating circumstances. And that's especially so if the petitioner did not tell anyone about the abuse until many years later.[1] In *Sneed v. State*—in which the

[1] We accept the district court's finding that the childhood sexual encounters with an older boy occurred as Williams

defendant was convicted as an accomplice to murder during a robbery—the sentencing court gave "little" mitigating weight to evidence that the defendant "was likely raped at a young age by a virtual stranger and told no one of this until he was out of high school." 1 So. 3d at 129-30. And in *McMillan v. State*—also a murder-during-robbery case—the trial court assigned "very little" mitigating weight to evidence that the defendant was raped as a child, noting that the defendant first disclosed the childhood sexual abuse to a defense expert after his arrest for capital murder. 139 So. 3d at 213-15.

Nor would the psychologists' testimony linking the sexual assaults Williams suffered as a child to Rowell's rape and murder have been entirely mitigating. In fact, that kind of testimony may have even backfired. *See Waldrop v. State*, 987 So. 2d 1186, 1200 (Ala. Crim. App. 2007). Alabama courts, after all, have described such evidence as a "double-

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described them, and we assume for purposes of our analysis that the Alabama sentencing court also would have found that the assaults occurred and would have given this evidence some weight in mitigation. But the fact remains that Williams's failure to report the abuse until after he was convicted of murder and sentenced to death—along with reports that he denied any such abuse in a pretrial psychological examination and when initially asked by his collateral counsel—would have lessened the mitigating weight accorded to the abuse by the state court. *See Sneed*, 1 So. 3d at 129-30; *McMillan*, 139 So. 3d at 213-15. It is worth noting that in denying Williams's penalty-phase ineffective-assistance claim, the state post-conviction court discounted his assertion of childhood abuse based on the pre-trial psychological evaluation report indicating that Williams had denied "childhood sexual, emotional, or physical abuse."

edged sword" because it also supports a finding of future dangerousness. *State v. Mitchell*, 377 So. 3d 94, 121 (Ala. Crim. App. 2022); *Harris v. State*, 365 So. 3d 1075, 1128 (Ala. Crim. App. 2021); *Davis v. State*, 9 So. 3d 539, 566 (Ala. Crim. App. 2008). Expert testimony about his hyperaggressive behavior and compulsive sexuality might also have opened the door to evidence of his second burglary and sexual assault, as further proof to the jury of his future dangerousness. Though it is not weighed as a separate aggravating factor, future dangerousness is a proper consideration when evaluating the weight of the statutory aggravating circumstances. *Floyd v. State*, 289 So. 3d 337, 431 (Ala. Crim. App. 2017). And the question is "of inestimable concern at the penalty phase" of a capital trial in Alabama. *Id.*

Plus, experts on both sides testified that Williams's alcohol use played a causative role in Rowell's murder. But that testimony would not have been helpful—Alabama courts typically do not assign much, if any, mitigating weight to voluntary drug or alcohol use. *See, e.g., Jones*, 43 So. 3d at 1287; *Thompson v. State*, 503 So. 2d 871, 882 (Ala. Crim. App. 1986).

Alabama courts, in short, do not typically give much mitigating weight to evidence of the sort offered at Williams's habeas hearing.

B.

By contrast, Alabama courts give heavy weight to the aggravating circumstance at issue here—murder committed during the course of a rape,

robbery, burglary, or kidnapping. *See* Ala. Code. § 13A-5-49(4). It is common for Alabama sentencing courts to impose the death penalty when this aggravating factor applies, and for Alabama appellate courts to uphold that penalty after independently reweighing the aggravating and mitigating circumstances on appeal. *See Williams*, 795 So. 2d at 785 (collecting cases involving rape or attempted rape); *Reeves v. State*, 807 So. 2d 18, 50 (Ala. Crim. App. 2000) (collecting cases involving robbery); *Walker v. State*, 932 So. 2d 140, 161-62 (Ala. Crim. App. 2004) (collecting cases involving burglary); *Ingram v. State*, 779 So. 2d 1225, 1283 (Ala. Crim. App. 1999) (collecting cases involving kidnapping).

This remains true when murder during rape, robbery, burglary, or kidnapping is the only aggravating circumstance found to apply—even when the murder involves only one of the enumerated felonies. *See, e.g., Osgood v. State*, 341 So. 3d 170, 236-37 (Ala. Crim. App. 2016) (rape); *McWhorter v. State*, 781 So. 2d 257, 329-30 (Ala. Crim. App. 1999) (robbery); *George v. State*, 717 So. 2d 849, 857 (Ala. Crim. App. 1997) (burglary). Alabama courts have weighed this single aggravating circumstance more heavily than multiple significant mitigating circumstances, including that the defendant "was raised in extreme poverty; that he was abandoned by his mother; that he was physically abused as a child; that he was raped as a child; that he was a witness to his mother's and sister's abuse; that he was raised in the home of an alcoholic/drug addict; that he did not get

the treatment he needed; that he had no positive male role models; that he suffered from psychological and emotional difficulties; and that his intellectual functioning was in the borderline range." *McMillan*, 139 So. 3d at 268-69; *see Riley v. State*, 166 So. 3d 705, 766 (Ala. Crim. App. 2013).

And when more than one of the listed felonies is involved, Alabama courts weigh the aggravating factor more than once, typically by counting each applicable felony as a separate aggravating circumstance. *See Belisle v. State*, 11 So. 3d 256, 321-22 (Ala. Crim. App. 2007). The Alabama Court of Criminal Appeals has explained that to "hold otherwise would be to say that a person could commit a murder during the course of committing any number of the felonies enumerated in § 13A–5–49(4) and face no additional consequences at the penalty phase and in fact be considered to have committed only one of the felonies contained in this section. This was not the intent of the legislature." *Stewart v. State*, 730 So. 2d 1203, 1212 (Ala. Crim. App. 1996).

The Alabama case most like this one tells the tale. In *Osgood*, the state courts found that the aggravating circumstance of murder during rape outweighed mitigating evidence of childhood experiences that were similar to, or even worse than, those experienced by Williams. *See Osgood*, 341 So. 3d at 236-37. The mitigating circumstances there included an "unsettled" childhood "being passed around from home to home"; parental abandonment; sexual abuse by a man in a bar when he was

between three and six years old; sexual encounters with other children beginning at age nine and sexual involvement with a 24-year-old woman at age 14; malnutrition as an infant, possibly resulting in delayed brain development; substance abuse; a suicide attempt; admission to a psychiatric hospital as a teenager; and diagnoses of antisocial personality disorder, sexual addiction, and attachment disorder. *Id.*at 209, 236-37.

The Alabama trial court identified ten mitigating circumstances and acknowledged the expert testimony linking the defendant's crimes to his childhood. *Id*. at 236-37. But it concluded that the single aggravating circumstance of murder during rape outweighed the mitigating factors and sentenced Osgood to death. *Id.* at 213, 229. On appeal, the state appellate court independently reweighed the aggravating and mitigating circumstances and agreed that death was the appropriate sentence. *Id*. at 237.

Williams, in contrast, has not identified any case in which an Alabama sentencing court or court of appeals has held that mitigating circumstances like these balanced or outweighed the aggravating circumstance of murder during burglary and rape.

C.

Considering these examples and the absence of comparable cases going the other way, we think it plain what Alabama courts are likely to have done here, even considering the new evidence Williams now offers. The Alabama trial court already gave the

aggravating factor of murder during rape, robbery, burglary, or kidnapping extra weight because the crime involved both rape and burglary. And it concluded that the aggravating circumstance outweighed the mitigating evidence of Williams's sad and unstable childhood, abandonment by his mother, dashed hopes of an athletic career, unsuccessful stint at Job Corps, and substance abuse, and sentenced him to death. The state appellate court independently weighed the evidence and reached the same conclusion. The evidence introduced at habeas consisted primarily of more detailed testimony concerning his unsettled and sometimes impoverished childhood, plus his testimony that he was sexually assaulted three or four times by an older boy and expert testimony linking the childhood instability, sexual abuse, and drug and alcohol use to his hypersexual and increasingly aggressive behavior, including Rowell's rape and murder. Weighing all of Williams's mitigating evidence against the aggravating circumstance found by the trial court at sentencing, we see no reasonable probability that the new evidence he presented at habeas would have made a difference in his sentence. To conclude otherwise, we would have to dismiss the statutory aggravator of murder during burglary and rape without giving it the significant weight accorded to that factor by Alabama courts or overvalue Williams's mitigation evidence in a way the Alabama sentencer almost certainly would not do.

D.

In closing, we offer a few brief responses to the dissenting opinion. *First*, we have not, as that opinion suggests, altered the *Strickland* standard in any way. Dissenting Op. at 1-2. As the dissenting opinion itself recognizes, "*Thornell's* language about 'the sentencer' is not new language—it comes directly from *Strickland*." *Id.* at 4. The point of *Thornell* is that a federal court performing a *Strickland* prejudice analysis must focus on how the petitioner's new mitigating information would have impacted the state court's sentencing decision. *See Thornell*, 602 U.S. at 163-64. And when trying to determine how a state court would have weighed evidence, it is a good idea to consult state court opinions weighing similar evidence. *See id.* at 164-65. This is not a change in the *Strickland* standard. It is an instruction on how to correctly apply it.

Nor is it true, as the dissenting opinion suggests, that "[n]either *Strickland* nor *Thornell* defines who the proper 'sentencer' is." Dissenting Op. at 6. Both are clear that for our purposes, the "sentencer" is the state court responsible for weighing aggravating and mitigating circumstances to determine whether death is the appropriate sentence. *See Thornell*, 602 U.S. at 163-64 (quoting *Strickland*, 466 U.S. at 695).

Second, we agree that *Thornell* does not require federal habeas courts to "defer to state courts and avoid their duty to independently 'consider all the evidence—the good and the bad.'" Dissenting Op. at 5 (quoting *Wong v. Belmontes*, 558 U.S. 15, 26

(2009)). But we disagree with any suggestion that we have not done so in this case. We have evaluated the entirety of Williams's evidence, doing our best to follow the "persuasive guideposts" in Alabama cases as the Supreme Court directed in *Thornell*. *Id.*

Finally, the dissenting opinion cites workability problems in our approach, but those critiques are grounded, as the opinion admits, in the *Strickland* standard itself. *See id.* at 6-7. *Strickland* requires us to assess the probability of a different result based on how the state sentencer would have weighed the evidence presented to it. *Strickland*, 466 U.S. at 695. If an Alabama prisoner presents new evidence that would not have mattered to an Alabama sentencing court, then the prisoner has not met the *Strickland* standard for prejudice even if a sentencer in California may have been more sympathetic.

No doubt, the prejudice inquiry can be a difficult and uncertain task. But relying on state court opinions rather than our own unbounded intuition allows federal courts to avoid overstepping our habeas authority when reviewing state decisions.

* * *

All things considered, it is highly unlikely that the assistance of competent counsel during the sentencing phase would have led the Alabama trial court to impose a sentence of life in prison rather than death. *See Strickland*, 466 U.S. at 695. We do not excuse the failure of the defense team to properly investigate and present a mitigation case. But viewed in its entirety and weighed properly, the

evidence developed in habeas review creates only the slightest possibility of a more favorable result at sentencing. That is not enough. *See Harrington v. Richter*, 562 U.S. 86, 111–12 (2011). We therefore REVERSE the district court's judgment and REMAND with instructions for the district court to reinstate Williams's death sentence.

REVERSED and REMANDED with instructions.

WILSON, Circuit Judge, Dissenting:

As the majority explains, the Supreme Court granted certiorari as to Alabama's petition and then vacated and remanded the case to us to consider in light of *Thornell v. Jones*, 602 U.S. 154 (2024). Once back here, Alabama fervently pressed the argument that *Thornell* clarified the *Strickland*[1] prejudice standard that applies in the penalty phase of a trial when the defendant argues ineffective assistance of counsel for failure to present certain mitigating evidence.

And the majority adopts Alabama's conclusion without reservation. Rather than conducting an independent reweighing of the mitigating and aggravating factors as courts have done consistently in the past[2]—and as this court originally did when

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

[2] *See Porter v. McCollum*, 558 U.S. 30, 41 (2009) (*per curiam*) (The reviewing court must "consider 'the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding'—and 'reweigh it against the evidence in aggravation.'" (alteration adopted) (quoting *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000)); *see also Wiggins v. Smith*, 539 U.S. 510, 534 (2003) ("In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence.").
Indeed, when conducting habeas review in this context, we, along with several of our sister circuits, routinely and independently reweigh the evidence in mitigation against the evidence in aggravation. *See*, *e.g., Mashburn v. Comm'r*, 80 F.4th 1292 (11th Cir. 2023); *Jenkins v. Comm'r*, 963 F.3d 1248 (11th Cir. 2020); *Sandoval Mendoza v. Lumpkin*, 81 F.4th 461 (5th Cir. 2023); *Goodwin v. Johnson*, 632 F.3d 301 (6th Cir. 2011).

Alabama first appealed[3]—the majority explains that in light of *Thornell*, "the prejudice analysis requires habeas courts to weigh the aggravating and mitigating circumstances in the same way that the state sentencing judge and appellate courts would have done." Maj. Op. at 14 (citing *Thornell*, 602 U.S. at 164-65). Using that reasoning the majority now reverses the district court's grant of habeas relief to Williams and reinstates his death sentence. This amounts to more than a clarification—it effectively and detrimentally *changes* the *Strickland* standard.

I disagree with this interpretation for two reasons. First, a close reading of *Thornell* suggests that the Court did not intend to alter the *Strickland* standard in this way. Second, the "clarified" standard embraced by the majority creates significant workability problems, which unfairly erodes a critical federal constitutional protection for criminal defendants. Thus, I respectfully dissent.

I.

In *Thornell*, the Supreme Court reversed the Ninth Circuit's grant of habeas relief to a defendant claiming ineffective assistance of counsel, applying what it called, "the proper understanding of *Strickland*." 602 U.S. at 165. The defendant claimed his counsel failed to present certain mitigating

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[3] *Williams v. Alabama*, 73 F.4th 900, 911 (11th Cir. 2023) ("Considering the record before us—and given the highly deferential standard of review for factual findings—we conclude that Williams has established *Strickland* prejudice."), *cert. granted, judgment vacated*, 144 S. Ct. 2627 (2024).

evidence. *See id*. at 161. The Ninth Circuit agreed, concluding that there was a "reasonable probability" that the defendant "would not have received a death sentence" if that evidence had been presented at sentencing. *Id.* at 162. But the panel "made no mention of the aggravating factors" and "did not consider the State's rebuttal evidence." *Id.*

The Supreme Court found the Ninth Circuit erred in "at least three ways" in interpreting and applying *Strickland*. *Id.* at 162-65. First, it failed to sufficiently consider "the weighty aggravating circumstances" in the case. *Id.* at 164. The Ninth Circuit's initial opinion "did not mention those circumstances at all," and though its amended opinion "at least mentioned the aggravating circumstances, … it failed to give them the weight that they would almost certainly be accorded by an Arizona sentencing judge." *Id.* Second, the Ninth Circuit applied an "unsound" circuit rule that prohibits a court from assessing the relative strength of expert testimony. *Id*. And third, the Ninth Circuit found the district court erred by diminishing the persuasive value of the mitigating evidence because it saw no link between the evidence and the defend-ant's conduct. *Id.*

To correct the Ninth Circuit's errors, the Supreme Court conducted its own independent reweighing process. It turned to each piece of new mitigating evidence presented by the defendant at the evidentiary hearing and discussed what effect that evidence would have had if presented at the

penalty phase of the trial.[4] *Id.* at 166-71. The Court concluded that "[m]ost of the mitigating evidence [the defendant] presented at the federal evidentiary hearing was not new, and what was new would not carry much weight in Arizona courts." *Id.* The evidence "would barely have altered the sentencing profile presented to the sentencing judge, and it is insufficient to show prejudice." *Id.* at 166 (internal quotation marks omitted).

The majority points to language in *Thornell* requiring us to consider how "the sentencer" would have considered the aggravating and mitigating factors, and relatedly, the case's repeated references to how "Arizona courts" would have weighed the factors. *See id.* at 163-71 (quotation marks omitted). Still, *Thornell's* language about "the sentencer" is

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[4] The defendant first presented new evidence about mental illness, but the Court concluded that "[b]ecause none of [the defendant's] experts provided a real link between [his] disorders and the murders, their testimony would have done him little good in the Arizona courts." *Thornell v. Jones*, 602 U.S. 154, 167 (2024). Next, he presented new evidence of cognitive impairment, but the Court concluded that the evidence "at most corroborates testimony the Arizona courts already credited," and it "would have offered an insignificant benefit, if any at all." *Id.* at 168 (citation modified). He also presented new allegations of physical and sexual abuse, but the Court concluded that the new allegations of sexual abuse were "entirely uncorroborated," and the physical abuse allegations, while corroborated, were directly contradicted by other evidence in the record and not "causally connected to the murders." *Id.* at 168-69. Finally, he presented some minimal new evidence of substance abuse, but the Court concluded that it was merely duplicative of the other evidence in the record. *Id.* at 169-70.

not new language—it comes directly from *Strickland*. *Id.* at 163 (quoting *Strickland*, 466 U.S. at 695). And the Court did not state that it intended to change the *Strickland* standard—it said that it proceeded with "the proper understanding of *Strickland* in mind." *Thornell*, 602 U.S. at 165.

The main gist of *Thornell* is a far cry from changing the *Strickland* standard. *Thornell's* main points are that the Ninth Circuit did not sufficiently consider the aggravating circumstances, and the new mitigating evidence that the defendant presented was duplicative, uncorroborated, or directly contradicted by other record evidence. *Id.* at 164-66. *Thornell* uses "Arizona courts" and Arizona case law not as mandatory authority but as persuasive guideposts in its analysis of whether the new evidence would have meaningfully changed the outcome of the case.[5] *See id.* at 166-71. But *Thornell* does not suggest that the reviewing court should defer to state courts and avoid their duty to independently "consider all the evidence—the good and the bad." *Wong v. Belmontes*, 558 U.S. 15, 26 (2009) (*per curiam*). And we should not give up that critical, independent duty without clear direction from the Supreme Court.[6]

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[5] The Court has conducted similar analyses to decide whether there was a "reasonable probability that the advisory jury—and the sentencing judge—would have struck a different balance." *Porter*, 558 U.S. at 42 (internal quotation marks omitted).

[6] Justices Sotomayor, Kagan, and Jackson all dissented in *Thornell*. 602 U.S. at 172-73 (Sotomayor, J., dissenting, joined by Kagan, J.); *id.* at 173-74 (Jackson, J., dissenting). Neither dissent contemplates that *Thornell* alters the *Strickland*

II.

Next, the majority's interpretation of *Thornell* presents significant workability problems. Neither *Strickland* nor *Thornell* defines who the proper "sentencer" is, and *Thornell's* alternating use of "Arizona courts" and "Arizona sentencing judge" while citing to Arizona Supreme Court decisions offers little clarity. *Thornell*, 602 U.S. at 165-70. Hypothetically speaking, it would seem most probable that "the sentencer" would be the sentencing judge, since in *Thornell*, the trial judge initially imposed the sentence. *Id.* at 161. So, "the sentencer" could be the trial judge, but Court's references to "Arizona courts" and citations to Arizona Supreme Court cases, at the very least, create some confusion about whose shoes, exactly, we are supposed to put on. And if we do not know who the sentencer is, it is nearly impossible to step into their shoes properly.

Indeed, stepping into the shoes of a "sentencer," even if we know the identity of that "sentencer," is nearly an impossible task. Sentencing is, by its very nature, a fact-driven process, and *Thornell* gives little instruction about how we stand in the place of the sentencer, other than citing to prior Arizona Supreme Court decisions from various years. *See id.* at 166-71. If the actual sentencing judge is the proper "sentencer," then Arizona Supreme Court cases seem to be necessary, but also insufficient, evidence of how the individual judge would have

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prejudice standard in any way; in fact, the dissents focus on whether the Supreme Court should have involved itself in the reweighing process at all.

weighed the evidence. Similarly, if "Arizona courts" generally are "the sentencer," then why only look to Arizona Supreme Court cases? Cases from lower Arizona courts might also be relevant.

And if the Arizona Supreme Court is the proper "sentencer," then Arizona Supreme Court cases are indeed the only appropriate sources to look to, but what is the appropriate time frame? Is a case from 2020 appropriate evidence of how the 1996 Arizona Supreme Court[7] would have weighed new evidence of mood disorders with the rest of the aggravating and mitigating evidence in the record? *See id.* at 167 (citing *State v. Poyson*, 475 P.3d 293, 298 (Ariz. 2020)). Perhaps not.

The majority's interpretation effectively creates at least fifty standards—at least one per state, maybe more depending on changes in the state court's disposition over time—for when *Strickland* prejudice exists for failure to present mitigating evidence. While federal courts *can* and *do* consider state law in determining whether prejudice exists, *see, e.g., Wiggins v. Smith*, 539 U.S. 510, 536 (2003), *requiring* us to decide the prejudice prong based on state law leads to a standard where *Strickland* prejudice means one thing in one state and something else in another. For example, following the majority's interpretation, Williams' counsel was not constitutionally ineffective in Alabama, but had his trial been conducted in a different state with different views on aggravating and mitigating

[7] The Arizona Supreme Court first took up this case in *State v. Jones*, 917 P.2d 200 (Ariz. 1996).

evidence—Berkeley, California,[8] perhaps—his counsel may have been considered constitutionally ineffective there.

That cannot be so. The Sixth Amendment right to effective assistance of counsel is a universal right afforded to all citizens of the United States, no matter what state they are from or what state they are charged, tried, and sentenced in.

The majority's decision unfairly erodes the critical Sixth Amendment right to effective assistance of counsel. The majority's interpretation of *Thornell* takes away our ability, and the ability of the district court, to serve as independent safeguards for constitutional violations in habeas cases. Federal habeas review serves as "a bulwark against convictions [and sentences] that violate fundamental fairness." *Engle v. Isaac*, 456 U.S. 107, 126 (1982) (internal quotation mark omitted). If in conducting that critical review for constitutional violations, we must defer to how state courts would have weighed evidence, our role as an independent

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[8] *See* Oral Arg. at 3:00-4:00, *Williams v. Ala.* (11th Cir. 2025) (No. 21-13734), ca11.uscourts.gov/system/files_force/oral_argument_recordings/21-13734_01212025.mp3. During oral argument, counsel for the State of Alabama distinguished between the kinds of evidence that might have been available in Berkeley, California versus St. Claire County, Alabama at the time of Williams' trial. *See id.* But counsel's distinction helps make our point more than it does his. Tethering a critical federal constitutional right to idiosyncrasies of particular American geographic regions distorts the meaning and the purpose of the right itself.

reviewer is effectively eliminated.[9] The majority's interpretation of *Thornell*, therefore, frustrates the purpose of habeas review and allows for potential constitutional violations to go unchecked.

III.

Given the high stakes of this decision, and since it is based on a debatable reading of *Thornell*, absent clear direction from the Supreme Court that it intended to change the *Strickland* prejudice standard in this context, I would again affirm the district court's grant of habeas relief. Therefore, I respectfully dissent.

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[9] I recognize that the Antiterrorism and Effective Death Penalty Act (AEDPA) requires us to defer to the state court for federal claims that have been "adjudicated on the merits in State court proceedings." 28 U.S.C. § 2254(d). But AEDPA does not apply here. In a prior iteration of this case, we found that the Alabama Court of Criminal Appeals invoked an improper procedural bar as to Williams' claim for ineffective assistance of counsel for failure to investigate. *Williams v. Alabama*, 791 F.3d 1267, 1273 (11th Cir. 2015). We also found that there was no adjudication on the merits of that claim, so we remanded the case to the district court for de novo review on that issue. *Id.* Because there was no state court adjudication on the merits, AEDPA deference does not apply here. *See Wiggins*, 539 U.S. at 534.

APPENDIX B

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

MARCUS BERNARD WILLIAMS,	)	**[Filed Sep. 23, 2021]**
Petitioner,	)	
	)	**CIVIL ACTION NO.**
v.	)	**1:07-cv-1276-KOB**
STATE OF ALABAMA,	)	
Respondent.	)	

MEMORANDUM OPINION

This death penalty habeas case comes before the court following remand from the Eleventh Circuit Court of Appeals for an evidentiary hearing on Marcus Bernard Williams's failure-to-investigate claims. *See Williams v. Alabama*, 791 F.3d 1267 (11th Cir. 2015). Mr. Williams alleges that trial counsel's failure to investigate his background prevented the defense from presenting a constitutionally adequate mitigation case during the penalty phase of his trial. (Doc. 5 at 40-65). The court held an evidentiary hearing on May 14-16, 2018 at which Mr. Williams presented witnesses and exhibits.

The road from the evidentiary hearing to this point took a mistaken detour. After initially denying Mr. Williams' habeas motion after the evidentiary hearing, the court granted his motion for reconsideration and vacated its initial Memorandum Opinion and Order denying habeas relief under 28 U.S.C. § 2254. (Docs. 94, 95, & 102). The court vacated its rulings because it made a manifest error of law in assessing Mr. Williams' future dangerousness in weighing the mitigating and aggravating circumstances. (Doc. 102). So, the court set out to carefully re-weigh all of the aggravating and mitigating evidence in light of the relevant and binding case law.

After careful reconsideration of the record and applicable law, the court admits that it initially decided the failure to investigate claims wrongly. As the court will explain below, Mr. Williams' counsel failed to reasonably investigate Mr. Williams' background for mitigation and that failure prejudiced Mr. Williams. So, for the following reasons, the court will GRANT Mr. Williams' habeas motion on all of his failure-to-investigate claims EXCEPT counsels' failure to interview Mr. Williams' closest friend Alister Cook, failure to investigate his family history of mental illness, and the failure to present his redeeming characteristics because Mr. Williams has failed to show prejudice on these three claims.

I. INTRODUCTION

On November 6, 1996, Mr. Williams returned home after a night of drinking and smoking marijuana with friends. *Williams v. State*, 795 So. 2d 753, 761 (Ala. Crim. App. 1999). Upon arriving home, he desired to have sexual relations with a young female neighbor, Melanie Dawn Rowell. Mr. Williams entered Ms. Rowell's apartment through an unlocked window, then proceeded to her bedroom where he climbed on top of her and attempted to remove her clothes. Ms. Rowell struggled to stop him, so he strangled her until she was motionless, then had sexual intercourse with her for fifteen to twenty minutes. *Id*. at 761-62.

Ms. Rowell's cause of death was asphyxia due to strangulation. Mr. Williams stole Ms. Rowell's purse before leaving her apartment. He was later arrested and taken into custody for the burglary and attempted rape of Lottie Turner on November 24, 1996. While in custody for that burglary, Mr. Williams gave incriminating statements admitting his involvement in Ms. Rowell's death. DNA testing confirmed that semen and blood found at the Rowell crime scene were consistent with Mr. Williams's genetic profile. *Id*. at 762, 766-67.

II. PROCEDURAL HISTORY

Court-appointed attorneys Erskine Funderburg and Tommie Wilson[1] represented Mr. Williams at

[1] Ms. Wilson died on March 6, 2015. (*See* Doc. 84-84).

trial. (Vol. 4, Tab 27 at 2). Because of the overwhelming evidence of Mr. Williams's guilt, his attorneys argued only that, although he intended to rape Ms. Rowell, he did not intend to kill her. (Vol. 3, Tab 11 at 494-504). Despite their efforts, on February 24, 1999, the jury found Mr. Williams guilty of capital murder for intentionally causing the death of Ms. Rowell during a rape or attempted rape, in violation of Alabama Code § 13A-5-40(a)(3) (1975). (Vol. 4, Tab 14 at 534-36).

The penalty phase of Mr. Williams's trial was held the next day, before the same jury. (*See* Vol. 3, Tab 15 - Tab 24). Trial counsel called only two witnesses, Mr. Williams's mother, Charlene Williams, and his aunt, Eloise Williams. (Vol. 3, Tab 19). The Eleventh Circuit Court of Appeals summarized their testimony:

> Charlene Williams told the jury that she was sixteen years old and unmarried when Mr. Williams was born, and that Mr. Williams had faced certain difficulties as a child. For example, she testified that Mr. Williams sometimes lived with her grandmother and aunt; had no relationship with his father and lacked adult male figures in his life; and had to stop playing school sports after injuring his knee. Mr. Williams's counsel also elicited testimony that portrayed him in a negative light, such as the fact that he was a high school dropout; he "started hanging with a rough crowd"; he got kicked out of the Job Corp[s] for fighting; and upon returning

home, he stopped going to church and "wanted to sleep all day and stay up all night." FN.1.

> FN.1. A capital defendant's history of violent and aggressive behavior is generally considered an aggravating factor. *See Holsey v. Warden*, 694 F.3d 1230, 1269-70 (11th Cir. 2012).

Eloise Williams also testified about Mr. Williams's unstable home life. She told the jury that he had moved from place to place as a child and lived with different family members; he became sad and withdrawn at times because he did not see his mother often; he had been a good student with no significant criminal history; and he had struggled emotionally after the deaths of his grandfather and uncle. However, as with Charlene, counsel also elicited evidence from Eloise that was likely more harmful than helpful. For example, Eloise told the jury that Mr. Williams had a quick temper; he had been arrested for fighting as a teenager; FN.2, he had not maintained regular employment after leaving high school; and not long before the crime, he started drinking and using drugs. Eloise ended on a positive note, telling the jury that since Mr. Williams had been in jail, he had stayed out of trouble and expressed remorse for his crime.

> FN.2. The fact that Mr. Williams's counsel told the jury about these adolescent brushes with the law is noteworthy because the State could not have offered evidence of Mr. Williams's juvenile arrests to establish any aggravating factors. In Alabama, "juvenile charges, even those that result in an adjudication of guilt, are not convictions and may not be used to enhance punishment." *Thompson v. State*, 503 So. 2d 871, 880 (Ala.Crim.App. 1986) aff'd sub nom. *Ex parte Thompson*, 503 So. 2d 887 (Ala. 1987).
>
> Neither Charlene nor Eloise was asked about Mr. Williams's history of sexual abuse.

Williams, 791 F.3d at 1269-70. The jury deliberated only thirty minutes before returning an 11 to 1 verdict, recommending that Mr. Williams be sentenced to death. (Vol. 3, Tab 24 at 596-97).

At the April 6, 1999 sentencing hearing, Mr. Williams testified, expressing his remorse. (Vol. 4 at 607-11). The victim's mother, Donna Rowell, testified about the impact of her daughter's death on the family, especially Ms. Rowell's young children. (*Id.* at 604-06). The trial court found one aggravating circumstance–that Mr. Williams killed the victim while committing or attempting to commit a rape, robbery, burglary, or kidnapping. (*Id.* at 630). The

trial court found as mitigating factors Mr. Williams's lack of a criminal history, his unstable home life as a child, his frustration from an injury ending his hopes of an athletic career, his obtaining a GED, and his remorse. (*Id*. at 631-38). The trial court found the aggravating factor outweighed the mitigating factors, and sentenced Mr. Williams to death. (*Id*. at 639).

The Alabama Court of Criminal Appeals affirmed Mr. Williams's conviction and death sentence on December 10, 1999. *See Williams v. State*, 795 So. 2d 753 (Ala. Crim. App. 1999). The Alabama Supreme Court affirmed his conviction and sentence on January 12, 2001. *See Ex parte Williams*, 795 So. 2d 785 (2001). The United States Supreme Court denied certiorari review on October 1, 2001. *See Williams v. Alabama*, 535 U.S. 900 (2001).

In August, 2004, Mr. Williams filed an amended Rule 32 petition in the trial court. The trial court denied the Rule 32 petition on the merits, without holding an evidentiary hearing. (Vol. 13, Tab 59). The Alabama Court of Criminal Appeals affirmed the denial of Rule 32 relief. (Vol. 13, Tab 60).

In 2007, Mr. Williams filed the present § 2254 petition in this court, arguing *inter alia*, that trial counsel were ineffective for failing to conduct an adequate mitigation investigation. (Doc. 5 at 40-65). This court denied the petition on April 12, 2012. *See* (Docs. 27, 28). The Eleventh Circuit Court of Appeals remanded the case, instructing this court to

"determine whether Mr. Williams is entitled to an evidentiary hearing and to reconsider his failure-to-investigate claims de novo." *Williams*, 791 F.3d at 1277.

Mr. Williams filed a motion for an evidentiary hearing on March 3, 2017. (Doc. 51). On October 4, 2017, the court granted Mr. Williams's motion for an evidentiary hearing on his failure-to-investigate claims. (Doc. 60).

This court held an evidentiary hearing on May 14-16, 2018. Mr. Williams testified at the evidentiary hearing, and presented the testimony of the following witnesses: Tina Watson, the legal secretary for Tommy Wilson, Mr. Williams' trial counsel who was deceased at the time of the evidentiary hearing; Erskine Funderburg, Mr. Williams' trial counsel; Billy Stephens, the person Ms. Wilson purportedly sought to hire as a mitigation investigator; Sharenda Williams and LaCharo Williams, Mr. Williams' sisters; Eloise Williams, Mr. Williams' aunt; Charlene Williams, Mr. Williams' mother; and Marlon Bothwell, Mr. Williams' childhood friend. Mr. Williams also called two experts, clinical psychologist Dr. Matthew Mendel and neuropsychologist Dr. Kenneth Benedict, as mitigation witnesses. The State of Alabama presented expert testimony from Dr. Glen King. The court paid close attention to the testimony, and carefully reviewed the transcript of the evidentiary hearing, along with the exhibits presented at the hearing. (Docs. 91-93).

The court entered its initial Memorandum Opinion and Order denying habeas relief under 28 U.S.C. § 2254 (docs. 94 & 95), and Mr. Williams filed a motion to reconsider under Fed. R. Civ. P. 59 (doc. 98). The court granted the motion to reconsider because it made a manifest error of law in assessing Mr. Williams' future dangerousness in weighing the mitigating and aggravating circumstances and vacated its initial Memorandum Opinion and Order denying relief. (Doc. 102). Now, after careful and thorough reconsideration, the court will GRANT Mr. Williams' habeas motion for ineffective assistance of counsel on all of the failure-to-investigate claims EXCEPT counsels' failure to interview Mr. Williams' closest friend Alister Cook, failure to investigate his family history of mental illness, and failure to present his redeeming characteristics because Mr. Williams has failed to show prejudice on these three claims.

III. LEGAL STANDARD

To determine whether counsel were ineffective, the court begins with the instruction from *Strickland v. Washington*, 466 U.S. 668 (1984). The Supreme Court established a two-pronged analysis for determining whether counsel's performance was ineffective. "First, the defendant must show that counsel's performance was deficient. … Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687.

A petitioner must establish both parts of the *Strickland* standard: that is, a habeas petitioner

bears the burden of proving, by "a preponderance of competent evidence," that the performance of his trial or appellate attorney was deficient; and, that the deficient performance prejudiced his defense. *Chandler v. United States*, 218 F.3d 1305, 1313 (11th Cir. 2000) (*en banc*).

A. The Performance Prong

To satisfy the performance prong, a petitioner must establish by a preponderance of the evidence that counsel's performance was unreasonable. *Stewart v. Sec'y, Dep't of Corr.*, 476 F.3d 1193, 1209 (11th Cir. 2007) (citing *Chandler*, 218 F.3d at 1313). Deficient performance is "'representation [that] f[alls] below an objective standard of reasonableness.'" *Hardwick v. Sec'y, Fla. Dep't of Corr.*, 803 F.3d 541, 551 (11th Cir. 2015) (citing *Strickland*, 466 U.S. at 688).

The Sixth Amendment does not guarantee a defendant the very best counsel or the most skilled attorney, but only an attorney who performed reasonably well within the broad range of professional norms. *Stewart*, 476 F.3d at 1209. The court does not consider "what the best lawyers would have done"; instead the court must determine "whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial." *White v. Singletary*, 972 F.2d 1218, 1220 (11th Cir. 1992).

Judicial scrutiny of counsel's performance must be highly deferential, because "[r]epresentation is an art, and an act or omission that is unprofessional in

one case may be sound or even brilliant in another." *Strickland*, 466 U.S. at 693. Indeed, reviewing courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. This strong presumption of competent assistance creates a heavy burden of persuasion: "petitioner must establish that *no competent counsel would have taken the action that his counsel did take*." *Stewart*, 476 F.3d at 1209 (quoting *Chandler*, 218 F.3d at 1315) (emphasis added). The court can grant relief on ineffectiveness grounds only if a petitioner shows that "no reasonable lawyer, in the circumstances, would have done so." *Rogers v. Zant*, 13 F.3d 384, 386 (11th Cir. 1994).

This court's review of counsel's performance must not be made with the benefit of hindsight. As the Eleventh Circuit has instructed, "[t]he widespread use of the tactic of attacking trial counsel by showing what 'might have been' proves that nothing is clearer than hindsight—except perhaps the rule that we will not judge trial counsel's performance through hindsight." *Waters v. Thomas*, 46 F.3d 1506, 1514 (11th Cir. 1995).

When examining counsel's performance at the penalty phase of trial, the court must decide "'whether counsel reasonably investigated possible mitigating factors and made a reasonable effort to present mitigating evidence to the sentencing court.'" *Stewart*, 476 F.3d at 1209 (quoting *Henyard v. McDonough*, 459 F.3d 1217, 1242 (11th Cir. 2006)). To meet the requirements of *Strickland*,

counsel does not need to investigate "every conceivable line of mitigating evidence" regardless of its likelihood of benefitting the defendant at sentencing. *Pittman v. Sec'y, Florida Dep't of Corr.*, 871 F.3d 1231, 1250 (11th Cir. 2017) (quoting *Wiggins v. Smith*, 539 U.S. 510, 533 (2003)).

In fact, the *Strickland* standard does not even "require defense counsel to present mitigating evidence at sentencing in every case." *Id*. Rather, the *Strickland* standard for counsel's performance is "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. And, of course, reasonableness depends upon the context of the particular case. *Wiggins v. Smith*, 539 U.S. 510, 522-23 (2003). So, the district court must make a case-by-case determination regarding whether a mitigation investigation was reasonable under the facts of that particular case. *Hardwick*, 803 F.3d at 552.

Counsel's failure to present mitigating evidence is not per se ineffective assistance of counsel; "it can, on occasion, be justified as a strategic choice." *Hardwick*, 803 F.3d at 551 (citing *Lightbourne v. Dugger*, 829 F.2d 1012, 1025 (11th Cir. 1987)). "Strategic choices made *after thorough investigation* of law and facts relevant to plausible options are virtually unchallengeable …." *Strickland*, 466 U.S. at 690 (emphasis added). So, counsel's decision not to investigate or present mitigating evidence is "only reasonable, and thus due deference, to the extent that it is based on a professionally reasonable investigation." *Hardwick*, 803 F.3d at 551.

B. The Prejudice Prong

A petitioner also must meet a high burden to establish that his lawyer's deficient performance caused prejudice to his case. *Van Poyck v. Fla. Dep't of Corr.*, 290 F.3d 1318, 1322 (11th Cir. 2002). The petitioner does not meet that high burden merely by showing "that the errors had some conceivable effect on the outcome of the proceeding." *Id*. (citing *Strickland*, 466 U.S. at 693). Instead, a petitioner must show "'a reasonable probability that, absent the errors, the sentencer … would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'" *Stewart*, 476 F.3d at 1209 (quoting *Strickland*, 466 U.S. at 695). "A reasonable probability is a probability sufficient to undermine confidence in the outcome, which is a lesser showing than a preponderance of the evidence." *Sealey v. Warden, Georgia Diagnostic Prison*, 954 F.3d 1338, 1360 (11th Cir. 2020) (internal quotation marks and citations omitted) (quoting *Strickland*, 466 U.S. at 694).

In evaluating whether the petitioner has shown a reasonable probability that, if counsel had not been deficient the petitioner would not have been sentenced to death, the court must "consider 'the totality of the available mitigation evidence – both that adduced at trial, and the evidence adduced in the habeas proceeding' – and 'reweig[h] it against the evidence in aggravation.'" *Porter v. McCollum*, 558 U.S. 30, 41 (2009) (quoting *Williams v. Taylor*, 529 U.S. 362, 397-398 (2000)); *see also Sears v. Upton*, 561 U.S. 945, 956 (2010) (holding that a

proper prejudice analysis under *Strickland* must take into account the newly uncovered mitigation evidence, along with the mitigation evidence introduced during the penalty phase of the trial, to assess whether a reasonable probability arises that the petitioner would have received a different sentence after a constitutionally sufficient mitigation investigation).

IV. THE EVIDENTIARY HEARING

In his amended petition, Mr. Williams alleges that trial counsel were ineffective during the penalty phase of the trial because they failed to adequately investigate and present mitigation evidence to show that he should not have been sentenced to death. (Doc. 5 at 38-65).

Specifically, he claims in his amended petition that trial counsel were ineffective because they failed to conduct an adequate mitigation investigation into Mr. Williams' background, including their failure to collect documentary evidence and hire a mitigation specialist; failure to thoroughly investigate Mr. Williams's history, including that he was sexually abused as a child; failure to interview Mr. Williams's closest friend Alister Cook[2]; failure to adequately interview and

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[2] Described as "Marcus' closest friend[] during the period leading up to his arrest," Cook and Mr. Williams had been friends since they were eight or nine years old. (*See* Doc. 5 at 49). Mr. Williams and Cook had been drinking together the night of the murder. (*Id*. at 47).

prepare the penalty phase witnesses; failure to compile Mr. Williams's history of abuse and neglect; failure to investigate his family history of mental illness; failure to show that Mr. Williams's background contributed to his committing capital murder; and failure to present his redeeming characteristics. (*Id.*).

Mr. Williams called witnesses at the evidentiary hearing who testified to the facts that he claims trial counsel should have discovered and presented during the penalty phase of Mr. Williams' trial. And, Mr. Williams also called two experts, clinical psychologist Dr. Matthew Mendel who specializes in child sexual abuse, and neuropsychologist Dr. Kenneth Benedict, as mitigation witnesses to explain the effects of the sexual abuse, alcoholism, abandonment and overall family dysfunction on Mr. Williams. The State of Alabama presented expert testimony from Dr. Glen King to counter Mr. Williams' experts' opinions. Both sides also submitted evidentiary materials, including Mr. Williams' trial counsels' files and the experts' written opinions.

Mr. Williams argues that if counsel had performed an adequate penalty phase mitigation investigation, they would have learned and been able to present the following evidence:

A. Sexual Abuse by an Older Boy

Mr. Williams testified at the evidentiary hearing that, between the ages of four and six, he was sexually abused three or four times by an older boy

Mario Mostella, while he and his mother Charlene lived with the Mostella family. (Doc. 91 at 118-20). Mr. Williams' amended habeas petition indicates that Mario was "then about age fifteen" when he "repeatedly subjected [Marcus] to anal rape." (Doc. 5). Mr. Williams testified at the evidentiary hearing that "Mario is probably about ten years older." (Doc. 91 at 123). Mr. Williams did not know the exact year that Mario was born but just knew Mario was older than Mr. Williams. (*Id.* at 128). And Dr. Mendel's report indicates that Mr. Williams *estimated* that Mario was about ten years older than Mr. Williams, making Mario about fourteen to sixteen years old at the time of the abuse. (Doc. 87-1 at 117). Mr. Williams' sexual abuse by Mario occurred at times when Mario was at least an age to babysit Mr. Williams. (Doc. 91 at 203).

Eloise Williams testified that she thought Mario was "maybe six or seven" or "maybe ten" when Mr. Williams and Charlene moved in with the Mostella family, but did not know Mario's true age. Charlene testified at the evidentiary hearing that Mario was "like eight or nine" when she and Mr. Williams moved in with the Mostellas. (Doc. 92 at 162). Eloise described Mario as being on the "rough side" and "in and out of trouble … a bully, pushy," and Charlene described Mario as "just being a bad, bad little boy or so." (Doc. 92 at 111-112, 162).

Mr. Williams testified that all but one of the instances of sexual abuse by Mario occurred in Ashville, Alabama in an old shack called Bachelor's Kip behind the Mostella's home when Mario was

babysitting him. Mr. Williams testified that one of the instances of sexual abuse occurred in "Ohio." Eloise Williams testified that Charlene and Mr. Williams moved out of state with the Mostellas to Ohio at some point when Marcus was younger. (Docs. 91 at 119-120 & 92 at 114). But Charlene testified that she and Mr. Williams went to visit the Mostellos in Missouri, not Ohio, and ended up staying for about four months. (Doc. 92 at 216-217).

Mr. Williams stated that at the time the abuse was happening, he thought it was a game when Mario Mostella would "touch" and "penetrate" him from behind while Charlene was away. (*Id.*). Mr. Williams testified at the evidentiary hearing and told Dr. Benedict that Mario would "touch my groin area and have me touch him in the same area" but only Mario penetrated Mr. Williams from behind. (Docs. 87-1 at 87 & 91 at 119). But Mr. Williams told Dr. Mendel that "I don't remember [Mario] asking me to touch him." (Doc. 87-1 at 118). And Mr. Williams told the State's expert Dr. King that the sexual abuse by Mario involved "anal penetration of Mr. Williams and also of Mario" and that the abuse by Mario involved "you do me and I do you." (Doc. 85-2 at 4).

Dr. Mendel described Mario's actions as "pretty classic grooming behavior." (Doc. 93 at 165). Dr. Mendel stated in his report that at the time Mr. Williams was being molested by Mario, Mr. Williams "did not think there was anything wrong with what was going on." (Doc. 84-31 at 5). But Dr. Mendel explained that by the time Mr. Williams became

sexually active with a female at the age of ten he began to feel shame about Mario's sexual abuse of him. (Doc. 93 at 52). Mr. Williams testified at the evidentiary hearing that he felt shame, was depressed, and had thoughts of hurting and killing himself as a result of the sexual abuse by Mario. (Doc. 91 at 121).

While he lived with Eloise after his sexual abuse by Mario, Mr. Williams was "sullen, withdrawn, unhappy," and had issues with bed-wetting. (*Id*. at 125-26). Charlene testified that Mr. Williams started wetting the bed "between five and six or something like that." (Doc. 92 at 166). Dr. Benedict stated that bed-wetting was "another factor associated with [Mr. Williams'] shame and lack of control." (Doc. 87-1 at 84). And Mr. Williams reported to Dr. King that he started having nightmares at the age of seven or eight about "either falling off a cliff or drowning" that would occur once or twice a week. (Doc. 85-2 at 6).

Dr. Mendel testified that he assessed Mr. Williams' account of sexual abuse by Mario "with the greatest level of skepticism," especially where Mr. Williams did not tell anyone until after his criminal charges. (Doc. 93 at 85). But Dr. Mendel found Mr. Williams's account of his childhood sexual abuse "extremely credible" and testified that he has no doubt that it happened even though Mr. Williams did not tell anyone about the sexual abuse until around 2005 because he was ashamed and did not think that his mother would believe him. Dr. Mendel also testified that "if there was not the sexual abuse,

particularly by Mario, if there was not the sexual abuse, we would not be sitting here today." And Dr. Mendel opined that "if the sexual abuse hadn't happened, there would not have been sexual violence. I believe that very strongly …." (Docs. 92 at 121 & 93 at 85-86, 120).

Dr. Mendel explained that male victims of sexual abuse are much less likely to disclose their abuse; the length of time between sexual abuse in males and eventual disclosure is much longer; and people are more likely to suspect sexual abuse in female victims. (Doc. 93 at 74). Dr. Mendel stated in his report that "[m]ale victims often do not tell about their sexual abuse until they enter either the justice system or substance abuse treatment." (Doc. 84-31 at 5). He concluded that "the fact that [Mr. Williams] did not tell about his abuse is not at all unusual and should not be considered a counter-indication of the presence of sexual abuse." (Doc. 84-31 at 5).

Mr. Williams points out that consistent with other male victims who finally disclose childhood abuse after entering the justice system, he shared details of his sexual abuse with the first attorney who asked him about it. (Doc. 88 at 95-96). Mr. Williams testified that trial counsel never asked him if he had been sexually abused, but that if counsel had asked, he would have told them:

> Q. Why did you tell [Rule 32 counsel] about what had happened to you during your childhood when you previously had not talked about it?

A. He asked me about it. And I didn't, at first, I didn't tell him anything. And over time, I got comfortable, more comfortable with him and he asked me about it again and that's when I told him.

Q. Why didn't you tell your trial lawyers about sexual abuse and about some of the things you have told the Court here today about your background?

A. They didn't ask.

(Doc. 91 at 122).

Mr. Williams told Dr. Mendel that he became sexually active at the young age of ten and was promiscuous throughout his adolescence and early adulthood because he wanted to prove to himself that he is not gay. (*Id*. at 6). Dr. Mendel testified that prepubescent sexual intercourse is "the biggest red flag" indicating sexual abuse. (Doc. 93 at 124). Dr. Mendel also opined that Mr. Williams became hypersexual, having from one hundred fifty to two hundred sexual partners by the time he was arrested, in an effort to prove that he is not gay. (Doc. 93 at 55-56).

Mr. Williams was also exposed to sexuality by his family members. While they lived with the Mostellas, Mr. Williams bathed with Charlene and shared a bed with her. (Doc. 92 at 165). Dr. Benedict, a neuropsychologist specializing in developmental psychopathology, testified that Mr. Williams was "also exposed to adult sexual relations when living

with his mother, when she would have … her boyfriends in the same bed that she shared with" Mr. Williams, although Mr. Williams said that he did not actually witness his mother having sexual relations. (Doc. 91 at 176). Dr. Benedict reported that Mr. Williams would wake up in his mother's bed "to find other men in the same bed … indicating that premature exposure to adult sexuality occurred very early in his life." (Doc. 87-1 at 87).

Mr. Williams testified that when he was about ten years old, his teenage cousin Brian Williams "allowed [Mr. Williams] to watch him have sex as a way of showing [Mr. Williams] how to do it with a woman." (Doc. 91 at 120). Dr. Mendel testified that Mr. Williams told him that Brian was "always talking about sex and telling him about sex." (Doc. 93 at 64). Dr. Mendel explained that premature exposure to sexuality "basically tends to feed hypersexualization. So you get these, basically you get these kids who are thinking about sex and wanting to do and explore sexual things before they are physically, psychological or emotionally ready to do that. They're not adults." (*Id*. at 65).

Mr. Williams also engaged in other sexually inappropriate behavior. In his affidavit, Dr. Benedict stated that Mr. Williams told him that when he was a child he would sneak outside to peep on his mother's friends while they used the outhouse. (Doc. 84-33 at 12). Eloise testified that while Mr. Williams lived with her, she once caught him peeping at her through the bathroom door. (Doc. 92 at 127). Charlene testified that when Mr. Williams was

fifteen, Lottie Turner told her that Mr. Williams was "peeping in her window." (*Id*. at 184).

Dr. Mendel testified that Mr. Williams's sexual promiscuity reassured him that he was not gay and made Mr. Williams feel like a man. (Doc. 93 at 58). Dr. Mendel opined that Mr. Williams's lack of a serious girlfriend made it less likely that he would tell anyone about his sexual abuse. (*Id*. at 84). Dr. Mendel explained in his report that because male victims who fear they might be gay after being sexually abused often try to compensate for their fears by becoming stereotypically "macho," Mr. Williams's compensatory hyper-masculinization resulted in aggressive and violent behavior in his pre-teen years. (Doc. 84-31 at 7).

Mr. Williams's compensatory hyper-masculinization continued into his teenage years. Mr. Williams' friend Marlon Bothwell testified that Mr. Williams was bullied in high school and often got into fights after school. (Doc. 93 at 10-20). Marlon recalled that Mr. Williams became more aggressive after a fight in which Mr. Williams was slammed, head-first, into the ground. (*Id*. at 13).

Mr. Williams dropped out of high school in his senior year. (Doc. 91 at 103). He joined the Job Corps, but was kicked out for fighting. (Doc. 93 at 60-61). Dr. Mendel stated in his report that when Mr. Williams returned home to Ashville after being kicked out of Job Corps, he was "drinking constantly, always drunk, with a pervasive sense of hopelessness and despair he had felt only once

previously in his life, in the aftermath of his knee surgery during his senior year of high school." (Doc. 84-31 at 9). Dr. Mendel further stated in his report that the "critical factors in Marcus' progression toward his crimes were his chronic states of hypersexuality and of aggression, which fused together in his acts of sexual violence; the acute state of hopelessness secondary to his expulsion from JobCorps;[3] along with alcohol as a disinhibiting agent." (*Id*.).

Mr. Williams maintains that exploring his sexual abuse history was especially important because, as Dr. Mendel testified, a large number of people who commit acts of sexual violence were themselves sexually abused. *See* (Docs. 84-31 at 9 & 93 at 122). Mr. Williams argues that although childhood abuse is particularly mitigating in capital cases, counsel's failure to investigate his background meant the jury never heard "this account of [his] psychological trajectory from an abusive childhood to sexual violence." (Doc. 88 at 87).

At the evidentiary hearing, Mr. Funderburg justified his decision not to present evidence concerning Mr. Williams's "future dangerousness" or propensity for sexual violence, including that eighteen days after Mr. Williams committed the rape and murder of Ms. Rowell, he attempted to rape Lottie Turner:

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[3] Mr. Williams maintains that he killed Melanie Rowell only ten days after his expulsion from Job Corps. (Doc. 88 at 86).

Q. Is it also fair to say that you would want to avoid any testimony that might show or tend to show the future dangerousness of your client, like he's going to do it again?

A. In this case?

Q. Yes.

A. Yes. We had another crime that had occurred that we had to keep out. Marcus had been involved in a similar act from when this case occurred until his arrest.

So, at the time he was found guilty of this, we, I think, entered into a plea agreement on the other charge as well, which the State tried to get it in, but we were able to keep it out.

Q. You wouldn't have wanted, certainly, to offer any testimony that might tend to indicate that your client was predisposed to sexual violence?

A. Absolutely not.

Q. And in that judgment that might have made a jury even more likely to give death, fair to say?

A. Yes, that's one of the biggest reasons we did not want to call Marcus in the case, even though he had given statements, we

> couldn't put him up on the stand and run the risk of that other conduct somehow coming in.

(Doc. 91 at 76).

Mr. Williams argues that counsel's failure to present available evidence of sexual abuse was not a strategic choice because counsel failed to ask Mr. Williams or anyone else about sexual abuse and failed to "conduct any reasonable investigation" of Mr. Williams's background. (Doc. 88 at 88). Mr. Williams maintains that if counsel had investigated and presented evidence of Mr. Williams's childhood sexual abuse, the jury would have had "powerfully mitigating context for his behavior." (Doc. 88 at 89). Mr. Williams points out that the Eleventh Circuit Court of Appeals has held that sexual abuse evidence is not a "double-edged sword," *Williams v. Alabama*, 791 F.3d at 1277, and that "'both the Supreme Court and [the Eleventh Circuit] have recognized the long-lasting effects child sexual abuse has on its victims.' *Daniel v. Comm'r, Ala. Dep't of Corr.*, 822 F.3d 1248, 1276 (11th Cir. 2016) (citing *Kennedy v. Louisiana*, 554 U.S. 407, 435 (2008); *United States v. Irey*, 612 F.3d 1160, 1207 (11th Cir. 2010) (*en banc*))." (Doc. 88 at 89).

Mr. Williams adds that his arrest for breaking into Lottie Turner's house and attempting to rape her "is entirely consistent with the portrait of [his] psychological unraveling, stemming from his childhood sexual abuse." (Doc. at 89-90). Mr. Williams points to the portion of his confession to the

murder in which he wrote, "I have a problem and I want help." (*Id*. at 90) (quoting Doc. 84-11 at 39). He concludes that without the context of Mr. Williams's history of childhood sexual abuse, the jury was given no explanation for his "confounding, and harmful, behavior," which allowed the jury to sentence him to death for an "awful, and apparently inexplicable, crime." (Doc. 88 at 90).

B. Extensive Family History of Childhood Sexual Abuse

Mr. Williams points out that under the ABA Guidelines applicable at the time of his trial, "counsel had a duty to collect information pertaining to 'family and social history (including physical, sexual or emotional abuse),' and to 'obtain names of collateral persons or sources to verify, corroborate, explain and expand upon [the] information obtained.'" (Doc. 88 at 90) (quoting *Williams v. Allen*, 542 F.3d at 1339) (citing 1989 ABA Guidelines 11.4.1(D)). He explains that "several interviews are often necessary to bring out all the relevant information, particularly when sensitive matters such as child abuse or sexual abuse are involved." (*Id*.) (quoting *Alabama Capital Defense Trial Manual*, at 588 (3d ed. 1997)). Mr. Williams contends that if trial counsel had investigated his background, they would have learned the following details about childhood sexual abuse and incest in his family.

In his report, Dr. Mendel detailed the pervasive history of sexual abuse of children by older relatives

in Mr. Williams's family. Dr. Mendel stated that Mr. Williams's great-grandmother, Beulah, was reportedly raped by her uncle; his grandmother Laura's first child was fathered by her cousin; his aunt Veronica was molested as a child by her aunt's boyfriend; and his cousin Brian Williams, in addition to allowing Mr. Williams to watch him having sex with girls, molested Mr. Williams's sister LaCharo and his cousin Zakia Fomby. (Doc. 84-31 at 6). Charlene testified that when LaCharo was "about twelve," she told her that Brian Williams "tried to molest her." (Doc. 92 at 190). Despite Brian "den[ying] it all," Charlene tried to talk to the police about it, but "didn't get to talk to the police" because "there wasn't none at the station where [she] went." (*Id*. at 190-91).

Dr. Mendel testified that he was "struck by the level of sexual abuse across multiple generations" of Mr. Williams's family. (Doc. 93 at 40). He stated that in evaluating Mr. Williams, he considered the history of sexual abuse in Mr. Williams's family because it "very much runs in families." (*Id*. at 68). He added that a family history of sexual abuse is a risk factor for future sexual abuse by the victim. (*Id*. at 74). Mr. Williams argues that Brian Williams's abuse of LaCharo and Zakia lends credibility to Mr. Williams's account of Brian's inappropriate behavior, and confirms that Brian's sexual interactions with Marcus were predatory, not playful or minor. (Doc. 88 at 93).

Mr. Williams asserts that his family history of sexual abuse, and the lack of intervention by the

adults in his family, provides context for his own abuse, and explains his reluctance to disclose his own sexual abuse as a child. (*Id*. at 94). Dr. Mendel testified that the family's unresponsiveness to other instances of sexual abuse "affects the degree of disclosure or the likelihood of disclosure." (Doc. 93 at 69). Dr. Mendel opined that Mr. Williams and other victims in his family feared that they would not be believed if they reported their abuse. (*Id*. at 69-70; Doc. 84-31 at 6). Dr. Mendel contends that if Mr. Williams's trial attorneys had conducted in depth interviews with him and his family, as required under the ABA Guidelines, they too would have learned about the sexual abuse in his background and family history. (Doc. 93 at 96).

C. Family History of Alcoholism Contributed to Mr. Williams's Early and Excessive Use of Alcohol

Mr. Williams asserts that he was raised in a family of alcoholics. (Doc. 88 at 72). Eloise testified that when she married into the Williams family, she "learned that they did a lot of drinking and partying." (Doc. 92 at 99). Mr. Williams's great-grandmother, Beulah Williams, with whom he lived from time to time, was unable to properly care for the children left with her. (Doc. 91 at 146, Doc. 92 at 155). Beulah, described as a good person who "did like to drink and party," worked through the week, but got drunk on the weekends, to the point that she became incoherent and would pass out or urinate on herself. (Doc. 92 at 100, 152, Doc. 91 at 146).

Eloise testified at the evidentiary hearing that almost all of Beulah's family, including Eloise's husband Robert, had problems with drinking. (Doc. 92 at 106-07). Sharenda testified that during the times she and Mr. Williams spent with Eloise and Robert, Robert was a heavy drinker who "drank probably almost every day at some point," to the point of intoxication. (Doc. 91 at 147). And Sharenda testified that Robert, who was angry with Mr. Williams for walking away from the stove while grease was heating on the stove, walked Mr. Williams over to Eloise's daycare, argued with and grabbed Mr. Williams, and body slammed Mr. Williams to the ground. (Doc. 91 at 148-149).

Charlene testified that she was a heavy drinker from the age of fifteen until she was "like about thirty-two," having been influenced to drink by Beulah and other relatives who drank excessively. (Doc. 92 at 155-56). Charlene drank mostly on the weekends, sometimes to the point of intoxication. (Doc. 91 at 141; Doc. 92 at 156). She drank while she lived with the Mostellas,[4] and she drank while she was in a relationship with Jeff Deavers who was abusive towards her. (Doc. 92 at 112; Doc. 91 at 140). Dr. Mendel stated in his report that Charlene's "pattern of drinking and going out rather than watching her children left Marcus susceptible to Mario's sexual predation." (Doc. 84-31 at 8).

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[4] Eloise testified that while Charlene and Mr. Williams lived with the Mostellas, Charlene and Olivia Mostella "were still partying and doing different things, drinking, leaving the children." (Doc. 92 at 112).

Mr. Williams's childhood friend, Marlon Bothwell, testified that he and Mr. Williams began drinking probably between the ages of twelve and fourteen, but Mr. Williams's alcohol consumption increased so much when he was about sixteen or seventeen that he often saw Mr. Williams drunk. (Doc. 93 at 15-17). Dr. Mendel testified that Mr. Williams "was drinking heavily by his high school years" and began drinking "much more following a couple of very negative difficult experiences in his life." (*Id*. at 77). Dr. Mendel stated in his report that, because alcoholism runs in families, Mr. Williams's "alcohol abuse and likely dependence are probably 'multiply-determined,' stemming from a familial pattern of alcoholism as well as Marcus' specific traumatic life circumstances." (Doc. 84-31 at 8).

Dr. Mendel explained that alcoholism often runs in families because of the modeling and example shown by family members drinking. (Doc. 93 at 75-76). He added that "people generally accept that there is a genetic basis for a predisposition towards addiction, including alcoholism." (*Id*. at 76). Dr. Glen King, a clinical psychologist who testified on behalf of the State of Alabama, testified that "but for [Mr. Williams's] substance abuse, in terms of this crime, I don't think we would be here." (Doc. 92 at 86). Dr. Mendel agreed with Dr. King's conclusion that "if there wasn't the alcohol, we wouldn't – this wouldn't have happened and we wouldn't be here today." (Doc. 93 at 82).

Mr. Williams argues that by failing to investigate and present expert testimony at the

penalty phase on both his and his families excessive use of alcohol, counsel deprived the jury of this critical explanation for his conduct. (Doc. 88 at 77). He argues that, although Mr. Funderburg testified that the defense theory for the penalty phase of the trial was that Mr. Williams was not in his right mind because of alcohol and marijuana use, he presented "paltry" evidence about Mr. Williams's substance abuse. (*Id*.) (citing Doc. 91 at 90).

Mr. Williams points out that, although counsel asked Charlene two questions "conceivably related to alcohol use" in the penalty phase, those questions were not helpful because they pertained to Mr. Williams's time in Job Corps, not during his childhood or the time of the crime. (*Id*.) (citing Vol. 3, Tab 19 at 557). Mr. Williams also points out that during the penalty phase, Eloise offered, without being asked about alcohol or drugs, that she "began to notice he had changed – drinking, you know and maybe drugs." (*Id*.) (citing Vol. 3, Tab 19 at 565).

Mr. Williams argues that "without any specifics of when Marcus began drinking, and with no explanation for why Marcus was drinking–such as his genetic predisposition to alcoholism, the excessive drinking modeled by close relatives who reared him, and his traumatic childhood experiences–the jury was left to conclude that Marcus's drinking, which was only vaguely mentioned, was merely a personal failing." (*Id*.) He maintains that counsel was unreasonable for failing to investigate and present available evidence of Mr. Williams's family history of substance abuse. (*Id*.)

D. Childhood Defined by Chaos, Abandonment, and Abuse

Charlene testified that Mr. Williams, her second child, was born when she was sixteen years old. (Doc. 92 at 158-59). Before he was born, his older sister Aquea was sent to New York to live with her paternal grandmother, and never returned to live with Charlene. (*Id*. at 159-60). His father, Michael Daniels, was not involved in his life when Mr. Williams was "small," but "became involved later on in life," when he was around thirteen or fourteen. (*Id*. at 161).

During his early years, Charlene and Mr. Williams "bounced from place to place." (Doc. 88 at 53). They lived with Charlene's grandparents, Ralph and Beulah Williams, in "the old house," a dilapidated house without a bathroom, heating, air conditioning, or hot water (Doc. 92 at 116, 206); they lived with family friends, Della and Will Bothwell (Doc. 93 at 7, 23); they lived with Charlene's friend Olivia Mostella and her three children in Ashville, Alabama (Doc. 92 at 161-62); and they moved to Missouri with the Mostellas for about four months. (*Id*. at 166-67).

Eloise Williams testified that when Charlene and Mr. Williams lived with the Mostellas, Charlene and Olivia left the children alone at home with Olivia's elderly mother while they went out partying and drinking. (Doc. 92 at 112). Mr. Williams testified that when they lived with Olivia, her son, Mario Mostella, sexually abused him three or four times,

over the course of "a couple of years," beginning at the age of four. (Doc. 91 at 118-19). When they returned to Ashville, Charlene lived with her grandmother for a while; with Mary Mostella, Olivia Mostella's mother, for a while; moved into an apartment in Gadsden; then finally moved back to Ashville. (*Id*. at 167-68).

During this time, Charlene gave birth to three more children. (*Id*.). When Mr. Williams was around nine years old, Charlene began a six-year relationship with Jeff Deavers, who was physically and verbally abusive to her, "sometimes" in front of Mr. Williams. (Doc. 92 at 170-74). Mr. Williams testified that one time when he was twelve or thirteen years old, he saw Mr. Deavers strike Charlene with his bare hands. In response, Mr. Williams "grabbed a knife and tried to stab him." (Doc. 91 at 118). Although Mr. Williams previously told Dr. Benedict that Mr. Deavers was the one with the knife, the state's expert Dr. King testified that discrepancy was not a "significant difference in the dynamics of that event." (Doc. 92 at 59).

Charlene had poor parenting skills: she left the children to fend for themselves; they were not supervised appropriately; and at times, they were not clean or "well taken care of." (*Id*. at 117). During the time period when Mr. Williams was around five to ten years old, family members tried to help Charlene by taking her children in to live with them. (*Id*. at 117-21).

Eventually, when Mr. Williams was about seven or eight years old, Charlene abandoned Mr. Williams and could no longer care for him. So, he moved in with his aunt Eloise Williams. (*Id.* at 119, 169). During this time, Mr. Williams moved back and forth between the homes of his great grandmother, Beulah Williams, his aunt Elvis, his aunt Veronica Fomby, and his aunt Eloise Williams. (Docs. 91 at 116 & 92 at 169). Eloise took him to Sunday School and church, helped him with his homework, and allowed him to play baseball. (Doc. 92 at 119-20, 124-26).

Mr. Williams lived with Eloise on and off until he was twelve or thirteen years old. (*Id.* at 127). Eloise testified that when Mr. Williams was in middle school, he started getting in trouble at school, "getting in fights, stealing and just different things." (Doc. 92 at 126-27). At one point, Eloise caught him peeping through the bathroom door at her. (*Id.* at 127). When Mr. Williams was twelve or thirteen years old, Eloise took him back to live with Charlene because he wanted to live with his mother. (Doc. 92 at 127). Eloise testified that Charlene was not happy about Mr. Williams living with her and that he stayed with Charlene "not very long." Mr. Williams then went to live with his Aunt Elvis Williams and then "he went floating around to different places after that." (Doc. 92 at 128).

When he was fourteen years old, Mr. Williams finally met his father, Michael Daniels, and moved in with him for about nine months. (Doc. 91 at 116). Dr. Mendel testified at the evidentiary hearing that

Mr. Williams had "wondered about, questioned, struggled and worried about" his father his entire life, hoping that the reason his father never came to visit him was because he did not know Mr. Williams existed. (Doc. 93 at 42).

Mr. Williams argues that rather than investigating his family history and presenting "available evidence of Marcus's abandonment by his mother, as well as the itinerant and dysfunctional lifestyle he was subject to while he was with her," trial counsel elicited testimony in the penalty phase from Charlene, minimizing the instability in Mr. Williams's life, and leaving the jury with the impression that he "spent lots of time with his mother." (Doc. 88 at 65).

Specifically, Mr. Williams points to the following portions of Charlene's testimony in the penalty phase:

> Q. Where was [Mr. Williams] when he wasn't with you?
>
> A. He lived with my grandmother and my aunt. They helped me because I was a young girl.
>
> . . . .
>
> Q. Prior to this time, had Marcus been a problem child to you in any way?
>
> A. No, he had never been.

Q. Did you spend a lot of time with him when he was growing up?

A. Yes. Marcus was the baby for five and a half years.

(*Id.*) (quoting Vol. 3, Tab 19 at 554, 558).

He adds that at the sentencing hearing, Eloise testified only generally about Marcus being "left from one place to another" and not "hav[ing] a stable home." (*Id.*) (quoting Vol. 3, Tab 19 at 561). Mr. Williams argues that the penalty phase of his trial contained no testimony about the "domestic violence and abuse" he experienced in the various places he lived. (*Id.*). Mr. Williams argues that the testimony presented at the evidentiary hearing paints a "vastly different picture of his background" than the limited testimony presented at his trial. (*Id.* at 65-66) (quoting *Williams v. Allen*, 542 F.3d at 1342).

E. Extensive Family History of Dissolution and Dysfunction

Mr. Williams alleges that compounding the failure to thoroughly investigate and present evidence of his "dysfunctional upbringing," trial counsel also failed to present available evidence of his "troubled family history." (Doc. 88 at 66). He claims that the dysfunction of his childhood was part of an "easily discernable pattern." (*Id.*). Charlene testified that she, her sister, and her brother were raised by their grandparents, Ralph and Beulah Williams; she did not meet her father until she was three years old; her mother, Laura Williams, "moved

away to New York" and never contacted her after she left; and that her mother died a violent death when Charlene was twelve years old. (Doc. 92 at 148-51, 193).

Charlene became sexually active at age thirteen, became pregnant with Mr. Williams's older sister at the age of fourteen, and started drinking at age fifteen. (*Id.* at 155-57). Charlene eventually gave birth to Mr. Williams and three more children, LaCharo, and twins, Sharenda, and Sharay, all of whom were raised in different homes. (*Id.* at 167-68). Mr. Williams maintains that the "distance created by Charlene's abandonment and separation of her children made it difficult for them to bond, and develop loving relationships, as a family." (Doc. 88 at 70).

Mr. Williams's sister Sharenda Williams testified at the evidentiary hearing that she and Mr. Williams "did spend time together" during Mr. Williams's teenage years after he left Aunt Eloise's home. (Doc. 91 at 150). She clarified that they spent a minimal amount of time together because after being adopted by her Aunt Eloise, she lived a "much more strict lifestyle" and was "very involved in church." (*Id.*). Mr. Williams's sister LaCharo Williams testified at the evidentiary hearing that because of their age difference her relationship with Mr. Williams did not really develop until after he was arrested. (Doc. 92 at 214).

Mr. Williams contends that the "treatment that Marcus and his siblings received from caregivers

reinforced this sense of distance." (Doc. 88 at 71). Sharenda testified at the evidentiary hearing that their uncle Robert Williams was "very strict" with Mr. Williams, while he treated her "like a girl," letting her get away with anything. (Doc. 91 at 148).

Mr. Williams adds that although "the circumstances of all of Charlene's children were precarious, [his] nomadic existence was especially so." (Doc. 88 at 71). Mr. Williams points out Dr. Mendel's testimony from the evidentiary hearing:

> I think that the chaos, the lack of stability and the sense of abandonment, betrayal, the contrast he experienced in his life from seeing why was my younger sister adopted by this aunt, this great aunt, and not me. Why was my other younger sister kept and raised by our mother and not me, why was my younger brother adopted by this family, unrelated family down the road and raised in a stable household, why was my older sister taken in by her father and raised in a – I don't know much about that family, but at least a relatively consistent home, and why was I bounced around.
>
> He experienced a sense of being unwanted, rejected, abandoned, betrayed throughout his life, and I think that's had an enormous impact on him.

(*Id.*) (quoting Doc. 93 at 41-42).

Mr. Williams asserts that defense counsel should have investigated and presented evidence of his dysfunctional family history because conditions within the family can influence a defendant's upbringing and experiences. (Doc. 88 at 71-72) (citing *Kormondy v. Sec'y, Fla. Dep't of Corr.*, 688 F.3d 1244, 1251 (11th Cir. 2012) (explaining that, during penalty phase proceedings in 1994, "[the defendant's] life story actually began with [his mother's] story about her life prior to [his] birth because, according to Dr. Larson, what she had experienced prior to that event had a profound effect on the person [the defendant] eventually became"). He points out that courts have held that failing to investigate and present available evidence of a "chaotic, abusive, neglectful family" was deficient. (Doc. 88 at 72) (citing *Johnson v. Bagley*, 544 F.3d 592, 605 (6th Cir. 2008) and *Frierson v. Woodford*, 463 F.3d 982, 989 (9th Cir. 2006) ("[A] failure to investigate and present, at the penalty phase of a capital trial, evidence of … a dysfunctional family or social environment may constitute ineffective assistance of counsel.")).

Mr. Williams argues that his life was impacted by the "early sexual activity, excessive alcohol use, neglect and abandonment of children, and frayed familial bonds" that persisted generation after generation in his family. He contends that, with the evidence of his troubled family history, counsel "could have described the cycles of generational abusive and neglectful parenting that repeat the same behaviors and lead to the same outcomes." (Doc. 88 at 72) (quoting *Johnson*, 544 F.3d at 605).

He maintains that counsel were deficient for failing to present the available evidence of his dysfunctional family history to the jury. (Doc. 88 at 72).

F. Psychologically Damaging Childhood Experiences

Dr. Benedict testified that the following risk factors present in Mr. Williams's early life increased the likelihood that Mr. Williams would have a "bad outcome in life": the family history of intergenerational sexual abuse; being born out of wedlock to a teenage mother who did not have help with parenting; the family's limited resources and conditions that would constitute poverty or would border on poverty; very poor boundaries in the family with respect to sexuality and drinking; exposure to adult sexuality and adult substance abuse at a young age; being sodomized or sexually molested as a child; Mr. Williams's own precocious or early sexual activity; and his early use of alcohol. (Doc. 91 at 167-68, 175-78). Dr. Benedict concluded that Mr. Williams's greatest risk factor was the "lack of consistent caretaking by his mother with whom he tried to establish a relationship and wanted a relationship with, you know, to the present day, but her inconsistency and the various reunions and separations from her." (*Id*. at 175).

Dr. Benedict also testified that Mr. Williams's childhood sexual abuse was traumatic. (*Id*. at 181). Dr. Mendel testified that Mr. Williams was "groomed" into sexual activity at a young age, and taught that it was a secret. (Doc. 93 at 49-51,

100-01). Dr. Benedict testified that being molested at a young age by someone older "comes with the kind of power differential that characterizes abusive situations, sexual or physical aggression or emotional aggression." (Doc. 91 at 181). Dr. Mendel explained that even before Mr. Williams knew that what was happening with Mario was inappropriate, he knew it was something he should hide:

> [T]he time that Marcus says that he came close to telling was when on – after one of the incidents of sexual abuse, he and Mario came out of the – that shack, the Bachelor's Kip and Marcus' mother, Mario's mother and I believe Mario's sister were walking toward them and asked, one of them asked, they all asked, what were you guys doing in there.
>
> I think independently Marcus would have blurted out exactly what they were doing, but instead, Mario said something, Mario lied, said, oh, we were, you know, doing whatever in there, Marcus doesn't recall exactly what. So that's why he didn't tell at that point.
>
> As time went on and he got more of a sense that this was sexual, this was shameful, this was something to be embarrassed about, he did, as most male victims do, which is to keep it – keep it hidden.

(Doc. 93 at 51).

Dr. Benedict testified that the instability in Mr. Williams's childhood, and his inability to develop an attachment with a primary caretaker were traumatic for him. (*Id*. at 180). Dr. Mendel testified that Mr. Williams had a "lot of anger toward his mother for not being there," and that the "chaos, the abandonment, the betrayal, the loss, the lack of stability, [and] the lack of predictability" were the "biggest factor[s] in his childhood." (Doc. 93 at 44, 118).

Dr. Benedict testified that it was very difficult for Mr. Williams to reconcile the different expectations his various caretakers had of him:

> It's very difficult for a child and even teenagers to experience such radically different sets of expectation in parenting styles.
>
> So, if there are essentially very few boundaries, very few rules and very limited oversight in the home of his mother, we heard testimony today about the very strict and regimented environment he grew up or he experienced when he was living with [his aunt Eloise Williams].
>
> It's very difficult for kids to reconcile those differences and to know what message to take.

(Doc. 91 at 180-82).

Dr. Benedict explained that Mr. Williams was also exposed to "general disinhibited behavior that would take a number of forms in his life," including exposure to relatives with serious drinking problems, and exposure to domestic violence between his mother and her long time boyfriend, Jeff Deavers. (Doc 91 at 181-82). Dr. Benedict concluded that, as a result of these traumatic experiences, Mr. Williams turned to alcohol, hypersexuality, and hypermasculine aggression as a way to "guard against some psychological problem." (*Id*. at 183-84).

Mr. Williams argues that despite trial counsel's knowledge that he "was not in his right mind" at the time of the crime, counsel "presented no expert testimony to explain his psychological trajectory from a childhood of abuse to commission of the crime."[5] (Doc. 88 at 101). Instead, counsel "painted an incomplete and unhelpful picture" at the penalty phase, by relying on limited testimony that never mentioned Mr. Williams's family history of domestic violence, alcoholism, and sexual abuse. (*Id*.).

Mr. Williams also faults trial counsel for failing to present expert testimony to give a favorable opinion as to his "capacity for rehabilitation." (*Id*.). Both Dr. Benedict and Dr. Mendel testified that treatment was available, including when Marcus was a child, to ameliorate the damage from his

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[5] Trial counsel Erskine Funderburg testified that in mitigation, counsel were arguing that Mr. Williams was "not in his right mind but not because of a mental disease, it was because of the alcohol and the marijuana." (Doc. 91 at 90).

traumatic experiences, and that Marcus would have benefitted from such treatment. (Doc. 91 at 182, 197-98; Doc. 93 at 63-64). Dr. Mendel opined that if Mr. Williams had been able to discuss his traumatic experiences with someone, "we would have seen way less dramatic and self-destructive and destructive to others acts on [Mr. Williams's] part." (Doc. 93 at 62-63).

Dr. Benedict testified that Mr. Williams's psychological condition has improved significantly since his discussions with experts and his attorneys while he has been incarcerated. (Doc. 91 at 194). In addition, Dr. Mendel and even Dr. King, the State's expert, both testified that, but for alcohol, Marcus's crime would not have happened. (Doc. 92 at 86; Doc. 93 at 82).

V. ANALYSIS

Mr. Williams argues that counsel were deficient in failing to investigate and present the potentially mitigating evidence he presented at the evidentiary hearing, and that he was prejudiced by counsel's failures. He maintains that he was "cooperative and willing to assist in his defense"; that he offered to "provide information about his background, but counsel w[ere] unresponsive"; and that his friend and family were "available and willing to provide mitigating information, but they were not contacted or interviewed." (Doc. 90 at 10). Mr. Williams argues that absent counsel's errors, counsel would have been able to present several more non-statutory mitigating circumstances pertaining to his

excruciating life history, including sexual abuse, alcoholism, abandonment, and poverty. (*Id*. at 32-34). He argues that in light of this new mitigating evidence, taken as a whole, a reasonable probability exists that the jury would have reached a different result. (*Id*. at 35). For the following reasons, this court agrees.

A. Deficient Performance

Mr. Williams claims that counsel were deficient for failing to investigate and present at the penalty phase non-statutory mitigating evidence about his background, including his prior sexual abuse by an older male, his family history of sexual abuse, his family history of alcoholism, and his family cycle of overall chaos and dysfunction. This court agrees that counsels' performance was deficient for failing to reasonably investigate Mr. Williams' background for mitigation.

The Supreme Court has held that, based on standards applicable in 1999 when Mr. Williams was tried, attorneys representing capital defendants were obligated "to conduct a thorough investigation of the defendant's background." *See Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (finding that counsel's mitigation investigation "fell short of the standards for capital defense work articulated by the American Bar Association (ABA)—standards to which we long have referred to as 'guides to determining what is reasonable'"). Counsel's failure to conduct an adequate background investigation or to pursue all reasonably available mitigating

evidence can satisfy *Strickland*'s deficient performance prong. *Wiggins v. Smith*, 539 U.S. 510, 524 (2003); *Cooper v. Sec'y, Dep't of Corr.*, 646 F.3d 1328, 1351 (11th Cir. 2011).

To determine whether trial counsel conducted a reasonable background investigation or made a reasonable decision to not conduct a background investigation, the court must "put itself in counsel's shoes, review the information of which he was or should have been aware, and determine what a reasonable attorney would have done under those circumstances." *Hardwick v. Sec., Fla. Dep't of Corrections*, 803 F.3d 541, 552 (11th Cir. 2015) (citing *Strickland*, 466 U.S. at 690). This court must "assess 'all the circumstances' and 'consider whether the known evidence would lead a reasonable attorney to investigate further.'" *See Frazier v. Bouchard*, 661 F.3d 519, 531 (11th Cir. 2011) (quoting *Powell v. Allen*, 602 F.3d 1263, 1273 (11th Cir. 2010)). So, the court must consider what Mr. Williams' counsel knew about him, his criminal charges, and his background and "what counsel then failed to do and learn about [Mr. Williams] and his childhood background." *See Hardwick*, 803 F.3d at 552.

In Mr. Williams' case, counsels' failure to conduct an adequate and thorough background investigation for possible mitigating circumstances was unreasonable and deficient. The court will first explain what Mr. Williams' counsel knew or should have known about Mr. Williams and his case, including knowledge of potential sources of

mitigation. Then the court will set out in what ways counsel failed to conduct a reasonable investigation into Mr. Williams' background and discuss what mitigation evidence a reasonable investigation would have uncovered.

1. What Counsel Knew or Should Have Known

a. Counsel Knew the Penalty Phase was Pivotal

When the trial court first appointed Ms. Wilson and Mr. Funderburg to represent Mr. Williams in his capital murder case, they knew or should have known that the penalty phase would be pivotal to Mr. Williams' defense. As the Eleventh Circuit acknowledged in this case, Mr. Williams' defense counsel faced "overwhelming evidence of [Mr. Williams'] guilt." *Williams v. Alabama*, 791 F.3d 1267, 1269 (11th Cir. 2015). In light of Mr. Williams' three detailed statements to investigators admitting his guilt and the DNA evidence corroborating Mr. Williams' statements and linking him directly to the crime (doc. 84-25 at 7), no reasonable attorney would have basically disregarded the penalty phase of the trial and conducted virtually no background investigation for mitigating evidence.

Where the evidence clearly supports the guilt of a defendant, reasonable counsel would focus their efforts on the penalty phase of the trial. *See Johnson v. Sec., DOC*, 643 F.3d 907, 932 (11th Cir. 2011) ("Given the overwhelming evidence of guilt, any reasonable attorney would have known, as [counsel]

testified he actually did know, that the sentence stage was the only part of the trial in which Johnson had any reasonable chance of success."); *Collier v. Turpin*, 177 F.3d 1184, 1202 (11th Cir. 1999) ("Although counsel … recognized that the sentencing phase was the most important part of the trial given the overwhelming evidence of guilt, they presented almost none of the readily available evidence of Collier's background and character that would have led the jury to eschew the death penalty.").

Because the penalty phase of Mr. Williams' trial was pivotal to his case given the overwhelming evidence of Mr. Williams' guilt, no reasonable counsel would have failed to conduct a thorough mitigation investigation into Mr. Williams' background. *See Hardwick v. Sec., Fla. Dep't Corr.*, 803 F.3d 541, 552 (11th Cir. 2015) (finding deficient performance and prejudice where "[c]ounsel knew, or should have known, that Hardwick's defense in the penalty phase—specifically the presence or absence of mitigating evidence—would be pivotal").

And the prevailing norms at the time of Mr. Williams' trial underscored the importance of the penalty phase of the trial, especially when a defendant has confessed to the crime. According to the 1989 ABA Guidelines 1.1, commentary, in many death penalty cases, "no credible argument for innocense exists, so that the life or death issue of punishment is the *real focus* of the entire case." (Emphasis added).

Trial counsel knew from the beginning that Mr. Williams' "life depended on the penalty-phase presentation." *See Maples v. Comm'r Ala. Dep't Of Corr.*, 729 F. App'x 817, 825 (11th Cir. 2018) (finding deficient performance could be based on counsel's unreasonably cursory preparation for the penalty-phase when counsel "knew from the onset that Maple's life depended on the penalty-phase presentation."). Mr. Funderburg admitted at the evidentiary hearing that he knew at the outset of the case that Mr. Williams' confessions would likely be admitted into evidence, so counsel would "have to prepare for the penalty phase in advance of the trial." And Mr. Funderburg testified that knowing "in all likelihood the confession is going to go in," counsel would then "focus on mitigation because if you can get a mitigating factor and convince a jury, then you can get possibly life without [the possibility of parole]." (Doc. 91 at 52 & 88).

Mr. Funderburg also testified that he ordered the *Alabama Capital Defense Trial Manual* that discusses the importance of mitigation evidence for the penalty phase of a capital murder trial. *See* (Doc. 91 at 52). That manual explains that, during the penalty phase of a capital murder trial, counsel "will be faced with giving an account of how the defendant came to be on trial for life. *Defense counsel cannot do this without a clear understanding of the circumstances and influences surrounding that life.*" *Ala. Capital Def. Trial Manual*, at 3 (3d ed. 1997) (emphasis added). So, Mr. Funderburg knew that mitigation evidence and the penalty phase were key to Mr. Williams' defense; yet, as the court will

discuss in detail *infra*, counsel conducted virtually no mitigation investigation.

And the record shows that Ms. Wilson also knew the importance of the penalty phase and an adequate mitigation investigation in light of Mr. Williams' confessions and overwhelming evidence of guilt. Ms. Wilson's case file contains a note presumably in her hand-writing that indicates that the primary focus of Mr. Williams' case and "best issue" would be to argue for life imprisonment without the possibility of parole and to avoid the death penalty. *See* (Doc. 84-26 at 69).

Ms. Wilson also expressed to the trial court in her June 4, 1997 "Ex Parte Application for Investigative Expenses" the importance of the penalty phase and counsel's mitigation efforts. Specifically, she stated that "Defense counsel has an ethical, legal and constitutional duty to conduct a *thorough inquiry into all aspects of this case*," including any mitigation factors. (Doc. 84-14 at 55) (emphasis added). Her motion contains a section titled "MITIGATING CIRCUMSTANCES" in which Ms. Wilson states that the jury and judge will be "constitutionally required" to consider as mitigating factors "any aspects of [Mr. Williams'] character or record and any of the circumstances of the offense that [he] proffers on a basis for a sentence less than death," including "any of the diverse frailties of human kind." (Doc. 84-14 at 56) (quotations and citations omitted).

Ms. Wilson, citing the 1989 ABA Guidelines applicable in death penalty cases at that time, acknowledged in the motion that counsel must direct an investigator to "interview people with knowledge of all aspects of Marcus Bernard Williams' background" and that an investigator is "*essential* to obtaining documentary evidence and discovering mitigating information." (Doc. 84-14 at 56) (emphasis added). Ms Wilson also admitted in that motion that counsel at that point—about *seven months after her appointment* to represent Mr. Williams on November 26, 1996—had not conducted an "adequate investigation into critical matters relevant to guilt, level of culpability and appropriate punishment." (Doc. 84-14 & 84-17). She stated in the motion that a "*constitutionally sufficient investigation* into these aspects of the life and character of [Mr. Williams] will *require* … the services of an investigator to assist in the identification of potential witnesses, and a *thorough investigation into [his] past* …." (Doc. 84-14 at 57) (emphasis added). And Ms. Wilson tellingly admitted in the motion that "*counsel would be remiss and constitutionally ineffective if she did not conduct a thorough investigation of all aspects of Marcus Bernard Williams' case*." (Doc. 84-14 at 54-58) (emphasis added).

And the trial court granted Mr. Wilson's motion and awarded counsel $1,500.00 to hire an investigator to assist with a thorough mitigation investigation for the penalty phase of Mr. Williams' trial. The trial judge's order granting this relief was "conditioned upon the defendant's attorney providing

to the Court the name of said investigator to be used and the costs of services to be provided for a determination of reasonableness." (Docs. 84-51 at 42, 73 & 91 at 35). As the court will discuss thoroughly *infra*, counsel failed to use those funds to hire an investigator to assist with mitigation or for any other mitigation efforts.

So, Ms. Wilson and Mr. Funderburg knew and acknowledged that a mitigation investigation into Mr. Williams' background and the penalty phase would play a vital role in their ability to effectively represent him and in fact obtained court-ordered funds to assist counsel in that mitigation investigation. But, as discussed thoroughly *infra*, instead of focusing on the penalty phase of the trial and conducting a thorough and adequate mitigation investigation into Mr. Williams' background, counsel unreasonably conducted virtually no mitigation efforts in this case.

b. Counsel Knew Mr. Williams Wanted Help for His Sexual Crime

Counsel also knew that Mr. Williams' crime for which he was on trial for his life involved a rape and murder; that eighteen days after the rape and murder of Ms. Rowell, Mr. Williams broke into Ms. Turner's home and attempted to rape her; and that, at the time he confessed to these sexual crimes, Mr. Williams wrote in his statement to law enforcement that "*I have a problem and I want help*." (Doc. 84-11 at 39).

Mr. Williams' counsel, knowing the importance of a thorough mitigation investigation for the penalty phase, would have to explain to the jury how Mr. Williams came to be on trial for his life for committing the rape and murder. *See Ala. Capital Def. Trial Manual*, at 3 ("counsel will be faced with giving an account of how the defendant came to be on trial for life"). Given the sexual nature of Mr. Williams' crime and his statements to investigators regarding his "problem" in committing sexual crimes, reasonable counsel would have thoroughly explored *why* Mr. Williams stated that he had a "problem" that led him to commit a sexual offense; what was the problem; and why he felt that he needed help. When asked at the evidentiary hearing "Given the sexual nature of the offense, would a full psychological evaluation have been warranted?" Mr. Funderburg stated "That, I don't know." (Doc. 91 at 48). But a reasonable attorney would have at least known that the sexual nature of the crime and Mr. Williams' plea for help for his conduct warranted some investigation into that issue.

That reasonable investigation would involve *at the least* questioning Mr. Williams *thoroughly* about his prior sexual history, including why he felt that he had a problem committing sexual crimes; at what age he became sexually active; whether he had been exposed to any deviant sexual actions as a child; whether he had been the victim of any improper sexual contact as a child; and whether he had a history of sexual abuse in his family. To understand how Mr. Williams ended up committing such a heinous sexual crime and then explain to the jury

any mitigating factors they should consider against the aggravating factor involving a murder in the commission of a sexual crime, reasonable counsel would have thoroughly inquired into Mr. Williams' background for any explanation for his confessed "problem" with sexual crimes.

But, as discussed in detail *infra*, Mr. Williams' counsel failed to thoroughly question Mr. Williams or any of his family members regarding any aspect of his background. Counsel did not ask Mr. Williams, his family, or friends a single specific or even general question about Mr. Williams' prior sexual abuse, sexual history or about any sexual abuse history in the family. That failure was unreasonable given what counsel knew about the sexual nature of Mr. Williams' crime and his statement regarding wanting help for his actions.

c. Counsel Knew Alcohol and Marijuana Contributed Greatly to Mr. Williams' Crime

Counsel also knew that Mr. Williams' crime involved his abuse of alcohol and marijuana. *See* (Doc. 84-11 at 39). Mr. Williams' confessed to law enforcement that "I have let drugs, alchohol [sic], and sex ruin my life." (Doc. 84-11 at 39). Mr. Williams stated in another written confession that "I have an alchohol [sic] and drug problem"; that "too much alchohol [sic] and drugs controled [sic] my actions"; and that he wanted help for his alcohol and drug issues. (Doc. 84-6 at 25).

And Mr. Funderburg testified at the evidentiary hearing that "I think the peg we held our hat on the most was the fact that he had been drinking quite a bit[;] I believe he had smoked pot most of the day or part of the day." (Doc. 91 at 75). Mr. Funderburg also testified that "the mitigation factors" counsel presented involved Mr. Williams not being "in his right mind" because of "the alcohol and marijuana." (Doc. 91 at 232).

In fact, in her opening statement for the penalty phase, Ms. Wilson told the jury that Mr. Williams had been "drinking and doing drugs that day"; that he "admitted he had been out drugging that day"; and "but for [Mr. Williams'] drinking and drugging, none of us would be here today." (Doc. 84-29 at 13). She specifically asked the jury to take into consideration as a mitigating factor that Mr. Williams had been drinking and doing drugs the day of the rape and murder. (Doc. 84-29 at 15).

So, counsel knew that alcohol and drugs played a significant role in Mr. Williams' crime and actually wanted the jury to consider this fact as a mitigating factor. Reasonable counsel with this knowledge would have thoroughly investigated Mr. Williams' background for any mitigation factors explaining *why* Mr. Williams was under the influence of alcohol and marijuana on the day of the murder. *See Rompilla v. Beard*, 545 U.S. 374, 382 (2005) (finding deficient performance and prejudice where counsel knew from police reports that Rompilla had been drinking heavily at the time of the offense and a mental health expert reported Rompilla's alcohol

issues, but counsel "did not look for evidence of a history of dependence on alcohol that might have extenuating significance").

To explain how Mr. Williams ended up raping and murdering a woman while heavily under the influence of alcohol and drugs, reasonable counsel would have thoroughly questioned Mr. Williams and his family about what age Mr. Williams began abusing alcohol and drugs; his history of abusing alcohol and drugs; and any history of alcoholism or drug abuse in his family. But, as the court will explain in detail *infra*, Mr. Williams' counsel failed to thoroughly investigate Mr. Williams' background regarding his alcohol and drug issues—the very thing that counsel sought to present as a mitigation factor. That failure was unreasonable.

2. What Counsel Failed To Do

Under the prevailing professional norms in 1999, Mr. Williams' counsel had a constitutional duty to conduct a thorough investigation into his background. *See Williams*, 529 U.S. at 396. According to Mr. Funderburg's testimony at the evidentiary hearing, Ms. Wilson assumed the primary responsibility for the penalty phase of Mr. Williams' trial and that his role in the guilt and penalty phase "would have been more of experts." (Doc. 91 at 17). Mr. Funderburg testified that he subpoenaed some records for and gave the closing statement in the penalty phase, but Ms. Wilson filed the motion for a mitigation investigator and conducted the witness examinations of Charlene and

Eloise Williams, the only two witnesses called during the penalty phase. And, Mr. Funderburg testified that "Tommie was primarily responsible for mitigation, talking to fact witnesses, local witnesses, [and] family members. . . ." (Doc. 91 at 17-18, 58).

And in her opening statement at the penalty phase of Mr. Williams' trial, Ms. Wilson told the jury that "any life events that influence a person are factors for your consideration" in mitigation. (Doc. 84-29 at 13). Yet, neither she nor Mr. Funderburg conducted a *thorough* investigation into Mr. Williams' background to discover those specific life events that negatively influenced his life. *See Wiggins*, 539 U.S. at 526 ("Though [counsel] told the jury it would "hear that Kevin Wiggins had a difficult life," counsel never "followed up on that suggestion with details of Wiggins' history.").

In fact, Mr. Funderburg in his closing statement at the penalty phase, after counsel called only two family members to testify very scarcely about Mr. Williams' background, told the jury "I don't know what makes a person do certain things. I don't know what made Marcus Williams do this in this case." (Doc. 84-29 at 41). Mr. Funderburg could not offer powerful mitigating circumstances to explain Mr. Williams' actions because counsel failed to thoroughly investigate Mr. Williams' background to discover any such mitigation evidence. Counsel failed to discover important mitigating factors that could give the jury some explanation of how Mr. Williams ended up on trial for his life. Counsel's mitigation efforts were minimal and deficient.

a. Counsel failed to timely begin any mitigation efforts or collect documentary evidence on Mr. Williams

Even though counsel knew that the penalty phase of the trial was pivotal to Mr. Williams' defense, counsel did not *timely* begin any mitigation efforts or request documentary evidence regarding Mr. Williams' background. The Supreme Court has endorsed the 1989 ABA Guidelines applicable in death penalty cases as "well-defined norms" for purposes of determining when counsel's performance is objectively unreasonable. *See Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (finding that counsel's conduct "fell short of the standards for capital defense work articulated by the American Bar Association (ABA)—standards to which we long have referred to as 'guides to determining what is reasonable'"). Those Guidelines require that counsel begin independent investigations relating to the penalty phase "immediately upon counsel's entry into the case and should be pursued expeditiously." 1989 ABA Guidelines at 11.4.1(A); *see also Raheem v. GDCP Warden*, 995 F.3d 895, 910 (11th Cir. 2021) (finding counsel not deficient where defense counsel "quickly began investigating Raheem's background and mental health" upon their appointment as counsel in 1999).

The record in Mr. Williams' case shows that counsel did not conduct a thorough investigation, much less begin any type of mitigation efforts expeditiously. The trial court appointed Ms. Wilson

on November 26, 1996 and Mr. Funderburg on May 28, 1997. (Docs. 84-17 at 3 & 84-1 at 54). The trial court originally set Mr. Williams' trial to begin February 9, 1998, but continued it until November 17, 1998 at counsels' request just about a week before the original trial date. (Docs. 84-10 at 82 & 84-11 at 56). The trial that began November 17, 1998 ended in a mistrial because of an insufficient number of qualified jurors. (Docs. 84-16 at 28 & 91 at 25). Mr. Williams' second trial began on February 22, 1999, with the penalty phase starting on February 25, 1999. (Doc. 84-1 at 67).

Mr. Funderburg testified that when he joined the case in May 1997, Ms. Wilson did not have a "plan for the penalty phase of the trial" and had conducted no mitigation investigation. (Doc. 91 at 16). So, for the six months from November 1996 until May 1997, Ms. Wilson failed to begin any type of penalty phase preparation. As of Ms. Wilson's filing of her motion for funds for a mitigation investigator on June 4, 1997, about *seven months* after her appointment in this case, counsel admitted that she had not conducted an "adequate investigation" regarding mitigation. (Doc. 91 at 34).

Mr. Funderburg also testified that as of August 26, 1997, when he completed the "Defense Attorney Information" form for Mr. Williams' pre-trial competency evaluation at Taylor Hardin, he had not reached out to any of Mr. Williams family or friends "to try to get information about Marcus' background." (Doc. 91 at 42). So, between May 1997 and August 1997, Mr. Funderburg conducted no

mitigation investigation. And in a letter dated February 2, 1998 to Ms. Wilson, which was only a week before the initial February 1998 trial setting and about the time counsel requested a continuance of the trial, Mr. Funderburg wrote that "there is still much work to be done in preparing the defense." (Doc. 91 at 36).

And at the time of Mr. Funderburg's letter to Ms. Wilson on February 2, 1998, counsel had not requested any school, medical, or Job Corp records for Mr. Williams. A thorough mitigation investigation "must include obtaining all medical, mental health, school, employment and other records that relate to the client." *See Ala. Capital Def. Trial Manual*, at 589 (3d ed. 1997); *see also Raheem v. GDCP Warden*, 995 F.3d 895, 910 (11 th Cir. 2021) (finding counsel not deficient where they "tried to get all records [they] could from [Raheem's] educational past, his medical past, and his counseling past," in addition to his prison records; [they] got every kind of record [they] could think of").

In fact, the only documentary records counsel actually requested were Mr. Williams' Job Corp records. Even though Mr. Williams' mother Charlene called Mr. Funderburg's office on November 12, 1998 with information to request the Job Corp records from Earl C. Clements, 2302 Hwy 60 East, Morganfield, Kentucky 42437 (doc. 84-11 at 12), Mr. Funderburg waited *three months* to request those records from the U.S. Department of Labor on February 17, 1999—only *five days* prior to the start of Mr. Williams' trial on February 22, 1999. (Doc. 84-

1 at 70); *see also Williams v. Taylor*, 529 U.S. 362, 395 (2000) (finding counsel was deficient when he did not begin to prepare for the sentencing phase until a week before trial).

And even Mr. Funderburg characterized the timing of his request for the Job Corp records as "Late, late in relation to – short notice before trial." (Doc. 91 at 39). He gave no explanation as to why he waited until right before the February 1999 trial setting to request those records or why he was the one requesting those records given his testimony at the hearing that Ms. Wilson was the primary counsel on the mitigation efforts. And, Mr. Funderburg admitted that he failed to request the Job Corp records before the November 1998 trial ended in a mistrial. (Doc. 91 at 39). Had the November 1998 trial not ended in a mistrial, Mr. Funderburg would have proceeded through that trial without having sought any documentary records regarding Mr. Williams' background. Mr. Funderburg also failed to explain why he failed to request any other documentary evidence for Mr. Williams' case.

No reasonable attorney who knows that the penalty phase of the trial would be paramount to Mr. Williams' defense would wait until five days before trial to request Job Corp documents, especially when Mr. Williams' crime occurred only ten days after he was terminated from the Job Corp on October 27, 1996. *See* (Doc. 84-17 at 65). But counsel failed to obtain those records in time to utilize any information in them for mitigation purposes. And

counsel failed to even request any other type of documentary evidence on Mr. Williams.

And most telling about the *untimeliness* of counsels' minimal efforts regarding mitigation involved the character letters for Mr. Williams provided to the trial judge for sentencing *after* the penalty phase of the trial before the jury. *See* (Doc. 84-21 at 1-6). Eloise Williams testified at the evidentiary hearing that, *on the day of her testimony at the penalty phase*, counsel asked Eloise to "get[] people to write letters" as character references for Mr. Williams. (Doc. 92 at 137). And two of those letters are dated April 4, 1999, which was after the penalty phase of the trial and before the sentencing before the trial court on April 6, 1999. (Doc. 84-21 at 1-6). Eloise testified that she turned those letters over to counsel, and Mr. Funderburg offered those statements at the sentencing as attachments to the pre-sentence investigation report. (Docs. 92 at 138 & 84-29 at 66).

No reasonable attorney would wait until literally the day of the penalty phase of the trial to get a family member with whom counsel has hardly communicated to pull together character letters for Mr. Williams at the last minute. Counsel did not bother to solicit names from Eloise Williams or any other family member and then interview those people themselves; instead they waited until literally the last minute to get someone else to do what they should have done long before the day of the penalty phase of the trial. Seemingly, getting those character letters for Mr. Williams seemed like an afterthought

to counsel. And given counsels' minimal effort regarding mitigation, the entire penalty phase of Mr. Williams' trial seemed to be the least of counsel's concern.

b. Counsel failed to utilize mitigation investigation funds or hire a mitigation investigator

Most telling regarding the *lack* of counsels' mitigation efforts was the fact that they failed to utilize any of the $1,500 awarded by the trial court for a mitigation investigation. Counsel indicated in the motion for mitigation investigation funds that they had a constitutional duty to conduct a thorough mitigation investigation; received $1,500 from the trial court to conduct a mitigation investigation; but failed to utilize those funds to conduct a thorough mitigation investigation or to hire anyone to assist with a mitigation investigation.

Ms. Wilson's case file contained a letter addressed to Billy Stephens dated October 29, 1997, indicating that Ms. Wilson wanted Mr. Stephens to help with a mitigation investigation.[6] (Docs. 84-26 at 68 & 91 at 101). But Mr. Stephens testified at the evidentiary hearing that he did not receive the letter, never met with Ms. Wilson, and did not assist

[6] Ms. Wilson's fee declaration also contains an entry dated "1-29-97" for "Letter to Billy Stephens RE: Investigator," but the court can find no letter with that date addressed to Mr. Stephens in Ms. Wilson's case files. *See* (Doc. 84-17 at 3).

counsel in any way with mitigation efforts in Mr. Williams' case. (Doc. 91 at 100-103).

Mr. Funderburg testified that "I think Tommie hired another investigator that did some interviews for her …. It would be in her billing, I don't know." (Doc. 91 at 92). But the court can find no other evidence in the record to support that Ms. Wilson contacted any other investigator to assist with mitigation efforts. In fact, the court can find no filing with the trial court in which counsel provided the name of any investigator used for mitigation efforts or the costs of services provided by an investigator, as required by the trial court's order awarding those funds. *See* (Doc. 84-51 at 42, 73). And the court can find no records in either Ms. Wilson or Mr. Fundeburg's trial counsel files or fee declarations submitted to the trial court to show that either counsel used the court-ordered funds to hire a mitigation investigator or used the funds to conduct any type of meaningful mitigation investigation.

Instead of using the court-awarded money to conduct a thorough mitigation investigation that they knew and acknowledged was paramount to Mr. Williams' case, Mr. Funderburg testified at the evidentiary hearing that he used $400 of the $1,500 to serve subpoenas on potential witnesses that investigators previously identified as suspects in the crime—not to subpoena family members or friends who could testify about Mr. Williams' background. (Docs. 84-6 at 4-6, 84-11 at 43-44 & 91 at 36-38). And Mr. Funderburg admitted at the evidentiary hearing

that he did not interview any of those subpoenaed witnesses for mitigation purposes. (Doc. 91 at 37).

The other $1,100 of those court-ordered mitigation funds were unused and not reported on either counsel's fee declaration. Mr. Funderburg testified at the evidentiary hearing that he did not expend any of the court allocated funds on a mitigation investigation. *See* (Docs. 84-51 at 42, 73 & 91 at 35, 92). And nothing in Ms. Wilson's counsel files or fee declaration indicates that she used any of those funds on a mitigation investigation.

Remarkably, instead of utilizing the court-awarded funds for any mitigation efforts, Mr. Funderburg filed a "Motion for Extraordinary Expenses" on December 9, 1998, *after* Mr. Williams' November 1998 trial ended in a mistrial, requesting additional funds for an independent forensic testing laboratory to re-test Mr. Williams' DNA samples. (Docs. 84-1 at 43 & 91 at 24-25). The trial judge granted the motion and awarded counsel $2,500 for the DNA re-testing. (Doc. 91 at 25). Counsel did not even bother to ask for these additional funds for DNA re-testing *before* his first trial ended in a mistrial. But most shocking is that counsel focused on securing additional funds related to the *guilt* phase although Mr. Williams had confessed to the crime, but counsel failed to utilize existing mitigation funds for the *penalty* phase that the trial court had already awarded to conduct any type of mitigation investigation.

Instead of counsel focusing on the penalty phase of Mr. Williams' trial given his three statements admitting his guilt, Mr. Funderburg spent two months right before the February 22, 1999 trial arranging for Reliagene to conduct independent DNA analysis and awaiting the results of the re-testing. (Doc. 91 at 25-28). In the end, those efforts merely confirmed that the DNA from the crime scene matched that of Mr. Williams. (Docs. 84-1 at 1-23 & 91 at 27). Counsels' focus on the guilt phase so late in the game when they knew Mr. Williams' confessions would be admitted into evidence was unreasonable. No reasonable counsel, knowing the importance of the penalty phase because of their client's confessions and existing DNA evidence linking their client to the crime, would fail to spend court-ordered mitigation funds but instead ask for more funds to re-test DNA samples *after* the first trial ended in a mistrial. In fact, choosing to forgo spending any court-ordered mitigation funds and instead focusing on re-testing DNA at that stage lacked any reasonable basis.

Counsel's failure to utilize the court-ordered mitigation funds to conduct a thorough investigation into Mr. Williams' background was unreasonable in light of their acknowledgment of the importance of the penalty phase in Mr. Williams' case. This case does not involve counsel who thought a thorough mitigation investigation was not necessary and made a strategic decision to not conduct one or end mitigation efforts at a certain point as futile. Counsel in this case asked for funds to hire a mitigation investigator, and the court granted that

request. Nothing in the record suggests that counsel made a strategic decision to not use those court-ordered funds to conduct a mitigation investigation. They just did not follow through.

To the contrary, the record shows that counsel knew a mitigation investigation was paramount to Mr. Williams' case and wanted to conduct a thorough mitigation investigation. The problem is that counsel's minimal efforts to conduct a thorough mitigation investigation fell way short of reasonable. Counsel *attempted* to secure a mitigation investigator but failed to follow through with efforts to hire an investigator to assist with mitigation. No reasonable counsel would secure court funds to hire a mitigation investigator; try to secure a mitigation investigator; drop those efforts for no legitimate, strategic reason; and instead focus on re-testing the DNA for the guilt phase when the defendant confessed to the crime.

As Ms. Wilson stated in the motion for mitigation funds, counsel knew they would be "constitutionally ineffective" if they did not conduct a *thorough* mitigation investigation into Mr. Williams' background and needed the help of an investigator to conduct interviews. Yet, counsel failed to use those mitigation funds to hire an investigator to assist them with mitigation efforts and failed to themselves conduct a thorough mitigation investigation into any area of Mr. Williams' background. Reasonable counsel would not seek mitigation funds knowing the importance of a thorough background investigation and then fail to use any of those funds to conduct

any type of mitigation efforts themselves or hire a mitigation investigator to assist them. Counsels failed efforts regarding using the court-ordered mitigation funds to hire a mitigation investigator were unreasonable and deficient and in their own words "constitutionally ineffective."

c. Failure to adequately interview Mr. Williams about his background for mitigation

A thorough, reasonable mitigation investigation would start with counsel thoroughly interviewing their client and collecting background information from him. *See Ala. Capital Def. Trial Manual*, at 588 (the penalty phase investigation "must start at the first client interview"). Based on the professional standards in both the 1989 ABA Guidelines and the *Alabama Capital Defense Trial Manual*, Mr. Williams' counsel had a "duty to collect information pertaining to 'family and social history (including physical, sexual, or emotional abuse,' and to 'obtain names of persons or sources to verify, corroborate, explain and expand upon [the] information obtained.'" *See Williams v. Allen*, 542 F.3d 1326, 1339 (11th Cir. 2008) (quoting 1989 ABA Guidelines 11.4.1(D)). As the *Alabama Capital Defense Trial Manual* also explains, because the "stakes are so high in a capital case," counsel must spend "a great deal of time with the client" so he will "feel very comfortable and competent during what will be a very difficult experience." *Ala. Capital Def. Trial Manual*, at 3 (3d ed. 1997).

But, Mr. Williams' counsel spent very minimal time themselves interviewing Mr. Williams regarding any mitigation efforts or in preparing for the penalty phase of Mr. Williams' trial. Mr. Williams testified that counsel met with him "about a half dozen times," each time from "fifteen to thirty minutes." (Doc. 91 at 104-105). Mr. Williams stated that those meetings were generally in the courthouse before or after court settings and that none of those meetings were at the jail. (*Id*. at 105).

Mr. Williams testified that he had "hardly any" relationship with Ms. Wilson because "she didn't really talk to me much." (Doc. 91 at 105). Ms. Wilson's fee declaration corroborates this claim. As the primary counsel responsible for the penalty phase of Mr. Williams' trial, Ms. Wilson's fee declaration submitted to the trial court reflects that she spent very little time with Mr. Williams at all, much less for the penalty phase.[7]

Ms. Wilson's fee declaration contains just a few entries indicating that she spent any time with Mr. Williams. *See* (Doc. 84-17 at 2-10). Ms. Wilson noted in her fee declaration a 30 minute conference with Mr. Williams on May 28, 1997 regarding "charges, defenses, discovery" on the same day as Mr.

[7] Ms. Wilson submitted her fee declaration to the trial court on June 24, 1999, after Mr. Williams' guilt and penalty phases of his trial on February 22-25, 1999 and sentencing by the trial judge on April 6, 1999. *See* (Doc. 84-17 at 2-10).

Williams' arraignment.[8] The only other entry prior to Mr. Williams' trial on February 22-25, 1999 regarding meeting with Mr. Williams was for August 3, 1997, where Ms. Wilson noted that she had an "*Office Conference* with Co-Counsel & Defendant" for two hours. (Doc. 84-17 at 5) (emphasis added). Curiously, Mr. Funderburg's fee declaration does not contain an entry for August 3, 1997 and does not indicate that he met with Mr. Williams or Ms. Wilson on that day. *See* (Doc. 84-1 at 68). And the court is unsure where Ms. Wilson's August 3, 1997 meeting with Mr. Williams occurred because he was incarcerated at that time and could not meet at Ms. Wilson's "office."

Even though Mr. Williams wrote Ms. Wilson a letter dated February 28, 1997 asking her to meet with him about his background, without interruptions and "without my family being around," Ms. Wilson's records indicate that she possibly met with Mr. Williams only two times as discussed above for at most 2.5 hours prior to his trial that began on February 22, 1999. *See* (Docs. 84-26 at 86 & 91 at 109). So for the two years between his February 1997 letter asking to meet with counsel to discuss his background and his February 1999 trial, Ms. Wilson's records indicate she met with Mr. Williams only twice. And according to Ms. Wilson's fee declaration, she had no meetings or contact with Mr.

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[8] Mr. Funderburg indicated in his fee declaration that Mr. Williams' arraignment occurred June 10, 1997, and that he spent .25 hours on May 28, 1997 for "Receipt and review of notice of appointment." *See* (Doc. 84-1 at 67).

Williams for almost a year and a six months between the August 3, 1997 meeting and his trial date on February 22, 1999.

Although Ms. Wilson's legal secretary Tina Watson testified that "it is normal practice for [all documents about this case] to be kept in the file," she could not say for sure that all of Ms. Wilson's notes were in her case file submitted to the court. (Doc. 91 at 11-14). And the State argues that "[b]ecause Tommie Wilson is deceased, it is simply impossible to determine how much time she actually spent 'preparing for the sentencing phase.'" (Doc. 89 at 23). But a reasonable attorney would document and include in her fee declaration submitted to the trial court at least *all* time spent with a defendant in a capital murder trial. The fact that Ms. Wilson included only a few cursory entries in her fee declaration regarding specifically spending time with Mr. Williams supports his statements regarding the minimal amount of time Ms. Wilson devoted to talking with him and investigating Mr. Williams' background for mitigating evidence.

No reasonable counsel in a death penalty case who is primarily responsible for the penalty phase would meet with the defendant only twice in two years when she knows that a thorough mitigation investigation is vital to the case. Mr. Williams was willing to discuss his background with Ms. Wilson, but according to Ms. Wilson's fee declaration she failed to spend any meaningful time with him to discover mitigation evidence in his background.

Ms. Wilson's case file contains no notes regarding her meetings with Mr. Williams or any notes regarding any mitigation investigation efforts with Mr. Williams. Ms. Wilson's minimal contact with Mr. Williams was especially unreasonable given her role as the primary counsel responsible for the penalty phase of his trial and the paramount importance of Mr. Williams' background as a potential source of mitigation evidence.

Although Mr. Funderburg claimed Ms. Wilson was primarily responsible for the penalty phase of the trial, his fee declaration indicates that he spent more time with Mr. Williams than did Ms. Wilson. *See* (Doc. 84-1 at 67-71). And Mr. Williams testified that he had more contact with Mr. Funderburg than he did with Ms. Wilson. (Doc. 91 at 106). According to Mr. Funderburg's fee declaration, he met with Mr. Williams only five times and spent at most only about eight hours total meeting with him from May 1997 when the court appointed Mr. Funderburg until Mr. Williams' trial in February 1999. *See* (Doc. 84-1 at 67-70).

Mr. Funderburg testified at the hearing that he met with Mr. Williams about "nine or ten times" because he *assumed* that the entries in his fee declaration for "Travel to and from Ashville" would be to meet with Mr. Williams. (Doc. 91 at 50). But, in four of the only five entries in his fee declaration where Mr. Funderburg indicates that he actually met with Mr. Williams, he also included a 1.0 hour entry for "Travel to and from Ashville" on that same date. In most of the "Travel to and from Ashville"

entries where he did *not* include a meeting with Mr. Williams, Mr. Funderburg included other things that he did that day, including "Research and Trial Preparation" and "Receipt/ review of case action summary." The April 6, 1999 entry where Mr. Funderburg included only "Travel to and from Ashville" corresponded with the date of Mr. Williams' sentencing hearing. (Doc. 84-1 at 67-70). And a reasonable attorney would include in his fee declaration *all* the time he actually spent with the defendant, especially in a death penalty case. So, Mr. Funderburg's fee declaration shows that he met with Mr. Williams about five times from June 1997 until his trial in February 1999 for a total of about 8 hours.

And Mr. Funderburg noted that 4.5 hours of those 8 hours were for a "Meeting with District Attorney *and* Defendant," so he presumably met with Mr. Williams *alone* for less than 4.5 hours on that date. *See* (Doc. 84-1 at 68) (emphasis added).

And 1.25 of those 8 hours included Mr. Funderburg meeting with Mr. Williams on August 26, 1997 regarding "psychological forms" for the Taylor Hardin evaluation for Mr. Williams' competency to stand trial (*Id*.) But those forms were only two pages and contained no background mitigation information on Mr. Williams because counsel had conducted no mitigation investigation into Mr. Williams' background at that point. (Doc. 84-15 at 22-25). In fact, question 3 of that form asked counsel to indicate "information from Relatives, Friends, etc. that would Substantiate Defendant's

Mental Condition" but Mr. Funderburg wrote in response that "Defense Counsel has been unable to consult with relatives and friends concerning this issue." *Id*. So, Mr. Funderburg presumably did not glean any background information from Mr. Williams during that 1.25 hours meeting with him regarding those forms.

And although Mr. Funderburg does not specify about what he met with Mr. Williams during the rest of his meetings, some of those meetings presumably were about the guilt phase of the trial because Mr. Funderburg testified that his primary responsibility was "forensics and DNA and kind of the technical issues." *See* (Doc. 91 at 57).

So, Mr. Funderburg most likely spent less than eight hours actually meeting with Mr. Williams in a meaningful way to investigate his background for mitigation. That minimal amount of time spent with Mr. Williams was inadequate to thoroughly interview and question Mr. Williams about his background for possible mitigation. *See Daniel v. Comm'r, Ala. Dep't Corr.*, 822 F.3d 1248, 1264 (11th Cir. 2016) (finding deficient performance when no competent attorney in 2003 would have failed to conduct timely and thorough background interviews with the defendant and his immediate family members when they were available to counsel).

Not only did Mr. Funderburg spend very minimal time with his client, Mr. Williams testified that counsel posed to him "just general questions" about his background, including about "parents,

brothers, sisters, that sort of deal, school," but did not ask anything specific about his family history or whether he had been sexually, physically, or emotionally abused in his childhood. (Doc. 91 at 106). Mr. Funderburg admitted at the hearing that he asked Mr. Williams only general questions about his background. (Doc. 91 at 70). Mr. Funderburg testified that he did not ask Mr. Williams any specific questions regarding his past sexual history, alcohol use, or family background. Instead, Mr. Funderburg testified that his practice was to ask only "general questions" like "what kind of childhood did you have, where did you grow up, where did you live, how were you treated, were there problems." (Doc. 91 at 70). Mr. Funderburg indicated that he understood the importance of physical and sexual abuse as "potential" mitigation evidence, but that he did not try to get that information by asking Mr. Williams "a litmus test of specific questions." (*Id*. at 69).

Counsel's practice of only asking vague, general questions did not satisfy counsel's duty to thoroughly interview Mr. Williams about his background and was unreasonable in light of the professional norms at the time of Mr. Williams' trial. The 1989 ABA Guidelines specifically required counsel to "[c]ollect information relevant to the sentencing phase of trial," including information about his medical history and any "alcohol and drug use" and "family and social history (including physical, sexual or emotional abuse)." 1989 ABA Guidelines 11.4.1(D).

The *Alabama Capital Defense Trial Manual*, of which Mr. Funderburg had a copy, provides a "list of questions relating to your client's life history[,]" but cautions that the list is "not exhaustive" and that counsel may need to seek "additional background information and data" not specifically listed in the questions. *Ala. Criminal Def. Trial Manual*, at 55. The *Manual's* list of questions instructs counsel to ask about "the name, age and address (where available) of every member of the client's family or household"; the "physical conditions in which the family lived" and whether the client had "adequate food" at home; "any moves made by the client's family" and the reasons for those moves; whether the client or his siblings experienced "sexual abuse (whether or not associated with discipline) or harassment, or aberrant sexual modeling"; "any major disruptions of or trauma to any member of the household;" whether the client "demonstrate[d] any behavioral difficulties"; whether the client "has ingested quantities of alcohol or drugs in such a way as to suggest substance abuse"; and whether the client has any "family history of mental illness, criminal conduct, or alcohol or drug use." *Ala. Capital Def. Trial Manual*, at 1, 58-61, 64, 72, 68, 78-80.

Mr. Funderburg knew that Mr. Williams's crime involved a sexual offense; that Mr. Williams admitted to police that he had a problem committing sexual crimes and wanted help; that Mr. Williams admittedly had an alcohol and drug problem and wanted help; and that alcohol and drugs contributed greatly to the Mr. Williams' crime. Yet, counsel

failed to ask Mr. Williams any specific questions about his sexual history or alcohol and drug history as required by the 1989 ABA Guidelines and the *Alabama Capital Defense Manual*. A reasonable investigation would involve *at the least* counsel questioning Mr. Williams *thoroughly* about his prior sexual history, including why he felt that he had a problem committing sexual crimes; at what age he became sexually active; whether he had been exposed to any deviant sexual actions as a child; whether he had been the victim of any improper sexual contact as a child; and whether he had a history of sexual abuse in his family. But counsel did not even broach the subject of Mr. Williams' sexual history or why he thought he had a problem committing sexual crimes. *See Johnson*, 643 F.3d at 907 (finding deficient performance where trial counsel did not specifically ask Johnson if he had been abused by his father, mother, grandparent, or anyone else; counsel "did not broach the subject."). That failure was unreasonable.

Mr. Funderburg's practice of asking only general questions of defendants in death penalty cases was especially unreasonable given what counsel knew about Mr. Williams and the specifics of his sexual crime and his alcohol abuse on the day of the crime. *See Correll v. Ryan*, 539 F.3d 938, 945 (9th Cir. 2008) (The Court found deficient performance for failure to investigate for mitigating evidence where counsel "asked no such specific questions" about the defendant's "drug abuse, head injury, psychiatric history, or family dysfunction …. Thus, his failure to gather mitigating information did not result from its

unavailability; it resulted from counsel's complete failure to ask any relevant questions."); *McNeill v. Branker*, 601 F. Supp. 2d 694, 717 (E.D.N.C. 2009) (finding trial counsel deficient when he "made only minimal effort to investigate potential mitigating evidence" where his "primary approach to learning about the petitioner's character, background, and upbringing was to ask petitioner and his parents their impression on the subject").

Had counsel simply spent adequate time with Mr. Williams, developed a rapport with him to gain his trust, and specifically asked Mr. Williams about his sexual history, counsel most likely would have discovered the same mitigating evidence uncovered by Mr. Williams' Rule 32 counsel "Karl," who Mr. Williams first told about his sexual abuse by Mario. *See Wiggins*, 529 U.S. at 525 ("Had counsel investigated further, they might well have discovered the sexual abuse later revealed during state post conviction proceedings.").

Mr. Williams testified that he did not tell Karl about the sexual abuse the first time he asked about that issue, but after Karl developed a rapport with Mr. Williams and specifically asked him about his past sexual abuse, he then felt comfortable telling Karl about his past sexual abuse by Mario. (Doc. 91 at 122). Mr. Williams testified at the evidentiary hearing that "Karl was more accessible and more like he wanted to help, interested in what I had to say. Whereas my trial attorneys already had their plan made out so, you know, there was – they had nothing they wanted to talk to me about or wanted

to hear from me about, that's the way I felt." (Doc. 91 at 130).

Likewise, had Ms. Wilson and Mr. Funderburg spent adequate time with Mr. Williams, developed a rapport with him as did Karl, and asked Mr. Williams specific questions relevant to mitigation, Mr. Williams would have told trial counsel that Mario, who Mr. Williams believed was "ten or twelve years older" than him, sexually abused him about three or four times between the ages of four and six; that he felt shame and depression about Mario's sexual abuse of him; that he had thoughts of hurting and killing himself after the sexual abuse; that Mr. Williams began having sexual intercourse at the age of ten; that when he was around ten years old he "was allowed to watch [his eighteen-year-old cousin Brian Williams] have sex as a way of showing me how to do it with a woman"; and that his mother had men in her bed when Mr. Williams was sleeping with her. (Doc. 91 at 118-134); *see Daniel*, 822 F.3d at 1265 (finding deficient performance and prejudice where the jury never heard about Daniel's physical, emotional, or sexual abuse "that trial counsel could have gotten from timely and meaningful interviews with Mr. Daniels.").

And, had counsel asked Mr. Williams specific questions about his family background as called for by the prevailing professional norms in 1999, Mr. Williams also would have told them about the domestic violence he witnessed at the age of twelve between his mother and her boyfriend Jeff Deavers. (Doc. 117-118, 132). Mr. Williams testified at the

evidentiary hearing that his mother's relationship with Mr. Deavers was "volatile," meaning they would "get into fights, physical fights"; he saw evidence on his mother that Mr. Deavers had attacked or beaten her, including a black eye and busted lip; and when he was twelve-years-old, he saw Mr. Deavers' strike Mr. Williams' mother with his bare hands, and Mr. Williams responded by "grabb[ing] a knife and tr[ying] to stab him." (Doc. 91 at 117-118).

Mr. Funderburg claimed that he was at the "mercy of what [Mr. Williams was] willing to tell [him]." (Doc. 91 at 70). But Mr. Williams did not give information because counsel failed to even ask. And Mr. Funderburg cannot assign his constitutional duty to thoroughly investigate for mitigation to the client Mr. Williams. *See Rompilla*, 545 U.S. at 381 (Court found deficient performance and prejudice when Rompilla's "own contributions to the case were minimal" and even though he was "even actively obstructive by sending counsel on false leads."). Even if Mr. Williams was not willing to cooperate with counsel, which he was, that fact would not abrogate counsel's duty to thoroughly investigate Mr. Williams' background for mitigation. *See Blanco v. Singletary*, 943 F.2d 1477, 1502 (11th Cir. 1991) (counsel cannot "blindly follow" a client's command to not present mitigating evidence and that command does not end counsel's responsibility to conduct a reasonable mitigation investigation).

Mr. Williams' counsel unreasonably failed to ask Mr. Williams any specific questions about or *thoroughly* investigate any aspect of Mr. Williams'

background. That failure constituted deficient performance.

d. Failure to adequately investigate or interview any family members or friends for mitigation

Not only did counsel fail to adequately spend time with and interview Mr. Williams about his background, counsel also failed to adequately investigate or interview any family members or friends for possible mitigation evidence. When asked at the evidentiary hearing "How would you characterize the amount of work you did in preparation for the sentencing in the Marcus Williams case," Mr. Funderburg testified that "I would say that we tried to contact as many people as we obtained information from from [sic] Marcus' mother and his grandmother." Mr. Funderburg did not know how many people he contacted and said "whatever is in my notes." (Doc. 91 at 28). But both his and Ms. Wilson's case files are silent on the issue of a mitigation investigation and do not contain *any* notes about *any* meetings with or list of *any mitigation* witnesses.

Mr. Williams testified that counsel did not discuss with him prior to his trial any witnesses or information that counsel planned to present at the penalty phase or what aspects of his childhood or background that his counsel might argue to the jury. (Doc. 91 at 112-113). But Mr. Williams indicated that before trial his counsel asked him to give them "a list of relatives and friends that I could call as

witnesses." (Doc. 91 at 113). Mr. Williams testified that he wrote about twelve or thirteen names, including Glen Smith, Tim Cater, Marlon Bothwell, Tameka Richardson, Charlene Williams, and Eloise Williams, and others names he could not recall on a piece of paper and gave the list to counsel. (Doc. 91 at 113). But the list provided by Mr. Williams is not in Ms. Wilson or Mr. Funderbug's case files in the record. And Mr. Funderburg testified his practice was to keep all papers and documents related to a case in his file. (Doc. 91 at 96).

Counsels' files do, however, contain a *blank* form provided by the trial court on which counsel was to list all possible mitigation witnesses for the penalty phase. (Doc. 84-50 at 70-73). In fact, on September 18, 1997, the trial court provided that form to counsel and ordered that counsel "shall have the defendant fill out and complete a list of any potential witnesses in this cause who might in any way assist counsel in their defense of this case"; that counsel "retain a copy of this list for their files and investigative use"; and that counsel furnish a completed and signed copy of that list to the trial judge within fourteen days of that September 18, 1997 order. (Doc. 84-11 at 73-74). The trial court's order also indicates that the list provided to the trial judge "shall remain under seal in the office of the undersigned judge. Upon completion of the trial, the sealed list shall be made a part of the record in this cause …." (*Id.*) Ms. Wilson's fee declaration indicates that she mailed a copy of that order to Mr. Williams on September 20, 1997 "to complete and return."

(Doc. 84-17 at 6). But the only copy of that form that the court can find in the record is completely blank.

Mr. Funderburg acknowledged that the form provided by the court was blank and testified at the evidentiary hearing that he "would have produced a list independent of that form," or "we would have prepared one on our own, not necessarily using this exact form." (Doc. 91 at 30, 60). But the court can find no list of any mitigation witnesses in either counsel's files. And Mr. Funderburg admitted at the evidentiary hearing that his case file contained no list of possible mitigation witnesses. (Doc. 91 at 96). He gave no explanation for why some type of mitigation list was *not* in his or Ms. Wilson's files for Mr. Williams' case.

In fact, at sentencing, the trial judge inquired about the fact that it had not received a list of mitigation witnesses from the defendant as he had ordered. The trial judge stated at the sentencing hearing that "I think the record will reflect the Court has previously distributed to the defendant and his attorneys a list for prospective witnesses that the defendant would request be called. Quite frankly, based on that list, I don't know whether any witnesses were listed as to the sentencing phase." (Doc. 84-29 at 92).

Mr. Funderburg responded to the trial judge that "[w]e did that through statements [attached to the pre-sentence report]. [Mr. Williams] read through those and he said he wanted us to offer those and we did." (*Id.* at 93). But the jury did not see those six

written statements on behalf of Mr. Williams because counsel asked Eloise Williams *on the day of the penalty phase of the trial* to gather those statements for sentencing before the trial judge. And Mr. Funderburg did not testify that counsel talked to or interviewed any of the people who provided character references before receiving their statements from Eloise Williams. So, although Mr. Williams provided a list of possible mitigation witnesses to counsel, they failed to compile or provide a completed list of possible mitigation witnesses to the trial court as ordered. That failure was unreasonable and reflects counsel's complete lack of effort to conduct any type of mitigation investigation.

The court acknowledges that Mr. Funderburg testified that he did meet with Mr. Williams and talked about potential mitigation witnesses (doc. 91 at 47, 61) and that counsel had "contacted or tried to contact everyone that had been presented" (doc. 91 at 60). But the facts that counsel failed to compile any list of mitigation witnesses, no mitigation list is in either counsels' case files, and the trial judge questioned why counsel failed to provide to the court a list of mitigation witnesses as ordered undermine Mr. Funderburg's testimony. Reasonable counsel would have compiled a list of mitigation witnesses as ordered and provided that list to the trial court. And even if Mr. Funderburg did meet with Mr. Williams and talk about some mitigation witnesses, *talking about* some witnesses would not be enough. Counsel had a duty to *thoroughly interview or investigate*

mitigation witnesses, but they failed to fulfill that constitutional duty.

Mr. Funderburg tried to justify this failure by testifying that "[i]f I recall, we actually had an in-camera meeting with [the trial judge] without the State being involved," at which the trial judge questioned Mr. Williams about whether he had any other witnesses he wanted counsel to call as mitigation witnesses, but Mr. Williams answered "no." (Doc. 91 at 60). But the only colloquy from the trial judge that this court can find in the record took place during the actual sentencing hearing on April 6, 1999. (Doc. 84-29 at 92-93). And that colloquy occurred immediately after the trial judge questioned why counsel failed to submit a list of mitigation witnesses. (Doc. 84-29 at 92).

The responsibility to know what evidence is relevant to mitigation, investigate any family members or friends to discover that mitigation evidence, and call them as witnesses during the penalty phase of the trial was on *counsel*, not Mr. Williams. Mr. Williams' indication to the trial judge that he did not want to call any additional witnesses did not erase counsel's duty to conduct a thorough mitigation investigation *prior* to the penalty phase before the jury and the sentencing hearing before the trial judge.

In addition to the counsels' failure to compile a list of possible mitigation witnesses, both Ms. Wilson and Mr. Funderburg's fee declarations show very little time meeting with family members at all, much

less regarding mitigation. In her fee declaration, Ms. Wilson indicates that she spent at most only two hours total in conferences with "family," but her declaration does not specify which family members. And her fee declaration indicates that she reviewed on April 4, 1999 the "character witness letters," but Ms. Wilson did not actually collect those letters herself—counsel tasked Eloise Williams with collecting them. Ms. Wilson's fee declaration shows no other time investigating or interviewing Mr. Williams's family members or any other witnesses for the penalty phase of the trial. (Doc. 84-17 at 6). The minimal time that Ms. Wilson spent talking to or interviewing family members regarding Mr. Williams' background was unreasonable, especially in light of Mr. Funderburg's claims that Ms. Wilson was the one primarily responsible for any mitigation efforts for the penalty phase of Mr. Williams' trial.

And, although Mr. Funderburg testified that Ms. Wilson was primarily responsible for the penalty phase of Mr. Williams' trial, Mr. Funderburg's fee declaration submitted to the trial court showed he spent more, albeit minimal, time talking to family members and preparing for the penalty phase of the trial. *See* (Doc. 84-1 at 55-59). But Mr. Funderburg testified at the evidentiary hearing that he could not identify any entry on his fee declaration "referring to interviews of mitigation witnesses." (Doc. 91 at 29). And, at most, Mr. Funderburg spent about twelve hours on the enitre penalty phase of the trial that included two 15 minute phone calls with Charlene on August 27, 1997 and September 5, 1997; a 45 minute "meeting with Eloise" on October 23, 1997;

two short phone calls with Charlene regarding "pastoral rights" and a continuation of the trial on November 6, 1997 and January 3, 1998; a 90 minute meeting with "Defendant's family" on November 11, 1998; and two telephone conferences with "witnesses" totaling 2.5 hours on November 16, 1998 and December 14, 1999. And on March 15, 1999, *after* the penalty phase of the trial before the jury in February 1999, Mr. Funderburg researched sentencing preparation and prepared Mr. Williams's sentencing statement for the April 1999 sentencing before the trial judge. His fee declaration states "12.3 Hours at $20.00 per hour = $246 (Sentencing Phase)." (Doc. 84-1 at 55-59).

Generously interpreting Mr. Funderburg's fee declaration, he spent at most about a total of twelve hours preparing for the entire penalty phase of Mr. Williams' trial, including *minimal* contact with Mr. Williams' family. And his trial counsel file and records do not reflect any additional time spent investigating or interviewing family members or friends for mitigation purposes. Counsel had no list of mitigation witnesses in their files; no documented plan to secure mitigation evidence; and no notes from conversations with Mr. Williams, Charlene, Eloise, or any of his family members regarding his family background.

Counsel had no reasonable excuse for failing to—at the very least—compile a list of *all* of Mr. Williams family members, including all the relatives with whom Mr. Williams had lived and all of his

siblings, and reach out to them to find out about Mr. Williams' childhood background.

The 1989 Guidelines do not establish a specific number of persons that counsel should interview, and the Eleventh Circuit has rejected the idea that there is a "magic number" of witnesses an attorney must interview for mitigation. *See Alderman v. Terry*, 468 F.3d 775, 792 (11th Cir. 2006). But the Eleventh Circuit has "found deficient performance in cases where an attorney's efforts to speak with available witnesses were insufficient to formulate an accurate life profile of [the] defendant." *Williams v. Allen*, 542 F.3d 1326, 1339 (11th Cir. 2008) (alteration in original) (internal quotation marks omitted) (quoting *Jackson v. Herring*, 42 F.3d 1350, 1367 (11th Cir. 1995)).

Mr. Williams' sisters Lacharo Williams and Sharenda Williams both testified at the evidentiary hearing that they were present at the penalty phase of Mr. Williams' trial in February 1999 but that neither Mr. Funderburg nor Ms. Wilson spoke to or interviewed them about their family background either before or on the day of the penalty phase of the trial. (Docs. 91 at 153 & 92 at 211-212). LaCharo also testified at the evidentiary hearing that she was with her mother Charlene "when she was talking to [Ms. Wilson before the trial], but Ms. Wilson "didn't have any interaction with me." (Doc. 92 at 211). Both LaCharo and Sharenda testified they would have cooperated with Mr. Williams' counsel and talked to them about their family background had counsel reached out to them. (Docs. 91 at 153 & 92 at 212).

Counsels' failure to interview or investigate Mr. Williams' sisters who were available and present at the penalty phase of the trial was unreasonable. *See Cooper v. Sec'y, Dep't Of Corr.*, 646 F.3d 1328, 1351-52 (11th Cir. 2011) (finding deficient performance based on an inadequate mitigation investigation where counsel only interviewed Cooper, his mother, and a psychologist, but not other available family members).

Mr. Funderburg's case file also contains a note in his handwriting on which he wrote the names Takeisha Fomby, Barbara Powell, LaCharo Williams, and Sharenda Williams and "need excuse that their appearance was necessary in court on 2-25-99." (Doc. 84-11 at 29). Mr. Funderburg testified at the evidentiary hearing that none of the people listed on the note were called as mitigation witnesses. (Doc. 91 at 33). And Sharenda and LaCharo testified that neither of Mr. Williams' trial counsel ever talked with them prior to, during, or after the trial about mitigation or anything else, even though they were present at the penalty phase of the trial. (Docs. 91 at 153 & 92 at 212); *see Johnson v. Sec'y, DOC*, 643 F.3d 907, 935 (11th Cir. 2011) (finding deficient performance where trial counsel's failure to speak with witnesses was not product of witnesses' unavailability or unwillingness but counsel's lack of effort). Both LaCharo and Sharenda's testimony at the evidentiary hearing was credible and undermine Mr. Funderburg's testimony that he had contacted or tried to contact all possible mitigation witnesses.

And Mr. Williams' childhood friend Marlon Bothwell testified at the evidentiary hearing that he knew Mr. Williams since he was around four-years-old; was living in Ashville in 1999; but no one contacted him about Mr. Williams during the time his case was going to trial. And Marlon Bothwell was one of the names that Mr. Williams testified he wrote on a piece of paper and gave to counsel to contact regarding testifying on Mr. Williams' behalf. (Doc. 91 at 113). But counsel failed to reach out to Mr. Bothwell or ask him any questions regarding Mr. Williams' background. And Mr. Bothwell testified that he would have cooperated with anyone working on Mr. Williams' behalf if they had contacted him and asked what he knew about Marcus' background. (Doc. 93 at 6, 18-19). Counsels' failure to contact one of Mr. Williams' childhood friends whose name Mr. Williams provided to them was unreasonable and deficient.

When asked at the evidentiary hearing why he failed to contact any family members or friends prior to completing the Taylor Hardin evaluation paperwork on August 26, 1997, Mr. Funderburg testified that "I don't think at that time there was a lot of cooperation with those – with friends that were also suspects." (Doc. 91 at 42). The court agrees that Mr. Williams' childhood friend Alister Cook, who was partying with Mr. Williams the night Mr. Williams broke into Lottie Turner's home and attempted to rape her, could have initially been a suspect and may not have cooperated with talking to counsel about Mr. Williams' background; Mr. Cook gave several statements to the police about being

with Mr. Williams the night of the Turner burglary and attempted rape. *See* (Doc. 84-6 at 25 & 84-15 at 25-28).

But the record contains no evidence that Mr. Funderburg or Ms. Wilson even *attempted* to talk to Mr. Cook about Mr. Williams' background for mitigation. In fact, Mr. Funderburg included Mr. Cook on the list of witnesses he subpoenaed to appear for the November 1998 trial, but Mr. Funderburg admitted at the evidentiary hearing that he did not interview any of the subpoenaed witnesses for mitigation purposes. (Doc. 84-11 at 44 & 91 at 37). Counsel's failure to even attempt to talk to Mr. Williams's closest friend Mr. Cook, who was "hanging" with Mr. Williams around the time of the Rowell murder, was deficient.

And Mr. Funderburg admitted that he had not reached out to any of Mr. Williams' family or friends who were *not* suspects in the crime. (Doc. 91 at 42). Mr. Williams' sisters LaCharo and Sharenda and friend Marlon Bothwell who all testified at the evidentiary hearing were *not* suspects in the case. *See* (Doc. 84-6 at 4-6). They were available witnesses that counsel could have interviewed thoroughly about Mr. Williams and his family background. *See Hardwick*, 803 F.3d at 554 (reasonable counsel would have pursued avenues of mitigation by interviewing available family members). But counsel failed to conduct a thorough mitigation investigation, ignored Mr. Williams' sisters who were actually present at the penalty phase of the trial, and failed to thoroughly interview close family

members who were willing and available to testify. Those failures were unreasonable.

e. Failure to Adequately Interview and Prepare the Penalty Phase Witnesses

Counsel also failed to thoroughly interview and prepare prior to Mr. Williams' trial the only two family members they called as witnesses at the penalty phase—Charlene Williams and Eloise Williams. Mr. Funderburg testified that "the mother and the grandmother seems were the primary two we would have met with on several occasions. . . ." (Doc. 91 at 30). But Mr. Funderburg did not have clear understanding of Mr. Williams' family dynamics because he thought Beulah Williams was Mr. Williams' grandmother, when she in fact was his great-grandmother. *See* (Doc. 91 at 43). And counsel did not call Beulah Williams to testify at the penalty phase of the trial; they called his aunt Eloise Williams.

And counsel's decision to call two mitigation witnesses at the penalty phase whom they failed to thoroughly interview prior to their testimony was deficient. *See Andrus v. Texas*, 140 S. Ct. 1875, 1882 (2020) (finding deficient performance where counsel was "barely acquainted" with the mitigation witnesses and "did not prepare the witnesses or go over their testimony before calling them to the stand"). Eloise testified at the evidentiary hearing that counsel did not meet with her about her testimony until the day of her testimony at the penalty phase "in a little room at the courthouse";

that they met "not long at all" about "fifteen minutes"; that counsel asked her "general things" "about his family life"; and that counsel did not seem to have an "understanding at that time of Marcus' life story." (Doc. 92 at 134-135). Eloise also stated that before the trial date, counsel did "not get in touch with me or not told me, ask me things"; did not ask her any questions regarding sexual issues in Marcus' family, behavior issues, or substance abuse history for Mr. Williams or his family; and did not explain mitigation evidence to her or what would be useful or helpful for Mr. Williams' case. (Doc. 92 at 135-136). And Mr. Funderburg's testimony that he primarily met with Mr. Williams' mother and "grandmother" supports Eloise's testimony that counsel did not thoroughly interview her before her testimony at the penalty phase of the trial.

Charlene testified that she met with Mr. Williams' counsel "maybe three times" for "not long," "about thirty minutes." (Doc. 92 at 191-192). She testified that counsel asked to meet with her one time; that she went herself the other two times to talk to them about the trial; and that she talked to Ms. Wilson first and then to Mr. Funderburg. (*Id.*) Charlene testified that when she went to Pell City to meet with counsel on one occasion, her cousin Gwin Fomby went with her, but counsel did not attempt to interview Ms. Fomby. (*Id.* at 192). Charlene also testified that Mr. Williams' trial counsel did not ask her to put them in contact with any other family members; never came to her home to meet with her; did not explain to her the meaning of mitigation evidence; did not explain what kind of evidence

would be helpful to Mr. Williams' case; and did not ask her about alcohol or sexual abuse in the family. She stated that had counsel asked her about these specific things, she would have cooperated with them and answered their questions. (Doc. 92 at 192-193).

And the Eleventh Circuit noted in its decision remanding this case that both Charlene and Eloise's testimony at the penalty phase of the trial was "brief" and that counsel "elicited testimony [from them] that portrayed [Mr. Williams] in a negative light" that was "likely more harmful than helpful." *Williams*, 791 F. 3d at 1270. The fact that counsel elicited testimony from Charlene and Eloise that was harmful to Mr. Williams' case indicates that counsel had no real understanding of Mr. Williams' background and had not thoroughly interviewed either Charlene or Eloise about the details of Mr. Williams' background prior to their testimony.

Most telling about counsel's lack of understanding about Mr. Williams' abandonment by his mother involved counsel's questions of Charlene and her testimony at the penalty phase that could have given the jury the impression that she spent considerable amount of time with her son when he was growing up.

Q. Where was [Mr. Williams] when he wasn't with you?

A. He lived with my grandmother and my aunt. They helped me because I was a young girl.

. . . .

Q. Prior to this time, had Marcus been a problem child to you in any way?

A. No, he had never been.

Q. Did you spend a lot of time with him when he was growing up?

A. Yes. Marcus was the baby for five and a half years.

(Doc. 84-29 at 18, 22). From her testimony, the jury could conclude that Mr. Williams at times lived with relatives because Charlene was a "young girl"; that she never had any problems with Mr. Williams when she was raising him; and she spent a lot of time with him when he was growing up. None of her testimony revealed the true dysfunction and troubled history Mr. Williams faced being raised by an alcoholic mother whose abandonment of him impacted his life in a traumatic way. Counsel presented but a "hallow shell" of Mr. Williams' traumatic and troubling childhood. *See Collier v. Turpin*, 177 F.3d 1184, 1201 (11th Cir. 1999) (Court found deficient performance where counsel called *ten* witnesses but the examinations were "minimal"; "Counsel presented no more than a *hollow shell* of the testimony necessary for a 'particularized consideration of relevant aspects' of the defendant's background.").

Counsel failed to ask Charlene about her own alcohol abuse, her inability to care for her children, her abandonment of her children, the domestic

violence she suffered by Jeff Deavers that Mr. Williams' witnessed, the sexual abuse of her daughter by Brian Williams that Charlene failed to do anything about, or the fact that she allowed men to sleep with her while in her bed with Mr. Williams. Counsel failed to ask because they failed to even look for this mitigation evidence. *See Andrus*, 140 S. Ct. At 1877 ("Andrus' defense counsel not only neglected to present [mitigating evidence]; he failed to even look for it.").

Reasonable counsel would have thoroughly interviewed Charlene and Eloise before their testimony, asked specific questions of them as called for by the prevailing norms at that time, and spoke to other family members who could verify the cycle of dysfunction in which Mr. Williams was raised. Instead, Mr. Williams put Charlene and Eloise on the stand without thoroughly interviewing them and without a true understanding of Mr. Williams' family dysfunction and troubled history. *See Wiggins*, 529 U.S. at 534 (Counsel's "partial presentation of a mitigation case suggest[s] that their incomplete investigation was the result of inattention, not reasoned strategic judgment.").

A reasonable attorney would have thoroughly interviewed all family members with whom Mr. Williams lived during his childhood, any family member who could explain how Mr. Williams' grew up, and any friend of his that knew his background. And a reasonable attorney would have asked specific questions called for by the prevailing norms at that time, especially regarding Mr. Williams and his

family's past history of sexual abuse and alcoholism. Had counsel conducted an adequate and thorough mitigation investigation with Mr. Williams' family members and friends, they would have uncovered evidence of the history of sexual abuse throughout his family, history of alcoholism in his family, and the depth of the dysfunction and chaos in Mr. Williams' troubled family history. Counsel's failure to conduct a thorough investigation into Mr. Williams' family background constitutes deficient performance.

3. What a Reasonable Investigation Would Have Uncovered

As the court has thoroughly discussed supra, Mr. Williams' counsel failed to thoroughly investigate Mr. Williams' background for mitigation evidence. Had counsel performed a thorough mitigation investigation, they would have uncovered powerful mitigation evidence about Mr. Williams' background that the jury never heard.

a. Preliminary Matters

But before the court sets out the mitigation evidence that the court finds a thorough investigation would have uncovered, it must first address a few preliminary issues.

i. Consideration of Strategic Choices

The court first must address whether counsel's failure to conduct a thorough mitigation

investigation and present the mitigation evidence presented at the evidentiary hearing involved a strategic decision by counsel. Counsel's failure to present mitigating evidence is not per se ineffective assistance of counsel and can "on occasion, be justified as a strategic choice." *Hardwick*, 803 F.3d at 551.

At the evidentiary hearing, Mr. Funderburg justified his decision not to present evidence concerning Mr. Williams's "future dangerousness" or propensity for sexual violence because he did not want to indicate to the jury that his client was predisposed to sexual violence. (Doc. 91 at 76). And Mr. Funderburg testified that he successfully kept out of the guilty phase of Mr. Williams' trial any reference to Mr. Williams' attempted rape of Ms. Turner just eighteen days after his rape and murder of Ms. Rowell. (Doc. 91 at 78).

But that strategic decision to keep out the subsequent attempted rape of Ms. Turner did not eradicate counsel's duty to *first* thoroughly investigate Mr. Williams' background for any mitigating evidence that might shed light on why he committed both sexual crimes. "Strategic choices made *after thorough investigation* of law and facts relevant to plausible options are virtually unchallengeable …." *Strickland*, 466 U.S. at 690 (emphasis added). Counsel's decision not to investigate or present mitigating evidence is "only reasonable, and thus due deference, to the extent that it is based on a professionally reasonable investigation." *Hardwick*, 803 F.3d at 551.

Here, counsel's alleged strategic decision to keep out of evidence Mr. Williams' subsequent sexual crime may have made sense during the *guilt* phase of the trial, but that decision was not made *after* a thorough investigation of Mr. Williams' background and was not based on a professionally reasonable investigation regarding the *penalty* phase of the trial. Counsel unreasonably failed to even ascertain what mitigation evidence existed regarding Mr. Williams childhood sexual abuse or childhood sexual history. Reasonable counsel would have conducted a thorough mitigation investigation into Mr. Williams' past sexual history, asked Mr. Williams specific questions regarding his past sexual abuse and his sexual experiences, processed that information, and then a made a "strategic" decision whether to present that evidence to the jury at the *penalty* stage of the trial. Counsel cannot side-step the first requirement—the thorough mitigation investigation—and then claim they strategically chose to not present mitigating evidence they did not bother to ask about or discover.

So, counsel's claims to have strategically decided to keep out any evidence of the sexual abuse and deviant sexual circumstances to which Mr. Williams was subjected as a child come too late. Counsel could not strategically decide to keep out evidence of which they were not aware because of their unreasonable mitigation investigation.

Mr. Funderburg also testified that he would not have wanted to introduce evidence that conflicted with Mr. Williams' pretrial competency report, in

which Dr. Smith with Taylor Hardin stated that Mr. Williams "denied history of childhood sexual, emotional, or physical abuse." (Doc. 84-10 at 34). But Mr. Williams testified that Dr. Smith did not ask him specifically about whether he had been sexually abused, but instead asked general questions about his background. He admitted at the evidentiary hearing that he did not tell Dr. Smith about the sexual abuse by Mario because she did not specifically ask him about it. (Doc. 91 at 110-111). And if Mr. Williams did not offer that information to Dr. Smith based on her general questions, that circumstance could explain Dr. Smith's notation that Mr. Williams denied any such abuse.

But in any event, as the Eleventh Circuit pointed out in this case, "[a]lthough [the statement regarding Mr. Williams's denial of sexual abuse] may be relevant to [this court's] *Strickland* analysis, it does not by itself foreclose relief." *Williams*, 791 F.3d at 1277. The Eleventh Circuit stated that "[b]ecause this report only evaluated Mr. Williams's 'competency to stand trial and mental state at the time of the alleged offense,' it is not an adequate substitute for the '*thorough investigation*' required of attorneys representing capital defendants." *Williams*, 791 F.3d at 1277 (quoting *Williams v. Taylor*, 529 U.S. 362, 396 (2000)) (emphasis added); *see also Wiggins*, 539 U.S. at 532 (Counsel's "decision to hire a psychologist sheds no light on the extent of the investigation into petitioner's social background."). And the Eleventh Circuit further stated that the fact that the competency report was not a substitute for a thorough mitigation

investigation was "especially true because the competency report itself came with a significant disclaimer: 'this information should be viewed cautiously without verification by a third party." *Id.* And Mr. Funderburg testified that neither he nor Ms. Wilson attempted to verify the information contained in the competency report. (Doc. 91 at 47). So, the notation in Dr. Smith's report that Mr. Williams denied being sexually abused does not justify counsel's failure to conduct a thorough mitigation investigation into Mr. Williams' background.

Mr. Funderburg also testified that the trial judge would not have granted a motion for an independent mental health evaluation of Mr. Williams, apart from the Taylor Hardin evaluation, unless counsel had a basis for asking for one. And Mr. Funderburg testified that the he did not see "any need for a mental health evaluation based on the Taylor Hardin report and [his] dealings with Mr. Williams." (Doc. 91 at 67).

But Dr. Smith's Taylor Hardin evaluation of Mr. Williams only assessed Mr. Williams' competency to stand trial and his mental status *at the time of the crime* and was not for mitigation. A defendant can be competent to stand trial but have suffered traumatic childhood experiences that deeply affect his psychological development and behavior. *See Hardwick*, 803 F.3d at 553 ("Dr. Barnard was appointed solely to evaluate Hardwick for competency and sanity, not for mitigation," and counsel did not discuss mitigation evidence with the

doctor.). But because Mr. Williams' trial counsel failed to conduct a thorough mitigation investigation to discover those childhood experiences, they failed to supply any relevant information to Dr. Smith about Mr. Williams' past sexual history and lacked any background information to properly evaluate Dr. Smith's evaluation in light of Mr. Williams' troubling background. *See Hardwick*, 803 F.3d at 553 (finding deficient performance where counsel, prior to the competency evaluation, failed to give Dr. Barnard any limited background information on Hardwick). Reasonable counsel would have thoroughly interviewing Mr. Williams and his family members before the competency evaluation and providing that information to Dr. Smith.

And a reasonable attorney evaluating Dr. Smith's report would have seen red flags that would have led him to at least ask for an independent mental health evaluation. Dr. Smith's report indicates that Mr. Williams "has had difficulty sustaining interpersonal, dating relationships for longer than three months at any given time"; that he began drinking at the age of fourteen or fifteen and would consume two six-packs of beer to get drunk; that he reported having "vague suicidal ideation from time to time … and 'thoughts of just you know knife … jumping off building … they come and go pretty often …'"; that on the day of the crime Mr. Williams was "being driven to 'do something stupid' by 'hearing voices telling me to just do it … try something stupid … it was like my own voice, my inner voice telling me to do something'"; and that Mr. Williams "attributed his behavior on [that day of

the crime] to 'I've always been neglected … looked down upon.'" Dr. Smith also indicated in her report that Mr. Williams' "pattern of behavior over time[] is also *consistent with personality disorder*, most likely antisocial." (Doc. 87-1 at 57-64) (emphasis added). Yet, Mr. Williams' counsel "disregarded, rather than explored, the multiple red flags." *See Andrus*, 140 S. Ct. at 1883.

Given what Mr. Williams' trial counsel knew about the sexual nature of the crime and the role of alcohol and drugs in his conduct, these red flags in Dr. Smith's report would have prompted a reasonable attorney to explore any underlying reasons in Mr. William's history for his difficulty maintaining interpersonal relationships, alcohol abuse as a young teenager, suicidal ideation experienced "pretty often," hearing his inner voice telling him to "do something stupid" in a alcohol and drug induced state on the day of the crime, and feelings of severe neglect. *See Hardwick*, 803 F.3d at 553 (Hardwick's competency assessment included red flags that counsel should have investigated including Hardwick's alcohol and drug abuse at an early age and diagnosis of anti-social personality disorder.).

Had Mr. Williams' trial counsel conducted a thorough mitigation investigation into Mr. Williams' background and discovered his troubling sexual history and alcohol abuse at an early age, coupled with these red flags from Dr. Smith's report, they would have had a basis to at least request from the trial judge an independent mental health evaluation

regarding the effects of his past sexual experiences, alcohol abuse, abandonment by his mother, and overall troubled background on his psychological development for mitigation purposes.

And, in his January 16, 1998 "Order on Pre-trial Motions Filed to Date," the trial judge in essence invited a defense motion for independent psychological testing and stated that "Defendant will be filing motion for funds for independent psychologist for independent test. Defendant's counsel to advise the Court in advance the basis for said testing." (Vol. IV, Tab R-27 at 87). But counsel never filed a motion with such request. Had Mr. Williams' trial counsel conducted a thorough mitigation investigation and discovered all of the mitigation evidence that a reasonable investigation would have uncovered, trial counsel would have had a basis to at least ask the trial judge for funds for an independent mental health evaluation for mitigation purposes. Given the trial judge's willingness to grant trial counsel's request for independent DNA re-testing even though Mr. Williams had confessed to the crime and the first round of DNA testing linked him to the crime, the trial judge would have likely granted a request from trial counsel for an independent mental health evaluation.

And Mr. Funderburg gave no testimony at the evidentiary hearing that counsel's trial strategy was to *not* investigate Mr. Williams' background. *See Daniel*, 822 F.3d at 1268 ("It is important to Mr. Daniel's case that this record includes nothing to indicate that trial counsel's limited investigation into

Mr. Daniel's troubled family background was the product of reasonable professional judgment.") Mr. Funderburg gave no indication that counsels' trial strategy was to *not* talk to all available family members about Mr. Williams' background. In fact, he claimed to have contacted everyone he knew to contact, yet he had no mitigation list or notes from any mitigation interviews in his case file and did not interview Mr. Williams' sisters who testified at the evidentiary hearing. And Mr. Funderburg gave no testimony at the evidentiary hearing that counsels' trial strategy was to not explain to the jury Mr. Williams' and his family's history of alcohol abuse, including by family members with whom Mr. Williams' lived when he was a child. In fact, counsel specifically asked the jury to take into consideration as a mitigating factor that Mr. Williams had been drinking and doing drugs the day of the rape and murder. (Doc. 84-29 at 15).

So, the court finds that counsel's failure to thoroughly investigate Mr. Williams' background for possible mitigation evidence and present that evidence at the penalty phase of the trial was not the result of any reasonable trial strategy.

ii. Consideration of Expert Testimony

The court also must decide whether it can consider as mitigating evidence the testimony and opinions of Dr. Mendel and Dr. Benedict. Mr. Williams must demonstrate that a reasonable investigation for mitigation evidence would have

uncovered the mitigating evidence he presented at the evidentiary hearing. *See Blanco v. Singletary*, 942 F.2d 1477, 1500 (11th Cir. 1991). When that mitigation evidence includes expert testimony, a petitioner must show a "reasonable likelihood that an ordinary competent attorney conducting a reasonable investigation would have found an expert similar to the one eventually produced." *Elledge v. Dugger*, 823 F.2d 1439, 1446 (11th Cir. 1987) (opinion withdrawn in part on a different issue by 833 F.2d 250 (11th Cir. 1987)).

If Mr. Williams cannot show a reasonable likelihood that a "similar expert could have been found at the pertinent time by an ordinary competent attorney using reasonably diligent effort," he "was not prejudiced by counsel's failure to investigate." *Elledge*, 823 F.2d at 1446. "Merely proving that someone–years later–located an expert who will testify favorably is irrelevant" unless Mr. Williams can make this showing. *See Id.*

Dr. Mendel

Dr. Mendel testified that he is a clinical psychologist in Raleigh, North Carolina. (Doc. 93 at 34). He completed his degree at Princeton in 1984 and received his Masters and PhD in clinical psychology from the University of Michigan in 1992. (*Id.* at 35).

Dr. Mendel found that his testing of Mr. Williams would not support a formal diagnosis of PTSD as a result of Mr. Williams' sexual abuse by Mario and other traumatic childhood experiences.

But Dr. Mendel testified regarding how Mr. Williams' abandonment by his mother, past sexual abuse, alcoholism, family history of both alcoholism and sexual abuse, and overall family dysfunction contributed to Mr. Williams' overall development and later sexual crime. (Doc. 93 at 34-131).

Dr. Mendel testified that, during the time he worked on his dissertation in the "mid eighties or late eighties," the National Center for Child Abuse and Neglect was and still is located in Huntsville, Alabama. He testified that based on the location of that Center in Huntsville, he "think[s] there actually were and still are a lot of experts in the impact of child abuse here in Alabama," but he did not know if any of them were closer than Huntsville. (Doc. 93 at 64).

The court finds that based on Dr. Mendel's testimony a reasonable likelihood exists that Mr. Williams' counsel could have found an expert similar to Dr. Mendel in 1999 in Alabama to testify about the impact of Mr. Williams' abandonment by his mother, history of sexual abuse, alcohol abuse, and overall dysfunctional upbringing. And, the State did not raise any specific objection to the court's consideration of Dr. Mendel's testimony in its post-hearing brief. *See* (Doc. 89 at 31-34). So, the court will consider Dr. Mendel's testimony as mitigation evidence that reasonable counsel could have presented at Mr. Williams' trial in 1999.

Dr. Benedict

Dr. Benedict received his Ph.D in Clinical Psychology in 1992 from the University of North Carolina at Chapel Hill and completed his Postdoctoral Fellowship in Child and Adolescent Clinical Psychology and Neuropsychology at Harvard Medical School in 1993.

Dr. Benedict testified at the evidentiary hearing regarding the affects of Mr. Williams' sexual abuse by Mario and overall dysfunctional upbringing on his development. (Doc. 91 at 166-231). He also testified that Mr. Williams suffered from "complex trauma syndrome," a diagnosis that Dr. Benedict concedes was not in a "diagnostic manual to which [an expert] could have turned." (Doc. 91 at 226).

Dr. Benedict testified that a "suitably trained clinician," such as a social worker, psychologist, psychiatrist, or licensed counsel, with knowledge of the "dynamics of child sexual abuse … and neglect, who was current with the literature" in 1999 could have reached the same diagnosis of "complex trauma syndrome" or "complex PTSD." (Doc. 91 at 228-229). Dr. Benedict *assumed* that "child and adolescent trained clinicians" were available to testify regarding "complex trauma syndrome" in Alabama in 1999. (*Id.* at 230).

The State objected to the court's consideration of Dr. Benedict's opinion and testimony regarding his opinion that Mr. Williams suffers from "complex post-traumatic stress syndrome." (Doc. 89 at 31). First, the State argues that Mr. Williams never

raised any claim in his habeas petition "regarding trial counsel's failure to present expert testimony from a psychologist" and that he never raised a claim of ineffective assistance of counsel for failure to present psychological testimony in his Rule 32 petition. (*Id*.). But Mr. Williams specifically argued in his amended habeas petition in the context of a failure to investigate claim that "[a]lthough a thorough, defense sponsored, mental health evaluation was essential to Mr. Williams' defense, trial counsel failed to obtain one." (Doc. 5 at 36) (citing *Fortenberry v. Haley*, 297 F.3d 1213, 1126 (11th Cir. 2002) ("The duty to investigate requires that counsel 'conduct a substantial investigation into any of his client's plausible lines of defense.'"). So, the court finds that Mr. Williams has presented Dr. Benedict's testimony and report as part of the failure to investigate claim that is properly before this court.

The State also argues that the court should not consider Dr. Benedict's opinion and testimony regarding his diagnosis of "complex trauma syndrom" because Dr. Benedict conducted no testing for psychological trauma on Mr. Williams; Dr. Benedict admitted that Mr. Williams did not describe his encounters with Mario as "traumatic"; the DSM-4 diagnostic manual did not in 1999 and does not currently recognize "complex trauma syndrome" as a diagnosable mental disorder; and Dr. Benedict testified that Mr. Williams' alleged "complex post traumatic stress disorder" did not manifest until 2007, nearly a decade after the trial. (Doc. 89 at 33-34).

And Dr. King, the State's expert, testified at the evidentiary hearing that neither the DSM-4 or DSM-5 diagnostic manuals contain a diagnosis of "complex trauma syndrome." (Doc. 92 at 55). Dr. King also indicated that complex trauma syndrome "was actually originally proposed in 1994, didn't gel in terms of possibility until about 2005, 2006, [and] now is under consideration." (Doc. 92 at 56). He explained that this syndrome would be "subsumed under posttraumatic stress disorder," a mental disorder from which both Dr. Mendel and Dr. King found Mr. Williams did not suffer at the time of the crime. (Doc. 92 at 56-57 & Doc. 93 at 93).

Because the DSM-4 diagnostic manual in effect at the time of Mr. Williams' trial did not include "complex trauma syndrome" as a recognized diagnosis, the court finds that Mr. Williams' counsel in 1999 could not have found an expert like Dr. Benedict who would have testified that Mr. Williams suffered from that syndrome. So the court will not consider Dr. Benedict's testimony or opinion regarding his "complex trauma syndrome" diagnosis of Mr. Williams.

But the court finds that Mr. Williams' trial counsel in 1999 could have found an expert like Dr. Benedict who could have testified regarding the impact of Mr. Williams' sexual abuse by Mario and overall dysfunctional upbringing on his psychological development. So, the court will consider Dr. Benedict's testimony and opinion as it relates to Mr. Williams' childhood experiences on his psychological development for mitigation purposes.

b. Evidence that a Reasonable Investigation Would have Uncovered

In addition to the evidence that trial counsel already presented during the penalty-phase presentation at Mr. Williams' trial, the jury would have heard the evidence as set out in detail *supra* in the evidentiary hearing section of this Memorandum Opinion. Had Mr. Williams' trial counsel conducted a thorough mitigation investigation, the jury and the trial judge would have heard the following mitigation evidence:

- While in the care of his alcoholic mother, Mr. Williams was sexually abused three or four times between the ages of four and six by an older boy Mario Mostello when Mr. Williams and his mother Charlene lived with the Mostellos. Mr. Williams felt shame and depression, had thoughts of hurting or killing himself, began having nightmares about falling off a cliff or drowning, began wetting the bed after his sexual abuse by Mario, and had difficulty maintaining a relationship with a girl for more than three months.

- Mr. Williams was exposed to adult sexual relations early in his life when living with his mother until around the age of six or seven when Charlene would have boyfriends sleep in the same bed that she shared with Mr. Williams. Mr. Williams

would wake up in his mother's bed and find men in the same bed with him.

- Charlene had poor parenting skills; lived with her children in poverty, sometimes in homes without running water, plumbing, or electricity; left the children to fend for themselves; and did not appropriately supervise her children.

- Charlene abandoned Mr. Williams when he was around six or seven years old because of her alcohol use and inability to properly care for him. Mr. Williams' contact with his mother after the abandonment was inconsistent, resulting in various reunions and painful separations from her. Because of Charlene's abandonment of Mr. Williams, he bounced between living with different relatives many times and never had a particular place he called home. Mr. Williams felt unwanted, rejected, abandoned, and betrayed throughout his life because of Charlene's abandonment.

- When Mr. Williams was only ten years old, his teenage cousin Brian arranged for Mr. Williams to watch Brian having sex with girls. Mr. Williams became sexually active with females at the young age of ten. Mr. Williams was hypersexual as a young boy and had one hundred fifty to two hundred sexual partners by the time he was

arrested in an effort to prove that he was not gay. Mr. Williams also became hypermasculine and aggressive in his teenage years because of his childhood sexual abuse.

- Sexual abuse was rampant throughout Mr. Williams' family. Mr. Williams's great-grandmother, Beulah, was reportedly raped by her uncle; his grandmother Laura's first child was fathered by her cousin; his aunt Veronica was molested as a child by her aunt's boyfriend; and his cousin Brian Williams, in addition to allowing Mr. Williams to watch him having sex with his girlfriend, molested Mr. Williams's sister LaCharo and his cousin Zakia Fomby.

- When he was twelve or thirteen years old, Mr. Williams witnessed domestic abuse involving his mother Charlene and her boyfriend Jeff Deavers. Mr. Deavers struck Charlene with his bare hands, and Mr. Williams grabbed a knife and tried to stab Mr. Deavers.

- When Mr. Williams was a teenager and living with Eloise, her husband Robert physically abused Mr. Williams by picking him up in the air and body slamming him to the ground because Mr. Williams walked away from the stove when he was cooking.

- Mr. Williams was raised by and lived with alcoholics during his childhood, including his mother Charlene, his great-grandmother Beulah, and his uncle Robert Williams. Beulah drank so heavily that she would become incoherent and urinate on herself; Charlene would drink heavily and party instead of watching her children, leaving Mr. Williams' susceptible to the sexual abuse by Mario; Charlene was influenced to drink heavily by Beulah and other relatives she saw abusing alcohol; and Robert was a heavy drinker who drank almost every day to the point of intoxication.

- Mr. Williams began drinking alcohol as a young teenager and was heavily drinking and often drunk by the time he was sixteen or seventeen years old. After his expulsion from the Job Corp about ten days before the murder, Mr. Williams was drinking excessively and smoking marijuana.

Counsels' failure to thoroughly investigate Mr. Williams' background deprived the jury and the trial judge from hearing any of this powerful mitigating evidence.

B. Prejudice

But the ineffective assistance of counsel claim based on an unreasonable mitigation investigation does not end with a finding of deficient performance. Mr. Williams must also show that he was prejudiced

by his counsels' deficient performance. In this case, the court finds that, not only was Mr. Williams' counsels' performance deficient because they failed to conduct a thorough mitigation investigation as set out in detail *supra*, that failure prejudiced Mr. Williams.

To prove prejudice, Mr. Williams must show a "*reasonable probability* that, absent the errors, the sentencer … would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'" *Jones v. Sec'y, Florida Dep't of Corr.*, 834 F.3d 1299, 1312 (11th Cir. 2016) (quoting *Strickland*, 466 U.S. at 695) (emphasis added). "A reasonable probability is a probability sufficient to undermine confidence in the outcome, which is a lesser showing than a preponderance of the evidence." *Sealey v. Warden, Georgia Diagnostic Prison*, 954 F.3d 1338, 1360 (11th Cir. 2020) (internal quotation marks and citations omitted) (quoting *Strickland*, 466 U.S. at 694) (emphasis added).

In evaluating that probability, this court must "consider the totality of the available mitigation evidence – both that adduced at trial, and the evidence adduced in the habeas proceeding – and reweigh it against the evidence in aggravation." *Id.* (quoting *Porter v. McCollum*, 558 U.S. 30, 41 (2009)). Taking into consideration all of the evidence presented at both the penalty phase of Mr. Williams's trial and the evidence from the evidentiary hearing that a reasonable mitigation investigation would have revealed, this court finds

that Mr. Williams has established a reasonable probability that his sentence would have been different but for his trial counsel's deficient performance.

As an initial matter, the court finds that Mr. Williams failed to present any evidence or testimony regarding what Mr. Williams' closest friend Alister Cook would have told the jury about Mr. Williams' background; his family's history of mental illness; or Mr. Williams' "redeeming characteristics." Mr. Williams did not call Mr. Cook as a witness at the evidentiary hearing and did not submit an affidavit from him that the court can find; so the court has no evidence about what Mr. Cook would have testified regarding Mr. Williams' background. Mr. Williams also did not call any of the individuals he listed in his amended petition as witnesses at the evidentiary hearing who could have testified about Mr. Williams' redeeming characteristics. *See* (Doc. 5 at 63). And none of the witnesses that testified at the evidentiary hearing testified about any history of mental illness in Mr. Williams' family.

So, Mr. Williams has failed to show how counsels' failures to interview Mr. Cook, investigate Mr. Williams' background for his family's history of mental illness, or present mitigating evidence about his "redeeming characteristics" prejudiced Mr. Williams. So, the court will deny Mr. Williams' failure to investigate claims on just these three specific grounds. But the court will grant Mr. Williams failure-to-investigate claims on all other

grounds because he has shown both deficient performance and prejudice on those claims.

The court finds that the mitigation evidence presented at the evidentiary hearing "'paints a vastly different picture of [Mr. Williams'] background than that created by the actual penalty-phase testimony'" of Charlene and Eloise. *See Debruce v. Comm'r, Ala. Dep't of Corr.*, 758 F.3d 1263, 1276 (11th Cir. 2014) (quoting *Williams v. Allen*, 542 F.3d 1326, 1342 (11th Cir. 2008)). Charlene's brief testimony at the penalty phase of the trial that her family had to step in to help her raise Mr. Williams because she was a "young girl," that Mr. Williams had never been a problem child to her in any way, and that she spent a lot of time with him when he was growing up failed to touch the surface of the depth of dysfunction that Mr. Williams experienced being raised solely by his alcoholic mother until the age of six. In fact, the court agrees with Mr. Williams that Charlene's testimony "minimized the instability in Marcus's life" in the eyes of the jury. *See* (Doc. 88 at 65). Likewise, Eloise's brief testimony at the penalty phase of the trial that Mr. Williams had an unstable life and moved between different family members did not give the jury a complete picture of Mr. Williams troubled background as a child. Although counsel nominally presented a mitigation case, "the record leaves no doubt that counsel's investigation to support that case was an empty exercise." *See Andrus*, 140 S. Ct. at 1882.

Contrary to the State's argument, the court finds that all of the powerful mitigating evidence that Mr. Williams' counsel failed to elicit at the penalty phase of the trial was not duplicative because the jury never heard any of the specific details of his troubled background. And in this case, "the nature, quality, and volume of the mitigation evidence is significant enough to conclude that it 'bears no relation' to the cursory evidence that trial counsel presented" at the penalty phase of the trial. *See Daniel v. Comm'r, Alabama Dep't of Corr.*, 822 F.3d 1248, 1276 (11th Cir. 2016) (citing *Rompilla v. Beard*, 545 U.S. 374, 393 (2005) (emphasis added). Trial counsel barely and vaguely touched the surface of Mr. Williams' troubled childhood and failed to give the jury powerful mitigation evidence readily available to counsel.

Mr. Williams' trial counsel failed to present any evidence at the penalty phase regarding Charlene's alcohol abuse and the impact it had on her ability to raise Mr. Williams; Charlene's abandonment of Mr. Williams when he was around six or seven years old because she could not adequately take care of or provide for him and the traumatic effect this abandonment had on Mr. Williams; the poverty in which Mr. Williams lived when he lived with Charlene; Mr. Williams' early exposure to adult sexual relations when Charlene allowed boyfriends to sleep in the same bed that she shared with Mr. Williams; Mr. Williams' exposure to domestic violence between Charlene and her boyfriend Jeff Deavers; and Mr. Williams' inconsistent contact with his mother throughout his childhood that led to

various reunions and painful separations from her that left him feeling rejected and unwanted.

And Mr. Williams' trial counsel failed to elicit from Eloise at the penalty phase of the trial any testimony regarding Charlene's alcohol abuse and neglect of Mr. Williams when he lived with Charlene until about the age of six or seven; the conditions of poverty in which Mr. Williams was raised; Mr. Williams' family history of alcohol abuse by those with whom he lived at times in his childhood, including Beulah and Eloise's husband Robert; and the extensive history of sexual abuse that was rampant in Mr. Williams' family, including the sexual abuse of his sister by his cousin Brian.

Trial counsel also failed to present any evidence at the penalty phase that Mr. Williams' teenage cousin Brian arranged for Mr. Williams around the age of ten to watch Brian having sexual intercourse with females; that Mr. Williams began having sexual intercourse with girls at the age of ten; or that Mr. Williams was hypersexual and had about one hundred fifty to two hundred sexual partners by the time he was twenty-one years old. All of this evidence was not duplicative and would constitute powerful mitigating evidence, especially in light of Dr. Mendel's testimony tying these sexual behaviors with Mr. Williams sexual abuse at a young age.

And the evidence of Mr. Williams' sexual abuse by Mario is also powerful mitigation evidence that the jury never heard because of trial counsel's deficient performance. *See Daniel*, 822 F.3d at 1276

("Both the Supreme Court and this Court have recognized the long-lasting effects child sexual abuse has on its victims."). As the Eleventh Circuit stated in this case, evidence of Mr. Williams' sexual abuse at the hands of an older boy was neither "cumulative" nor a "double-edged sword." *Williams*, 791 F.3d at 1277. In fact, according to the Eleventh Circuit, evidence that Mr. Williams was a victim of sexual abuse during his childhood formative years is "precisely the type of evidence that is 'relevant to assessing a defendant's moral culpability.'" *See Id.* (quoting *Wiggins v. Smith*, 539 U.S. 510, 535 (2003)).

The court acknowledges the testimony at the evidentiary hearing that Mario may not have been "ten or twelve" years older than Mr. Williams; that one of instances of sexual abuse may have occurred in Missouri and not Ohio; and that the abuse may have also involved Mr. Williams' touching and penetration of Mario. But despite these discrepancies, the court agrees with Dr. Mendel that Mr. Williams' account of his sexual abuse by Mario is credible. The court credits Mr. Williams' testimony at the evidentiary hearing regarding the sexual abuse by Mario and Dr. Mendel's testimony at the evidentiary hearing that he assessed Mr. Williams' account of his childhood sexual abuse by Mario with "the greatest level of skepticism" and had no doubt that Mr. Williams had been sexually abused by Mario. *See* (Doc. 93 at 85).

Although the court cannot ascertain from the record the exact age of Mario at the time of his sexual abuse of Mr. Williams, the court finds based

on the testimony that Mario was old enough to babysit Mr. Williams and was probably at least six years older than Mr. Williams based on the testimony of Eloise. The fact that Mr. Williams was left in Mario's care while his mother was not present supports Mr. Williams *belief* that Mario was ten to twelve years older than him at the time of the sexual abuse. And the fact that Mr. Williams was mistaken about the age of Mario does not discredit his belief that Mario was much older than him at the time of the sexual abuse.

Also, Mr. Williams' mistaken belief that he and Charlene lived with the Mostellas in Ohio instead of Missouri does not negate that Mario sexually abused him. In fact, given Mr. Williams young age at the time of his four-month stay in Missouri, the court finds that mistake would not undermine the credibility of the mitigating effects of the sexual abuse.

And even though Mr. Williams was inconsistent about whether he reciprocally penetrated or touched Mario, that fact does not eliminate the mitigating effect that Mario's grooming and sexual abuse of a little boy about six years younger than him could have on a jury. Although Dr. Mendel testified that he could not explain that discrepancy, he still had no doubt that Mr. Williams had been groomed and sexually abused by Mario. And the court credits Dr. Mendel's testimony that he believes strongly that, if Mario had not sexually abused Mr. Williams, he would not have committed sexual violence. The court

finds Dr. Mendel's testimony persuasive and credible.

And Dr. King did not testify that he did not believe that the sexual abuse by Mario never happened. Instead, Dr. King testified that Mr. Williams' sexual encounter with Mario was just two pre-pubescent children engaging in homosexual experimentation to which Mr. Williams did not react with horror and did not describe as a "traumatic event." (Doc. 92 at 49). Dr. King testified that Mario's behavior was not abnormal because sixty percent of children under teenage years engage in some kind of homosexual activity. (Doc. 92 at 49).

But the court finds that a reasonable probability exists that the jury could credit Dr. Mendel's testimony on this issue as more persuasive. Dr. Mendel explained that even a four year age difference between Mr. Williams and Mario would be a "significant" age difference in terms of the impact of the sexual abuse on Mr. Williams and a six-year age difference would be "very significant." (Doc. 93 at 99). Dr. Mendel acknowledge the study that indicates sixty percent of children under the age of twelve "play doctor" and agreed that sexual touching and exploration between children of similar ages may not "particularly mean anything." (Doc. 93 at 126). But Dr. Mendel testified that actual sexual intercourse, like sodomy, initiated by a boy about *six years older* than the victim is not normal sexual exploration for prepubescent children. (Doc. 93 at 124, 126). The court finds Dr. Mendel's testimony on

this issue more persuasive than Dr. King's testimony.

And although the State's expert Dr. King testified that Mr. Williams did not suffer from PTSD as a result of the sexual abuse by Mario, Dr. King also stated the lack of a PTSD diagnosis "doesn't mean that [Mr. Williams] doesn't have maybe some other kinds of symptoms that would go along with discomfort about previous sexual encounters, sexual activity." (Doc. 92 at 81). And Dr. King testified that, even though he believed that Mr. Williams' sexual abuse by Mario was not a "traumatic event" for a PTSD diagnosis, "[t]hat's not to say it wasn't a problematic event in his life." (Doc. 92 at 49). So even Dr. King agreed that Mr. Williams' sexual abuse by Mario could have affected Mr. Williams negatively.

The Supreme Court and the Eleventh Circuit have repeatedly held that the failure to investigate and present available mitigating evidence of a troubled childhood, including parental abandonment, alcoholism, domestic violence, poverty, and sexual abuse, during the penalty phase of a capital murder trial is both deficient and prejudicial. *See Rompilla v. Beard*, 545 U.S. 374 (2005) (petitioner was prejudiced by trial counsel's failure to investigate and present evidence of parent's alcoholism, domestic violence, physical abuse, poverty, and inadequate living conditions); *Wiggins v. State*, 539 U.S. 510 (2003) (petitioner was prejudiced by trial counsel's failure to investigate and present mitigating evidence of an "alcoholic,

absentee mother," abandonment, poverty, neglect, and sexual abuse during childhood); *Johnson v. Sec'y, DOC*, 643 F.3d 907 (11th Cir. 2011) (petitioner was prejudiced by trial counsel's failure to investigate and present mitigating evidence of parents' alcoholism, childhood abandonment, abuse, family history of drug use, poverty, and neglect).

Moreover, even the State's expert Dr. King testified that the facts that Mr. Williams was "sexually active beginning at age ten," had "multiple sexual partners," had difficulty maintaining a relationship with a girl for more than three months, had an older boy "arrange[] for him to observe that older teenager having sex with women or girls," never had a place he felt was his home, lived with alcoholics who drank to the point of being drunk, and lived at times with people who "had themselves been sexually abused years previously" were all relevant to evaluate Mr. Williams' "conduct or his mental or emotional condition." (Doc. 92 at 87-90). Dr. King explained that all of those facts would be "relevant in terms of understanding his childhood situation, adolescent development," "in terms of he didn't have very good childhood and wasn't given the appropriate kind of stable situation that we like to see children have," and "in terms of the development of what we call personality disorder because that's where those kinds of things start." (Doc. 92 at 89). The court finds that those facts would have been particularly relevant and mitigating given the sexual nature of Mr. Williams' crime and the role that alcohol and drugs played in that crime. But the jury

never heard any of those mitigating factors because of trial counsel's deficient performance.

The State argues that the "mitigation factor" of Mr. Williams' "unstable childhood would have been undercut by the fact that he was given a chance at a stable, structured, nurturing home, but rejected it because he didn't like the beneficial rules put in place by his Aunt Eloise." *See* (Doc. 89 at 30). But while Mr. Williams lived with Eloise who provided some stability, he was also living with her husband Robert who was an alcoholic who physically abused him by body slamming him to the ground. And while living with Eloise, Mr. Williams struggled with wanting to be with his mother who he felt rejected and abandoned him. As Dr. Mendel testified, Mr. Williams' feelings of abandonment and rejection by his mother greatly impacted his psychological development. The jury never heard those facts.

And the court finds that evidence regarding Mr. Williams' alcohol abuse as a young teenager and his family history of alcoholism was not a "doubled-edged sword." Mr. Funderburg and Ms. Wilson actually argued to the jury that Mr. Williams' alcohol and drug abuse on the day of the crime was a mitigating factor for the jury to consider. And as both Dr. Mendel and Dr. King testified, Mr. Williams would not have been on trial for his life but for his alcohol and drug abuse the day of the crime. *See* (Docs. 92 at 86 & 93 at 82). But because trial counsel presented no evidence at the penalty phase regarding when Mr. Williams began drinking, his possible predisposition to alcoholism given his family

history, or the excessive drinking modeled by close relatives with whom he lived, counsel failed to give the jury any background mitigating evidence to explain his alcohol abuse on the day of the crime. Instead, the jury was left with the impression that Mr. Williams' alcohol abuse on the day of the crime was a result solely of his moral failure with no explanation as to when or why Mr. Williams began abusing alcohol.

Also, as mitigating circumstances, trial counsel argued at the penalty phase, and the jury considered, that Mr. Williams was only twenty-one years old at the time of the crime; that he was under the influence of alcohol at the time of the crime; that he had no significant prior criminal history; that he cooperated with law enforcement in confessing to the crime; that he had no disciplinary issues while in jail awaiting trial; and that he expressed remorse for the crime. (Vol. 3, Tab 21 at 573-74). In sentencing Mr. Williams, the trial court found the following mitigating circumstances existed: Mr. Williams's lack of a criminal history; his unstable home life as a child; his frustration from an injury ending his hopes of an athletic career; his obtaining a GED; and his remorse. (Vol. 4 at 631-38). The trial court found the following mitigating factors argued by the defense did not exist: Mr. Williams's age at the time of the offense; his capacity to appreciate the criminality of his conduct due to marijuana and alcohol use at the time of the offense; and his cooperation with law enforcement. (*Id*. at 636-37).

Weighing the mitigating evidence actually presented at the penalty phase and the additional mitigating evidence that counsel could have presented in the penalty phase against the *one* aggravating factor the prosecution argued in the penalty phase, the court finds that the scale tips in favor of a reasonable probability that the jury would have reached a different conclusion.

During the penalty phase of Mr. Williams's trial, the state argued only one aggravating circumstance, "[t]hat the capital offense was committed while the defendant was engaged in commission of or an attempt to commit rape, robbery, burglary or kidnapping." (Vol. 3, Tab 18 at 552; Vol. 3, Tab 23 at 584; Vol. 4 at 601). The court specifically instructed the jury that it could not consider any other aggravating circumstance. (Vol. 3, Tab 23 at 584). If this court granted Mr. Williams' habeas petition in this case, no doubt the state would again argue the same aggravating circumstance. This one aggravating factor does not outweigh the powerful mitigation evidence present in this case.

The court acknowledges that, if Mr. Williams were granted a new sentencing hearing, the state could also present evidence of Mr. Williams' future dangerousness that just eighteen days after the murder of Ms. Rowell on November 6, 1996, Mr. Williams broke into the home of Lottie Turner during the night of November 24, 1996 and attempted to rape her. (*See* Doc. 84-22 at 59-60).[9] On

[9] After his arrest, Mr. Williams confessed in a written statement, to breaking into Ms. Turner's house "with sex in

May 20, 1997, a St. Clair County grand jury indicted Mr. Williams on a charge of first degree burglary in the Lottie Turner case. *See* https://v2.alacourt.com, *State of Alabama v. Marcus Bernard Williams*, Case No. CC-1997-000083.00.[10] On March 2, 1999, less

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mind." (Petitioner's Exhibit 1 at 525). Mr. Williams explained that he had been drinking and "smok[ing] a lot [of] weed" all day, when he and his friend Alister Cook left the party around midnight to go pick up some girls. (*Id.*). Mr. Williams got "upset" and "snapped" when his plans "didn't work out with those females." (*Id.*). Mr. Williams described the crime as follows:

> I walk around to the back of [Lottie Turner's] house and I put my gloves on try to open two bedroom windows, no luck so I tried the one and I was in there. I took off my clothes outside and went in through the window. I found her in bed so I stripped on down out of my underwear and enter the bedroom crawling to the foot of her bed. I went to raise up and crawl on top of her. She wakes up. She tries to hit [me] with something so we tussle and finally I got [her] pin down. I started fondling her breast and rubbing my penis on her breast. At this time I [was] holding her down. I told her all I wanted was sex and not to hurt her. I told her this several times. She grabs my shirt when I was about to leave so I could not leave until she realized that I wasn't going to hurt her. It was 6:30 am [when] she finally let go. So I grab[b]ed my glove and my boxers and jumped out of the window. I threw my clothes on and ran into the woods ….

(*Id.*). Mr. Williams blamed the crime on "lack of sex and too much alcohol and drugs." (*Id.*). Mr. Williams also apologized "for the two women [he had] hurt," and asked for help "find[ing] his true self again." (*Id.*).

[10] The court takes judicial notice of the state court records available on the state's Alacourt website. *See Keith v. DeKalb*

than a week after the guilt and penalty phases of his capital murder trial, and a month before the sentencing hearing, Mr. Williams entered a plea of guilty to first degree burglary, and was sentenced to twenty-five years' imprisonment. (*Id*.).

Because Mr. Williams had not been convicted in the Turner burglary case at the time of the penalty phase of his trial, the state did not and could not have argued that case as a statutory aggravating circumstance. *See* Alabama Code § 13A-5-49(2) (a prior *conviction* of a felony involving the use or threat of violence to the person can be used as an aggravating circumstance). But the trial court took judicial notice of Mr. Williams's conviction in the Turner burglary case. (*Id*. at 634). The trial court did not "consider this subsequent act by [Mr. Williams] for any purposes of aggravation," but did consider it as evidence of his state of mind in determining that Mr. Williams's capacity to appreciate the criminality of his actions due to his use of marijuana and alcohol, and his cooperation with law enforcement were not mitigating circumstances in his case. (*Id*. at 634-37).

And the State could have presented evidence of this similar crime at the penalty phase of the trial to

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County, Ga., 749 F.3d 1034, 1041 n.18 (11th Cir. 2014) (taking judicial notice of DeKalb County Superior Court Online Judicial System pursuant to Federal Rule of Evidence 201); *see also Grider v. Cook*, 522 Fed. Appx. 544, 545 n.2 (11th Cir. 2013) ("the district court was permitted to take judicial notice of Grider's state court criminal proceedings").

show Mr. Williams' future dangerousness, but chose not do to so.[11] But, upon re-sentencing, the State could introduce the Turner burglary to show Mr. Williams' future dangerousness. Alabama Courts have held that remarks on future dangerousness are proper in determining "what weight should be afforded the aggravating circumstances that the State had proven." *Floyd v. State*, CR-13-0623, 2017 WL 2889566 at 63 (Ala. Crim. App. July 7, 2017). As the *Floyd* court explained:

> Although future dangerousness is not an aggravating circumstance under § 13A-5-49, Ala. Code 1975, "future dangerousness [is] a subject of inestimable concern at the penalty phase of the trial" and evidence and argument about future dangerousness are permissible. *McGriff v. State*, 908 So. 2d 961, 1013 (Ala. Crim. App. 2000), *rev'd on other grounds*, 908 So. 2d 1024 (Ala. 2004). *See also Whatley v. State*, 146 So. 3d 437, 481-82 (Ala. Crim. App. 2010) (holding that evidence of a capital defendant's future dangerousness is admissible during the penalty phase of the trial under § 13A-5-45(d), Ala. Code 1975); and *Arthur v. State*, 575 So. 2d 1165, 1185 (Ala. Crim. App. 1990) (holding that prosecutor's remark during penalty phase of capital trial that the defendant would kill

[11] Mr. Williams's trial counsel, Erskine Funderburg, testified at the evidentiary hearing that the State tried to get the Turner case into evidence in the *guilt* phase of the trial, "but [defense counsel] were able to keep it out." (Doc. 91 at 76).

> again if given the chance was "proper because [it] concerned the valid sentencing factor of [the defendant's] future dangerousness.").

Id.

But the court finds that the fact that Mr. Williams would never be eligible for parole would undercut the State's future dangerousness evidence. The Supreme Court has held that "where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible."[12] *Simmons v. South Carolina*, 512 U.S. 154, 156, 162 (1994). The Court in *Simmons* reasoned that, in assessing future dangerousness during the penalty phase of a capital trial, "the actual duration of the defendant's prison sentence is indisputably relevant" because a jury could "view a defendant who is eligible for parole as a greater threat to society than a defendant who is not. Indeed, there may be no greater assurance of a defendant's future *nondangerousness* to the public than the fact that he

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[12] The Court noted that, although South Carolina death penalty statutes "do not mandate consideration of a defendant's future dangerousness in capital sentencing, the State's evidence in aggravation is not limited to evidence relating to statutory aggravating circumstances." *Simmons*, 512 U.S. at 162-63. Likewise, Alabama law does not mandate consideration of Williams' future dangerousness, but a jury can consider future dangerousness in capital sentencing. *See Floyd v. State*, CR-13-0623, 2017 WL 2889566 at 63 (Ala. Crim. App. July 7, 2017).

never will be released on parole." *Id*. at 163-64 (emphasis added). The Supreme Court stated that "the fact that the alternative sentence to death is life without parole will necessarily *undercut* the State's argument regarding the threat the defendant poses to society." *Id*. at 169 (emphasis added).

The Supreme Court again in 2017 reiterated how a sentence of life in prison without the possibility of parole could minimize a defendant's future dangerousness. In *Buck*, the defendant's sentence of death under Texas law required that the State prove that he posed a threat of future dangerousness. *Buck*, 137 S. Ct. at 767. Buck's counsel presented evidence from an expert that "his client is liable to be a future danger because of his race." *Id*. at 765. In addressing the *Strickland* standard for ineffective assistance of counsel, the Supreme Court in *Buck* found that "no competent defense attorney would introduce such evidence about his own client." *Id*. at 775.

In assessing the prejudice prong of *Strickland*, the Court in *Buck* addressed the issue of "whether Buck had demonstrated a reasonable probability that, without Dr. Quitjano's testimony on race, at least one juror would have harbored a reasonable doubt about whether Buck was likely to be violent in the future."[13] *Id*. at 776. In finding that Buck was prejudiced by his counsels' deficient performance,

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[13] In Texas, a sentence of death requires an unanimous vote by the jury; if the jury vote is not unanimous, a defendant would receive life without parole.

the Court addressed whether any mitigating circumstances would minimize Buck's future dangerousness. The Supreme court stated that "Buck's prior violent acts had occurred outside of prison, within the context of romantic relationships with women." But the Court noted that "[i]f the jury did not impose a death sentence, Buck would be sentenced to life in prison, and no such romantic relationship would be likely to arise. ***A jury could conclude that those changes would minimize the prospect of future dangerousness***." *Buck*, 137 S. Ct. at 776 (emphasis added).

Likewise, in Mr. Williams' case, the trial judge instructed the jury that they had two options for in the penalty phase of the trial under Alabama Law: "to sentence the defendant to a term of life in prison without the possibility of parole … or to sentence the defendant to death." (Doc. 84-29 at 6). So, even if the State chose to present the subsequent Turner burglary to the jury at the re-sentencing, Mr. Williams's future dangerousness evidenced by that burglary would be *minimized* by the fact that Mr. Williams would never be eligible for parole and would pose no threat to the public at large. Moreover, Mr. Williams' counsel on re-sentencing could present evidence of his prison record evidencing no violent history while incarcerated, which would further minimize the significance of the State's future dangerousness argument.

And the court agrees with Mr. Williams that his attempted rape of Ms. Turner just eighteen days after his rape and murder of Ms. Rowell is "entirely

consistent with the portrait of Marcus' psychological unraveling, stemming from his childhood sexual abuse" and his plea for help for his sexual crimes. *See* (Doc. 88 at 90). Had counsel investigated and presented evidence of Mr. Williams' background, especially his childhood sexual abuse, the jury would have received powerful mitigating evidence to give context for his adult sexual crimes. *See New York v. Ferber*, 458 U.S. 747, 758 n.9 (1982) (in the context of child pornography, the Court noted that "[i]t has been found that sexually exploited children are unable to develop healthy affectionate relationships in later life, having sexual dysfunctions, and have a tendency to become sexual abusers as adults.") (citations omitted). And Dr. Mendel testified at the hearing that had Mario not sexually abused Mr. Williams, "there would not have been the sexual violence" by Mr. Williams. (Doc. 93 at 85-86). So, evidence of Mr. Williams' childhood sexual abuse by Mario and Mr. Williams' subsequent hypersexualization may have cast his sex-related crimes in a "different light." *See Wharton v. Chappell*, 765 F.3d 953, 977 (9th Cir. 2014).

And the Supreme Court and the Eleventh Circuit have time and again found that petitioners were prejudiced by their counsel's deficient performance where the crimes were more highly aggravated than Mr. Williams' case involving only one aggravating factor. *See Porter v. McCollum*, 558 U.S. 30, 40-44 (2009) (finding prejudice in a two-victim murder case with *three* aggravating factors); *Rompilla*, 545 U.S. at 383 (finding prejudice despite *three* aggravating factors including that the murder

was committed in the course of a felony; that the petitioner had a "significant history of felony convictions," including a rape and assault conviction; and the murder was committed by torture); *Williams v. Taylor*, 529 U.S. 362, 399, 418 (finding prejudice despite the fact that "in the months following the murder of Mr. Stone, Williams savagely beat an elderly woman, stole two cars, set fire to a home, stabbed a man during a robbery, set fire to the city jail, and confessed to having strong urges to choke other inmates and to break a fellow prisoner's jaw") (Rehnquist, C.J., dissenting); *Hardwick*, 822 F.3d at 546 (finding prejudice when Hardwick had *five* aggravating factors, including three prior felony convictions); *Johnson*, 643 F.3d at 911-912, 937-938 (finding prejudice despite Johnson having *five* mitigating factors, including being on parole for burglary at the time of the murders and having prior felony convictions involving the use of violence; Johnson also committed armed robbery and attempted murder in Oregon just one month after he committed the two murders for which a jury sentenced him to death); *Cooper v. Sec'y Dep't of Corr.*, 646 F.3d 1328, 1356 (11th Cir. 2011) (finding prejudice despite a triple homicide and the presence of *six* aggravating factors).

Recently, the Eleventh Circuit in *Dallas v. Warden* affirmed the district court's denial of habeas relief and found that counsel's failure in 1994 to discover and present allegations that Dallas had been sexually assaulted did not prejudice Dallas. 964 F.3d 1285, 1311 (11th Cir. 2020). But that case is distinguishable from Mr. Williams' case for many

reasons. In contrast to Mr. Williams' case, counsel in *Dallas* presented a "substantial" mitigation case during the penalty phase of the trial, including calling as witnesses a licensed clinical psychologist, a defense mitigation consultant, two of Dallas' older siblings, the mother of Dallas' children, a long-time friend who was with Dallas around the time of the murder, and Dallas himself. Dallas and his siblings testified at trial and "described at length" Dallas' "deeply abusive childhood and a thoroughly dysfunctional family." His sister testified at trial that Dallas knew that she was molested as a teenager and that she "ran away from home at eighteen to escape." But when Dallas' brother testified at the penalty phase of the trial, he did not mention being sexual abused. *Dallas*, 964 F.3d at 1291-1295.

Years later, Dallas' brother, in a 2007 affidavit for Dallas' federal habeas case, alleged for the first time that he and Dallas were both sexually assaulted. Dallas' brother explained in the affidavit that he "witnessed Donald being anally raped as well as being forced to perform oral sex on this man"; that the sexual assault happened on at least four occasions; but Dallas' brother "did not identify the name of the abuser, the time, or the location." *Id*. at 1300.

The Eleventh Circuit in *Dallas* held that "although [the brother's] new allegations paint a darker picture of Dallas' childhood, it does not *standing alone* raise a reasonable probability that the jury would not have recommended that Dallas be

sentenced to death." *Id*. at 1311 (emphasis added). The Court noted that trial counsel had called Dallas' brother as a mitigation witness but he failed to mention the sexual abuse even after his sister testified that she had been sexually molested. And, the Court in Dallas found that "[u]ltimately and most critically, however, the aggravating factors were overwhelming," and that the sexual abuse allegation would not have outweighed the *four* aggravating factors, especially where the "jury [already] heard many details of the abuse and poverty-stricken conditions of Dallas' childhood." *Id*. at 1311 (emphasis added).

In Mr. Williams' case, unlike in *Dallas*, counsel conducted virtually no mitigation investigation; the jury heard none of the details of Mr. Williams' troubled background; counsel failed to utilize funds for a mitigation investigator; and the case involved only *one* aggravating factor. In this case, a reasonable probability exists that the sexual abuse of Mr. Williams, in totality with all the other powerful mitigating evidence the jury never heard, would have undermined the confidence in the outcome of Mr. Williams' sentencing.

The fact that Mr. Williams' case is *not* highly aggravated further supports a finding of prejudice in this case. *See Wiggins v. Smith*, 539 U.S. 510, 537 (2003) (noting that Wiggins did not have a record of violent conduct to offset the mitigating factors); *Williams v. Allen*, 542 F.3d 1326, 1343 (11 th Cir. 2008) ("Further supporting a finding of prejudice is the fact that this case is not highly aggravated.");

Maples, 729 F. App'x at 827 ("And the probability that one more juror would have been moved to vote for life over death is further compounded by the limited aggravation in this case—the state trial court found only one statutory aggravating factor applicable here.").

And even though the jury heard none of the powerful mitigating evidence produced at the evidentiary hearing, one juror still voted for life without parole. Had the jury heard all of the powerful mitigating evidence about Mr. Williams' sexual abuse and troubling childhood background, a reasonable probability exists that more jurors would have followed suit.

A failure of counsel to conduct a reasonable mitigation investigation is prejudicial where, as in Mr. Williams' case, such an investigation would have uncovered an "'excruciating life history.'" *See Daniel*, 822 F.3d at 1275 (quoting *Wiggins*, 539 U.S. at 537). This mitigation evidence "might well have influenced the jury's appraisal of his moral culpability." *See Williams v. Taylor*, 529 U.S. at 398. Mr. Williams' case is not one where the new evidence "would barely have altered the sentencing profile presented to the sentencing judge." *See Porter*, 558 U.S. at 41 (quotations and citations omitted). The jury and judge in Mr. Williams case heard almost nothing that would allow them to "accurately gauge his moral culpability." *See id*.

A reasonable probability exists that the result of the sentencing proceeding would have been different

had Mr. Williams' counsel discovered, presented, and explained to the jury the significance of all of the available evidence that Mr. Williams presented at the evidentiary hearing. *See Williams v. Taylor*, 529 U.S. at 398. Had the jury and judge been able to "place [Mr. Williams'] life history 'on the mitigating side of the scale," a reasonable probability exists that the jury and sentencing judge "would have struck a different balance." *See Wiggins*, 539 U.S. at 537.

The court has carefully weighed all of the mitigating evidence presented at the both the penalty phase and the evidentiary hearing against the limited aggravating evidence in this case and finds that Mr. Williams has shown a reasonable probability that but for his counsels' deficient performance the jury would not have recommended the death sentence.

V. CONCLUSION

Under a *de novo* standard of review, and for the reasons stated above, the court finds that Mr. Williams has shown that his trial counsels' performance was deficient for failing to investigate and present mitigation evidence at the penalty phase of the trial. Mr. Williams has also shown that he was prejudiced by his trial counsels' deficient performance. The court therefore will **GRANT** Mr. Williams Amended Petition for Writ of Habeas Corpus (doc. 5) as to all of his claims of ineffective assistance of counsel during the penalty phase of his trial for failing to investigate and present mitigating evidence EXCEPT counsels' failure to interview Mr.

Williams' closest friend Alister Cook, failure to investigate his family history of mental illness, and the failure to present his redeeming characteristics because Mr. Williams has failed to show prejudice on these three claims.

A writ of habeas corpus shall issue directing the State of Alabama to vacate and set aside the death sentence of Marcus Williams unless, within 90 days of this judgment's entry, the State of Alabama initiates proceedings to retry Mr. Williams' sentence. In the alternative, the State of Alabama shall resentence Mr. Williams to life without the possibility of parole.

VI. CERTIFICATE OF APPEALABILITY

Rule 11(a) of the Rules Governing Section 2254 Cases requires the district court to issue or deny a certificate of appealability when it enters a final order adverse to the applicant. This court may issue a certificate of appealability "only if the applicant has a made a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2). To make such a showing, a "petitioner must demonstrate that reasonable jurist would find the district court's assessment of the constitutional claims debatable and wrong," *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), or that "the issues presented were adequate to deserve encouragement to proceed further," *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (internal quotations omitted).

This court's denial of Mr. Williams ineffective assistance of counsel claims involving counsels'

failure to interview Mr. Williams' closest friend Alister Cook, failure to investigate his family history of mental illness, and the failure to present his redeeming characteristics because Mr. Williams has failed to show prejudice on these three claims constitutes an adverse ruling on those claims. But those three claims do not satisfy either standard for a certificate of appealability. Accordingly, a motion for a certificate of appealability is due to be **DENIED** as to those three claims.

The court will enter a separate Order in accordance with this Memorandum Opinion.

DONE and **ORDERED** this 23rd day of September, 2021.

[handwritten signature]
KAREN OWEN BOWDRE
UNITED STATES DISTRICT JUDGE

APPENDIX C

[PUBLISH]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 21-13734

MARCUS BERNARD WILLIAMS,

Petitioner-Appellee,

versus

STATE OF ALABAMA,

Respondent-Appellant.

Appeal from the United States District Court
for the Northern District of Alabama
D.C. Docket No. 1:07-cv-01276-KOB

[Filed July 11, 2023]

Before WILSON, GRANT, and LAGOA, Circuit Judges.

WILSON, Circuit Judge:

In 1996, Marcus Bernard Williams was convicted of capital murder by an Alabama jury. The jury recommended death by execution, and the trial judge imposed the death penalty. Williams filed a petition for habeas corpus relief in the Northern District of Alabama, alleging—as relevant to this appeal—that trial counsel was ineffective during the penalty phase of his trial for failing to investigate and present mitigating evidence.

The district court initially denied habeas relief on all claims, and Williams appealed. We vacated the district court's order and remanded to the district court to determine whether Williams was entitled to an evidentiary hearing and to reconsider his failure-to-investigate claims de novo. *Williams v. Alabama*, 791 F.3d 1267, 1277 (11th Cir. 2015). After conducting an evidentiary hearing, the district court granted habeas relief. The State of Alabama (State) now appeals. After careful review of the record and with the benefit of oral argument, we affirm.

I. BACKGROUND

The only question presented in this appeal is whether Williams' trial attorneys were constitutionally ineffective during the penalty phase of his trial. Neither the facts of Williams' case nor his guilt is in dispute. The relevant facts are as follows:

> On November 6th, 1996, the defendant had been out with friends, drinking and smoking marijuana. Upon returning home that evening, the defendant's thoughts

> turned to a young female neighbor of his, Melanie Dawn Rowell, and his desire to have sexual relations with her.
>
> At approximately 1:00 a.m. that night, Williams attempted to enter Rowell's back door, but the door was locked. He then noticed a kitchen window beside the door. He removed the screen from the window and found that the window was not locked.

Williams v. State, 795 So. 2d 753, 761 (Ala. Crim. App. 1999) (*Williams I*). Williams entered through the kitchen window, took a knife from the counter, and proceeded upstairs, removing his pants part way up the stairs. *Id.* Williams entered Rowell's bedroom. *Id.*

> He climbed in bed on top of her. When he began removing Rowell's clothes, a struggle ensued. … As Rowell continued to struggle, Williams placed his hands around her neck. Eventually Rowell ceased to struggle as Williams continued to strangle her. When she was motionless, Williams proceeded to have sexual intercourse with her for 15 to 20 minutes.

Id. at 761–62. Williams was subsequently arrested. *Id.* at 762. He provided written statements to the police implicating himself in Rowell's death. Williams was indicted for murder during a rape or attempted rape. *See* Ala. Code § 13A-5-40(a)(3) (1975).

Trial

Williams was represented at trial by Tommie Wilson (now deceased) and Erskine Funderburg. Wilson was primarily responsible for the guilt phase, while Funderburg mainly handled the penalty phase. After his first trial ended in a mistrial, Williams' retrial began on February 22, 1999. Williams' sole defense was that he intended only to rape, not kill, Rowell. The defense offered no evidence or witnesses at the guilt phase. The jury found Williams guilty of capital murder during a rape. *Williams I*, 795 So. 2d at 761.

At the penalty phase, trial counsel called two witnesses: Williams' mother, Charlene Williams, and his great-aunt, Eloise Williams. Charlene[1] told the jury that she was young and unmarried when she had Williams; that Williams faced hardships as a child, such as living with different relatives and having no father or adult male figure in his life; and that Williams stopped playing school sports after a knee injury. Charlene also gave testimony that portrayed Williams in a negative light. She testified that Williams dropped out of high school, hung out "with a rough crowd," was kicked out of the Job Corps for fighting, stopped going to church, and "wanted to sleep all day and stay up all night."

Eloise told the jury about Williams' unstable home life and testified that he did not see his

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[1] Williams' relatives are referred to throughout this opinion by their first names to avoid confusion

mother often and became sad and withdrawn at times, that he was a good student with no significant criminal history, that he struggled following the deaths of his grandfather and uncle, and that since going to jail, he stayed out of trouble and was remorseful for his crime. Eloise also testified that Williams had a quick temper, had a prior arrest for fighting as a teenager, was irregularly employed after high school, and started drinking and using drugs not long before the crime. After 30 minutes of deliberation, the jury recommended a death sentence by an 11-to-1 vote. *Id.*

At the sentencing hearing, Williams took the stand to testify, and he expressed his remorse. The trial court found one aggravating circumstance—the murder was committed during a rape—and one statutory mitigating circumstance—Williams had no significant history of prior criminal activity. *Id.* at 784. The trial court also found four non-statutory mitigating circumstances: (1) Williams' unstable upbringing, (2) his problem resulting from the end of a promising athletic career, (3) the attainment of his GED after not graduating from high school, and (4) his remorse. *Id.* at 784–85. The trial court found the aggravating factor out-weighed the mitigating factors and sentenced Williams to death. *Id.* at 761.

Direct Appeal

Williams appealed to the Alabama Court of Criminal Appeals (ACCA). He raised several issues, including ineffective assistance of counsel during

trial. *Id.* at 782. The ACCA reviewed Williams' claims for plain error because he "did not first present [them] to the trial court in a motion for a new trial." *Id.* The ACCA concluded that Williams had not shown that his trial counsel's performance was deficient and that their allegedly deficient performance prejudiced him. *Id.* at 784. The Alabama Supreme Court affirmed the ACCA's judgment and Williams' conviction and sentence. *Ex parte Williams*, 795 So. 2d. 785, 787–88 (Ala. 2001). The United States Supreme Court denied certiorari. *Williams v. Alabama*, 534 U.S. 900 (2001).

State Postconviction Proceedings

Williams next sought state postconviction relief based on his claim that trial counsel failed to conduct an adequate investigation into his background, thus failing to uncover a history of neglect and childhood sexual abuse by an older boy. Williams requested discovery and an evidentiary hearing. The postconviction court denied relief. The ACCA affirmed, *see Williams v. State*, 2 So. 3d 934 (Ala. Crim. App. 2006) (table), and the Alabama Supreme Court denied certiorari, *see Ex parte Williams*, 13 So. 3d 52 (Ala. 2007) (table).

Federal Habeas Proceedings

In July 2007, Williams petitioned for federal habeas corpus relief under 28 U.S.C. § 2254 from the Northern District of Alabama. The district court, applying deference under the Antiterrorism and Effective Death Penalty Act (AEDPA) to the state postconviction court's ruling, concluded that

the ruling was not contrary to, or an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984), and denied his petition. *See Williams v. Alabama*, No. 1:07-cv-1276, 2012 WL 1339905 (N.D. Ala. Apr. 12, 2012). After the district court denied Williams' request for a certificate of appealability (COA), Williams filed a motion in our court seeking a COA.

We granted a limited COA on Williams' claim of ineffective assistance of counsel for failure to investigate and present mitigating evidence during the penalty phase of his trial. After considering Williams' appeal, we concluded that "Williams' failure-to-investigate claims were fairly presented in state court, [but] they were not decided 'on the merits' within the meaning of 28 U.S.C. § 2254(d)." *Williams v. Alabama*, 791 F.3d 1267, 1269 (11th Cir. 2015) (*Williams II*). We held that the district court erred in granting deference under AEDPA to the postconviction court's decision because the ACCA had applied a procedural bar and therefore had not adjudicated Williams' claims on the merits. *Id.* at 1273–74. Thus, we vacated the district court's order denying the failure-to-investigate claims and Williams' request for an evidentiary hearing. *Id.* at 1277. We remanded Williams' case back to the district court to determine whether Williams was entitled to an evidentiary hearing and to reconsider his failure-to-investigate claims de novo. *Id.*

Evidentiary Hearing

On remand, the district court conducted a three-day evidentiary hearing on Williams' failure-to-investigate claims.[2] Williams testified at the hearing and called several witnesses who testified to facts that Williams claims trial counsel should have presented during the penalty phase of his trial. The following lay witnesses testified: attorney Funderburg; Tina Watson (attorney Wilson's former legal secretary); Billy Stephens (a mitigation investigator whom Wilson purportedly sought to hire); Sharenda and LaCharo Williams (Williams' sisters); Marlon Bothwell (Williams' childhood friend); Eloise; and Charlene. Williams also presented testimony from clinical psychologist Dr. Matthew Mendel and neuropsychologist Dr. Kenneth Benedict to explain the effects that child sexual abuse, alcoholism, abandonment, and familial dysfunction had on Williams. Wilson did not testify because she passed away in 2015. However, Wilson's case file was presented as documentary evidence. The State presented expert

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[2] Williams asserted eight failure-to-investigate claims in his amended habeas petition: (1) failure to collect documentary evidence and hire a mitigation specialist; (2) failure to thoroughly investigate Williams' history, including his childhood sexual abuse; (3) failure to interview Williams' friend, Alister Cook; (4) failure to adequately interview and prepare the penalty phase witnesses; (5) failure to compile Williams' history of abuse and neglect; (6) failure to investigate Williams' family history of mental illness; (7) failure to show that Williams' background contributed to his committing capital murder; and (8) failure to present his redeeming characteristics.

testimony from Dr. Glen King to counter Williams' experts. Both sides presented evidentiary materials.

Williams argued that, had counsel performed an adequate penalty phase mitigation investigation, they would have discovered and been able to present evidence regarding: childhood sexual abuse by an older boy; an extensive family history of childhood sexual abuse and incest; a family history of alcoholism which contributed to Williams' early and excessive use of alcohol; a childhood defined by chaos, abandonment, and abuse; an extensive family history of fracture and dysfunction; and psychologically damaging experiences during childhood.

On September 23, 2021, the district court entered a 141-page order granting Williams' habeas petition on all his failure-to-investigate claims except for three of them.[3] *Williams v. Alabama*, No. 1:07-cv-1276, 2021 WL 4325693, at *1 (N.D. Ala. Sept. 23, 2021) (*Williams III*).

The State timely appealed.

II. STANDARD OF REVIEW

[3] The claims that the district court did not grant habeas relief on were "counsels' failure to interview Mr. Williams' closest friend Alister Cook, failure to investigate his family history of mental illness, and the failure to present his redeeming characteristics because Mr. Williams … failed to show prejudice on these three claims." *Williams III*, 2021 WL 4325693, at *1.

We review de novo the district court's grant of a federal habeas petition under 28 U.S.C. § 2254. *Peterka v. McNeil*, 532 F.3d 1199, 1200 (11th Cir. 2008). The district court's factual findings in a habeas proceeding are reviewed for clear error—a highly deferential standard of review. *Sims v. Singletary*, 155 F.3d 1297, 1304 (11th Cir. 1998); *Holton v. City of Thomasville Sch. Dist.*, 425 F.3d 1325, 1350 (11th Cir. 2005). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985) (alteration adopted) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). "An ineffective assistance of counsel claim is a mixed question of law and fact which we review *de novo*." *Sims*, 155 F.3d at 1304.

III. DISCUSSION

The State argues on appeal that the district court erred in two ways. First, by failing to uphold the presumption of effective assistance of counsel, and second, by incorrectly reweighing the additional aggravating and mitigating evidence produced at the evidentiary hearing. None of the State's arguments has merit.

To succeed on an ineffective assistance of counsel claim, a defendant must demonstrate two things: (1) that counsel's performance was deficient,

and (2) that the deficiency prejudiced the defense. *Strickland*, 466 U.S. at 687.

A. Deficient Performance

To establish deficient performance, a defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* "[T]he proper standard for attorney performance is that of reasonably effective assistance." *Id.* Thus, to prevail on an ineffectiveness claim, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. A petitioner bears the burden of proving counsel's performance was unreasonable by "a preponderance of competent evidence." *Chandler v. United States*, 218 F.3d 1305, 1313 (11th Cir. 2000) (en banc). Regarding the duty to investigate, "counsel has a duty to make a reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary. … [A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 691.

The district court found "that counsels' performance was deficient for failing to reasonably investigate Mr. Williams' background for mitigation." *Williams III*, 2021 WL 4325693, at *17. In making this determination, the district court considered "what Mr. Williams' counsel knew about

him, his criminal charges, and his background and 'what counsel then failed to do and learn about [Mr. Williams] and his childhood background.'" *Id.* (citing *Hardwick v. Sec'y, Fla. Dep't of Corr.*, 803 F.3d 541, 552 (11th Cir. 2015)). Because the State has not shown any of the district court's factual findings are clearly erroneous, we agree with the district court.

After reviewing the totality of the evidence in the record and produced at the evidentiary hearing, we find that Funderburg's and Wilson's representation of Williams at the penalty phase "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687–88. Specifically, counsel failed to conduct an adequate investigation into Williams' background for possible mitigating evidence. Counsel knew how important the penalty phase of the trial was, given the overwhelming evidence of Williams' guilt. Funderburg testified that he knew Williams' confession would likely be admitted at trial, so mitigation would be important to possibly get life without parole. Wilson also knew the importance of mitigation. Handwritten notes from her case file show that she identified the "best issue" to be whether the sentence would be life without parole or death. Counsel also knew the sexual nature of the crime and that alcohol and marijuana played a significant role, so reasonable counsel with this knowledge would have thoroughly investigated Williams' sexual history and how he began abusing alcohol and marijuana.

Despite counsel's knowledge that the penalty phase would be crucial, counsel failed to use available resources for a mitigation investigation. The trial court had granted a motion from Wilson and awarded $1,500 to hire a mitigation investigator for the penalty phase, but counsel never used the court-awarded funds to retain a mitigation investigator.

The evidence also shows that counsel unreasonably delayed starting their mitigation investigation, and when counsel did start at the eleventh hour, their efforts were minimal and deficient. The trial court appointed Wilson in November 1996 and Funderburg in May 1997, and Williams' trial was ultimately set for November 1998. Yet, at the time Wilson filed the June 1997 motion seeking funds for a mitigation investigator—seven months after her appointment—she stated in the motion that there had "not been adequate investigation into critical matters relevant to … [the] level of culpability and appropriate punishment." By August 1997, Funderburg had not spoken to any of Williams' friends or family regarding his background. And by February 1999—only days prior to Williams' trial—the only documentary records that Funderburg had received and reviewed were Williams' Job Corps records.

Funderburg testified at the evidentiary hearing that he did not contact any family or friends prior to August 1997 because he did not think there was much cooperation at the time from Williams' friends who were also suspects. But counsel did not

even reach out to those friends or relatives who were *not* suspects, such as Williams' childhood friend, Marlon Bothwell, or his sisters, LaCharo and Sharenda. Prior to trial, the only relatives Funderburg met with were Williams' mother, Charlene, and his great-grandmother, Beulah Williams. Counsel called only two witnesses at the penalty phase—Charlene and Eloise. Funderburg failed to properly prepare Eloise to testify, as he only met with her for the first time on the day of her testimony for about fifteen minutes. Eloise testified at the evidentiary hearing that counsel did not seem to understand Williams' life story.

The evidence shows that counsel met infrequently with Williams and failed to ask more than general questions about Williams' background. Williams testified at the evidentiary hearing that he met with counsel only about "a half dozen times," and the meetings lasted 15 to 30 minutes. Counsel's fee declarations support Williams' testimony. Wilson's fee declaration reflects that she met with Williams only twice for a total of 3 hours over the course of two years. Funderburg's fee declaration shows he met with Williams five times for a total of 8 hours (although 4.5 of the 8 hours were conferences with Williams *and* the District Attorney, so presumably Funderburg and Williams were not alone). Williams testified that Funderburg asked him only general questions about his childhood, such as about family and school. Williams was never asked about his family background; whether he had been

neglected; or whether he had been sexually, physically, or emotionally abused.

These deficiencies were patently unreasonable. *See Johnson v. Sec'y, DOC*, 643 F.3d 907, 932 (11th Cir. 2011) ("Given the overwhelming evidence of guilt, any reasonable attorney would have known … that the sentence stage was the only part of the trial in which [the defendant] had any reasonable chance of success.")

Had counsel conducted a more thorough investigation into Williams' sexual history, they would have learned that Williams had been sexually abused on three or four occasions between the ages of four and six when he and his mother lived with the Mostella family. At the evidentiary hearing, Williams testified that Mario Mostella, who was older[4] and used to babysit him, used to pretend they were playing a game in which they would touch each other's genitals, and Mostella would anally penetrate Williams. Williams never told his mother about the sexual abuse, and the abuse led Williams to have thoughts of self-harm and suicide and feelings of shame and depression. Williams stated that he never told his trial attorneys about the sexual abuse because "[t]hey

[4] Williams testified that he believed Mostella was ten or twelve years older than him, whereas Eloise testified that Mostella was "maybe ten" years old. While Mostella's exact age is unclear, it is apparent that he was older than Williams and, since he used to babysit Williams, presumably would have been in control when they were unsupervised.

didn't ask," but he later told his postconviction attorney. Williams testified that he did not tell his postconviction attorney about the sexual abuse when first asked, but after growing comfortable with him over time, Williams shared that he had been sexually abused when counsel later asked him again.

Williams was also exposed to sexual relations at an inappropriately young age. There were poor boundaries in Williams' family with regard to sexuality. For example, Charlene used to have her boyfriends in the same bed that she shared with Williams (although Williams never witnessed his mother having sexual relations). Williams testified that when he was ten years old, his 18- or 19-year-old cousin Brian Williams allowed him "to watch [Brian] have sex as a way of showing [Williams] how to do it with a woman." Williams' sexual abuse and his exposure to other people's sexual relations at such a young age had a significant detrimental impact on his own sexual development. Dr. Mendel testified that male victims of sexual abuse will often display "compulsive sexuality or hyper sexuality, [become] very driven to be sexually active and have numerous partners." Williams became sexually active at the age of ten, had about 75 sexual partners by the time he graduated high school, and about 150 sexual partners by the time of his arrest. Williams had no serious or committed relationships, just a "pattern of repeated hookups and sexual encounters." Dr. Mendel testified that Williams' promiscuity was "very reassuring to him" and "made him feel like a man."

Had counsel conducted an adequate investigation into Williams' family background, they also would have learned about the domestic violence Williams witnessed between his mother and her abusive boyfriend, Jeff Deavers. Williams saw his mother "with a black eye and busted lip," and on another occasion he saw Deavers strike his mother with his hand. Williams, who was then 12 or 13 years old, grabbed a knife and tried to stab Deavers.

Counsel would have also learned about the pervasive history of childhood sexual abuse and incest within Williams' family, which spans multiple generations. Dr. Mendel stated in his expert report that Williams' great-grandmother Beulah was raped by her uncle, who fathered her child; his grandmother Laura's first child was fathered by Laura's cousin; his aunt Veronica was molested by her aunt Helen's boyfriend; and his cousin Brian molested Williams' sister LaCharo and his cousin Zakia. Within Williams' family, the sexual abuse and molestations were simply "swept under the rug." According to Dr. Mendel, within Williams' family, "disclosure would have been worthless, resulting in neither protection from further abuse or treatment for the impact of the abuse."

Further, counsel would have learned about the alcoholism that was rampant in Williams' family, and how Williams' mother Charlene often drank to the point of intoxication and neglected Williams as a child. Williams began drinking alcohol between the

ages of 12 and 14 years old, and his consumption steadily increased through his teenage years to the point where he was getting drunk weekly.

Finally, counsel would have learned that Williams' childhood was defined by chaos and abandonment. As a child, Williams and his teenage mother lacked a stable home life, instead bouncing around to live with different relatives or family friends. Eloise testified at the evidentiary hearing that Charlene would often go out partying or drinking; she would leave the children to fend for themselves; and at times the children were not clean or well cared for. When Williams was six or seven years old, he moved back and forth between Eloise and his great-grandmother because Charlene could not properly care for him. Charlene and Williams' father were not in a committed relationship, and Williams' father was not involved in his life until he was 13 or 14 years old. Williams did not grow up with any of his six half-siblings, all of whom were raised in different households. Williams felt that all of his half-siblings had a place they could call home, whereas Williams lacked a consistent home and felt that he was never wanted or belonged anywhere.

Had trial counsel conducted an adequate investigation into Williams' background, they would have learned about all the circumstances discussed above and been able to present them to the jury as mitigating evidence. But the jury never heard any of this compelling mitigating evidence.

Because the Supreme Court has endorsed the use of the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 1989 (ABA Death Penalty Guidelines), the district court properly used it to determine whether Williams' counsel was deficient. *See Wiggins v. Smith*, 539 U.S. 510, 524 (2003). Looking to the prevailing norms at the time of Williams' trial, a capital defendant who does not have a "credible argument for innocence … has the right to present his or her sentencer with any mitigating evidence that might save his or her life." ABA Death Penalty Guidelines 1.1, commentary. The ABA Death Penalty Guidelines further instruct that counsel should investigate both the guilt and penalty phases "immediately upon counsel's entry into the case and [the investigation] should be pursued expeditiously." *Id.* 11.4.1(A). Moreover, as soon as appropriate counsel should "collect information relevant to the sentencing phase of trial including, but not limited to … family and social history (including physical, sexual or emotional abuse)." *Id.* 11.4.1(2)(C).

It is clear to us from the totality of the evidence that counsel spent minimal time and effort conducting a background investigation for potential mitigating evidence that would help the jury understand why Williams committed the crime that he did. Counsel's minimal efforts were also unreasonably delayed and untimely. As a result, counsel's failure to conduct an adequate background investigation for mitigating evidence deprived

Williams of reasonably effective assistance. *Strickland*, 466 U.S. at 687.

The State argues that the district court failed to uphold the presumption of effective assistance when it found that attorney Wilson unreasonably failed to keep better records. Citing *Callahan v. Campbell*, 427 F.3d 897, 933 (11th Cir. 2005), the State asserts that when assessing a deceased attorney's performance, courts presume the attorney "did what [s]he should have done" and exercised reasonable professional judgment. We are not persuaded by the State's argument. While it is true that "[j]udicial scrutiny of counsel's performance must be highly deferential" and we must endeavor "to eliminate the distorting effects of hindsight," *Strickland*, 466 U.S. at 680, the deferential standard is not insurmountable. Although Wilson could not testify herself, we have a thorough understanding from the other witnesses and documentary evidence of what Wilson did—and, more importantly, did not do—as far as Williams' mitigation defense during the penalty phase. Funderburg, Wilson's co-counsel, and Tina Watson, her legal assistant of almost two decades, both testified at the evidentiary hearing, and Wilson's case file was also produced. Here, there is abundant evidence that trial counsel's performance at the penalty phase was untimely, deficient, and unreasonable.

Nor were counsel's omissions the result of strategy. Trial counsel had "a duty to make reasonable investigations or to make a reasonable

decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. Here, counsel did not conduct a reasonable background investigation, and the decision not to investigate was not the result of any strategic choice. In order to make a strategic choice about which evidence to present and which evidence to omit, counsel needed to first investigate and discover the evidence and then make an informed, strategic decision. Here, counsel simply failed to conduct an adequate investigation in the first place.

In sum, the district court made thorough factual findings after the evidentiary hearing, which help us assess the merit of Williams' failure-to-investigate claims—and the State has not specifically identified any of those factual findings as clearly erroneous. Considering the district court's factual findings and the totality of the evidence in the record, on de novo review we find that "in light of all the circumstances," trial counsel's failure to investigate Williams' background for mitigating evidence was "outside the wide range of professionally competent assistance." *Id.* at 690.

B. Prejudice

In addition to deficient performance, a petitioner must also establish prejudice to succeed on an ineffective-assistance-of-counsel claim. *Id.* at 687. To establish prejudice, a defendant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* When a defendant challenges a death

sentence, the test for prejudice "is whether there is a reasonable probability that, absent [counsel's] errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

After carefully reweighing the evidence, we find there is a reasonable probability that, absent counsel's deficiencies, the balance of aggravating and mitigating factors in Williams' case did not warrant a sentence of death.

At the penalty phase of Williams' trial, the jury only heard testimony from Eloise and Charlene. However, their testimony revealed very little about the true extent of Williams' troubled upbringing and family history. The jury never heard about Williams' sexual abuse, his early exposure to sexual relations, his exposure to domestic violence, the abandonment by both his father and mother, or the sexual abuse and alcoholism that was pervasive in his family. The Supreme Court has found that counsel's failure to present evidence of abuse in mitigation constitutes prejudice. *See*, *e.g.*, *Wiggins*, 539 U.S. at 534–35 (finding prejudice where counsel failed to discover and present mitigating evidence of the defendant's physical and sexual abuse during childhood); *Rompilla v. Beard*, 545 U.S. 374, 391–93 (2005) (finding petitioner was prejudiced by counsel's failure to present evidence of parents'

alcoholism, domestic violence, physical and verbal abuse, and dire living conditions). In Williams' case, "the nature, quality, and volume of the mitigation never known to the jury is significant enough to conclude that it 'bears no relation' to the cursory evidence that trial counsel presented." *Daniel v. Comm'r, Ala. Dep't of Corr.*, 822 F.3d 1248, 1276 (11th Cir. 2016) (quoting *Rompilla*, 545 U.S. at 393). Had the jury been presented with all of the mitigating evidence, there is a reasonable probability that the outcome of Williams' trial could have been different. *Strickland*, 466 U.S. at 695.

The State argues that the district court incorrectly reweighed the additional aggravating and mitigating evidence produced at the evidentiary hearing by giving significance to the number of aggravators and mitigators rather than their nature. This argument is meritless and, in all events, on de novo review, this Court has independently reweighed all the available evidence. *See Strickland*, 466 U.S. at 695. We have reviewed the record and the evidence produced at the evidentiary hearing, and we find that not only the sheer volume of but also the powerful nature of the mitigators overwhelmingly outweighs the aggravator in Williams' case. We do not minimize the weight or significance of the aggravating circumstance—that the murder was committed during a rape—but, when balancing it against all of the mitigating circumstances that we now know, our confidence in the outcome of the penalty phase of Williams' trial is undermined. *Id.* at 694.

The State also asserts that the district court erroneously found Williams was prejudiced by counsel's failure to present evidence of childhood sexual abuse by Mostella because Williams never described the experience as traumatic, and the mitigation value of the evidence is weakened by the passage of time between the abuse and Williams' crime. We disagree. Dr. Mendel testified at the evidentiary hearing that he strongly believed that "if the sexual abuse hadn't happened, there would not have been the sexual violence." The abuse clearly had a damaging impact on Williams because he felt shameful and had thoughts of hurting or killing himself. The abuse also contributed to the early age at which Williams became sexually active, and the hypersexuality he developed as an adolescent and a young man. The district court credited both Williams' and Dr. Mendel's testimony regarding the sexual abuse by Mostella, and the State has not adequately challenged this credibility finding. Thus, we reject the State's argument that Williams was not prejudiced by the failure to present evidence regarding Williams' sexual abuse by Mostella. *See Williams II*, 791 F.3d at 1277 (noting that sexual molestation and repeated rape "during childhood can be powerful mitigating evidence, and is precisely the type of evidence that is 'relevant to assessing a defendant's moral culpability'").

The dissent disagrees that Williams has established prejudice and places much emphasis on the facts of the underlying murder. Dissenting Op. at 2–3. While we do not minimize the brutality of

Williams' crime, those facts must be weighed against all the mitigating evidence. Here, the district court conducted an evidentiary hearing on the failure-to-investigate claims, made extensive factual findings based on evidence that had not been presented during Williams' penalty phase, and concluded that Williams was entitled to habeas relief. On appeal, we must review the district court's factual findings for clear error and its legal conclusions de novo. The clear error standard is highly deferential. *Holton*, 425 F.3d at 1350. The dissent has not suggested that any of the district court's factual findings were clearly erroneous. We find no clear error in the court's factual findings. Considering the record before us—and given the highly deferential standard of review for factual findings—we conclude that Williams has established *Strickland* prejudice.

Thus, Williams "has met the burden of showing that the decision reached [at the penalty phase] would reasonably likely have been different absent the errors." *Strickland*, 466 U.S. at 696.

IV. CONCLUSION

Williams has established both that his trial counsel rendered deficient performance during the penalty phase of his trial, and that their deficient performance prejudiced him. As a result, Williams' trial was fundamentally unfair. Accordingly, we affirm the district court's grant of habeas corpus relief.

AFFIRMED.

GRANT, Circuit Judge, dissenting:

Trial counsel's efforts to investigate Williams's background and prepare for the sentencing phase were unacceptable. Despite being fully aware that the strength of the evidence of their client's guilt meant a thorough mitigation investigation was imperative, the two attorneys billed a combined total of less than 15 hours for sentencing-phase preparation. But even though I join the majority in concluding that counsel's performance was deficient, I do not agree that Williams can meet his burden of showing a reasonable probability that, if not for counsel's substandard performance, the sentencing authority "would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland v. Washington*, 466 U.S. 668, 695 (1984). I therefore respectfully dissent.

The only way to conclude that Williams met that burden is to dismiss the statutory aggravator—that the murder was committed during a burglary and rape, Alabama Code § 13A-5-49(4)—without adequate consideration. We have previously explained that when a murder is "carefully planned, or accompanied by torture, rape or kidnapping," the aggravating circumstances of the crime itself may "outweigh any prejudice caused when a lawyer fails to present mitigating evidence." *Callahan v. Campbell*, 427 F.3d 897, 938 (11th Cir. 2005) (quoting *Dobbs v. Turpin*, 142 F.3d 1383, 1390 (11th Cir. 1998)). This is especially true where the murder is a brutal one—"or, even, a less

brutal murder for which there is strong evidence of guilt in fact." *Clisby v. Alabama*, 26 F.3d 1054, 1057 (11th Cir. 1994).

Here, the murder of Rowell was brutal. And it was proven by overwhelming evidence of Williams's guilt, including blood and semen evidence and several statements by Williams describing his crimes. *See Williams v. Alabama*, 791 F.3d 1267, 1269 (11th Cir. 2015).

The circumstances of the burglary, rape, and murder that Williams committed bear repeating. Melanie Rowell, a young mother with two small children, was fast asleep when Williams invaded her home in the middle of the night, intent on raping her. He took a knife from her kitchen and went quietly up the stairs, taking his pants off along the way. At the top of the stairs, he climbed over a baby gate and stopped to "peek[] in" at the children, who were asleep in the bedroom across the hall from Rowell's. Rowell awoke with Williams on top of her, holding a knife to her throat and pulling off her shorts. She screamed and struggled and bit his hand, but he held her down and strangled her until she stopped moving, and then raped her—apparently not caring whether she was alive or dead at that point. Afterward, Williams left Rowell's brutalized and half-naked body on the floor, where it was discovered first by Rowell's 15-month-old daughter and then by her mother. Any evaluation of the aggravating circumstance must acknowledge the shock and terror of the home invasion, the added fear the victim must have felt

for her children, the cold brutality shown by Williams in strangling a neighbor to death so that he could rape her, and the cruel aftermath of the murder for Rowell's family, especially her young children. *See Miller v. State*, 913 So. 2d 1148, 1164 (Ala. Crim. App. 2004) (explaining that victim impact evidence is admissible during the penalty phase and relevant to whether the death penalty should be imposed).

Here, the majority concludes that the "sheer volume" and "powerful nature" of the mitigating evidence "overwhelmingly outweighs the aggravator in Williams' case." Maj. op. at 22. I cannot agree. To start, the volume of mitigating evidence has little bearing on its weight, especially when much of the evidence is cumulative of the testimony given at trial. *See Wong v. Belmontes*, 558 U.S. 15, 22–23 (2009) (finding no prejudice where some of the new evidence was cumulative of evidence presented at trial and thus of little use); *Holsey v. Warden, Georgia Diagnostic Prison*, 694 F.3d 1230, 1270–71 (11th Cir. 2012) (same). Williams's mother and aunt testified during the original penalty phase about Williams's difficult childhood, including his abandonment by his father, his lack of a stable home, and his sadness and sense of abandonment when his mother left him to be cared for by relatives. Their testimony about Williams was much the same during the federal habeas proceedings. That this narrative was already presented makes it no less tragic. But it does minimize the potential effect of the new evidence Williams offers.

Williams's new evidence of childhood abuse also fails to match the standard set by the Supreme Court in *Wiggins v. Smith* and *Rompilla v. Beard*.[1] His testimony that he was sexually abused by an older boy on three or four occasions over a two-year period, though horrifying, bears little resemblance to the "severe privation and abuse," "physical torment, sexual molestation, and repeated rape" demonstrated in *Wiggins*, or the long history of severe neglect and physical and emotional abuse described in *Rompilla*. *See Wiggins v. Smith*, 539 U.S. 510, 516–17, 535 (2003); *Rompilla v. Beard*, 545 U.S. 374, 390–93 (2005). Indeed, the State's expert testified that Williams did not experience trauma from the encounters, and Williams's own expert testified that the lack of stability in Williams's home life had a more negative and traumatizing impact on Williams than the sexual abuse.

Other new evidence has even less mitigating value. Testimony that members of Williams's extended family also suffered childhood sexual abuse has little relevance—and thus should be

[1] The majority accepts as a given that Williams would have disclosed the abuse to trial counsel if they had asked, but I am not convinced. Williams never told anyone about the abuse until decades after it occurred and after he had already been sentenced to death. He denied childhood abuse during his pretrial psychological evaluation and when he was first asked about it by his postconviction counsel. Williams's psychological expert opined that Williams would also have initially denied sexual abuse if his trial counsel had asked him about it and would only say that it was "possible" that the abuse "could have come out" with "time and development of trust."

accorded little weight—given the lack of evidence that Williams witnessed or even knew about the abuse. Evidence of widespread alcoholism among the adults in Williams's life would have served only to partially explain Williams's own alcoholism; the witnesses gave no indication that his family members were violent or abusive when drunk. And more detailed evidence of Williams's own drug and alcohol use likely would not have helped him at all. Such evidence "often has little mitigating value and can do as much or more harm than good in the eyes of the jury." *Crawford v. Head*, 311 F.3d 1288, 1321 (11th Cir. 2002); *see*, *e.g.*, *Grayson v. Thompson*, 257 F.3d 1194, 1227 (11th Cir. 2001).

One more thing to consider is that Williams's evidence related to childhood sexual abuse is not entirely mitigating, and would also invite unfavorable evidence in rebuttal. We "must consider all the evidence—the good and the bad—when evaluating prejudice." *Belmontes*, 558 U.S. at 26. In explaining the link between the childhood sexual abuse and Williams's capital crime, Williams's expert testified that he compensated for feelings of shame and self-doubt by becoming hypersexual and hyperaggressive. He became sexually promiscuous without developing any stable romantic relationships. He was suspended from school twice and kicked out of Job Corps for fighting, and he was arrested for assault during his teens. Further, the new evidence shows that although Williams was open about his hypersexuality, he refused to acknowledge his "anger and the tendencies toward violence" arising from the abuse.

This testimony would have had the potential to harm Williams in the eyes of the jury. It would have also invited argument by the State that Williams's tendencies toward violence and aggression would make him a danger to other inmates if he were released into the general population to serve a life sentence. *See Simmons v. South Carolina*, 512 U.S. 154, 165 n.5 (1994) (plurality opinion) ("the fact that a defendant is parole ineligible does not prevent the State from arguing that the defendant poses a future danger"); *see also id.* at 177 (O'Connor, J., concurring in judgment) (when the defendant raises his parole ineligibility, "the prosecution is free to argue that the defendant would be dangerous in prison").

To prove this propensity, the State undoubtedly would have introduced evidence that before his arrest, Williams committed a second burglary and sexual assault on another neighbor—this time a woman he had known since childhood. The evidence would have shown that only a few weeks after murdering Rowell, Williams again invaded a neighbor's home in the middle of the night with the intention of raping her. The record reflects graphic evidence of yet another violent attack in which Williams took off his pants, climbed through a window, and attacked the woman in her bed, holding her down while he rubbed his penis on her and "put his hand up in her vagina" as she struggled and begged for her life. When Williams discovered that the woman was menstruating, he ordered her to perform oral sex on him. She

continued to struggle with Williams until daybreak, when he finally left.

This evidence is relevant in several ways. To start, it is admissible in Alabama to show future dangerousness, which is "a subject of inestimable concern at the penalty phase." *Floyd v. State*, 289 So. 3d 337, 431 (Ala. Crim. App. 2017) (citation omitted). And while future dangerousness is not an aggravating circumstance in itself, it is relevant to determining the weight that should be afforded to the aggravating circumstance proven by the State. *See id.*

The evidence of Williams's second burglary and attempted rape would have also reduced or eliminated the mitigating value of his lack of significant prior criminal history. Just as significantly, the later crime would have demonstrated Williams's lack of regret in the weeks following Rowell's murder, undermining his (already unconvincing) claim for the mitigating circumstance of remorse.

In addition to the previously unexplored evidence depicting Williams as an unrepentant murderer and serial home invader, the State likely would have responded to Williams's claims of childhood suffering by further developing evidence of the lasting trauma Williams inflicted on Rowell's children by killing their mother. At the initial sentencing hearing, the State introduced only one witness to testify about the children's anger, fear, grief, and confusion; the evidence Williams now

proffers would have opened the door to much more. *See*, *e.g.*, *Woodward v. State*, 123 So. 3d 989, 1041–43 (Ala. Crim. App. 2011), *as modified on denial of reh'g* (Aug. 24, 2012).

Given all of these facts, I do not agree that it is reasonably likely that the assistance of competent counsel at trial would have resulted in a different sentence. *Strickland*, 466 U.S. at 696. To be sure, I do not excuse the failure of the defense team to properly investigate and present a mitigation case. But viewed in its entirety and weighed properly, the evidence developed in habeas creates only the slightest possibility of a different outcome. This conclusion does not in any way conflict with the factual findings made by the district court. *Contra* Maj. op. at 23. And the district court's final determination on the prejudice prong is a mixed question of law and fact that we review de novo. *Strickland*, 466 U.S. at 698; *Jefferson v. GDCP Warden*, 941 F.3d 452, 473 (11th Cir. 2019). To show prejudice under *Strickland*, the "likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 111–12 (2011). Because Williams has not met that standard, I would reverse the district court's grant of federal habeas relief and reinstate Williams's death sentence.

APPENDIX D

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 21-13734

MARCUS BERNARD WILLIAMS,

Petitioner-Appellee,

versus

STATE OF ALABAMA,

Respondent-Appellant.

Appeal from the United States District Court
for the Northern District of Alabama
D.C. Docket No. 1:07-cv-01276-KOB

[Filed July 1, 2026]

Before GRANT, LAGOA, and WILSON, Circuit Judges.

PER CURIAM:

The Petition for Panel Rehearing filed by Marcus Bernard Williams is DENIED.