PETITION APPENDIX

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Appendix A

Rel: January 30, 2026

Notice: This unpublished memorandum should not be cited as precedent. See Rule 54, Ala. R. App. P. Rule 54(d) states, in part, that this memorandum "shall have no precedential value and shall not be cited in arguments or briefs and shall not be used by any court within this state, except for the purpose of establishing the application of the doctrine of law of the case, res judicata, collateral estoppel, double jeopardy, or procedural bar."

ALABAMA COURT OF CRIMINAL APPEALS

CR-2025-0396

Dontae Callen v. State of Alabama

Appeal from Jefferson Circuit Court
(CC-11-2047.60)

MEMORANDUM DECISION

WINDOM, Presiding Judge.

Dontae Callen appeals the dismissal of his petition for postconviction relief filed pursuant to Rule 32, Ala. R. Crim. P., in which he challenged his August 2013 convictions for capital murder in the deaths of Bernice Kelly, Quortes Kelly, and 12-year-old Aaliyah Budgess,

and his resulting sentence of death.[1] This Court affirmed Callen's convictions on August 11, 2017, and, following a remand, affirmed his sentence of death on April 28, 2017. Callen v. State, 284 So. 3d 177 (Ala. Crim. App. 2017). The certificate of judgment was issued on November 16, 2018.

On November 11, 2019, Callen filed this, his first, Rule 32 petition. Callen filed an amended petition on August 19, 2021, and a second amended petition on July 29, 2022. (C. 682-809.) In this second and final amended petition, Callen raised various claims of ineffective assistance of counsel. The State filed a motion to dismiss Callen's petition on January 27, 2023. On April 10, 2025, the circuit court dismissed Callen's petition. (C. 46-131.)

In this Court's opinion on direct appeal, it set out the following facts surrounding Callen's convictions:

> "The State's evidence tended to show that around 4:00 a.m. on the morning of October 29, 2010, emergency personnel were dispatched to Bernice Kelly's apartment in response to a 911-emergency telephone call that there was a fire in her apartment. Lt. Warren Calvert, a member of the Birmingham Fire Department, testified that his unit was the first on the

[1] The jury, by a vote of 11 to 1, recommended that Callen be sentenced to death. The circuit court accepted the jury's recommendation and sentenced Callen to death.

scene and that he observed smoke coming from one of the apartments on the lower level. He went to the apartment, he said, and tried to open the front door, but it was blocked. (R. 442.) Lt. Calvert said that he pulled an unconscious woman's body from behind the door and was then able to enter and search the apartment because, he said, people were yelling that more people were in the apartment. He found another body, a young female, in the bathroom, and he took her out of the apartment. At that time, Lt. Calvert said, another firefighter yelled at him to stop because he was covered in blood. He further testified that a third body, a male, was also recovered from the apartment. After they discovered that the victims were covered in blood, Lt. Calvert said, they called the police department. Lt. Fitzgerald Mosely, a fire investigator with the City of Birmingham, testified that he investigated the fire, that the fire was not accidental, and that it had multiple points of origin. He further testified that when the firemen arrived Bernice's body was on fire and they had to extinguish that fire to remove her body. Bernice was still alive and was taken to a local hospital where she died later that day.

"Dr. Gary Simmons, a forensic pathologist with the Jefferson County Coroner's Office, testified that Bernice Kelly had been stabbed 18 times in her upper body and died of multiple sharp-force trauma; Quortes Kelly had been stabbed 33 times in his upper body and died of multiple sharp-force trauma; and Aaliyah Budgess had been stabbed 25 times to her neck and head and died of multiple sharp-force trauma. None of the three victims had carbon monoxide in their lungs. Lisa Brown -- Bernice's daughter and Quortes's sister -- testified that Bernice was Callen's great aunt and that Quortes and Aaliyah were Callen's cousins. Brown said that Aaliyah lived with Bernice so that she could go to a private school in the area and that Quortes also lived with Bernice. Faye Budgess, Bernice's sister, testified that on the evening of October 28, 2010, she was with Quortes, Callen, and Aaliyah at a neighbor's house watching television. She said

that Quortes, Callen, and Aaliyah left at about 10:00 p.m. to return to Bernice's apartment. Budgess said that Callen had lived with Bernice until several months before the murders.

"Det. Warren Cotton, an investigator with the Birmingham Police Department, testified that he investigated the triple homicide and first came into contact with Callen at the hospital. Callen was nervous, Det. Cotton said, and had cuts on his body and a red substance in one of his ears. Det. Cotton requested that Callen be transported to the police station. At the police station, Det. Cotton said, Callen confessed that he stabbed all three victims, that he lit some clothes on fire with a lighter, and that when the fire started 'getting big' he left the apartment through the back door. He said that Quortes was in a bedroom, his Aunt Bernice was near the front door, and Aaliyah was by the bathroom. Callen said that he threw the knife away down the street from the apartment.

"Officer Roxanne Murry, an evidence technician with the Birmingham Police Department, testified that she collected various items from the scene and near the scene of the triple homicide. Officer Murry said that in a sewer about one block from the triple homicide she collected two knives, a sandal, red-soaked clothes, and red-stained mittens.

"Nathan Rhea, a forensic scientist with the Alabama Department of Forensic Sciences, testified that he performed DNA testing on the red substance collected from one of Callen's ears and the items collected from the scene of the crime and from Callen's residence. Rhea testified that the substance in Callen's ear was blood and that it contained a mixture of Quortes's blood and Callen's blood. Rhea further testified that each of the three victims could have contributed to the blood discovered on one of the knives recovered in a sewer near the crime scene. Also, clothes taken from Callen's residence contained blood that matched Quortes's blood."

Callen, 284 So. 3d at 187-88.

Standard of Review

Callen appeals the circuit court's summary dismissal of his petition for postconviction relief attacking his capital-murder conviction and sentence of death. According to Rule 32.3, Ala. R. Crim. P., Callen has the sole burden of pleading and proving that he is entitled to relief. Rule 32.3, Ala. R. Crim. P., provides:

> "The petitioner shall have the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief. The state shall have the burden of pleading any ground of preclusion, but once a ground of preclusion has been pleaded, the petitioner shall have the burden of disproving its existence by a preponderance of the evidence."

When it reviewed Callen's claims on direct appeal, this Court applied a plain error standard of review and examined every issue regardless of whether the issue was preserved for appellate review. See Rule 45A, Ala. R. App. P. However, the plain error standard does not apply when evaluating a ruling on a postconviction petition, even when the petitioner has been sentenced to death. See Ferguson v. State, 13 So. 3d 418, 424 (Ala. Crim. App. 2008); Waldrop v. State, 987 So. 2d 1186 (Ala. Crim. App. 2007); Hall v. State, 979 So. 2d 125 (Ala. Crim. App. 2007); Gaddy

v. State, 952 So. 2d 1149 (Ala. Crim. App. 2006). "The standard of review this Court uses in evaluating the rulings made by the trial court is whether the trial court abused its discretion." Hunt v. State, 940 So. 2d 1041, 1049 (Ala. Crim. App. 2005) (citing Elliott v. State, 601 So. 2d 1118, 1119 (Ala. Crim. App. 1992)). However, "[t]he sufficiency of pleadings in a Rule 32 petition is a question of law. 'The standard of review for pure questions of law in criminal cases is de novo. Ex parte Key, 890 So. 2d 1056, 1059 (Ala. 2003).'" Ex parte Beckworth, 190 So. 3d 571, 573 (Ala. 2013) (quoting Ex parte Lamb, 113 So. 3d 686, 689 (Ala. 2011)). Last, "[t]his Court may affirm the judgment of the circuit court for any reason, even if not for the reason stated by the circuit court." Acra v. State, 105 So. 3d 460, 464 (Ala. Crim. App. 2012).

With these principles in mind, this Court reviews the claims raised by Callen in his brief to this Court.

I.

Callen asserts on appeal, as he did in his postjudgment objection, that the circuit court erred by adopting verbatim the State's proposed order. Specifically, Callen contends that the State's proposed order was nearly identical to the State's answer and the State's motion to dismiss.

According to Callen, because the circuit court's order copied the State's proposed order verbatim it cannot be deemed a manifestation of the findings and conclusions of the court and, thus, is due to be reversed. Callen also cites typographical errors and erroneous statements regarding the pleadings in the circuit court's order.

It is well settled in Alabama that

> "'"[w]hile the practice of adopting the state's proposed findings and conclusions is subject to criticism, the general rule is that even when the court adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous. Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985); Hubbard v. State, 584 So. 2d 895 (Ala. Cr. App. 1991); Weeks v. State, 568 So. 2d 864 (Ala. Cr. App. 1989), cert. denied, [498] U.S. [882], 498 U.S. 882, 111 S. Ct. 230, 112 L. Ed. 2d 184 (1990); Morrison v. State, 551 So. 2d 435 (Ala. Cr. App.), cert. denied, 495 U.S. 911, 110 S. Ct. 1938, 109 L. Ed. 2d 301 (1990)."

"'Bell v. State, 593 So. 2d 123, 126 (Ala. Crim. App. 1991). See also Dobyne v. State, 805 So. 2d 733, 741 (Ala. Crim. App. 2000); Jones v. State, 753 So. 2d 1174, 1180 (Ala. Crim. App. 1999).

"'More recently in Hyde v. State, 950 So. 2d 344 (Ala. Crim. App. 2006), we stated:

> "'"[T]his Court has repeatedly upheld the practice of adopting the State's proposed order when denying a Rule 32 petition for postconviction

> relief. See, e.g., Coral v. State, 900 So. 2d 1274, 1288 (Ala. Crim. App. 2004), overruled on other grounds, Ex parte Jenkins, 972 So. 2d 159 (Ala. 2005), and the cases cited therein. 'Alabama courts have consistently held that even when a trial court adopts verbatim a party's proposed order, the findings of fact and conclusions of law are those of the trial court and they may be reversed only if they are clearly erroneous.' McGahee v. State, 885 So. 2d 191, 229–30 (Ala. Crim. App. 2003)."

"'950 So. 2d at 371.

"'However, the Alabama Supreme Court has admonished that "appellate courts must be careful to evaluate a claim that a prepared order drafted by the prevailing party and adopted by the trial court verbatim does not reflect the independent and impartial findings and conclusions of the trial court." Ex parte Ingram, 51 So. 3d 1119, 1124 (Ala. 2010).

"'In Ingram, the Supreme Court held that the circuit court's adoption of the State's proposed order denying postconviction relief was erroneous because, it said, the order stated that it was based in part on the personal knowledge and observations of the trial judge when the judge who actually signed the order denying the postconviction petition was not the same judge who had presided over Ingram's capital murder trial. "[T]he patently erroneous nature of the statements regarding the trial judge's 'personal knowledge' and observations of Ingram's capital murder trial undermines any confidence that the trial judge's findings of fact and conclusions of law are the product of the trial judge's independent judgment ...." Ingram, 51 So. 3d at 1125.

"'....'

"Ray, 80 So. 3d at 971-72."

Miller v. State, 99 So. 3d 349, 355-57 (Ala. Crim. App. 2011).

> "'In Ex parte Scott, [262 So. 3d 1266 (Ala. 2011)], the circuit court adopted verbatim as its order the State's answer to Scott's Rule 32 petition. The Alabama Supreme Court stated:
>
> > "'"[A]n answer, by its very nature, is adversarial and sets forth one party's position in the litigation. It makes no claim of being an impartial consideration of the facts and law; rather it is a work of advocacy that exhorts one party's perception of the law as it pertains to the relevant facts."
>
> "'[262] So. 3d at [1274]. The Court then held that "[t]he trial court's verbatim adoption of the State's answer to Scott's Rule 32 petition as its order, by its very nature, violates this Court's holding in Ex parte Ingram" that the findings and conclusions in a court's order must be those of the court itself. [262] So. 3d at [1274].
>
> "'[The appellant] argues that his case is similar to Ex parte Scott because, he says, the State's proposed order adopted by the circuit court tracks the language of the State's answer and motion to dismiss and, thus, "is filled with language adversarial in nature." However, [the appellant] cites only a single word in the order that he believes is adversarial in nature, and we do not find this single word to be sufficient to indicate that the court's findings in the order were not the product of its own independent judgment. Likewise, although [the appellant] is correct that the State's proposed order adopted by the circuit court included substantially similar language as

> the State's answer and motion to dismiss, the court adopted the State's proposed order, not the State's answer, unlike the case in Ex parte Scott, and we do not consider the similar language in the adopted order and the State's answer to be an indication that the court's order was not a product of the court's own independent judgment.
>
> "'In sum, the circumstances here are substantially different than the circumstances in both Ex parte Ingram and Ex parte Scott, cases in which it was clear from the record that the orders adopted by the circuit court were not the product of the circuit court's independent judgment. Rather, we conclude that the circuit court's order was its own and was not merely an unexamined adoption of the proposed order submitted by the State. See Ex parte Jenkins, 105 So. 3d 1250 (Ala. 2012); Jackson v. State, 133 So. 3d 420 (Ala. Crim. App. 2009) (opinion on return to remand); McWhorter v. State, 142 So. 3d 1195 (Ala. Crim. App. 2011); and Miller v. State, 99 So. 3d 349, 355-59 (Ala. Crim. App. 2011).'
>
> "Mashburn, 148 So. 3d [1094,] 1111-13 [(Ala. Crim. App. 2013)].

Van Pelt v. State, 202 So. 3d 707, 721-22 (Ala. Crim. App. 2015).

As in Mashburn and Van Pelt, it is not clear from the record in this case that the order adopted by the circuit court was not the product of the circuit court's independent judgment. The typographical errors do not establish that the circuit court's order dismissing Callen's petition was not the product of the court's own independent judgment. Although

Callen may disagree with some of the circuit court's findings regarding his pleadings, the circuit court's order does not contain the same "patently erroneous" statements that were present in Ex parte Ingram, 51 So. 3d at 1125. In the absence of evidence that clearly establishes that the order was not the product of the court's independent judgment, "deference is owed to that order in the same measure as any other order of the [circuit] court." Ex parte Ingram, 51 So. 3d at 1122. Therefore, Callen is not entitled to relief on this claim.

II.

Callen pleaded in his petition that he received ineffective assistance of counsel in the penalty phase, at his sentencing hearing, and in the guilt phase. When pleading claims of ineffective assistance of counsel, this Court has stated:

> "To sufficiently plead an allegation of ineffective assistance of counsel, a Rule 32 petitioner not only must 'identify the [specific] acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment,' Strickland v. Washington, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), but also must plead specific facts indicating that he or she was prejudiced by the acts or omissions, i.e., facts indicating 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' 466 U.S. at 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674. A bare

> allegation that prejudice occurred without specific facts indicating how the petitioner was prejudiced is not sufficient."

Hyde v. State, 950 So. 2d 344, 356 (Ala. Crim. App. 2006).

> "An evidentiary hearing on a coram nobis petition [now Rule 32 petition] is required only if the petition is 'meritorious on its face.' Ex parte Boatwright, 471 So. 2d 1257 (Ala. 1985). A petition is 'meritorious on its face' only if it contains a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the facts relied upon (as opposed to a general statement concerning the nature and effect of those facts) sufficient to show that the petitioner is entitled to relief if those facts are true. Ex parte Boatwright, supra; Ex parte Clisby, 501 So. 2d 483 (Ala. 1986)."

Moore v. State, 502 So. 2d 819, 820 (Ala. 1986). Further,

> "The burden of pleading under Rule 32.3 and Rule 32.6(b) is a heavy one. Conclusions unsupported by specific facts will not satisfy the requirements of Rule 32.3 and Rule 32.6(b). The full factual basis for the claim must be included in the petition itself. If, assuming every factual allegation in a Rule 32 petition to be true, a court cannot determine whether the petitioner is entitled to relief, the petitioner has not satisfied the burden of pleading under Rule 32.3 and Rule 32.6(b). See Bracknell v. State, 883 So. 2d 724 (Ala. Crim. App. 2003)."

Hyde, 950 So. 2d at 356.

A.

Callen asserts that trial counsel were ineffective during the penalty phase and that the circuit court erred in dismissing his penalty-phase claims.

Although Callen asserts that counsel should have done more in the penalty phase, "we first look at what the lawyer[s] did in fact." Chandler v. United States, 218 F.3d 1305, 1320 (11th Cir. 2000).

The record from Callen's direct appeal reveals that, during the penalty phase, defense counsel presented the testimony of several family members who testified that Callen's childhood was chaotic and replete with abandonment. Beatrice Brown, Callen's grandmother, testified that Callen, his brother, and Callen's mother moved in with her when Callen was a child. During that stay, Callen's mother often left the home at night to stay with David Sanders, her boyfriend, leaving Callen and his brother on the front porch in tears. Callen's mother spent only a month at Brown's home, leaving her sons behind with Brown when she moved out. Brown testified that, over the years, she periodically returned Callen to live with his mother; however, "[Callen] would stay a little while and [his mother] would bring him back and just leave him." (Trial R. 1060.) Brown described another stay, when Callen was 15, that ended when Callen's mother and her boyfriend moved out of the home in the middle of the night, leaving Callen abandoned. Callen again returned to live with Brown. According to Brown, Callen "just seemed to always want

his mom," and "couldn't get over that she abandoned him and didn't want him." (Trial R. 1053.) Brown was particularly bewildered about Callen's killing Budgess. Brown testified that Callen loved Budgess and thought of her as a little sister. Brown concluded that, "[f]or him to do this, something had to have been wrong inside of him." (Trial R. 1059.)

Laquoya Callen, Callen's sister, described Sanders, her mother's boyfriend, as "a bad person" and uncaring about Callen and his siblings. (Trial R. 1068.) Laquoya listed the various family members with whom Callen had lived and stated that the Department of Human Resources ("DHR") had been involved with Callen over abandonment issues. Laquoya told the jury that her pleas for her mother to care for Callen were met with indifference, and that her mother had very little interaction with Callen from the age of 11.

Lawrence Callen, Callen's brother, echoed much of what his grandmother and sister had said about Deontae's tumultuous childhood. Lawrence testified that Callen's feeling of abandonment manifested as anger and sadness, and that Callen often fought with Sanders because Callen "wanted [his] mother back." (Trial R. 1078.) Lawrence also discussed how difficult it was for Callen to be separated from John

Collins, Callen's presumptive father. Collins helped raise Callen from the time Callen was an infant but the loss of a job led Collins to move away when Callen was around 10 years old.

Dr. Ron Meredith, a clinical psychologist, also testified during the penalty-phase proceedings. He testified that he had interviewed Callen and had performed several tests, including tests to evaluate Callen's intellectual functioning. Dr. Meredith reviewed prior DHR records and school records that indicated that Callen did poorly in school and had a learning disability. Dr. Meredith concluded that Callen has "borderline mental retardation" and "is in very low functioning in terms of his overall intellectual capability." (Trial R. 1099.) Dr. Meredith testified that that diagnosis "in and of itself is a powerful statement, but when you understand that that affects every facet of his life from his judgment to his discernment to his ability to make good decisions to his executive functioning that involves breaking a problem down into pieces and being able to analyze those pieces, to also very poor reasoning and planning skills." (Trial R. 1100.) Dr. Meredith testified that Callen also suffers from post-traumatic stress disorder and from borderline personality disorder. Dr. Meredith testified that "both of those disorders produce a

condition that is called disassociation. … And disassociation is when there is a disconnect between your pattern of thought and your emotions or your behavior" which means that Callen "could act without awareness of his actions." (Trial R. 1104-05.) Dr. Meredith testified that alcohol use would exacerbate the condition. When asked to explain Callen's state of mind when setting the fire after committing the murders and disposing of the murder weapon and other evidence, Dr. Meredith opined that Callen "was probably still in a disassociate disorder. He had a low intelligence. He was not capable of planning. His idea of trying to deal with the situation that he was in just was poorly planned and poorly thought out." (Trial R. 1107.) Dr. Meredith testified that, in his opinion, Callen was suffering from both a severe mental illness and a mental defect at the time of the murders and that his ability to appreciate the criminality of his conduct or ability to conform his conduct to the requirements of the law was substantially impaired.

> "The circuit court found the existence of three aggravating circumstances: (1) that the act that constituted the capital offense did create 'a great risk of death to many persons' during its commission, § 13A-5-49(3), Ala. Code 1975; (2) that the murders were especially heinous, atrocious, or cruel when compared to other capital murders, § 13A-5-49(8), Ala. Code 1975; and (3) that Callen did intentionally cause the

> death of two or more persons by one act or pursuant to one scheme or course of conduct, § 13A-5-49(9), Ala. Code 1975. ."

Callen, 284 So. 3d at 247.

> "The circuit court found as statutory mitigating circumstances: (1) that Callen did not have a history of prior criminal activity, § 13A-5-51(1), Ala. Code 1975 and (2) that Callen was 18 years of age at the time of the murders, § 13A-5-51(7), Ala. Code 1975. As nonstatutory mitigating circumstances the circuit court indicated that it considered the following: that Callen had been abandoned by his mother; that Callen had been moved from household to household for most of his life; that Callen had been in the Department of Human Resources' system for most of his life; that Callen had a low IQ; that Callen had been 'diagnosed by Dr. Ron Meredith in preparation for the mitigating phase of the trial with mild or borderline mental retardation, borderline personality disorder, dissassociative (sic);' and that 'Callen was from a low socio-economic status.' (C. 122.)

Callen, 284 So. 3d at 249.

1.

Callen first pleaded that trial counsel were ineffective for failing to notice a critical duty to investigate mitigating factors. Specifically, Callen pleaded that, despite counsel's recognizing that he needed to concentrate on the penalty phase, counsel sought a five-month continuance "on the eve of trial" because he needed more time to review "thousands of pages of records." (C. 701.) Callen asserted that trial counsel's inexcusable delay in conducting a mitigation investigation

prevented counsel from reaching a strategic decision that further investigation was unnecessary. The circuit court dismissed the claim as being insufficiently pleaded.

Initially, it's unclear whether this portion of Callen's petition was intended to set out a distinct claim. To the extent it was, this Court agrees with the circuit court that the claim is insufficiently pleaded. Although it is true that Callen sought a continuance a few weeks before trial was scheduled, Callen omitted that counsel received a four-month continuance to review Callen's records. Further, Callen failed to plead what was in the records or what counsel could have learned had they, as Callen asserted, noticed their critical duty to investigate mitigating factors. See Hyde, 950 So. 2d at 356 (recognizing that it is not the pleading of a conclusion that, if true, entitles a petitioner to relief, but rather the allegation of facts that, if true, entitle a petitioner to relief). Therefore, the circuit court did not err in dismissing this claim. See Rule 32.7(d), Ala. R. Crim. P.

2.

Callen pleaded that trial counsel were ineffective for failing to conduct an adequate investigation that would have uncovered that he suffers from severe organic brain dysfunction, which, he claimed, was critical mitigation evidence that should have been presented to the jury and judge.

Initially,

> "'"A defendant who alleges a failure to investigate on the part of his counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial." Nelson v. Hargett, 989 F.2d 847, 850 (5th Cir. 1993) (quoting United States v. Green, 882 F.2d 999, 1003 (5th Cir. 1989)). "[C]laims of failure to investigate must show with specificity what information would have been obtained with investigation, and whether, assuming the evidence is admissible, its admission would have produced a different result." Thomas v. State, 766 So. 2d 860, 892 (Ala. Crim. App. 1998) (Citing Nelson, supra), aff'd, 766 So. 2d 975 (Ala. 2000), overruled on other grounds by Ex parte Taylor, 10 So. 3d 1075 (Ala. 2005).'

"Mashburn v. State, 148 So. 3d 1094, 1133 (Ala. Crim. App. 2013).

> "….
>
> "'The inquiry of whether trial counsel failed to investigate and present mitigating evidence turns upon various factors, including the reasonableness of counsel's investigation, the mitigation evidence

> that was actually presented, and the mitigation evidence that could have been presented.'
>
> "Commonwealth v. Simpson, 620 Pa. 60, 100, 66 A.3d 253, 277 (2013)."

McMillan v. State, 258 So. 3d 1154, 1168 (Ala. Crim. App. 2017).

> "When addressing a counsel's duty to investigate, this Court has stated:
>
> > "'"[T]his duty only requires a reasonable investigation." Singleton v. Thigpen, 847 F.2d 668, 669 (11th Cir. [(Ala.)] 1988), cert. denied, 488 U.S. 1019, 109 S. Ct. 822, 102 L. Ed. 2d 812 (1989) (emphasis added). See Strickland, 466 U.S. at 691, 104 S. Ct. at 2066; Morrison v. State, 551 So. 2d 435 (Ala. Cr. App. 1989), cert. denied, 495 U.S> 911, 110 S. Ct. 1938, 109 L. Ed. 2d 301 (1990). Counsel's obligation is to conduct a "substantial investigation into each of the plausible lines of defense." Strickland, 466 U.S. at 681, 104 S.Ct. at 2061 (emphasis added). "A substantial investigation is just what the term implies; it does not demand that counsel discover every shred of evidence but that a reasonable inquiry into all plausible defenses be made." Id., 466 U.S. at 686, 104 S. Ct. at 2063.'"

McMillan, 258 So. 3d at 1174 (quoting James v. State, 61 So. 3d 357, 363-64 (Ala. Crim. App. 2010)).

> "The United States Supreme Court in Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed. 471 (2003), stated, when reviewing the sufficiency of a claim that counsel was ineffective for failing to present mitigating evidence:

> "In Stickland [v. Washington, 466 U.S. 668 (1984)], we made clear that, to establish prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id., at 684. In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence.'
>
> "539 U.S. at 534.
>
> "'"'[T]he failure to present additional mitigating evidence that is merely cumulative of that already presented does not rise to the level of a constitutional violation.' Nields v. Bradshaw, 482 F.3d 442, 454 (6th Cir. 2007) (quoting Broom v. Mitchell, 441 F.3d 392, 410 (6th Cir. 2006))." Eley v. Bagley, 604 F.3d 958, 968 (6th Cir. 2010). "This Court has previously refused to allow the omission of cumulative testimony to amount to ineffective assistance of counsel." United States v. Harris, 408 F. 3d 186, 191 (5th Cir. 2005).'
>
> "Daniel v. State, 86 So. 3d 405, 429-30 (Ala. Crim. App. 2011)."

McMillan, 258 at1172.

In his petition, Callen pleaded that Dr. Kristine Lokken, a clinical neuropsychologist, was available at the time of his trial to evaluate whether he had organic brain damage and organic brain dysfunction. Callen stated that Dr. Lokken had reviewed Callen's records and administered several neuropsychological tests on him during two visits

in 2021. Dr. Lokken concluded that Callen is profoundly impaired in executive functioning and that Callen's cognitive deficits are generally seen with someone who has suffered a severe traumatic brain injury. Dr. Lokken's tests reveal that Callen's executive functions fall below the 1st percentile of similarly situated individuals and that his results are consistent with what is typically seen in patients with organic brain damage to the frontal lobe. Callen claimed that, had trial counsel retained Dr. Lokken, she would have explained to the jury and the court that Callen's impaired executive functions likely resulted in diminished impulse control, heightened aggression, and the inability to modify behavior in response to environmental changes.

Callen argued that counsel failed to investigate whether Callen suffered from any neurological deficiencies despite, what he alleges were, significant red flags showing the need for further investigation and a neurological evaluation. Callen contends that warning signs of head trauma were extensive and included headaches, blackouts, and hallucinations. Callen claimed that trial counsel also ignored other red flags in Callen's history such as his alcohol and narcotic use, malnutrition, physical abuse, neglect, and injuries he suffered as a child

including injuries sustained when he was involved in a traffic accident when he was 16 years old. Callen claimed that all of these "insults" could have contributed to damage to his brain. Callen contended that his "peculiar and abnormal affect and presentation" should have led counsel to pursue further investigation into organic brain damage. (C. 724.) Callen pleaded that Dr. Meredith, the clinical psychologist trial counsel retained during Callen's trial, noted in his written evaluation that Callen may have organic brain damage. Callen claimed that evidence of his severe organic brain dysfunction and its impact on his ability to act rationally and control his impulses would have "undercut the senseless" nature of the crime. (C. 730.)

When addressing Callen's claim that trial counsel were ineffective for failing to investigate and discover Callen's organic brain damage, the circuit court separated the claim into three sub-claims – as Callen had presented the claim. In addressing whether trial counsel were ineffective for failing to call an expert neuropsychologist, the circuit court made the following findings:

> "This claim is insufficiently pleaded and without merit. Callen claims counsel failed to investigate his potential 'organic brain damage' and should have hired a neuropsychologist, Dr. Kristine Lokken, who 'would have

> testified that [he] exhibits profound executive function deficits.' (Pet. at 17.) Callen asserts that Dr. Lokken administered nine tests 'specifically designed to determine if and to what extent a person suffers from organic brain damage and/or dysfunction.' (Pet. at 20.) Although Callen pleads the results of four of these tests … he fails to plead the results of the other five tests Lokken purportedly administered and relied upon. (Pet. at 20-24.) Moreover, his claim is entirely speculative and presents a claim of potential organic brain damage. But that claim devolves further when Callen asserts 'his test performances indicate [he] likely suffered an unreported serious traumatic incident or multiple significant disruptions' … and that '[e]ach neurodevelopment insult likely caused further damage ….' (Pet. at 24.) (Emphasis added.) Mere speculation regarding what the results of unspecified testing might show is insufficient to meet the pleading requirements of Rule 32. … As such, Callen fails to present a meritorious claim and does not meet the pleading and specificity requirements.
>
> "Thus, this claim is summarily dismissed under Rules 32.3, 32.6(b), and 32.7(d)."

(C. 59-61.) (internal citations omitted; emphasis in original.)

The circuit court also found Callen's claim that counsel should have noticed multiple red flags indicating potential organic brain damage to be insufficiently pleaded and without merit. The circuit court stated:

> "Callen claims counsel 'ignored numerous red flags in [his] personal and medical history that … obligated [them] to investigate whether [he] has organic brain damage.' (Pet. at 27.) Callen then lists five red flags: 'a car accident; a history of physical abuse and injuries; headaches, blackouts, and hallucinations; alcohol abuse, and childhood abuse, trauma, and neglect.' (Id.)

"…Callen claims he suffered head and back injuries from a car accident. This claim is insufficiently pleaded. Callen does not plead what specific facts counsel should have, but did not discover and present, e.g., when and where the accident allegedly occurred, whether, where, when, and for [how] long he was hospitalized, what injuries, if any, he suffered, or what the medical records show. Callen contends that he possesses medical records, but he fails to plead anything specific from the record except that they show Callen went to the ER at UAB Children's Hospital after the accident and that he was unrestrained in the back seat when his vehicle was hit head-on on the highway. (Pet. at 28.) Callen claims his unnamed grandmother, his unnamed brother, and his high school girlfriend would have told counsel that he had injuries to the head and back and he suffered headaches, but he does not claim the medical records contained a diagnosis. Nor does he identify any admissible evidence that trial counsel could have, but did not, present to the jury. Further, counsel does not plead how this scant information is a 'red flag,' what counsel should have done with this information, and how it would have affected the outcome of his case. 'A bare allegation that prejudice occurred without specific facts indicating how the petition was prejudiced is not sufficient.' Wilson v. State, No. CR-21-0109, 2024 WL 3218214, at *10 (Ala. Crim. App. June 28, 2024). … Callen relies on Ferrell v. Hall, 640 F.3d 1199, in which the 11th Circuit Court of Appeals found that Ferrell's headaches were one of 'the many red flags that had been raised about Ferrell's mental health throughout the proceedings' including that Ferrell had a seizure in the courtroom during trial. Id. at 1229. While Callen tries to draw a parallel with Ferrell for the proposition that a 'car accident followed by headaches [is] a red flag warranting further investigation by trial counsel,' he fails to allege facts showing that he suffered headaches of a similar nature, much less seizures, or other facts to show that his issues were of the magnitude of the issues suffered by Ferrell. (Pet. at 28.) Consequently, he fails to plead facts

showing any 'red flag' of sufficient significance that no reasonable counsel would have failed to investigate the cause of his alleged headaches.

"…Callen claims he has 'a history of physical abuse and injuries, including signs of head trauma.' (Pet. at 29.) This claim is insufficiently pleaded. Callen does not plead specific facts such as when and where the abuse allegedly occurred, whether, where, when, and for [how] long he was treated by medical personnel or hospitalized, what injuries, if any, he suffered, or what the medical records show. Callen claims certain family and friends would have told counsel about vague instances of abuse or injuries, but he does not provide the specific details. Further, Callen acknowledges in this claim that the DHR records that trial counsel obtained and admitted at trial documented at least one instance of physical abuse by his father. Thus, further testimony regarding that incident would be cumulative. Despite Callen's conclusory comment that counsel ignored this red flag, Callen does not plead how this scant information is a 'red flag,' what counsel should have done with this information, and how it would have affected the outcome of his case….

"…Callen claims he suffers 'from headaches, blackouts, and hallucinations' which, he alleges are red flags pointing to organic brain damage. (Pet. at 30.) This claim is insufficiently pleaded. Callen does plead that he went to the hospital four or five times over an almost eight-year period for headaches and claims that counsel should have hired Dr. Lokken. (Pet. at 31.) Callen claims that Dr. Lokken believes that his 'organic brain dysfunction likely resulted from early trauma,' and that a series of events 'could have been additional 'neurological insults.' (Id.) (Emphasis added.) Callen does not plead that he was ever diagnosed with head trauma, blackouts, or hallucination or the specifics of the 'early trauma.' The mere fact that Callen has, years after the trial, located a new expert, Dr. Lokken, that he believes will give superior testimony does not show deficient performance.

… Despite Callen's conclusory comment that counsel ignored this red flag, Callen does not plead how this scant information is a 'red flag,' what counsel should have done with this information, and how it would have affected the outcome of his case. … This claim is pure speculation. As such, it is meritless and cannot possibly meet the pleading and specificity requirements. Speculation is not enough to support a showing of prejudice….

"…Callen claims 'excessive drinking and a family history of alcoholism are red flags' related to organic brain damage. (Pet. at 32.) This claim is insufficiently pleaded. Callen claims that counsel should have hired Dr. Lokken who would have testified that 'various studies strongly suggest that alcohol may alter not only the physical brain structure of adolescents, but also physiologic brain functioning.' (Pet. at 34.) (Emphases added.) Despite Callen's conclusory comment that counsel ignored this red flag, Callen does not plead how this scant information is a 'red flag' that no reasonable counsel would have ignored, or what specifically counsel should have done with this information and how it would have affected the outcome of his case. … Furthermore, this claim is pure speculation. As such, it is meritless and cannot possibly meet the pleading and specificity requirements. Speculation is not enough to support a showing of prejudice….

"…Callen claims that counsel had records that showed his 'significant history of childhood abuse, trauma, and neglect, including that [he] was malnourished] and that counsel ignored these red flags. (Pet .at 35.) This claim is insufficiently pleaded. Callen claims that counsel should have hired Dr. Lokken who would have testified that malnourishment, chronic dental issues, and exposure to toxins impact brain development. Callen cites two examples in the DHR records showing that he was undernourished (Pet. at 35), but the two examples do not show malnourishment, they only show a need for access to food on those occasions. Callen does not specifically plead that he was malnourished.

Callen also claims he had multiple medical visits relating to jaw and tooth pain, but fails to allege any specific details about the visits or whether he received any diagnosis, much less any facts that would show that his dental health impacted his brain health. Again, his claim is full of speculation: the unspecified dental issues would 'likely have resulted in infections,' the 'amount of pain [he] likely suffered would have impacted his ability to eat,' and the 'likely infections, could have potentially impacted his developing brain.' (Pet. at 37.) Indeed, if Callen suffered such great pain that he could not eat, then he would know that. Yet he fails to allege it. In paragraph 81, Callen also claims that toxins like lead can impact brain development. Callen fails to plead that he was exposed to lead or any other toxin. Instead, he pleads he was 'likely' exposed. Despite Callen's conclusory comment that counsel ignored this red flag, Callen does not plead how this scant information is a 'red flag,' what specifically counsel should have done with this information, much less how it would have affected the outcome of his case. … Furthermore, this claim is pure speculation. As such it is meritless and cannot possibly meet the pleading and specificity requirements. Speculation is not enough to support a showing of prejudice….

"… Callen adds a sixth category to his claim regarding supposed 'red flags' – his affect. (Pet. at 238.) This claim is insufficiently pleaded. Callen claims that Dr. Karen Salkein, a clinical psychologist, 'suspected' Callen 'may' have 'potential' brain damage because of his flat affect. First, Callen does not plead that Dr. Salekin was available and willing to testify at trial. Second, Callen does not plead facts that, if proven, would show that he actually had brain damage. Despite Callen's conclusory comment that counsel ignored this red flag, Callen does not plead how unspecified features of his 'affect' were a 'red flag' that no reasonable counsel could have ignored, much less what specifically counsel should have done with this information, or how it would have affected the outcome of his case. … Furthermore,

> this claim is pure speculation. As such, it is meritless and cannot possibly meet the pleading and specificity requirements. Speculation is not enough to support a showing of prejudice…."
>
> "'[E]ven if the evidence [Callen] alleged should have been discovered had been presented at trial, there [is] no reasonable probability that the outcome of the trial would have been different.' Woodward, 276 So. 3d at 741, see, e.g., Miller v. State, 99 So. 3d 349, 412 (Ala. Crim. App. 2011)('[Petitioner] has not shown a reasonable probability that the result of the penalty phase would have been different had additional mitigation evidence been presented based on the brutal nature of the crime, the overwhelming and convincing evidence of guilt, and the strength of the aggravating circumstances [of] this murder….").
>
> "Thus, this claim is summarily dismissed under Rules 32.2, 32.6(b), and 32.7(d)."

(C. 61-69.) (some internal citations omitted; emphasis in original.)

In addressing Callen's claims that counsel should have hired Dr. Lokken to testify about his likely and potential organic brain damage, the circuit court found the claim "speculative" and insufficiently pleaded. (C. 71.) The circuit court stated:

> "Callen does not plead that Dr. Lokken was willing and available to testify at the trial, the tests employed by Dr. Lokken, the results of those tests, the specific testimony she would have presented, or how presenting such testimony would le[a]d to a reasonable probability of different results. At bottom, Callen does not allege that Dr. Lokken has diagnosed him with organic brain damage or that she could offer any admissible evidence that he suffers from such

> condition. As such, Callen fails to plead a facially meritorious claim and has not met the pleading and specificity requirements ….
>
> "The mere fact that Callen has, years after the trial, located a new expert, Dr. Lokken, that he believes will provide testimony that he now prefers to that presented by trial counsel does not show deficient performance."

(C. 71-2.) (internal citations omitted.)

On appeal, Callen argues that the circuit court's finding that his claims were insufficiently pleaded lacks merit. Callen argues that the circuit court's finding that he failed to plead specific details about the red flags lacks merit because, he says, that finding misconstrues what he alleges. Callen contends that he alleges that it is the red flags themselves that should have put counsel on notice of the need to conduct a more thorough mitigation investigation and to retain a neuropsychologist to evaluate him and that the specific contents of any records are irrelevant. Callen also argues that the circuit court erroneously concluded that Callen had located a new expert that he believed would give superior testimony. Callen states that trial counsel failed to procure and present expert testimony of a fundamentally distinct nature than Dr. Meredith's testimony. Callen further contends that he sufficiently pleaded that Dr. Lokken was available to testify and what she would have testified to at

trial and that the circuit court incorrectly rejected her testimony as speculative because of qualifying language used in the context of her opinion that Callen likely suffered from organic brain damage at the time of the crimes. Callen argues that such qualifications do not reflect speculation but rather reflect Lokken's views that it is likely that Callen experienced brain injuries.

Although the circuit court identified a number of pleading deficiencies, we find it unnecessary to determine the propriety of all the circuit court's findings because, after thoroughly reviewing Callen's petition, we conclude that Callen's pleadings fail to state a meritorious claim. During the penalty phase of Callen's capital-murder trial, as set forth above, Dr. Meredith testified that Callen had post-traumatic stress disorder, low intelligence, borderline personality disorder, and poor executive functioning. Dr. Meredith testified that incidents and other factors present throughout Callen's childhood contributed to his diagnosis and that Callen's judgment and ability to make good decisions were impacted. Dr. Meredith testified that Callen would, at times, experience disassociation during which he could act without awareness

of his actions and that Callen could not appreciate the criminality of his actions.

It is well settled in Alabama that counsel is "not required to present all mitigation evidence, even if the additional mitigation evidence would not have been incompatible with counsel's strategy" because "counsel must be permitted to weed out some arguments to stress others and advocate effectively." McWhorter v. State, 142 So. 3d 1195, 1246 (Ala. Crim. App. 2011) (internal quotation marks and citation omitted). Importantly,

> "'"we 'must recognize that trial counsel is afforded broad authority in determining what evidence will be offered in mitigation.' State v. Frazier (1991), 61 Ohio St. 3d 247, 255, 574 N.E.2d 483. We also reiterate that post-conviction proceedings were designed to redress denials or infringements of basic constitutional rights and were not intended as an avenue for simply retrying the case. [Laugesen] v. State, [(1967), 11 Ohio Misc. 10, 227 N.E.2d 663]; State v. Lott, [(Nov. 3, 1994), Cuyahoga App. Nos. 66338, 66389, 66390]. Further, the failure to present evidence which is merely cumulative to that which was presented at trial is, generally speaking, not indicative of ineffective assistance of trial counsel. State v. Combs (1994), 100 Ohio App. 3d 90, 105, 652 N.E.2d 205."'"

Id. (citation omitted).

As Dr. Meredith's testimony demonstrates, counsel did present evidence of the effects that Callen's personal history and diagnosis had

on his executive functions and on his behavior the night of the murders. Although Callen contends that his trial counsel should have presented additional testimony from a neurological expert indicating how Callen's history could have likely caused organic brain damage and how that damage could impact his behavior, the overall purpose for the testimony remains the same. Dr. Lokken's purported testimony merely expounds on the testimony that was presented. Thus, based on the testimony discussed above, any additional evidence on this point would have been cumulative to that which was already presented by defense counsel. "[T]he failure to present evidence which is merely cumulative to that which was presented at trial is, generally speaking, not indicative of ineffective assistance of counsel." Id. (internal quotation marks and citation omitted).[2] Accordingly, Callen has failed to allege facts demonstrating how he was prejudiced by his counsel's failure to investigate this issue further and to present additional evidence on the matter. Therefore, summary dismissal of this claim was proper.

3.

[2] Further, Dr. Lokken's purported testimony was no more definitive than the alleged notation in Dr. Meredith's report that Callen may have brain damage – a notation that Callen asserts should have alerted counsel to seek out a neurological expert.

Callen pleaded that trial counsel were ineffective for failing to obtain his medical records. In his petition, Callen claimed that the "nearly 300 pages of neglected medical records contain objective, medical evidence that corroborate [he] suffered severe neglect and abuse during his childhood." (C. 735.) Callen then listed 19 dates on which Callen visited a medical professional and provided a brief synopsis of each visit. Callen contended that had counsel obtained these records, counsel would have recognized that they needed a medical expert to interpret and explain that Callen "was likely neglected, sexually abused, and lived in impoverished conditions that plagued his childhood." (C. 737.) Callen pleaded that he had retained Dr. Heinz Dueffer, an emergency room physician, to review the medical records that trial counsel had failed to obtain. Dr. Dueffer would have explained to the jury that Callen was treated for multiple medical conditions consistent with child abuse and neglect. Specifically, Dr. Dueffer would have testified that Callen was diagnosed at 10 years old with a urinary tract infection, which, according to Dr. Dueffer, is rare. Dr. Dueffer would have testified that a urinary tract infection can be indicative of childhood sexual abuse. Callen claimed that this "evidence would have corroborated Dr. Meredith's

conclusion that Callen suffered chronic childhood sexual abuse and was being sexually abused by Quortes on the night of the incident, which likely triggered him to enter a dissociative state." (C. 739.)[3]

Callen pleaded that Dr. Dueffer would have explained that the numerous emergency-room visits to receive routine care were indicative of low-income individuals who do not have insurance, which Callen did not have. Dr. Dueffer would have explained that the nature of the medical conditions for which Callen sought treatment, such as scabies, can be associated with poverty and that the condition of his teeth showed that he lacked proper dental care. Dr. Dueffer would have testified that Callen was prescribed antidepressants at an early age for depression and that it was unusual for a child of that age to require medicine to treat such a condition. Dr. Dueffer would have also testified regarding the visits for Callen's headaches and that he was prescribed narcotic painkillers on several occasions. Dr. Dueffer would have explained that doctors try to limit prescribing narcotics to children for fear that they will

[3] This Court notes that no testimony was presented that Quortes sexually abused Callen, much less sexually abused him the night of the murders. This allegation was noted in the sentencing memorandum in which Dr. Meredith stated that Callen had stated that Quortes had made sexual advances toward him and would grope and try to play with his genitals. Callen did not state when those incidents occurred.

become addicted and that narcotics should not be taken with alcohol. According to Callen, such testimony would have provided additional corroboration of and context for testimony he would have presented concerning his substance abuse.

In summarily dismissing this claim, the circuit court stated:

> "This claim is insufficiently pleaded and without merit. Callen claims counsel failed to obtain his medical records despite having a duty to do so. First, Callen again attempts to use the ABA Guidelines as dictating what every counsel must do. But the ABA publications serve only as aspirational guides, not minimum constitutional standards. Second, this claim itself shows that there was a plethora of medical information available in the DHR records and the psychological reports by both the State's expert, Dr. King, and the defense expert, Dr. Meredith. Callen does not plead what information additional medical records would provide. It appears the generalized medical records would be cumulative with the evidence presented at trial. The failure to present additional cumulative evidence, even if more detailed or elaborate, does not amount to ineffective assistance of counsel. Third, even if the evidence [Callen] alleged should have been discovered had been presented at trial, there is no reasonable probability that the outcome of the trial would have been different….
>
> "…
>
> "…Callen claims that his medical records contain objective, medical evidence that corroborates [he] suffered severe neglect and abuse during his childhood. First, Callen concedes that this is not a case where trial counsel failed to learn of or present evidence of the abuse and neglect that he suffered as a child. Indeed, counsel presented extensive DHR

> records documenting these facts. Callen contends that these medical records corroborate the testimony and evidence presented at trial. But Callen's claim does little more than demonstrate that his medical records are merely cumulative to the testimony that trial counsel offered. Nor does he plead facts that would show how this cumulative evidence would have a probability of changing the outcome of the trial. Callen claims that a medical expert, like Dr. Heinz Dueffer, could have testified about the cumulative evidence; but he does not plead that Dr. Dueffer was willing to testify at his trial. Nor does he plead facts that, if proven, would show that Dr. Dueffer's testimony would have materially added to the jury's knowledge of Callen's childhood rather than being simply cumulative to the facts they already learned from trial counsel's efforts. Failure to offer additional mitigation evidence that is cumulative to evidence offered at trial does not amount to deficient performance."

(C. 74-7.) (internal quotation marks and citations omitted). We agree with the circuit court's conclusions.

Once again, counsel is "not required to present all mitigation evidence, even if the additional mitigation evidence would not have been incompatible with counsel's strategy" because "counsel must be permitted to weed out some arguments to stress others and advocate effectively." McWhorter, 142 So. 3d at 1246 (internal quotations marks and citation omitted). The testimony and documentation presented at trial was offered to show the neglect and physical abuse that Callen had suffered. Although Dr. Meredith testified that Callen had indicated to

him that a family member had sexually abused him, he also testified that Callen was reluctant to talk about it and later retracted that statement. Even so, however, the possibility that Callen had been sexually abused was placed before the jury and circuit court. Thus, any additional testimony or evidence would have been cumulative to that which was already presented by defense counsel. "[T]he failure to present evidence which is merely cumulative to that which was presented at trial is, generally speaking, not indicative of ineffective assistance of counsel." Id. (internal quotation marks and citation omitted). Accordingly, Callen has failed to allege facts demonstrating how he was prejudiced by his counsel's failure to obtain medical records and to present additional evidence on the issue. Therefore, summary dismissal of this claim was proper.

4.

Callen pleaded that trial counsel were ineffective for failing to elicit proper expert testimony explaining the effects that his childhood neglect and abuse had on his psychological development. Callen claims that trial

counsel failed to retain and present experts with qualifications necessary to analyze and interpret evidence of abuse and neglect and that trial counsel were deficient in presenting the mitigation evidence that counsel's expert, Dr. Meredith, did provide.

In his petition, Callen contended that proper expert testimony would have helped the jury understand the connection between his traumatic childhood experiences and the mental disorders from which he suffers as a result, and how this affected his moral culpability for the crimes. Callen pleaded that experts Dr. Karen Salekin, a forensic psychologist, and Dr. Merida Grant, a clinical psychologist, with expertise in trauma-related disorders were available at the time of trial and would have presented testimony relating to his neglect and abuse.

Callen alleged that, after reviewing his records and conducting several interviews with him and his family members and friends, Dr. Salekin concluded that Callen had experienced several family risk factors that affected his psychological development, including family conflict, abandonment, inconsistent caregivers, and neglect. Dr. Salekin would have described these factors in more detail and explained how these factors may have affected Callen's development. Dr. Salekin would have

explained how Callen's low intelligence and nearly non-existent problem-solving skills would have impaired his ability to cope with the stressors resulting from the risk factors. Dr. Salekin would have explained how the presence of multiple risk factors and the absence of positive factors negatively impacted Callen's development, including his resilience, decision-making, and ability to weigh short-term gratification against long-term consequences.

Callen pleaded that Dr. Grant would have testified that Callen suffers from a multitude of psychological and behavioral impairments, including post-traumatic stress disorder, depression with psychotic features, generalized anxiety disorder, panic disorder, and substance-abuse disorders. Dr. Grant would have explained that the level of childhood trauma Callen experienced paralleled the most severe type of trauma a child could experience and, as such, he was at a heightened risk of severe mood, anxiety, and substance-abuse disorders caused by alterations in the brain. Dr. Grant would have testified that Callen's behavior in recanting and denying that he was sexually abused fits the typical description of an individual with a history of childhood sexual

abuse and that Callen has many characteristics that are frequently correlated with individuals who have experienced sexual abuse.

Callen acknowledged that trial counsel did present testimony from Dr. Meredith, a clinical psychologist, to testify during the penalty phase, but he claimed that Dr. Meredith's testimony was inadequate to help the jury understand the magnitude of Callen's childhood trauma and its connection to his moral culpability for the crimes for which he was convicted. Callen argued that the jury never heard critical testimony from Dr. Meredith that would have explained what his diagnoses meant, what led Dr. Meredith to diagnose him with these disorders, or how his magnitude of childhood trauma and neglect contributed to Callen suffering from such disorders.

The circuit court dismissed this claim as insufficiently pleaded and without merit.

> "Callen claims counsel should have called an expert forensic psychologist like Dr. Karen Salekin, instead of Dr. Meredith. Callen asserts that Salekin would have testified about the risk factors on his development.
>
> "Counsel hired Dr. Meredith, a forensic psychologist who testified at trial. It is clear on the face of the record that Dr. Meredith was qualified. The fact that Callen has now retained a different expert, who did different things, and arrived at a different result, does not establish either deficient

performance or prejudice. As the Supreme Court has explained:

> "[']The selection of an expert witness is a paradigmatic example of the type of 'strategic choic[e]' that, when made 'after thorough investigation of [the] law and facts,' is "virtually unchallengable.[']

"Hinton v. Alabama, 571 U.S. 263, 275 (2014) (quoting Strickland, 466 U.S. at 690). Moreover, the mere fact that Callen now prefers the opinions of a different expert does not render trial counsel's performance ineffective. See Harris v. State, 365 So. 3d 1075, 1113 (Ala. Crim. App. 2021) ('[T]he mere fact that a defendant can find, years after the fact, a[n] … expert who will testify favorably for him does not demonstrate that trial counsel was ineffective for failing to produce that expert at trial.' (quoting Daniel v. State, 86 So. 3d 405, 423 (Ala. Crim. App. 2011) (quoting Davis[v. Singletary, 119 F.3d [1471] at 1475 [(11th Cir. 1997)]). There is no suggestion in this case that trial counsel failed to adequately investigate Dr. Meredith's credentials, or that, as in Hinton, he made any mistake of law that resulted in him retaining an expert who 'he himself deemed inadequate.' Hinton, 571 U.S. at 275.

"Although Callen identified some additional witnesses who he claims would have been willing to testify and claims that 'his trial counsel should have done something more, [courts] must look at what the lawyer[s] did in fact.' [State v.] Mitchell, 377 So. 3d [94] at 119 [Ala. Crim. App. 2022)] (quoting Chandler[v. United States], 218 F.3d [1305] at 1320 [(11th Cir. 2000)]). It is clear from the face of the record that counsel did conduct a reasonable investigation. Counsel hired a mitigation expert, Sirena L. Saunders, who 'did a wonderful job of putting together what was a very comprehensive history about his juvenile court records, his DHR record, and also his school records.' (C. 62, R. 1087.) Counsel also hired Dr.

Meredith, introduced testimony of family members Beatrice Brown, LaQuoya Callen, Lawrence Callen Jr., and John Collins, and presented the testimony of Dr. Meredith. (R. 1049-1123, 1149-61.)

"Callen claims that Dr. Salekin was capable and willing to testify at his trial, but he does not plead that she was available. Callen then avers that Dr. Salekin would have assessed his 'risk and protective factors' and 'concluded that [he] was subject to a multitude of risk factors throughout his life and that protective factors were absent. In footnote 23, Callen asserts that Dr. Meredith's work was ineffective because he relied on Ms. Saunders' interviews rather than conducting his own. Callen does not plead with specificity how this methodology was ineffective or what would have been gained by Dr. Meredith conducting the interviews personally. To the extent that Dr. Meredith failed in his role as a mitigation expert, any ineffectiveness is attributable to [petitioner's] expert rather than to his counsel and therefore cannot support a Strickland claim. The mere fact that Callen has, years after the trial, located a different expert that he believes will give superior testimony does not show deficient performance. … At bottom, this claim is nothing more than a complaint about how the evidence was presented, and is filled with citations to the record that were actually presented to the jury. Counsel cannot be found ineffective for failing to present cumulative evidence. Indeed, simply alleging that trial counsel should have offered more mitigation tha[n] was offered at trial is not sufficient….

"Callen does plead that some medical records were not discovered for use by Dr. Meredith and that elementary school records were not obtained. In footnote 27, Callen asserts that the elementary school records showing that he was chronically tardy and absent 'directly contradict … trial counsel's claims that [Callen] lived a "normal life" until he was about 11 years old. But the trial record shows that trial counsel attempted to locate Callen's school records, but they

were unavailable in that 'most of the school records from that time are in an abandoned schoolhouse that's quarantined.' Callen fails to plead facts that, if proven, would show that no reasonable counsel would have failed to obtain records from a 'quarantined' school building.

"Callen fails to plead either deficient performance or prejudice. 'A bare allegation that prejudice occurred without specific facts indicating how the petitioner was prejudiced is not sufficient.' 'Even if the evidence [Callen] alleged should have been discovered had been presented at trial, there [is] no reasonable probability that the outcome of the trial would have been different.' The evidence that Callen argues was deficiently omitted is minimal and cumulative, and it would not have changed his sentence."

(C. 32-7.) (some internal quotation marks and citations omitted.)

In addressing Callen's pleadings regarding Dr. Grant, the circuit court found:

"First, Callen fails to plead sufficient facts to show that no reasonable counsel would have failed to retain another psychologist when they had already retained and consulted with Dr. Meredith. Callen does not allege that Dr. Meredith suggested additional psychological assessment or that anything in his report would have caused every reasonable attorney to consult a different psychologist. In short, Callen fails to plead sufficient facts that would show that no counsel could have made a reasonable decision to terminate their psychological investigation after consulting with Dr. Meredith. Consequently, this claim fails to sufficiently plead deficient performance and should be dismissed.

"Second, Callen does not claim that Dr. Grant was willing and able to testify at his trial. Thus, this claim does not meet the specificity and pleading requirements. Callen

avers that had Dr. Grant, or a similar expert, been called at trial, the jury would have heard that Callen 'experienced a history of significant and repeated trauma throughout his early life, including life-threatening incidents, significant abuse by multiple family members, parental neglect, abandonment, and significant poverty.' Insofar as Callen alleges that some other, unknown psychologist should have been retained, it is not sufficient to plead that an expert 'like' Dr. Grant would have testified; the petition must plead the name of an expert who was willing and able to testify at the time of trial and the content of that named expert's testimony. Simply put, experts are not fungible; they can, and often do, have different opinions.

"Third, Callen claims that Dr. Grant has 'administered several assessments' and based her conclusions on those assessments. Callen only pleads one assessment Dr. Grant conducted, but he fails to identify any other assessments, the results of those assessments, or specifically how such assessments are mitigating in Callen's case. … Callen also pleads that he suffers from a 'multitude of psychological and behavior impairments.' These include PTSD, a diagnosis of major depressive disorder, shame-based avoidance, a diagnosis of brief psychotic disorder, generalized anxiety disorder, panic disorder, and alcohol abuse. While Callen pleads that he currently has these disorders, he only ties a 'history of depression … when he was 10 years old' and a 'history of hallucinations and delusions' to his childhood. Callen fails to plead with specificity that he suffered from the other disorders at the time of the murders or the time of trial, and what the content of Dr. Grant's relevant testimony would have been at the time of trial. Additionally, the general nature of the evidence described in this claim is cumulative to evidence presented in mitigation at Callen's trial. Moreover, with regard to mitigation, simply offering more mitigation than was offered at trial is not sufficient. … Likewise, counsel cannot be ineffective for failing to present cumulative evidence.

"Fourth, Callen fails to plead prejudice."

(C. 83-6.) (internal citations omitted) (emphasis in original).

In his petition, Callen also argued that trial counsel were unprepared and ineffective in presenting Dr. Meredith's testimony. Specifically, Callen claimed that counsel were ineffective because of the following: 1) a series of the prosecutor's objections were sustained during Dr. Meredith's testimony; 2) Dr. Meredith failed to adequately explain dissociation and PTSD; 3) counsel "dumped" 914 pages of DHR records into the trial record; 4) counsel minimized the importance of these records during closing argument; 5) counsel accidentally tried admitting work product along with the DHR records; 6) counsel failed to understand the rules of evidence regarding how to submit a summary of mitigation work; 7) counsel should have called social workers, counselors, and teachers named in the DHR records; and 8) counsel discredited Dr. Meredith.

In finding this claim insufficiently pleaded and without merit, the circuit court stated:

> "First, Callen claims that a series of sustained objections are evidence that trial counsel was not prepared for Dr. Meredith's testimony. … Callen lists eight interactions in which the State's objection was sustained. In each instance, Dr. Meredith's testimony was not responsive to the question

asked. After the sustained objections, trial counsel refocused Dr. Meredith and was able to elicit the desired testimony. For example, in the first excerpt, [counsel] redirected Dr. Meredith, asking, '[W]hat is it that [Callen] suffers from? (R. 1100.) Dr. Meredith replied, '[Callen] suffers from post-traumatic stress disorder' and then veered into nonresponsive testimony about his [own] work with the National Guard. (R. 1100-01.) After two sustained objections that Dr. Meredith's answer was nonresponsive, [counsel] again focused Dr. Meredith on posttraumatic stress disorder. (R. 1101.) After another sustained objection about disorders in soldiers, [counsel] asked his next question about other disorders. (R. 1103.) Again, Callen's claim is insufficiently pleaded. Callen does not state what counsel should have done to better prepare Dr. Meredith for his testimony, what additional steps counsel could have taken, what different questions counsel could have asked or what Dr. Meredith's responses would have been, how any of these actions by counsel would have changed Dr. Meredith's testimony, what the content of Dr. Meredith's testimony would have been, or how there is a reasonable probability that the outcome of the trial would have been different had counsel prepared Dr. Meredith in a different way.

"Second, … Callen claims that trial counsel failed to have Dr. Meredith adequately explain dissociation. Dr. Meredith testified in the penalty phase that he diagnosed Callen with dissociation and that Callen was in a dissociative episode at the time of the murders. (R. 1104-05, 1107,08.) The State presented no evidence to the contrary. Callen now asserts that Dr. Meredith should have testified about the tests he conducted and the results of these tests. But these facts are merely cumulative with Dr. Meredith's testimony about the opinions he reached. Callen also asserts that counsel should have presented testimony from family members, only some of whom are named, about their observations of Callen's behavior. Again, this testimony would be cumulative with Dr. Meredith's testimony. The failure to present additional

cumulative mitigating evidence, even if more detailed or elaborate, does not amount to ineffective assistance of counsel. Callen does not specifically plead the content of the testimony, the specific dates and locations of each of these 'episodes,' that these 'episodes' are indeed dissociative episodes, or the name and content of the testimony of a different expert who was available to testify at the trial in a different way than Dr. Meredith.

"Third, … Callen claims that trial counsel failed to have Dr. Meredith adequately explain posttraumatic stress disorder (PTSD). Dr. Meredith testified in the penalty phase that he diagnosed Callen with PTSD. The State presented no evidence to the contrary. Dr. Meredith's testimony about PTSD included his diagnosis of PTSD, association with childhood characteristics, and a description/definition of PTSD. (R. 1100-01.) Further, Dr. Meredith testified about the relationship between borderline personality disorder, dissociation, and PTSD. (R. 1104.) Callen asserts that Dr. Meredith could have explained to the jury how he diagnosed Callen with PTSD. This testimony would have been cumulative. The failure to present additional cumulative mitigating evidence, even if more detailed or elaborate, does not amount to the ineffective assistance of counsel. Callen does not plead how there is a reasonable probability that the outcome of the trial would have been different had counsel presented this cumulative testimony.

"Fourth, Callen claims that trial counsel mishandled and mischaracterized the DHR records when they 'dumped 914 pages of scrambled DHR records in the trial record.' Callen's claim that Dr. Meredith only testified about the DHR records from R. 1096-1098 is belied by the trial record. Dr. Meredith's testimony continued with the conclusions he derived from the records. (R. 1096-1100.) Callen relies on Ferrell v. Hall, 640 F.3d 1199 (11th Cir. 2011), to support his proposition that his counsel were ineffective. But unlike in Callen's case, Ferrell's counsel limited their investigation to

character evidence and presented no evidence of his mental health or his difficult and abusive childhood. Callen's counsel did not make any similar mistake.

"Callen claims that trial counsel 'minimized the significance' of the DHR records in the penalty phase arguments. Again taking counsel's comments out of context, Calen claims that trial counsel told the jury the 'records are "confusing" and "they don't make sense sometimes.'" The record shows that counsel was explaining that the living situation for Callen and his brother was confusing.

"…

"…Callen claims that counsel were ineffective for the narrative that Callen's life was normal before age 11 and states that the 914 pages of DHR records conflict with this theme. Callen is incorrect. While there are some historical references contained in the almost 1,000 pages of Callen's life before 11, the DHR records begin right before Callen's 11th birthday. (C. 992.) Also, counsel's theme is inconsistent with the testimony of Callen's closest sibling, Lawrence, who testified that those were 'the best years of my life.' (R. 1074.) Callen has not alleged any facts that would show that counsel's theme was unreasonable.

"…Callen criticizes his counsel for the handling of the DHR records when they accidentally tried to admit attorney work product. But, the entire portion of the record Callen includes in the petition reflects a session that was held outside the presence of the jury. (R. 1090-1094.) While counsel did make a mistake, they rectified it without the jury's knowledge. Callen fails to plead the relevance of this interchange, how an innocent mistake amounts to deficient performance, or how this conduct caused prejudice.

"Fifth, … Callen claims that his counsel 'lacked a basic understanding of the Alabama Rules of Evidence regarding

admitting an exhibit into the trial record that summarizes or compiles voluminous records into actual mitigation evidence. First, Callen's characterization of the records is mere argument for he cites no authority for the proposition that the DHR records were not 'actual mitigation evidence.' Instead, he mistakenly relies on Turpin v. Lipham, 510 S.E.2d 32 (Ga. 1998), in which 2500 pages of institutional records were admitted with no expert witnesses to explain the records. By contrast, Dr. Meredith did testify about and explain the less than 1,000 pages of DHR records so Callen's reliance on Turpin is inapposite. The jury in Callen's case had access to the full record and heard the testimony of Dr. Meredith. While Alabama Rules of Evidence 1006 does allow for summaries, Callen fails to plead facts showing that the trial court would have been required to admit the summary or that a summary of the records would have resulted in a different outcome. From the face of the record, it is clear that trial counsel and the State had a stipulation to the admission of the entirety of the records….

"Sixth, … Callen claims that counsel should have called a laundry list of named social workers, counselors, and teachers listed in the DHR records. This claim is insufficiently pleaded. For such a claim to be adequately pleaded, a petitioner is 'required to identify the names of the witnesses, to plead with specificity what admissible testimony those witnesses would have provided had they been called to testify, and to allege facts indicating that had the witnesses testified there is a reasonable probability that the outcome of the proceeding would have been different.' Additionally, the petitioner must plead that the witness was 'willing and able to testify on his behalf.' While Callen identifies some individuals by name, he fails to specifically plead that they were available and willing to testify or what their testimony would have been. Moreover, Callen's claim is inconsistent with his previous claims regarding 'summarization.' Counsel presented a summary of the DHR records through Dr. Meredith's testimony and Callen fails to plead facts showing

that no reasonable counsel could have decided that the testimony of an expert who had evaluated Callen was preferable to many hours of testimony from multiple witnesses who may have known little about Callen.

"Seventh, Callen attempts to plead prejudice … when he speculates that counsel's action led the jury to discredit Dr. Meredith. This too is insufficiently pleaded. Callen fails to plead specific facts relevant to what the jury credited or discredited. Moreover, Callen could not present any such evidence because, under Rule 606(b), Ala. R. Evid., jurors are prohibited from testifying regarding 'any matter or statement occurring during the course of jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent or to dissent from the verdict.'

"This claim is also refuted by the record. In the sentencing order, this Court stated:

> "The non-statutory mitigating circumstances offered by the defense included:
> Being abandoned by his mother;
> Being moved from household to household for the majority of his life
> Being involved in the DHR system most of his life;
> Having a low IQ;
> Having been diagnosed by Dr. Ron Meredith in preparation for the mitigation phase of the trial with mild or borderline mental retardation, Borderline Personality Disorder, Dissassociative [sic] Disorder and Post Traumatic Stress Disorder; and,
> The defendant's low socio-economic status.

"(C. 122.)

"Thus, this claim is summarily dismissed under Rules 32.2, 32.6(b), and 32.7(d)."

(C. 41-50.) (some internal citations omitted) (emphasis in original).

After reviewing Callen's petition and the transcript from the penalty phase of his capital-murder trial, we agree with the circuit court's conclusions. As discussed above, similar claims were properly dismissed by the circuit court because Callen's counsel adequately presented this information through the testimony of Dr. Meredith and the admission of Callen's DHR records. Callen's allegations simply present a critique of trial counsel's mitigation strategy and do not allege sufficient facts to show that trial counsel's strategy was unreasonable. "[B]ecause counsel's conduct is presumed reasonable, for a petitioner to show that the conduct was unreasonable, a petitioner must establish that no competent counsel would have taken the action that counsel did take." Chandler v. United States, 218 F.3d 1305, 1315 (11th Cir. 2000). Counsel retained a qualified expert who presented testimony that Callen suffered from several disorders and that these disorders were likely in response to incidents and other trauma in Callen's childhood. Dr. Meredith explained how these disorders and trauma could have contributed to Callen's behavior the night of the murders. Callen failed to show that no counsel could

have made a reasonable decision to terminate their psychological investigation after consulting with its mitigation expert and Dr. Meredith. Further, as the circuit court correctly stated, simply offering more mitigation than was offered at trial is not sufficient. Washington v. State, 95 So. 3d 26 (Ala. Crim. App. 2012). Additional testimony or evidence of Callen's childhood and disorders related to his psychological development would have been cumulative to that which was already presented by defense counsel. Washington, supra. With respect to counsel's failure to obtain and present school records, Callen failed to allege any facts indicating that, but for his counsels' failure to obtain those records and present them to the jury, he probably would not have been convicted of capital murder or sentenced to death. Thus, summary dismissal of this claim was proper.

5.

Callen argues on appeal that the circuit court erred by failing to consider his penalty-phase claims in conjunction. Specifically, Callen contends that "[r]ather than construing [his] ineffective assistance claim as one, the court dissected [his] penalty phase claim into 16 individual 'subclaims,' evaluated each purported subclaim in a vacuum, and

summarily dismissed each." (Callen's brief, at 78.) According to Callen, that "approach belies a common sense reading of the facts alleged in the Petition and is inconsistent with applicable ineffective assistance principles." (Id.)

After the circuit court dismissed his petition, Callen filed a postjudgment motion challenging the circuit court's verbatim adoption of the State's proposed order as well as several findings by the circuit court, but he did not raise an argument regarding the circuit court's division of the ineffective-assistance-of-counsel claim. "'The general rules of preservation apply to Rule 32 proceedings.'" Morris v. State, 261 So. 3d 1181, 1188 (Ala. Crim. App. 2016) (quoting Boyd v. State, 913 So. 2d 1113, 1123 (Ala. Crim. App. 2003)) (holding that Morris's claim that trial court erred when it divided his ineffective-assistance-of-counsel claim into many separate claims not preserved for appellate review). Because Callen did not raise this claim in the circuit court, the claim is not preserved for appellate review.

Moreover, even if Callen had preserved this claim for review, he would not be entitled to any relief. Initially, we note that the circuit court addressed the claim in subparts because Callen had pleaded the claim in

subparts. This Court has stated that an ineffective-assistance-of-counsel claim is a general claim that consists of several different allegations or subcategories and that each subcategory is considered an independent claim that must be sufficiently pleaded. Morris, supra. Furthermore, to the extent that Callen argues that the circuit court should have considered his claims cumulatively, this Court has stated:

> "'[The appellant] also contends that the allegations offered in support of a claim of ineffective assistance of counsel must be considered cumulatively, and he cites Williams v. Taylor, 529 U.S. 362 (2000). However, this Court has noted: "Other states and federal courts are not in agreement as to whether the 'cumulative effect' analysis applies to Strickland [v. Washington, 466 U.S. 668 (1984),] claims"; this Court has also stated: "we can find no case where Alabama appellate courts have applied the cumulative-effect analysis to claims of ineffective assistance of counsel." Brooks v. State, 929 So. 2d 491, 514 (Ala. Crim. Ap. 2005) …; see also McNabb v. State, 991 So. 2d 313, 332 (Ala. Crim. App. 2007); and Hunt v. State, 940 So. 2d 1041, 1071 (Ala. Crim. App. 2005). More to the point, however, is the fact that even when a cumulative-effect analysis is considered, only claims that are properly pleaded and not otherwise due to be summarily dismissed are considered in that analysis. A cumulative-effect analysis does not eliminate the pleading requirements established in Rule 32, Ala. R. Crim. P. An analysis of claims of ineffective assistance of counsel, including a cumulative-effect analysis, is performed only on properly pleaded claims that are not summarily dismissed for pleading deficiencies or on procedural grounds. Therefore, even if a cumulative-effect analysis were required by Alabama law, that factor would not eliminate [the appellant's] obligation to plead each claim of

> ineffective assistance of counsel in compliance with the directives of Rule 32.'"

Morris, 261 So. 3d at 1189 (quoting Taylor v. State, 157 So. 3d 131, 140 (Ala. Crim. App. 2010)).

Neither the circuit court nor this Court is required to conduct a cumulative-effect analysis of Callen's claims of ineffective-assistance-of-counsel, and, even if we were, because Callen failed to plead facially meritorious claims individually, there are no claims to consider in the aggregate. Callen is due no relief on this claim.

B.

Callen asserts that trial counsel were ineffective during the sentencing phase and that the circuit court erred in dismissing his sentencing-phase claims.

1.

Callen pleaded that counsel were ineffective because they failed to object to an inadequate presentence investigation report (PSI) prior to judicial sentencing. In his petition, Callen alleged that his PSI did not contain any information about his voluminous medical history, his mental health history, his mother's abandonment of her children, DHR's failure to intervene, and the physical and sexual abuse he suffered at the

hands of his own family members. Callen claimed that the PSI report contained the same information as his youthful-offender report -- a report completed in 2011 with minimal personal and social history. Callen argued that "[h]ad [t]rial [c]ounsel objected to proceeding with the judicial sentencing hearing in the face of a PSI report that explicitly stated it was based on the same information contained in the Youthful Offender report, and completely devoid of [Callen's] childhood trauma, the trial court probably would have ordered a new PSI be conducted to include [his] comprehensive social and personal history." (C. 792.) According to Callen, "[h]ad the trial court been provided with an adequate presentence investigation report, there is a reasonable probability that [Callen] would not have been sentenced to death." (793.)

In dismissing this claim, the circuit court found that Callen had raised the underlying claim on direct appeal and that this Court had held that it was without merit. The circuit court also stated:

> "Callen speculates that the 'trial court probably would have ordered a new PSI be conducted to include [Callen's] comprehensive social and personal history' if counsel had objected to the PSI containing the same social history as the youthful offender report. But speculation is insufficient to warrant further proceedings. 'It is well established that, in a claim of ineffective assistance of counsel, "[m]ere conjecture

> and speculation are not enough to support a showing of prejudice.'" Woodward, 276 So. 3d at 786.
>
> "Additionally, Callen fails to plead what information this new PSI would contain, how that information would differ from the information already presented to the judge and jury, or how the new PSI would change the result of his trial."

(C. 110.)

On appeal, Callen contends that the circuit court erred in finding that his claim had been raised and addressed by this Court on direct appeal because, he says, he argued a different claim on direct appeal. Indeed, on direct appeal Callen argued that the circuit court relied on a youthful-offender report rather than a PSI report prior to determining his sentence. This Court found the claim to be without merit because a PSI report had been produced, and the trial court had specifically referenced the PSI in its sentencing order. In his petition, however, Callen challenges the sufficiency of the PSI report. Thus, Callen is correct that the circuit court's finding that this claim had been raised and addressed on direct appeal was inaccurate. Nevertheless, Callen is not entitled to relief.

Assuming, without deciding, that the PSI was perfunctory and deficient, Callen has not demonstrated that he suffered prejudice because

of the deficient PSI. The PSI is only part of the information on which the circuit court based its sentencing. Here, before sentencing Callen, the circuit court had the opportunity to consider the background evidence presented during the guilt and penalty phases, and it found certain information to be mitigating factors. Thus, Callen failed to show that there is a reasonable probability that the result would have been different had the PSI report contained additional information. See Townes v. State, 253 So. 3d 447 (Ala. Crim. App. 2015) (refusing to find plain error in any inadequacy of the presentence report where trial court considered the full mosaic of defendant's background before sentencing defendant to death). Compare Ex parte Washington, 106 So. 3d 441 (Ala. 2011), and Guthrie v. State, 689 So. 2d 935 (Ala. Crim. App. 1996). Accordingly, Callen is not entitled to any relief on this claim.

2.

Callen pleaded that trial counsel were ineffective for soliciting victim-impact testimony from a family member during the sentencing hearing. During sentencing, the State called Lisa Brown, Bernice Brown's daughter and Quortes's sister, to testify. During cross-examination, defense counsel asked Lisa whether Callen should receive

the death penalty, and Brown replied that she agreed with what the jury decided Callen's punishment should be.

The circuit court found this claim to be insufficiently pleaded and without merit. The circuit court stated:

> "It is clear from the face of the record that counsel expected different testimony and was surprised when Ms. Brown answered as she did. Counsel attempted to clarify Ms. Brown's opinion. (R. 1245-47.) To the extent that Callen claims that he was prejudiced by this testimony, he has failed to plead sufficient facts that would show how this comment, taken in context with the overwhelming evidence of guilt, actually affected the judge's verdict. Trial judges 'are presumed to know the law and to follow it in making their decision.' Mitchell, 377 So. 3d at 131 (quoting Knight v. State, 252 So. 2d 1108, 1111 (Ala. Crim. App. 2017) (quoting Ex parte Slaton, 680 So. 2d 909, 924 (Ala. 1996))). Claims such as these that do not plead these types of facts do not comply with Rule 32.6(b)."

(C. 111-12.)

This Court cannot ascertain from the record on direct appeal whether defense counsel expected a certain answer from Lisa in response to his questions during the sentencing hearing. Therefore, we cannot say whether reasonable counsel would have asked such a question in this case. Statements expressing an opinion about the appropriate punishment a defendant should receive are improper; however, this Court has held that in certain situations the admission of such testimony

can be harmless. Osgood v. State, 341 So. 3d 170 (Ala. Crim. App. 2016) (holding that no plain error occurred during victim's sister's testimony in which she requested that the defendant be sentenced to death where testimony was made only to trial court and the court did not indicate that it considered the testimony); and Lockhart v. State, 163 So. 3d 1088 (Ala. Crim. App. 2013) (holding that no plain error occurred after victim's relatives presented statements to the trial court requesting that the defendant receive the death penalty where statements were presented only to trial court and the court stated that it considered the statements for a limited purpose). A circuit court errs if it considers an opinion by a victim's family member of the appropriate punishment the defendant should receive. Ex parte Williams, 640 So. 2d 1015 (Ala. 1993). Here, the victim-impact statement was made only to the trial court at the sentencing hearing, and the trial court made no statement indicating that it would consider the victim-impact statement when making the sentencing determination.[4] The sentencing order indicates that the trial

[4] Although the trial court referenced in its sentencing order the evidence and testimony that had been presented during all phases of the trial and stated that it would considered by the court in affixing punishment, the trial court also stated that it had disregarded pleas or references to the court to consider the sentence on the basis of passion or prejudice in determining Callen's sentence.

court's sentencing decision was based solely on the weighing of the aggravating and mitigating circumstances. Absent evidence to the contrary, "we presume that the trial court disregarded any inadmissible evidence and improper factors in sentencing." Hyde v. State, 778 So. 2d 199 (Ala. Crim. App. 1998). Accordingly, even if defense counsel were deficient, Callen has not demonstrated that there is a reasonable probability that the result of the proceeding would have been different had counsel not elicited Lisa's opinion on Callen's punishment.

3.

Callen pleaded that trial counsel were ineffective in their investigation into mitigation evidence for the sentencing phase.

In addition to the testimony and other evidence presented at the sentencing hearing, the circuit court had before it testimony and evidence presented at prior proceedings. As demonstrated by our analysis above in addressing this claim with respect to the penalty phase, Callen failed to show that counsel's investigation and presentation of mitigation evidence was insufficient or that he suffered prejudice as a result of any deficiency. For the same reasons as we found Callen's claim to be without merit in Section II.B., we find this claim without merit.

Callen also argues that counsel were ineffective during the sentencing phase when counsel submitted a memorandum by Dr. Meredith only minutes before the sentencing proceedings that contained statements Callen had made to Dr. Meredith that he had been sexually abused -- statements which he claims the trial court disregarded. Callen failed to show, though, that counsel should have presented Dr. Meredith's sentencing memorandum at an earlier time or that he suffered any prejudice by counsel's failure to do so. The memorandum referenced statements Callen had made to Dr. Meredith that he had been sexually abused by a family member, and, when the State objected to the trial court's considering any statements not made under oath, the court stated that it would give the hearsay statements the appropriate weight when evaluating the memorandum. Callen failed to show that these statements could have been used differently by the trial court. Further, these statements were cumulative to Dr. Meredith's testimony at trial. Callen has not shown a reasonable probability that the outcome of his sentencing hearing would have been different but for these alleged errors. Callen is not entitled to any relief on this claim.

C.

Callen argues that trial counsel were ineffective during the guilt phase of his trial and that the circuit court erred by dismissing his guilt-phase claims.

1.

Called pleaded in his petition that counsel's sole theory of defense during the guilt phase was that Callen was intoxicated during the offense, and, therefore, was guilty only of manslaughter. Callen claimed that the only evidence presented regarding his intoxication the night of the murders was his statement to police that he had consumed alcohol that evening. Callen argues that counsel failed to obtain any of Callen's medical records that showed Callen's repeated use of prescribed narcotics and that Dr. Dueffer could have testified about the effects of Callen's use of prescription opioids, particularly when mixed with alcohol. Callen pleaded that trial counsel failed to interview Callen's family and friends regarding his history of alcohol use and to present their testimonies. Callen alleges that counsel should have presented the testimonies of Dr. Meredith and Dr. Glen King[5] about Callen's history of alcohol use --

[5] Dr. King, a licensed clinical and forensic psychologist, performed a mental evaluation of Callen prior to trial pursuant to the circuit court's order directing that Callen be evaluated.

evidence that had been presented prior to trial during an Atkins[6] hearing.

Callen further claimed that counsel damaged their intoxication defense when counsel repeatedly made confusing and inconsistent arguments regarding Callen's intoxication during the offense. Specifically, Callen cites counsel's statements during closing argument of the guilt phase that he claims were contradictory to a finding that Callen was intoxicated, which could have only confused the jury.

The circuit court dismissed this claim as insufficiently pleaded and without merit. In addressing Callen's claim that counsel failed to present an adequate intoxication defense, the circuit court stated:

> "Callen claims trial counsel failed to present any available evidence of his use of alcohol. Callen cites his own statement to police in support of his use of alcohol on the night of the murder, State's Exhibit 112A. This evidence was obviously presented to the jury. Callen pleads no facts to further clarify his level of intoxication on the night of the murders. Callen criticizes his counsel for their cross-examination of Lisa Brown, Faye Budgess, and Jerrell Williams about the use of alcohol by Quortes, but not by Callen. He fails to plead the questions counsel should have asked and the answers these witnesses would have given. He also fails to plead how his drinking habits would be relevant

[6] Atkins v. Virginia, 122 S.Ct. 2242 (2002) (holding that the Eighth Amendment does not permit the execution of "mentally retarded" defendants).

to his level of intoxication on the night of the murders. … Callen lists several friends and family members he claims counsel should have questioned about significant alcohol abuse in the family and his and Quortes' history of drinking. Callen again fails to plead that any of those witnesses could testify that he was drinking at the time of the murders, or how this testimony would be relevant in the guilt phase of trial. Counsel cannot be found ineffective for failing to present inadmissible evidence. Logic dictates that the only person who could testify that Callen was under the influence of narcotics is Callen himself. Reasonable counsel could easily decide to avoid putting his client on the stand.

"…Callen claims trial counsel failed to present any available evidence of use of prescribed narcotics. Callen's claim has no merit because he pleads no facts to suggest that he was using narcotics, prescribed or otherwise, at the time of the murders. He recites dates and conditions for which he was prescribed narcotics, but he does not claim that he was under the influence of narcotics at the time of the murders, nor does he claim that he provided any information about narcotic use at the time to his counsel. Counsel cannot be found ineffective for failing to introduce information uniquely within the knowledge of the defendant and his family which is not provided to counsel. Further, while Callen claims that the narcotics would have supported his theory of intoxication, he does not, however, claim that he was suffering from these effects. … Further, Callen does [not] identify any witness who would have testified about his narcotic use, the substance of their testimony, or how presentation of these facts would have produced a different result. Again, the only person who could testify that Callen was under the influence of narcotics is Callen himself. A reasonable strategy of counsel would be to avoid Callen's testimony.

"…Callen claims that counsel should have obtained and presented the testimony of a medical expert, such as Dr. Dueffer, to testify about the effects of [Callen's] use of

prescription opioids, particularly when mixed with alcohol. But Callen has not identified any witness who could have testified that he was actually taking opioids on the day of the murder. Consequently, testimony about their supposed effects would be nothing more than speculation. While Callen pleads generally that Dr. Dueffer could testify about the effects of combining alcohol and opioids, he fails to plead that Dr. Dueffer was willing and available to testify at his trial, that Dr. Dueffer would testify that Callen was suffering from any of these effects at the time of the murder, or that such testimony would reasonably affect the outcome of the trial.

"…Callen claims that counsel could have called Dr. Meredith as a witness at the guilt phase to testify that Callen drank significant amounts of alcohol every night beginning at 15 or 16 years old. Alternatively, Callen claims that counsel should have called the State's expert, Dr. King, to testify about Callen's history of alcohol use. Callen fails to plead how second-hand evidence regarding historical accounts of his drinking would have been admissible in the guilt phase. Counsel cannot be found ineffective for failing to present inadmissible evidence. Furthermore, this evidence would not be relevant to Callen's intoxication immediately preceding and at the time of the murder.

"Thus, this claim is summarily dismissed under Rules 32.3, 32.6(b), and 32.7(d)."

(C. 112-116.) (internal citations, quotation marks, and footnote omitted).

With respect to Callen's claim that counsel were ineffective by presenting inconsistent and confusing arguments during closing arguments, the circuit court stated:

"On the face of the record, trial counsel's strategy in the guilt phase of the trial was clearly to raise intoxication to

> negate intent in order to argue guilt to the lesser-included offense of manslaughter. Counsel argued intoxication in closing by weaving in Callen's own statements to police. (R. 920-47.) Based on the facts, counsel chose the best theory of defense available to them based on the evidence. This is not ineffective assistance of counsel. … Callen failed to meet his burden to [plead] … that no reasonable attorney would have chosen the course of action that [his] attorney[s] chose.
>
> "Additionally, … Callen includes only four excerpts about the defense of intoxication from [counsel]s closing argument. … Callen includes only one excerpt from the argument of [second chair] and asserts that this was contradictory to the theory of intoxication. A plain reading of the trial transcript shows that the chosen excerpt was preceded with a plea for the jury to listen closely to Callen's statement to the police: 'Go back to the statement, please. I beg you to go back and listen to this statement more than anything else.' (R. 943.) Further, [both counsel] argued lack of intent and facts about Callen's intoxication and lack of memory throughout his closing. (R. 937-40, 944-45.) Callen fails to plead how [counsel] should have argued differently or showed a reasonable probability that, but for counsel's errors, the results of the proceeding would have been different. The fact that [a] defense strategy was ultimately unsuccessful with the jury does not render counsel's performance deficient."

(C. 117-18.) (some internal citations and quotation marks omitted).

This Court agrees with the circuit court. These claims were not pleaded with sufficient specificity to satisfy the requirements in Rule 32.3 and 32.6(b), and were without merit. The evidence that Callen claims counsel should have presented during the guilt phase was irrelevant to

Callen's intoxication defense. "[T]here must be evidence that the ingestion [of alcohol or drugs] caused a disturbance of the person's mental or physical capacities and that that mental or physical disturbance existed at the time the offense was committed." Lee v. State, 898 So. 2d 790, 838 (Ala. Crim. App. 2001) (emphasis in original). Callen failed to plead any evidence that counsel should have presented that would have shown his level of intoxication at the time of the murders. Callen's prior alcohol and narcotic use do not show that he was under the influence of either or both at the time of the murders. Callen's assertion is a speculative assertion that, given his history, he was likely intoxicated at the time. However, even evidence that Callen ingested alcohol or drugs, standing alone, does not warrant a charge of intoxication, yet Callen received the benefit of such a charge. The only person who Callen asserts had knowledge of the level of his intoxication and its effect on him at the time of the murders was Callen himself, and he does not plead that he would have testified or what testimony he would have presented. This Court also agrees that the circuit court's finding that counsel were not ineffective during its presentation of the intoxication defense and that Callen failed to show that the outcome of the proceeding would have been

different but for counsel's alleged deficient performance. For these reasons, these claims were both insufficiently pleaded and meritless and were properly summarily dismissed.

2.

Callen pleaded that trial counsel were ineffective for failing to present evidence that would have supported a jury instruction for provocation or heat-of-passion manslaughter. Callen contends that counsel should have presented evidence that Quortes may have sexually abused Callen on the night of the murders, sending Callen into a dissociative state that led him to murder his relatives, and that this evidence would have supported a manslaughter charge.

In finding this claim insufficiently pleaded and without merit, the circuit court stated:

> "Callen does not plead facts to show a reasonable probability of a different outcome. It is clear from the face of the record that Callen did not want to present testimony about the alleged sexual abuse. (C. 602-03.) In Dr. Meredith's report, he stated, '[Callen] was extremely self-conscious about revealing this information and asked if he would have to talk about this in Court in front of his family.' (C. 602.) Callen had not pleaded facts that, if proven, would show no reasonable counsel would have proceeded in this fashion. In order for counsel to have presented admissible evidence of lawful provocation to support an instruction on heat of passion, Callen himself would have had to testify as the only

> living witness, and reasonable counsel could easily decide to avoid putting his client on the stand. Moreover, Callen does not specifically allege what happened prior to the murders or how those events would have provided legal provocation, and he gives no consideration at all to the potential pitfalls of testifying on his own behalf. These are the types of facts that Callen is required to allege to sufficiently plead his claims."

(C. 120-21.)

We agree with the circuit court that this claim was not sufficiently pleaded to satisfy Rule 32.6(b), Ala. R. Crim. P.[7] Thus, summary dismissal was proper, and Callen is due no relief on this claim.

3.

Callen pleaded that trial counsel were ineffective for failing to object to highly prejudicial evidence. Specifically, Callen asserted that trial counsel should have objected to a video admitted by the State showing Callen in handcuffs and jail attire and that counsel should have objected to improper victim-impact testimony during the guilt phase.

a.

Callen pleaded that the State played a nearly hour-long video of Callen's statement to police in which Callen was shown wearing prison

[7] Further, Callen's claim assumes that a sexual assault is sufficient to warrant an instruction on manslaughter. In addition to other insufficient pleadings, Callen failed to plead that a sexual assault is the type of assault sufficient to establish provocation under the law.

clothes and handcuffs. Callen argues, as he did in his petition, that this depiction deprived him of the presumption of innocence.

In dismissing this claim, the circuit court found the following:

> "The Court of Criminal Appeals addressed the underlying substantive claim and found no plain error:
>
> > ["]This issue is raised for the first time on appeal; therefore, we review this claim for plain error….
> >
> > "'This Court has recognized that there is a distinction between the jury's observing a defendant wearing handcuffs in the courtroom for his or her trial and the jury's observing the defendant wearing handcuffs in a videotape that is shown for the jury during trial. We have stated:
> >
> > > "'"'"'"The presumption of innocence, although not articulated in the Constitution, is a basic component of our system of criminal justice." United States v. Dawson, 563 F.2d 149, 151 (5th Cir. 1977) (citations omitted). A government entity violates the presumption of innonence when it "compels an accused to stand trial before a jury while dressed in identifiable prison garb." United States v. Birdsell, 775 F.2d 645, 652 (5th Cir. 1985).'
> >
> > "'"United States v. Pryor, 483 F.3d 309, 311 (5th Cir. 2007). However, we have not extended the violation of the presumption of innocence to the viewing of the defendant on a videotape while he is in handcuffs.'

"Shaw v. State, 207 So. 3d 79, 97 (Ala. Crim. App. 2014).

"More importantly, Callen did not object. …

> "'…
>
> "[']…Callen's failure to object 'negates the presence of compulsion and, thus, there was no plain error.' 775 F.2d at 652. For the reasons stated above, we find no plain error in Callen's appearance in the video in handcuffs and prison clothes. Accordingly, Callen is due no relief on this claim.[']

"Callen, 284 So. 2d at 206. Callen attempts to use the failure to object to show that had counsel objected to the video, there is a reasonable likelihood that the State would have had to find an alternative method of presenting [Callen's] statements, and the jury would not have seen [Callen] in an inherently prejudicial manner. This attempt fails to ignore the 'distinction between the jury's observing a defendant wearing handcuffs in the courtroom for his or her trial and the jury's observing the defendant wearing handcuffs in a videotape that is shown to the jury during trial.' Callen, 284 So. 3d at 206. Likewise the case law cited by Callen is not persuasive because in each case cited, the defendant was constrained or in prison uniforms in front of the jury. … Because the underlying claim has no merit, trial counsel cannot be ineffective for failing to object to it. It is only in the rare case that a finding of no plain error on direct appeal does not foreclose a corresponding ineffective assistance claim. But, Callen has not pleaded any facts whatsoever in his petition that would show that this is such a rare case. Indeed, this is not one of those rare cases. The Court of Criminal Appeals has recently reaffirmed, where an underlying substantive claim caused no error, an IAC claim that relies on that issue is without merit.

"Thus, this claim is summarily dismissed under Rule 32.7(d)." (C. 121-24.) (some internal citations and quotations omitted; emphasis in original).

As the circuit court stated, the claim underlying the ineffectiveness claim was specifically rejected on appeal. Although part of this Court's holding that no plain error occurred relied on counsel's failure to object, this Court also stated that case law holding that prejudice occurs when a defendant is wearing prison attire or handcuffs in the courtroom for his or her trial does not extend to the viewing of the defendant on a videotape in such attire or handcuffs. Counsel cannot be ineffective for failing to raise a baseless objection or on a novel claim that hinges on a legal question of first impression. Stanley v. State, 335 So. 3d 1 (Ala. Crim. App. 2020); and McCoy v. State, 387 So. 3d 261 (Ala. Crim. App. 2023). Therefore, the circuit court properly denied this claim of ineffective assistance of counsel.

b.

Callen pleaded that trial counsel were ineffective for failing to object to victim-impact testimony by Lisa Brown during the guilt phase.

In his petition, Callen pleaded that

> "[w]hile Ms. Brown testified as to the relationships between herself, [Callen], and the rest of the family, she also testified as to extraneous information irrelevant to the underlying crime; specifically, she testified regarding Bernice and Quortes' (male victim) employment (R. 409-10), Aaliyah's schooling (R. 412), that the family spent a lot of time together (R. 416-17), and that Aaliyah was the 'baby of the family' (R. 414.)"

(C. 806.)

The circuit court dismissed this claim as insufficiently pleaded and without merit. The circuit court found that Callen failed to plead why no reasonable attorney in counsel's position would have failed to object to testimony about the family structure in a case involving family structure and that Callen failed to plead how these actions prejudiced him. The circuit court further stated:

> "Moreover, Callen does not explain how this testimony is improper victim impact evidence. Callen relies on the Alabama Supreme Court's finding that emotional victim impact testimony distracted the jury in Ex parte Jackson, 68 So. 3d 211 (Ala. 2010), but this reliance is misplaced. The facts in Jackson are highly distinguishable and included emotional outbursts…. Ms. Brown's testimony was not emotional and was not victim-impact testimony."
>
> "This claim is also meritless because the Court of Criminal Appeals addressed the underlying victim impact testimony issue on direct appeal and held that no plain error existed ….

> "... Callen makes no attempt to counter this portion of the Court of Criminal Appeals' holding. Because the underlying claim has no merit, trial counsel cannot be ineffective for failing to object to it. This Court recognizes that a finding of no plain error on direct appeal does not foreclose Callen from arguing that he was prejudiced by his counsel's failure. ... However, it is the rare case in which the application of the plain-error test and the prejudice prong of the Strickland test will result in different outcomes. But, Callen has not pleaded any facts whatsoever in his petition that would show that his is such a rare case. This is not one of those rare cases."

(C. 125-27.) (internal citation and quotations omitted).

On appeal, Callen reasserts the claim in his petition and argues that the court's summary dismissal of this claim was erroneous; however, he fails to comply with the requirements of Rule 28(a)(10), Ala. R. App. P. Callen fails to present any argument or authority to support his argument that the circuit court erred in summarily dismissing this claim. Therefore, Callen waived this argument on appeal.

Moreover, even if Callen's claim were properly before this Court for review, he would not be entitled to any relief. As the circuit court explained, this Court, in Callen's direct appeal, addressed the claim underlying this claim of ineffective assistance of counsel. Although "'a determination on direct appeal that there has been no plain error does not automatically foreclose a determination of the existence of the

prejudice under Strickland to sustain a claim of ineffective assistance of counsel,'" "it is the 'rare case in which the application of the plain-error test and the prejudice prong of the Strickland test will result in different outcomes.'" Bohannon v. State, 401 So. 3d 302, 327 (Ala. Crim. App. 2023) (quoting Ex parte Taylor, 10 So. 3d 1075, 1078 (Ala. 2005)). As the circuit court stated in its order dismissing this claim, Callen failed to plead any facts showing why this claim was one of the rare claims in which prejudice can be found in a petition filed pursuant to Rule 32, Ala. R. Crim. P., after this Court has found on direct appeal that no plain error occurred on the underlying claim. Thus, the circuit court properly dismissed this claim.

III.

Callen argues on appeal that the circuit court erred by denying his request to be transported to a local hospital for a magnetic resonance imaging (MRI) test to be performed at no expense to the State. Callen argues that an MRI would have provided additional, critical evidence to buttress his claims regarding organic brain damage. Callen provided an

affidavit from Dr. Grant explaining that an MRI was needed to evaluate the extent to which Callen's past trauma damaged his brain and altered its tissue and structure. Dr. Grant claimed that an MRI would provide objective evidence to support her clinical assessment.

"A trial court has inherent discretionary authority to order discovery in post-conviction proceedings." Jackson v. State, 910 So. 2d 797 (Ala. Crim. App. 2005) (quotation marks omitted). The trial court's authority to order discovery in postconviction proceedings "'"must be exercised with caution, because of the potential for abuse of the discovery process and because of the limited scope of postconviction proceedings."'" Newton v. State, [Ms. CR-2023-0953, September 27, 2024] ___ So. 3d ___, ___(Ala. Crim. App. 2024) (quoting Jackson v. State, 910 So. 2d 797, 803 (Ala. Crim. App. 2005)). "A Rule 32 petitioner is not entitled to discovery on claims that are not facially meritorious, i.e., on claims that are subject to summary dismissal." Id. Further, "[a] postconviction court does not abuse its discretion in denying a discovery request that is in the nature of a 'fishing expedition.'" Id.

For the reasons set out in this memorandum, specifically in Part II.A.2., we hold that the postconviction court did not err in denying

Callen's request for discovery because the claims related to organic brain damage were either insufficiently pleaded or without merit; therefore, Callen did not show good cause to be entitled to discovery on those claims. See Ex parte Land, 775 So. 2d 847 (Ala 2000) ("[W]e must determine whether [the petitioner] presented the trial court with good cause for ordering the requested discovery. To do that, we must examine [the petitioner's] basis for the relief requested in his postconviction petition and determine whether his claims are facially meritorious. Only after making that examination and determination can we determine whether [the petitioner] has shown good cause."), overruled on other grounds, State v. Martin, 69 So. 3d 94 (Ala. 2011).[8] Thus, the circuit court did not abuse its discretion when it denied Callen's request to be transported to

[8] To the extent that it can be argued that the circuit court erred in finding his claims regarding brain damage insufficiently pleaded as speculative without affording Callen an opportunity to obtain the requisite test necessary to remove any speculation, this Court notes that Callen's own expert, Dr. Grant, stated that the test would be helpful in excessing the degree of Callen's illness – an illness which was presented in some manner during Callen's trial and which the trial court found was a nonstatutory mitigating factor. An MRI that may show brain damage that may have contributed to Callen's psychological and behavior issues would constitute nothing more than a physical finding to support a diagnosis that was cumulative to evidence presented at trial. Moreover, Callen's pleadings failed to explain how an MRI conducted years after the offenses could show the degree of damage that may or may not have been present at the time of the murders.

a local hospital for an MRI.

Accordingly, Callen is due no relief on his claims, and the judgment of the circuit court is affirmed.

AFFIRMED.

Cole and Minor, JJ., concur. Kellum, J., concurs in the result. Anderson, J., recuses himself.

Appendix B

ELECTRONICALLY FILED
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01-CC-2011-002047.60
CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA
JACQUELINE ANDERSON SMITH, CLERK

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

DONTAE CALLEN,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. CC-2011-002047.60
	)	
STATE OF ALABAMA,	)	
	)	
Respondent.	)	

FINAL ORDER DENYING DEFENDANT'S RULE 32 PETITION

This matter is before this Court as a second amended Petition for Relief from Conviction or Sentence pursuant to Rule 32, Alabama Rules of Criminal Procedure. After considering the pleadings and for the reasons set forth below, Callen's second amended Rule 32 petition is summarily dismissed.

Procedural History

On July 11, 2013, Dontae Callen was found guilty of three counts of capital murder: one count of capital murder of two or more persons, in violation of Alabama Criminal Code § 13A-5-40(A)(10); one count of capital murder of a person under the age of 14, in violation of § 13A-5-40(A)(15); and one count of capital murder of three people during an arson, in violation of § 13A-5-40(A)(9). (C. 131-32.) After the presentation

of evidence and arguments of counsel, the jury recommended Callen be sentenced to death by a vote of 11-1. On August 20, 2013, this Court, Judge Laura Petro presiding, followed the jury's recommendation and sentenced Callen to death. (C. 113-23.)

The Alabama Court of Criminal Appeals affirmed Callen's conviction and sentence to death. On June 3, 2019, the United States Supreme Court denied certiorari. *Callen v. Alabama*, 139 S. Ct. 2668 (June 3, 2019).

Callen timely filed a Rule 32 petition on November 11, 2019. He filed a first amended petition on August 19, 2021, which the State moved to dismiss on September 16, 2021. Callen filed the present second amended petition on July 29, 2022. The State answered and moved to dismiss the second amended petition on January 27, 2023. Callen filed a response to the State's motion to dismiss on June 2, 2023.

Facts of the Case

This Court adopts the facts of the Alabama Court of Criminal Appeals in *Callen v. State*, 284 So. 3d 177, 187–89 (Ala. Crim. App. 2017).

Rule 32 and the Strickland Standard

Mere "notice pleading" is insufficient in a postconviction petition. *Jones v. State*, 322 So. 3d 979, 994 (Ala. Crim. App. 2019) (quoting *Washington v. State*, 95 So. 3d 26, 59 (Ala. Crim. App. 2012)). Rule 32.3 of the Alabama Rules of Criminal Procedure provides:

> The petitioner shall have the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief. The state shall have the burden of pleading any ground of preclusion, but once a ground of preclusion has been pleaded, the petitioner shall have the burden of disproving its existence by a preponderance of the evidence.

Furthermore, Rule 32.6(b) of the Alabama Rules of Criminal Procedure states:

> Each claim in the petition must contain a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds. A bare allegation that a constitutional right has been violated and mere conclusions of law shall not be sufficient to warrant any further proceedings.

This "burden of pleading under Rule 32.3 and Rule 32.6(b) is a heavy one," and "[t]he full factual basis for the claim must be included in the petition itself." *Harris v. State*, 365 So. 3d 1075, 1089 (Ala. Crim. App. 2021) (quoting *Hyde v. State*, 950 So. 2d 344, 356 (Ala. Crim. App. 2006)).

Accordingly, the petitioner is not entitled to an evidentiary hearing unless he first meets the pleading requirements of Rules 32.3 and 32.6(b), for "Rule 32.6(b) requires that the petition itself disclose the facts relied upon in seeking relief." *Id.* at 1089 (emphasis omitted) (quoting *Boyd v. State*, 746 So. 2d 364, 406 (Ala. Crim. App. 1999)). As the Court of Criminal Appeals has held, "[I]t is not the pleading of a ***conclusion*** 'which, if true, entitles the petitioner to relief.'" *Id.* (quoting *Boyd*, 913 So. 2d at 1125 (quoting *Lancaster*, 638 So. 2d at 1373). Rather,

> [I]t is the allegation of ***facts*** in pleading which, if true, entitle a petitioner to relief. After ***facts*** are pleaded, which, if true, entitle the petitioner to relief, the petitioner is then entitled to an opportunity, as provided in [Rule 32.9 of the Alabama Rules of Criminal Procedure], to present evidence proving those ***alleged facts***.

Id. (quoting *Boyd*, 913 So. 2d at 1125).

"An evidentiary hearing on a [Rule 32] petition is required only if the petition is 'meritorious on its face.'" *Brooks v. State*, 340 So. 3d 410, 441 (Ala. Crim. App. 2020) (quoting *Ex parte Boatwright*, 471 So. 2d 1257, 1258 (Ala. 1985)). The Alabama Supreme Court has explained that

> [a] petition for [postconviction relief] is "meritorious on its face" only if it contains ***a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the facts relied upon*** (as opposed to a general statement concerning the nature and effect of those facts),

> sufficient to show that the petitioner is entitled to relief if those facts are true.

Ex parte Clisby, 501 So. 2d 483, 486 (Ala. 1986) (internal citations omitted). Thus, the petitioner is not automatically entitled to an evidentiary hearing on any of the allegations presented in his petition.

Ineffective assistance claims are governed by the two-pronged test of *Strickland v. Washington*: the petitioner must show that (1) his counsel's performance was deficient and (2) this deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

The "performance" prong "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* The standard for judging counsel's performance is "reasonableness under prevailing professional norms," and there is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 688–89. Reasonableness is judged from the perspective of counsel at the time of the alleged error and in light of the circumstances. E.g., *Johnson v. Alabama*, 256 F.3d 1156, 1176 (11th Cir. 2001); *Mills v. Singletary*, 161 F.3d 1237, 1285-86 (11th Cir. 1998).

Judicial scrutiny of counsel's performance must be "highly deferential," and reviewing courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id. See Bolender v. Singletary*, 16 F.3d 1547, 1557 (11th Cir. 1994) (review of counsel's conduct is "appropriately highly deferential because the craft of trying cases is far from an exact science; in fact, it is replete with uncertainties and obligatory judgment calls."). As the Court of Criminal Appeals explained, "[a]n attorney looking at a trial transcript can always find places where objections could have been made. Hindsight is not always 20/20, but hindsight is always ineffective in evaluating performance of trial counsel." *State v. Lewis*, 371 So. 3d 863, 890 (Ala. Crim. App. 2022) (quoting *State v. Tarver*, 629 So. 2d 14, 19 (Ala. Crim. App. 1993)). Accordingly, because counsel's conduct is presumed to have been reasonable, the analysis under *Strickland* "has nothing to do with what the best lawyers would have done . . . [or] what most good lawyers would have done." *Lisbon v. United States*, 758 F. App'x 780, 782 (11th Cir. 2018) (quoting *White v. Singletary*, 972 F.2d 1218, 1220 (11th Cir. 1992)). Instead, the question is whether "some reasonable lawyer at the

trial could have acted, in the circumstances, as defense counsel acted at trial." *Id.* (quoting *White*, 972 F.2d at 1220).

Because counsel is strongly presumed to have been competent in this analysis, "the petitioner's burden of persuasion is a heavy one: 'petitioner must establish that no competent counsel would have taken the action that his counsel did take.'" *Stewart v. State*, 476 F.3d 1193, 1209 (11th Cir. 2011). For example, counsel's performance will not be found deficient if a reasonable lawyer could have decided, under the same circumstances, not to investigate or present particular evidence. *See Ward v. Hall*, 592 F.3d 1144, 1168 (11th Cir. 2010) ("[E]ven when trial counsel's investigation is less complete than collateral counsel's, trial counsel has not performed deficiently when a reasonable lawyer could have decided, in the circumstances, not to investigate." (quoting *Hallford v. Culliver*, 459 F.3d 1193, 1205 (11th Cir. 2006) (per curiam) (quoting *Housel v. Head*, 238 F.3d 1289, 1295 (11th Cir. 2001)).

"Under *Strickland*, counsel's conducting or not conducting an investigation need only be reasonable to fall within the wide range of competent assistance." *Chandler v. U.S.*, 218 F.3d 1305, 1317 (11th Cir. 2000). "The performance component outlined in *Strickland* is an objective

one." *Lockhart v. State*, 354 So. 3d 1039, 1046 (Ala. Crim. App. 2021) (quoting *Daniels v. State*, 650 So. 2d 544, 552 (Ala. Crim. App. 1994)). Counsel's performance "must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Mashburn v. State*, 148 So. 3d 1094, 1132 (Ala. Crim. App. 2013) (internal citations omitted). *See also Boyd*, 913 So. 2d at 1129. In evaluating a claim that "trial counsel should have done something more, [courts must] first look at what the lawyer[s] did in fact." *State v. Mitchell*, 377 So. 3d 94, 119 (Ala. Crim. App. 2022) (quoting *Chandler*, 218 F.3d at 1320). Further, to adequately plead deficient performance in trial counsel's argument, a petitioner must offer superior alternative arguments. *See, e.g.*, *Harris*, 365 So. 3d at 1089–90 (discussing the "heavy" burden of the pleading requirements under Rule 32.3 and Rule 32.6(b) of the Alabama Rules of Criminal Procedure); *Coan v. State*, 322 So. 3d 552, 557 (Ala. Crim. App. 2020) (same). Counsel cannot be held ineffective for failing to object to admissible evidence. See, e.g., *Yeomans v. State*, 195 So. 3d 1018, 1036 (Ala. Crim. App. 2013) ("[T]here is no merit to [the] claim of ineffective assistance, because there is no merit to the underlying claim that the [evidence was] inadmissible."). Conversely,

counsel cannot be found ineffective for failing to present inadmissible evidence. *See, e.g.*, *Peraita v. State*, No. CR-17-1025, 2021 WL 3464344, at *27 (Ala. Crim. App. Aug. 6, 2021) ("Counsel is not ineffective for failing to present inadmissible evidence."); *Harris*, 365 So. 3d at 1119 ("Counsel will not be deemed ineffective for failing to present inadmissible evidence." (quoting *Daniel*, 86 So. 3d at 421 (quoting *Kuehne v. State*, 107 S.W.3d 285, 294 (Mo. Ct. App. 2003) (quoting *Barnum v. State*, 52 S.W.3d 604, 608 (Mo. Ct. App. 2001)). Furthermore, counsel cannot be held ineffective for failing to raise a baseless objection. *See, e.g.*, *Wimbley v. State*, No. CR-20-0201, 2022 WL 17729209, at *12 (Ala. Crim. App. Dec. 16, 2022) ("[C]ounsel could not be ineffective for failing to raise a baseless objection." (quoting *Stanley v. State*, 335 So. 3d 1, 54 (Ala. Crim. App. 2020) (quoting *Bearden v. State*, 825 So. 2d 868, 872 (Ala. Crim. App. 2001))). Likewise, counsel cannot be ineffective for failing to present cumulative evidence. *See, e.g.*, *Burgess v. State*, No. CR-19-1040, 2023 WL 4146021, at *14 (Ala. Crim. App. June 23, 2023) ("[T]rial counsel are not ineffective for failing to present cumulative evidence." (citing *Marquard v. State*, 850 So. 2d 417, 429–30 (Fla. 2002)).

The "prejudice" prong "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. Here, as with the performance prong, "[a] petitioner's burden of establishing that his lawyer's deficient performance prejudiced his case is also high." *Reynolds v. Dunn*, No. 18-CV-236, 2022 WL 895947, at *33 (N.D. Ala. Mar. 25, 2022) (quoting *Van Poyck v. Fla. Dep't. of Corr.*, 290 F.3d 1318, 1322 (11th Cir. 2002)). It is insufficient for a petitioner to show that the alleged errors have "some conceivable effect on the outcome of the proceeding." *Strickland*, 466 U.S. at 693. Rather, "[he] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Thus, "[a] finding of prejudice requires proof of unprofessional errors so egregious that the trial was rendered unfair and the verdict rendered suspect." *Marshall v. Dunn*, 497 F. Supp. 3d 1124, 1152 (N.D. Ala. 2020) (quoting *Johnson*, 256 F.3d at 1177). When claims arise concerning a death sentence, the question is whether "there is a reasonable probability that, absent [counsel's] errors, the sentencer . . . would have concluded

that the balance of aggravating and mitigating circumstances did not warrant death." *Thornell v. Jones*, 144 S. Ct. 1302, 1310 (2024) (quoting *Strickland*, 466 U.S. at 695). As the Supreme Court has reiterated, the *Strickland* standard is "highly demanding" and requires that a petitioner show "a 'substantial,' not just 'conceivable,' likelihood of a different result." *Shinn v. Kayer*, 592 U.S. 111, 118 (2020) (first quoting *Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986); and then quoting *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011)).

In a Rule 32 proceeding, as discussed above, the petitioner has the burden of pleading "a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds." Ala. R. Crim. P. 32.6(b). Thus, for claims of ineffective assistance of counsel, the petitioner must include in his petition a full disclosure of the facts entitling him to relief under *Strickland*. If he fails to specifically plead facts that would, if true, establish both *Strickland* prongs, then summary dismissal is appropriate under Rules 32.6(b) and 32.7(d) of the Alabama Rules of Criminal Procedure. Specifically, a petitioner is "required to identify the names of the witnesses, to plead with specificity what admissible testimony those witnesses would have

provided had they been called to testify, and to allege facts indicating that had the witnesses testified there is a reasonable probability that the outcome of the proceeding would have been different." *Young v. State*, No. CR-21-0393, 2023 WL 2623665, at *9 (Ala. Crim. App. Mar. 24, 2023) (quoting *Mashburn*, 148 So. 3d at 1151).

Callen claims his trial counsel were ineffective in the penalty phase, the sentencing hearing, and the guilt phase of his trial.

Claim I - The claim that Callen was denied effective assistance of counsel during the penalty phase of his trial.

This claim is dismissed in its entirety. Each sub-claim raised within this claim is addressed below in the order presented.

Claim I(A) - The claim that Callen's counsel were on notice of the duty to investigate mitigation factors.

This claim is meritless and insufficiently pleaded because Callen has not pleaded facts that would show deficient performance or that he was actually prejudiced. A claim for IAC cannot be established by sweeping generalizations that do not meet the specificity and pleading requirements of Rule 32. Callen claims his counsel asked for a five-month continuance on the "eve of trial, in March 2013." (Pet. at 15.) Callen's counsel did indeed argue for a continuance of the trial for five months

(from March to August); but Callen fails to acknowledge that his attorneys successfully obtained a four-month continuance (from March to July). (R. 16-17.) Callen fails to plead what more counsel could have argued or presented to obtain an additional month continuance, the basis counsel should have used to argue for a continuance, that any such argument or presentation would have swayed this Court to grant a longer continuance, or what information would have been discovered in one additional month. Claims such as these that do not plead these types of facts do not comply with Rule 32.6(b). *Young*, 2023 WL 2623665, at *8–10; *Mashburn*, 148 So. 3d at 1150. Even considering the sparse factual allegations in the petition as true, there is no reasonable likelihood that a one-month continuance of trial would have changed the result of Callen's trial. Additionally, Callen's overreliance on the ABA Guidelines fails. As the Court of Criminal Appeals has "consistently held": "Although the ABA guidelines may, in some instances, provide guidance as to what is reasonable in terms of counsel's representation, they are not determinative." *Okeowa v. State*, 337 So. 3d 767, 774 (Ala. Crim. App. 2021) (quoting *Jones v. State*, 43 So. 3d 1258, 1278 (Ala. Crim. App. 2007)); *see also State v. Smith*, 85 So. 3d 1063, 1071 (Ala. Crim. App.

2010). ABA publications serve only as aspirational guides, "not minimum constitutional standards." *Mashburn*, 148 So. 3d at 1162 (quoting *Ray v. State*, 80 So. 3d 965, 982 (Ala. Crim. App. 2011) (quoting *Yarbrough v. Johnson*, 520 F.3d 329, 339 (4th Cir. 2008))). ABA Guidelines are "guides to determining what is reasonable, ***but they are only guides***." *Strickland*, 466 U.S. at 688 (emphasis added). More recently, the Supreme Court has rejected usage of the ABA Guidelines as "inexorable commands with which all capital defense counsel must fully comply." *Bobby v. Van Hook*, 558 U.S. 4, 8 (2009) (per curiam) (internal quotation marks omitted).

Thus, this claim is summarily dismissed under Rules 32.3, 32.6(b), and 32.7(d).

Claim I(B) - The claim that Callen's counsel were ineffective for failing to investigate his potential organic brain damage.

Callen breaks this claim into three sub-claims.

Claim I(B)(1) - The claim that Callen's counsel were ineffective for failing to call an expert neuropsychologist.

This claim is insufficiently pleaded and without merit. Callen claims counsel failed to investigate his **potential** "organic brain damage" and should have hired a neuropsychologist, Dr. Kristine Lokken, who

"would have testified that [he] exhibits profound executive function deficits." (Pet. at 17.) Callen asserts that Dr. Lokken administered nine tests "specifically designed to determine if and to what extent a person suffers from organic brain damage and/or dysfunction." (Pet. at 20.) Although Callen pleads the results of four of these tests (WAIS-IV, Rey Complex Figure Test, Trailmaking Test A & B, and Wisconsin Card Sorting), he fails to plead the results of the other five tests Lokken purportedly administered and relied upon. (Pet. at 20-24.) Moreover, his claim is entirely speculative and presents a claim of **potential** organic brain damage. But that claim devolves further when Callen asserts "his test performances indicate [he] **likely** suffered an unreported serious traumatic incident or multiple significant disruptions" . . . and that "[e]ach neurodevelopmental insult **likely** caused further damage. . . ." (Pet. at 24.) (Emphasis added.) Mere speculation regarding what the results of unspecified testing might show is insufficient to meet the pleading requirements of Rule 32. *See Woodward v. State*, 276 So. 3d 713, 786 (Ala. Crim. App. 2018); *McMillan v. State*, 258 So. 3d 1154, 1178 (Ala. Crim. App. 2017). As such, Callen fails to present a meritorious claim and does not meet the pleading and specificity requirements.

Thus, this claim is summarily dismissed under Rules 32.3, 32.6(b), and 32.7(d).

Claim I(B)(2) - The claim that Callen's counsel were ineffective for failing to notice multiple red flags indicating potential organic brain damage.

This claim is insufficiently pleaded and meritless. Callen claims counsel "ignored numerous red flags in [his] personal and medical history that . . . obligated [them] to investigate whether [he] has organic brain damage." (Pet. at 27.) Callen then lists five red flags: "a car accident; a history of physical abuse and injuries; headaches, blackouts, and hallucinations; alcohol abuse, and childhood abuse, trauma, and neglect." (*Id.*)

In paragraphs 61-64, Callen claims he suffered head and back injuries from a **car accident**. This claim is insufficiently pleaded. Callen does not plead what specific facts counsel should have, but did not discover and present, e.g., when and where the accident allegedly occurred, whether, where, when, and for long he was hospitalized, what injuries, if any, he suffered, or what the medical records show. Callen contends that he possesses medical records, but he fails to plead anything specific from the records except that they show Callen went to the ER at

UAB Children's Hospital after the accident and that he was unrestrained in the back seat when his vehicle was hit head-on on the highway. (Pet. at 28.) Callen claims his unnamed grandmother, his unnamed brother, and his high school girlfriend would have told counsel that he had injuries to his head and back and he suffered headaches, but he does not claim the medical records contained a diagnosis. Nor does he identify any admissible evidence that trial counsel could have, but did not, present to the jury. Further, counsel does not plead how this scant information is a "red flag," what counsel should have done with this information, and how it would have affected the outcome of his case. "A bare allegation that prejudice occurred without specific facts indicating how the petitioner was prejudiced is not sufficient." *Wilson v. State*, No. CR-21-0109, 2024 WL 3218214, at *10 (Ala. Crim. App. June 28, 2024) (quoting *Hyde*, 950 So. 2d at 356). Callen relies on *Ferrell v. Hall*, 640 F.3d 1199, in which the 11th Circuit Court of Appeals found that Ferrell's headaches were one of "the many red flags that had been raised about Ferrell's mental health throughout the proceedings" including that Ferrell had a seizure in the courtroom during trial. *Id.* at 1229. While Callen tries to draw a parallel with *Ferrell* for the proposition that a "car accident followed by

headaches [is] a red flag warranting further investigation by trial counsel," he fails to allege facts showing that he suffered headaches of a similar nature, much less seizures, or other facts to show that his issues were of the magnitude of the issues suffered by Ferrell. (Pet. at 28.) Consequently, he fails to plead facts showing any "red flag" of sufficient significance that no reasonable counsel would have failed to investigate the cause of his alleged headaches.

In paragraphs 65-66, Callen claims he has "a **history of physical abuse and injuries**, including signs of head trauma." (Pet. at 29.) This claim is insufficiently pleaded. Callen does not plead specific facts such as when and where the abuse allegedly occurred, whether, where, when, and for long he was treated by medical personnel or hospitalized, what injuries, if any, he suffered, or what the medical records show. Callen claims certain family and friends would have told counsel about vague instances of abuse or injuries, but he does not provide the required specific details. Further, Callen acknowledges in this claim that the DHR records that trial counsel obtained and admitted at trial documented at least one instance of physical abuse by his father. Thus, further testimony regarding that incident would be cumulative. Despite Callen's

conclusory comment that counsel ignored this red flag, Callen does not plead how this scant information is a "red flag," what counsel should have done with this information, and how it would have affected the outcome of his case. *Wilson*, 2024 WL 3218214, at *10; *Young*, 2023 WL 2623665, at *9.

In paragraphs 67-70, Callen claims he suffers "from **headaches, blackouts, and hallucinations**" which, he alleges are red flags pointing to organic brain damage. (Pet. at 30.) This claim is insufficiently pleaded. Callen does plead that he went to the hospital four times over an almost eight-year period for headaches and claims that counsel should have hired Dr. Lokken. (Pet. at 31.) Callen claims that Dr. Lokken believes that his "organic brain dysfunction likely resulted from early trauma," and that a series of events "could have been additional 'neurological insults.'" (*Id.*) (Emphasis added.) Callen does not plead that he was ever diagnosed with head trauma, blackouts, or hallucination or the specifics of the "early trauma." The mere fact that Callen has, years after the trial, located a new expert, Dr. Lokken, that he believes will give superior testimony does not show deficient performance. *See George v. State*, 333 So. 3d 1022, 1043 (Ala. Crim. App. 2019) ("[T]he mere fact a

defendant can find, years after the fact, a mental health expert who will testify favorably for him does not demonstrate that trial counsel was ineffective for failing to produce that expert at trial." (quoting *Ray*, 80 So. 3d at 989–90 (quoting *Ward*, 592 F.3d at 1173 (quoting *Davis v. Singletary*, 119 F.3d 1471, 1475 (11th Cir. 1997))))); *see also id.* ("We cannot say that in light of the reports of the mental examinations performed, counsel's failure to retain a psychiatric expert to investigate this area further or to provide mitigating testimony fell outside the broad range of professionally adequate conduct." (quoting *Ray*, 80 So. 3d at 990) (quoting *Gilbert v. Moore*, 134 F.3d 642, 655 (4th Cir. 1998)). Despite Callen's conclusory comment that counsel ignored this red flag, Callen does not plead how this scant information is a "red flag," what counsel should have done with this information, and how it would have affected the outcome of his case. *Wilson*, 2024 WL 3218214, at *10; *Young*, 2023 WL 2623665, at *9. This claim is pure speculation. As such, it is meritless and cannot possibly meet the pleading and specificity requirements. Speculation is not enough to support a showing of prejudice. See *Woodward*, 276 So. 3d at 786; *McMillan*, 258 So. 3d at 1178.

In paragraphs 71-75, Callen claims "excessive drinking and a family history of **alcoholism** are red flags" related to organic brain damage. (Pet. at 32.) This claim is insufficiently pleaded. Callen claims that counsel should have hired Dr. Lokken who would have testified that "various studies **strongly suggest** that alcohol abuse **may** alter not only the physical brain structure of adolescents, but also physiologic brain functioning." (Pet. at 34.) (Emphasis added.) Despite Callen's conclusory comment that counsel ignored this red flag, Callen does not plead how this scant information is a "red flag" that no reasonable counsel would have ignored, or what specifically counsel should have done with this information and how it would have affected the outcome of his case. *Wilson*, 2024 WL 3218214, at *10; *Young*, 2023 WL 2623665, at *9. Furthermore, this claim is pure speculation. As such, it is meritless and cannot possibly meet the pleading and specificity requirements. Speculation is not enough to support a showing of prejudice. *See Woodward,* 276 So. 3d at 786; *McMillan*, 258 So. 3d at 1178.

In paragraphs 76-81, Callen claims that counsel had records that showed his "significant history of childhood **abuse, trauma, and neglect**, including that [he] was malnourished" and that counsel ignored

these red flags. (Pet. at 35.) This claim is insufficiently pleaded. Callen claims that counsel should have hired Dr. Lokken who would have testified that malnourishment, chronic dental issues, and exposure to toxins impact brain development. Callen cites to two examples in the DHR records showing that he was undernourished (Pet. at 35), but the two examples do not show malnourishment, they only show a need for access to food on those occasions. Callen does not specifically plead that he was malnourished. Callen also claims he had multiple medical visits relating to jaw and tooth pain, but fails to allege any specific details about the visits or whether he received any diagnosis, much less any facts that would show that his dental health impacted his brain health. Again, his claim is full of speculation: the unspecified dental issues would "**likely** have resulted in infections," the "amount of pain [he] **likely** suffered would have impacted his ability to eat," and the "**likely** infections, **could have potentially** impacted his developing brain." (Pet. at 37.) Indeed, if Callen suffered such great pain that he could not eat, then he would know that. Yet he fails to allege it. In paragraph 81, Callen also claims that toxins like lead can impact brain development. Callen fails to plead that he was exposed to lead or any other toxin. Instead, he pleads he was

"**likely**" exposed. Despite Callen's conclusory comment that counsel ignored this red flag, Callen does not plead how this scant information is a "red flag," what specifically counsel should have done with this information, much less how it would have affected the outcome of his case. *Wilson*, 2024 WL 3218214, at *10; *Young*, 2023 WL 2623665, at *9. Furthermore, this claim is pure speculation. As such, it is meritless and cannot possibly meet the pleading and specificity requirements. Speculation is not enough to support a showing of prejudice. *See Woodward*, 276 So. 3d at 786; *McMillan*, 258 So. 3d at 1178.

In paragraphs 82-89, Callen adds a sixth category to his claims regarding supposed "red flags"—his affect. (Pet. at 38.) This claim is insufficiently pleaded. Callen claims that Dr. Karen Salekin, a clinical psychologist, "**suspected**" Callen "**may**" have "**potential**" brain damage because of his flat affect. First, Callen does not plead that Dr. Salekin was available and willing to testify at his trial. Second, Callen does not plead facts that, if proven, would show that he *actually* had brain damage. Despite Callen's conclusory comment that counsel ignored this red flag, Callen does not plead how unspecified features of his "affect" were a "red flag" that no reasonable counsel could have ignored, much

less what specifically counsel should have done with this information, or how it would have affected the outcome of his case. *Wilson*, 2024 WL 3218214, at *10; *Young*, 2023 WL 2623665, at *9. Furthermore, this claim is pure speculation. As such, it is meritless and cannot possibly meet the pleading and specificity requirements. Speculation is not enough to support a showing of prejudice. *See Woodward*, 276 So. 3d at 786; *McMillan*, 258 So. 3d at 1178.

"[E]ven if the evidence [Callen] alleged should have been discovered had been presented at trial, there [is] no reasonable probability that the outcome of the trial would have been different." *Woodward*, 276 So. 3d at 741; *see, e.g.*, *Miller v. State*, 99 So. 3d 349, 412 (Ala. Crim. App. 2011 ("[Petitioner] has not shown a reasonable probability that the result of the penalty phase would have been different had additional mitigation evidence been presented based on the brutal nature of the crime, the overwhelming and convincing evidence of guilt, and the strength of the aggravating circumstances [of] this murder . . . .").

Thus, this claim is summarily dismissed under Rules 32.3, 32.6(b), and 32.7(d).

Claim I(B)(3) - The claim that Callen's trial counsel's failure to investigate potential brain damage was objectively unreasonable and highly prejudicial.

This claim is insufficiently pleaded and meritless. Callen claims he was "prejudiced by [counsel's] failure to adequately investigate and present evidence of [his] severe organic brain dysfunction, which correlates with organic brain damage to [his] frontal lobe and results in extremely diminished executive function." (Pet. at 41-42.)

First, Callen argues that this Court should assess counsel's effectiveness in presentation of mitigation evidence by reviewing the mitigation evidence cumulatively. (Pet. at 41.) Callen is incorrect that this Court should consider the cumulative effect of his counsel's alleged errors. "Alabama does not recognize a 'cumulative effect' analysis for ineffective-assistance-of-counsel claims." *Bohannon v. State*, No. CR-21-0148, 2023 WL 5314631, at *18 (Ala. Crim. App. Aug. 18, 2023) (quoting *Lewis v. State*, 333 So. 3d 970, 1016 (Ala. Crim. App. 2020) (quoting *Carruth v. State*, 165 So. 3d 627, 651 (Ala. Crim. App. 2014))). And Alabama appellate courts have "repeatedly declined similar requests from petitioners to do so." *Id.* (quoting *Lewis*, 333 So. 3d at 1016). If Alabama did recognize a cumulative-effect analysis, it would apply to

only those claims that are facially meritorious. *See Brooks*, 340 So. 3d at 441; *W.B.S. v. State*, 244 So. 3d 133, 144 (Ala. Crim. App. 2017). In this case, all of Callen's penalty-phase ineffective assistance claims are either deficiently pleaded or facially meritless. Because this Court is dismissing each individual claim, there is no cumulative effect to consider. *See Wilson*, 2024 WL 3218214, at *38–39.

Further, like in claims I(B)(1) and I(B)(2) above, this claim is speculative at best. Callen claims counsel should have hired Dr. Lokken to testify about his **likely** and **potential** organic brain damage. In this claim, Callen does not plead that Dr. Lokken was willing and available to testify at the trial, the tests employed by Dr. Lokken, the results of those tests, the specific testimony she would have presented, or how presenting such testimony would led to a reasonable probability of different results. At bottom, Callen does not allege that Dr. Lokken has diagnosed him with organic brain damage or that she could offer any admissible evidence that he suffers from any such condition. As such, Callen fails to plead a facially meritorious claim and has not met the pleading and specificity requirements. Speculation is not enough to

support a showing of prejudice. *See Woodward*, 276 So. 3d at 786; *McMillan*, 258 So. 3d at 1178.

The mere fact that Callen has, years after the trial, located a new expert, Dr. Lokken, that he believes will provide testimony that he now prefers to that presented by trial counsel does not show deficient performance. *See George*, 333 So. 3d at 1043 ("[T]he mere fact a defendant can find, years after the fact, a mental health expert who will testify favorably for him does not demonstrate that trial counsel was ineffective for failing to produce that expert at trial." (quoting *Ray*, 80 So. 3d at 989–90 (quoting *Ward*, 592 F.3d at 1173 (quoting *Davis*, 119 F.3d at 1475)))); *see also id.* ("We cannot say that in light of the reports of the mental examinations performed, counsel's failure to retain a psychiatric expert to investigate this area further or to provide mitigating testimony fell outside the broad range of professionally adequate conduct." (quoting *Ray*, 80 So. 3d at 990) (quoting *Gilbert*, 134 F.3d at 655))).

Callen claims his counsel were ineffective for failing to adequately present evidence about the science of teenage brain development and employ the legal arguments promulgated in *Roper v. Simmons*, 543 U.S. 551 (2005), *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v.*

Alabama, 567 U.S. 460 (2012). (Pet. At 45-47.) Contrary to Callen's assertion that there existed a "prevailing scientific consensus" regarding the development of the male brain, the only scientific support he cites is an NPR article published on October 10, 2011, about the "emerging science" of brain development.[1] Callen fails to plead how there was scientific consensus in the community, or, indeed, how he could have demonstrated that supposed "consensus," despite his "burden to [plead and] prove that no reasonable attorney would have chosen the course of action that [his] attorney[s] chose." *Okeowa*, 337 So. 3d at 772 (quoting *Bryant v. State*, 181 So. 3d 1087, 1142–43 (Ala. Crim. App. 2011)). At bottom, Callen fails to plead facts that, if proven, would show that any consensus exists at all, much less one that no reasonable counsel could possibly ignore.

Thus, this claim is summarily dismissed under Rules 32.3, 32.6(b), and 32.7(d).

[1] *Brain Maturity Extends Well Beyond Teenage Years*, NAT'L PUB. RADIO (Oct. 10, 2011), http://www.npr.org/templates/story/story.php?storyid=141164708 [http://perma.cc/76WW-QB44].

Claim I(C) - The claim that Callen's counsel were ineffective for failing to obtain his medical records, failing to investigate those records, and failing to hire a medical expert.

Callen breaks this claim into two sub-claims.

Claim I(C)(1) - The claim that Callen's counsel were ineffective for failing in their duty to obtain his medical records.

This claim is insufficiently pleaded and without merit. Callen claims counsel failed to obtain his medical records despite having a duty to do so. (Pet. at 47.) First, Callen again attempts to use the ABA Guidelines as dictating what every counsel must do. *See Okeowa*, 337 So. 3d at 774; *see also Smith*, 85 So. 3d at 1071. But the ABA publications serve only as aspirational guides, "not minimum constitutional standards." *Mashburn*, 148 So. 3d at 1162 (quoting *Ray*, 80 So. 3d at 982 (quoting *Yarbrough*, 520 F.3d at 339)). Second, this claim itself shows that there was a plethora of medical information available in the DHR records and the psychological reports by both the State's expert, Dr. King, and the defense expert, Dr. Meredith. (Pet. at 48-49.) Callen does not plead what information additional medical records would provide. It appears the generalized medical records would be cumulative with the evidence presented at trial. The failure to present additional cumulative

mitigating evidence, even if more detailed or elaborate, does not amount to ineffective assistance of counsel. *See Burgess*, 2023 WL 4146021, at *14. Third, "even if the evidence [Callen] alleged should have been discovered had been presented at trial, there [is] no reasonable probability that the outcome of the trial would have been different." *Woodward*, 276 So. 3d at 741; *see, e.g.*, *Miller*, 99 So. 3d at 412 ("[Petitioner] has not shown a reasonable probability that the result of the penalty phase would have been different had additional mitigation evidence been presented based on the brutal nature of the crime, the overwhelming and convincing evidence of guilt, and the strength of the aggravating circumstances [of] this murder . . . .").

Thus, this claim is summarily dismissed under Rules 32.3, 32.6(b), and 32.7(d).

Claim I(C)(2) - The claim that Callen's medical records contain significant mitigation evidence and would have corroborated a history of neglect and sexual and physical abuse.

This claim is without merit and insufficiently pleaded. Callen claims that his medical records "contain objective, medical evidence that corroborates [he] suffered severe neglect and abuse during his childhood." (Pet. at 49.) First, Callen concedes that this is not a case where trial

counsel failed to learn of or present evidence of the abuse and neglect that he suffered as a child. Indeed, counsel presented extensive DHR records documenting these facts. Callen contends that these medical records corroborate the testimony and evidence presented at trial. But Callen's claim does little more than demonstrate that his medical records are merely cumulative to the testimony that trial counsel offered. Nor does he plead facts that would show how this cumulative evidence would have a probability of changing the outcome of the trial. Callen claims that a medical expert, like Dr. Heinz Dueffer, could have testified about the cumulative evidence; but he does not plead that Dr. Dueffer was willing to testify at his trial. *See Burgess*, 2023 WL 4146021, at *6 ("It is well settled that, to properly *plead* a claim that counsel were ineffective for failing to hire an expert witness, the petitioner must, among other things, identify by name the expert witness his counsel should have hired, set out the testimony that the named expert would have given, and plead that the named expert was both willing and available to testify at trial." (quoting *Brooks*, 340 So. 3d at 437)). Nor does he plead facts that, if proven, would show that Dr. Dueffer's testimony would have materially added to the jury's knowledge of Callen's childhood rather than being

simply cumulative to the facts they had already learned from trial counsel's efforts. Failure to offer additional mitigation evidence that is cumulative to evidence offered at trial does not amount to deficient performance. *See Burgess*, 2023 WL 4146021, at *14**;** *Stallworth*, 171 So. 3d at 74.

Thus, this claim is summarily dismissed under Rules 32.3, 32.6(b), and 32.7(d).

Claim I(D) - The claim that Callen's counsel were ineffective for not eliciting proper expert testimony about the effects of his neglect and abuse.

Callen breaks this claim into three sub-claims.

Claim I(D)(1) – The claim that Callen's counsel were ineffective for failing to present adequate testimony by an expert *forensic* psychologist.

This claim is insufficiently pleaded and meritless. Callen claims counsel should have called an expert forensic psychologist like Dr. Karen Salekin, instead of Dr. Meredith. Callen asserts that Salekin would have testified about the risk factors on his development. (Pet. at 57-65.)

Counsel hired Dr. Meredith, a forensic psychologist who testified at trial. It is clear on the face of the record that Dr. Meredith was qualified. The fact that Callen has now retained a different expert, who did

different things, and arrived at a different result, does not establish either deficient performance or prejudice. As the Supreme Court has explained:

> The selection of an expert witness is a paradigmatic example of the type of "strategic choic[e]" that, when made "after thorough investigation of [the] law and facts," is "virtually unchallengeable."

Hinton v. Alabama, 571 U.S. 263, 275 (2014) (quoting *Strickland*, 466 U.S. at 690). Moreover, the mere fact that Callen now prefers the opinions of a different expert does not render trial counsel's performance ineffective. *See Harris v. State*, 365 So. 3d 1075, 1113 (Ala. Crim. App. 2021) ("[T]he mere fact a defendant can find, years after the fact, a[n] . . . expert who will testify favorably for him does not demonstrate that trial counsel was ineffective for failing to produce that expert at trial." (quoting *Daniel v. State*, 86 So. 3d 405, 423 (Ala. Crim. App. 2011) (quoting *Davis*, 119 F.3d at 1475)). There is no suggestion in this case that trial counsel failed to adequately investigate Dr. Meredith's credentials, or that, as in *Hinton*, he made any mistake of law that resulted in him retaining an expert who "*he himself* deemed inadequate." *Hinton*, 571 U.S. at 275.

Although Callen identifies some additional witnesses who he claims would have been willing to testify and claims that "his trial counsel should have done something more, [courts must] first look at what the lawyer[s] did in fact." *Mitchell*, 377 So. 3d at 119 (quoting *Chandler*, 218 F.3d at 1320). It is clear from the face of the record that counsel did conduct a reasonable investigation. Counsel hired a mitigation expert, Sirena L. Saunders, who "did a wonderful job of putting together what was a very comprehensive history about his juvenile court records, his DHR record, and also his school records." (C. 62, R. 1087.) Counsel also hired Dr. Meredith, introduced the testimony of family members Beatrice Brown, LaQuoya Callen, Lawrence Callen Jr., and John Collins, and presented the testimony of Dr. Meredith. (R. 1049-1123, 1149-61.)

Callen claims that Dr. Salekin was capable and willing to testify at his trial, but he does not plead that she was available. *See Burgess*, 2023 WL 4146021, at *6; *see also Brooks*, 340 So. 3d at 437. Callen then avers that Dr. Salekin would have assessed his "risk and protective factors" and "concluded that [he] was subject to a multitude of risk factors throughout his life and that protective factors were absent." (Pet. at 57, 58.) In footnote 23, Callen asserts that Dr. Meredith's work was

ineffective because he relied on Ms. Saunders' interviews rather than conducting his own. Callen does not plead with specificity how this methodology was ineffective or what would have been gained by Dr. Meredith conducting the interviews personally. To the extent that Dr. Meredith failed in his role as a mitigation expert, "any ineffectiveness is attributable to [petitioner's] expert rather than to his counsel and therefore cannot support a *Strickland* claim." *McHone v. Polk*, 392 F.3d 691, 706 (4th Cir. 2004) (citing *Thomas v. Taylor*, 170 F.3d 466 (4th Cir. 1999)). The mere fact that Callen has, years after the trial, located a different expert that he believes will give superior testimony does not show deficient performance. *See George*, 333 So. 3d at 1043 ("[T]he mere fact a defendant can find, years after the fact, a mental health expert who will testify favorably for him does not demonstrate that trial counsel was ineffective for failing to produce that expert at trial." (quoting *Ray*, 80 So. 3d at 989–90 (quoting *Ward*, 592 F.3d at 1173 (quoting *Davis*, 119 F.3d at 1475)))); *see also id.* ("We cannot say that in light of the reports of the mental examinations performed, counsel's failure to retain a psychiatric expert to investigate this area further or to provide mitigating testimony fell outside the broad range of professionally adequate conduct." (quoting

Ray, 80 So. 3d at 990) (quoting *Gilbert*, 134 F.3d at 655))). At bottom, this claim is nothing more than a complaint about *how* the evidence was presented, and is filled with citations to the record that was actually presented to the jury. Counsel cannot be found to be ineffective for failing to present cumulative evidence. Indeed, simply alleging that trial counsel should have offered more mitigation that was offered at trial is not sufficient. After all, "[f]airminded jurists . . . could take a different view of [a petitioner's new] mitigating evidence." *Shinn*, 592 U.S. at 122. Likewise, counsel cannot be ineffective for failing to present cumulative evidence. *See Burgess*, 2023 WL 4146021, at *14.

Callen does plead that some medical records were not discovered for use by Dr. Meredith and that elementary school records were not obtained. In footnote 27, Callen asserts that the elementary school records showing that he was chronically tardy and absent "directly contradict . . . trial counsel's claims that [Callen] lived a 'normal life' until he was about 11 years old." (Pet. at 60.) But the trial record shows that trial counsel attempted to locate Callen's school records, but they were unavailable in that "most of the school records from that time are in an abandoned schoolhouse that's quarantined." (R. 1085.) Callen fails to

plead facts that, if proven, would show that no reasonable counsel would have failed to obtain records from a "quarantined" school building.

Callen fails to plead either deficient performance or prejudice. "A bare allegation that prejudice occurred without specific facts indicating how the petitioner was prejudiced is not sufficient." *Wilson*, 2024 WL 3218214, at *10 (quoting *Hyde*, 950 So. 2d at 356). "Even if the evidence [Callen] alleged should have been discovered had been presented at trial, there [is] no reasonable probability that the outcome of the trial would have been different." *Woodward*, 276 So. 3d at 741. The evidence that Callen argues was deficiently omitted is minimal and cumulative, and it would not have changed his sentence.

Thus, this claim is summarily dismissed under Rules 32.3, 32.6(b), and 32.7(d).

Claim I(D)(2) – The claim that Callen's counsel were ineffective for failing to present adequate expert testimony from a trauma specialist.

This claim is insufficiently pleaded and meritless. Callen claims counsel should have called a different mental health expert, a clinical psychologist specializing in trauma like Dr. Grant. Callen asserts that Grant has assessed him and, unlike Dr. Meredith, the psychologist that

trial counsel retained, "concluded that [he] suffers from a multitude of psychological and behavioral impairments, including (1) post-traumatic stress disorder; (2) depression with psychotic features, including hallucinations and delusions; (3) generalized anxiety disorder; (4) panic disorder; and (5) substance use disorders." (Pet. at 66.)

First, Callen fails to plead sufficient facts to show that no reasonable counsel would have failed to retain *another* psychologist when they had already retained and consulted with Dr. Meredith. Callen does not allege that Dr. Meredith suggested additional psychological assessment or that anything in his report would have caused every reasonable attorney to consult a different psychologist. In short, Callen fails to plead sufficient facts that would show that no counsel could have made a reasonable decision to terminate their psychological investigation after consulting with Dr. Meredith. Consequently, this claim fails to sufficiently plead deficient performance and should be dismissed.

Second, Callen does not claim that Dr. Grant was willing and able to testify at his trial. Thus, this claim does not meet the specificity and pleading requirements. *See Burgess*, 2023 WL 4146021, at *6. Callen avers that had Dr. Grant, or a similar expert, been called at trial, the jury

would have heard that Callen "experienced a history of significant and repeated trauma throughout his early life, including life-threatening incidents, significant abuse by multiple family members, parental neglect, abandonment, and significant poverty." (Pet. at 66.) Insofar as Callen alleges that some other, unknown psychologist should have been retained, it is not sufficient to plead that an expert "like" Dr. Grant would have testified; the petition must plead the name of an expert who was willing and able to testify at the time of trial and the content of that named expert's testimony. Simply put, experts are not fungible; they can, and often do, have different opinions.

Third, Callen claims that Dr. Grant has "administered several assessments" and based her conclusions on those assessments. (*Id.*) Callen only pleads one assessment Dr. Grant conducted, but he fails to identify any other assessments,[2] the results of those assessments, or specifically how such assessments are mitigating in Callen's case. For example, Callen pleads generally that his scores reflect "more severe trauma across all but one category," but he fails to plead what that

[2] Callen only pleads that Dr. Grant assessed him using a CTQ-SF, but he does not plead the name of any other assessments. (Pet. at 67 n.32.)

category is. Callen also pleads that he suffers from a "multitude of psychological and behavioral impairments." (Pet. at 66.) These include PTSD,[3] a diagnosis of major depressive disorder,[4] shame-based avoidance,[5] a diagnosis of brief psychotic disorder,[6] generalized anxiety disorder,[7] panic disorder,[8] and alcohol abuse.[9] While Callen pleads that he *currently* has these disorders, he only ties a "history of depression . . . when he was 10 years old" and a "history of hallucinations and delusions" to his childhood. (Pet. at 68, 70.) Callen fails to plead with specificity that he suffered from the other disorders at the time of the murders or the time of trial, and what the content of Dr. Grant's relevant testimony would have been at the time of trial. Additionally, the general nature of the evidence described in this claim is cumulative to evidence presented in mitigation at Callen's trial. Moreover, with regard to mitigation, simply offering more mitigation than was offered at trial is not sufficient. After all, "[f[airminded jurists . . . could take a different view of [a

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[3] Paragraph 144.
[4] Paragraph 145.
[5] Paragraphs 146-49.
[6] Paragraphs 150-51.
[7] Paragraph 152.
[8] Paragraph 153.
[9] Paragraph 154.

petitioner's new] mitigating evidence." *Shinn*, 592 U.S. at 122. Likewise, counsel cannot be ineffective for failing to present cumulative evidence. *See Burgess*, 2023 WL 4146021, at *14.

Fourth, Callen fails to plead prejudice. *See Woodward*, 276 So. 3d at 741; *Wilson*, 2024 WL 3218214, at *10.

Thus, this claim is summarily dismissed under Rules 32.3, 32.6(b), and 32.7(d).

Claim I(D)(3) – The claim that Callen's counsel were ineffective in the presentation of expert testimony.

This claim is insufficiently pleaded and without merit. Callen claims that counsel were unprepared in their presentation of Dr. Ron Meredith, a clinical psychologist, who testified in the penalty phase of trial. (Pet. at 71.)

First, Callen claims that a series of sustained objections are evidence that trial counsel was not prepared for Dr. Meredith's testimony. In paragraph 158, Callen lists eight interactions in which the State's objection was sustained. In each instance, Dr. Meredith's testimony was not responsive to the question asked. After the sustained objections, trial counsel refocused Dr. Meredith and was able to elicit the desired testimony. For example, in the first excerpt, Mr. Thrasher

redirected Dr. Meredith, asking, "[W]hat is it that Dontae suffers from?" (R. 1100.) Dr. Meredith replied, "Dontae suffers from post-traumatic stress disorder" and then veered into nonresponsive testimony about his work with the National Guard. (R. 1100-01.) After two sustained objections that Dr. Meredith's answer was nonresponsive, Mr. Thrasher again focused Dr. Meredith on posttraumatic stress disorder. (R. 1101.) After another sustained objection about disorders in soldiers, Mr. Thrasher asked his next question about other disorders. (R. 1103.) Again, Callen's claim is insufficiently pleaded. Callen does not state what counsel should have done to better prepare Dr. Meredith for his testimony, what additional steps counsel could have taken, what different questions counsel could have asked or what Dr. Meredith's responses would have been, how any of these actions by counsel would have changed Dr. Meredith's testimony, what the content of Dr. Meredith's testimony would have been, or how there is a reasonable probability that the outcome of the trial would have been different had counsel prepared Dr. Meredith in a different way. *Woodward*, 276 So. 3d at 741.

Second, in paragraphs 161-67, Callen claims that trial counsel failed to have Dr. Meredith adequately explain **dissociation**. Dr. Meredith testified in the penalty phase that he diagnosed Callen with dissociation and that Callen was in a dissociative episode at the time of the murders. (R. 1104-05, 1107-08.) The State presented no evidence to the contrary. Callen now asserts that Dr. Meredith should have testified about the tests he conducted and the results of these tests. But these facts are merely cumulative with Dr. Meredith's testimony about the opinions he reached. Callen also asserts that counsel should have presented testimony from family members, only some of whom are named, about their observations of Callen's behavior. Again, this testimony would be cumulative with Dr. Meredith's testimony. The failure to present additional cumulative mitigating evidence, even if more detailed or elaborate, does not amount to ineffective assistance of counsel. *See Burgess*, 2023 WL 4146021, at *14. Callen does not specifically plead the content of the testimony, the specific dates and locations of each of these "episodes," that these "episodes" are indeed dissociative episodes, or the name and content of the testimony of a different expert who was available to testify at the trial in a different way than Dr. Meredith.

Third, in paragraphs 168-70, Callen claims that trial counsel failed to have Dr. Meredith adequately explain **posttraumatic stress disorder** (PTSD). Dr. Meredith testified in the penalty phase that he diagnosed Callen with PTSD. (R. 1100-04.) The State presented no evidence to the contrary. Dr. Meredith's testimony about PTSD included his diagnosis of PTSD, association with childhood characteristics, and a description/definition of PTSD. (R. 1100-01.) Further, Dr. Meredith testified about the relationship between borderline personality disorder, dissociation, and PTSD. (R. 1104.) Callen asserts that Dr. Meredith could have explained to the jury how he diagnosed Callen with PTSD. This testimony would have been cumulative. The failure to present additional cumulative mitigating evidence, even if more detailed or elaborate, does not amount to ineffective assistance of counsel. *See Burgess*, 2023 WL 4146021, at *14. Callen does not plead how there is a reasonable probability that the outcome of the trial would have been different had counsel presented this cumulative testimony. *Woodward*, 276 So. 3d at 741.

Fourth, Callen claims that trial counsel mishandled and mischaracterized the DHR records when they "dumped 914 pages of

scrambled DHR records into the trial record." (Pet. at 79.) Callen's claim that Dr. Meredith only testified about the DHR records from R. 1096 to 1098 is belied by the trial record. Dr. Meredith's testimony continued with the conclusions he derived from the records. (R. 1096-1100.) Callen relies on *Ferrell v. Hall*, 640 F.3d 1199 (11th Cir. 2011), to support his proposition that his counsel were ineffective. But unlike in Callen's case, Ferrell's counsel limited their investigation to character evidence and presented *no evidence* of his mental health or his difficult and abusive childhood. Callen's counsel did not make any similar mistake.

Callen claims that trial counsel "minimized the significance" of the DHR records in the penalty phase arguments. (Pet. at 80.) Again taking counsel's comments out of context, Callen claims trial counsel told the jury the "records are 'confusing' and 'they don't make sense sometimes.'" (*Id.*) The record shows that counsel was explaining that the living situation for Callen and his brother was confusing:

> Now Dontae—they tried to live with Mr. Callen at one time, both of them, but Mr. Callen and Dontae didn't get along and they had an extreme amount of discourse with them.
>
> So Dontae and Lawrence are both kicked out at one point. Dontae never went back. Lawrence was allowed to go back at some point.

> But Dontae was the one that was left out and bounced around and did end up staying with Bernice Kelly and Quortes Kelly at one point in time.
>
> And then the last time he was living with Natasha Brown, which was Ms. Beatrice Brown, the grandmother's, daughter.
>
> Now that's as best as we can figure. We've scoured DHR records, juvenile court records, and tried to get school records, and it's very difficult. Some of the records, they don't make sense sometimes. It's confusing.
>
> They were supposed to be living with this person, according to DHR, but DHR dropped the ball and they weren't living there, they were going somewhere else.

(R. 1032.) Callen claims that counsel were ineffective for the narrative that Callen's life was normal before age 11 and states that the 914 pages of DHR records conflict with this theme. (Pet. at 80.) Callen is incorrect. While there are some historical references contained in the almost 1,000 pages of Callen's life before 11, the DHR records begin right before Callen's 11th birthday. (C. 992.) Also, counsel's theme is consistent with the testimony of Callen's closest sibling, Lawrence, who testified that those were "the best years of my life." (R. 1074.) Callen has not alleged any facts that would show that counsel's theme was unreasonable.

In paragraph 177, Callen criticizes his counsel for the handling of the DHR records when they accidentally tried to admit attorney work product. But, the entire portion of the record Callen includes in the

petition reflects a session that was held *outside the presence of the jury*. (R. 1090-1094.) While counsel did make a mistake, they rectified it without the jury's knowledge. Callen fails to plead the relevance of this interchange, how an innocent mistake amounts to deficient performance, or how this conduct caused prejudice. *Wilson*, 2024 WL 3218214, at *10; *Young*, 2023 WL 2623665, at *9.

Fifth, in paragraphs 178-83, Callen claims that his counsel "lacked a basic understanding of the Alabama Rules of Evidence regarding admitting an exhibit into the trial record that summarizes or compiles voluminous records into actual mitigation evidence." (Pet. at 83.) First, Callen's characterization of the records is mere argument for he cites no authority for the proposition that the DHR records were not "actual mitigation evidence." Instead, he mistakenly relies on *Turpin v. Lipham*, 510 S.E.2d 32 (Ga. 1998), in which 2500 pages of institutional records were admitted with *no expert witnesses* to explain the records. *See id.* at 41–42. By contrast, Dr. Meredith did testify about and explain the less than 1,000 pages of DHR records so Callen's reliance on *Turpin* is inapposite. The jury in Callen's case had access to the full record and heard the testimony of Dr. Meredith. While Alabama Rule of Evidence

1006 does allow for summaries, Callen fails to plead facts showing that the trial court would have been required to admit the summary or that a summary of the records would have resulted in a different outcome. *Wilson*, 2024 WL 3218214, at *10; *Young*, 2023 WL 2623665, at *9. From the face of the record, it is clear that trial counsel and the State had a stipulation to the admission of the entirety of the records. When discussing these records, the prosecutor stated, "As long as [trial counsel] tells me that's the same documents from the subpoena duces tecum. As long as he's telling me it's in full and nothing's been taken out." (R. 1089.) It is also apparent this was an attempt to avoid having to lay a foundation for the records. (R. 1092-93.)

Sixth, in paragraph 184, Callen claims that counsel should have called a laundry list of named social workers, counselors, and teachers listed in the DHR records. This claim is insufficiently pleaded. For such a claim to be adequately pleaded, a petitioner is "required to identify the names of the witnesses, to plead with specificity what admissible testimony those witnesses would have provided had they been called to testify, and to allege facts indicating that had the witnesses testified there is a reasonable probability that the outcome of the proceeding

would have been different." *Young*, 2023 WL 2623665, at *9 (quoting *Mashburn*, 148 So. 3d at 1151). Additionally, the petitioner must plead that the witness was "willing and able to testify on his behalf." *Wimbley*, 2022 WL 17729209, at *28 (quoting *Mashburn*, 148 So. 3d at 1154)). While Callen identifies some individuals by name, he fails to specifically plead that they were available and willing to testify or what their testimony would have been. Moreover, Callen's claim is inconsistent with his previous claims regarding "summarization." Counsel presented a summary of the DHR records through Dr. Meredith's testimony and Callen fails to plead facts showing that no reasonable counsel could have decided that the testimony of an expert who had evaluated Callen was preferable to many hours of testimony from multiple witnesses who may have known little about Callen.

Seventh, Callen attempts to plead prejudice in paragraph 185 when he speculates that counsel's action lead the jury to discredit Dr. Meredith. This too is insufficiently pleaded. Callen fails to plead specific facts relevant to what the jury credited or discredited. Moreover, Callen *could not* present any such evidence because, under Rule 606(b), Ala. R. Evid., jurors are prohibited from testifying regarding "any matter or statement

occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict."

This claim in also refuted by the record. In the sentencing order, this Court stated:

> The non-statutory mitigating circumstances offered by the defense included:
> Being abandoned by his mother;
> Being moved from household to household for the majority of his life;
> Being involved in the DHR system most of his life;
> Having a low IQ;
> Having been diagnosed by Dr. Ron Meredith in preparation for the mitigation phase of the trial with mild or borderline mental retardation, Borderline Personality Disorder, Dissassociative [*sic*] Disorder and Post Traumatic Stress Disorder; and,
> The defendant's low socio-economic status.

(C. 122.)

Thus, this claim is summarily dismissed under Rules 32.3, 32.6(b), and 32.7(d).

> **Claim I(E) - The claim that the cumulative effect of Callen's counsel's deficient performance prejudiced Callen at the penalty phase.**

This claim is insufficiently pleaded and facially meritless. Callen alleges that the cumulative effects of his trial counsel's deficient

performance prejudiced him at the penalty phase; this claim is further divided into three separate sub-claims. (Pet. at 88-99.)

To establish prejudice under *Strickland*, a petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* In a case challenging a death sentence, the question is whether "there is a reasonable probability that, absent [counsel's] errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Thornell*, 144 S. Ct. at 1310 (quoting *Strickland*, 466 U.S. at 695). Callen's petition does not meet this standard.

Callen incorrectly asserts that this Court should consider the cumulative effect of his counsel's alleged errors. "Alabama does not recognize a 'cumulative effect' analysis for ineffective-assistance-of-counsel claims." *Bohannon*, 2023 WL 5314631, at *18 (quoting *Lewis*, 333 So. 3d at 1016 (quoting *Carruth*, 165 So. 3d at 651)). And Alabama appellate courts have "repeatedly declined similar requests from

petitioners to do so." *Id.* (quoting *Lewis*, 333 So. 3d at 1016). If Alabama did recognize a cumulative-effect analysis, it would apply to only those claims that are facially meritorious. *See Brooks*, 340 So. 3d at 441; *W.B.S.*, 244 So. 3d at 144. In this case, all of Callen's penalty-phase ineffective assistance claims are either deficiently pleaded or facially meritless. Because this Court has dismissed each individual claim, there is no cumulative effect to consider. *See Wilson*, 2024 WL 3218214, at *38–39.

In an attempt to rebut the actual case law applicable in Alabama, Callen misrepresents the holding in *Kyles v. Whitley*, 514 U.S. 419 (1995), stating that "in assessing prejudice, [the] court must consider cumulative effect of conduct at issue." (Pet. at 88.) The U.S. Supreme Court in *Kyles* held that the cumulative effect of evidence suppressed by the prosecution should be considered in assessing the materiality of the evidence in a *Brady* claim. Thus, *Kyles* has no precedential value here.

Thus, this claim is summarily dismissed under Rules 32.3, 32.6(b), and 32.7(d).

Claim I(E)(1) - The claim that the jury never heard constitutionally significant mitigation evidence.

This claim, like claims I(B) and I(D) upon which it is based, is meritless. In paragraphs 193-203, Callen claims his trial counsel's deficient performance prejudiced Callen at the penalty phase because the jury never heard certain mitigation evidence related to organic brain dysfunction and impairment, his medical records, and his childhood trauma. (Pet. at 89-90.) Because claims I(B) and I(D) are meritless and fail to sufficiently plead claims of deficient performance or prejudice, this claim attempting to show prejudice fails. Ineffective assistance claims are governed by the two-pronged *Strickland* standard: the petitioner must show that (1) his counsel's performance was deficient and (2) this deficient performance prejudiced his defense. 466 U.S. at 687. Callen fails to plead how these mitigating factors, taken with the other mitigating factors, would outweigh the aggravating factors. Likewise, Callen fails to plead facts to show a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. Claims such as these that do not plead these types of facts do not comply with Rule 32.6(b). *Young*, 2023 WL 2623665, at *8–10.

Thus, this claim is summarily dismissed under Rules 32.3, 32.6(b), and 32.7(d).

Claim I(E)(2) - The claim that the mitigation evidence counsel failed to present is the sort the Supreme Court and other courts have held to be constitutionally significant.

This claim, like claim I upon which it relies, is meritless. In paragraphs 204-13, Callen alleges that the mitigation evidence his trial counsel failed to present is "the precise type of mitigation evidence that the Supreme Court and other courts have held is prejudicial to a criminal defendant when counsel fails to adequately investigate." (Pet. at 93.) Although this claim is framed as a claim about prejudice, Callen pleads nothing regarding prejudice in the claim. Callen relies on the meritless and insufficiently pleaded factual allegations of claim I and then cites several cases. Because claim I is meritless and fails to sufficiently plead claims of deficient performance or prejudice, this claim attempting to show prejudice fails. Further, the cases cited by Callen are factually distinguishable from his case. For example, in *Rompilla v. Beard*, counsel presented no evidence about Rompilla's childhood, mental capacity and health, or alcoholism; "Rompilla's evidence in mitigation consisted of relatively brief testimony: five of his family members argued in effect for residual doubt, and beseeched the jury for mercy, saying that they believed Rompilla was innocent and a good man. Rompilla's 14-year-old

son testified that he loved his father and would visit him in prison." 545 U.S. 374, 378 (2005). In *Wiggins v. Smith*, counsel did not present powerful mitigation evidence, instead, despite promising in opening to tell the jury they would hear about Wiggins' difficult life, counsel never provided that information. 539 U.S. 510, 526 (2003). In *State v. Lewis*, counsel did not request or present any records at all and did not contact anyone who knew Lewis. 371 So. 3d 863, 892–93 (Ala. Crim. App. 2022). In *Williams v. Allen*, counsel relied solely on information provided by his mother. 542 F.3d 1326, 1339 (11th Cir. 2008). In *DeBruce v. Commissioner, Alabama Department of Corrections*, counsel presented only testimony by his mother as mitigation evidence. 758 F.3d 1263, 1275 (11th Cir. 2014). By contrast, Callen's counsel presented extensive evidence regarding his childhood and background through the testimony of family members Beatrice Brown, LaQuoya Callen, Lawrence Callen Jr., and John Collins, and presented the testimony of Dr. Meredith. (R. 1049-1123, 1149-61.) Callen fails to plead facts to show a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. Claims such as these that do not plead these types of facts do not comply with Rule 32.6(b). *Young*, 2023

WL 2623665, at *8–10. Thus, this claim is dismissed under Rules 32.3, 32.6(b), and 32.7(d).

Claim I(E)(3) - The claim that Callen was more prejudiced because the jury did not unanimously vote for death.

This claim is insufficiently pleaded and without merit. In paragraphs 214-15, Callen alleges he "was even more prejudiced because the jury did not unanimously vote for death." (Pet. at 97.) Callen makes a bare assertion that because one juror voted for life, he was prejudiced. Callen then provides a page of case citations with no analysis tying the cases to his case. As a matter of fact, each case cited is distinguishable from Callen's case. Most notably, Callen relies upon *Clark v. Dunn*, No. 16-CV-454, 2018 WL 264393 (S.D. Ala. Jan. 2, 2018), an unreported district court order, for his stated proposition "finding a reasonable probability that 'had trial counsel conducted the penalty phase as the petitioner suggests, at least two additional jurors would have voted for life rather than death.'" (Pet. at 98.) Quite the opposite, the district court's order states:

> In light of the brutal nature of the crime, the dubious character of the mitigating evidence, and its primary dependence on the drug use and consequences thereof that had been unsuccessfully presented at the guilt-innocence phase (albeit for a different purpose), and given that the

> jurors heard all the mitigating evidence shortly before they deliberated and knew they could consider anything to be a mitigating circumstance, it is difficult to imagine that multiple jurors would have changed their vote to life had trial counsel adopted the petitioner's proposed approach. Ultimately, however, the Court need not resolve the prejudice issue directly. The CCA, approving the trial court's decision, ruled that the petitioner was not prejudiced by counsel's performance. While the petitioner challenges the CCA's ruling with respect to deficient performance, he does not challenge its ruling with respect to prejudice. Thus, . . . the Court may not revisit the CCA's determination.
>
> In summary, the petitioner has failed to show either that counsel performed deficiently or that he was prejudiced by counsel's performance. He is thus not entitled to relief on this ground.

Clark, 2018 WL 264393, at *25–26 (citations omitted). Callen fails to plead facts to show a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. Claims such as these that do not plead these types of facts do not comply with Rule 32.6(b). *Young*, 2023 WL 2623665, at *8–10. Thus, this claim is dismissed under Rules 32.3, 32.6(b), and 32.7(d).

Claim II - The claim that Callen was denied effective assistance of counsel during the judicial sentencing phase of his trial.

This claim is dismissed in its entirety. Each sub-claim raised within this claim is addressed below in the order presented. This claim is divided into three sub-claims.

Claim II(A) - The claim that Callen's counsel failed to present critical mitigation evidence to the judge in sentencing.

This claim is insufficiently pleaded and without merit. Callen claims that counsel failed to present critical mitigation evidence in judicial sentencing. (Pet. at 99-103.)

First, Callen attempts to incorporate by reference claims I(B) to I(E). This is improper. The Alabama Court of Criminal Appeals has held that "[b]ecause the claim of ineffective assistance of counsel is a general allegation that often consists of numerous specific subcategories, . . . [e]ach subcategory is an independent claim that must be sufficiently pleaded." *Wilson*, 2024 WL 3218214, at *10 (quoting *Coral v. State*, 900 So. 2d 1274, 1284 (Ala. Crim. App. 2004), *overruled on other grounds*, *Ex parte Jenkins*, 972 So. 2d 159 (Ala. 2005)) (internal quotation marks omitted). Second, Callen claims that counsel's last-minute submission of

Dr. Meredith's sentencing memorandum regarding Callen's alleged sexual abuse by Quortes was ineffective. Callen cannot show that no reasonable counsel would have failed to present the sentencing memorandum. The portion of the sentencing memorandum at issue describes Dr. Meredith's conversations with Callen about Quortes' alleged sexual abuse previous to and immediately before the murders. (C. 597, 602-04.) This information is cumulative to the testimony of Dr. Meredith during the penalty phase. (R. 1106-07.) Callen claims that counsel should have called Dr. Dueffer, a medical expert, to testify about Callen's medical records at age 10 when he was diagnosed with a UTI and was tested for STDs, and that counsel should have called Dr. Grant to testify about "shame-based avoidance." (Pet. at 102.) Callen does not specifically allege the name of the doctor or facility, the dates of the records, that Drs. Dueffer and Grant were available and willing to testify at his trial, and the specific content of their testimony. *See Burgess*, 2023 WL 4146021, at *6 ("It is well settled that, to properly *plead* a claim that counsel were ineffective for failing to hire an expert witness, the petitioner must, among other things, identify by name the expert witness his counsel should have hired, set out the testimony that the named

expert would have given, and plead that the named expert was both willing and available to testify at trial." (quoting *Brooks*, 340 So. 3d at 437)). Further, Callen does not plead facts that would show how every reasonable counsel would have located such records, much less what "red flags" would have led to these records, or that counsel were told about Callen's treatment. *See George*, 333 So. 3d at 1038. Counsel's investigation was clearly reasonable. Callen cannot claim that no reasonable counsel would have failed to locate these alleged records. Lastly, Callen does not plead facts to show a reasonable probability of a different outcome. In footnote 57, Callen claims that "there is a reasonable probability that [he] would have been more willing to present this evidence [of sexual abuse] to the jury" if the medical records had been submitted. (Pet. at 102.) This is speculative and insufficiently pleaded. It is clear from the face of the record that Callen did not want to present testimony about the alleged sexual abuse. (C. 602-03.) In Dr. Meredith's report, he stated that "[Callen] was extremely self-conscious about revealing this information and asked if he would have to talk about this in court in front of his family." (C. 602.) Callen does not plead that he would have allowed such testimony by Dr. Meredith, what actions

counsel could have taken that would have resulted in him being more comfortable, or that Callen himself would have testified about the sexual abuse. Considering the difficulties counsel faced regarding this alleged abuse, Callen cannot claim that no reasonable counsel would have failed to present the sentencing memorandum. It was well-established law that the rules of evidence are greatly relaxed and hearsay is admissible in sentencing proceedings. Reasonable counsel could have relied on the well-established law and made the strategic decision to offer the sentencing memorandum to present this evidence in a controlled manner. Armed with the knowledge that Callen did not want to discuss the alleged abuse in court, counsel's strategy of presenting this evidence in memorandum form was reasonable. Callen has not pleaded facts that, if proven, would show no reasonable counsel would have proceeded in this fashion. Indeed, in its opinion, the Court of Criminal Appeals found that the admissibility of documents like this was a case of first impression and held:

> While it is true that hearsay is admissible at a sentencing hearing, there are limits to its admissibility.
>
> > "The trial court may properly consider hearsay at the penalty phase of the trial if the defendant has an opportunity to rebut the evidence.

> """Courts are permitted to consider hearsay testimony at sentencing. . . . While hearsay evidence may be considered in sentencing, due process requires both that the defendant be given an opportunity to refute it and that it bear minimal indicia of reliability. . . ."""

Ex parte McGahee, 632 So. 2d 981, 982–83 (Ala. 1993), quoting, in part, *Kuenzel v. State*, 577 So. 2d 474, 526 (Ala. Crim. App. 1990). The same should apply to evidence the defense seeks to introduce at sentencing. *Cf. Mendoza v. State*, 700 So. 2d 670, 675 (Fla. 1997) ("We have recognized that hearsay evidence may be admissible in a penalty-phase proceeding if there is an opportunity to rebut.").

Not only was the evidence in this case hearsay, but it was also "double hearsay."

> "Merely because testimony contains hearsay does not render it per se inadmissible at a sentencing hearing. [*People v.*] *Harris*, 375 Ill.App.3d [398] at 409, 313 Ill.Dec. 960, 873 N.E.2d 584 [(2007)]. If the evidence is 'double hearsay[, it] should be corroborated, at least in part, by other evidence.' *People v. Spears*, 221 Ill.App.3d 430, 437, 164 Ill.Dec. 19, 582 N.E.2d 227 (1991)."

People v. Varghese, 391 Ill.App.3d 866, 873, 330 Ill.Dec. 917, 924, 909 N.E.2d 939, 946 (2009). "In [*State v.*] *Johnson*, [856 P.2d 1064 (Utah 1993),] the supreme court held that a report prepared for a sentencing hearing that consisted of double and triple hearsay was unreliable and speculative . . . ." *State v. Simonette*, 881 P.2d 963, 964 n.2 (Utah Ct. App. 1994).

Indeed, defense counsel noted the unreliability of the statements. (R. 1266.) Given that the sentencing memorandum was filed within minutes of the judicial sentencing hearing, that the State had no opportunity to

> rebut the allegations, and that there was absolutely nothing to indicate the reliability of the statements purportedly made by Dr. Meredith, we agree with the circuit court that the sentencing memorandum was properly excluded from its consideration. Callen is due no relief on this claim.

Callen, 284 So. 3d at 238. Counsel is not ineffective for the inability to predict how an appellate court would resolve a question of first impression. For the above reasons, this claim is without merit and insufficiently pleaded.

Thus, this claim is summarily dismissed under Rules 32.3, 32.6(b), and 32.7(d).

Claim II(B) - The claim that Callen's defense counsel failed to object to the trial court's inadequate presentence investigation.

This claim fails to state a valid claim for relief or present a material issue of fact or law. It is without merit and insufficiently pleaded. Callen alleges his trial counsel were ineffective for failing to object to the supposedly inadequate presentence investigation. (Pet. at 103-07.) Callen raised the underlying claim on direct appeal, and the Alabama Court of Criminal Appeals held that it was without merit. *Callen*, 284 So. 3d at 237. Callen cannot prevail on a claim of ineffective assistance of counsel where the Alabama Court of Criminal Appeals held that the

underlying ground for the claim was meritless. *See, e.g.*, *Burgess*, 2023 WL 4146021, at *31–33; *Duncan v. State*, 925 So. 2d 245, 270–72 (Ala. Crim. App. 2005). In denying relief on this claim, the Court of Criminal Appeals reasoned:

> Callen next argues that the circuit court erred in failing to consider a presentence investigation ("PSI") report before sentencing him. Specifically, he argues that the circuit court erred in relying on the youthful-offender report and not the official PSI report that had been prepared by the Alabama Board of Pardons and Paroles after his conviction. He asserts that the youthful offender report had been completed more than two years before Callen was sentenced. Also, he argues that the youthful-offender report does not contain any victim-impact statements and no "updated information on this health, psychological status, or adjustment to incarceration." (Callen's brief, at p. 52.)
>
> However, Callen's argument is not supported by the record. As the State asserts in its brief, the circuit court's sentencing order clearly states that it considered the PSI report prepared by the Board of Pardons and Paroles. In fact, the PSI report is contained in the third supplemental record filed with this Court. (3 Supple. 60–64.) This report contains all the information Callen states was not included in the youthful-offender report. Callen's argument is not supported by the record, and he is due no relief on this claim.

Callen, 284 So. 3d at 238–39. Because Callen raised the underlying substantive issue on direct appeal, he "cannot relitigate the issue under the guise of ineffective assistance of counsel in a post-conviction proceeding." *Hunt v. State*, 940 So. 2d 1041, 1051–52 (Ala. Crim. App.

2005) (quoting *Williams v. State*, 783 So. 2d 108, 133 (Ala. Crim. App. 2000) ((quoting *State v. Clark*, 913 S.W.2d 399, 406 (Mo. Ct. App. 1996))).

Callen speculates that the "trial court probably would have ordered a new PSI be conducted to include Dantae's comprehensive social and personal history" if counsel had objected to the PSI containing the same social history as the youthful offender report. (Pet. at 106.) But speculation is insufficient to warrant further proceedings. "It is well established that, in a claim of ineffective assistance of counsel, '[m]ere conjecture and speculation are not enough to support a showing of prejudice.'" *Woodward*, 276 So. 3d at 786.

Additionally, Callen fails to plead what information this new PSI would contain, how that information would differ from the information already presented to the judge and jury, or how the new PSI would change the result of his trial.

Thus, this claim is summarily dismissed under Rules 32.3, 32.6(b) and 32.7(d).

Claim II(C) - The claim that Callen's defense counsel elicited highly prejudicial victim impact testimony that Callen deserved the death penalty.

This claim in insufficiently pleaded and meritless. Callen alleges his trial counsel were ineffective for eliciting highly prejudicial victim-impact testimony that Callen deserved the death penalty. (Pet. at 107-08.) Callen claims "the only question that trial counsel asked Ms. Brown was whether she recommended the death penalty for Dantae—not just once, but multiple times." (Pet. at 107.) It is clear from the face of the record that counsel expected different testimony and was surprised when Ms. Brown answered as she did. Counsel attempted to clarify Ms. Brown's opinion. (R. 1245-47.) To the extent that Callen claims that he was prejudiced by this testimony, he has failed to plead sufficient facts that would show how this comment, taken in context with the overwhelming evidence of guilt, actually affected the judge's verdict. Trial judges "are presumed to know the law and to follow it in making their decisions." *Mitchell*, 377 So. 3d at 131 (quoting *Knight v. State*, 252 So. 3d 1108, 1111 (Ala. Crim. App. 2017) (quoting *Ex parte Slaton*, 680 So. 2d 909, 924 (Ala. 1996))). Claims such as these that do not plead these

types of facts do not comply with Rule 32.6(b). *Young*, 2023 WL 2623665, at *8–10.

Thus, this claim is summarily dismissed under Rules 32.3, 32.6(b), and 32.7(d).

Claim III - The claim that Callen was denied effective assistance of counsel during the guilt phase of his trial.

This claim is divided into four sub-claims, one of which has additional sub-claims. This claim is dismissed in its entirety. Each sub-claim raised within this claim is addressed below in the order presented.

Claim III(A) - The claim that Callen's trial counsel failed to conduct an adequate investigation to support their sole defense—intoxication.

This claim is without merit and insufficiently pleaded. Callen claims his counsel were ineffective for failing to support the theory of intoxication. (Pet. at 108-11.)

First, in paragraphs 238 and 241, Callen claims trial counsel failed to present any available evidence of his use of alcohol. Callen cites to his own statement to police in support of his use of alcohol on the night of the murder, State's Exhibit 112A. This evidence was obviously presented to the jury. Callen pleads no facts to further clarify his level of intoxication on the night of the murders. Callen criticizes his counsel for their cross-

examination of Lisa Brown, Faye Budgess, and Jerrell Williams about the use of alcohol by Quortes, but not by Callen. He fails to plead the questions counsel should have asked and the answers these witnesses would have given. He also fails to plead how his drinking habits would be relevant to his level of intoxication on the night of the murders. In paragraph 241, Callen lists several friends and family members he claims counsel should have questioned about "significant alcohol abuse in the family" and his and Quortes' "history of drinking." (Pet. at 110.) Callen again fails to plead that any of these witnesses could testify that he was drinking at the time of the murders, or how this testimony would be relevant in the guilt phase of trial. Counsel cannot be found ineffective for failing to present inadmissible evidence. *See Peraita*, 2021 WL 3464344, at *27; *Harris*, 365 So. 3d at 1119. Logic dictates that the only person who could testify that Callen was under the influence of narcotics is Callen himself. Reasonable counsel could easily decide to avoid putting his client on the stand.

Second, in paragraphs 239-40, Callen claims trial counsel failed to present any available evidence of use of prescribed narcotics. Callen's claim has no merit because he pleads no facts to suggest that he was

using narcotics, prescribed or otherwise, at the time of the murders. He recites dates and conditions for which he was prescribed narcotics, but he does not claim that he was under the influence of narcotics at the time of the murders, nor does he claim that he provided any information about narcotic use at the time to his counsel. "Counsel cannot be found ineffective for failing to introduce information uniquely within the knowledge of the defendant and his family which is not provided to counsel." *George*, 333 So. 3d at 1038 (quoting *Washington,* 95 So. 3d at 44 (quoting *Waldrop v. State*, 987 So. 2d 1186, 1195 (Ala. Crim. App. 2007) (quoting *Commonwealth v. Bond*, 819 A.2d 33, 45–46 (Pa. 2002)))). Further, while Callen claims that the narcotics would have supported his theory of intoxication (Pet. at 110), he does not, however, claim that he was suffering from these effects. *See Largin v. State*, 2022 WL 17729374, at *21 (Ala. Crim. App. Dec. 16, 2022) ("It is well established that, in a claim of ineffective assistance of counsel, '[m]ere conjecture and speculation are not enough to support a showing of prejudice.'" (quoting *McMillan*, 258 So. 3d at 1178–79 (quoting *Elsey v. Comm'r of Corr.*, 126 Conn. App. 144, 166 (2011)). Further, Callen does identify any witness who would have testified about his narcotic use, the substance of their

testimony, or how presentation of these facts would have produced a different result. Again, the only person who could testify that Callen was under the influence of narcotics is Callen himself. A reasonable strategy of counsel would be to avoid Callen's testimony.

Third, in paragraph 240, Callen claims that counsel should have obtained and presented the testimony of a medical expert, such as Dr. Dueffer, to testify about the "effects of Dantae's use of prescription opioids, particularly when mixed with alcohol." (Pet. at 110.) But Callen has not identified any witness who could have testified that he was actually taking opioids on the day of the murder. Consequently, testimony about their supposed effects would be nothing more than speculation. While Callen pleads generally that Dr. Dueffer could testify about the effects of combining alcohol and opioids, he fails to plead that Dr. Dueffer was willing and available to testify at his trial, that Dr. Dueffer would testify that Callen was suffering from any of these effects at the time of the murder, or that such testimony would reasonably affect the outcome of the trial. *See Wilson*, 2024 WL 3218214, at *10; *Burgess*, 2023 WL 4146021, at *6; *Young*, 2023 WL 2623665, at *9.

Fourth, in paragraph 242, Callen claims that counsel should have called Dr. Meredith as a witness at the guilt phase to testify that Callen drank significant amounts of alcohol every night beginning at 15 or 16 years old.[10] Alternatively, Callen claims that counsel should have called the State's expert, Dr. King, to testify about Callen's history of alcohol use. Callen fails to plead how second-hand evidence regarding historical accounts of his drinking would have been admissible in the guilt phase. Counsel cannot be found ineffective for failing to present inadmissible evidence. *See Peraita*, 2021 WL 3464344, at *27; *Harris*, 365 So. 3d at 1119. Furthermore, this evidence would not be relevant to Callen's intoxication immediately preceding and at the time of the murder.

Thus, this claim is summarily dismissed under Rules 32.3, 32.6(b), and 32.7(d).

Claim III(B) - The claim that Callen's trial counsel presented inconsistent arguments regarding intoxication.

[10] Notably, Callen's claim here contradicts his earlier claims that Dr. Meredith should not have been called as an expert because he was not qualified.

This claim is meritless and insufficiently pleaded. Callen alleges his trial counsel presented inconsistent arguments regarding intoxication. (Pet. at 111-16.)

On the face of the record, trial counsel's strategy in the guilt phase of the trial was clearly to raise intoxication to negate intent in order to argue Callen's guilt to the lesser-included offense of manslaughter. Counsel argued intoxication in closing by weaving in Callen's own statements to police. (R. 920-47.) Based on the facts, counsel chose the best theory of defense available to them based on the evidence. This is not ineffective assistance of counsel. *See Clark v. State*, 196 So. 3d 285, 307 (Ala. Crim. App. 2015) ("[Courts] must view counsel's decisions at the time they were made. . . . [The] decision to pursue the . . . defense theories that counsel pursued was reasonable and strategic and was based on the evidence and circumstances known to counsel at the time of [the defendant's] trial . . . ."); *Davis v. State*, 44 So. 3d 1118, 1132 (Ala. Crim. App. 2009) ("Hindsight does not elevate unsuccessful trial tactics into ineffective assistance of counsel." (quoting *People v. Eisemann*, 70 N.Y.S.2d 39, 40–41 (App. Div. 1998)). Callen failed to meet his "burden to [plead and] prove that no reasonable attorney would have chosen the

course of action that [his] attorney[s] chose." *Okeowa*, 337 So. 3d at 772 (quoting *Bryant*, 181 So. 3d at 1142–43).

Additionally, in paragraph 245, Callen includes only four excerpts about the defense of intoxication from Mr. Collee's closing argument. (Pet. at 112.) In paragraph 246, Callen includes only one excerpt from the argument of Mr. Thrasher and asserts that this was "contradictory" to the theory of intoxication. (Pet. at 112-13.) A plain reading of the trial transcript shows that the chosen excerpt was preceded with a plea for the jury to listen closely to Callen's statement to the police: "Go back to the statement, please. I beg you to go back and listen to this statement more than anything else." (R. 943.) Further, Mr. Thrasher, like Mr. Collee, argued lack of intent and facts about Callen's intoxication and lack of memory throughout his closing. (R. 937-40, 944-45.) Callen fails to plead how Mr. Thrasher or Mr. Collee should have argued differently or showed a reasonable probability that, but for counsel's errors, the results of the proceeding would have been different. "The fact that [a] defense strategy was ultimately unsuccessful with the jury does not render counsel's performance deficient." *Lewis*, 333 So. 3d at 999 (quoting *Clark*, 196 So.

3d at 306 (quoting *Bush v. State*, 92 So. 3d 121, 160–61 (Ala. Crim. App. 2009) (quoting *Heath v. State*, 3 So. 3d 1017, 1029 (Fla. 2009)))).

Thus, this claim is summarily dismissed under Rules 32.3, 32.6(b), and 32.7(d).

Claim III(C) - The claim that Callen's trial counsel failed to investigate and present evidence of sexual abuse and severe mental illness that would have supported jury instructions for the lesser-included offense of manslaughter and defense to negate specific intent.

This claim is insufficiently pleaded and without merit. Callen appears to claim his trial counsel should have presented evidence of his sexual abuse and dissociation to support jury instructions related to manslaughter and heat of passion. (Pet. at 116-18.)

Like in claim II(A), Callen claims counsel should have called Dr. Dueffer, a medical expert, to testify about Callen's medical records at age 10 where he was diagnosed with a UTI and was tested for STDs, and Dr. Grant to testify about "shame-based avoidance." (Pet. at 102.) Callen does not specifically allege the dates of these records, the treating doctor, that Drs. Dueffer and Grant were available and willing to testify at his trial, and the specific content of their testimony. *See Burgess*, 2023 WL 4146021, at *6. Further, Callen does not plead what "red flags" would

have led to these records or that counsel were told about Callen's treatment. *See George*, 333 So. 3d at 1038. Counsel's investigation was clearly reasonable. Callen cannot show that no reasonable counsel would have failed to locate these alleged records. Lastly, Callen does not plead facts to show a reasonable probability of a different outcome. It is clear from the face of the record that Callen did not want to present testimony about the alleged sexual abuse. (C. 602-03.) In Dr. Meredith's report, he stated, "[Callen] was extremely self-conscious about revealing this information and asked if he would have to talk about this in Court in front of his family." (C. 602.) Callen had not pleaded facts that, if proven, would show no reasonable counsel would have proceeded in this fashion. In order for counsel to have presented admissible evidence of lawful provocation to support an instruction on heat of passion, Callen himself would have had to testify as the only living witness, and reasonable counsel could easily decide to avoid putting his client on the stand. Moreover, Callen does not specifically allege what happened prior to the murders or how those the events would have provided legal provocation, and he gives no consideration at all to the potential pitfalls of testifying on his own behalf. These are the types of facts that Callen is required to

allege to sufficiently plead his claims. *Young*, 2023 WL 2623665, at *8–10.

This claim is summarily dismissed under Rules 32.3, 32.6(b), and 32.7(d).

Claim III(D) - The claim that counsel failed to object to the presentation of prejudicial evidence to the jury.

This claim has two sub-claims.

Claim III(D)(1) - The claim that Callen's trial counsel failed to object to a highly prejudicial video showing Callen in handcuffs and a jail uniform.

This claim is meritless. In paragraphs 258-61, Callen claims his counsel were ineffective for failing to object to a highly prejudicial video showing Callen in handcuffs and a jail uniform.

The Court of Criminal Appeals addressed the underlying substantive claim and found no plain error:

> This issue is raised for the first time on appeal; therefore, we review this claim for plain error. . . .
>
> > "This Court has recognized that there is a distinction between the jury's observing a defendant wearing handcuffs in the courtroom for his or her trial and the jury's observing the defendant wearing handcuffs in a videotape that is shown to the jury during trial. We have stated:
> >
> > > """"The presumption of innocence, although not articulated in the Constitution, is a basic

> component of our system of criminal justice.' *United States v. Dawson*, 563 F.2d 149, 151 (5th Cir. 1977) (citations omitted). A government entity violates that presumption of innocence when it 'compels an accused to stand trial before a jury while dressed in identifiable prison garb.' *United States v. Birdsell*, 775 F.2d 645, 652 (5th Cir. 1985)."

> "'*United States v. Pryor*, 483 F.3d 309, 311 (5th Cir. 2007). However, we have not extended the violation of the presumption of innocence to the viewing of the defendant on a videotape while he is in handcuffs."

Shaw v. State, 207 So. 3d 79, 97 (Ala. Crim. App. 2014).

More importantly, Callen did not object. In declining to find plain error when a defendant was tried while wearing prison clothing, the United States Court of Appeals for the Fifth Circuit stated:

> "This Court, in *Hernandez v. Beto*, 443 F.2d 634, 636–37 (5th Cir.), cert. denied, 404 U.S. 897, 92 S. Ct. 201, 30 L.Ed.2d 174 (1971), determined that trying a defendant in prison clothing infringes his fundamental right to the presumption of innocence. That right is only infringed, however, when a state compels an accused to stand trial before a jury while dressed in identifiable prison garb. *Estelle v. Williams*, 425 U.S. 501, 512, 96 S. Ct. 1691, 1696, 48 L.Ed.2d 126 (1976). If, for whatever reason, the defendant fails to object to his attire, the presence of compulsion necessary to establish a constitutional violation is negated. *Id.* at 512–13, 96 S. Ct. at 1696–97. Accordingly, a 'defendant may not remain silent and willingly go to trial in prison garb and thereafter claim error.' *Hernandez v. Beto*, 443 F.2d at 637.
>
> ". . . In any event, the failure to object negates the presence of compulsion and, thus, there was no plain error. See also *Gray v. Estelle*, 538 F.2d 1190, 1190–91

(5th Cir. 1976)."

United States v. Birdsell, 775 F.2d 645, 652 (5th Cir. 1985).

> As was the case in *Birdsell*, Callen's failure to object "negates the presence of compulsion and, thus, there was no plain error." 775 F.2d at 652. For the reasons stated above, we find no plain error in Callen's appearance in the video in handcuffs and prison clothes. Accordingly, Callen is due no relief on this claim.

Callen, 284 So. 3d at 206. Callen attempts to use the failure to object to show that had "counsel objected to the video, there is a reasonable likelihood that the State would have had to find an alternative method of presenting Dantae's statements, and the jury would not have seen Dantae in an inherently prejudicial manner." (Pet. at 119.) This attempt fails because it ignores the "distinction between the jury's observing a defendant wearing handcuffs in the courtroom for his or her trial and the jury's observing the defendant wearing handcuffs in a videotape that is shown to the jury during trial." *Callen*, 284 So. 3d at 206. Likewise, the case law cited by Callen is not persuasive because in each case cited, the defendant was constrained or in prison uniforms in trial **in front of** the jury. *See Holbrook v. Flynn*, 475 U.S. 560, 569 (1986); *Estelle v. Williams*, 425 U.S. 501, 503 (1976); *Allen v. Montgomery*, 728 F.2d 1409, 1413 (11th Cir. 1984). Because the underlying claim has no merit, trial counsel

cannot be ineffective for failing to object to it. It is only in the "rare case" that a finding of no plain error on direct appeal does not foreclose a corresponding ineffective assistance claim. *Bohannon*, 2023 WL 5314631, at *17 (quoting *Ex parte Taylor*, 10 So. 3d 1075, 1078 (Ala. 2005)). But, Callen has not pleaded any facts whatsoever in his petition that would show that his is such a "rare case." *See, e.g.*, *White v. State*, 343 So. 3d 1150, 1183–85 (Ala. Crim. App. 2019); *Lee v. State*, 44 So. 3d 1145, 1162–63 (Ala. Crim. App. 2009). Indeed, this is not one of those rare cases. The Court of Criminal Appeals has recently reaffirmed, where an underlying substantive claim caused "no error," an IAC claim that relies on that issue is "without merit." *Brooks*, 340 So.3d at 425.

Thus, this claim is summarily dismissed under Rule 32.7(d).

Claim III(D)(2) - The claim that Callen's trial counsel failed to object to prejudicial victim impact testimony introduced during the culpability phase.

This claim is insufficiently pleaded and meritless. Callen claims his counsel were ineffective for failing to object to the prejudicial victim impact testimony of Ms. Brown introduced during the culpability phase. (Pet. at 120-21.)

Callen fails to specifically plead why no reasonable attorney in counsel's position would have failed to object to testimony about the family structure in a case involving family structure. Callen completely fails to plead how these actions prejudiced him. Instead, Callen makes a conclusory allegation that counsel's actions were deficient, but does not explain how an objection would have changed the outcome of his trial. Moreover, Callen does not explain how this testimony is improper victim impact evidence. Callen relies on the Alabama Supreme Court's finding that emotional victim impact testimony distracted the jury in *Ex parte Jackson*, 68 So. 3d 211 (Ala. 2010), but this reliance is misplaced. The facts in *Jackson* are highly distinguishable and included emotional outbursts: "She also, while crying, described how badly her son's death had affected her: "I ain't able to take it"; "I never be okay anymore"; "it hurts so bad." *Id.* at 217. Ms. Brown's testimony was not emotional and was not victim-impact testimony.

This claim is also meritless because the Court of Criminal Appeals addressed the underlying victim impact testimony issue on direct appeal and held that no plain error existed:

> The record shows that Brown identified photographs of the three victims, that she discussed her relationship with the

three victims and who was living with her mother at the time of her death, that she gave the jurors the layout of her mother's apartment, and that she spoke of her last meeting with her mother.

The Alabama Supreme Court in *Ex parte Rieber*, 663 So. 2d 999 (Ala. 1995), upheld the admission of similar victim-impact evidence at the guilt phase of a capital-murder trial. The court stated:

> "It is presumed that jurors do not leave their common sense at the courthouse door. It would elevate form over substance for us to hold, based on the record before us, that Rieber did not receive a fair trial simply because the jurors were told what they probably had already suspected—that [the victim] was not a 'human island,' but a unique individual whose murder had inevitably had a profound impact on [his] children, spouse, parents, friends, or dependents (paraphrasing a portion of Justice Souter's opinion concurring in the judgment in *Payne v. Tennessee*, 501 U.S. 808, 838, 111 S. Ct. 2597, 115 L.Ed.2d 720 (1991))."

663 So. 2d at 1006.

> "Many other courts have likewise found no reversible error in the admission of limited victim impact evidence in the guilt phase of a capital murder trial. See *Commonwealth v. Jordan*, 65 A.3d 318 (Pa. 2013); *State v. Jackson*, 410 S.W.3d 204 (Mo. Ct. App. 2013); *Moore v. Mitchell*, 708 F.3d 760, 805 (6th Cir. 2013); *Schreibvogel v. State*, 228 P.3d 874 (Wy. 2010); *State v. Ott*, 247 P.3d 344 (Utah 2010); *Goff v. State*, 14 So. 3d 625 (Miss. 2009); *State v. Hale*, 119 Ohio St.3d 118, 892 N.E.2d 864 (2008); *Coulthard v. Commonwealth*, 230 S.W.3d 572 (Ky. 2007); *Dodd v. State*, 100 P.3d 1017 (Okla. Crim. App. 2004)."

Wiggins v. State, 193 So. 3d 765, 794 (Ala. Crim. App. 2014).

> There was no reversible error in the admission of Brown's testimony during the guilt phase of Callen's trial. Callen is due no relief on this claim.

Callen, 284 So. 3d at 222–23. Callen makes no attempt to counter this portion of the Court of Criminal Appeals' holding. Because the underlying claim has no merit, trial counsel cannot be ineffective for failing to object to it. This Court recognizes that a finding of no plain error on direct appeal does not foreclose Callen from arguing that he was prejudiced by his counsel's failure. *Bohannon*, 2023 WL 5314631, at *17 ("'[A] determination on direct appeal . . . does not automatically foreclose a determination of the existence of the prejudice required . . . to sustain a claim of ineffective assistance of counsel.' . . . However, it is 'the rare case in which the application of the plain-error test and the prejudice prong of the *Strickland* test will result in different outcomes.'" (quoting *Taylor*, 10 So. 3d at 1078)). But, Callen has not pleaded any facts whatsoever in his petition that would show that his is such a "rare case." *See, e.g.*, *White*, 343 So. 3d at 1183–85; *Lee*, 44 So. 3d at 1162–63. This is not one of those rare cases.

Thus, this claim is summarily dismissed under Rules 32.3, 32.6(b),

and 32.7(d).

Conclusion

Based on the above, this Court finds the Petitioner's claims to be insufficiently pleaded and meritless under Rules 32.3, 32.6(b), and 32.7(d).

The State's Motion to Dismiss the Petitioner's Second Amended Rule 32 petition is hereby **GRANTED**.

Petitioner's request for an evidentiary hearing is **DENIED**.

The Petitioner's Second Amended Rule 32 Petition is hereby **DENIED**.

DONE this 10th day of April, 2025.

/s/ SHANTA OWENS
CIRCUIT JUDGE

Appendix C

ALABAMA COURT OF CRIMINAL APPEALS

April 10, 2026

CR-2025-0396
Dontae Callen v. State of Alabama (Appeal from Jefferson Circuit Court: CC-11-2047.60)

NOTICE

You are hereby notified that on April 10, 2026, the following action was taken in the above-referenced cause by the Court of Criminal Appeals:

Application for Rehearing Overruled.

Scott Mitchell

D. Scott Mitchell, Clerk

Appendix D

IN THE SUPREME COURT OF ALABAMA

August 21, 2026

SC-2026-0276

Ex parte Dontae Callen PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Dontae Callen v. State of Alabama) (Jefferson Circuit Court: CC-11-2047.60; Criminal Appeals: CR-2025-0396).

CERTIFICATE OF JUDGMENT

WHEREAS, the petition for writ of certiorari in the above referenced cause has been duly submitted and considered by the Supreme Court of Alabama and the judgment indicated below was entered in this cause on August 21, 2026:

Writ Denied. No Opinion. Mendheim, J. -- Stewart, C.J., and Shaw, Wise, Bryan, Sellers, Cook, McCool, and Parker, JJ., concur.

NOW, THEREFORE, pursuant to Rule 41, Ala. R. App. P., IT IS HEREBY ORDERED that this Court's judgment in this cause is certified on this date. IT IS FURTHER ORDERED that, unless otherwise ordered by this Court or agreed upon by the parties, the costs of this cause are hereby taxed as provided by Rule 35, Ala. R. App. P.

I, Megan B. Rhodebeck, certify that this is the record of the judgment of the Court, witness my hand and seal.

Megan B. Rhodebeck

Clerk, Supreme Court of Alabama

Appendix E

ALABAMA COURT OF CRIMINAL APPEALS

August 21, 2026

CR-2025-0396
Dontae Callen v. State of Alabama (Appeal from Jefferson Circuit Court: CC-11-2047.60)

CERTIFICATE OF JUDGMENT

To the Clerk of the above noted Trial Court, Greetings:

WHEREAS, the appeal in the above referenced cause has been duly submitted and considered by the Court of Criminal Appeals; and

WHEREAS, the judgment indicated below was entered in this cause on January 30, 2026:

Affirmed by Memorandum.

NOW, THEREFORE, pursuant to Rule 41 of the Alabama Rules of Appellate Procedure, it is hereby certified that the aforesaid judgment is final.

Witness D. Scott Mitchell, Clerk
Court of Criminal Appeals, on this
the 21st day of August, 2026.

Scott Mitchell

Clerk
Alabama Court of Criminal Appeals

Appendix F

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

DONTAE CALLEN,	*	
	*	
Petitioner,	*	
	*	**Case No. CC-2011-002047.60**
v.	*	
	*	
STATE OF ALABAMA,	*	
	*	
Respondent.	*	

FILED IN OFFICE
CRIMINAL DIVISION
JUL 29 2022
JACQUELINE ANDERSON SMITH
CLERK

SECOND AMENDED PETITION
FOR RELIEF FROM JUDGMENT PURSUANT TO RULE 32
OF THE ALABAMA RULES OF CRIMINAL PROCEDURE

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PRAYER FOR RELIEF 121

Petitioner DANTAE CALLEN,[1] now incarcerated on death row at Holman Correctional Facility in Atmore, Alabama, petitions this Court pursuant to Rule 32 of the Alabama Rules of Criminal Procedure for relief from his unconstitutionally obtained convictions and death sentence. Dantae seeks a ruling from this Court vacating his convictions and death sentence.

INTRODUCTION

Dantae was convicted of brutally killing three family members late one night without warning, only two months after he turned 18. There was no question that he committed an unfathomable act. But there were circumstances to explain the unexplainable, and to show why this young man does not deserve to die. A reasonable investigation would have revealed compelling and constitutionally significant mitigation evidence. That evidence would also have provided a basis for arguing that Dantae was not guilty of capital murder. Yet trial counsel failed to adequately look for it or present it.

As the record developed for this Petition reflects, at the time of the crime, Dantae likely suffered from severe organic brain dysfunction consistent with severe organic brain damage. He had a childhood plagued with physical and sexual abuse, substance abuse, neglect, malnutrition, and parental abandonment, all while living in impoverished conditions. These traumas—physical, psychological, and developmental—mean that Dantae's executive functions fell far, far below even a typical eighteen-year-old. Indeed, according to one expert who could have testified at trial, Dantae's deficits in executive functions are comparable to those seen in someone who has suffered a ***gunshot wound to the head*** and fall ***below the bottom 1 percentile*** of similarly-situated individuals. This same expert could have also explained that Dantae's results on certain neurological tests were consistent with results of ***children aged between 3 and 5 years old***. This

[1]Although Petitioner's name throughout these proceedings has been spelled "Dontae," his legal name is spelled "Dantae." This Petition uses the correct legal spelling.

is further evidence that Dantae has severe deficits in executive functions and likely frontal lobe damage. Rather than acting out of cold blood (as the prosecution argued in seeking the death penalty), Dantae likely acted while in a dissociative state triggered by sexual abuse at the hands of his older male cousin (one of the victims) and/or the cumulative effects of his severe organic brain dysfunction and other environmental factors. Taken cumulatively, all of these factors reduced Dantae's ability to control his impulses, make decisions, and behave in a socially appropriate manner.

No one ever heard that evidence. The jury did not hear it at trial; nor did the judge at sentencing. Trial Counsel knew all along that any defense had to be based on mitigation or lack of scienter, and they knew that Dantae's affect and upbringing raised numerous red flags. Yet they failed to perform an adequate investigation. Among other things, Trial Counsel did not follow up on the indicators of potential brain damage; failed to obtain Dantae's medical records, which corroborate years of neglect and sexual abuse; and did not retain other qualified experts who would have spoken directly to the impact of Dantae's neglect, abuse, and other factors in his traumatic childhood.

Even when Trial Counsel did attempt to argue mitigation, they failed to mount a competent defense. For example, Trial Counsel retained a clinical psychologist who could have provided some testimony as to the magnitude and severity of Dantae's childhood trauma and how this affected his moral culpability for the brutal stabbings. Inexcusably, the jury never heard this critical testimony because Trial Counsel was so disorganized and unprepared during the direct examination that—after being admonished by the judge and losing almost every objection lodged by the State—Trial Counsel simply gave up and abandoned the questioning and key mitigating

testimony. Other examples abound of failures that courts have consistently found prejudicial and required relief.

Indeed, after Dantae's conviction and death sentence, Trial Counsel appeared on a true-crime television show where they admitted, effectively and expressly, that they had failed Dantae.[2] The jury "want[ed] to know why this happened."[3] Because of their ineffective assistance, including failure to conduct adequate pre-trial investigations, Trial Counsel did not know and could not provide the answer. That answer would not have changed the terrible fact that three people were killed. But it could have, and likely would have, changed whether Dantae too should die. Had Trial Counsel made more than its meager mitigation presentation, there is a reasonable probability that only two more jurors would have voted for life—all that was needed to change the outcome of Dantae's sentence. Accordingly, the Petition should be granted.

PROCEDURAL BACKGROUND

I. Proceedings Below

1. On November 4, 2010, a Jefferson County grand jury returned an indictment charging Dantae with one count of capital murder of two or more persons, in violation of Alabama Criminal Code§ 13A-5-40(A)(10); one count of capital murder of a person under the age of 14, in violation of Alabama Criminal Code§ 13A-5-40(A)(15); and one count of capital murder during an arson, in violation of Alabama Criminal Code § 13A-5-40(A)(9). (C. 131-32). On September 12, 2011, Dantae was arraigned in Jefferson County Circuit Court and pleaded not guilty. (C. 35, 146).

[2] After the First 48: Burning Rage (S5 E4) - https://www.aetv.com/shows/after-the-first-48/season-5/episode-4 Season 5, which aired May 15, 2014 ("After the First 48").
[3] Id.

2. Dantae's trial began on July 8, 2013. (R. 144). On August 20, 2013, the trial court sentenced Dantae to death. (R. 1275). Dantae timely appealed his conviction and sentence. On April 28, 2017, the Court of Criminal Appeals affirmed his capital murder convictions but remanded the case to the Jefferson Circuit Court to amend its sentencing order to make specific findings of fact concerning the aggravating circumstances set out in § 13A-5-49(3) and § 13A-5-49(8) of the Alabama Code. Callen v. State, 284 So. 3d 177, 247 (Ala. Crim. App. 2017). On return to remand, the Court of Criminal Appeals affirmed Dantae's death sentence. Id. at 249.

3. Dantae filed a petition for writ of certiorari to the Alabama Supreme Court on February 2, 2018. Dantae sought a reversal of his convictions and death sentence as unconstitutionally obtained contrary to the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Alabama law. The Alabama Supreme Court denied Dantae's petition for writ of certiorari and issued a Certificate of Judgment on November 16, 2018. Ex Parte Callen, No. 1170219 (Ala. Nov. 16, 2018). On June 3, 2019, the United States Supreme Court denied certiorari. Callen v. Alabama, 139 S. Ct. 2668 (June 3, 2019).

II. This Rule 32 Proceeding

4. On November 11, 2019, Dantae, *pro se*, submitted a Petition for Relief from Judgment Pursuant to Rule 32 of the Alabama Rules of Criminal Procedure in this Court. Thereafter, Dantae retained pro bono post-conviction counsel, who entered appearances in this case. Due to the unforeseen circumstances presented by the COVID-19 pandemic, the Court granted Dantae until August 19, 2021 to file an amended Rule 32 petition.

5. On August 19, 2021, Dantae filed a First Amended Petition for Relief from Judgment Pursuant to Rule 32 of the Alabama Rules of Criminal Procedure. On September 16, 2021, the State filed an Answer and Motion to Dismiss Dantae's Amended Rule 32 Petition for Post-Conviction Relief. On April 20, 2022, the Court held a Scheduling Conference. Post-

conviction counsel and counsel for the State were present in-person. Dantae appeared via Zoom from the Alabama Department of Corrections. The Court entered the following scheduling order: Amendment of the Defendant's petition was set to be due on July 29, 2022 at 9:00 a.m., and the State's Response is due on October 28, 2022 at 9:00 a.m. The Court also approved post-conviction counsel's properly submitted Pro Hac Vice applications to represent Dantae in this case.

6. This petition is timely filed pursuant to Rule 32 of the Alabama Rules of Criminal Procedure.

STATEMENT OF FACTS

I. The Incident and Investigation

7. On October 29, 2010, the Birmingham fire department and police responded to a report of a residential fire. (R. 442, 460). When they arrived, firefighters found the bodies of Bernice Kelly, Quortes Kelly, and Aaliyah Budgess. (R. 442-53). Autopsies indicated that all three individuals had multiple stab wounds. (C. 117). The police, who were being filmed by the reality show "The First 48," focused on Dantae as their key suspect, a relative of the victims and a teenager who had recently turned 18 years old with a long history of abuse, neglect, and intellectual deficits. (C. 1947, 1972, 1976, 1982). After ten hours of police interrogation, Dantae told police that he loved his relatives and could not remember what happened, but gave an inculpatory statement. (C. 2027, 2028, 2029, 2031, 2033).

II. Proceedings

A. Pre-Trial Proceedings

8. On June 15, 2011, the trial court appointed John Waddell as defense counsel; approximately one month later, the trial court appointed Ron Thrasher as co-counsel. (C. 2-3). Patrick Lamb and Julie McMakin were the Deputy District Attorneys who prosecuted the case. (C. 76). On June 20, 2011, the trial court ordered discovery and granted a protective order. (C. 3). In

early September of that year, Dantae's trial counsel at the time filed an application for youthful offender status. (C. 3). The trial court denied Dantae's youthful offender application, despite the incident occurring only 2 months after Dantae's 18th birthday. (C. 3). Dantae's jury trial was continued until March 25, 2013 to give defense counsel more time to collect evidence, including mitigation records. (C. 7; C. 12).

9. On March 5, 2013, the trial court held a hearing on defense counsel's motion for a continuance. During the hearing, the trial court removed Mr. Waddell as Dantae's defense counsel due to personal medical reasons. (R. 11-12). During this hearing, Mr. Thrasher pleaded with the trial court that he needed an additional "five months" from the March 25, 2013 trial date to conduct an adequate mitigation investigation. (R. 13). The State objected to any further delay. The court denied Mr. Thrasher's request for a five-month continuance and set Dantae's trial for July 8, 2013. (R. 17, C. 16). Mr. Colee was later appointed as Dantae's second attorney on March 8, 2013. (C. 16). (Colee and Thrasher, collectively referred to as "Trial Counsel").

B. Atkins Hearing

10. On May 28, 2013, the trial court held a pretrial hearing pursuant to Atkins v. Virginia, 536 U.S. 304 (2002), to determine whether Dantae was intellectually disabled and therefore not eligible for the death penalty. (C. 92).

11. Trial Counsel hired Dr. Ronald Meredith,[4] a clinical psychologist, to testify during the Atkins hearing. Dr. Meredith had determined that Dantae's IQ was 75, which was above the minimum IQ threshold of 70 that would have made Dantae ineligible for the death penalty under Atkins and Alabama law at the time. Dantae's records, however, contained an IQ test score of 69 from an IQ test administered when he was 16. Trial Counsel subpoenaed Mr. Gilbert Robbins, the

[4] Post-conviction counsel understand Dr. Meredith is now deceased; however, Dr. Meredith's partner at the time of Dantae's evaluation, Dr. Barry Adams, appears to still be alive and practicing in Alabama.

counselor who administered the IQ test on Dantae when he was 16, to testify. Exchanges between Mr. Colee and Mr. Robbins contained in Trial Counsel's files indicate that the two "started out on the 'wrong foot.'" Trial Counsel's files also indicate that, upon serving Mr. Robbins a subpoena, Mr. Robbins said "I warned him" in reference to Mr. Colee. After the Atkins hearing, Mr. Robbins wrote a letter to Mr. Thrasher stating: "as I warned your co-counsel, I was not comfortable in making the determination/conclusion . . . needed."

12. Despite Mr. Robbins having told Mr. Colee that he would not give useful evidence and his frustration with having to appear for the Atkins hearing, Trial Counsel still decided to call Mr. Robbins as a witness. Predictably, Mr. Robbins testified at the Atkins hearing that, because of what he perceived as Dantae's disinterested attitude during testing, he was not confident in the results of the examination. (R. 121). As a result, the trial court found that the defense failed to prove by a preponderance of the evidence that Dantae was intellectually disabled and denied Dantae's Atkins motion. (C. 94).

C. Guilt Phase

13. Dantae's jury trial began on July 8, 2013. (R. 144). The State presented a theme focused on the question of "[w]hat do you owe your family?" (R. 395). The State argued that Dantae's family had "cared for him," "helped him," and "g[iven] him shelter." (R. 395–96). Despite evidence that Dantae's Aunt Bernice had asked him to leave her home just two weeks before the incident, the State argued that Dantae "wasn't homeless" and "wasn't put out into the streets." (R. 397).

14. Mr. Thrasher gave an extremely short (five-transcript-page) opening statement on behalf of the defense. (R. 401–06). Rather than point to facts exposing the State's inaccurate arguments about Dantae's background and familial relationships, including the plethora of evidence Trial Counsel had showing Dantae's years of childhood trauma, abuse, and neglect, Mr.

Thrasher emphasized that Dantae "for many years [] had a normal life and a normal family until he was about 11 years old, and then things changed." (R. 402–03). Then, Mr. Thrasher explained, the "family broke up." (R. 403). Mr. Thrasher also threw in a sudden and random personal anecdote that "I don't know about you. But I had a family member that, unfortunately, was brilliant, but he had—he liked to drink. He liked to drink too much. It finally killed him. Not in a manner like this." (R. 405).

15. The State presented eleven witnesses during its case-in-chief:

- Lisa Brown (R. 407), who testified as to personal details about the victims;
- Faye Budgess (R. 425), who testified about where Dantae and the victims had been at various points in time, including the night of the incident;
- Officer Angela Cook (R. 438), who authenticated the recording of the 911 call;
- Lieutenant Warren Calvert (R. 441), who testified about his experiences responding to the fire;
- Lieutenant Fitzgerald Mosely (R. 458), who testified as to the cause of the fire;
- Jerrell Williams (R. 487), Bernice Kelly's neighbor, who testified about his response in recognizing the fire;
- Officer Roxanne Murray (R. 495), who testified regarding details of the crime scene;
- Officer April Denson (R. 568), who testified regarding a cotton swab and clothing taken from Dantae;
- Dr. Garry Simmons (R. 575), who testified regarding the autopsies of the victims' bodies;
- Nathan Rhea (R. 736), who testified regarding the DNA evidence; and
- Detective Warren Cotton (R. 815), who testified regarding Dantae's interrogation.

16. As part of Detective Cotton's testimony, the State played a nearly one-hour video of Dantae's statement to the police. (R. 848; State's Ex. 112A). In watching the video, the jury

witnessed Dantae in a red jail uniform and, for all but one minute of the video, saw handcuffs wrapped around his wrists. (State's Ex. 112A). The State also replayed the video at five different points during its closing argument. (R. 950 (twice), 951, 954, 955). Trial Counsel did not object even once.

17. Despite the State calling eleven witnesses, Trial Counsel called only Beatrice Brown (Dantae's Grandmother) for the defense's case-in-chief. (R. 860). Trial Counsel split the closing argument. Mr. Colee went first and raised the question of intoxication to the jury. He argued that intoxication could negate specific intent to commit the murders that Dantae is charged with and asked that the jury return a verdict finding Dantae did not commit murder, but rather was guilty of manslaughter. (R. 935-36). Mr. Thrasher's argument immediately followed. While Mr. Colee had just argued to the jury that Dantae was intoxicated to negate a finding of specific intent, Mr. Thrasher made arguments contrary to this defense. For example, he argued that one of the fires started because Dantae "threw the lamp down on some clothes" but that he doesn't "know why [Dantae] threw the lamp down in the clothes. Was he mad because he realized what he did? Did he throw it down intentionally [to] try to start the fire? I don't know." (R. 943-44). Mr. Thrasher also told the jury that "this is pretty cold-blooded, isn't it, folks?" (R. 945). At the end of his closing argument, Mr. Thrasher did not mention the intoxication defense that Mr. Colee had just argued to the jury. Rather, Mr. Thrasher asked the jury to find that Dantae did not commit capital murder "because I don't think it is in my heart of hearts. This is what I do." (R. 947).

18. After deliberating for three hours, the jury returned a verdict finding Dantae guilty of murder on all three counts. (R. 120).

D. Penalty Phase

19. The penalty phase of the trial began immediately after the guilt phase. Before opening statements, the State informed the court that it would seek the death penalty based on

three aggravating factors, including that the incident was "heinous, atrocious, and cruel." The court commented that such an aggravating factor is a "high bar" and would "take that up at the proper time" before instructing the jury. (R. 1017-18).

20. The State told the jury that the court would instruct them as to mitigating and aggravating circumstances, but that the State was asking the jury to find the incident was "heinous, atrocious, and cruel." The State called one witness, Lisa Brown, Dantae's cousin and Quortes's (one of the victims) sister. Ms. Brown gave victim impact testimony and analogized her loss to a "story in the Bible." (R. 1047). Trial Counsel did not object or even cross-examine Ms. Brown.

21. Mr. Thrasher took the lead for defense during the penalty phase and called three fact witnesses: Dantae's Grandmother, Lawrence Callen, Jr. (Dantae's Brother), and LaQuoya Callen (Dantae's Sister). Mr. Thrasher told the jury that Dantae's early years were "normal" and "standard," and while his other siblings had "done better" and "reacted better" to the circumstances, all Dantae wanted was his mother who had abandoned him at 11-years-old. He told the jury that Dantae's "[f]amily members tried to help him and did try . . . and that's what you're going to hear." This is despite testimony the jury later heard from Dantae's Sister, who said that family who had "custody" of Dantae "wasn't taking care of [him]" and that she "really think[s]" family members took Dantae in "for the [welfare] benefits and to have dependents for the income tax and stuff." (R. 1071).

22. Trial Counsel's last witness was Dr. Meredith, the same clinical psychologist Trial Counsel had retained to testify at the Atkins hearing. Dr. Meredith concluded Dantae has mental retardation, post-traumatic stress disorder, and borderline personality disorder. However, Mr. Thrasher minimized and confused the purpose and importance of Dr. Meredith's testimony to the jury. For example, Mr. Thrasher previewed Dr. Meredith to the jury during opening statements as

someone who would "talk to you about mental disorders, but they're not mental disorders that rise to the level of insanity or temporary insanity – and low functioning ability, but it doesn't really arise to the level, at least legally, to a standard of mental retardation, as far as Dantae goes . . . we're presenting this to you and letting you look at it. It's not one of these things like, oh we've got all of this stuff over here, and they've got all of this stuff over here. . ." (R. 1035).

23. Trial Counsel's presentation during Dr. Meredith's testimony was riddled with objections and confusion admitting exhibits, and the court even admonished Trial Counsel for being so disorganized. Indeed, Dr. Meredith's testimony regarding Dantae's psychological disorders only spans nine transcript pages and contains nine sustained objections on those same nine pages.

24. Despite Trial Counsel's sole focus and mitigation theory being that Dantae's mother abandoned him, Mr. Thrasher stated that Dantae wanting to be with his mother "it's not an excuse and its [sic] not a justification, the action that he took against family members." Mr. Thrasher told the jury that "we can't explain why" the offense happened (R. 1182). Astonishingly, Mr. Thrasher ended his closing argument by telling the jury that the incident was "atrocious and cruel and heinous," (R. 1037), an aggravating factor that the ***State had the burden to prove***. This is also the same aggravating factor that the trial court expressed some reservations about immediately before penalty phase closing arguments, specifically telling both Trial Counsel and the prosecutors for the State that there is a "high bar" the State has to prove with such a factor.[5]

25. The jury returned an 11-1 recommendation that Dantae be sentenced to death. (R. 120).

[5] As discussed supra para. 19, the court had some reservations about whether the offense in Dantae's case would meet the high bar for the "atrocious, heinous, and cruel" aggravating factor.

E. Judicial Sentencing

26. The judicial sentencing hearing was held on August 20, 2013. The 36-page transcript of the hearing reveals it was a brief proceeding. The State called the same one witness it had called during the penalty phase, Lisa Brown, Dantae's cousin and Quortes's (one of the victims) sister, to give a victim impact statement. On cross-examination, Mr. Thrasher asked Ms. Brown numerous times whether she thought Dantae should be sentenced to death—this is despite Alabama Supreme Court precedent that clearly states victim impact testimony opining on what punishment the defendant should receive is improper and prejudicial.

27. For the defense, Trial Counsel called the same three witnesses who had testified during the penalty phase: Dantae's Grandmother, Dantae's Brother, and Dantae's Sister. These individuals testified regarding their relationships with Dantae and explained that they did not believe Dantae could have committed the crimes in his right mind. In their closing argument, Trial Counsel focused again on the notion that there was no explanation for the offense. (R. 1258 ("[S]ometimes there are certain crimes that occur and we don't know why."); R. 1261 ("Nobody sitting here can tell us exactly why this happened."))

28. Trial Counsel had also filed a presentence memorandum, which included Dr. Meredith's assessment of Dantae. Dr. Meredith's assessment included critical evidence explaining the incident, notably that Dantae told Dr. Meredith that Quortes (one of the victims) had sexually abused Dantae. Dr. Meredith concluded that based on Dantae being chronically sexually abused and sexually abused on the night of the incident, Dantae was in a dissociative state with no conscious recollection or control of his activities the night of the incident. Dr. Meredith had vaguely testified that Dantae was sexually abused by a close family member during the penalty phase before the jury. However, when the court asked Mr. Thrasher whether this evidence was testified to under oath, Mr. Thrasher stated "no." The trial court therefore discounted Dr.

Meredith's conclusions and sentenced Dantae to death, stating that "there has been no reasonable explanation given" for the incident. (R. 1273).

29. On August 20, 2013, the trial court sentenced Dantae to death. (R. 1275).

GROUNDS SUPPORTING THIS PETITION FOR RELIEF

30. The Sixth Amendment of the United States Constitution guarantees every criminal defendant "the right to the effective assistance of counsel," Strickland v. Washington, 466 U.S. 668, 686 (1984) (citation omitted). The Sixth Amendment of the Alabama State Constitution provides the same guarantee. Taylor v. State, 291 Ala. 756, 759 (Ala. 1973) (citing Ala. Const. Art. I, §6). This right is applicable to the guilt and penalty phase of proceedings. Porter v. McCollum, 558 U.S. 30 (2009); Rompilla v. Beard, 545 U.S. 374 (2005); Wiggins v. Smith, 539 U.S. 510 (2003); State v. Gamble, 63 So. 3d 707 (Ala. Crim. App. 2010).

31. Strickland, and its progeny, promulgated a familiar two-part standard governing claims of ineffective assistance of counsel. First, a defendant "must show that counsel's performance was deficient" by establishing that "counsel's representation 'fell below an objective standard of reasonableness'" as gauged by "prevailing professional norms." Wiggins, 539 U.S. at 521 (quoting Strickland, 466 U.S. at 687-88). Second, a defendant must show that "counsel's failures prejudiced his defense," id. at 534 (citing Strickland, 466 U.S. at 692); see also Ex Parte Pierce, 851 So. 2d 618, 622 (Ala. 2002).

32. Trial Counsel's performance was both deficient and prejudiced Dantae under this two-part test. As explained below, Dantae was therefore denied his constitutionally-guaranteed effective assistance of counsel throughout his capital murder trial, including during the penalty, judicial sentencing, and guilt phases.

I. Dantae Was Denied Effective Assistance of Counsel During the Penalty Phase of His Trial.

A. Trial Counsel Was On Notice of a Critical Duty to Investigate Mitigation Factors.

33. Alabama's sentencing scheme "broadly allows the accused to present evidence in mitigation." Ex Parte Smith, 213 So. 3d 214, 218 (Ala. 2003). The Alabama Code expressly provides that "mitigating circumstances shall include" the following:

> [A]ny aspect of a defendant's character or record . . . that the defendant offers as a basis for a sentence of life imprisonment without parole instead of death, and any other relevant mitigating circumstance which the defendant offers as a basis for a sentence of life imprisonment without parole instead of death.

Ala. Code § 13A-5-52 (1975).

34. Counsel has a duty to conduct a thorough mitigation investigation. See, e.g., Williams v. Taylor, 529 U.S. 362, 396 (2000). This obligation is especially important because the trial court and the jury must consider "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 (1978); see also Ala. Code § 13A-5-51.

35. Counsel's duty in conducting a mitigation investigation is satisfied only after their existing investigation supports a reasonable belief that further investigation "would be fruitless or even harmful." Strickland, 466 U.S. at 691; see also Wiggins, 539 U.S. at 525. Accordingly, in assessing the reasonableness of an attorney's investigation, the court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would have led a reasonable attorney to investigate further. Wiggins, 539 U.S. 527.

36. Moreover, the Supreme Court has long held that the ABA Guidelines set forth what is reasonably expected of an attorney to effectively represent a client in a capital case. Wiggins, 539 U.S. at 533-34. The 2003 ABA Guidelines explain that counsel should obtain "all potentially

relevant information," including "medical records." 2003 ABA Guidelines § 10.7. Those same guidelines explain that effective counsel must consider including expert witnesses "to provide medical, psychological, sociological, cultural or other insights into the client's mental and/or emotional state and life history that may explain or lessen the client's culpability for the underlying offense(s)." Id. § 10.11(F)(2).

37. Trial Counsel knew they had a duty to conduct a thorough mitigation investigation. On July 19, 2012, Trial Counsel filed an Ex Parte Motion for Funds to Retain a Mitigation Expert. (C. 251). In the motion, Trial Counsel explained that "[t]he standard of care in capital cases in State and Federal courts requires that an in-depth investigation be conducted in Mr. Callen's case to develop a reliable social and medical history for him." (C. 259).

38. It was not until the eve of trial, in March 2013, that Trial Counsel requested a continuance based on an alleged need for more time to review the thousands of pages of records in this case (R. 13, 17). Mr. Thrasher requested an additional "five months" to conduct a mitigation investigation, claiming that he "found a treasure trove of information . . . that need and warrant further investigation in order for us to do the mitigation that is required in this case." (R. 4, 13). The trial court ruled that the request was too late. The court commented that the case "came off the grand jury in May of 2011" and asked "[w]hy is it now at the eleventh hour, two, three weeks before trial, that all of this information is just now getting discovered?" (R. 6). Mr. Thrasher responded that he "didn't have the money to copy the records" immediately after receiving them and that, although he was not "trying to use this as an excuse," he was "out of town." (R. 7).

39. Trial Counsel also acknowledged that in Dantae's case, the penalty phase is "the phase that [Trial Counsel] have to concentrate on." (R. 5). Trial Counsel's inexcusable delay in conducting their mitigation investigation, admitting—just months before trial—that Trial Counsel

still had thousands of pages to review demonstrates that Trial Counsel did not reach a strategic or reasonable belief that further mitigation investigation "would be fruitless or even harmful."[6] Strickland, 466 U.S. at 691; Wiggins, 539 U.S. 527 (holding counsel was ineffective in failures to conduct mitigation investigation when record suggested the "failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment"). Trial Counsel's failures are bolstered by the trial court's statement directly to Dantae when sentencing him to death that the "Court has provided your attorneys all of the money and resources that it could possibly to research, to explore, to investigate why you did what you did" but "[t]here has been no reasonable explanation given." (R. 1273-74).

B. Trial Counsel Failed to Investigate Potential Organic Brain Damage and Therefore Did Not Discover that Dantae Has Severe Organic Brain Dysfunction.

40. Trial Counsel unreasonably failed to conduct the adequate investigations that would have uncovered Dantae suffers from severe organic brain dysfunction. Based on expert neuropsychological evaluation, Dantae exhibited ***profound*** impairment in executive functions, with performances below the 1st percentile in comparison to those performances of similarly matched individuals, as explained in Part I.B.1 below. Such severe executive function deficits manifest as deficits in social functioning, cognitive functioning, behavior, and full appreciation of situations. Dantae's executive function deficits are severe and rare in a young adult without known devastating neurological insult (such as severe traumatic brain injury, a gunshot wound to the head, or the like).

41. Moreover, as explained below, Trial Counsel were on notice of Dantae's organic brain dysfunction because Dantae's personal and medical history is riddled with legally recognized

[6] Nor did Trial Counsel's failed pursuit of an Atkins determination that Dantae was intellectually disabled discharge Trial Counsel's duty to investigate other physiological, psychological, or environmental mitigation factors.

red flags that required Trial Counsel to investigate whether Dantae has organic brain damage. Therefore, under Supreme Court, Eleventh Circuit, and Alabama precedent, Trial Counsel's failure to further investigate the presence of a neurocognitive disorder secondary to multiple developmental disruptions ("red flags" in legal terms) was deficient. As further explained below, Trial Counsel's failure to investigate these red flags was prejudicial because Trial Counsel would have discovered that Dantae suffers from severe organic brain dysfunction, which is critical mitigation evidence that should have been presented to the jury and judge.

1. An Expert Neuropsychologist Would Have Testified That Dantae's Organic Brain Dysfunction Is So Severe That His Executive Functions Fall Below the 1st Percentile of All Those Similarly Situated.

42. Had Trial Counsel adequately investigated whether Dantae has organic brain damage, they would have hired a neuropsychologist who would have testified that Dantae exhibits profound executive function deficits. Post-conviction counsel has retained Dr. Kristine Lokken, a clinical neuropsychologist with a PhD in Clinical Psychology. Dr. Lokken has nearly thirty years of experience in the field of neuropsychology in clinical and academic settings, including over ten years as the Director of Rehabilitation Neuropsychology at the Birmingham VA Hospital, where she worked with veterans who suffered from, among other things, traumatic brain injury, stroke, dementia, and other neuropsychiatric phenomenon. Dr. Lokken is currently Chief Psychologist at the University of Alabama at Birmingham, overseeing a team of seventeen psychologists and neuropsychologists and multiple trainees. Dr. Lokken also maintains an active caseload of medically complex neuropsychiatric patients, engages in research and teaching, and remains abreast of the current literature and best practices in the area of neuropsychology.[7] Dr. Lokken was available at the time of Dantae's capital murder trial to evaluate whether Dantae has organic brain

[7] Dr. Lokken's work for this case is through her forensic neuropsychology private practice (Alabama Neurobehavior, LLC).

damage and organic brain dysfunction. In fact, Trial Counsel's case files include a document that listed Dr. Lokken as a practicing neuropsychologist and as someone who would have been available as a potential expert.

43. Had Trial Counsel retained Dr. Lokken, she would have explained that the presence of executive function difficulties in an adolescent is considered an indicator of atypical brain development, even if the adolescent has other disorders. Executive function difficulties can be secondary to many different kinds of developmental disruptions. This means that certain external factors that an adolescent has been exposed to can cause executive function difficulties. For example, genetic, epigenetic, in-utero exposures, neglect, malnutrition, physical, emotional, and sexual abuse, alcohol abuse, environmental exposure, and infections may alter the functioning of an adolescent's brain, resulting in executive function difficulties. Even where such external factors do not cause organic brain damage, they may nonetheless disrupt neurodevelopment during critical periods in a manner that still results in executive function difficulties. In other words, executive function difficulties are a "red flag" for organic brain damage. Likewise, certain external factors during the developmental period are also "red flags" for organic brain damage and dysfunction. See Philip David Zelazo, Annual Review of Clinical Psychology Executive Function and Psychopathology: A Neurodevelopmental Perspective, 16 Annu. Rev. Clin. Psychol. 431 (2020).

44. Dr. Lokken reviewed Dantae's records and administered several neuropsychological tests on Dantae during clinical, in-person visitations occurring on October 6, 2021 and December 7, 2021. Dr. Lokken concluded that Dantae is "profoundly impaired" in the area of executive functions. Specifically, Dr. Lokken concluded that Dantae's cognitive deficits are generally seen with someone who has suffered a severe traumatic brain injury with extended loss of consciousness (coma), or comparable to individuals who have suffered ***a gunshot wound***

to the head. Executive functions control the higher order cognitive functions that make us uniquely human. Dr. Lokken's tests reveal that Dantae's executive function fall below the 1st percentile of similarly-situated individuals. Had Trial Counsel retained Dr. Lokken during Dantae's trial, Dr. Lokken would have explained to the jury just how profoundly impaired Dantae is, and she further would have explained how this impacts Dantae's impulse control, decision making ability, and other vital cognitive functions. Specifically, that Dantae's impaired executive functions likely resulted in diminished impulse control, heightened aggression, and the inability to modify behavior in response to environmental changes.

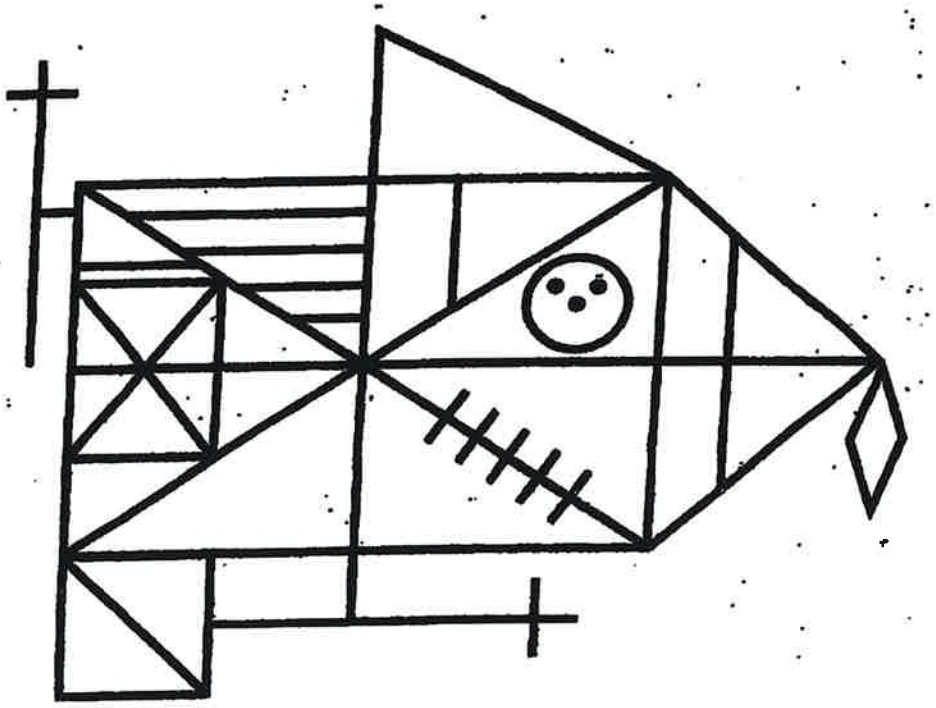
45. Post-conviction counsel requested, but were denied, permission to obtain an MRI scan of Dantae's brain to confirm the presence of physiological damage. Without such imaging, Dr. Lokken was unable to conclusively determine whether Dantae has structural damage. However, regardless of definitive neurological injury, Dantae is exhibiting organic brain dysfunction based on the results of sensitive and specific neuropsychological tests known to identify true cognitive impairment. Note that even in cases where there is no evidence in the historical data, data on physical examination or on MRI of the brain, it is presumed that defective executive function cognitions and behaviors arise from an organic cause. Philip David Zelazo, Annual Review of Clinical Psychology Executive Function and Psychopathology: A Neurodevelopmental Perspective, 16 Annu. Rev. Clin. Psychol. 431 (2020). It is generally accepted within the field of neuropsychology that existing technologies are insufficient in fully detecting abnormalities of biochemical function and/or cortical circuitry, and therefore often do not correspond with clinical findings. See JM Tillema & I. Pirko, Neuroradiological Evaluation of Demyelinating Disease, 6 Therapeutic Adv. Neurol. Disord. 249 (2013); Vanessa C Rausa, Jesse Shapiro, Marc L Seal, Gavin A Davis, Vicki Anderson, Franz E Babl, Ryan Veal, Georgia Parkin,

Nicholas P Ryan, Michael Takagim, Neuroimaging in paediatric mild traumatic brain injury: a systematic review, 118 Neuroscience & Biobehavioral Rev. 643 (2020)

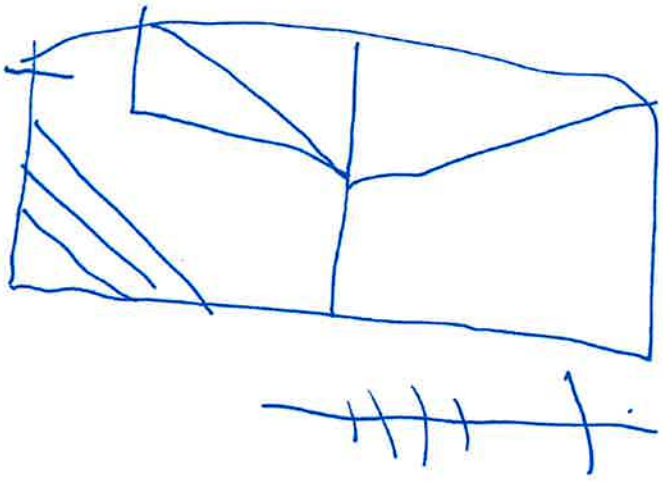
46. Dr. Lokken evaluates a person's performance on a number of tests specifically designed to determine if and to what extent a person suffers from organic brain damage and/or dysfunction. These tests are widely recognized in the field of neuropsychology as the standard battery of evaluations, and include aptitude, achievement, and domain specific specialized tests. Dr. Lokken administered a comprehensive series of such tests on Dantae: Brief Cognitive Status Exam Subtest of the Wechsler Memory Scale-Fourth Edition Adult Battery ("WMS-IV"); Wechsler Adult Intelligence Scale-IV ("WAIS-IV"); California Verbal Learning Test-II ("CVLT-II"), Standard Form; Rey Complex Figure Test ("CFT"); Controlled Oral Word Association Test ("COWAT"); Animal Fluency; Trailmaking Test A & B; Wisconsin Card Sorting Test ("WCST"); Neuropsychological Assessment Battery ("NAB") Judgment Subtest; Beck Depression Inventory-II ("BDI-II").

47. Dr. Lokken would have explained to the jury that Dantae's performance on these assessments reveal that Dantae has profoundly impaired executive function, consistent with what is typically seen in patients with organic brain damage to the frontal lobe. For example, Dantae's performance on the Rey Complex Figure Test demonstrates the severity of Dantae's brain dysfunction. The Rey Complex Figure Test copy is commonly used to assess a patient's ability to engage in visual planning and organization, visuospatial perception, and spatial orientation. This assessment requires an individual to reconstruct an image of the figure demonstrated below.

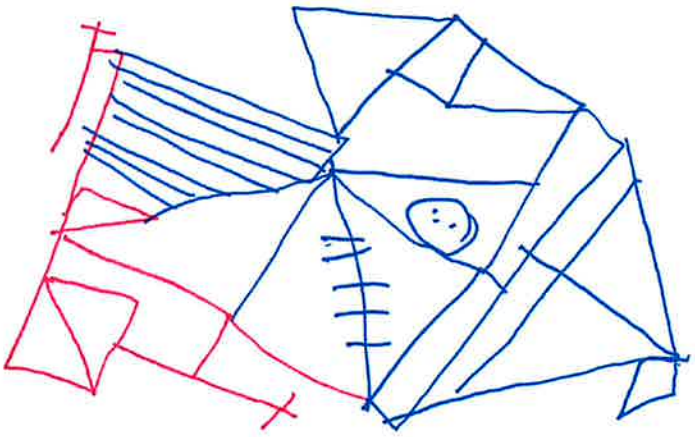
Original Image



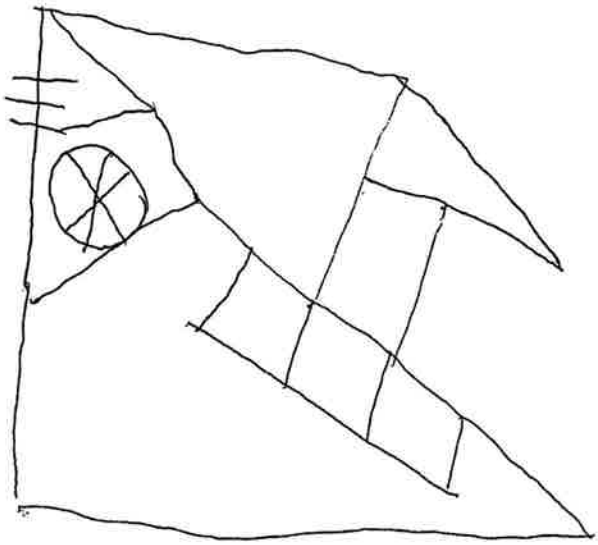
Dantae's Immediate Recall (3 minutes), Oct. 6, 2021

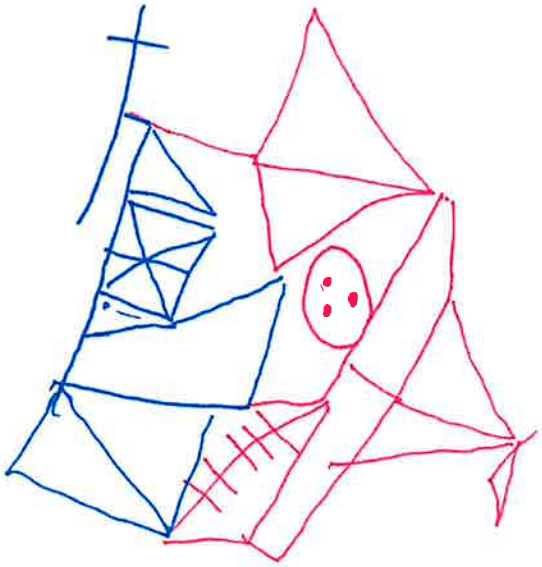


Dantae's Copy Attempt, Oct. 6, 2021



Dantae's Immediate Recall (3 minutes), Dec. 7, 2021 **Dantae's Copy Attempt, Dec. 7, 2021**





48. Dr. Lokken would have explained that most people, especially neurologically healthy young adults, will reconstruct the image successfully and in some logical order. Dantae's process, however, was haphazard and resulted in nearly unrecognizable comparisons to the original figure. Specifically, Dantae's overall copies of the Rey Complex Figure reflect a piece-meal approach without appreciation of the whole of the figure. Additionally, his drawings of the figure reflected poor visual perception, a disorganized approach, poor attention to detail, perseverations, and general inaccuracies. His score on this measure was not reflective of rushed performance, as he was mildly slowed (6-10th percentile, *Low Average* range) in his time to copy. Dr. Lokken would have explained to the jury that she typically only sees this level of performance in patients with moderate to severe dementia.

49. In addition, Dantae scored as *Profoundly Impaired* on the Trailmaking Test, Part B. This test is generally considered a test of executive function, as it requires cognitive flexibility to complete the task. On Trailmaking Test B, the examinee is asked to consecutively connect numbered and lettered circles by alternating between the two sequences. The task is timed, and

performance is scored by the amount of time required to finish the task and the number of errors made. Dantae's performance on Trailmaking Test B was *Profoundly Impaired*. The task had to be discontinued due to multiple impulsive errors and Dantae's inability to complete the task.

50. Dantae's performance on the WAIS-IV also demonstrates his profound executive dysfunction. As discussed in Section I.D.1.below, this test reveals that Dantae's current overall general intellectual function is in the *Below Average* range of ability (Full Scale IQ=71, 3rd percentile). Dantae's performances on aptitude tests that are generally unaffected by developmental neurocognitive syndromes were in the *Average* range of ability (*e.g.*, Basic Attention and aspects of Working Memory); however, his performances on aptitude tests that are more reliant on EF and require higher order cognitive function, were compromised, falling in the range of *Borderline Impaired* to *Below Average.* In sum, when taken together, Dantae's pattern of scores on the WAIS-IV make "neurological sense" and is consistent with organic brain dysfunction.

51. Finally, Dantae also scored as *Profoundly Impaired* on the Wisconsin Card Sorting Test. This test is also considered a test of executive function and is generally described as a problem-solving task designed to measure the ability to maintain and shift mental set in response to feedback. It consists of two sets of 64 cards on which different objects (square, star, circle, plus) are depicted. The objects vary in terms of color and number on each card. The examinee's task is to sort the cards into specified categories (*i.e.*, according to color, number, shape). Correctly sorting cards into the specified categories is reinforced by the examiner (*i.e.*, "that is correct") and incorrectly sorting cards is deterred by the examiner (*i.e.*, "that is incorrect"). Dantae failed to respond to feedback provided by the examiner, but instead continued to match the cards the same incorrect way over and over again, while seemingly unconcerned by his poor performance. Based

on what is known of the development of executive function in children, most 3-year-olds tend to perseverate and fail to respond to administrator feedback in testing situations, exhibiting a pattern of inflexibility similar to that seen in patients with prefrontal cortical damage. By 5 years of age, most children switch when instructed to do so. See Zelazo. In other words, Dantae's performance on this neurological test is what would be expected from a ***child who is 3 to 5 years old.*** Dantae's results on this test are therefore consistent with an adult patient with prefrontal cortical damage.

52. Dr. Lokken would have explained that not only did Dantae perform well on embedded measures of effort, but also that it seemed Dantae was trying his hardest and would solicit and respond well to any positive feedback during the evaluation. Dantae also appeared unphased that his test results consistently fell below the 1st percentile as compared to similarly-situated individuals. Normally, individuals will exhibit frustration in response to poor performances on executive function tests. Dantae did not get frustrated. This further demonstrates Dantae's impaired functioning, because he did not recognize or appreciate his cognitive deficits (*i.e.*, anosognosia or lack of awareness of disability).

53. Dr. Lokken would have explained that Dantae's pattern of performance on neuropsychological tests is consistent with a "neurodevelopmental syndrome." In other words, his test performances indicate Dantae likely suffered an unreported serious traumatic incident or multiple significant disruptions in neurodevelopment very early in his life, likely in-utero or within the first few years of being born. Dr. Lokken would have also explained that multiple discrete factors or occurrences, commonly referred to as "neurodevelopmental insults," punctuated Dantae's development and led to or exacerbated Dantae's severe brain dysfunction. Each neurodevelopmental insult likely caused further damage, resulting in Dantae's "profoundly impaired" executive function.

54. Dr. Lokken would have explained that at least the following known "insults" during Dantae's childhood and adolescence likely contributed to Dantae's severe organic brain dysfunction: a history of physical trauma, including to the head and face; a history of alcohol abuse; a history of narcotic use, and a history of childhood trauma, abuse, and neglect. Notably, many of these are the same "red flags" that ***required*** Trial Counsel to investigate whether Dantae has organic brain damage, but that Trial Counsel ignored. These red flags are explained further in Section I.B.2 below.

55. Cognitive development occurs throughout childhood and into early adulthood. Dr. Lokken would have explained that according to current scientific consensus, the brain does not fully develop until age 25. Studies show that developmental processes undergo periods of increased neural sensitivity to specific environmental stimuli. In other words, at certain ages, human brains are particularly sensitive to any neurodevelopmental insults. Studies show that executive function development also undergoes such "sensitive periods." See Abigail Thompson and Nikolaus Steinbeis, "Sensitive Periods in Executive Function Development," 36 Current Opinion in Behavioral Sciences 98, 98 (2020). Dr. Lokken further would have explained to the jury that the first 6 months after birth and early to late adolescence are particularly important times for executive function development. See also id. at 102. Any neurodevelopmental insults experienced during these times therefore would have been particularly harmful to executive function development.

56. Importantly, Dr. Lokken would have testified that Dantae's severe organic brain dysfunction is consistent with an individual who has organic brain damage to the frontal lobe. The frontal lobe is associated with executive function, which in turn are responsible for a significant amount of our judgment and behavior. Executive functions are the "cognitive processes . . . that

integrate ideas, thoughts, movements, and actions during complex situations that require solving problems or inhibiting inappropriate responses." Ana Rita Cruz, Andreia de Castro-Rodrigues, and Fernando Barbarosa, "Executive Dysfunction, Violence and Aggression," 51 Aggression & Violent Behavior 1, 1–2 (2020).

57. Dr. Lokken would have explained that executive function allow us to regulate our emotions, assess risk, think ahead, make decisions, solve problems, exercise judgment, adapt to new and changing situations, and evaluate our behavior. Those with executive function deficits have severe difficulties with these functions and generally exhibit impairment in such behaviors and cognitions. This is in part because executive function allow us to properly weigh short term rewards versus long term consequences. Dr. Lokken would have explained that the inability to regulate emotions and weigh the consequences of one's actions can result in impulsivity. Results of Dantae's neuropsychological evaluation with Dr. Lokken indicated that he has profoundly impaired problem solving, judgment, planning, and cognitive flexibility.

58. Most importantly, Dr. Lokken would have explained the scientific research regarding the connection between executive function and aggression—specifically that deficits in executive functioning are a risk factor for committing violent crimes. In other words, Dr. Lokken would have explained to the jury how Dantae's impaired executive function likely resulted in diminished impulse control, heightened aggression, and the inability to modify behavior in response to environmental changes. This is critical mitigation evidence that would have helped the jury assess whether Dantae's culpability rose to the level of being sentenced to death, and had they heard it, there is a reasonable probability that Dantae's case would have resulted in a different outcome.

2. Multiple Red Flags Put Trial Counsel On Notice To Investigate Potential Organic Brain Damage

59. Trial Counsel ignored numerous red flags in Dantae's personal and medical history that, taken either individually, cumulatively, or in any combination, obligated Trial Counsel to investigate whether Dantae has organic brain damage. See Jefferson v. GDCP Warden, 941 F.3d 452, 456 (11th Cir. 2019) (holding counsel was deficient when they "ignore[d] a series of red flags that suggested that [the defendant's] aberrant behavior was the result of organic brain damage"); Rompilla, 545 U.S. at 376 (additional records found by post-conviction counsel contained "red flags pointing up [sic] a need for further testing, which revealed organic brain damage").

60. Trial Counsel ignored at least the following red flags: a car accident; a history of physical abuse and injuries; headaches, blackouts, and hallucinations; alcohol abuse, and childhood abuse, trauma, and neglect. These red flags triggered Trial Counsel's duty to investigate whether Dantae has organic brain damage.

61. ***Car Accident.*** When Dantae was 16 years old, he was in a head-on car collision while sitting unrestrained in the vehicle. Trial Counsel knew Dantae was in this car accident because Dantae's Grandmother and Christian Pegues (Dantae's Mother) explicitly told Trial Counsel's mitigation investigator, Ms. Sirena Saunders, about the car accident during interviews. Specifically, Dantae's Mother told Ms. Saunders that Dantae required chiropractic care after the accident. Post-conviction counsel have obtained a complete copy of Trial Counsel's files, which contain these witness interview summaries. These documents unequivocally state that Dantae was in a car accident, and that Dantae's Grandmother's car was totaled in that accident.

62. The Eleventh Circuit, among others, recognizes that a car accident is a red flag warranting further investigation into whether a defendant has organic brain damage. For example, in Jefferson, the defendant had been in a severe car accident and suffered from headaches and

blackout spells thereafter. 941 F.3d at 467 (further noting that severity of head injury need not be demonstrated by, *e.g.*, skull fracture); Ferrell v. Hall, 640 F.3d 1199, 1229 (11th Cir. 2011) (car accident followed by headaches a red flag warranting further investigation by trial counsel).

63. Trial Counsel's failure to investigate additional information surrounding this car accident was therefore deficient. Trial Counsel did not obtain, nor did they make adequate attempts to obtain,[8] Dantae's medical records, including those regarding Dantae's car accident. Trial Counsel therefore could not have known whether Dantae had lost consciousness, sustained any injuries, or how this could have affected Dantae's ability to make judgment calls. Had Trial Counsel conducted even a bare minimum inquiry by obtaining Dantae's medical records for this accident or even asking Dantae's friends and family about it, Trial Counsel would have uncovered further red flags that they needed to investigate whether Dantae has organic brain damage.

64. Dantae's medical records, which Trial Counsel failed to obtain, further include records from UAB Children's Hospital, which document when Dantae presented at the emergency room immediately after this car accident. They further explain that Dantae was unrestrained in the back seat of the vehicle when a van traveling on the highway struck the car head-on. Further, had Trial Counsel asked Dantae's family and friends about the accident, Dantae's Grandmother and Dantae's Brother would have informed Trial Counsel that they recalled Dantae suffered injuries, including to his head and back. Dantae's high school girlfriend[9] would have told Trial Counsel that Dantae complained about headaches following the car accident. See Jefferson, 941 F.3d at 456 (defendant experienced headaches and blackouts following car accident triggering a need to investigate organic brain damage). Trial Counsel also would have learned from Dantae's

[8] Post-conviction counsel has a complete copy of Trial Counsel's files, and they do not contain Dantae's medical records. Moreover, post-conviction counsel easily obtained these records, indicating Trial Counsel failed to make even minimal attempts to obtain these records.
[9] Jasmine Colvin.

Grandmother that Dantae was so badly shaken by the accident that he ran from the car to a strip of grass on the side of the highway and began to cry hysterically. Trial Counsel chose to ignore this red flag.

65. ***History of Physical Abuse / Injuries.*** Dantae has a history of physical abuse and injuries, including signs of head trauma. See Ferrell, 640 F.3d at 1220, 1228 (history of head injury a red flag that should have prompted neuropsychological testing); Jefferson, 941 F.3d at 467 (severity of a head injury need not be demonstrated by, *e.g.*, skull fracture). Trial Counsel knew about Dantae's physical abuse and injuries through multiple sources. First, Dantae himself told Dr. Meredith that he suffered a "head injury when young." This is documented in Dr. Meredith's written evaluation, which was included amongst Trial Counsel's files disclosed to post-conviction counsel. Had Trial Counsel asked Dantae's Mother, she would have further informed Trial Counsel that when Dantae was an infant, she fell down an entire flight of stairs while she was holding Dantae in her arms. Trial Counsel chose to ignore this red flag.

66. Second, Dantae's family and friends told Ms. Saunders that Dantae suffered from multiple severe physical beatings by his family members. For example, Trial Counsel knew Dantae suffered a severe beating while living with Quortes (one of the victims) and Dantae's maternal uncle.[10] A family friend[11] also told Ms. Saunders that Dantae's maternal uncle seriously injured Dantae after Dantae discovered and shared nude photographs of the uncle's girlfriend. Specifically, Dantae's face was "all swollen." A neighbor[12] corroborated this account, including the severity of Dantae's injuries, in an interview with Ms. Saunders. Trial Counsel also would have discovered from Collins[13] that Dantae suffered two black eyes from the incident. Had Trial

[10] Charles Brown
[11] Gertrude Thomas
[12] Angela Allen
[13] John Collins, Dantae's mother's ex-boyfriend who Dantae lived with until nearly age 11.

Counsel asked Dantae about his head injuries, Dantae would have explained that he was beaten so badly his nose was damaged and he thought he had broken his jaw. The DHR records also document an incident where Dantae's Legal Father hit Dantae with a golf club, resulting in injuries to Dantae's leg further evidencing the physical violence Dantae experienced at the hands of family. Trial Counsel chose to ignore this red flag.

67. ***Headaches / Blackouts / Hallucinations.*** Dantae also suffered from headaches, blackouts, and hallucinations, which are yet more red flags that required Trial Counsel to investigate organic brain damage. See Ferrell, 640 F.3d at 1215 (trial counsel ineffective for failing to investigate organic brain damage despite evidence that defendant had history of blackouts, visions, and heard voices); Jefferson, 941 F.3d at 456. Trial Counsel had ample evidence demonstrating Dantae's history of blackouts and hallucinations. Dantae himself explained to Dr. Meredith (C. 603) and Ms. Saunders (memorialized in her Mitigation Notebook located in Trial Counsel's files), that he "blacked out" prior to and during the incident.[14] Ms. Saunders' Mitigation Notebook also contains evidence that shortly before the incident, Dantae told Dantae's Grandmother that he did not feel "right in the head" and that he was "hearing things." Finally, Dantae's Brother described a possible tactile hallucination to Ms. Saunders. Dantae had once screamed for his brother, but his brother could not hear Dantae because "something was holding him down." Dantae's Brother told Ms. Saunders that Dantae insisted this was not a dream.

68. Moreover, as explained further in Section I.C. below, had Trial Counsel not been deficient in failing to obtain Dantae's readily-available medical records, they would have further learned from multiple sets of medical records that Dantae went to the emergency room complaining of neck pain and/or headaches on at least four separate occasions: (1) on October 8,

[14] Dr. Meredith characterized these episodes in his report as "periods in which [Dantae] lost time."

2002, as seen in the UAB Children's Hospital records; (2) on September 1, 2003, as seen in the UAB Children's Hospital records; (3) on December 10, 2003, as seen in the Jefferson County Department of Health records; and (4) on August 7, 2010, as seen in the UAB Medical records. Specifically, the Jefferson County Department of Health records show that Dantae presented at the hospital after suffering serious frontal headaches for three days. Dantae was accordingly diagnosed with "headache syndromes." Trial Counsel chose to ignore this red flag.

69. Had Trial Counsel conducted a proper investigation by hiring and presenting a neuropsychologist like Dr. Lokken, Dr. Lokken would have explained that severe or repeated head trauma can cause organic brain damage and organic brain dysfunction. Dr. Lokken believes, and would have explained, that Dantae's organic brain dysfunction likely resulted from early trauma, compounded by repeated "neurodevelopmental insults" thereafter. Although the record does not indicate what this early traumatic brain insult might have been, the record does contain evidence of several subsequent insults Dantae suffered. The red flags—his mother falling down a flight of stairs with him as a baby; the car accident; multiple beatings, including at least one to his face and head; and history of headaches—all could have been additional "neurological insults" that each subsequently impaired Dantae's brain function. Dr. Lokken would have explained this to the jury.

70. Dr. Lokken further would have pointed out that Dantae's history of blackouts and hallucinations, evidence of psychiatric dysfunction, are additional contributing factors to Dantae's neuropsychological presentation. In other words, Dantae's psychiatric symptoms and neurocognitive deficits are inextricably linked. Dantae's psychiatric status can impact how Dantae's organic brain dysfunction manifests. In sum, Dr. Lokken's expert opinion is, and she would have explained to the jury, that Dantae's repeated traumas constituted individual "insults" that punctuated Dantae's development. In combination with other "insults" Dantae suffered, each

subsequent head trauma caused further damage until Dantae became "profoundly impaired." Simply put, Dantae did not suffer one single devastating physical blow to the head that resulted in organic brain dysfunction and likely organic brain damage. Rather, it seems Dantae suffered multiple, lesser blows that over time had a similar, cumulative effect.

71. ***Alcohol Abuse.*** At the Atkins hearing, Dr. Meredith testified that, "from the time that he [Dantae] was 15 or 16 years old, he drank significant amounts of alcohol every night." (R. 64). Trial Counsel's interviews with Dantae's family and friends are replete with evidence of Dantae's and his family's alcohol abuse. Both excessive drinking and a family history of alcoholism are red flags that should have prompted Trial Counsel to pursue an investigation into organic brain damage. In State v. Gamble, 63 So. 3d 707 (Ala. Crim. App. 2010), the court found counsel ineffective for failing to obtain records showing that the defendant suffered from organic brain damage as a result of "heavy alcohol consumption." Id. at 720. Not only does this case demonstrate the need to investigate records (as Trial Counsel failed to do here), but it shows the legally-recognized link between alcohol consumption and organic brain damage.

72. Moreover, a neighbor[15] told Ms. Saunders that Dantae and Quortes (one of the victims) would drink beer and Four Loko "all of the time." The neighbor also believes that Dantae drank even before he started spending time with Quortes. A second neighbor[16] also told Ms. Saunders that he often saw Quortes and Dantae drinking. Quortes' excessive drinking habits was further corroborated by a third neighbor.[17] Collins[18] also explained to Ms. Saunders that Quortes was a "bad influence" on Dantae and would "make" Dantae drink even when he did not want to. Both Dantae's Brother and Dantae's Sister corroborated these accounts of Quortes. They explained

[15] Jerrell Williams
[16] Raymond Thomas
[17] Kim Williams
[18] John Collins, Dantae's mother's ex-boyfriend who Dantae lived with until nearly age 11.

that on at least one occasion they know of Quortes kept waking Dantae up and pressuring Dantae to drink with him. This information was available to Trial Counsel in Ms. Saunders' Mitigation Notebook, but never presented at trial. Had Trial Counsel investigated the severity of Dantae's drinking, they would have discovered that one night not long before the offense, Collins found Dantae throwing up all over himself after having drunk excessive amounts of alcohol with Quortes. Collins further suspected Dantae's drinking began at an earlier age.

73. Trial Counsel's records are also teeming with evidence that Quortes was an alcoholic. For example the following information was found in interview summaries in Ms. Saunders Mitigation Notebook: (1) a neighbor[19] explained that if Quortes did not get his alcohol, "he would go into a rage": (2) Dantae's Grandmother stated Quortes was an alcoholic; and (3) Dantae's Brother explained Quortes would drink "up to 24 beers a day." Indeed, at the time of the incident, Quortes's blood alcohol content was .22, or nearly three times the legal limit to drive. (R. 597). Quortes's excessive alcohol consumption is not surprising given the evidence of alcoholism in the family—evidence that was available to post-conviction counsel from Trial Counsel's own records. To provide a small slice: Dantae's Brother told Ms. Saunders that Dantae's grandfather was an alcoholic. Dr. Ronald Bray, a counselor who assessed Dantae's immediate family, also wrote in an assessment of Dantae's Mother that Dantae's grandfather was an alcoholic. (C. 1051). Trial Counsel chose to ignore these red flags.

74. Had Trial Counsel conducted a proper investigation by hiring and presenting a neuropsychologist like Dr. Lokken, the jury would have heard expert testimony regarding the impact of alcohol consumption on brain development, particularly in adolescents. Dr. Lokken would have explained that alcohol is a powerful neurotoxin. Although it is difficult to precisely

[19] Angela Allen

quantify how much alcohol is sufficient to damage the developing brain of an adolescent, daily or near-daily drinking of several cans of beer and Four Loko for a period of at least two years would likely be sufficient to constitute a sustained neurodevelopmental insult. Dr. Lokken also would have explained that various studies strongly suggest that alcohol abuse may alter not only the physical brain structure of adolescents, but also physiologic brain functioning. For example, one study explains that exposure to alcohol and drugs in the context of ongoing neuromaturational processes can permanently alter brain function by interrupting the natural course of brain maturation and key processes of brain development. L.M. Squeglia, J. Jacobus, & S.F. Tapert, The Influence Of Substance Use On Adolescent Brain Development, 40 Clin. EEG Neurosci. 31 (2009). Other studies involving MRI imaging indicate that youths with heavy alcohol use have abnormalities in the hippocampus and brain white matter, compared to youths who do not drink. But even "subtle alterations could lead to disturbances in brain function that may have a long-lasting influence on subsequent performance of thinking and memory tasks." Susan F. Tapert, Lisa Caldwell, & Christina Burke, Alcohol and the Adolescent Brain (Alcohol Research & Health 2004) at 208. In terms of physiologic brain functioning, studies observed adolescents with heavy alcohol use expressed "delayed neural response during information processing" and "reduced brain response in key regions" of the brain involving working memory. Id. at 211.

75. Dr. Lokken further would have explained that the impact of a neurotoxin like alcohol could be more pronounced in an undernourished adolescent of low body weight. Alcohol consumption impacts the body's ability to absorb nutrients and therefore depletes the body of these critical nutrients. The combination of excessive alcohol consumption with preexisting malnutrition could have a synergistic, devastating effect on the developing brain. Dr. Lokken therefore would have explained to the jury the possible neurodevelopmental impacts of Dantae's frequent, chronic,

and excessive alcohol consumption over a prolonged period of time. This ongoing insult, in conjunction with the other "insults" in Dantae's life, likely contributed to his severe organic brain dysfunction.

76. ***Childhood Abuse / Trauma / Neglect.*** Last, but definitely not least, Trial Counsel had 914 pages of records that detailed Dantae's significant history of childhood abuse, trauma, and neglect, including that Dantae was undernourished. Dantae lived in extreme poverty, impacting the environment he grew up in, the foods he ate, and the toxins to which he was exposed. Not only did Trial Counsel know that Dantae grew up in some of the most impoverished, neglected, and dangerous neighborhoods in Alabama, Trial Counsel had first-hand accounts of Dantae's undernourishment. For example, Dantae's Grandmother explained in interviews with Ms. Saunders that Dantae never had enough food and would always complain to her that he was hungry. In some of the many homes in which Dantae stayed, Dantae did not have ***any*** food. She further described how Dantae's Legal Father would use food stamps meant to feed Dantae and Dantae's Brother to throw neighborhood barbecues, leaving nothing for the boys.

77. The DHR records Trial Counsel obtained evidence Dantae's malnutrition. Below are just two examples of documented evidence by DHR that Dantae was undernourished and experienced severe childhood neglect:

Reporter stated mother sells foodstamps for beer and cigerettes. Mother works, and when she gets off work, she does not come home. Children are left with maternal aunt and grandmother. Children tells reporter they are hungry a lot. Children stated they have to sleep on the floor while their mother sleep on the couch. Mother and children lived with aunt and grandmother. Reporter stated he is a concerned neighbor, because the children are often calling their home asking for food. (C. 993).

Billing Name: DANTAE CALLEN Billing # : 000-422-39-5782-2

COMMENTS:

PER ISP DATED 7/30/04, THE HOUSEHOLD IS IN DESPERATE NEED OF FOOD IN ORDER TO PREVENT DISRUPTION OF PLACEMENT. (C. 1383).

78. The lack of proper nutrition, potential exposure to environmental toxins, and other signs of extreme neglect, particularly in combination with other factors such as physical trauma and alcohol abuse, should have prompted Trial Counsel to investigate whether Dantae has organic brain damage. See Caro v. Calderon, 165 F.3d 1223, 1226–27 (9th Cir. 1999) (court remanded for evidentiary hearing when, among other things, trial counsel failed to further investigate defendants' exposure to environmental toxins, noting expert declarations that "no evaluation of [the defendant's] mental capacities is complete without information concerning [the defendant's] exposure to neurotoxicants"). Trial Counsel chose to ignore these red flags.

79. Had Trial Counsel conducted a proper investigation by hiring and presenting a neuropsychologist like Dr. Lokken, Dr. Lokken would have explained that prolonged malnutrition in developing children profoundly impacts brain development. Systematic review and meta-analysis found that malnutrition was associated with poor cognitive development. See Damiano Pizzol, Florina Tudor, Vincenzo Racalbuto, Alessandro Bertoldo, Nicola Veronese, & Lee Smith, Systematic Review And Meta-Analysis Found That Malnutrition Was Associated With Poor Cognitive Development, 110 Acta Paediatr 2704 (2021). In addition, common findings across studies show the long-term effects of childhood malnutrition, such as reduced intellectual capabilities, poor academic performance, attentional deficits, and poor executive control. See Janina R Galler, et al, Neurodevelopmental effects of childhood malnutrition: A neuroimaging perspective, 231 NeuroImage (2021). Without sufficient nutrients, the brain cannot properly develop. Malnutrition in children results from inadequate food supply caused by household food insecurity, poverty, hygiene, poor quality drinking water, and a number of factors related to pregnancy and early childhood, such as poor nutrition in pregnant women, poor breastfeeding, and other early childhood inadequacies. See Valeria Dipasqaule, Ugo Cucinotta, & Claudio Romano,

Acute Malnutrition in Children: Pathophysiology, Clinical Effects and Treatment, 12 Nutrients 1, 1 (2020). Dr. Lokken would have explained the impact of prolonged malnutrition on Dantae's brain, including that it was an ongoing "neurodevelopmental insult" that further compounded Dantae's executive function deficits.

80. Had Trial Counsel obtained Dantae's medical records, they also would have been aware of Dantae's significant and chronic dental issues, which is also corroborated by DHR records. As explained in Section I.C below, on multiple occasions, Dantae presented to the doctor with jaw and tooth pain. Dantae had multiple teeth extracted and was prescribed powerful narcotics after each operation. Not only would such pronounced dental issues likely have resulted in infection, but the amount of pain Dantae likely suffered would have impacted his ability to eat, worsening his already poor nutrient intake. Dr. Lokken would have explained the impact of Dantae's poor dental health on the developing brain. Studies show that there is a direct link between teeth and gum health to brain health, with the potential for an oral infection to spread to the brain via blood ("hematogenic spread"). In fact, it is well documented that dental infections can cause brain abscesses and the like. Therefore, Dantae's extremely poor dental hygiene and history of serious dental issues, including likely infections, could have potentially impacted his developing brain.

81. Further, toxins, such as lead, have deleterious impacts on overall health, including brain development. This is why many states mandate lead testing in children. Dantae's life in the projects likely resulted in exposure to a number of environmental toxins, such as pesticides, pest control methods such as rat poison, low quality drinking water, asbestos, and a number of other harmful substances. Dr. Lokken would have explained these environmental risk factors to a jury and their impact on the developing brain.

82. ***Affect / Presentation.*** A defendant's peculiar and abnormal affect and presentation is a red flag requiring further investigation into organic brain damage. See Ferrell, 640 F.3d at 1227 (the "record reveal[ed] numerous, obvious indicators that should have led counsel to pursue a more comprehensive mental health investigation," including the defendant's affect); Baxter v. Thomas, 45 F.3d 1501, 1513–14 (11th Cir. 1995) (trial counsel "on notice of potential psychiatric problems" when defendant behaves "oddly"). As Mr. Thrasher himself explained on a national true-crime television show "From the first day [he] met Dantae . . . His affect was flat. And, in fact, the first time the judge ever saw him, she asked me what was wrong."[20] This required Trial Counsel to investigate potential brain damage.

83. Trial Counsel's and the judge's perception that something was off with Dantae was further shared by Dr. Karen Salekin, a clinical psychologist retained by post-conviction counsel. Dr. Salekin would testify at a post-conviction hearing that she also immediately knew something was wrong with Dantae. She suspected that Dantae may have potential brain damage, an assessment that Dr. Meredith had also made to Trial Counsel. Dr. Lokken would have explained to the jury how Dantae's affect and presentation indicate he suffers from organic brain dysfunction. For example, Dantae exhibits severe perseveration—the continual, involuntary repetition of a thought or behavior. In other words, Dantae would become fixated on a thought or action and be incapable of moving past that thought or action.

84. Trial Counsel was also subjectively aware of the importance of a neuropsychologist for mitigation. Trial Counsel's files contained an article that explicitly discusses the importance of a neuropsychological exam to mitigation:

[20] After the First 48, https://www.aetv.com/shows/after-the-first-48/season-5/episode-4.

> It is imperative that anyone working with the capital defendant become aware of the commonalities of this unique population, as some of the characteristics they share include developmental risk factors for violence. For example, research suggests that defendants on death row often suffer from poor intelligence (IQ's around 80 indicating borderline range of intelligence); low commitment to school and poor academic success; neurological injury and organic brain impairment; history of attention deficit hyperactivity disorder ADHD, psychiatric disorders, primarily schizophrenia and affective disorders; history of familial family abuse/neglect; offspring birth complications, parental substance abuse; family separation; history of substance dependence; and poor ability to represent oneself in appeal process.[21]

John Matthew Fabian, PsyD, JD, ABPP, Mitigating Murder at Capital Sentencing: An Empirical and Practical Psycho-Legal Strategy, 9 J. Forensic Psych. Practice 1, 6 (2009).

85. Specifically, this article put Trial Counsel on notice that under the prevailing standards in neuropsychology, several indicators of organic brain damage were present in Dantae's personal history, highlighted below.

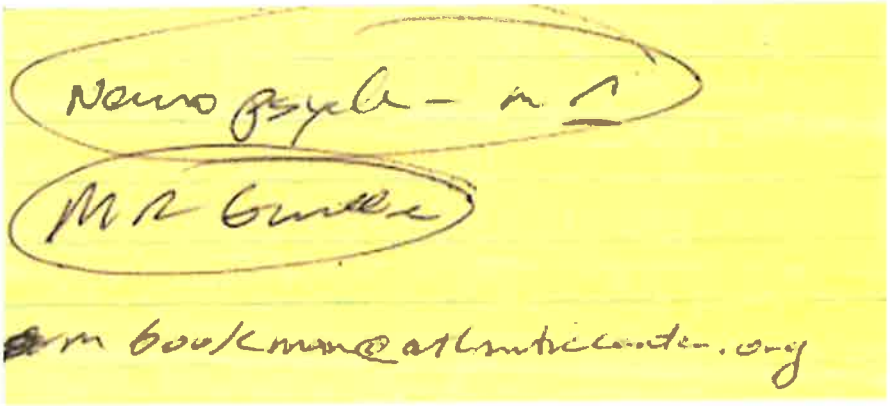
> (1) Young maternal age during pregnancy
> (2) Maternal alcohol, nicotine, and drug use and poor diet and medical care during pregnancy
> (3) Fetal maldevelopment, minor physical abnormalities, fetal alcohol syndrome
> (4) Pregnancy and birth complications
> (5) Domestic violence to mother during pregnancy
> (6) Poor offspring nutrition and medical care
> (7) Large family size
> (8) Exposure to parental physical abuse and emotional neglect
> (9) Exposure to deplorable home conditions
> (10) Exposure to toxins, lead, parasites, infection
> (11) Poor socioeconomic conditions and deficient parental and offspring education
> (12) Substance abuse and dependence history; brain dysfunction is more common among substance users. Substance abusers are more likely to have preexisting neurological conditions and deal with conditions by use of substances.

Id. at 14.

86. Even more revealing of Trial Counsel's deficiency is that Mr. Fabian, the author of this article, explicitly informed Mr. Thrasher in an email that if Trial Counsel retained Mr. Fabian in Dantae' case, he would conduct a neuropsychological exam as part of his mitigation investigation. Trial Counsel did not retain Mr. Fabian, nor any other neuropsychological expert.

87. Second, Dr. Meredith, the clinical psychologist Trial Counsel retained during Dantae's trial, noted several times in his written evaluation provided to Trial Counsel that Dantae may have organic brain damage. On page 22, Dr. Meredith wrote that Dantae, "evidenced some indication of neurological issues." On page 23, Dr. Meredith noted that some of Dantae's test results, "suggest that he may have minimal brain impairment associated with prefrontal 'Executive Functioning' capabilities." On page 34, Dr. Meredith expressly stated that some of Dantae's test results are often seen in individuals "who suffer from organic brain dysfunction." Dr. Meredith's evaluation required Trial Counsel to investigate further. See Jefferson, 941 F.3d at 456 (retained psychologist recommended neuropsychological evaluation of defendant based on red flags in testing and personal and medical history).

88. Third, and most revealing of Trial Counsel's known deficiency is that Trial Counsel's files contained their own handwritten notes with "Neuropsych" circled. Not only did Dantae's red flags trigger the need to investigate under Supreme Court and Alabama precedent, but Trial Counsel knew they needed to obtain a neuropsychological exam. Inexplicably, Trial Counsel did not.



* * * * *

89. Car accident; history of physical—including head—trauma; headaches, hallucinations, and blackouts; alcohol abuse; neglect, malnutrition, toxins, and other

environmental factors; Dantae's affect and presentation—these are the very sort of red flags that the Supreme Court and Eleventh Circuit have held puts counsel on notice that they need to conduct further investigation in order to render constitutionally effective representation. And as Trial Counsel's own notes reveal, Trial Counsel knew they needed to obtain a neuropsychological exam, but failed to do so. See, e.g., Wiggins, 539 U.S. at 525 ("[A]ny reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses."); id. ("The scope of their investigation was also unreasonable in light of what counsel actually discovered" in their investigation); see also Baxter, 45 F.3d at 1504, 1512 (reversing and remanding sentence due to trial counsel's ineffective assistance by failing to investigate psychiatric background despite red flags). And as Dr. Lokken would have explained to the jury, there is scientific evidence underpinning each of these red flags.

3. Trial Counsel's Failure to Investigate Potential Brain Damage was Objectively Unreasonable and Highly Prejudicial.

90. Trial Counsel's failure to investigate whether Dantae has potential brain damage was objectively unreasonable and prejudiced Dantae during the penalty phase of his capital murder trial under Supreme Court, Eleventh Circuit, and Alabama precedent, as explained below. In assessing whether Dantae was prejudiced by Trial Counsel's failure to investigate organic brain damage and/or dysfunction, the question is not whether Trial Counsel presented some mitigation evidence, but whether "the entire postconviction records, viewed as a whole and cumulative mitigation evidence presented originally, raised a reasonable probability that the result of the sentencing proceeding would have been different if competent counsel had presented and explained the significance of all the available evidence." Williams, 529 U.S. at 399 (citations omitted). Here, Dantae was prejudiced by Trial Counsel's failure to adequately investigate and

present evidence of Dantae's severe organic brain dysfunction, which correlates with organic brain damage to Dantae's frontal lobe and results in extremely diminished executive functions.

91. In Rompilla v. Beard, the Supreme Court noted that post-conviction counsel tested the defendant for organic brain damage, "an extreme mental disturbance significantly impairing several of his cognitive functions," that "relate[s] back to his childhood." 545 U.S. at 392. Here, post-conviction counsel hired Dr. Lokken to examine Dantae for organic brain damage and dysfunction. As discussed, Dr. Lokken found Dantae to be profoundly impaired, and had she testified, she would have further contextualized Dantae's deficits, including that his results are consistent with a level of impairment comparable to an individual who has been ***shot in the head***. Throughout Dantae's trial, neither Trial Counsel nor Dr. Meredith explained to the court or the jury that Dantae has severe organic brain dysfunction resulting in executive function falling below the 1st percentile for all similarly-situated individuals. Not once did Trial Counsel or Dr. Meredith explain that such dysfunction is consistent with organic brain damage to the frontal lobe. Not once did they explain how such severe executive function deficits result in the inability to regulate emotions, which manifests as impulsivity, difficulty managing emotions such as anger or rage, an underdeveloped or nonexistent social filter, and the inability to modify behavior in response to environmental changes. Not once did they explain that, because of these deficiencies, those with EF deficits are at greater risk for committing violent crimes.

92. The Rompilla Court explained that the powerful evidence of the defendant's organic brain damage "adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury," and that this undiscovered mitigating evidence "might well have influenced the jury's appraisal of [the defendant's] culpability." Id. at 393 (quoting Wiggins, 539 U.S. at 538.). So too here: Trial Counsel's failure to investigate and present evidence of

Dantae's organic brain dysfunction and likely organic brain damage, as just described, was prejudicial because that information might have influenced the jury's appraisal of Dantae's culpability. Simply put, as in Rompilla, the mitigation case Trial Counsel presented to the jury "bears no relation" to Dantae's actual mitigation profile, and had the jury heard such critical mitigation evidence, there is a reasonable probability that the outcome of Dantae's case would have been different.

93. In Jefferson v. GDCP Warden, post-conviction counsel presented evidence from an expert neuropsychologist and neurologist during a post-conviction hearing that the defendant suffered from brain damage which "likely manifested in an inability to control his impulses and exercise sound judgment and meaningfully set him apart from an unimpaired person." 941 F.3d at 484. Those experts also explained that the "defendant's mental impairments potentially resulted in 'transient outburst of rage' that are incongruous with [defendant's] ordinary behavior." Specifically, "[i]n evaluating prejudice," the court held that aggravating factors the prosecution argued during trial "were significantly undermined by the expert testimony that the defendant suffered from organic brain damage, which caused 'increased impulsivity, decreased sound judgment, and [] actions that are not entirely volitional." Id. at 485. This evidence was neither uncovered nor presented during the defendant's trial. As Dr. Lokken would have explained to the jury and would testify at a post-conviction hearing, Dantae's EF deficits manifest similarly to Jefferson's, including that he has increased impulsivity, decreased sound judgment, and is at increased risk for aggressive behavior. And, also as in Jefferson's case, Trial Counsel never uncovered or presented this evidence.

94. The Eleventh Circuit further stated that "[t]here is a powerful difference between someone who grew up poor and without a father and a person who grew up suffering from organic

brain damage yielding debilitating mental impairments that worsened into adulthood." Id. at 484. Sadly for Dantae, he grew up poor, without even knowing who his father is, and suffering from severe organic brain dysfunction. And as the Jefferson court held: "The new mitigation evidence . . . would have dramatically transformed the sentencing profile presented to the jury." Id. So too here does this add up to a mitigation profile profoundly at odds with what Trial Counsel presented to the jury.

95. Finally, in Ferrell, the court found that but for trial counsel's deficient performance, there is a reasonable probability that the outcome of the proceedings would have been different. Specifically, the court explained that "the evidence of Ferrell's mental illness measurably weakens the aggravating circumstances found by the jury." 640 F.3d at 1234. As experts explained to the court, the "organic brain damage to [the defendant's] frontal lobe has led to impaired insight, impaired judgment, increased impulsiveness and explosiveness, emotional and mental dysfunctions, decreased ability to plan and understand consequences, and inability to process information in stressful situations." Id. at 1235. As already discussed, Dr. Lokken would have explained how all of these characteristics apply to Dantae. The Ferrell court further held that "the mental health expert opinions would have served to reduce the volitional nature of the crime, as well as [the defendant's] ability to plan and act rationally, and as a result, undercut the senseless and cold-blooded nature of the crime as stressed by the prosecutor." Id. As in Dantae's case, Dr. Lokken, or a similar expert, would have explained to the court and the jury how Dantae's severe organic brain dysfunction impacts his ability to act rationally and control his impulses. Moreover, throughout Dantae's trial, the judge and prosecution noted the senseless nature of the killings. Similar to Ferrell, Dr. Lokken's explanation of Dantae's severe organic brain dysfunction would have "undercut the senseless" nature of the crime.

96. Trial Counsel's failure to obtain a neuropsychologist even further prejudiced Dantae, because Trial Counsel failed to adequately present evidence about the science of teenage brain development and employ the legal arguments promulgated in Roper, Graham, and Miller, to support a sentence of life without parole. Roper v. Simmons, 543 U.S. 551 (2005), Graham v. Florida, 560 U.S. 48 (2010), and Miller v. Alabama, 567 U.S. 460 (2012).

97. Roper, Graham, and Miller all stress that with youth comes distinctive attributes that undermine the penological justifications for imposing the death penalty, even when they commit terrible crimes. The Supreme Court has repeatedly emphasized that a young person's character is not as "well formed," his traits "less fixed," and his actions "less likely to be evidence of irretrievabl[e] depravity." Miller, 567 U.S. at 477 (quoting Roper, 543 U.S. at 570). Therefore, judges and juries must account for youth in juvenile sentencing. This determination that younger people bear categorically less culpability "rest[s] not only on common sense-on what 'any parent knows' – but on science and social science as well." Id. Although Trial Counsel told the jury that Dantae was "two months a man," that it was nonsensical to execute someone who could not legally drink, and that Dantae being 18 years old and two months was a "legal technicality" (R. 941), Trial Counsel's arguments were insufficient under the Supreme Court trilogy establishing the importance of presenting scientific arguments regarding a young adult's developing brain.

98. A neuropsychologist, like Dr. Lokken, would have explained that under the prevailing scientific consensus, a male brain does not fully develop until at least the age of 25—7 full years after reaching the age of legal majority. For example, the white matter tracts in the brain are forged in middle to late adolescence. In addition, "18 year olds are about halfway through" the synaptic pruning process that begins at the onset of puberty. See Brain Maturity Extends Well Beyond Teenage Years, National Public Radio, available at

https://www.npr.org/templates/story/story.php?storyid=141164708. Dr. Lokken would have elaborated that synaptic pruning is the process by which brain synapses are selectively "pruned" or eliminated from the brain. This process —which begins near the back of the cortex and finishes in the pre-frontal cortex —allows for adult level brain functioning and decision-making. Therefore, the part of the brain responsible for executive functions is also the last part of the brain to fully form.

99. As explained above, Dr. Lokken also would have testified that executive functions, which are primarily associated with the pre-frontal cortex of the frontal lobe, are responsible for a significant amount of our judgment and behavior. It allows us to regulate our emotions, assess risk, think ahead, exercise judgment, make decisions, and evaluate our behavior, among other vital processes. Because these critical developmental processes continue beyond the age of 18, there is significant opportunity for rehabilitation for an older adolescent or young adult. But a death sentence reflects "an irrevocable judgment about a person's value and place in society," at odds with a young person's capacity for change. Miller, 567 U.S. at 473 (internal quotations omitted).

100. Given the developmental trajectory of executive functions, deficits typically do not become obvious until around age 14 to 17. In other words, as children reach adolescence, they begin to "grow into" their deficits. Dr. Lokken would have explained that this is because adolescents are increasingly required to perform more complex tasks, rely on problem-solving skills, and make decisions. Individuals with executive function deficits will begin to struggle in early to late adolescence, as society begins to expect them to engage in self-monitoring behaviors, problem solving, decision making, and impulse control. Therefore, sentencing an 18-year-old to death not only ignores the ongoing developmental processes that make youth pliable and open to

rehabilitation, but it irreversibly punishes an individual for behavior resulting from an impairment they hardly understand and might not yet even know about. This is not just.

101. Dr. Lokken would have further testified that as Dantae was beginning to grow into his deficits, Dantae experienced additional "neurodevelopmental insults" as described in Section I.B.1. above. These "insults" likely hampered Dantae's development and likely further compounded Dantae's organic brain dysfunction. The effects of this perfect storm are evident in Dr. Lokken's tests, in Dantae's affect and presentation, and in the incident. This is powerful scientific evidence, and had this evidence been presented to the jury, there is a reasonable probability that the outcome of Dantae's trial would have been different. Rompilla, 545 U.S. at 393 ("It goes without saying that the undiscovered 'mitigating evidence,' taken as a whole, 'might well have influenced the jury's appraisal' of [the petitioner's] culpability, and the likelihood of a different result if the evidence had gone in it 'sufficient to undermine confidence in the outcome' actually reached at sentencing."). Failure to present it is undeniably prejudicial. Indeed, "***the most powerful explanation for an otherwise inexplicable crime – that [the defendant] suffered from organic brain damage that severely impaired his judgment and ability to control his behavior – was never presented to the jury.***" Jefferson, 941 F.3d at 467.

C. Trial Counsel Failed to Obtain Dantae's Medical Records, Which Would Have Required Further Investigation and a Medical Expert.

1. Trial Counsel Had a Duty to Obtain Medical Records But Failed to Do So.

102. The ABA Guidelines at the time of Dantae's trial explained that effective representation during a criminal trial requires that "counsel should use all appropriate avenues . . . to obtain all potentially relevant information pertaining to the client . . . including but not limited to . . . medical records." 2003 ABA Guidelines § 10.7. Here, Trial Counsel failed to obtain ***any***

medical records, including almost 300 pages of Dantae's readily-available medical records, which post-conviction counsel obtained from:

- Gateway Health Clinic;
- UAB Kirklin Clinic;
- UAB Children's Hospital;
- Jefferson County Department of Health; and
- UAB Dental Clinic

103. Based on the ABA Guidelines, standard practice, and Supreme Court precedent, Trial Counsel should have obtained Dantae's medical records. Medical records are useful in the mitigation context because the frequency and nature of visits, for example, can be indications of poverty, nonadherence to health supervision visits, sexual abuse, child abuse, or neglect.

104. Trial Counsel's failure here is even more severe considering the quantum of evidence in Trial Counsel's possession that should have triggered a need to obtain Dantae's medical records for further information. For example, in Wiggins, trial counsel's failure to investigate additional facts in light of already-discovered facts—including a failure to obtain records showing that petitioner's mother was a chronic alcoholic, that he was shuttled from foster home to foster home, and that he displayed some emotional difficulties—was deficient performance. Id.

105. Here, Trial Counsel ignored multiple red flags indicating the need to investigate and obtain Dantae's medical records, including but not limited to:

- April 27, 2004 psychological evaluation by Dr. Ronald Bray, stating Dantae is likely in the "low average range of intelligence" and recommended "an antidepressant such as Lexapro [to] help with his depression" (C. 1025-27);
- July 30, 2004 DHR Individualized Service Plan, stating "Dantae needs to be placed on medication as recommended by Ronald Bray" (C. 1113).

- February 10, 2005 record, stating Dantae was taking 15mg of Remeron daily, a prescription medication used to treat depression;
- October 16, 2008 DHR Individualized Service Plan, stating "If Dontae's behavior gets completely out of control, [Lawrence Callen] is to take him to Children's Hospital for an evaluation" (C. 1159);
- November 6, 2008 DHR Individualized Service Plan, stating Dantae suffered physical childhood abuse, specifically noting an incident where Dantae's Legal Father hit Dantae with a golf club. (C. 982);
- Interviews with Dantae's family members, Dantae's Grandmother and Dantae's Mother, revealed that Dantae had been in a car accident shortly before the offense;
- Dantae told the State's expert, Dr. King, that he had gone to the hospital when he was 17 for a fractured hand (C. 245);
- Dantae told defense expert, Dr. Meredith that he had been sexually abused as a child by a family member (C. 597);

106. In fact, Trial Counsel had obtained funding from the court to retain a mitigation expert specifically to investigate Dantae's medical records. In Trial Counsel's motion for funds, Trial Counsel told the court that they needed to retain a mitigation expert to investigate Dantae's "[m]edical history (including hospitalization, mental, physical illness or injury, alcohol and drug use, prenatal and birth trauma, malnutrition, developmental delays, and neurological damage)." (C. 254) (emphasis added). The motion also explained the need to retain Dantae's medical records, including "private physicians, clinics and hospitals." (C. 260). While Trial Counsel did obtain the funds and hired Sirena Saunders as an investigator, Trial Counsel still failed to obtain Dantae's medical records.

2. Dantae's Records Contain Significant Mitigation Evidence and Would Have Corroborated a History of Neglect and Sexual and Physical Abuse.

107. The nearly 300 pages of neglected medical records contain objective, medical evidence that corroborate Dantae suffered severe neglect and abuse during his childhood. If Trial

Counsel would have conducted an adequate investigation and obtained Dantae's medical records, they would have learned the following crucial facts about Dantae's medical history:

- April 13, 2002 (Age 9) – Diagnosed with pink eye at UAB Children's Hospital
- September 16, 2002 (Age 10) – Diagnosed with skin rash (pityriasis rosea) at Jefferson County Department of Health
- September 23, 2002 (Age 10) – Diagnosed with scabies and pityriasis rosea at UAB Children's Hospital
- October 8, 2002 (Age 10) – Emergency room visit at UAB Children's Hospital for rash and neck pain; treated for eczema
- June 18, 2003 (Age 10) – Diagnosed with urinary tract infection and urethritis by Dr. Susan Buckingham at Jefferson County Department of Health; Dr. Susan Buckingham ordered STI testing; Dantae presented with complaints of fever and vomiting
- December 10, 2003 (Age 10) – Diagnosed with allergic rhinitis and conjunctivitis at Jefferson County Department of Health; Dantae presented with complaints of headaches and vomiting
- September 1, 2003 (Age 11) – Emergency room visit at UAB Children's Hospital with complaints of headaches behind eyes/dark circles under eyes; diagnosed with conjunctivitis
- March 5, 2004 (Age 11) – Emergency tooth extraction because of reported pain in upper left posterior and significant tooth decay at UAB Children's Hospital; prescribed Children's Moltrin as needed
- April 9, 2004 (Age 11) – Gateway Health record for initial treatment plan after referral was made by Jefferson County DHR; showed Dantae was neglected as a child
- July 9, 2004 (Age 11) -- Gateway Health diagnosis for adjustment disorder with depressed mood, oppositional defiant disorder, parent-child relational problem, crowded quarters, absence of mother
- August 23, 2004 (Age 11) – Gateway Health record stating Dantae was abused and grandmother reporting dissociative behavior; prescribed 10mg of Lexapro
- October 1, 2004 (Age 12) – Gateway Health record stating Lexapro seemed to agitate Dantae and recommending 15mg Remeran

- February 2, 2009 (Age 16) – Emergency room visit at UAB Children's Hospital for injuries and pain following car accident (Dantae was unrestrained in back seat)
- February 24, 2009 (Age 16) – Emergency room visit at UAB Children's Hospital for left hand fracture (i.e., Boxer's fracture); prescribed hydrocodone and acetaminophen
- February 27, 2009 (Age 16) – Presented to UAB Children's Hospital with pain and hand swelling from left hand Boxer's fracture sustained on Feb. 23; prescribed hydrocodone and acetaminophen
- March 5, 2009 (Age 16) – Surgery for left hand fracture (i.e., Boxer's fracture) at UAB Hospital; prescribed Tylenol No. 3.
- October 22, 2009 (Age 17) – Diagnosed with tooth decay at UAB Hospital for emergency room visit for toothache; prescribed penicillin and tramadol; given instructions to quit smoking
- November 5, 2009 (Age 17) – Oral surgery at UAB School of Dentistry
- August 7, 2010 (Age 17) – Emergency room visit at UAB Hospital for upper jaw pain and dental abscess; prescribed acetaminophen-oxycodone (Percocet)

108. Had Trial Counsel obtained Dantae's medical records, they would have seen that Dantae has a long history of emergency room visits and would have recognized that they needed to retain a medical expert to help them and the jury understand the significance of such records. Lindell v. Schneiter, No. 06-C-608-C, 2007 WL 5517463, at *5 (W.D. Wis. Aug. 31, 2007) ("The documents and medical records say what they say; the significance of their contents is for an expert to explain."); In re Wright Med. Tech. Inc., Conserve Hip Implant Prod. Liab. Litig., 127 F. Supp. 3d 1306, 1324 (N.D. Ga. 2015) ("The observations of an experienced treating physician are especially reliable because they serve to record a patient's medical history and often form the basis for a person's treatment and health issues throughout the person's life."). A medical expert would have interpreted and explained that Dantae's medical records support that Dantae was likely neglected, sexually abused, and lived in impoverished conditions that plagued his childhood.

109. Post-conviction counsel has retained Dr. Heinz Dueffer, an emergency medicine physician, as a medical expert. Dr. Dueffer, of the Emergency Department at Medical West Hospital in Bessemer, Alabama, completed his residency and training in emergency medicine at Beth Israel Medical Center in New York City. Dr. Dueffer has extensive experience in emergency medicine, predominantly as a physician or an expert in the assessment of critical injuries. He also serves on the Medical Executive Committee of Medical West Hospital, Bessemer and the Vestavia Hills Chamber of Commerce. Dr. Dueffer was available to testify at the time of Dantae's capital murder trial.

110. Post-conviction counsel provided Dr. Dueffer with the medical records that Trial Counsel should have been collected. Dr. Dueffer reviewed those records, including Dantae's Jefferson County medical records, Gateway Health records, University of Alabama at Birmingham medical and dental records, and Children's of Alabama medical records. Dr. Dueffer, or a similar expert, would have testified and explained to the jury that Dantae was treated for multiple medical conditions that are consistent with child abuse and neglect. Particularly, Dr. Dueffer would have explained how Dantae's medical records relate to critical mitigation evidence, as explained below.

111. ***Urinary Tract Infection / STD Test at Age 10→ Sexual Abuse.*** Dr. Dueffer concluded that Dantae's medical records could have corroborated that he was sexually abused. Dr. Dueffer would have testified that a urinary tract infection (UTI) in a 10-year-old boy is extremely rare. In fact, because UTI's in young boys are so rare, they can be indicative of potential childhood sexual abuse. Dr. Dueffer would have explained to the jury that Dantae's medical records reveal when Dantae was diagnosed with a UTI by Dr. Susan Buckingham, a treating medical professional contemporaneously ordered testing for sexually transmitted diseases (STDs). STD testing of a 10-year-old boy is not standard treatment absent suspicions of child sexual abuse or other indications

that such testing could be probative. This evidence would have corroborated Dr. Meredith's conclusion that Dantae suffered chronic childhood sexual abuse and was being sexually abused by Quortes on the night of the incident, which likely triggered him to enter a dissociative state, as explained in Section I.D.3 below.

112. ***Routine ER Visits / Uninsured / Scabies / Depression → Extreme Poverty.*** Dr. Dueffer would have also explained that the volume of Dantae's medical records, particularly emergency room visits to receive routine care, are consistent with extreme poverty. Dr. Dueffer would have explained that low-income individuals often times use the emergency room as a replacement for primary care physicians. Depending upon one's insurance status and/or the availability of their caretaker to take a child to the doctor during normal business hours, there are limited healthcare options outside of the emergency room.

113. Dantae was seen in an emergency room for conditions like headaches, dental abscesses, rash, and pink eye. These are conditions that do not typically require emergency care but are instead indicative of lack of access to a pediatrician or other primary care doctor. Dantae's medical records, in fact, show that he was uninsured. They also show that Dantae had to discharge himself from the hospital following him being in a car accident despite being a minor and needing a parent or guardian supervision. No one was there for Dantae.

114. The nature of the medical conditions for which Dantae sought treatment can also be associated with poverty. For example, Dantae was diagnosed with scabies. Scabies are microscopic mites called Sarcoptes scabiei that burrow into the skin and lay eggs. Scabies can be transmitted through close personal contact with an infected person or by sharing clothing or

bedding with an infected person. Scabies can also be associated with poor hygiene and could be a consequence of a child forced to sleep on the floor.[21]

115. ***Severe Dental Decay*** → ***Childhood Neglect.*** On at least four separate occasions, Dantae was diagnosed with extreme dental decay/abscess, reported extreme dental pain, and/or had to undergo medical procedures to have his teeth extracted from the severe lack of dental care and hygiene. Specifically, in March 2004, when he was just 11 years old, Dantae went to the emergency room at UAB Children's Hospital because he was having extreme toothache. His teeth were rotting from poor oral hygiene and neglect. Just a few years later, Dantae again went to the emergency room, on October 22, 2009, for a toothache. He was diagnosed with dental caries (tooth decay). A month later, Dantae received an oral evaluation at UAB Dental. Less than a year later, and just months before the incident, Dantae went back to the emergency room because his teeth were rotting again. On August 7, 2010, Dantae was treated in the emergency room for a dental abscess and was prescribed narcotic painkillers.

116. ***Car Accident / Multiple Headaches*** → ***Brain Damage Investigation.*** Dr. Dueffer would have also testified regarding the multiple medical records regarding Dantae's headaches. Early in his childhood, Dantae made several visits to the emergency department complaining of pain and headaches. On October 8, 2002, Dantae went to the emergency department after experiencing neck pain and a rash. The following year, Dantae went to the emergency department due to a headache and abdominal pain. A month later, Dantae returned because he complained about a headache and his eyes hurting. Dantae was also involved in a car accident on February 2, 2009. As explained in Section I.B.2 above, this is all critical evidence that would have further

[21] Merkler, Carmen MD Scabies: Neglected or Forgotten?, Infectious Diseases in Clinical Practice: March 2010 - Volume 18 - Issue 2 - p 85-86 ("Poverty, poor hygiene, overcrowding, institutionalization, malnutrition, and sexual promiscuity are the main factors that increase the risk of scabies.").

corroborated a need to investigate brain damage by Trial Counsel and retention of an expert neuropsychologist to conclude that Dantae has the most severe degree of brain damage to his frontal lobe.

117. ***Multiple Prescription Narcotics*** → ***Substance Abuse***. Dr. Dueffer would have provided expert testimony concerning the narcotic painkillers that were prescribed to Dantae. In particular, he was prescribed hydrocodone on February 24, 2009 (UAB Children's Hospital); Tylenol number 3 on March 5, 2009 (UAB Hospital); Tramodal on October 22, 2009 (UAB Hospital); Acetaminophen-oxycodone (Percocet) on August 7, 2010 (UAB Emergency Department). Dr. Dueffer, or a similar medical expert, would have explained that those drugs are narcotics. He would have also explained the reasons why doctors try to limit prescriptions of narcotics to children. Specifically, physicians have discovered that 1 in 10 kids who receive opioid pain medication—even for a week — tend to become addicted. Even one dose of pain medication tends to increase the receptors for opioid pain medication and repeated doses over the course of a week can affect them for the rest of their life. Dr. Dueffer would have further testified that a person taking narcotics should not drink alcohol. Such testimony would have provided additional corroboration of and context for testimony concerning Dantae's substance abuse by Drs. Salekin and Grant or similar experts.

118. ***Depression.*** Dr. Dueffer would have provided expert testimony concerning the antidepressants that were prescribed to Dantae. Dr. Dueffer would have explained that Dantae's records from Gateway Health show that Dantae was diagnosed with depression as early as 10 years old. Dantae was prescribed at least two prescription medications for depression—Remeron and Lexapro. Dr. Dueffer would have explained that it is atypical for a child that age to suffer from depression that requires medication.

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119. Dr. Dueffer was available to testify at the time of Dantae's trial, as were similarly credentialed experts. However, Trial Counsel failed to obtain Dantae's voluminous medical records and further failed to obtain a corresponding medical expert. Dantae's voluminous medical records could have been admitted into evidence as certified domestic records of regularly conducted activity under Alabama Rule of Evidence 902. Had the jury been presented with this evidence, objective medical documents, that would have shown and/or corroborated Dantae's bleak childhood, riddled with multiple visits to the emergency room, neglect, and sexual abuse, there is a reasonable probability that Dantae would not have been sentenced to death.

D. Competent Counsel Would Have Elicited Proper Expert Testimony on the Effects of Dantae's Neglect and Abuse.

120. The ABA Guidelines explain that effective counsel must consider including expert witnesses "to provide medical, psychological, sociological, cultural or other insights into the client's mental and/or emotional state and life history that may explain or lessen the client's culpability for the underlying offense(s)." 2003 ABA Guidelines § 10.11(F)(2). Trial Counsel called one expert to testify during the penalty phase—Dr. Meredith. However, as explained in Section I.D.3 below, Trial Counsel failed to elicit adequate expert mitigation testimony during Dr. Meredith's presentation. Dr. Meredith's testimony failed to help the jury understand the connection between Dantae's traumatic childhood experiences, the mental disorders he suffers from as a result, and how this affects his moral culpability for the crimes. Such expert testimony would have helped the jury assess that Dantae's moral culpability does not rise to the level of capital punishment, but is instead more appropriately penalized by life without parole. Post-conviction counsel has retained Dr. Karen Salekin, a forensic psychologist, and Dr. Grant, a clinical psychologist, with expertise in trauma-related disorders.

121. This Section proceeds in three Parts. The first two explain the critical evaluations, conclusions, and testimony Trial Counsel should have (and could have) elicited from Drs. Salekin and Grant (or similar experts), respectively, in order to adequately present mitigation expert testimony. The last part discusses Trial Counsel's inadequate presentation of expert testimony by Dr. Meredith.

1. Failure to Present Adequate Testimony By An Expert Forensic Psychologist Prejudiced Dantae.

122. Trial Counsel failed to present adequate testimony from an expert forensic psychologist, who would have explained the significance of the available mitigation evidence on Dantae's development and its subsequent impact on his culpability. Dr. Salekin is an Associate Professor of Psychology at the University of Alabama. See Declaration of Karen Lee Salekin, PhD (Docket No. 23) ¶ 3. Dr. Salekin completed her post-doctorate work in forensic assessment and received training at the University of Massachusetts Medical School in evaluating competence, insanity, malingering, and mental illness. Dr. Salekin has extensive experience working on capital cases, predominantly as a mitigation expert or an expert in the assessment of intellectual disability. See Salekin Declaration ¶ 4. She also conducts research in capital mitigation and teaches a number of both graduate and undergraduate courses in forensic psychology

123. Dr. Salekin was capable and would have been willing to testify at Dantae's trial. Mr. Thrasher's files indicate that Trial Counsel was or should have been aware of Dr. Salekin, as she was a listed recipient of an email from the Alabama Criminal Defense Lawyers Association regarding an Alabama Supreme Court decision in a capital case that was provided to Mr. Thrasher.

124. Dr. Salekin evaluates a person's development by assessing risk and protective factors present in the person's life over time. Risk factors are events in a person's life or internal characteristics that are demonstrably linked to negative developmental outcomes. Such factors

include poverty, lack of role models, malnutrition, family history of psychological problems, family history of drug and alcohol abuse, physical abuse or early exposure to it, sexual abuse, early exposure to criminal activity, and other similar events. Protective factors are events, circumstances, and personal attributes that have been scientifically found to counteract risk factors and protect people in high-risk situations from falling prey to negative life trajectories. This analytic framework is based on research initiated by the U.S. Department of Justice into the risk and protective factors associated with juvenile delinquency and violence. See Hawkins, J.D., et al., Predictors of Youth Violence, U.S. Dep't Justice, Office of Juvenile Justice and Delinquency Prevention (Apr. 2000), https://www.ojp.gov/pdffiles1/ojjdp/179065.pdf. Dr. Salekin would have explained how, in the absence of sufficient protective factors to balance out powerful risk factors, there is a greater likelihood of developmental difficulties.

125. In connection with this Petition, Dr. Salekin has conducted several clinical interviews of Dantae[22] and has spoken with his family members and friends,[23] including Dantae's Mother, Dantae's Brother, Dantae's Sister, two of Dantae's high school friends,[24] and Collins.[25] Post-conviction counsel has also provided Dr. Salekin with Dantae's DHR records, school records, and medical records (which Trial Counsel should have, but failed to, obtain). Based on those records and interviews, Dr. Salekin concluded that Dantae was subject to a multitude of risk factors throughout his life and that protective factors were absent. Dr. Salekin would have explained the

[22] Dr. Salekin spoke with Dantae at Holman Correctional Facility on August 10, 2021, and June 21 and 22, 2022.
[23] These meetings occurred in Birmingham on March 19, April 9, June 18 and 19, and July 25, 2022. Dr. Meredith did not conduct collateral interviews, which is standard for mitigation experts. Dr. Meredith either relied on interview summaries compiled by the mitigation investigators, such as Ms. Saunders, or provided his mitigation assessment without speaking to family and friends who knew Dantae, thereby missing an important piece of a mitigation assessment. As Dr. Salekin would have explained, when an expert does not conduct her own witness interviews, the expert cannot pick up on intonation and body language cues, ask clarifying questions, and steer the conversation towards the most relevant topics to her analysis.
[24] Donald Carlisle and Naujie Lee
[25] John Collins, Dantae's Mother's ex-boyfriend and who Dantae lived with until nearly age 11.

effects of the mitigation evidence described throughout this Petition, including in the areas of familial, individual, and community risks, on Dantae's development and in a manner that would have helped the jury assess Dantae's moral culpability.

126. ***Family Conflict / Abandonment / Childhood Neglect.*** Dr. Salekin would have testified that Dantae experienced a number of family risk factors, including family conflict, abandonment, and inconsistent caregivers. As regards familial conflict, Dantae's Mother separated from Collins when Dantae was just 11 years old, breaking up the only family he had known. Dantae was also told conflicting information on who his biological father is. Further, Dantae's Mother's boyfriend[26] was not allowed to see Dantae and there was a restraining order against him due to his anger problems and allegations of abuse. (C. 1136, 1128).

127. In addition to family conflict, Dantae experienced repeated abandonment. Dantae's Mother abandoned him shortly after separating from Collins and told DHR on multiple occasions that she did not want him (C. 998, 1757). This in part is because Dantae's Mother's boyfriend did not want the children, and Dantae's Mother put her boyfriend's wants before her children's needs. Dantae subsequently was forced to live in numerous homes with various family members, many of whom used Dantae for welfare benefits, some of whom did not like or get along with Dantae, and the majority of whom did not even have room for Dantae. When there was no room for Dantae, he had to sleep on the couch or floor, and at certain times without bed linens (C. 993, 1048). Few cared to make Dantae feel welcome because no one was willing or able to take him in long term.

128. Dantae also experienced neglect. For example, he did not receive consistent medical care, as evidenced by Dantae's voluminous medical records, which show that he often went to the ER for routine medical care and would even sign himself out despite being a minor.

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[26] David Sanders

Dantae's school records, which Trial Counsel failed to obtain,[27] further reveal that he missed school often, started the school year late at least once, missed school because he lacked the proper clothing, and was reported as showing up without shoes. (C. 998, 1000). DHR ultimately had to obtain clothing and shoes for Dantae. (C. 1361). Dantae was also undernourished. The DHR records show that the boys asked neighbors for food and that Dantae's households' relied on food stamps and assistance from DHR to keep sufficient food around. (C. 993, 1383).

129. Of particular import are Dantae's inconsistent and multiple caregivers. Children who experience multiple caregivers commonly exhibit behavioral problems, including anger, impulsivity, fighting, damaging property, and defying authority. They are also more likely to exhibit cognitive effects such as poor school performance. These inconsistent and often disinterested caregivers did not provide Dantae with the proper guidance and supervision needed for Dantae to develop. (C. 1162, 1202, 1594, 1631, 1729, 1806, 1844, 1927). For example, while most children would check into their homes before venturing out after school, Dr. Salekin learned that Dantae would never check in with anyone. Rather, Dantae seemed to wander around wherever he wanted for however long he wanted. He appears to have spent the majority of his time on the streets. Dantae also experienced inconsistent discipline at these various households, with some of his guardians being strict and enforcing rules, while others merely provided a roof, and still others actively encouraging problematic behaviors (such as Quortes introducing Dantae to drinking).

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[27] Trial Counsel failed to obtain available elementary school records from the Birmingham Public Schools, which post-conviction counsel obtained. These records are significant in showing chronic tardiness and absence, indicating a chaotic and substandard home life even before Dantae's Mother and Collins separated in mid to late 2002, and before Dantae's Mother abandoned him shortly thereafter. For example, in Kindergarten, Dantae was absent 30 times, in second grade was absent 15 times, and in third grade was absent 14 times. The chronic absences continued after Dantae's home life deteriorated, with 19 absences in fifth grade and 27 absences in the sixth grade. This directly contradicts Trial Counsel's claims that Dantae lived a "normal life" until he was about 11 years old. (R. 402–03). Rather, these records support that Dantae has experienced parental neglect his entire life. This is powerful mitigation evidence. These records are non-cumulative because trial counsel did not introduce evidence that Dantae missed this much school when he was younger and they indicate neglect prior to Dantae's Mother abandoning him, which Trial Counsel denied.

According to documents in Trial Counsel's files, a psychologist working with Dr. Meredith[28] determined that Dantae's Mother's ability to "safely parent her children [is] mildly impaired" due in part to her low intellectual functioning, having an IQ of 70. Dr. Salekin would have testified that this lack of consistent supervision and proper guidance during Dantae's critical adolescent years likely contributed to severe negative impacts on his psychological development.

130. As explained in Section I.D.3 below, although Dr. Meredith provided ***some*** testimony about Dantae's abandonment, lack of a father figure, and having been placed by DHR in many different homes, (R. 1088, 1097-99), Dr. Meredith failed to mention the neglect Dantae experienced both before and after his mother abandoned him. Nor did he mention how many of Dantae's interim caregivers neither liked nor actively cared for him. In addition to omitting this crucial information, Dr. Meredith failed to explain how the family risk factors may have affected Dantae's development. Studies show that these risk factors lead to substance abuse, and becoming a school dropout.

131. ***Low Intelligence / Poor Constitution / Mental Disorder / Substance Abuse.*** Dr. Salekin also would have explained how certain factors about an individual, such as the presence of a mental or personality disorder, substance abuse, and low intellectual functioning, are linked to poor developmental outcomes. As explained in Section I.D.3 below, although Dr. Meredith testified to some individual risk factors, such as post-traumatic stress disorder, borderline personality disorder, and low IQ, (R. 1099, 1101-08), Dr. Meredith did not explain why these conditions would lessen Dantae's culpability. His sole explanation was that Dantae was experiencing a dissociative episode during the murder and having poor judgment from low intellectual functioning. There are also many other individual risk factors associated with poor

[28] Dr. Ronald Bray

outcomes that Dr. Meredith should have raised to the jury. These include neuropsychological dysfunction (as diagnosed by Dr. Lokken and suspected by both Dr. Salekin and Dr. Meredith), depression with psychotic disorder (as diagnosed by Dr. Grant), anger issues (C. 1030, 1071, 1268, 1754), impulsivity, inability to cope, impaired interpersonal relations, and substance abuse.

132. ***Disinterest in School / Impoverished Neighborhoods.*** Dr. Salekin further observed that Dantae lived in poor neighborhoods and concluded that Dantae lacked a commitment to school. Research shows that children lacking commitment to school have ceased to believe school and learning is a viable part of their lives. They are consequently at greater risk for problematic behavior, including substance abuse, delinquency, and becoming a school dropout. Dantae had poor grades in school and was eventually expelled (or possibly suspended) over behavioral issues. Additionally, impoverished communities often breed violence, as manifested by exposure, skill, and interest in weapons; presence and use of drugs; presence and involvement in gangs; victimization of violent offenses, stress from poverty and close living conditions; exposure to violent individuals; lack of employment opportunities; and residential instability. According to Collin's brother,[29] Dantae watched a shootout when he was very young. Dantae grew up in poor and violent areas: Kingston, Baby Kingston, and Avondale. These areas of Birmingham have poor public schools, substandard public housing, low economic opportunity, and a lack of quality community centers. Dantae was therefore at risk as a result of his environs and disinterest in education.

133. ***Virtually No Protective Factors.*** Dantae also lacked any meaningful protective factors. Dr. Salekin would have explained that individuals generally experience a combination of protective factors that serve to counteract and balance the blend of also-present risk factors.

[29] Peter Collins

However, Dantae's low intelligence, male gender, low number of positive attachments (both within and outside of the family), and constitution rendered Dantae without any of the traditional protective factors that would have helped counteract (to any extent) Dantae's family, individual, and community risk factors.

134. Dantae is of low intelligence. Dr. Salekin, Dr. Lokken, and an associate of Dr. Meredith performed IQ tests on Dantae showing he has an overall IQ of 76, 71, and 75 respectively, placing Dantae at or below the bottom 5th percentile of the population in terms of IQ. A counselor who conducted an IQ test on Dantae when he was 16 concluded that "Dantae presented with below average intelligence."[30] (C. 1029, 1031). Dantae also struggled in school, receiving "Ds" and "Fs" in nearly all subjects in school by the time he reached sixth grade.[31] (C. 1511, R. 54). Dantae's medical records from Gateway Health contain a recommendation that Dantae be evaluated for special education. Moreover, Dantae's likely frontal lobe damage (which is consistent with Dantae's neuropsychological evaluation showing extreme executive dysfunction) significantly impaired Dantae's problem-solving abilities. Dr. Salekin would have explained how Dantae's low intelligence and near non-existent problem solving skills would have impaired his ability to cope with the stressors resulting from the risk factors discussed above.

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[30] While the trial court determined that Trial Counsel did not meet the legal proof required to show Dantae was intellectually disabled under Atkins sufficient to render him constitutionally disqualified to receive the death penalty from the outset of trial, this evidence is still probative to show Dantae has low intelligence and would have been admissible as mitigation evidence.

[31] As discussed above, Trial Counsel failed to obtain available elementary school records from the Birmingham Public Schools, which post-conviction counsel obtained. These records would have shown that, starting in third grade, Dantae was receiving "D" equivalents in social studies and science and received "Not Satisfactory" grades (on a scale of Excellent, Satisfactory, and Not Satisfactory) in areas like writing, citizenship, and work habit in the fourth and fifth grades. Dantae's other grades were mostly "Cs" until, in sixth grade, his grades dropped to a 59% average across subjects, excluding P.E. His academic struggles starting early on and continually getting worse support that Dantae has a low IQ and neurological dysfunction. This evidence is non-cumulative because it shows Dantae struggled in school prior to high school and prior to taking his fifth grade Stanford Achievement Test.

135. Dantae is male. Gender may influence or modify responses to adversity. For example, Dr. Salekin would have explained that a number of studies on the effects of marital discord found that females are less reactive to family stressors than males.

136. Dantae lacked strong, positive interests and attachments outside of the family. Developing such interests and attachments outside the family can increase resiliency. Dantae had little opportunity for developing such interests. While he did spend a good amount of time playing street basketball, he never played on an organized team. Dantae also lacked positive adult role models in whom he could confide and who could intervene on his behalf. Dantae expressed feeling very alone as a child. (R. 1072). Dantae also lacked warm, nurturing, or supportive relationships with his parents. Such a relationship with at least one parent has been shown to increase resiliency. Dantae's mother abandoned him around the age of eleven. She told DHR multiple times that she did not want custody of him. (R. 998). Neither Dantae's Legal Father nor Collins were a constant presence in Dantae's life. Moreover, Dantae did not get along with his Legal Father, yet Dantae was placed in his home by court order. The two could barely stand each other and once got into a serious fight. The police were called because Dantae's Legal Father struck Dantae in the leg with a golf club. (C. 1222).

137. Nor did Dantae have a significant number of positive peer relationships, which may contribute to resilience. While Dantae did have a few friends, he did not have many. In fact, according to a questionnaire administered by Dr. Meredith, located in Trial Counsel's files, Dantae answered that he did not have any close friends. Starting at age 16, Dantae spent a lot of time with Quortes (one of the victims) who was significantly older than him and would pressure Dantae to drink in excess and smoke marijuana. (R. 597).

138. Dantae also did not have the early temperament suggesting resiliency to adversity. A positive temperament as a child is associated with resiliency. Dantae exhibited behavioral problems. Based on Dr. Salekin's conversations with Dantae and his family, Dantae was quick to confrontation if he felt he was wronged. The record is rife with observations regarding Dantae's anger and behavioral issues as a child, for which he did not receive adequate resources or treatment. (R. 989, 1000-01, 1026-27, 1072, 1171).

139. Had Trial Counsel adequately presented Dr. Salekin, or similarly qualified expert, the jury would have heard evidence on how the presence of multiple risk factors and absence of positive factors negatively impacted Dantae's development, including impairing his resiliency, decision-making, and ability to weigh short term gratification against long term consequences. Research shows that factors outside of the control of a child have a profound influence on their development and, in turn, on delinquency and violence. There is a reasonable likelihood that this evidence might have sufficiently influenced the jury's appraisal of Dantae's moral culpability. Andrus v. Texas, 140 S. Ct. 1875, 1879, 1887 (2020) (remanding to the court of appeals for further consideration of prejudice where the habeas court found the defendant's childhood was marked by extreme neglect and privation, a family environment filled with violence and abuse, and a neighborhood known for frequent shooting, gang fights, and overdoses); Rompilla, 545 U.S. at 390-93 (finding prejudice where trial counsel failed to present mitigation evidence of defendant having grown up in a slum environment, been a school dropout, had mental health issues, organic brain damage, parental alcoholism, low IQ, and an absentee mother).

2. Failure to Present Adequate Expert Testimony from a Trauma Specialist Prejudiced Dantae.

140. Trial Counsel also failed to elicit testimony from a clinical psychologist with a specialty in trauma, or similar expert, such as Dr. Grant, to evaluate, and testify regarding the

severe negative impact that the magnitude and years of childhood trauma had on Dantae's psychological and behavioral health. Dr. Grant is an Associate Professor in the Department of Psychiatry & Behavior Neurobiology and the Director of the Trauma Related Disorders Clinic at the University of Alabama at Birmingham. See Affidavit of Merida M. Grant, PhD (Docket No. 45) ¶ 1. Dr. Grant has contributed to and published many manuscripts and books and delivered numerous presentations and lectures relating to the neurobiology of trauma. See Grant Affidavit, Ex. A.

141. In connection with this Petition, Dr. Grant conducted a clinical face-to-face interview of Dantae on June 22, 2021 and administered several assessments to evaluate Dantae's trauma history. Dr. Grant also reviewed Dantae's DHR and school records, as well as the medical records Trial Counsel failed to obtain. Based on these assessments, Dr. Grant concluded that Dantae suffers from a multitude of psychological and behavioral impairments, including (1) post-traumatic stress disorder; (2) depression with psychotic features, including hallucinations and delusions; (3) Generalized Anxiety Disorder; (4) Panic Disorder; and (5) substance use disorders.

142. Had Trial Counsel retained Dr. Grant, or a similar expert, the jury would have heard expert testimony about how Dantae experienced a history of significant and repeated trauma throughout his early life, including life-threatening incidents, significant abuse by multiple family members, parental neglect, abandonment, and significant poverty.

143. ***Childhood Trauma***. Dr. Grant would have explained that the level of childhood trauma Dantae experienced paralleled the most severe type of trauma a child could experience. Childhood trauma is defined as exposure to actual or threatened death, serious injury, or sexual violence. When compared to two control groups: a healthy control group of similarly-aged volunteers and a group of depressed outpatients, Dantae's scores reflect more severe trauma across

all but one category as compared to the healthy and depressed groups.[32] Dantae's documented poverty and magnitude and frequency of traumatic childhood events further evidence that Dantae has experienced among the most severe degree of childhood trauma. Dr. Grant would have further explained that Dantae's results and assessment of childhood trauma means Dantae was at a heightened risk of severe mood, anxiety, and substance use disorders caused by alterations in the brain.

144. ***Post-Traumatic Stress Disorder***. Dr. Grant would have also testified that Dantae has a severe form of post-traumatic stress disorder (PTSD). PTSD is a disorder in which an individual fails to recover from the initial acute stress response after experiencing or witnessing a terrifying event. As explained below in Section I.D.3, while Dr. Meredith testified that PTSD is "the type of anxiety disorder . . . with our deployed soldiers who are coming home in droves," (R. 1101-02), Dr. Grant could have explained that an event triggering PTSD can take many forms: physical abuse, emotional abuse, being told that he has no value, or any other time an individual believes his life is in danger. Dr. Grant would have explained that PTSD can last months, years, or decades, exposing Dantae to a heightened risk of intrusive memories and intense emotional and physical reactions. Moreover, Dr. Grant would have explained that Dantae grew up in a fractured home, among significant poverty, and suffered emotional and physical abuse, testimony which Trial Counsel failed to elicit from Dr. Meredith. Significantly, Dantae's PTSD symptoms exceeded 80% of all patients treated at an outpatient clinic specializing in the treatment of trauma-related disorders.

145. ***Depression***. Dantae also suffers from depression. Specifically, Dr. Grant diagnosed Dantae with Major Depressive Disorder (MDD). Symptoms included anhedonia (loss of interest

[32] Based on Dantae's results from a CTQ-SF, an assessment which measures the severity of childhood trauma, which Dr. Grant administered.

in previously-enjoyed activities), decreased appetite, insomnia, restlessness, fatigue, feelings of guilt, diminished thinking capacity, and passive suicidal ideation. Dantae's medical records from Gateway Health also show that Dantae has a history of depression, and was diagnosed with depression when he was 10 years old. Moreover, in 2010, Dantae lost nearly twenty pounds, had little energy, experienced insomnia, and felt worthless and hopeless. Early onset depression (before age eighteen) is characterized by greater severity and chronicity than adult-onset depression. Finally, the lack of timely treatment of early onset depression is associated with treatment resistance.

146. ***Shame-Based Avoidance.*** Dr. Grant would have also testified that Dantae's behavior in recanting and denying that he was sexually abused by Quortes (one of the victims) fits the typical description of an individual with a history of childhood sexual abuse. As explained below in Section I.D.3, while Dr. Meredith only testified that Dantae was reluctant to answer whether he had been sexually abused, Dr. Grant would have explained to the jury that such conduct is termed shame-based avoidance. This occurs when a sexually abused person is made to feel that something is intrinsically wrong with them and that they may have sought the interaction. Individuals are therefore reluctant to speak about the abuse. Shame-based avoidance is particularly prevalent in men who have been sexually assaulted—these men fear that people will think they are gay or that they somehow ***wanted*** or invited the abuse.

147. Dr. Grant would have explained that Dantae has many characteristics that are frequently correlated with individuals who have experienced sexual abuse. Studies have found that black or Hispanic boys or children who live either only with their mother or neither parent are at higher risk of sexual abuse. Additionally, certain family characteristics such as parental divorce,

separation, or remarriage, parental alcohol abuse, and parental criminal behavior, put an individual at greater risk of experiencing sexual abuse.

148. Dr. Grant would have testified that characteristics of shame-based avoidance are especially prevalent in cases of incest. Sexual abuse, and particularly incestuous sexual abuse, are particularly difficult for child victims. Incest essentially destroys a family, as family members are forced to make a decision as to which party to support. In an already dysfunctional family such as Dantae's, there is no support system for victims of sexual abuse, forcing them to rely on the individual already abusing them. As discussed earlier, Dantae did not have a lot of friends and spent a lot of time with Quortes (one of the victims), who was significantly older. Research also suggests that perpetrators are most often males who identify as heterosexual and that concomitant physical and sexual abuse are common, especially from family member abusers.

149. Dr. Grant also would have testified that Dantae's depression manifested at approximately the same age Dantae was diagnosed with a UTI (10 years old). The timing of the abuse is particularly relevant since the mere presence of childhood trauma in and of itself is not always determinative of psychiatric outcomes. Specifically, if Dantae had been sexually abused by Quortes (his older male cousin), this would present several detrimental and horrific abuse factors: an early age of onset (10 years old), penetration and same-sex incest, and cumulative stressors (sexual in addition to physical and emotional abuse). Sexual abuse, specifically by male perpetrators or involving penetration, is associated with the most negative mental health outcomes (such as PTSD, MDD, anxiety, dissociation, and substance abuse).

150. ***Brief Psychotic Disorder***. Dr. Grant diagnosed Dantae with Brief Psychotic Disorder, a short-term display of psychotic behavior, such as hallucinations or delusions, which occur in response to extremely stressful or traumatic events. A brief psychotic episode is followed

by a return to the previous level of function, typically within 1 month. Critically, an affected individual may not be aware of their strange behavior. Poverty, a depressive episode, and alcohol use disorder, all increase an individual's risk of psychosis. Dantae experienced significant early-life poverty, depression, and alcohol abuse. Auditory hallucinations are the most common reported symptom of psychosis.

151. Dantae showed signs of experiencing both hallucinations and delusions and acknowledged a history of hallucinations. Hallucinations are a sensory perception that present as reality, but occur without external sensory input. Put differently, hallucinations occur when an individual hears, sees, smells, tastes, or feels sensations that appear to be real, but exist only in the individual's mind. While Dr. Meredith's testimony did not discuss Dantae's history of hallucinations and delusions, Dr. Grant would have explained that Dantae told her that for months leading up to the incident, Dantae saw ghosts and images moving around. During that time, Dantae stated that he "knew something was very wrong" and "fe[lt] the presence of death." Dantae's Mother and her boyfriend[33] once witnessed Dantae in a potential dissociative episode when he was 16. Dantae tried to seek help from his family, including telling his Grandmother about hearing voices, but they either refused to help him[34] or otherwise did not have the proper resources Dantae desperately needed. Dr. Grant, would have explained that social deprivation and childhood maltreatment are significant risk factors for psychosis and paranoid delusions.

152. ***Anxiety***. Dantae experiences ongoing anxiety with symptoms consistent with Generalized Anxiety Disorder. Dantae explained to Dr. Grant that his symptoms include frequent

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[33] David Sanders

[34] In fact, Dantae's Mother and her boyfriend may have abandoned Dantae in response to this episode. Dantae's Grandmother said that when Dantae was living with his mother when he was 15 or 16, Dantae's Mother and her boyfriend packed up and moved in the middle of the night while Dantae was asleep without telling him where they were going.

worries that bad things will happen to him, inability to stop worrying, physical restlessness, edginess, trouble concentrating, irritability, muscle tension, and sleep disruption.

153. ***Panic Disorder***. Dantae has further experienced ongoing symptoms of panic disorder two to three times a week since he was 18 years old. As he told Dr. Grant, Dantae's symptoms include his heart pounding, sweating, shaking, shortness of breath, nausea, dizziness, depersonalization, fear he is going "crazy," hot flashes, chills, and fear of death.

154. ***Alcohol Abuse***. Dantae began to consume alcohol every day, at the start of each day, beginning when he was sixteen or seventeen years old. As Dantae told Dr. Grant during his clinical interview, he would drink 12 to 18 beers a day, in addition to drinking liquor. Because Dantae experienced a severe degree of medical neglect, lacked a stable home, proper care, and access to appropriate mental health resources, Dantae utilized the substances available to him to minimize the effects of multiple stressors, including the symptoms associated with his severe childhood trauma.

155. Had Trial Counsel retained Dr. Grant, or a similar expert, the jury would have heard expert testimony that Dantae suffers from these significant behavioral and psychological impacts that stem from the degree of severe childhood trauma he has experienced.

3. Even Where Trial Counsel Did Attempt to Present Expert Testimony, It Was Grossly Inadequate.

156. Although Trial Counsel called Dr. Meredith, a clinical psychologist, to testify during the penalty phase, Trial Counsel was so unprepared that they failed to elicit adequate mitigation testimony from Dr. Meredith, including in a manner that would have helped the jury understand the magnitude of Dantae's childhood trauma and connection to his moral culpability for the crimes of which he was convicted. As Mr. Thrasher conceded on the national true-crime

show, After the First 48, "to be quite honest, ***things at trial a certain point just kind of fell apart. In the psychological end*** of it. It just didn't gel. ***It didn't come out.***" Mr. Thrasher is right.

157. Although Dr. Meredith's primary conclusion was that Dantae experienced a dissociative episode, Dr. Meredith's testimony regarding dissociation was short and conclusory—spanning merely two transcript pages. Similarly, although Dr. Meredith testified that Dantae suffers from post-traumatic stress disorder and personality disorder, Dr. Meredith's testimony regarding these disorders spanned only 5 transcript pages. The jury never heard critical testimony from Dr. Meredith that would have explained what those diagnoses mean, what led Dr. Meredith to diagnose Dantae with these disorders, the severity to which Dantae suffers from these disorders, what symptoms are associated with these disorders, or how Dantae's magnitude of childhood trauma and neglect contributed to Dantae suffering from such disorders.

158. Trial Counsel's ill preparation is evidenced by the fact that during this portion of Dr. Meredith's testimony, the court sustained every single objection by the State (Mr. Lamb)—9 objections spanning only 9 transcript pages.

> MR. LAMB: Objection, Judge. Is this responsive to a question? It appears to be a narrative.
>
> THE COURT: Well, I think he's giving his results and opinions.
>
> But the why, Mr. Thrasher, I find questionable.
>
> MR. THRASHER: I agree, Your Honor.

(R. 1100).

MR. LAMB: Objection, Judge. This doesn't appear responsive to the question.

THE COURT: Sustained.

(R. 1101).

MR. LAMB: Objection, Judge.

THE COURT: Sustained. Now, Dr. Meredith, let's -- Mr. Thrasher, if you'd like to ask another question, but --

(R. 1101).

MR. LAMB: Objection, Your Honor. Once again, not responsive to any question.

THE COURT: Sustained. I don't see where that particular reference has relevance here.

A. Uh --

THE COURT: Let's ask another question, Mr. Thrasher.

(R. 1103).

MR. LAMB: Judge --

THE COURT: Sustained. You can't ask the jury questions, Dr. Meredith.

THE WITNESS: But I can ask a hypothetical.

MR. LAMB: Objection, Judge.

THE COURT: No, you can't. Let's ask another question, Mr. Thrasher.

(R. 1104-05).

MR. LAMB: Objection, Judge. He asked a question and he's already answered it.

THE COURT: Mr. Thrasher, do you want to ask the next question?

MR. THRASHER: Yes, ma'am.

(R. 1105).

MR. LAMB: Objection. He's not answering his question.

THE COURT: Sustained.

(R. 1107).

MR. LAMB: Objection, Judge. There's no question from --

THE COURT: Yes. Let's ask --

(R. 1108).

159. Rather than re-phrasing the question to guide their own expert, Trial Counsel just seemed to give up and thus left the jury and judge with the impression that Dr. Meredith had little credibility and his testimony served little to no probative value.

160. Had Trial Counsel properly prepared and guided Dr. Meredith in direct examination, Dr. Meredith could have testified regarding critical conclusions that he had provided to Trial Counsel in a 70-page written evaluation of Dantae.[35] In these 70 pages, Dr. Meredith explained critical details about Dantae's childhood trauma, the psychological evaluations and assessments he administered, Dantae's performance on these assessments, Dr. Meredith's conclusions, and importantly ***why*** Dr. Meredith reached his conclusions and ***how*** these disorders affect Dantae. Notably, Trial Counsel did not ask Dr. Meredith what assessments Dr. Meredith

[35] Based on information and belief, Dr. Meredith is deceased. Dr. Barry L. Adams is also listed as a clinical psychologist at Vestavia Behavioral Health on the written psychological evaluation of Dantae and assisted Dr. Meredith in his evaluation.

conducted to diagnose Dantae, nor how Dantae performed on such assessments. Trial Counsel further did not ask Dr. Meredith to explain how these test results revealed Dantae suffered from the specific mental disorders Dr. Meredith diagnosed, nor did Trial Counsel ask what factors from Dantae's background contributed to Dantae's mental illnesses or how this could affect Dantae's moral culpability for the crime. For example, Trial Counsel's preparation and presentation was inadequate as relates to the following: Dissociation, PTSD, Borderline Personality Disorder, and with respect to the DHR records.

161. ***Dissociation.*** During the penalty phase, Dr. Meredith testified that Dantae "had a disassociative [sic] episode." (R. 1106). The only reason Dr. Meredith gave for why he reached this conclusion was that when Dr. Meredith asked Dantae "if he had ever been sexually abused [ ] he was very reluctant to answer that question. Then, he went again and told me that he had been sexually abused by a close member of his family, and that the only person who knew anything about that was the little boy who was watching." (R. 1106). Dr. Meredith did not explain why this indicated Dantae was having a dissociative episode. Nor did Dr. Meredith explain any other standardized assessments or indicators from Dantae's traumatic childhood that supported this conclusion. The entirety of Dr. Meredith's testimony regarding dissociation was general and hypothetical (triggering numerous objections from the State).

162. Had Trial Counsel asked Dr. Meredith whether he conducted any standardized assessments on Dantae to evaluate whether Dantae suffers from dissociation, Dr. Meredith could have explained to the jury (as he explained in his written evaluation provided to Trial Counsel) that he administered at least "three standardized measures of Dissociative Disorder (Multiscale Dissociation Inventory, Trauma Symptom Inventory (TSI), and the Dissociative Experience Scale)." Dr. Meredith could have further testified that based on these assessments, Dantae

performed "in a fashion consistent with ***extreme*** Dissociative symptoms."

> 8. On three standardized measures of Dissociative Disorder (Multiscale Dissociation Inventory, Trauma Symptom Inventory (TSI), and the Dissociative Experience Scale), Mr. Callen performed in a fashion consistent with extreme Dissociative symptoms. Dissociation is a condition usually brought on by trauma in which there is a disconnect between conscious thinking and behavior. Though rare, the condition is well documented. Individuals are known to be able to behave without conscious awareness of their behavior and to experience changes

163. Dr. Meredith could have further explained that based on Dantae's performance on at least one of the assessments in particular "the probability that he suffers from 'Severe Dissociation' ***approached 100%***."

> ***Dissociative Experience Scale***
>
> On this scale, Mr. Callen was asked to respond to 28 questions that measure dissociative symptoms. He performed in a manner consistent with Dissociative Symptoms on most of the scale items. Based on Mr. Callen's performance, the probability that he suffers from "Severe Dissociation" approached 100%. Specific examples included:
>
> Dissociative Disorder is often associated with Borderline Personality Disorder (See Appendix I), the most severe of all Personality Disorders, often characterized by psychotic symptoms. Dissociative Disorder is also often associated with severe neglect, emotional abuse, physical abuse and sexual abuse, associated with Posttraumatic Stress Disorder. Mr. Callen was never afforded any structure or a family system that looked after his emotional needs. He was taken by his familial father to crack houses where he was left as a youngster. Whether or not sexual abuse occurred during these episodes is unknown but certainly not out of the question.

164. Trial Counsel also failed to adequately investigate and present testimony from Dantae's Mother, his Mother's Boyfriend,[36] Dantae's Brother, Dantae's Legal Father, Dantae's Sister, and Dantae's Aunt,[37] who were each available and willing to testify during Dantae's trial about Dantae's history of dissociative episodes, which would have corroborated Dr. Meredith's testimony. This would have been non-cumulative testimony regarding other specific episodes.

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[36] David Sanders
[37] Madlyn Scott

165. For example Dantae's Brother could have testified that as a child, Dantae, completely lost control one evening when he was playing video games with his brother. Although Dantae and his brother had fought in the past, as brothers do, Dantae's Brother observed that his younger brother had become someone else in that moment.

166. Dantae's Mother and Dantae's Legal Father could have testified about a time during adolescence when Dantae had a dissociative mental health episode in front of Dantae's Sister, Dantae's uncle, and Dantae's Legal Father. Dantae appeared to be having an out-of-body experience and Dantae's Sister had to hold him. Dantae's Mother and his Mother's Boyfriend could have testified that when Dantae was 16 years old, he suffered a severe dissociative episode where he seemed to be a different person.

167. Dantae's Sister could have testified that she thought Dantae was hearing voices and was concerned that he was suffering from schizophrenia. She could have also testified that Dantae's thought processes right after the offense were irrational and incoherent. Moreover, Dantae's Aunt could have testified that immediately after the offense, Dantae appeared dazed and did not seem to even know what happened.

168. ***Post-Traumatic Stress Disorder.*** Moreover, Dr. Meredith's testimony regarding PTSD was similarly inadequate. Dr. Meredith testified on numerous occasions that post-traumatic stress disorder is the type of anxiety disorder that soldiers experience. He also generally went through a "list . . . of the childhood predictors of post-traumatic stress disorder." However, Trial Counsel did not ask, nor did Dr. Meredith testify about, whether and which of these factors were present in Dantae's childhood that led Dr. Meredith to diagnose him with PTSD. Trial Counsel also did not ask, nor did Dr. Meredith testify about, Dantae's performance on any other standardized assessments used to diagnose PTSD.

But I would like to go through a list very quickly of the childhood predictors of post-traumatic stress disorder.

The growing up in a dysfunctional family. Early childhood emotional, physical and sexual abuse. Younger age. Less family cohesion and nurtrance. Increased anger. Early onset of behavior illness. Type and amount of traumatic events. Amount of general social support. Lack of consistent social support. Depression. Domestic problems. And, then, specifically, sexual abuse. (R. 1102).

169. Had Trial Counsel asked Dr. Meredith which childhood predictors were present in Dantae's childhood, Dr. Meredith could have testified regarding a multitude of specific opinions that are present in his written evaluation, including that Dantae's "DHR [records] reflect the chaos and disharmony during most of [Dantae's] life," including being "exposed to frequent fights, alcoholism, drug abuse, maternal abandonment, and loss of the only father figure [Collins] he ever experienced."

Records obtained from DHR reflect the chaos and disharmony during most of Mr. Callen's life. Specifically, he was shuffled from home to home and did not have strong role models or consistent parental limits and boundaries. A summary of records obtained from DHR reflect a pattern of abandonment and loss:

The DHR records are confusing and conflicting at times with family interviews by the defense team. As best as could be pieced together, Mr. Callen lived in at least six different "family" situations prior to age 18. None of these situations provided a strong male role model and none provided structure and limits that a young person requires to develop adaptive social values. He was exposed to frequent fights, alcoholism, drug abuse, maternal abandonment, and loss of the only father figure (John Collins) he ever experienced. Of twelve individuals interviewed by the defendant's private investigator, none saw Mr. Callen as being violent or aggressive.

170. Had Trial Counsel asked Dr. Meredith whether he used any standardized metric to diagnose Dantae with PTSD, Dr. Meredith could have explained to the jury that Dantae exhibited 19 out of 21 symptoms listed in the Diagnostic Criteria for PTSD in the Diagnostic and Statistical Manual of the American Psychiatric Associations, which were included in his written evaluation.

171. ***Borderline Personality Disorder.*** Similarly, had Trial Counsel asked Dr. Meredith whether he used any standardized metric to diagnose Dantae with Borderline Personality Disorder, Dr. Meredith could have explained that Dantae exhibited 6 of the 9 characteristics associated with Borderline Personality Disorder—opinions which Dr. Meredith included in his written evaluation to Trial Counsel. But Dr. Meredith's ***sole*** testimony regarding borderline personality disorder spanned merely one transcript page and discussed the disorder in general terms—never making any connections to Dantae specifically nor even mentioning that he displayed characteristics of such disorder.

172. ***DHR Records.*** Trial Counsel's deficient presentation is further exacerbated by Trial Counsel's mishandling and mischaracterization of the DHR records. During Dr. Meredith's testimony, Trial Counsel dumped 914 pages of scrambled DHR records into the trial record. Dr. Meredith explained that he had reviewed Dantae's DHR records generally and that those records formed the basis of his conclusions. Dr. Meredith then "very quickly" discussed only four of those records and opined that they show Dantae's mother abandoned him. (R. 1096-98); see also (R. 1096 (Dr. Meredith: "I'm going to just run through a few items very quickly for the jury."). See, e.g., Ferrell, 640 F.3d at 1231 (finding trial counsel deficient where the jury heard nothing of the defendant's "powerful mental health issues or his abused and difficult childhood" and failed to elicit "readily available mitigating evidence"). Despite the quantum of mitigation contained in the

other 910 pages of the DHR records, Trial Counsel never presented to the jury the significance and magnitude of childhood neglect and abuse that riddled Dantae's childhood.

173. Trial Counsel also minimized the significance and probative value of the DHR records. Trial Counsel told the jury that the DHR records are "confusing" and "they don't make sense sometimes." (R. 1032). During closing arguments, Trial Counsel reiterated that they presented the jury with "a big ton of records. Whether you want to look through those or not[.]" (R. 1172).

Penalty Phase Closing Argument by Mr. Thrasher:

> What I'm saying and I'm getting to is this: You know, you've got a big ton of records. Whether you want to look through those or not, I could summarize those DHR records very simply. They're going to tell you very simply that Dontae's mother didn't want to do anything with him or for him. (R. 1172).

174. Worst of all, despite the documented evidence in the 914 pages of DHR records, Trial Counsel literally, repeatedly, and incorrectly, told the jury that Dantae "had a life that was normal" and "what you and I would all consider standard up until about the age of 11." Trial Counsel described years of childhood trauma and abuse Dantae suffered just as "weird stuff that's happened to him."

Penalty Phase Arguments by Mr. Thrasher:

> Now Mr. Callen had a life that was normal, like what you and I would all consider standard up until about the age of 11 when he lived with (R. 1028).

...

Here's the deal. Here's where I get back to where Dontae's name was misspelled. It's a small thing. It's just an example of all of the weird stuff that's happened to him over this period of time since the family broke up. (R. 1089).

175. As explained throughout this Petition, the magnitude of mitigation evidence clearly demonstrate that Dantae's childhood was far from "normal" or "standard." Courts have found counsel ineffective when counsel presents "the sentencing jury with an incomplete and inaccurate 'life profile of [the] defendant.'" Debruce v. Comm'r Ala. Dep't of Corr., 758 F.3d 1263, 1275 (11th Cir. 2014) (quoting Williams v. Allen, 542 F.3d 1326, 1339 (11th Cir. 2008)). This is true whether the "incomplete and inaccurate life profile" is due to omission or misrepresentation. Id. at 1276 (finding counsel ineffective when the "generalized description omitted the 'particularized characteristics' of [the defendant's] heavily disadvantaged background and upbringing") (internal citation omitted); Rompilla, 545 U.S. at 390 (finding prejudice where mitigating evidence portrayed the defendant's "childhood and mental health very differently from anything defense counsel had seen or heard"); Williams, 542 F.3d at 1340 (holding counsel's investigation deficient where "counsel obtained an incomplete and misleading understanding of [the defendant's] life history" by relying upon the defendant's mother's account despite the availability of several other family members).

176. Trial Counsel also incorrectly told the jury that "[f]amily members tried to help [Dantae] and did try." (R. 1037). Trial Counsel's argument was directly contradicted by Trial Counsel's own witness—Dantae's Sister—who testified that "the people that got custody of [Dantae] . . . They would provide for [him], but they wasn't [sic] taking care of [him] like school wise and clothing and stuff. . . . I really think it was for the benefits and to have dependents for the income tax and stuff." (R. 1071).

177. Trial Counsel's ill preparation with regard to the DHR records is further demonstrated by the 6 transcript pages of confusion by Mr. Thrasher, the State (Mr. Lamb), and the court when Mr. Thrasher tried to admit attorney work product in the trial record. While presenting Dr. Meredith's direct testimony, Mr. Thrasher admitted, and then had to recall, attorney work product as part of Dantae's DHR records. The court even admonished Mr. Thrasher for his disorder.

MR. THRASHER: This one can't come in. It's attorney work product, Judge. If he has a problem with it, he's going to make me get Jonathan Schlenker over here tomorrow to document these things, I can do it.

THE COURT: Well, I mean, I'm going to leave that up to Mr. Lamb. I mean, I'll allow him to withdraw it. That's why I asked him to double-check. I had a feeling -- I didn't want anything to get -- no offense, Mr. Thrasher, but you're over there going through stuff kind of like -- what's that character in Peanuts?

MR. LAMB: Well, let me point out, it's still marked. So, I mean, it doesn't leave the courtroom because it's a marked exhibit. (R. 1092).

THE COURT: Okay. Are we sure? You said it was 3 and then you said it was 4. Look at the book!

MR. THRASHER: Well, I thought it was -- it's those three she has up there. (R. 1094).

178. Trial Counsel also lacked a basic understanding of the Alabama Rules of Evidence regarding admitting an exhibit into the trial record that summarizes or compiles voluminous records into actual mitigation evidence. See Turpin v. Lipham, 510 S.E.2d 32, 41-42 (Ga. 1998) (holding trial counsel's performance was deficient during penalty phase because "no reasonable lawyer would have based the penalty phase defense on giving 2,500 pages of raw institutional documents to the jury and asking them, without any guidance, to read through the stack of papers for mitigation evidence").

179. During Dr. Meredith's testimony, Trial Counsel tried to offer into evidence an exhibit Dr. Meredith prepared—a compilation of the DHR records. The court indicated that it thought it was "not right" to pull out certain records into a separate exhibit. (R. 1122). However, the Alabama Rules of Evidence explicitly permit the admission of these types of summaries. See Ala. R. Evid. 1006 ("The contents of voluminous writings which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation."); Hunte v. Blake, 476 So. 2d 75, 78 (Ala. 1985) (recognizing the "voluminous records" exception to the best evidence rule when "a fact to be proven requires an inspection and compilation of numerous and voluminous documents, such that inspection and compilation by the judge or jury at the trial would be unreasonable, impracticable or impossible" (internal citations omitted)).

180. The strong mitigation evidence contained in these 914 pages of DHR records is the quintessential example of contents requiring an "inspection and compilation of numerous and voluminous documents, such that inspection and compilation by the judge or jury at the trial would be unreasonable, impracticable or impossible." Hunte, 476 So. 2d at 78. Trial Counsel knew that the records were voluminous and difficult to understand without aiding the jury by pointing to

critical parts. Mr. Thrasher even admitted that he "scoured" the records and "they don't make sense sometimes. It's confusing."

Penalty Phase Opening Argument by Mr. Thrasher:

> Now that's as best as we can figure. We've scoured DHR records, juvenile court records, and tried to get school records, and it's very difficult. Some of the records, they don't make sense sometimes. It's confusing. (R. 1032).

181. Trial Counsel's files also contain pre-trial email correspondence with the trial judge, where the judge describes the DHR records as "too voluminous to cull through" and containing information which "directly/indirectly impacts" Dantae.

From: Laura Petro <laura.petro@alacourt.gov>
Date: Wed, 23 Jan 2013 15:15:11 -0600
To: Ron Thrasher<rdtlaw@mac.com>
Subject: RE: DHR Records and NOW JUVENILE RECORDS LOCATED AT FAMILY COURT

You did, you did—it seems that everything is coming in duplicate—especially these records. They are too voluminous to cull through but everything is in duplicate or triplicate! You might want to go through and cull them out and not have to make copies!!! I haven't thoroughly reviewed your motions cause I wanted to go thru the records first. Is your request for Family Court records for your client's criminal history/records or for the dependent/neglect stuff in the DHR files?
LP

On Jan 23, 2013, at 2:53 PM, Laura Petro wrote:

Ron,
Dr Barry Adams that works with Dr Meredith just came by for the DHR records. I told him about your email to Dr. Meredith and that I was uncomfortable giving them to anyone but you. Dennis has made a copy for you; they are on his desk if you can come by this afternoon and get them or they will be available all day tomorrow.

I am going over them now--again, I am going to give you all of them (lots of them are duplicates) but in an abundance of caution I am going to let you have all of them. What I have seen so far directly/indirectly impacts the deft.

LP

182. Despite all this, rather than respectfully informing the court that a summary exhibit is admissible under Alabama law and that the DHR records are nearly impossible to inspect and understand without such an exhibit, Trial Counsel just said "Okay. That's fine" when the trial court indicated it didn't think "it's right" to admit such an exhibit.

MR. LAMB: Judge, I get handed this. We've got all of the DHR records up there. Earlier we had a disagreement about something else. I don't understand what this is.

MR. THRASHER: It's, basically, Your Honor a compilation of stuff that's actually in the records. It's reports that's been pulled out and noted, the different things that he testified from here on the stand.

...

THE COURT: Well, the volumes speak for themselves. I don't think it's right to pull out certain records and say --

MR. THRASHER: Okay. That's fine. (R. 1122-23).

183. Because of Trial Counsel's failures, no compilation or summary exhibit was admitted into evidence to aid the jury understand the 914 pages of DHR records. Hinton v. Alabama, 571 U.S. 263, 274 (2014) ("An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under Strickland."); see also Williams, 529 U.S. at 395 (finding deficient performance where counsel failed to uncover records because they incorrectly thought state law barred access to records). Trial Counsel could have had Dr. Meredith testify and explain the information contained in the compilation exhibit, including with references to where the jury could find this information in the 914 pages Trial Counsel dumped on them; Trial Counsel could have further displayed the compilation exhibit as a demonstrative for the jury to see. Trial Counsel did neither.

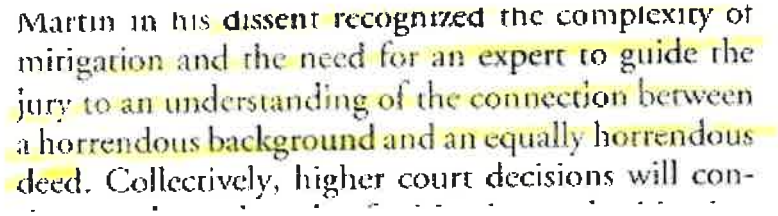
184. Trial Counsel also could have called the social workers, counselors, and teachers listed on key DHR records who had contemporaneous knowledge as to the facts described Dantae's records and could have testified as to such. These individuals include, but are not limited to, Mrs. McDaniel,[38] Ms. Joyce,[39] Margaret Hardy,[40] Tonya Nash,[41] Toria Pettway,[42] Janet Justice,[43] Arletha Miller,[44] Octavia Moore,[45] Fredrika Powell,[46] Melvin Rogers,[47] Kristen Sparyberry,[48] Erica Horton,[49] and Steven and Chegay of Seeraj Family Homes.[50]

185. Interestingly, Trial Counsel's lack of preparation and deficient performance was foreshadowed during their opening argument. Trial Counsel told the jury in a very confusing manner that Dr. Meredith is "going to talk to you about mental disorders . . . but it doesn't really arise [sic] to the level, at least legally, to a standard of mental retardation . . . [w]e're presenting this to you and letting you look at it." (R. 1035). Trial Counsel minimized (and even diminished) any probative value of their own expert. This ultimately led the jury to discredit the little bit of Dr. Meredith's testimony they did hear on top of diminishing Trial Counsel's own credibility with the court and jury for putting on such a disorganized and haphazard presentation.[51]

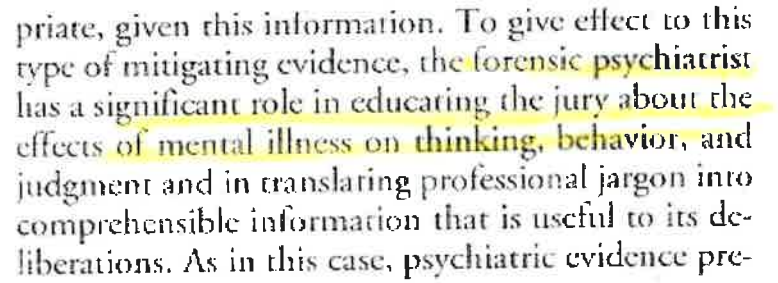
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[38] Taught Dantae and Lawrence at Huffman High School in 9th grade.
[39] Teacher at Kingston Elementary School who reported to DHR that Dantae returned from Christmas break with no shoes.
[40] Principal at Kingston Elementary School and was involved in the ISP meetings with DHR.
[41] Therapist
[42] Social worker
[43] Social worker
[44] Social worker
[45] Social worker
[46] Social worker
[47] Provided counseling services for Dantae.
[48] DHR worker who spoke with Dantae's Mother in 2003.
[49] DHR worker listed on several DHR records in 2008.
[50] Provided counseling for Dantae and his family, including Dantae's Brother and Dantae's Legal Father in 2008.
[51] Indeed, Trial Counsel's ill preparation was evident from the first day of trial when Trial Counsel took a similarly-disorganized and haphazard approach during jury selection. Trial Counsel just continued to lose credibility with the court and jury as the trial progressed.

186. Trial Counsel's abbreviated and deficient performance during Dr. Meredith's presentation was a result of ill preparation—not trial strategy. Not only did Mr. Thrasher admit on national television that, particularly "on the psychological end" of the evidence, "it just didn't come out," but Trial Counsel's files show that Trial Counsel specifically highlighted numerous articles discussing the need for an expert to help the jury understand the connection between a defendant's "horrendous background and an equally horrendous crime."


Martin in his dissent recognized the complexity of mirigation and the need for an expert to guide the jury to an understanding of the connection between a horrendous background and an equally horrendous deed. Collectively, higher court decisions will con-

187. Trial Counsel further highlighted an article stating that in mitigation, a "forensic psychiatrist has a significant role in educating the jury about the effects of mental illness on thinking, behavior, and judgement and in translating professional jargon into comprehensible information that is useful to its deliberations."


priate, given this information. To give effect to this type of mitigating evidence, the forensic psychiatrist has a significant role in educating the jury about the effects of mental illness on thinking, behavior, and judgment and in translating professional jargon into comprehensible information that is useful to its deliberations. As in this case, psychiatric evidence pre-

188. Trial Counsel neither elicited testimony that adequately helped the jury understand and connect Dantae's horrendous background to the brutal stabbings, nor did they explain to the jury the effects of Dantae's mental illnesses as "comprehensible information" that would have been "useful to its deliberations." Trial Counsel's numerous deficiencies in failing to present adequate mitigation expert testimony, including failing to properly present the documentary

evidence and making misleading statements, prejudiced Dantae during the penalty phase of his capital murder trial.

E. The Cumulative Effect of Trial Counsel's Deficiencies Prejudiced Dantae.

189. The prejudice component is met when a defendant demonstrates "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. "[A] defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case. ... The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." Id. at 693-94; see also Kyles v. Whitley, 514 U.S. 419, 434-41 (1995) (in assessing prejudice, court must consider cumulative effect of conduct at issue).

190. In assessing whether Dantae was prejudiced by Trial Counsel's failure to investigate the mitigating evidence described herein, the question is not whether Trial Counsel presented some mitigation evidence, but whether "the entire postconviction records, viewed as a whole and cumulative mitigation evidence presented originally, raised a reasonable probability that the result of the sentencing proceeding would have been different if competent counsel had presented and explained the significance of all the available evidence." Williams, 529 U.S. at 399 (citations omitted).

191. Trial Counsel's failures during the penalty phase, including but not limited to, their failure to uncover that Dantae suffers from severe executive functioning dysfunction (impairing his decision-making abilities akin to someone who has been shot in the head), failure to obtain Dantae's medical records, failure to present adequate mitigation expert testimony, and numerous failures in adequately presenting evidence from Dantae's DHR records and family and friends, all

cumulatively prejudiced Dantae for all the reasons explained in this Section I.A-F, which are fully incorporated herein.

192. This evidence would have been non-statutory mitigation evidence admissible during the penalty phase of Dantae's trial and would have also supported statutory mitigating factors under Section 13A-5-51(2) (defendant was under the influence of extreme mental or emotional disturbance) and Section 13A-5-51(6) (defendant's capacity to appreciate the criminality of his conduct was substantially impaired). Trial Counsel failed to present these to the jury. Dantae was prejudiced by Trial Counsel's failure to adequately investigate and present mitigating evidence.

1. The Jury Never Heard Constitutionally Significant Mitigation Evidence.

193. The jury never heard Dantae suffers from organic brain dysfunction and impairment, possibly brought on, and certainly compounded, by years of childhood abuse and neglect. As explained in Section I.B.3 above, Dantae suffers from severe organic brain dysfunction. Dantae's executive functions (decision-making, judgment, and cognitive abilities) rank ***below the 1st percentile*** of similarly-situated individuals. Indeed, Dantae's test results regarding executive dysfunction are comparable to someone who has been ***shot in the head***. This evidence alone is constitutionally significant mitigation evidence that Trial Counsel should have presented to the jury. See supra Section I.B.

194. The jury also never saw or heard testimony regarding the significant mitigation evidence in Dantae's medical records, as explained in Section I.C. Among other critical mitigating facts, Dantae's objective and standard medical records would have corroborated that Dantae was sexually abused by Quortes, including on the night of the offense. The jury was further never presented with adequate mitigation expert testimony that would have explained the connection

between Dantae's childhood trauma and how this impacted his behavior and manifested as psychological disorders, as explained in Section I.D above.

195. On top of all this, the jury never heard about the magnitude of Dantae's childhood trauma, uncovered in the crevices of the DHR records, medical records, school records, and interviews with family and friends. Although the jury was dumped with nearly 1,000 pages detailing Dantae's childhood—it is not reasonable to conclude that in the 3 hours of deliberations, the jurors were able to read, comprehend, and put together mitigation evidence from the 1,000 pages of raw, scrambled, handwritten, and sometimes illegible records. That was Trial Counsel's job and duty. Dantae's nightmarish childhood includes, but is not limited to the following facts.

196. Dantae was set up for failure from birth. As the youngest of three siblings, Dantae was the least wanted and never seemed to fit in. Dantae was forced to look after himself throughout his entire tumultuous childhood—something a child, and particularly a child suffering from severe organic brain dysfunction, is not capable of doing. Dantae's repeated emergency room visits show that he had extreme lack of oral hygiene, and that he sometimes had to discharge himself from the hospital because no parent or guardian was there for him. Nor did he have someone to supervise him when he was prescribed powerful narcotics, such as hydrocodone, Percocet, and Tylenol number 3, as evidenced by the UAB Children's hospital and UAB Kirklin Clinic records. Nobody ever provided Dantae with the basic level of care that a child needs.

197. Dantae's Mother, the woman who was tasked with nurturing him, suffered from substance abuse, chronic depression, and personality disorder. (C. 995, 1053-54). She often neglected her children, regularly leaving them at home alone for hours. (C. 1001). She even left Dantae home alone with Quortes—Dantae's older male cousin who forced Dantae to drink alcohol and sexually abused Dantae throughout his childhood. During this time, a teacher reported to DHR

that Dantae was frequently absent and arrived to school barefoot when he returned from Christmas break. (C. 1000). Dantae's Mother even sold her family's food stamps to pay for beer and cigarettes, leaving her own children hungry and helpless. (C. 1098). Seeking refuge, Dantae and his siblings were frequently forced to flee to their Grandmother's home. (C. 1098).

198. But Dantae's Grandmother was not much better equipped to raise the children; she struggled to provide with the meager resources she had available to her. (C. 999). Dantae's Grandmother also could not consistently feed the children and did not have beds for them—they had to share the couch. (C. 1101). Dantae's Grandmother begged for DHR to remain involved in the children's lives and asked to be released as their guardian. (C. 1104, 1111). When Dantae's Grandmother could no longer care for the children, Dantae and his Brother were chronically passed around from family member to family member, including at least ***13 times*** between when Dantae was 10 and 18.

199. Even when Dantae was able to find shelter, the area was often cruel and unsanitary. According to Dantae's Brother, Dantae rarely had a bed of his own. Dantae often slept on floors. (C. 1098, 1324). At one time, he slept in a rat-infested apartment. Dantae's UAB Children's Hospital records show that when Dantae was 10, he was diagnosed with scabies—a microscopic mite that burrows into the skin and lays eggs. Weeks later, Dantae experienced neck pain and developed a series of skin ashes. These ailments were likely the result of Dantae's atrocious living conditions.

200. Dantae's Legal Father refused to even acknowledge that Dantae was his son and suffered from anger management issues; Dantae often experienced the effects of his anger. (C. 982, 1462). Dantae would often get into physical fights with his Legal Father. (C. 1033, 1162). One of those fights resulted in Dantae's Legal Father hitting Dantae with a golf club. (C. 985).

Dantae was not just physically abused by his Father, but also by his Mother's new boyfriend,[52] who was restrained by court order from having contact with Dantae because of his history of physical abuse against Dantae. Dantae's maternal uncle[53] also badly beat Dantae, leaving him with two black eyes and a severely injured jaw and nose. In Fall 2009, Dantae was expelled from Carver High School for alleged domestic violence against his then-girlfriend.[54] (C. 192).

201. Dantae also suffered horrific emotional abuse. Dantae's Mother told Dantae that "no one wants" him, specifically her. (C. 1895). In September 2003, Dantae's Mother told DHR that she wanted someone to adopt Dantae. (C. 998). Dantae's mental health suffered. In June 2003, DHR administered psychiatric and mental evaluations that showed that Dantae needed special education and was mentally disturbed. (C. 1185). According to Dantae's Grandmother, mental health struggles run in the family. Dantae also has two family members who are institutionalized: Dantae's cousin, Demetrius Kelly,[55] and Dantae's great uncle on his Mother's side, Terry Pegues.

202. Despite his tumultuous childhood, Dantae had no prior criminal records.

203. The jury also never heard mitigation evidence from additional witnesses who were available and willing to testify during the penalty phase of Dantae's trial. Witnesses such as, Christian Pegues, Lawrence Callen, Sr., Jasmine Colvin, Charles Brown, Gertrude Thomas, Angela Allen, Jerrell Williams, Raymond Thomas, Dr. Ronald Bray, Naujie Lee, Donald Carlisle, Latoya Wooden, Madlyn Scott, Lakiya Jones, Josephine Aikerson, Natasha Brown, David Sanders, and Kim Williams were not called to testify during the penalty phase of Dantae's trial. Had these individuals been called to testify, they would have each provided favorable, non-cumulative, mitigation testimony as to specific facts they are alleged to have knowledge regarding,

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[52] David Sanders
[53] Charles Brown
[54] Jasmine Colvin
[55] This is Quortes Kelly's (the male victim's) brother.

as explained in the preceding paragraphs of this Petition, which are incorporated fully herein. Moreover, Trial Counsel's meager presentation of testimony from Beatrice Brown, LaQuoya Callen, Lawrence Callen, Jr., and John Collins was inadequate because these individuals could have testified regarding significant additional facts they are alleged to have knowledge regarding, as explained in the preceding paragraphs of this Petition.

2. The Mitigation Evidence Trial Counsel Failed to Present is the Precise Sort of Evidence the Supreme Court and Other Courts Have Held Constitutionally Significant.

204. Trial Counsel failed to adequately investigate and uncover constitutionally significant mitigation evidence, described above and incorporated fully herein. This is the precise type of mitigation evidence that the Supreme Court and other courts have held is prejudicial to a criminal defendant when counsel fails to adequately investigate.

205. For example, in Rompilla v. Beard, the petitioner, like Dantae, "was abused by his father who beat him with he was young." 545 U.S. at 374. Further like Dantae, post-conviction counsel had tested the defendant for organic brain damage, "an extreme mental disturbance significantly impairing several of his cognitive functions," that "relate[s] back to his childhood." Here, Dr. Lokken concluded Dantae suffers severe brain dysfunction are consistent with a level of impairment comparable to an individual who has been ***shot in the head***. The Supreme Court held that Rompilla was prejudiced because "[i]t goes without saying that the undiscovered 'mitigating evidence,' taken as a whole, 'might well have influenced the jury's appraisal' of [the petitioner's] culpability, and the likelihood of a different result if the evidence had gone in it 'sufficient to undermine confidence in the outcome' actually reached at sentencing." Id. at 393 (internal citations omitted).

206. In Wiggins v. Smith, the Supreme Court held that mitigation evidence that Wiggins, similar to Dantae, experienced "physical torment, sexual molestation, and repeated rape" among

other evidence is "the kind of troubled history that we have declared relevant to assessing a defendant's moral culpability." 539 U.S. at 535. The Court held that Wiggins was prejudiced by counsel's failure to investigate and introduce this mitigation evidence because "had the jury been confronted with this considerable mitigating evidence, there is a reasonable probability that it would have returned with a different sentence." Id. at 536.

207. Similarly, in State v. Lewis, a decision out of the Alabama Court of Criminal Appeals this year, the court held that Lewis was prejudiced by counsel's deficient performance in conducting a mitigation investigation, which included failing to conduct social-history interviews and failing to gather and "conduct[] a thorough record review of … school records, medical records, and most importantly the DHR records." No. CR-20-0372 (Ala. Ct. Crim. App. May. 6, 2022) (citations omitted). The court further held counsel was deficient despite retaining and presenting a mitigation expert during the penalty phase. The court held that "because of trial counsel's failures, [the expert] did not conduct a comprehensive mitigation investigation (nor was she asked to do so) and therefore knew very little about Lewis's tumultuous childhood or his success when he was in a stable environment. [The expert] was only able to testify that there was 'some abuse,' which, as shown at the evidentiary hearing and through the extensive DHR records, dramatically downplayed the horrific circumstances of Lewis's childhood." No. CR-20-0372 (Ala. Ct. Crim. App. May. 6, 2022).

208. Like Lewis, where the court held that the mitigation expert's inadequacy was "bolstered by her trial testimony, which covered only 7 1/2 transcript pages," Dr. Meredith's testimony similarly covered only about dozen pages—riddled with sustained objections during the most significant portions regarding Dantae's psychological disorders—and "dramatically downplayed the horrific circumstances of [Dantae's] childhood." Id. The Lewis court held the

defendant was prejudiced because "[h]ad counsel been effective, the judge and jury would have learned about the 'kind of troubled history [the Supreme Court has] declared relevant to assessing a defendant's moral culpability.'" No. CR-20-0372 (Ala. Ct. Crim. App. May. 6, 2022).

209. In Williams v. Allen, the Eleventh Circuit held that mitigation evidence that "paints a vastly different picture of [defendant's] background" than the evidence presented during the penalty phase prejudiced Williams. 542 F.3d at 1342. Particularly relevant to Dantae's case, the court in Williams held that mitigation evidence that "contradicted" factors the court relied on for imposing the death penalty, such as "discounting the significance of the abuse described" and that the judge believed "defendant was cared for by his mother and grandmother" when in actuality the evidence that was not presented "indicated that Williams' childhood was in fact characterized by an extreme level of deprivation, both physical and emotional . . . [including that] Williams' parents provided him with inadequate food and clothing, neglected his basic hygiene and medical needs, permitted him to roam the neighborhood unsupervised, and ignored his deteriorating academic performance." Id. at 1342-43.

210. In Debruce v. Comm'r Ala. Dept. of Corrs., the Eleventh Circuit reversed and remanded petitioner's sentence based on prejudice from counsel's inadequate mitigation investigation in the penalty phase. 758 F.3d at 1263, 1279. The Eleventh Circuit found the inadequate investigation prejudicial because of the difficulties petitioner faced growing up, ones that mirror the difficulties Dantae faced. Like Dantae, Debruce had a "troubled history that includes 'severe privation,' 'abuse,' and 'physical torment.' *Id.* at 1276. The Eleventh Circuit held that "[b]ecause the omitted mitigating evidence, when compared to what little was actually introduced at trial, undermines confidence in the outcome of DeBruce's sentencing, DeBruce suffered prejudice at the penalty phase of his capital murder trial." Id.

211. Also similarly to the DeBruce case, the evidence and arguments Trial Counsel presented during the penalty phase provided the jury and court with inaccurate information, which led the jury and court to discount the severity of Dantae's childhood trauma and abuse. Debruce, 758 F.3d at 1274 ("[Counsel] permitted [the defendant's] mother to present grossly inaccurate testimony during her son's sentencing hearing that [the defendant] had been a successful student and had attended the University of Alabama."); Williams, 542 F.3d at 1342 (finding counsel's ineffective assistance prejudicial because, in part, "the violence experienced by [the defendant] as a child far exceeded—in both frequency and severity—the punishments described at sentencing").

212. Despite the volume, severity, and strength of Dantae's mitigation evidence, as explicitly recognized under Supreme Court precedent, Trial Counsel failed to present both non-statutory and statutory mitigation evidence. Rather than present constitutionally significant mitigation evidence (described above), Trial Counsel instead made confusing arguments about mitigating factors to the jury—arguments that were further unsupported by the law. For example, Mr. Colee told the jury that Dantae is a "mama's boy" and that "[a] lot of we men are guilty of that, being a mama's boy. I suggest to you, ladies and gentlemen, that is also a mitigating circumstance that exists in this case."

Mr. Colee's Penalty Phase Closing Statement:

even John said a moment ago, he just seemed to be a mama's boy. A lot of we men are guilty of that, being a mama's boy.

I suggest to you, ladies and gentlemen, that is also a mitigating circumstance that exists in this case. That calls for you to consider it,

(R. 1179).

213. On top of Trial Counsel's numerous deficiencies investigating, presenting, and even coherently and accurately arguing mitigating factors, Trial Counsel also ***conceded***

aggravating factors to the jury. Mr. Thrasher literally told the jury and judge that the incident was "***heinous, atrocious, and cruel.***" This is the ***exact aggravating factor*** that the State had the burden to prove with a high bar. Ultimately, this was 1 of only 3 aggravating factors the trial court found applies in sentencing Dantae to death.

Mr. Thrasher's Penalty Phase Opening Statement:

> It is atrocious and cruel and heinous. I've never seen a capital murder that's not. They're

(R. 1037).

Court's Sentencing Order:

> Aggravating circumstance number 8 Section 13A-5-49 (8) does apply in that the capital offense was especially heinous, atrocious or cruel compared to other capital offenses.

(C. 121).

3. Dantae Was Even More Prejudiced Because The Jury Did Not Unanimously Vote for Death.

214. Despite Trial Counsel's meager mitigation presentation, the jury returned a non-unanimous, 11-1, verdict recommending that Dantae be sentenced to death. Similarly, in State v. Lewis, the jury verdict for death was 10-2. The Alabama Court of Criminal Appeals held not only was the "prejudice in [that] case similar to the prejudice in Williams, Wiggins, and Porter, [all U.S. Supreme Court cases] but [it] is ***greater*** because the jury verdict for death was not unanimous." No. CR-20-0372 (Ala. Ct. Crim. App. May. 6, 2022) (emphasis added). The court stated that the "jury verdict means that, even without hearing the details of Mr. Lewis's turbulent childhood and [other mitigation evidence], two jurors were already convinced that the mitigating circumstances outweighed any aggravating circumstances; thus the balance was close. Under Alabama law, the jury could not have returned a recommendation for death if one additional juror had voted for life." Id.

215. Here, the 11-1 jury verdict for death means that at least one juror was already convinced based on Trial Counsel's inadequate mitigation presentation that Dantae should not be sentenced to death. Trial Counsel only needed to sway 2 more jurors that the mitigating circumstances outweighed the aggravating circumstances, and the jury would not have been able to return a verdict recommending death. See Clark v. Dunn, No. CV 16-0454-WS-C, 2018 WL 264393, at *25 (S.D. Ala. Jan. 2, 2018) (finding a reasonable probability that "had trial counsel conducted the penalty phase as the petitioner suggests, at least two additional jurors would have voted for life rather than death."); see also Hardwick v. Crosby, 320 F.3d 1127, 1191 (11th Cir. 2003) (citation omitted) ("Even with investigation omissions and no defense at sentencing, the jury still was only one vote short of recommending a life sentence instead of death for Hardwick. The entirety of Hardwick's postconviction record under a Strickland analysis at least strongly suggests 'a reasonable probability that the result of the sentencing proceeding would have been different if competent counsel had presented and explained the significance of all the available evidence.'"); Blanco v. Singletary, 943 F.2d 1477, 1505 (11th Cir. 1991) ("Given that some members of [defendant's] jury were inclined to mercy even without having been presented with any mitigating evidence and that a great deal of mitigating evidence was available to [such] attorneys had they more thoroughly investigated . . . there was a reasonable probability that [the] jury might have recommended a life sentence absent the errors."); Lawhorn v. Allen, 519 F.3d 1272, 1297 (11th Cir. 2008) (finding prejudice where defendant "needed only to convince two other jurors" to incur a mistrial and therefore "alter the outcome of the proceedings"); Ex Parte Smith, 213 So. 3d at 220 ("[T]he evidence presented, which, if developed and allowed to be considered by the jury, may have been relevant in the jury's sentencing recommendation . . . . [I]f

the evidence had been developed and the jury allowed to consider it, [it] may have been different.").[56]

II. Dantae Was Denied Effective Assistance of Counsel During the Judicial Sentencing Phase of His Trial.

A. Trial Counsel Failed to Present Critical Mitigation Evidence to the Judge Prior to the Court's Issuance of a Sentence.

216. Under Alabama law at the time of Dantae's sentencing, the jury made a sentencing recommendation, but the final sentencing decision was made by the trial judge. See Ala. Code § 13A-5-47(a) (2013). Thus, the sentencing hearing was the last opportunity to present an argument to convince the trial court to impose a sentence of life without parole as opposed to death. Id. § 13A-5-47(c) ("At the sentence hearing evidence may be presented as to any matter that the court deems relevant to sentence and shall include any matters relating to the aggravating and mitigating circumstances . . .").

217. As detailed above in Sections I.B-E, and incorporated fully by reference herein, Trial Counsel's investigation of, preparation for, and presentation of mitigating evidence on Dantae's behalf was grossly inadequate. Trial Counsel either ignored or left undeveloped substantial and readily-available mitigation evidence. This mitigation evidence was therefore further not presented to the trial court during sentencing. Trial Counsel's failures were constitutionally deficient. See, e.g., Karis v. Calderon, 283 F.3d 1117, 1139-41 (9th Cir. 2002) (counsel ineffective for failing to prepare and present mitigating evidence of the defendant's troubled childhood; prejudice found after counsel presented only forty-eight minutes of mitigation); Jackson v. Herring, 42 F.3d 1350, 1367-68 (11th Cir. 1995) (counsel ineffective for

[56] The prejudice to Dantae during the penalty phase was further exacerbated by Trial Counsel's failure to object to an outwardly emotional reaction by the court during the State's presentation of victim impact testimony. Trial Counsel's files labeled "mitigation" contain a sticky note stating "Judge crying!! Object, sidebar, mistrial." However, nothing in the transcript indicates that Trial Counsel objected or took any actions to protect Dantae from the prejudicial impact of the court's emotional decorum.

failing to present mitigating evidence regarding petitioner's low IQ, alcohol abuse, and the circumstances of her upbringing).

218. Trial Counsel's failures to present mitigation evidence during the penalty phase before the jury are further exacerbated by Trial Counsel's additional failures during the judicial sentencing hearing.

219. Within minutes of the judicial sentencing hearing, Trial Counsel filed a sentencing memorandum. (C. 593). Specifically, the sentencing memorandum stated that Dantae told Dr. Meredith that "Quortez [sic] made sexual advances" toward Dantae and that "Quortez would grope and try to play with [Dantae's] genitals. This raises the question of whether or not sexual abuse may have occurred. Such behavior may have been a precursor to the instant offenses." (C. 597). Dr. Meredith concluded: "**Can individuals, under certain circumstances, act without awareness of their activities and if so was the chronic sexual abuse that Mr. Callen experienced sufficient duress to create the type of serious mental illness associated with such violent behavior? We feel the answer to this question is yes**." (C. 604).

220. Mr. Thrasher explained to the judge that the sentencing memorandum contains ***"some things in there that were not brought out at trial*** . . . Dantae never expressed to me some things that occurred to him, but he did to the mitigation expert and twice to the psychologist. But, then, he backed off. He never has gone there again." (R. 1266:14-24). The State responded that "the sentencing memorandum . . . contains a number of things that were never placed in evidence . . . ." (R. 1270:15-23). The court responded that it "***will not consider*** anything that has not been testified to under oath." (R. 1271:11-13). Mr. Thrasher tried to clarify that Dantae told Dr. Meredith twice about the sexual abuse and told the mitigation investigator, Ms. Saunders, just once. However, Mr. Thrasher completely missed the mark by incorrectly telling the court that

evidence that Dantae was sexually abused and resulting dissociative state were not testified to under oath. (R. 1271:17-25).

> MR. THRASHER: Just to clarify, the mitigation expert, it was mentioned to her once, but to Dr. Meredith twice. And, then, --
>
> THE COURT: Sure. Again, I'll give it the credibility that I think --
>
> MR. THRASHER: I understand.
>
> THE COURT: -- it deserves, but it was not testified to under oath, correct?
>
> MR. THRASHER: No, ma'am, it was not. Thank

(R. 1271).

221. As explained above in Section I.D.3 above, during the penalty phase before the jury, Dr. Meredith testified that Dantae had told Dr. Meredith he was sexually abused and that indicated to Dr. Meredith that Dantae was in a "disassociative [sic] episode" during the incident. (R. 1106:2-22). Thus, not only did Trial Counsel's deficient performance cause the jury to discredit Dr. Meredith's testimony during the penalty phase, but it further caused the court to give no weight to Dr. Meredith's conclusions presented in the sentencing memorandum.

> THE COURT: I understand and I agree. That information is there, and I will make it a part of the record, but this Court will not consider anything that has not been testified to under oath. I will give it, you know, the credence that it deserves as not being testified to under oath.

(R. 1271).

222. Moreover, as explained in Section I.C above, had Trial Counsel not been deficient in obtaining Dantae's medical records, the jury and the judge would have had corroborating

medical records showing that when Dantae was 10 years old, he was diagnosed with a UTI and underwent STD testing. As Dr. Dueffer, a medical expert, would have testified, this diagnosis and STD testing would have corroborated Dantae's statements to Dr. Meredith that he was sexually abused by Quortes. Moreover, had Dr. Grant been presented, she would have testified in-depth as to shame-based avoidance, which would have further explained that Dantae's behavior in recanting his statements and hesitation about presenting evidence about sexual abuse in a public setting where his family members would have to hear about it is consistent with an individual who has suffered sexual abuse. Indeed, the Court of Appeals opinion on Dantae's direct appeal confirms that Trial Counsel's deficiencies in this regard prejudiced Dantae. The court held:

> If the evidence is 'double hearsay, it **should be corroborated, at least in part, by other evidence.'** . . . **Indeed, defense counsel noted the unreliability of the statements.** (R. 1266.) Given that the sentencing memorandum was **filed within minutes of the judicial sentencing hearing**, that the State had no opportunity to rebut the allegations, and that there was **absolutely nothing to indicate the reliability of the statements purportedly made by Dr. Meredith**, we agree with the circuit court that the sentencing memorandum was properly excluded from its consideration.

Callen v. State, 284 So. 3d at 238 (citations omitted) (emphases added).

223. Had Trial Counsel presented this readily-available corroborating evidence, not made arguments undermining the credibility of Dr. Meredith's conclusions, and filed the sentencing memorandum sooner than merely "within minutes" of the judicial sentencing hearing, there is a reasonable probability that the judge would have given more weight to Dr. Meredith's conclusions and there is reasonable probability Dantae would not have been sentenced to death.[57]

[57] Additionally, had Trial Counsel not been deficient and uncovered this corroborating evidence, especially the medical records, there is a reasonable probability that Dantae would have been more willing to present this evidence to the jury. Dr. Meredith would have then testified to the jury details that Dantae was sexually abused by Quortes (one of the victims) on the night of the incident, rather than only a vague reference to statements Dantae made regarding a "close family member" but later denied. Trial Counsel could have also taken a number of actions to try to make Dantae more comfortable with presenting this evidence, including but not limited to, invoking Alabama Rule of Evidence 615, which would have required any testifying family members be excluded from the courtroom;

224. Trial Counsel's failures are further evidenced by the statement made by the trial court when sentencing Dantae to death. The trial court addressed Dantae directly and told Dantae that the "Court has provided your attorneys all of the money and resources that it could possibly to research, to explore, to investigate why you did what you did," but "[t]here has been no reasonable explanation given." "Three people are dead for absolutely no reason." The court then sentenced Dantae to death.

> It is this Court's opinion that this is -- and I join in with everyone else. This is a senseless, senseless case. There has been no reasonable explanation given, Mr. Callen, for
>
> ...
>
> your behavior and for your actions.
>
> This Court has provided your attorneys all of the money and resources that it could possibly to research, to explore, to investigate why you did what you did.

(R. 1273-1274).

225. If Trial Counsel would have adequately investigated, prepared, and presented mitigation evidence to the trial court prior to judicial sentencing, there is a reasonable probability that Dantae would not have been sentenced to death.

B. Trial Counsel Failed to Object to an Inadequate Presentence Investigation Report Prior to Judicial Sentencing.

226. Trial Counsel also failed to ensure that a proper presentence investigation and report were presented to the trial court prior to the judicial sentencing hearing. Section 13A-5-47(b) of the Alabama Code 1975 required that that "[b]efore making the sentence determination,

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Trial Counsel could have also requested the trial court seal the courtroom for that portion of testimony and evidence. Trial Counsel did nothing. Their failures prejudiced Dantae.

the trial court shall ***order and receive a pre-sentence investigation report***. The report shall contain the information prescribed by law or court rule for felony cases generally and any additional information specified by the trial court." Ala. Code §13A-5-47(b) (2013) (emphasis added). Section 13A-5-5 states that "There shall be a presentence or postsentence investigation completed and filed on every defendant convicted of a felony offense after March 10, 2006. . . such defendant shall not be sentenced or otherwise disposed of before such report has been presented to and considered by the court."

227. Following Dantae's conviction, the trial court ordered a presentence investigation report. (C. 592). But, between the close of the penalty phase on July 12, 2013, and the judicial sentencing hearing on August 20, 2013, Trial Counsel did not adequately ensure that the required presentence investigation report (PSI) was completed and presented to the court, nor did Trial Counsel object to proceeding with Dantae's sentencing hearing in the absence of a proper PSI.

228. Neither the attorneys nor the court ever mentioned a presentence report during the judicial sentencing hearing. Regardless of whether a PSI was actually presented to the court,[58] the PSI in record makes clear that it was missing many critical components required under the Alabama Code. Specifically, in Ex Parte Washington, the Alabama Supreme Court reversed the judgment of the Court of Criminal Appeals and held that a presentence investigation report was deficient where it:

> contain[ed] almost no information about Washington's troubled adolescence and unstable family life and its effect on him . . . Among other things, the report did not discuss his mother's abandonment of her children, Washington's residence in

[58] The original record contained a youthful offender report but no PSI. (C. 148-152). Dantae filed a motion to supplement the record with the PSI, among other things. (SR. 203). In response, the clerk filed a supplemental record containing the youthful offender report, but no PSI. (SR. 12-16). On direct appeal, after Dantae filed his opening brief, the State filed a motion to supplement the record with a copy of a PSI dated August 6, 2013. (SSSR. 60-65).

> a series of foster and group homes, or the absence of his father for most of his life.

106 So. 3d at 449.

229. Similarly here, Dantae's PSI contained no information about Dantae's background—his voluminous medical history, mental health history, his mother's abandonment of her children (C. 998-1002, 1557, 1754), DHR's failure to intervene (C. 980-1477), and the physical and sexual abuse Dantae suffered at the hands of his own family members (C. 993, 998-1002, 1062, 1150, 1316, 1557, 1754).

230. Moreover, the Court of Appeals decision on direct appeal does not preclude Dantae from raising an IAC claim for Trial Counsel's failure to object and insist that a new and adequate presentence investigation be conducted, as required under Alabama law. The issue raised on direct appeal was whether the "circuit court erred in relying on a youthful-offender report and not the official PSI report that had been prepared by the Alabama Board of Pardons and Paroles after [Dantae's] conviction." Callen v. State, 284 So. 3d at 238-39.

231. The Court of Appeals held Dantae's direct appeal claim—that the trial court erred because it did not consider a PSI and relied only on an outdated Youthful Offender report—was not supported by the record because "the circuit court's sentencing order clearly states that it considered the PSI . . . the PSI report is contained in the third supplemental record filed with this Court. (3 Supple. 60-64.)" The Court of Appeals is correct that the State supplemented the record on direct appeal and included a PSI dated July 31, 2013—two years after Dantae's Youthful Offender Report, dated July 26, 2011. (C. 148). Thus, it is technically correct that there is a PSI in the record that is dated after Dantae's conviction and prior to the judicial sentencing hearing.

232. But, although a parole officer may have technically generated a PSI report on July 31, 2013, the "officer remarks" reveal that this purported PSI is essentially a re-generated copy of

Dantae's July 26, 2011 Youthful Offender report. In fact, the July 31, 2013 PSI explicitly states that the ***sole source*** of the "personal/social history of this investigation" is the ***same*** July 26, 2011 interview with Dantae. Unsurprisingly then, the July 31, 2013 PSI is ***identical*** in terms of the completely missing and critical facts about Dantae's social and family history, medical history, including diagnoses of psychological disorders, DHR history, and the like.

July 26, 2011 Youthful Offender Report:

ALABAMA BOARD OF PARDONS AND PAROLES

REPORT OF INVESTIGATION

Type of Investigation: YOA **Date Dictated:** 07/26/2011

Dantae Callen was interviewed while incarcerated at the Jefferson County Jail on 7/26/2011. He was cooperative in giving this officer all the information necessary to complete this investigation.

(C. 152).

July 31, 2013 Purported PSI:

ALABAMA BOARD OF PARDONS AND PAROLES

REPORT OF INVESTIGATION

Type of Investigation: PREPROB **Date Dictated:** 07/31/2013

The personal/social history of this investigation was obtained from an interview with Dontae Callen on 07/26/2011 while incarcerated at the Jefferson County Jail. Mr. Callen has been incarcerated in the Jefferson County Jail since 10/29/2010.

(SSSR. 60-64).

233. Had Trial Counsel objected to proceeding with the judicial sentencing hearing in the face of a PSI report that explicitly stated it was based on the same information contained in the Youthful Offender report, and completely devoid of Dantae's childhood trauma, the trial court probably would have ordered a new PSI be conducted to include Dantae's comprehensive social and personal history. Trial Counsel's failure to object here was particularly damaging in light of

their failure to adequately investigate and present mitigation evidence during the penalty and judicial sentencing phases. The trial court needed a thorough and contemporary presentence investigation report in order to understand the mitigating circumstances that were not presented at trial. However, due to Trial Counsel's ineffectiveness, the trial court was never presented with constitutionally significant mitigation evidence regarding Dantae's childhood trauma, neglect, mental illness, intellectual deficits, physical and sexual abuse, substance abuse, or brain dysfunction—either as mitigation evidence, or as part of his presentence investigation and report. Had the trial court been provided with an adequate presentence investigation report, there is a reasonable probability that Dantae would not have been sentenced to death.

C. Trial Counsel Elicited Improper and Highly Prejudicial Victim Impact Testimony that Dantae Deserved the Death Penalty During the Judicial Sentencing Phase.

234. The State called Lisa Brown, the 3 victims' family member, to give victim impact testimony during the judicial sentencing hearing (the same witness who had given victim impact testimony during the penalty phase before the jury). "Victim impact evidence may be presented during the penalty phase of a capital-murder trial so long as the witness does not recommend an appropriate punishment or characterize the crime or the defendant." Gissendanner v. State, 949 So. 2d 956, 962 (Ala. Crim. App. 2006). In Ex Parte Washington, the Supreme Court of Alabama held that the trial court's admission of victim-impact testimony was plain error when the victim's parents testified that death was the appropriate punishment. 106 So. 2d at 447.

235. Despite this clear Alabama Supreme Court precedent, the only question that Trial Counsel asked Ms. Brown was whether she recommended the death penalty for Dantae—not just once, but multiple times.

Cross-Examination of Lisa Brown (State's Witness) by Mr. Thrasher:

However, we're here today in a sentencing hearing. We all know that the jury came back and recommended a death sentence. I hate to have to ask the question, but is that what you're asking for today, is the death sentence for Mr. Dontae Callen?

A. Yes, it is.

Q. Could you tell me why you think that's a just reason?

Q. Do you think it's proper that Mr. Callen die?

A. I think whatever the law decided, sir.

Q. I'm not asking what the law decided. I'm asking what you feel.

A. I agree with what the law decided.

Q. I understand you agree with what the law decided. I'm asking what you feel?

A. I just told you what I feel. I agree. (R. 1245:6-13, 1247:3-10).

236. No reasonable counsel would have repeatedly elicited this prejudicial testimony. Although the trial court is presumed to follow the law, this prejudicial testimony compounded with Trial Counsel's cumulative deficiencies in failing to adequately investigate and present mitigation evidence, concessions regarding the 3 mere aggravating factors, and ill preparation that diminished their credibility with the trial court, prejudiced Dantae.

III. Dantae Was Denied Effective Assistance of Counsel During the Guilt Phase of His Trial.

A. Trial Counsel Failed to Conduct an Adequate Investigation to Support Their Sole Defense – Intoxication.

237. Trial Counsel's sole theory of defense during the culpability phase was that Dantae was intoxicated during the offense, which negated a finding of specific intent such that Dantae was

guilty of manslaughter, rather than capital murder. The court instructed the jury that "[i]n order for intoxication to be such that it could satisfy you that it prevented the defendant from forming, mentally entertaining, the intent which the law says he must have held, then that intoxication must be of such character and extent as to render him incapable of consciousness that he is committing a crime . . . Intoxication must be so excessive as to paralyze the mental facilities and render the accused incapable of forming or entertaining the intent required by law as an element of the offense." (R. 658).

238. Trial Counsel presented one witness in their case in chief, Dantae's Grandmother, who testified that Quortes (one of the victims)—not Dantae—generally "drank a lot of beer" when around her. (R. 863). Trial Counsel further cross-examined State witnesses: Lisa Brown, Faye Budgess, and Jerrell Williams, each time asking only about Quortes' history of drinking, not Dantae's, including asking Dr. Gary Simmons (forensic pathologist) generally about alcohol levels in someone's body who "has a tendency to drink somewhat heavily on a regular basis." (R. 642-44). The only evidence regarding ***Dantae's*** intoxication during the night of the offense was Dantae's statements to the police, introduced in the record by the State, that he had drank alcohol the night of the offense. (R. 848; State's Ex. 112A). While the night of the incident, Quortes' blood alcohol level was 0.22%, far above the non-intoxication level of 0.05%, Dantae's blood alcohol level was never tested, but he had admitted to drinking that evening (C. 117, 2027).

239. As explained in Section I.C above, Trial Counsel failed to obtain any of Dantae's medical records, which showed Dantae's repeated use of prescribed narcotics, including that Dantae was prescribed Percocet, a strong opioid painkiller, just weeks before the date of the offense. Dantae's medical records further show that Dantae was prescribed hydrocodone on February 24, 2009 (UAB Children's Hospital); Tylenol number 3 on March 5, 2009 (UAB

Hospital); Tramodal on October 22, 2009 (UAB Hospital); Acetaminophen-oxycodone (Percocet) on August 7, 2010 (UAB Emergency Department).

240. Dantae's chronic and prolonged use of opioid painkillers was critical evidence that would have supported Trial Counsel's sole theory of intoxication. A medical expert, such as Dr. Dueffer, could have testified as to the effects of Dantae's use of prescription opioids, particularly when mixed with alcohol. Dr. Dueffer could have testified that drinking alcohol heavily while taking prescription painkillers and opioids can have many adverse effects, including "blacking out" and memory loss. Dr. Dueffer would have explained that alcohol itself is a disinhibitor and many people who drink heavily do not control themselves or their actions well, and when mixed with prescription drugs, especially opioids, the effects can be magnified and it is not recommended to mix alcohol and prescription painkillers for this reason and others.

241. Trial Counsel also failed to investigate or interview Dantae's friends and family, such as Naujie Lee, Donald Carlisle, and Madelyn Scott regarding Dantae's history of alcohol use. Each of these individuals would have testified about significant alcohol abuse in the family, and specifically about Dantae and Quortes's (one of the victims) history of drinking. Moreover, Trial Counsel failed to present critical testimony from Dantae's family members and friends, including Dantae's Mother, Collins, and Dantae's Sister. They would have each testified that Quortes was an alcoholic and that he was drunk all of the time and that Quortes introduced Dantae to alcohol and pressured him to drink until he became sick. Dantae also began consuming significant amounts of alcohol on a frequent basis. One night not long before the offense, Collins found Dantae throwing up from having drunk excessive amounts of alcohol with Quortes. Each of these individuals would also testify and explain that this type of excessive drinking was not surprising to them given their family's history of alcoholism. See Commentary to Rule 10.7, 2003 ABA

Guidelines (explaining trial counsel's duty to investigate during the guilt phase include seeking out and interviewing "witnesses familiar with aspects of the client's life history that might affect the likelihood that the client committed the charged offense(s), and the degree of culpability for the offense").

242. Moreover, despite Dr. Meredith having already testified during the Atkins hearing that "from the time that he [Dantae] was 15 or 16 years old, he drank significant amounts of alcohol every night" (R. 64), Trial Counsel failed to call Dr. Meredith to testify during the culpability phase. Nor did Trial Counsel try to call the State's expert, Dr. King to testify despite Dr. King's report stating that Dantae "started drinking alcohol at age 16 and before he was incarcerated, he was drinking every other day, a six-pack of beer or more per day as well as liquor occasionally." (R. 245).

243. Had the jury been presented with this evidence of Dantae's history of alcohol and prescription narcotic use, there is a reasonable probability that Dantae would not have been found guilty on three counts of capital murder.

B. Trial Counsel Presented Inconsistent Arguments Regarding Intoxication.

244. Further damaging their sole intoxication defense, Trial Counsel repeatedly made arguments that were both confusing and ***inconsistent*** with a finding that Dantae was intoxicated during the offense. Williams, 529 U.S. at 369 ("The consequence of counsel's failure to conduct the requisite, diligent investigation into his client's troubling background and unique personal circumstances manifested itself during his generic, unapologetic closing argument, which provided the jury with no reasons to spare petitioner's life."); see Herring v. New York, 422 U.S. 853 (1975) (" . . . no aspect of such advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment.").

245. Dantae's Trial Counsel split the closing argument during the culpability phase. Mr. Colee went first and explained to the jury that the judge would soon give them the law on intent, and specifically how intoxication can negate specific intent, that the crimes Dantae was charged with require specific intent, and that the evidence supported and the evidence supporting a finding that Dantae was intoxicated to the point where he was incapable of forming specific intent. Specifically, Mr. Colee stated to the jury:

Closing Argument by Mr. Colee:

What he could tell you is what he remembered. We know that they had been drinking that night. (R. 927).

The Judge will tell you this, that intent is a very specific thing. It requires a knowingly action of the mind.

She will tell you that intoxication can render intent. It can negate intent. She's (R. 928).

She's going to talk to you about how intoxication works as it relates to the intents involved in each one of the counts. (R. 929).

I thank you for your consideration and I ask that you find Dontae Callen guilty of

manslaughter as it relates to each count in the indictment, one, two and three. Thank you. (R. 935-36).

246. Immediately after Mr. Colee, Mr. Thrasher gave his portion of the closing statement on behalf of Dantae. However, Mr. Thrasher's statements were contradictory to a finding that

Dantae was intoxicated—even characterizing the evidence as occurring because Dantae could have been "mad because he realized what he did" or that he was "intentionally" trying to start the fire.

Closing Argument by Mr. Thrasher:

> Staring at a knife that killed somebody is not going to give you any insight as to your duties, but this statement will. There was a copy, go back and read. "So, you threw the lamp down on some clothes?" I don't know why he threw the lamp down in the clothes. Was he mad because he realized what he did? Did he throw it down to intentionally try to start a fire? I don't know.
>
> But after he did, after that happened, after that did occur, he did go and light some clothes. Lt. Calvert testified to what he testified to. Lt. Mosely came and testified that the fire was there. That it was not (sic) a fire that didn't have any air to give it what it needed to burn.
>
> These are all things that you're going, well? These are things you're going to have to think about.

(R. 943-44).

247. Mr. Thrasher repeatedly made prejudicial statements during the closing argument, including asking the jury "this is pretty cold-blooded, isn't it, folks?" Mr. Thrasher also said "I don't know" more than 30 times during his closing argument, confusing the jury and issues, including asking the jury to look at an exculpatory photograph and then stating that he did not

know whether it was in the record, telling the jury "[i]t may be in there or it may not. I don't know."

Closing Argument by Mr. Thrasher:

He talks about, and I think we can see it on here, that he's very remorseful about it. He's crying. Cotton says that. He says, "I don't think you're a cold-blooded killer." Although, this is pretty cold-blooded, isn't it, folks?

Although, what he means by that, is that something went wrong. Everybody is looking for a motive, like Mr. Colee said. We don't have to have motive. Everybody wants to know what happened. (Mr. Thrasher snaps fingers 3 times.) That's what happened. Something snapped. I don't know why. I'm not sure I know why.

(R. 945).

MR. THRASHER: There may be one that has -- that shows Budweiser. It looks like an 18-pack or a 24-pack. I don't know. It may be in there or it may not. I don't know.

(R. 946).

248. Trial Counsel's failure to investigate Dantae's history of drug use is even more ironic in light of confusing and unsupported arguments Mr. Thrasher made during closing argument about the prescription drug, Ambien—which was actually nowhere in the record.

Closing Argument by Mr. Thrasher:

You've heard of people taking Ambien. I've taken it and it never has bothered me. I sleep

like baby. But you've heard about people taking Ambien and then all of a sudden they get up and they go do stuff and they don't ever remember doing it. I've never experienced that and I don't know anybody that has, but we've all read reports about that.

(R. 939-40).

249. Mr. Thrasher ended his portion of the closing argument by making an improper plea to the jury that they find Dantae did not have the specific intent to commit capital murder, not because Dantae was intoxicated to a level that negated specific intent as a matter of law, but "because I don't think it is in my heart of hearts. This is what I do."

Closing Argument by Mr. Thrasher:

This is the last time I get to plead Mr. Callen's pleas to you. I would ask that you consider that is not a specific intent crime that rises to the level of capital murder, because I don't think it is in my heart of hearts. This is what I do.

(R. 947).

250. These inconsistent and improper arguments undermined Trial Counsel's credibility with the jury, were confusing, and there is a reasonable probability that it swayed the jury in rendering a verdict unfavorable to Dantae. See 2003 ABA Guidelines § 10.10.1 ("[I]f counsel takes contradictory positions . . . credibility with the sentencer may be damaged and the defendant's chances for a non-death sentence reduced.").

251. Had Trial Counsel conducted a sufficient investigation, presented evidence to support their intoxication theory, and actually made consistent arguments to the jury in furtherance of an intoxication defense, there is a reasonable probability that Dantae would not have been found guilty of capital murder. See People v. York, 312 Ill. App. 3d 434, 437 (Ill. App. Ct. 2000) (holding

trial counsel was ineffective for failing to present evidence of available DNA test results that would have corroborated defense theory that defendant did not participate in assault, but rather attempted to intervene); People v. Gunartt, 578 N.E.2d 1081, 1089 (Ill. App. 1991) (holding trial counsel rendered ineffective assistance of counsel for "fail[ing] to obtain available evidence to corroborate defendant's story"); People v. Popoca, 245 Ill. App. 3d 948, 959 (Ill. App. Ct. 1993) (holding trial counsel rendered ineffective assistance of counsel for failing to investigate and present expert testimony that "[t]he combination of low intelligence and alcohol had a devastating effect on defendant's ability to make appropriate judgments").

C. Trial Counsel Failed to Investigate and Present Evidence of Sexual Abuse And Severe Mental Illness That Would Have Supported Jury Instructions for the Lesser-Included Offense of Manslaughter and Defense To Negate Specific Intent.

252. Trial Counsel's sole defense of intoxication was revealed during their guilt phase closing arguments. However, prior to closing arguments Trial Counsel had submitted a proposed jury instruction regarding the impact of a murder done in a "heat of passion" or after being provoked. During the jury charge conference, the court asked Trial Counsel whether it was correct that there was no evidence to support the instruction, and thus should not be given. Trial Counsel responded "That's fine, Judge." (C. 612).

253. However, as explained in Sections I.D.3 and II.A above, Dr. Meredith concluded that the "precursor" to the incident could have been Quortes' attempting to sexually abuse Dantae on the night of the incident. Dr. Meredith concluded that "Quortez [sic] made sexual advances" toward Dantae and that "Quortez [sic] would grope and try to play with [Dantae's] genitals. This raises the question of whether or not sexual abuse may have occurred. Such behavior may have been a precursor to the instant offenses." (C. 597).

254. Critically, Dr. Meredith concluded the chronic sexual abuse Dantae suffered triggered him to enter a dissociative state on the night of the incident such that Dantae was acting "*without awareness of his activities*."

Rather than a premeditated murder, what occurred was a crime of passion by a seriously emotional disturbed young man. Exactly when Mr. Callen became aware of his actions is unknown, but it does not necessarily follow that he was acting consciously during the other murders or during his attempt to "cover his tracks."

Dissociative Identity Disorder occurs in only 1% of the population and is usually associated with other comorbid illnesses, in this case Borderline Personality Disorder (See Appendix II). One important issue for the Judge to consider is: Can individuals, under certain circumstances, act without awareness of their activities, and if so was the chronic sexual abuse that Mr. Callen experienced sufficient duress to create the type of serious mental illness associated with such violent behavior? We feel that the answer to this question is yes.

(C. 604).

255. Dantae's medical records corroborate Dr. Meredith's conclusions that Dantae could have been sexually abused on the night of the incident. As Dr. Dueffer, a medical expert, would have explained, Dantae's records show he was diagnosed with urethritis and a UTI, and underwent STD testing at 10 years old, which would have corroborated childhood sexual abuse. Moreover, had Trial Counsel called Dr. Grant, an expert in trauma-related psychological disorders, or a similar expert, she would have testified that had Dantae been sexually abused by Quortez on the night of the incident, Dantae's behavior of witnessing a "little boy" rather than himself experience the incident is consistent with and would support that Dantae was in a dissociative state. Dr. Grant would have also testified that Dantae's statement to the police that "it's like it wasn't me doing it" when describing what happened when Quortez was stabbed is also consistent with an individual who is in a dissociative state. (C. 2029).

256. Trial Counsel also failed to adequately investigate and present testimony from Dantae's Mother, his Mother's Boyfriend,[59] Dantae's Brother, Dantae's Legal Father, Dantae's

[59] David Sanders

Sister, and Dantae's Aunt, who were each available and willing to testify during Dantae's trial about Dantae's history of dissociative episodes, as explained in Section I.D.3 above.

257. Because Trial Counsel failed to conduct a proper investigation, including failing to gather any of Dantae's medical records, Trial Counsel could not have made an informed or strategic decision about whether to present evidence of sexual abuse and dissociation during the guilt phase, including in its decision to not call Dr. Meredith as a witness. This evidence—that Dantae was in dissociative state during the night of the incident and acting without awareness of his activities—directly supports a defense that Dantae was unable to appreciate the nature and quality or wrongfulness of his actions. Had this evidence been presented, it also separately would have required the trial court to give the jury a provocation or heat of passion instruction. Ex Parte Thomas, 766 So. 2d 975, 978 (Ala. 2000) ("[T]he jury must be instructed on each lesser-included offense which has 'any basis in the evidence.'") (quoting Beck v. State, 396 So. 2d 645, 658 (Ala. 1980)). The jury would therefore have been instructed by the court that a murder committed when provoked (i.e., in the heat of passion) is legally considered manslaughter. Had the jury been presented with this evidence during the guilt phase, there is a reasonable probability that the outcome of Dantae's proceedings would have been different.

D. Trial Counsel Failed to Object to the State's Presentation of Prejudicial Evidence to the Jury.

1. Trial Counsel Failed to Object to a Highly Prejudicial Video Showing Dantae in Handcuffs and a Jail Uniform.

258. Trial Counsel failed to object to the introduction of a highly prejudicial video of Dantae wearing handcuffs and prison garb, which the State presented several times throughout trial. During trial, the State played a nearly one-hour long video of Dantae in handcuffs and prison garb. (R. 484 (State's Ex. 112A)). The State then replayed portions of this video at five different points during closing argument. (R. 950 (twice), 951, 954, 955).

259. Trial Counsel never objected to the introduction of the video itself, even though "[t]he principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." Estelle v. Williams, 425 U.S. 501, 503 (1976) (citation omitted). A criminal defendant being exposed to the jury in handcuffs and prison garb "erode[s] a defendant's constitutionally guaranteed presumption of innocence." Allen v. Montgomery, 728 F.2d 1409, 1413 (11th Cir. 1984); see also Holbrook v. Flynn, 475 U.S. 560, 569 (1986) (handcuffs and prison garb are "unmistakable indications of the need to separate a defendant from the community at large.").

260. On direct appeal of Dantae's sentence, the Court of Criminal Appeals acknowledged that Trial Counsel failed to object to the introduction of the video. Callen, 284 So. 3d at 206 ("More importantly, Callen did not object."). Particularly in light of the presumption of innocence in favor of the accused, Trial Counsel's failure to object to video displaying Dantae in handcuffs and a prison uniform amounted to inexcusably deficient performance. See Allen, 728 F.2d at 1413. Had Trial Counsel objected to the video, there is a reasonable likelihood that the State would have had to find an alternative method of presenting Dantae's statements, and the jury would not have seen Dantae in an inherently prejudicial manner. See Holbrook, 475 U.S. at 568–69 (holding that a jury's viewing of a defendant in handcuffs was "inherently prejudicial").

261. Had the jury not been prejudiced by seeing Dantae in such a state that eroded his constitutionally guaranteed presumption of innocence, there is a reasonable likelihood he would not have been convicted of capital murder. Moreover, if the trial court had overruled Trial Counsel's objection, such a ruling would have been inconsistent with key precedent holding that viewing a criminal defendant in handcuffs and prison uniform is inherently prejudicial, and there

is a reasonable probability that Dantae's conviction and sentence would have been overturned on appeal. See Allen, 728 F.2d at 1413; Holbrook, 475 U.S. at 568–69.

2. Trial Counsel Failed to Object to Prejudicial Victim Impact Testimony.

262. Trial Counsel failed to object to extraneous testimony from Lisa Brown regarding Dantae's family, thereby permitting what amounted to victim impact testimony in effect. The State's first witness during the guilt phase of trial was Lisa Brown, the daughter of Bernice Kelly, sister of Quortes (male victim), and the cousin of Aaliyah Budgess. (R. 406). While Ms. Brown testified as to the relationships between herself, Dantae, and the rest of the family, she also testified as to extraneous information irrelevant to the underlying crime; specifically, she testified regarding Bernice and Quortes' (male victim) employment (R. 409–10), Aaliyah's schooling (R. 412), that the family spent a lot of time together (R. 416–17), and that Aaliyah was the "baby of the family" (R. 414).

263. Victim impact evidence is "not relevant to the question of [] guilt or innocence and, therefore [is] inadmissible in the guilt phase of the trial." Ex Parte Rieber, 6623 So. 2d 999, 1005 (Ala. 1995); see also Payne v. Tennessee, 501 U.S. 808, 825, 827 (1991) (allowing victim impact testimony, when not unduly prejudicial, at penalty phase only). Large swaths of Ms. Brown's testimony had no relevance to whether Dantae committed the charged offenses and only served to inflame the jury by providing illustrations of the former lives of the deceased.

264. Had Trial Counsel objected, the trial court would have been required to preclude the jury from hearing this extraneous testimony. Had the jury not heard this testimony, there is a reasonable probability that Dantae would not have been convicted of capital murder and sentenced to death. See Ex Parte Jackson, 68 So. 3d 211, 217 (Ala. 2010) (finding that emotional victim

impact testimony at culpability phase "probably distracted the jury and kept it from performing its duty." (quoting Rieber, 663 So. 2d at 1006)).

* * * * *

265. Trial Counsel's failures during the guilt phase of Dantae's trial, taken together, undermine confidence in the outcome of Dantae's convictions, and had Trial Counsel been effective, there is a reasonable likelihood that Dantae would not have been convicted of capital murder. Hinton, 571 U.S. at 274; Strickland, 466 U.S. at 694. Trial Counsel's deficient performance therefore prejudiced Dantae during the guilt phase of his capital murder trial.

PRAYER FOR RELIEF

266. For all the above stated reasons and other such reasons as may be made upon amendment of this Petition and a full evidentiary hearing, petitioner Mr. Dantae Callen respectfully asks this Honorable Court to grant him the following relief:

(b) permit petitioner to conduct discovery where it appears that it is necessary to support his claims of violation of constitutional rights;

(c) conduct a full and fair evidentiary hearing, that is recorded and transcribed, at which proof may be offered concerning the allegations in this petition and any other allegations raised in amendments to this petition;

(d) issue an order relieving petitioner of his unconstitutionally obtained conviction and death sentence following a full and complete hearing; and

(e) grant petitioner any such additional relief as is just, equitable, and proper under federal and state law.

Dated: July 29, 2022

Respectfully submitted,

By: /s/ *Joshua Fougere*

Joshua Fougere
jfougere@sidley.com
Jacquelyn Fradette
jfradette@sidley.com
Alaric R. Smith
alaric.smith@sidley.com
Kayla M. Scott
kayla.scott@sidley.com
Lindsey A. Ricchi
lricchi@sidley.com
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
Telephone: (202) 736-8000
Facsimile: (202) 736-8711

David R. Carpenter
drcarpenter@sidley.com
Patrick D. Rubalcava
prubalcava@sidley.com
SIDLEY AUSTIN LLP
555 West Fifth Street, Suite 4000
Los Angeles, California 90013
Telephone: (213) 896-6000
Facsimile: (213) 896-6600

Mehzabin Lora Chowdhury
lchowdhury@sidley.com
SIDLEY AUSTIN LLP
2021 McKinney Avenue, Suite 2000
Dallas, Texas 75201
Telephone: (214) 981-3300
Facsimile: (214) 981-3400

Susan E. McGahan
sm1561@att.com
40 Forest Way
Morris Plains, New Jersey 07950
Telephone: (908) 635-4944

Counsel (pro hac vice) for Dantae Callen

CERTIFICATE OF SERVICE

I certify that on July 29, 2022, I served the attached pleading via electronic mail on the following:

Polly S. Kenny
Office of the Attorney General
501 Washington Avenue
Montgomery, AL 36130-0152
Polly.Kenny@AlabamaAG.gov

/s/ *Joshua Fougere*

Appendix G

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1/27/2023 1:08 PM
01-CC-2011-002047.60
CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA
JACQUELINE ANDERSON SMITH, CLERK

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

DONTAE CALLEN,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. CC-2011-002047.60
	)	
STATE OF ALABAMA,	)	
	)	
Respondent.	)	

STATE OF ALABAMA'S ANSWER AND MOTION TO DISMISS PETITIONER DONTAE CALLEN'S SECOND AMENDED RULE 32 PETITION FOR POST-CONVICTION RELIEF

COMES NOW the State of Alabama, the Respondent in the above-styled cause, and files its answer to Petitioner Dontae Callen's second amended petition for post-conviction relief, filed pursuant to Rule 32 of the Alabama Rules of Criminal Procedure, as follows, and moves this Honorable Court to dismiss Callen's petition in its entirety for the following reasons.

LEGAL PRINCIPLES CONCERNING RULE 32

1. Mere notice pleading is insufficient in a postconviction petition. Washington v. State, 95 So. 3d 26, 59 (Ala. Crim. App. 2012). See Daniel v. State, 86 So. 3d 405, 410–11 (Ala. Crim. App. 2011). Rule 32.3 of the Alabama Rules of Criminal Procedure provides:

> The petitioner shall have the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief. The state shall have the burden of pleading any ground of preclusion, but once a ground of preclusion has been pleaded, the petitioner shall have the burden of disproving its existence by preponderance of the evidence.

2. Furthermore, Rule 32.6(b) of the Alabama Rules of Criminal Procedure states:

> The petition must contain a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds. A bare allegation that a constitutional right has been violated and mere conclusions of law shall not be sufficient to warrant any further proceedings.

This "burden of pleading under Rule 32.3 and Rule 32.6(b) is a heavy one," and "[t]he full factual basis for the claim must be included in the petition itself." McNabb v. State, 991 So. 2d 313, 318 (Ala. Crim. App. 2007).

3. Accordingly, the petitioner is not entitled to an evidentiary hearing unless he first meets the pleading requirements of Rules 32.3 and 32.6(b), for "Rule 32.6(b) requires that the petition itself disclose the facts relied upon in seeking relief." Boyd v. State, 913 So. 2d 1113, 1125–26 (Ala. Crim. App. 2003) (emphasis omitted). As the Court of Criminal Appeals has held, "it is not the pleading of a **conclusion** which, if true,

entitles the petitioner to relief." Id. at 1125 (citation and quotation omitted) (emphasis added). Rather,

> It is the allegation of **facts** in pleading which, if true, entitle a petitioner to relief. After **facts** are pleaded, which, if true, entitle the petitioner to relief, the petitioner is then entitled to an opportunity, as provided in Rule 32.9 of the Alabama Rules of Criminal Procedure, to present evidence proving those **alleged facts**.

Id. (emphasis added).

4. "An evidentiary hearing on a [Rule 32] petition is required only if the petition is 'meritorious on its face.'" Bracknell v. State, 883 So. 2d 724, 727 (Ala. Crim. App. 2003) (quoting Ex parte Boatwright, 471 So. 2d 1257, 1258-59 (Ala. 1985)). The Alabama Supreme Court has explained that

> [a] petition for [postconviction relief] is "meritorious on its face" only if it contains a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the facts relied upon (as opposed to a general statement concerning the nature and effect of those facts), sufficient to show that the petitioner is entitled to relief if those facts are true.

Ex parte Clisby, 501 So. 2d 483, 486 (Ala. 1986) (internal citations omitted). Thus, the petitioner is not automatically entitled to an evidentiary hearing on any of the allegations presented in his petition.

LAW CONCERNING INEFFECTIVE ASSISTANCE OF COUNSEL

5. Ineffective assistance claims are governed by the two-pronged test of Strickland v. Washington: the petitioner must show that: 1) his counsel's performance was deficient and 2) this deficient performance prejudiced his defense. 466 U.S. 668, 687 (1984).

6. The "performance" prong "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Six Amendment." Id. The standard for judging counsel's performance is "reasonableness under prevailing professional norms," and there is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 688-89. Reasonableness is judged from the perspective of counsel at the time of the alleged error and in light of the circumstances. E.g., Johnson v. Alabama, 256 F.3d 1156, 1176 (11th Cir. 2001); Mills v. Singletary, 161 F.3d 1237, 1285-86 (11th Cir. 1998). Judicial scrutiny of counsel's performance must be "highly deferential," and reviewing courts are instructed to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable

professional assistance." Strickland, 466 U.S. at 687. See Bolender v. Singletary, 16 F.3d 1547, 1557 (11th Cir. 1994) (review of counsel's conduct is "appropriately highly deferential because the craft of trying cases is far from an exact science; in fact, it is replete with uncertainties and obligatory judgment calls."). As the Court of Criminal Appeals explained, "[a]n attorney looking at a trial transcript can always find places where objections could have been made. Hindsight is not always 20/20, but hindsight is always ineffective in evaluating performance of trial counsel." Tarver v. State, 629 So. 2d 14, 19 (Ala. Crim. App. 1993). Accordingly, because counsel's conduct is presumed to have been reasonable, the analysis under Strickland "has nothing to do with what the best lawyers would have done . . . [or] what most good lawyers would have done." Grayson v. Thompson, 257 F.3d 1194, 1216 (11th Cir. 2001). Instead, the question is whether "some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial." Id.

7. Because counsel is strongly presumed to have been competent in this analysis, "the petitioner's burden of persuasion is a heavy one: petitioner must establish that no competent counsel would have taken

the action that his counsel did take." Stewart v. State, 476 F.3d 1193, 1209 (11th Cir. 2011). For example, counsel's performance will not be found deficient if a reasonable lawyer could have decided, under the same circumstances, not to investigate or present particular evidence. See Crawford v. Head, 311 F.3d 1299, 1312 (11th Cir. 2002); Housel v. Head, 238 F.3d 1289, 1294 (11th Cir. 2001).

8. "Under Strickland, counsel's conducting or not conducting an investigation need only be reasonable to fall within the wide range of competent assistance." Chandler v. U.S., 218 F.3d 1305, 1317 (11th Cir. 2000). "The performance component outlined in Strickland is an objective one." Brownfield v. State, 266 So. 3d 777, 795 (Ala. Crim. App. 2017). Counsel's performance "must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Mashburn v. State, 148 So. 3d 1094, 1132 (Ala. Crim. App. 2013) (internal citations omitted). See also Boyd, 913 So. 2d at 1129. In evaluating a claim that "his trial counsel should have done something more, we [must] first look at what the lawyer[s] did in fact." Reeves v. State, 226 So. 3d 711, 752 (Ala. Crim. App. 2016) (internal citations and emphasis omitted). Further, to adequately plead deficient performance

in trial counsel's argument, a petitioner must offer superior alternative arguments. See Van Pelt v. State, 202 So. 3d 707, 735 (Ala. Crim. App. 2015) ("Van Pelt fails to allege with any specificity what counsel should have argued and how those particular arguments would have changed the result of his trial."); see also Musgrove v. State, 144 So. 3d 410, 451 (Ala. Crim. App. 2012); Daniel, 86 So. 3d at 440; Callahan v. State, 767 So. 2d 380, 397 (Ala. Crim. App. 1999). Counsel cannot be held ineffective for failing to object to admissible evidence. See, e.g., Yeomans v. State, 195 So. 3d 1018, 1036 (Ala. Crim. App. 2013) ("[T]here is no merit to [the] claim of ineffective assistance, because there is no merit to the underlying claim that the [evidence was] inadmissible."). Conversely, counsel cannot be found ineffective for failing to present inadmissible evidence. See Daniel, 86 So. 3d at 420-21. Furthermore, counsel cannot be held ineffective for failing to raise a baseless objection. See, e.g., Hutcherson v. State, 243 So. 3d 855, 871 (Ala. Crim. App. 2017). Likewise, counsel cannot be ineffective for failing to present cumulative evidence. See Stallworth v. State, 171 So. 3d 53, 74 (Ala. Crim. App. 2013); Robinson v. State, 361 So. 2d 1172, 1175 (Ala. Crim. App. 1978).

9. The "prejudice" prong "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687. Here, as with the performance prong, "[a] petitioner's burden of establishing that his lawyer's deficient performance prejudiced his case is also high." Van Poyck v. Fla. Dep't of Corrs., 290 F.3d 1318, 1322 (11th Cir. 2002). It is insufficient for a petitioner to show that the alleged errors have "some conceivable effect on the outcome of the proceeding." Strickland, 466 U.S. at 693. Rather, he "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. Thus, "[a] finding of prejudice requires proof of unprofessional errors so egregious that the trial was rendered unfair and the verdict rendered suspect." Johnson, 256 F.3d at 1177. When claims arise concerning a death sentence, "the question is whether there is 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)

(quotation omitted). As the Supreme Court recently reiterated that the Strickland standard is "highly demanding" and requires a petitioner to show a "'substantial,' not just 'conceivable,' likelihood of a different result.'" Shinn v. Kayer, 141 S. Ct. 517, 523 (2020).

10. In a Rule 32 proceeding, as discussed above, the petitioner has the burden of pleading "a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis for those grounds." Ala. R. Crim. P. 32.6(b). Thus, for claims of ineffective assistance of counsel, the petitioner must include in his petition a full disclosure of the facts entitling him to relief under Strickland. If he fails to specifically plead facts that would, if true, establish both Strickland prongs, then summary dismissal is appropriate under Rules 32.6(b) and 32.7(d) of the Alabama Rules of Criminal Procedure. Specifically, a petitioner is "required to identify the names of the witnesses, to plead with specificity what admissible testimony those witnesses would have provided had they been called to testify, and to allege facts indicating that had the witnesses testified there is a reasonable probability that the outcome of the proceeding would have been different." Mashburn, 148 So. 3d at 1151. See also Morrissette v. State, 183 So. 3d 1009, 1016 (Ala.

Crim. App. 2014); Duncan v. State, 925 So. 2d 245, 275-76 (Ala. Crim. App. 2005); Bracknell, 883 So. 2d at 727-28; Duren v. Hopper, 161 F.3d 655, 660 (11th Cir. 1998).

11. For the reasons stated below, there is not a single facially meritorious claim in Callen's second amended Rule 32 petition, and the petition, therefore, is due to be summarily dismissed.

RESPONSE TO INTRODUCTORY PARAGRAPHS

12. On pages 1-3, Callen introduces his claims in a narrative format, stating general factual allegations and conclusions of law. To the extent that these five paragraphs are meant as independent claims for relief, they do not sufficiently state claims upon which relief may be granted pursuant to Alabama Rules of Criminal Procedure 32.3 and 32.6(b). Additionally, any arguments of factual allegations contained in these paragraphs are denied.

RESPONSE TO PROCEDURAL BACKGROUND[1]

13. The State admits the procedural history in paragraphs 1-6 of the second amended petition.[2] (Pet. at 3-5.)

RESPONSE TO STATEMENT OF FACTS

14. Callen sets out a very detailed factual statement of the proceedings and the crimes in paragraphs 7-29. (Pet. at 5-13.) Rather than re-state the facts of the crimes, the State adopts the facts of the Alabama Court of Criminal Appeals in Callen v. State, 284 So. 3d 177, 187-89 (Ala. Crim. App. 2017). The State denies the version of proceedings presented by Callen. To the extent that these paragraphs are meant to state independent claims for relief, they do not sufficiently state claims upon which relief may be granted pursuant to Rules 32.3 and 32.6(b) and should be dismissed pursuant to Rule 32.7(d).

RESPONSE TO CALLEN'S GROUNDS FOR RELIEF

15. Paragraphs 30-32 appear to be intended as an introduction to Callen's claims of ineffective assistance of counsel (hereinafter "IAC")

[1] "C." denotes the clerk's record on appeal. "R." denotes the trial record.

[2] The citation to the trial court's sentence to death is incorrect; it should be changed from "R. 1275" to "R. 1274." (Pet. at 4.)

and set forth general factual allegations and conclusions of law. To the extent that they are meant as an independent claim for relief, these paragraphs do not sufficiently state claims upon which relief may be granted pursuant to Rules 32.3 and 32.6(b). In addition, any arguments or factual allegations contained in these paragraphs are denied.

Claim I - The claim that Callen was denied effective assistance of counsel during the penalty phase of his trial.

16. Claim I is simply a heading with no narrative. (Pet. at 14.) Claim I is divided into five subclaims, four of which have additional subclaims, many of which have additional subclaims. In answering these claims, the State will refer to them as I(A), I(B), I(B)(1), I(B)(2), I(B)(3), I(C), I(C)(1), I(C)(2), I(D), I(D)(1), I(D)(2), I(D)(3), I(E), I(E)(1), I(E)(2), and I(E)(3) and answers as follows:

Claim I(A) - The claim that Callen's counsel were on notice of the duty to investigate mitigation factors.

17. In paragraphs 33-39, Callen alleges his trial counsel were on notice of their duty to investigate mitigation. (Pet. at 14-16.) This claim is answered as follows:

18. This claim is meritless and insufficiently pleaded because Callen has not pleaded facts that would show deficient performance or

that he was actually prejudiced. A claim for IAC cannot be established by sweeping generalizations that do not meet the specificity and pleading requirements of Rule 32. Callen claims his counsel asked for a five-month continuance on the "eve of trial, in March 2013." (Pet. at 15.) Callen's counsel did indeed argue for a continuance of the trial for five months (from March to August); but Callen fails to acknowledge that his attorneys successfully obtained a four-month continuance (from March to July). (R. 16-17.) Callen fails to plead what more counsel could have argued or presented to obtain an additional month continuance, the basis counsel should have used to argue for a continuance, that any such argument or presentation would have swayed this Court to grant a longer continuance, or what information would have been discovered in one additional month. Claims such as these that do not plead these types of facts do not comply with Rule 32.6(b). Mashburn, 148 So. 3d at 1150. Even considering the sparse factual allegations in the petition as true, there is no reasonable likelihood that a one-month continuance of trial would have changed the result of Callen's trial. Thus, this claim should be summarily dismissed under Rules 32.3, 32.6(b), and 32.7(d).

19. Callen argues that the ABA Guidelines establish professional norms that he believes his counsel should have followed, and argues that counsel must investigate "all sources of possible impeachment." (Pet. at 11.) However, in doing so he treats the ABA Guidelines as more authoritative than they truly are. "Although the ABA guidelines may, in some instances, provide guidance as to what is reasonable in terms of counsel's representation, they are not determinative." Jones v. State, 43 So. 3d 1258, 1278 (Ala. Crim. App. 2007); see also State v. Smith, 85 So. 3d 1063, 1071 (Ala. Crim. App. 2010). ABA publications serve only as aspirational guides, "not minimum constitutional standards." Ray v. State, 80 So. 3d 965, 982 (Ala. Crim. App. 2011) (internal citation omitted). See also Mashburn, 148 So. 3d at 1162; McWhorter v. State, 142 So. 3d 1195, 1238-39 (Ala. Crim. App. 2011). ABA Guidelines are "guides to determining what is reasonable, **but they are only guides**." Strickland, 466 U.S. at 688 (emphasis added). More recently, the Supreme Court has rejected usage of the ABA Guidelines as "inexorable commands with which all capital defense counsel must fully comply." Bobby v. Van Hook, 558 U.S. 4, 8 (2009) (per curiam) (internal citations and quotation marks omitted). Moreover, Callen fails to specifically

identify additional sources of mitigation that trial counsel could have investigated, but did not, during the hypothetical additional month continuance.

20. Alternatively, and without waiving the foregoing, this claim is denied.

Claim I(B) - The claim that Callen's counsel were ineffective for failing to investigate his potential organic brain damage.

21. In this portion of his second amended Rule 32 petition, Callen sets forth three claims. In answering these claims, the State will refer to them as I(B)(1), I(B)(2), and I(B)(3). Paragraphs 40-41 appear to be introductory paragraphs related to the three subclaims. To the extent that these paragraphs are meant as an independent claim for relief, these paragraphs do not sufficiently state a claim upon which relief may be granted pursuant to Rules 32.3 and 32.6(b). In addition, any arguments or factual allegations contained in these paragraphs is denied.

Claim I(B)(1) - The claim that Callen's counsel were ineffective for failing to call an expert neuropsychologist.

22. In paragraphs 42-58, Callen claims counsel failed to investigate his **potential** "organic brain damage" and should have hired a neuropsychologist, Dr. Kristine Lokken, who "would have testified that

[he] exhibits profound executive function deficits." (Pet. at 17.) This claim is answered as follows.

23. This claim is insufficiently pleaded and without merit. Callen asserts that Dr. Lokken administered nine tests "specifically designed to determine if and to what extent a person suffers from organic brain damage and/or dysfunction." (Pet. at 20.) Although Callen pleads the results of four of these tests (WAIS-IV, Rey Complex Figure Test, Trailmaking Test A & B, and Wisconsin Card Sorting), he fails to plead the results of the other five tests Lokken purportedly administered and relied upon. (Pet. at 20-24.) Moreover, his claim is entirely speculative and presents a claim of **potential** organic brain damage. But that claim devolves further when Callen asserts "his test performances indicate [he] **likely** suffered an unreported serious traumatic incident or multiple significant disruptions" ... and that "[e]ach neurodevelopmental insult **likely** caused further damage...." (Pet. at 24.) (Emphasis added.) Mere speculation regarding what the results of unspecified testing might show is insufficient to meet the pleading requirements of Rule 32. See Woodward, 276 So. 3d at 786; McMillan, 258 So. 3d at 1178. As such, it fails to present a meritorious claim and does not meet the pleading and

specificity requirements. Thus, this claim should be summarily dismissed under Rules 32.3, 32.6(b), and 32.7(d).

24. Alternatively, and without waiving the foregoing, this claim is denied.

Claim I(B)(2) - The claim that Callen's counsel were ineffective for failing to notice multiple red flags indicating potential organic brain damage.

25. In paragraphs 42-58, Callen claims counsel "ignored numerous red flags in [his] personal and medical history that . . . obligated [them] to investigate whether [he] has organic brain damage." (Pet. at 27.) Callen then lists five red flags: "a car accident; a history of physical abuse and injuries; headaches, blackouts, and hallucinations; alcohol abuse, and childhood abuse, trauma, and neglect." (Id.) This claim is answered as follows:

26. In paragraphs 61-64, Callen claims he suffered head and back injuries from a **car accident**. This claim is insufficiently pleaded. Callen does not plead what specific facts counsel should have, but did not discover and present, e.g. when and where the accident allegedly occurred, whether, where, when, and for long he was hospitalized, what injuries, if any, he suffered, or what the medical records show. Callen

contends that he possesses medical records, but he fails to plead anything specific from the records except that they show Callen went to the ER at UAB Children's Hospital after the accident and that he was unrestrained in the back seat when his vehicle was hit head-on on the highway. (Pet. at 28.) Callen claims his unnamed grandmother, his unnamed brother, and his high school girlfriend would have told counsel that he had injuries to his head and back and he suffered headaches, but he does not claim the medical records contained a diagnosis. Nor does he identify any admissible evidence that trial counsel could have, but did not, present to the jury. Further, counsel does not plead how this scant information is a "red flag," what counsel should have done with this information, and how it would have affected the outcome of his case. "A bare allegation that prejudice occurred without specific facts indicating how the petitioner was prejudiced is not sufficient." Hyde v. State, 950 So. 2d 344, 356 (Ala. Crim. App. 2006.) Callen relies on Ferrell v. Hall, 640 F.3d 1199, 1229, in which the 11th Circuit Court of Appeals found that Ferrell's headaches were one of "the many red flags that had been raised about Ferrell's mental health throughout the proceedings" including that Ferrell had a seizure in the courtroom during trial. While Callen tries to draw a

parallel with Ferrell for the proposition that "car accident followed by headaches a red flag warranting further investigation by trial counsel", he fails to allege facts showing that he suffered headaches of a similar nature, much less seizures, or other facts to show that his issues were of the magnitude of the issues suffered by Ferrell. (Pet. at 28.) Consequently, he fails plead facts showing any "red flag" of sufficient significance that no reasonable counsel would have failed to investigate the cause of his alleged headaches.

27. In paragraphs 65-66, Callen claims he has "a **history of physical abuse and injuries**, including signs of head trauma." (Pet. at 29.) This claim is insufficiently pleaded. Callen does not plead specific facts such as when and where the abuse allegedly occurred, whether, where, when, and for long he was treated by medical personnel or hospitalized, what injuries, if any, he suffered, or what the medical records show. Callen claims certain family and friends would have told counsel about vague instances of abuse or injuries, but he does not provide the required specific details. Further, Callen acknowledges in this claim that the DHR records that trial counsel obtained and admitted documented at least one instance of physical abuse by his father. Thus,

further testimony regarding that incident would be cumulative. Despite Callen's conclusory comment that counsel ignored this red flag, Callen does not plead how this scant information is a "red flag," what counsel should have done with this information, and how it would have affected the outcome of his case. Hyde, 950 So. 2d at 356.

28. In paragraphs 67-70, Callen claims he suffers "from **headaches, blackouts, and hallucinations**" which, he alleges are red flags pointing to organic brain damage. (Pet. at 30.) This claim is insufficiently pleaded. Callen does plead that Callen went to the hospital four times over an almost eight-year period for headaches and claims that counsel should have hired Dr. Lokken. (Pet. at 31.) Callen again claims that Dr. Lokken believes that his "organic brain dysfunction likely resulted from early trauma" and that a series of events "could have been additional 'neurological insults'." (Id.) (Emphasis added.) Callen does not plead that he was ever diagnosed with head trauma, blackouts, or hallucination or the specifics of the "early trauma." The mere fact that Callen has, years after the trial, located a new expert, Dr. Lokken, that he believes will give superior testimony does not show deficient performance. See Ward, 592 F.3d at 1173 ("'[T]he mere fact a defendant

can find, years after the fact, a mental health expert who will testify favorably for him does not demonstrate that trial counsel was ineffective for failing to produce that expert at trial.'" (Quoting Davis, 119 F.3d at 1475; Gilbert, 134 F.3d at 655 ("We cannot say that in light of the reports of the mental examinations performed, counsel's failure to retain a psychiatric expert to investigate this area further or to provide mitigating testimony fell outside the broad range of professionally adequate conduct."). Despite Callen's conclusory comment that counsel ignored this red flag, Callen does not plead how this scant information is a "red flag," what counsel should have done with this information, and how it would have affected the outcome of his case. Hyde, 950 So. 2d at 356. This claim is pure speculation. As such, it is meritless and cannot possibly meet the pleading and specificity requirements. Speculation is not enough to support a showing of prejudice. See Woodward v. State, 276 So. 3d 713, 786 (Ala. Crim. App. 2018); McMillan v. State, 258 So. 3d 1154, 1178 (Ala. Crim. App. 2017.)

29. In paragraphs 71-75, Callen claims "excessive drinking and a family history of **alcoholism** are red flags" related to organic brain damage. (Pet. at 32.) This claim is insufficiently pleaded. Callen claims

that counsel should have hired Dr. Lokken who would have testified that "various studies **strongly suggest** that alcohol abuse **may** alter not only the physical brain structure of adolescents, but also physiologic brain functioning." (Pet. at 34.) (Emphasis added.) Despite Callen's conclusory comment that counsel ignored this red flag, Callen does not plead how this scant information is a "red flag" that no reasonable counsel would have ignored, or what specifically counsel should have done with this information and how it would have affected the outcome of his case. Hyde, 950 So. 2d at 356. Furthermore, this claim is pure speculation. As such, it is meritless and cannot possibly meet the pleading and specificity requirements. Speculation is not enough to support a showing of prejudice. See Woodward, 276 So. 3d at 786; McMillan, 258 So. 3d at 1178.

30. In paragraphs 76-81, Callen claims that counsel had records that showed his "significant history of childhood **abuse, trauma, and neglect**, including that [he] was malnourished" and that counsel ignored these red flags. (Pet. at 35.) This claim is insufficiently pleaded. Callen claims that counsel should have hired Dr. Lokken who would have testified that malnourishment, chronic dental issues, and exposure to

toxins impact brain development. Callen cites to two examples in the DHR records showing that he was undernourished (Pet. at 35), but the two examples do not show malnourishment, they only show a need for access to food on those occasions. Callen does not specifically plead that he was malnourished. Callen also claims he had multiple medical visits relating to jaw and tooth pain, but fails to allege any specific details about the visits or whether he received any diagnosis, much less any facts that would show that his dental health impacted his brain health. Again, his claim is full of speculation: the unspecified dental issues would "**likely** have resulted in infections," the "amount of pain [he] **likely** suffered would have impacted his ability to eat," and the "**likely** infections, **could have potentially** impacted his developing brain." (Pet. at 37.) Indeed, if Callen suffered such great pain that he could not eat, then he would know that. Yet he fails to allege it. In paragraph 81, Callen also claims that toxins like lead can impact brain development. Callen fails to plead that he was exposed to lead or any other toxin. Instead, he pleads he was "**likely**" exposed. Despite Callen's conclusory comment that counsel ignored this red flag, Callen does not plead how this scant information is a "red flag," what specifically counsel should have done with this

information, much less how it would have affected the outcome of his case. Hyde, 950 So. 2d at 356. Furthermore, this claim is pure speculation. As such, it is meritless and cannot possibly meet the pleading and specificity requirements. Speculation is not enough to support a showing of prejudice. See Woodward, 276 So. 3d at 786; McMillan, 258 So. 3d at 1178.

31. In paragraphs 82-89, Callen adds a sixth category to his claims regarding supposed "red flags" – his affect. (Pet. at 38.) This claim is insufficiently pleaded. Callen claims that Dr. Karen Salekin, a clinical psychologist, "**suspected**" Callen "**may**" have "**potential**" brain damage because of his flat affect. First, Callen does not plead that Dr. Salekin was available and willing to testify at his trial. Second, Callen does not plead facts that, if proven, would show that he *actually* had brain damage. Despite Callen's conclusory comment that counsel ignored this red flag, Callen does not plead how unspecified features of his "affect" was a "red flag" that no reasonable could have ignored, much less what specifically counsel should have done with this information, or how it would have affected the outcome of his case. Hyde, 950 So. 2d at 356. Furthermore, this claim is pure speculation. As such, it is meritless and

cannot possibly meet the pleading and specificity requirements. Speculation is not enough to support a showing of prejudice. See Woodward, 276 So. 3d at 786; McMillan, 258 So. 3d at 1178.

32. "[E]ven if the evidence [Callen] alleged should have been discovered had been presented at trial, there [is] no reasonable probability that the outcome of the trial would have been different." Woodward, 276 So. 3d at 740. See, e.g., Miller v. State, 99 So. 3d 349, 412 (Ala. Crim. App. 2011) ("[Petitioner] has not shown a reasonable probability that the result of the penalty phase would have been different had additional mitigation evidence been presented based on the brutal nature of the crime, the overwhelming and convincing evidence of guilt, and the strength of the aggravating circumstances.")

33. Thus, this claim should be summarily dismissed under Rules 32.3, 32.6(b), and 32.7(d).

34. Alternatively, and without waiving the foregoing, this claim is denied.

Claim I(B)(3) - The claim that Callen's trial counsel's failure to investigate potential brain damage was objectively unreasonable and highly prejudicial.

35. In paragraphs 90-101, Callen claims he was "prejudiced by [counsel's] failure to adequately investigate and present evidence of [his] severe organic brain dysfunction, which correlates with organic brain damage to [his] frontal lobe and results in extremely diminished executive function." (Pet. at 41-42.) This claim is answered as follows:

36. First, Callen argues that this Court should assess counsel's effectiveness in presentation of mitigation evidence by reviewing the mitigation evidence cumulatively. (Pet. at 41.) Callen is incorrect that this Court should consider the cumulative effect of his counsel's alleged errors. "Alabama does not recognize a 'cumulative effect' analysis for ineffective-assistance of counsel claims." Carruth v. State, 165 So. 3d 627, 651 (Ala. Crim. App. 2014) (citing Mashburn, 148 So. 3d at 1117, quoting Taylor v. State, 157 So. 3d 131 (Ala. Crim. App. 2010), quoting in turn Brooks v. State, 929 So. 2d 491, 514 (Ala. Crim. App. 2005) ("We can find no case where Alabama appellate courts have applied the cumulative-effect analysis to claims of ineffective assistance of counsel.").

37. If Alabama did recognize a cumulative-effect analysis, it would apply to only those claims that are facially meritorious. See Morris v. State, 261 So. 3d 1181, 1188 (Ala. Crim. App. 2016). In this case, all of Callen's penalty-phase ineffective assistance claims are either deficiently pleaded or facially meritless. Because this Court should dismiss each individual claim, there is no cumulative effect to consider. See Yeomans, 195 So. 3d at 1047; Moody v. State, 95 So. 3d 827, 855 (Ala. Crim. App. 2011).

38. Further, like in claims I(B)(1) and I(B)(2) above, this claim is speculative at best. Callen claims counsel should have hired Dr. Lokken to testify about his **likely** and **potential** organic brain damage. In this claim, Callen does not plead that Dr. Lokken was willing and available to testify at the trial, the tests employed by Dr. Lokken, the results of those tests, the specific testimony she would have presented, or how presenting such testimony would led to a reasonable probability of different results. At bottom, Callen does not allege that Dr. Lokken has diagnosed him with organic brain damage or that she could offer any admissible evidence that he suffers from any such condition. As such, Callen fails to plead a facially meritorious claim and has not met the

pleading and specificity requirements. Speculation is not enough to support a showing of prejudice. See Woodward, 276 So. 3d at 786; McMillan, 258 So. 3d at 1178.

39. The mere fact that Callen has, years after the trial, located a new expert, Dr. Lokken, that he believes will testimony that he now prefers to that presented by trial counsel does not show deficient performance. See Ward, 592 F.3d at 1173 ("'[T]he mere fact a defendant can find, years after the fact, a mental health expert who will testify favorably for him does not demonstrate that trial counsel was ineffective for failing to produce that expert at trial.'" (Quoting Davis, 119 F.3d at 1475; Gilbert, 134 F.3d at 655 ("We cannot say that in light of the reports of the mental examinations performed, counsel's failure to retain a psychiatric expert to investigate this area further or to provide mitigating testimony fell outside the broad range of professionally adequate conduct.").

40. In paragraphs 96-100, Callen claims his counsel were ineffective for failing to adequately present evidence about the science of teenage brain development and employ the legal arguments promulgated in Roper v. Simmons, 543 U.S. 551 (2005), Graham v. Florida, 560 U.S. 48

(2010), and Miller v. Alabama, 567 U.S. 460 (2012.) Contrary to Callen's assertion that there existed a "prevailing scientific consensus" regarding the development of the male brain, the only scientific support he cites is an NPR article published on October 10, 2011 about the "emerging science" of brain development.[3] Callen fails to plead how there was scientific consensus in the community, or, indeed, how he could have demonstrated that supposed "consensus," despite his "burden to [plead and] prove that no reasonable attorney would have chosen the course of action that his attorneys chose." Bryant v. State, 181 So. 3d 1087, 1142–43 (Ala. Crim. App. 2011). At bottom, Callen fails to plead facts that, if proven, would show that any consensus exists at all, much less one that no reasonable counsel could possibly ignore.

41. Callen has completely failed his pleading requirement. Thus, this claim should be summarily dismissed under Rules 32.3, 32.6(b), and 32.7(d).

42. Alternatively, and without waiving the foregoing, this claim is denied.

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[3] Brain Maturity Extends Well Beyond Teenage Years, National Public Radio, available at https://www.npr.org/templates/story/story.php?storyid=141164708.

Claim I(C) - The claim that Callen's counsel were ineffective for failing to obtain his medical records, failing to investigate those records, and failing to hire a medical expert.

43. In this portion of his second amended Rule 32 petition, Callen sets forth two claims. Claim I(C) is simply a heading with no narrative. (Pet. at 14.) Thus, this claim is denied. In answering these claims, the State will refer to them as I(C)(1) and I(C)(2). These claims are answered as follows:

Claim I(C)(1) - The claim that Callen's counsel were ineffective for failing in their duty to obtain his medical records.

44. In paragraphs 102-106, Callen claims counsel failed to obtain his medical records despite having a duty to do so. (Pet. at 47.) This claim is answered as follows.

45. This claim is insufficiently pleaded and without merit. First, Callen again attempts to use the ABA Guidelines as dictating what every counsel must do. See Jones, 43 So. 3d at 1278; see also Smith, 85 So. 3d at 1071. But the ABA publications serve only as aspirational guides, "not minimum constitutional standards." Ray, 80 So. 3d at 982. Second, Callen's pleading itself shows that there was a plethora of medical information available in the DHR records and the psychological reports

by both the State's expert, Dr. King, and the defense expert, Dr. Meredith. (Pet. at 48-49.) Callen does not plead what information additional medical records would provide. It appears the generalized medical records would be cumulative with the evidence presented at trial. The failure to present additional cumulative mitigating evidence, even if more detailed or elaborate, does not amount to ineffective assistance of counsel. Daniel, 86 So. 3d at 429-30 (internal citation omitted). See also Saunders v. State, 249 So. 3d 1153, 1171 (Ala. Crim. App. 2016); McMillan, 258 So. 3d at 1172. Third, "even if the evidence [Callen] alleged should have been discovered had been presented at trial, there [is] no reasonable probability that the outcome of the trial would have been different." Woodward, 276 So. 3d at 740. See, e.g., Miller, 99 So. 3d at 412 ("[Petitioner] has not shown a reasonable probability that the result of the penalty phase would have been different had additional mitigation evidence been presented based on the brutal nature of the crime, the overwhelming and convincing evidence of guilt, and the strength of the aggravating circumstances.")

46. Thus, this claim should be summarily dismissed under Rules 32.3, 32.6(b), and 32.7(d).

47. Alternatively, and without waiving the foregoing, this claim is denied.

Claim I(C)(2) - The claim that Callen's medical records contain significant mitigation evidence and would have corroborated a history of neglect and sexual and physical abuse.

48. In paragraphs 107-19, Callen claims that his medical records "contain objective, medical evidence that corroborates [he] suffered severe neglect and abuse during his childhood." (Pet. at 49.) This claim is answered as follows.

49. This claim is without merit and insufficiently pleaded. First, Callen concedes that this is not a case where trial counsel failed to learn of or present evidence of the abuse and neglect that he suffered as a child. Indeed, counsel presented extensive DHR records documenting these facts. Callen contends that these medical records corroborate the testimony and evidence presented at trial. But Callen's claim does little more than demonstrate that his medical records are merely cumulative to the testimony that trial counsel offered. Nor does he plead facts that would show how this cumulative evidence would have a probability of changing the outcome of the trial. Callen claims that a medical expert, like Dr. Heinz Dueffer, could have testified about the cumulative

evidence; but he does not plead that Dr. Dueffer was willing to testify at his trial. See Brooks v. State, 340 So. 3d 410, 437 (Ala. Crim. App. 2020) ("It is well settled that, to properly plead a claim that counsel were ineffective for failing to hire an expert witness, the petitioner must, among other things, identify by name the expert witness his counsel should have hired, set out the testimony that the named expert would have given, and plead that the named expert was both willing and available to testify at trial.") Nor does he plead facts that, if proven, would show that Dr. Dueffer's testimony would have materially added to the jury's knowledge of Callen's childhood rather than being simply cumulative to the facts they had already learned from trial counsel's efforts. Failure to offer additional mitigation evidence that is cumulative to evidence offered at trial does not amount to deficient performance. Stallworth, 171 So. 3d at 74.

50. Thus, this claim should be summarily dismissed under Rules 32.3, 32.6(b), and 32.7(d).

51. Alternatively, and without waiving the foregoing, this claim is denied.

Claim I(D) - The claim that Callen's counsel were ineffective for not eliciting proper expert testimony about the effects of his neglect and abuse.

52. In paragraphs 120-88, Callen alleges three separate subclaims that his trial counsel were ineffective for allegedly failing to consult with and present, necessary expert assistance. (Pet. at 56-88.)

53. Paragraphs 120-21 are introductory. To the extent that they are meant as an independent claim for relief, these paragraphs do not sufficiently state a claim upon which relief may be granted pursuant to Rules 32.3 and 32.6(b).

54. Alternatively, and without waiving the foregoing, this claim is denied.

Claim I(D)(1) – The claim that Callen's counsel were ineffective for failing to present adequate testimony by an expert *forensic* psychologist.

55. In paragraphs 122-39, Callen claims counsel should have called an expert forensic psychologist like Dr. Karen Salekin, instead of Dr. Meredith. Callen asserts that Salekin would have testified about the risk factors on his development. (Pet. at 57-65.) This claim is answered as follows:

56. This claim is meritless. Counsel hired Dr. Meredith, a forensic psychologist who testified at trial. It is clear on the face of the record that Dr. Meredith was qualified. The fact that Callen has now retained a different expert, who did different things, and arrived at a different result, does not establish either deficient performance or prejudice. As the Supreme Court has explained:

> The selection of an expert witness is a paradigmatic example of the type of "strategic choic[e]" that, when made "after thorough investigation of [the] law and facts," is "virtually unchallengeable."

Hinton v. Alabama, 571 U.S. 263, 275 (2014). Moreover, the mere fact that Callen now prefers the opinions of a different expert does not render trial counsel's performance ineffective. Davis v. Singletary, 119 F.3d 1471, 1475 (11th Cir. 1997) ("we have held more than once that the mere fact a defendant can find, years after the fact, a mental health expert who will testify favorably for him does not demonstrate that trial counsel was ineffective for failing to produce that expert at trial.") There is no suggestion in this case that trial counsel failed to adequately investigate Dr. Meredith's credentials, or that, as in Hinton, he made any mistake of law that resulted in him retaining an expert who **"*he himself*** deemed inadequate." Id. (emphasis in original).

57. This claim is insufficiently pleaded and without merit. Although Callen identifies some additional witnesses who he claims would have been willing to testify and claims that "his trial counsel should have done something more, we [must] first look at what the lawyer[s] did in fact." Reeves, 226 So. 3d at 752 (internal citations and emphasis omitted). It is clear from the face of the record that counsel did conduct a reasonable investigation. Counsel hired a mitigation expert, Sirena L. Saunders, who "did a wonderful job of putting together what was a very comprehensive history about his juvenile court records, his DHR record, and also his school records." (C. 62, R. 1087.) Counsel also hired Dr. Meredith, introduced the testimony of family members Beatrice Brown, LaQuoya Callen, Lawrence Callen Jr., and John Collins, and presented the testimony of Dr. Meredith. (R. 1049-1123, 1149-61.)

58. Callen claims that Dr. Salekin was capable and willing to testify at his trial, but he does not plead that she was available. See Brooks, 340 So. 3d at 437 ("It is well settled that, to properly plead a claim that counsel were ineffective for failing to hire an expert witness, the petitioner must, among other things, identify by name the expert witness his counsel should have hired, set out the testimony that the named

expert would have given, and plead that the named expert was both willing and available to testify at trial.") Callen then avers that Dr. Salekin would have assessed his "risk and protective factors" and "concluded that [he] was subject to a multitude of risk factors throughout his life and that protective factors were absent." (Pet. at 57, 58.) In footnote 23, Callen asserts that Dr. Meredith's work was ineffective because he relied on Ms. Saunders' interviews rather than conducting his own. Callen does not plead with specificity how this methodology was ineffective or what would have been gained by Dr. Meredith conducting the interviews personally. To the extent that Dr. Meredith failed in his role as a mitigation expert, "any ineffectiveness is attributable to [petitioner]'s expert rather than to his counsel and therefore cannot support a Strickland claim." McHone v. Polk, 392 F.3d 691, 706 (4th Cir. 2004). The mere fact that Callen has, years after the trial, located a different expert that he believes will give superior testimony does not show deficient performance. See Ward, 592 F.3d at 1173 ("'[T]he mere fact a defendant can find, years after the fact, a mental health expert who will testify favorably for him does not demonstrate that trial counsel was ineffective for failing to produce that expert at

trial.'" (Quoting Davis, 119 F.3d at 1475; Gilbert, 134 F.3d at 655 ("We cannot say that in light of the reports of the mental examinations performed, counsel's failure to retain a psychiatric expert to investigate this area further or to provide mitigating testimony fell outside the broad range of professionally adequate conduct."). At bottom, this claim is nothing more than a complaint about *how* the evidence was presented, and is filled with citations to the record that was actually presented to the jury. Counsel cannot be found to be ineffective for failing to present cumulative evidence. Indeed, simply alleging that trial counsel should have offered more mitigation that was offered at trial is not sufficient. After all, "fairminded jurists … could take a different view of [a petitioner's new] mitigating evidence." Shinn, 141 S. Ct. at 525. Likewise, counsel cannot be ineffective for failing to present cumulative evidence. See Stallworth, 171 So. 3d at 74; Robinson, 361 So. 2d at 1175.

59. Callen does plead that some medical records were not discovered for use by Dr. Meredith and that elementary school records were not obtained. In footnote 27, Callen asserts that the elementary school records showing that he was chronically tardy and absent "directly contradict [] Trial Counsel's claims that [Callen] lived a 'normal life' until

he was about 11 years old." (Pet. at 60.) But the trial record shows that trial counsel attempted to locate Callen's school records, but they were unavailable in that "most of the school records from that time are in an abandoned schoolhouse that's quarantined." (R. 1085.) Callen fails to plead facts that, if proven, would show that no reasonable counsel would have failed to obtain records from a "quarantined" school building.

60. This claim is insufficiently pleaded. Callen fails to plead either deficient performance or prejudice. "A bare allegation that prejudice occurred without specific facts indicating how the petitioner was prejudiced is not sufficient." Hyde, 950 So. 2d at 356. "Even if the evidence [Callen] alleged should have been discovered had been presented at trial, there [is] no reasonable probability that the outcome of the trial would have been different." Woodward, 276 So. 3d at 740. The evidence that Callen argues was deficiently omitted is minimal and cumulative, and it would not have changed his sentence.

61. Thus, this claim should be summarily dismissed under Rules 32.3, 32.6(b), and 32.7(d).

62. Alternatively, and without waiving the foregoing, this claim is denied.

Claim I(D)(2) – The claim that Callen's counsel were ineffective for failing to present adequate expert testimony from a trauma specialist.

63. In paragraphs 140-55, Callen claims counsel should have called a different mental health expert, a clinical psychologist specializing in trauma like Dr. Grant. Callen asserts that Grant has assessed him and, unlike Dr. Meredith, the psychologist that trial counsel retained, "concluded that [he] suffers from a multitude of psychological and behavioral impairments, including (1) post-traumatic stress disorder; (2) depression with psychotic features, including hallucinations and delusions; (3) Generalized Anxiety Disorder; (4) Panic Disorder; and (5) substance use disorders." (Pet. at 66.) This claim is answered as follows:

64. First, and most importantly, Callen fails to plead sufficient facts to show that no reasonable counsel would have failed to retain *another* psychologist when they had already retained and consulted with Dr. Meredith. Callen does not allege that Dr. Meredith suggested additional psychological assessment or that anything in his report would have caused every reasonable attorney to consult a different psychologist. In short, Callen fails to plead sufficient facts that would show that no counsel could have made a reasonable decision to terminate their

psychological investigation after consulting with Dr. Meredith. Consequently, this claim fails to sufficiently plead deficient performance and should be dismissed.

65. Second, Callen does not claim that Dr. Grant was willing and able to testify at his trial. Thus, this claim does not meet the specificity and pleading requirements. See Brooks, 340 So. 3d at 437. Callen avers that had Dr. Grant, or a similar expert, been called at trial, the jury would have heard that Callen "experienced a history of significant and repeated trauma throughout his early life, including life-threatening incidents, significant abuse by multiple family members, parental neglect, abandonment, and significant poverty." (Pet. at 66.) Insofar as Callen alleges that some other, unknown, psychologist should have been retained, it is not sufficient to plead that an expert "like" Dr. Grant would have testified; the petition must plead the name of an expert was willing and able to testify at the time of trial and the content of that named expert's testimony.

66. Third, this claim is without merit and insufficiently pleaded. Callen claims that Dr. Grant has "administered several assessments" and based her conclusions on those assessments. (Id.) Callen only pleads

one assessment Dr. Grant conducted, but he fails to identify any other assessments[4], the results of those assessments, or specifically how such assessments are mitigating in Callen's case. For example, Callen pleads generally that his scores reflect "more severe trauma across all but one category," but he fails to plead what that category is. Callen also pleads that he suffers from a "multitude of psychological and behavioral impairments." (Pet. at 66.) These include PTSD,[5] a diagnosis of Major Depressive Disorder,[6] shame-based avoidance,[7] a diagnosis of Brief Psychotic Disorder,[8] Generalized Anxiety Disorder,[9] Panic Disorder,[10] and alcohol abuse.[11] While Callen pleads that he *currently* has these disorders, he only ties a "history of depression…when he was 10 years old" and a "history of hallucinations and delusions" to his childhood. (Pet. at 68, 70.) Callen fails to plead with specificity that he suffered from the

[4] Callen only pleads that Dr. Grant assessed him using a CTQ-SF, but he does not plead the name of any other assessments. (Pet. at 67, fn. 32.)
[5] Paragraph 144.
[6] Paragraph 145
[7] Paragraphs 146-49
[8] Paragraphs 150-51
[9] Paragraph 152
[10] Paragraph 153
[11] Paragraph 154

other disorders at the time of the murders or the time of trial, and what the content of Dr. Grant's relevant testimony would have been at the time of trial. Additionally, the general nature of the evidence described in this claim is cumulative to evidence presented in mitigation at Callen's trial. Moreover, with regard to mitigation, simply offering more mitigation that was offered at trial is not sufficient. After all, "fairminded jurists … could take a different view of [a petitioner's new] mitigating evidence." Shinn, 141 S. Ct. at 525. Likewise, counsel cannot be ineffective for failing to present cumulative evidence. See Stallworth, 171 So. 3d at 74; Robinson, 361 So. 2d at 1175. Fourth, Callen fails to plead prejudice. See Woodward, 276 So. 3d at 740**;** Hyde, 950 So. 2d at 356**.**

67. Thus, this claim should be summarily dismissed under Rules 32.3, 32.6(b), and 32.7(d).

68. Alternatively, and without waiving the foregoing, this claim is denied.

Claim I(D)(3) – The claim that Callen's counsel were ineffective in the presentation of expert testimony.

69. In paragraphs 156-88, Callen claims that counsel were unprepared in their presentation of Dr. Ron Meredith, a clinical

psychologist, who testified in the penalty phase of trial. (Pet. at 71.) This claim is answered as follows:

70. This claim is insufficiently pleaded and without merit. First, Callen claims that a series of sustained objections are evidence that trial counsel was not prepared for Dr. Meredith's testimony. In paragraphs 158, Callen lists eight interactions in which the State's objection was sustained. In each instance, Dr. Meredith's testimony was not responsive to the question asked. After the sustained objections, trial counsel refocused Dr. Meredith and was able to elicit the desired testimony. For example, in the first excerpt, Mr. Thrasher redirected Dr. Meredith asking "what is it that Dontae suffers from." (R. 1100.) Dr. Meredith replied "Dontae suffers from post-traumatic stress disorder" and then veered into nonresponsive testimony about his work with the National Guard. (R. 1100-01.) After two sustained objections that Dr. Meredith's answer was nonresponsive, Mr. Thrasher again focused Dr. Meredith on post-traumatic stress disorder. (R. 1101.) After another sustained objection about disorders in soldiers, Mr. Thrasher asked his next question about other disorders. (R. 1103.) But, again, Callen's claim is insufficiently pleaded. Callen does not state what counsel should have

done to better prepare Dr. Meredith for his testimony, what additional steps counsel could have taken, what different questions counsel could have asked or what Dr. Meredith's responses would have been, how any of these actions by counsel would have changed Dr. Meredith's testimony, what the content of Dr. Meredith's testimony would have been, or how there is a reasonable probability that the outcome of the trial would have been different had counsel prepared Dr. Meredith in a different way. Woodward, 276 So. 3d at 740.

71. Second, in paragraphs 161-67, Callen claims that trial counsel failed to have Dr. Meredith adequately explain **dissociation**. Dr. Meredith testified in the penalty phase that he diagnosed Callen with dissociation and that Callen was in a dissociative episode at the time of the murders. (R. 1104-05, 1107-08.) The State presented no evidence to the contrary. Callen now asserts that Dr. Meredith should have testified about the tests he conducted and the results of these tests. But these facts are merely cumulative with Dr. Meredith's testimony about the opinions he reached. Callen also asserts that counsel should have presented testimony from family members, only some of which are named, about their observations of Callen's behavior. Again, this testimony would be

cumulative with Dr. Meredith's testimony. The failure to present additional cumulative mitigating evidence, even if more detailed or elaborate, does not amount to ineffective assistance of counsel. Daniel, 86 So. 3d at 429-30 (internal citation omitted). See also Saunders, 249 So. 3d at 1171; McMillan, 258 So. 3d at 1172. Callen does not specifically plead the content of the testimony, the specific dates and locations of each of these "episodes", that these "episodes" are indeed dissociative episodes, or the name and content of the testimony of a different expert who was available to testify at the trial in a different way than Dr. Meredith.

72. Third, in paragraphs 168-70, Callen claims that trial counsel failed to have Dr. Meredith adequately explain **post-traumatic stress disorder** (PTSD.) Dr. Meredith testified in the penalty phase that he diagnosed Callen with PTSD. (R. 1100-04.) The State presented no evidence to the contrary. Dr. Meredith's testimony about PTSD included his diagnosis of PTSD, association with childhood characteristics, and a description/definition of PTSD. (R. 1100-01.) Further, Dr. Meredith testified about the relationship between borderline personality disorder, dissociation, and PTSD. (R. 1104.) Callen asserts that Dr. Meredith could have explained to the jury how he diagnosed Callen with PTSD. This

testimony would have been cumulative. The failure to present additional cumulative mitigating evidence, even if more detailed or elaborate, does not amount to ineffective assistance of counsel. Daniel, 86 So. 3d at 429-30 (internal citation omitted). See also Saunders, 249 So. 3d at 1171; McMillan, 258 So. 3d at 1172. Callen does not plead how there is a reasonable probability that the outcome of the trial would have been different had counsel presented this cumulative testimony. Woodward, 276 So. 3d at 740.

73. Fourth, Callen claims that trial counsel mishandled and mischaracterized the DHR records when they "dumped 914 pages of scrambled DHR records into the trial record." (Pet. at 79.) Callen's claim that Dr. Meredith only testified about the DHR records from R. 1096 to 1098 is belied by the trial record. Dr. Meredith's testimony continued with the conclusions he derived from the records. (R. 1096-1100.) Callen relies on Ferrell v. Hall, 640 F.3d 1199, 1231 (11th Cir. 2011) to support his proposition that his counsel were ineffective. But unlike in Callen's case, Ferrell's counsel limited their investigation to character evidence and presented *no evidence* of his mental health or his difficult and abusive childhood. Callen's counsel did not make any similar mistake.

74. Callen claims that trial counsel "minimized the significance" of the DHR records in the penalty phase arguments. (Pet. at 80.) Again taking counsel's comments out of context, Callen claims trial counsel told the jury the "records are 'confusing' and 'they don't make sense sometimes." (Id.) The record shows that counsel was explaining that the living situation for Callen and his brother was confusing:

> Now Dontae – they tried to live with Mr. Callen at one time, both of them, but Mr. Callen and Dontae didn't get along and they had an extreme amount of discourse with them.
>
> So Dontae and Lawrence are both kicked out at one point. Dontae never went back. Lawrence was allowed to go back at some point.
>
> But Dontae was the one that was left out and bounced around and did end up staying with Bernice Kelly and Quortes Kelly at one point in time.
>
> And then the last time he was living with Natasha Brown, which was Ms. Beatrice Brown, the grandmother's, daughter.
>
> Now that's as best as we can figure. We've scoured DHR records, juvenile court records, and tried to get school records, and it's very difficult. Some of the records, they don't make sense sometimes. It's confusing.
>
> They were supposed to be living with this person, according to DHR, but DHR dropped the ball and they weren't living there, they were going somewhere else.

(R. 1032.) Callen claims that counsel were ineffective for the narrative that Callen's life was normal before age 11 and states that the 914 pages of DHR records conflict with this theme. (Pet. at 80.) Callen is incorrect.

While there are some historical references contained in the almost 1,000 pages of Callen's life before 11, the DHR records begin right before Callen's 11th birthday. (C. 992.) Also, counsel's theme is consistent with the testimony of Callen's closest sibling, Lawrence, who testified that those were "the best years of my life." (R. 1074.) Callen has not alleged any facts that would show that counsel's theme was unreasonable.

75. In paragraph 177, Callen criticizes his counsel for the handling of the DHR records when they accidentally tried to admit attorney work product. But, the entire portion of the record Callen includes in the petition reflects a session that was held *outside the presence of the jury*. (R. 1090-1094.) While counsel did make a mistake, they rectified it without the jury's knowledge. Callen fails to plead the relevance of this interchange, how an innocent mistake amounts to deficient performance or how this conduct caused prejudice. Hyde, 950 So. 2d at 356.

76. Fifth, in paragraphs 178-83, Callen claims that his counsel "lacked a basic understanding of the Alabama Rules of Evidence regarding admitting an exhibit into the trial record that summarizes or compiles voluminous records into actual mitigation evidence." (Pet. at 83.) First, Callen's characterization of the records is mere argument for

he cites no authority for the proposition that the DHR records were not "actual mitigation evidence." Instead, he mistakenly relies on Turpin, in which 2500 pages of institutional records were admitted with *no expert witnesses* to explain the records. See Turpin v. Lipham, 510 S.E.2d 32, 41-42 (Ga. 1998). By contrast, Dr. Meredith did testify about and explain the less than 1,000 pages of DHR records so Callen's reliance on Turpin is inapposite. The jury in Callen's case had access to the full record and heard the testimony of Dr. Meredith. While Alabama Rule of Evidence 1006 does allow for summaries, Callen fails to plead facts showing that the trial court would have been required to admit the summary or that a summary of the records would have resulted in a different outcome. Hyde, 950 So. 2d at 356. From the face of the record, it is clear that trial counsel and the State had a stipulation to the admission of the entirety of the records. When discussing these records, the prosecutor stated, "[a]s long as [trial counsel] tells me that's the same documents from the subpoena duces tecum. As long as he's telling me it's in full and nothing's been taken out." (R. 1089.) It is also apparent this was an attempt to avoid having to lay a foundation for the records. (R. 1092-93.)

77. Sixth, in paragraph 184, Callen claims that counsel should have called a laundry list of named social workers, counselors, and teachers listed in the DHR records. This claim is insufficiently pleaded. For such a claim to be adequately pleaded, a petitioner is "required to identify the names of the witnesses, to plead with specificity what admissible testimony those witnesses would have provided had they been called to testify, and to allege facts indicating that had the witnesses testified there is a reasonable probability that the outcome of the proceeding would have been different." Mashburn, 148 So. 3d at 1151. Additionally, the petitioner must plead that the witness was "willing and able to testify on [the petitioner's] behalf.") Id. at 1154. While Callen identifies some individuals by name, he fails to specifically plead that they were available and willing to testify or what their testimony would have been. Moreover, Callen's claim is inconsistent with his previous claims regarding "summarization." Counsel presented a summary of the DHR records through Dr. Meredith's testimony and Callen fails to plead facts showing that no reasonable counsel could have decided that the testimony of an expert who had evaluated Callen was preferable to many hours of

testimony from multiple witnesses who may have known little about Callen.

78. Seventh, Callen attempts to plead prejudice in paragraph 185 when he speculates that counsel's action lead the jury to discredit Dr. Meredith. This too in insufficiently pleaded. Callen fails to plead specific facts relevant to what the jury credited or discredited. Moreover, Callen *could not* present any such evidence because, under Rule 606(b), Ala. R. Evid., jurors are prohibited from testifying regarding "any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict."

79. This claim in also refuted by the record. In the Sentencing Order, this Court stated:

> The non statutory mitigating circumstances offered by the defense included:
> Being abandoned by his mother;
> Being moved from household to household for the majority of his life;
> Being involved in the DHR system most of his life;
> Having a low IQ;
> Having been diagnosed by Dr. Ron Meredith in preparation for the mitigation phase of the trial with mild or borderline mental retardation, Borderline Personality Disorder, Dissassociative [sic] Disorder and Post Traumatic Stress Disorder; and,

The defendant's low socio-economic status.

(C. 122.) Thus, this claim should be summarily dismissed under Rules 32.3, 32.6(b), and 32.7(d).

80. Alternatively, and without waiving the foregoing, this claim is denied.

Claim I(E) - The claim that the cumulative effect of Callen's counsel's deficient performance prejudiced Callen at the penalty phase.

81. In paragraphs 189-215, Callen alleges that the cumulative effects of his trial counsel's deficient performance prejudiced him at the penalty phase; this claim is further divided into three separate subclaims. (Pet. at 88-99.) This claim is answered as follows:

82. This claim appears to be a summary of the penalty phase claims and an introduction to its three subclaims. These paragraphs set forth general factual allegations and conclusions of law. To the extent that they are meant as independent claims for relief, these paragraphs do not sufficiently state claims upon which relief may be granted pursuant to Rules 32.3 and 32.6(b). To establish prejudice under Strickland, a petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result in the proceeding would have

been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S.Ct. at 2068. In a case challenging a death sentence, "the question is whether there is a reasonable probability that, absent the errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Id. at 695, 104 S.Ct. at 2069. Callen's petition does not meet this standard.

83. Furthermore, this claim and its subclaims are meritless. Callen is incorrect that this Court should consider the cumulative effect of his counsel's alleged errors. "Alabama does not recognize a 'cumulative effect' analysis for ineffective-assistance of counsel claims." Carruth, 165 So. 3d at 651 (citing Mashburn, 148 So. 3d at 1117, quoting Taylor, 157 So. 3d 131, quoting in turn Brooks, 929 So. 2d at 514 ("We can find no case where Alabama appellate courts have applied the cumulative-effect analysis to claims of ineffective assistance of counsel.").

84. If Alabama did recognize a cumulative-effect analysis, it would apply to only those claims that are facially meritorious. See Morris, 261 So. 3d at 1188. In this case, all of Callen's penalty-phase ineffective assistance claims are either deficiently pleaded or facially meritless.

Because this Court should dismiss each individual claim, there is no cumulative effect to consider. See Yeomans, 195 So. 3d at 1047; Moody, 95 So. 3d at 855.

85. In an attempt to rebut the actual case law applicable in Alabama, Callen misrepresents the holding in Kyles v. Whitley, 514 U.S. 419, 434-41 (1995), stating that "in assessing prejudice, court must consider cumulative effect of conduct at issue." (Pet. at 88.) The U.S. Supreme Court in Kyles held that the cumulative effect of evidence suppressed by the prosecution should be considered in assessing the materiality of the evidence in a Brady claim. Thus, Kyles has no precedential value here.

86. Thus, this claim is insufficiently pleaded and facially meritless and should be summarily dismissed under Rules 32.3, 32.6(b), and 32.7(d).

87. Without waiving the foregoing defenses, the averments made in support of this claim are denied.

Claim I(E)(1) - The claim that the jury never heard constitutionally significant mitigation evidence.

88. In paragraphs 193-203, Callen claims his trial counsel's deficient performance prejudiced Callen at the penalty phase because the

jury never heard certain mitigation evidence related to organic brain dysfunction and impairment, his medical records, and his childhood trauma. (Pet. at 89-90.) This claim is answered as follows:

89. Callen relies on the meritless and insufficiently pleaded factual allegations of claim I(B) and I(D) as the basis of this claim. Because claims I(B) and I(D) are meritless and fail to sufficiently plead claims of deficient performance or prejudice, this claim attempting to show prejudice fails. Ineffective assistance claims are governed by the two-pronged test of Strickland: the petitioner must show that: 1) his counsel's performance was deficient and 2) this deficient performance prejudiced his defense. 466 U.S. at 687. Callen fails to plead how these mitigating factors, taken with the other mitigating factors, would outweigh the aggravating factors. Likewise, Callen fails to plead facts to show a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. Claims such as these that do not plead these types of facts do not comply with Rule 32.6(b). Mashburn, 148 So. 3d at 1150. Thus, this claim is without merit and insufficiently pleaded and should be dismissed under Rules 32.3, 32.6(b), and 32.7(d).

90. Alternatively, and without waiving the foregoing, this claim is denied.

Claim I(E)(2) - The claim that the mitigation evidence counsel failed to present is the sort the Supreme Court and other courts have held to be constitutionally significant.

91. In paragraphs 204-13, Callen alleges that the mitigation evidence his trial counsel failed to present is "the precise type of mitigation evidence that the Supreme Court and other courts have held is prejudicial to a criminal defendant when counsel fails to adequately investigate." (Pet. at 93.) This claim is answered as follows:

92. Although this claim is framed as a claim about prejudice, Callen pleads nothing regarding prejudice in the claim. Callen relies on the meritless and insufficiently pleaded factual allegations of claim I and then cites several cases. Because claim I is meritless and fails to sufficiently plead claims of deficient performance or prejudice, this claim attempting to show prejudice fails. Further, the cases cited by Callen are factually distinguishable from his case. For example, in Rompilla v. Beard, counsel presented no evidence about Rompilla's childhood, mental capacity and health, or alcoholism; "Rompilla's evidence in mitigation consisted of relatively brief testimony: five of his family members argued

in effect for residual doubt, and beseeched the jury for mercy, saying that they believed Rompilla was innocent and a good man. Rompilla's 14–year–old son testified that he loved his father and would visit him in prison." 545 U.S. 374, 378 (2005). In Wiggins v. Smith, counsel did not present powerful mitigation evidence, instead, despite promising in opening to tell the jury they would hear about Wiggins difficult life, counsel never provided that information. 539 U.S. 510, 526 (2003.) In State v. Lewis, counsel did not request or present any records at all and did not contact anyone who knew Lewis. 2022 WL 1439109 at *21 (Ala. Crim. App. May 6, 2022.) In Williams v. Allen, counsel relied solely on information provided by his mother. 542 F.3d 1326, 1339 (11th Cir. 2008.) In Debruce v. Commissioner Ala. Dept. of Corr., counsel presented only his mother as mitigation evidence. 758 F.3d 1263, 1275 (11th Cir. 2014.) By contrast, Callen's counsel presented extensive evidence regarding his childhood and background through the testimony of family members Beatrice Brown, LaQuoya Callen, Lawrence Callen Jr., and John Collins, and presented the testimony of Dr. Meredith. (R. 1049-1123, 1149-61.) Callen fails to plead facts to show a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have

been different. Claims such as these that do not plead these types of facts do not comply with Rule 32.6(b). Mashburn, 148 So. 3d at 1150. Thus, this claim is without merit and insufficiently pleaded and should be dismissed under Rules 32.3, 32.6(b), and 32.7(d).

93. Alternatively, and without waiving the foregoing, this claim is denied.

Claim I(E)(3) - The claim that Callen was more prejudiced because the jury did not unanimously vote for death.

94. In paragraphs 214-15, Callen alleges he "was even more prejudiced because the jury did not unanimously vote for death." (Pet. at 97.) This claim is answered as follows:

95. This claim is insufficiently pleaded and without merit. Callen makes a bare assertion that because one juror voted for life, he was prejudiced. Callen then provides a page of case citations with no analysis tying the cases to his case. As a matter of fact, each case cited is distinguishable from Callen's case. Most notably, Callen relies upon Clark v. Dunn, 2018 WL 264393, at *25 (S.D. Ala. Jan. 2, 2018), an unreported district court order for his stated proposition "finding a reasonable probability that 'had trial counsel conducted the penalty phase as the petitioner suggests, at least two additional jurors would

have voted for life rather than death.'" (Pet. at 98.) Quite the opposite, the district court's order states:

> In light of the brutal nature of the crime, the dubious character of the mitigating evidence, and its primary dependence on the drug use and consequences thereof that had been unsuccessfully presented at the guilt-innocence phase (albeit for a different purpose), and given that the jurors heard all the mitigating evidence shortly before they deliberated and knew they could consider anything to be a mitigating circumstance, it is difficult to imagine that multiple jurors would have changed their vote to life had trial counsel adopted the petitioner's proposed approach. Ultimately, however, the Court need not resolve the prejudice issue directly. The CCA, approving the trial court's decision, ruled that the petitioner was not prejudiced by counsel's performance. 196 So. 3d at 314-16. While the petitioner challenges the CCA's ruling with respect to deficient performance, (Doc. 13 at 72-73), he does not challenge its ruling with respect to prejudice. Thus, pursuant to Section 2254(d), the Court may not revisit the CCA's determination.
>
> In summary, the petitioner has failed to show either that counsel performed deficiently or that he was prejudiced by counsel's performance. He is thus not entitled to relief on this ground.

Clark, 2018 WL 264393, at *25-26. Callen fails to plead facts to show a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. Claims such as these that do not plead these types of facts do not comply with Rule 32.6(b). Mashburn, 148 So. 3d at 1150. Thus, this claim is without merit and

insufficiently pleaded and should be dismissed under Rules 32.3, 32.6(b), and 32.7(d).

96. Alternatively, and without waiving the foregoing, this claim is denied.

Claim II - The claim that Callen was denied effective assistance of counsel during the judicial sentencing phase of his trial.

97. Claim II is simply a heading with no narrative. (Pet. at 99.) Claim I is divided into three subclaims.

Claim II(A) - The claim that Callen's counsel failed to present critical mitigation evidence to the judge in sentencing.

98. In paragraphs 216-25, Callen claims that counsel failed to present critical mitigation evidence in judicial sentencing. (Pet. at 99-103.) This claim is answered as follows:

99. This claim is insufficiently pleaded and without merit. First, Callen attempts to incorporate by reference claims I(B) – I(E). This is improper. The Alabama Court of Criminal Appeals has held that "the claim of ineffective assistance of counsel is a general allegation that often consists of numerous specific subcategories. Each subcategory is [an] independent claim that must be sufficiently pleaded." Coral v. State, 900

So. 2d 1274, 1284 (Ala. Crim. App. 2004), overruled in part on other grounds, Ex parte Jenkins, 972 So.2d 159 (Ala. 2005.) Second, Callen claims that counsel's last-minute submission of Dr. Meredith's sentencing memorandum regarding Callen's alleged sexual abuse by Quortes was ineffective. Callen cannot show that no reasonable counsel would have failed to present the sentencing memorandum. The portion of the sentencing memorandum at issue describes Dr. Meredith's conversations with Callen about Quortes' alleged sexual abuse previous to and immediately before the murders. (C. 597, 602-04.) This information is cumulative to the testimony of Dr. Meredith during the penalty phase. (R. 1106-07.) Callen claims that counsel should have called Dr. Dueffer, a medical expert, to testify about Callen's medical records at age 10 where he was diagnosed with a UTI and was tested for STDs and that counsel should have called Dr. Grant to testify about "shame-based avoidance." (Pet. at 102.) Callen does not specifically allege the name of the doctor or facility, the dates of the records, that Drs. Dueffer and Grant were available and willing to testify at his trial, and the specific content of their testimony. See Brooks, 340 So. 3d at 437, this Court held that

> It is well settled that, to properly plead a claim that counsel were ineffective for failing to hire an expert witness, the petitioner must, among other things, identify by name the expert witness his counsel should have hired, set out the testimony that the named expert would have given, and plead that the named expert was both willing and available to testify at trial.

(emphasis in original). Further, Callen does not plead facts that would show how every reasonable counsel would have located such records, much less what "red flags" would have led to these records or that counsel were told about Callen's treatment. See Waldrop, 987 So. 2d at 1195. Counsel's investigation was clearly reasonable. Callen cannot claim that no reasonable counsel would have failed to locate these alleged records. Lastly, Callen does not plead facts to show a reasonable probability of a different outcome. In footnote 57, Callen claims that "there is a reasonable probability that [he] would have been more willing to present this evidence [of sexual abuse] to the jury" if the medical records had been submitted. (Pet. at 102.) This is speculative and insufficiently pleaded. It is clear from the face of the record that Callen did not want to present testimony about the alleged sexual abuse. (C. 602-03.) In Dr. Meredith's report, he stated "[Callen] was extremely self-conscious about revealing this information and asked if he would have to talk about this in Court

in front of his family." (C. 602.) Callen does not plead that he would have allowed such testimony by Dr. Meredith, what actions counsel could have taken that would have resulted in him being more comfortable, or that Callen himself would have testified about the sexual abuse. Considering the difficulties counsel faced regarding this alleged abuse, Callen cannot claim that no reasonable counsel would have failed to present the sentencing memorandum. It was well-established law that the rules of evidence are greatly relaxed and hearsay is admissible in sentencing proceedings. Reasonable counsel could have relied on the well-established law and made the strategic decision to offer the sentencing memorandum to present this evidence in a controlled manner. Armed with the knowledge that Callen did not to discuss the alleged abuse in court, counsel's strategy of presenting this evidence in memorandum form was reasonable. Callen had not pleaded facts that, if proven, would show no reasonable counsel would have proceeded in this fashion. Indeed, in its opinion, the Court of Criminal Appeals found that the admissibility of documents like this was a case of first impression and held:

> While it is true that hearsay is admissible at a sentencing hearing, there are limits to its admissibility.
>
> "The trial court may properly consider hearsay at the

> penalty phase of the trial if the defendant has an opportunity to rebut the evidence.
>
> > " ' "Courts are permitted to consider hearsay testimony at sentencing.... While hearsay evidence may be considered in sentencing, due process requires both that the defendant be given an opportunity to refute it and that it bear minimal indicia of reliability...." ' "

Ex parte McGahee, 632 So. 2d 981, 982–83 (Ala. 1993), quoting, in part, Kuenzel v. State, 577 So. 2d 474, 526 (Ala. Crim. App. 1990). The same should apply to evidence the defense seeks to introduce at sentencing. Cf. Mendoza v. State, 700 So. 2d 670, 675 (Fla. 1997) ("We have recognized that hearsay evidence may be admissible in a penalty-phase proceeding if there is an opportunity to rebut.").

Not only was the evidence in this case hearsay, but it was also "double hearsay."

> "Merely because testimony contains hearsay does not render it per se inadmissible at a sentencing hearing. [People v.] Harris, 375 Ill.App.3d [398] at 409, 313 Ill.Dec. 960, 873 N.E.2d 584 [(2007)]. If the evidence is 'double hearsay[, it] should be corroborated, at least in part, by other evidence.' People v. Spears, 221 Ill.App.3d 430, 437, 164 Ill.Dec. 19, 582 N.E.2d 227 (1991)."

People v. Varghese, 391 Ill.App.3d 866, 873, 330 Ill.Dec. 917, 924, 909 N.E.2d 939, 946 (2009). "In [State v.] Johnson, [856 P.2d 1064 (Utah 1993),] the supreme court held that a report prepared for a sentencing hearing that consisted of double and triple hearsay was unreliable and speculative ...." State v. Simonette, 881 P.2d 963, 964 n. 2 (Utah Ct. App. 1994).

Indeed, defense counsel noted the unreliability of the

> statements. (R. 1266.) Given that the sentencing memorandum was filed within minutes of the judicial sentencing hearing, that the State had no opportunity to rebut the allegations, and that there was absolutely nothing to indicate the reliability of the statements purportedly made by Dr. Meredith, we agree with the circuit court that the sentencing memorandum was properly excluded from its consideration. Callen is due no relief on this claim.

Callen, 284 So. 3d at 238. Counsel is not ineffective for the inability to predict how an appellate court would resolve a question of first impression. For the above reasons, this claim is without merit and insufficiently pleaded. Thus, this claim should be summarily dismissed under Rules 32.3, 32.6(b), and 32.7(d).

100. Alternatively, and without waiving the foregoing, this claim is denied.

Claim II(B) - The claim that Callen's defense counsel failed to object to the trial court's inadequate presentence investigation.

101. In paragraphs 226-33, Callen alleges his trial counsel were ineffective for failing to object to the supposedly inadequate presentence investigation. (Pet. at 103-07.) This claim is answered as follows:

102. This claim should be summarily dismissed as a matter of law because it fails to state a valid claim for relief or present a material issue of fact or law. Callen raised the underlying claim on direct appeal, and

the Alabama Court of Criminal Appeals held that it was without merit. Callen, 284 So. 3d at 237. Callen cannot prevail on a claim of ineffective assistance of counsel where the Alabama Court of Criminal Appeals held that the underlying ground for the claim was meritless. See, e.g., Duncan, 925 So. 2d at 271-272. In denying relief on this claim, the Court of Criminal Appeals reasoned:

> Callen next argues that the circuit court erred in failing to consider a presentence investigation ("PSI") report before sentencing him. Specifically, he argues that the circuit court erred in relying on the youthful-offender report and not the official PSI report that had been prepared by the Alabama Board of Pardons and Paroles after his conviction. He asserts that the youthful offender report had been completed more than two years before Callen was sentenced. Also, he argues that the youthful-offender report does not contain any victim-impact statements and no "updated information on this health, psychological status, or adjustment to incarceration." (Callen's brief, at p. 52.)
>
> However, Callen's argument is not supported by the record. As the State asserts in its brief, the circuit court's sentencing order clearly states that it considered the PSI report prepared by the Board of Pardons and Paroles. In fact, the PSI report is contained in the third supplemental record filed with this Court. (3 Supple. 60–64.) This report contains all the information Callen states was not included in the youthful-offender report. Callen's argument is not supported by the record, and he is due no relief on this claim.

Callen, 284 So. 3d at 238-39. Because Callen raised the underlying substantive issue on direct appeal, he "cannot relitigate the issue under

the guise of ineffective assistance of counsel in a post-conviction proceeding." Williams v. State, 783 So. 2d 108, 134 (Ala. Crim. App. 2000). This claim is meritless and should be dismissed.

103. In this amended petition, Callen speculates that the "trial court probably would have ordered a new PSI be conducted to include Dantae's comprehensive social and personal history" if counsel had objected to the PSI containing the same social history as the youthful offender report. (Pet. at 106.) But speculation is insufficient to warrant further proceedings. "It is well established that, in a claim of ineffective assistance of counsel, '[m]ere conjecture and speculation are not enough to support a showing of prejudice.'" Woodward, 276 So. 3d at 786.

104. Additionally, Callen fails to plead what information this new PSI would contain, how that information would differ from the information already presented to the judge and jury, or how the new PSI would change the result of his trial.

105. Thus, this claim should be summarily dismissed under Rules 32.3, 32.6(b) and 32.7(d).

106. Alternatively, and without waiving the foregoing, this claim is denied.

Claim II(C) - The claim that Callen's defense counsel elicited highly prejudicial victim impact testimony that Callen deserved the death penalty.

107. In paragraphs 234-36, Callen alleges his trial counsel were ineffective for eliciting highly prejudicial victim impact testimony that Callen deserved the death penalty. (Pet. at 107-08.) This claim is answered as follows:

108. Callen claims "the only question that Trial Counsel asked Ms. Brown was whether she recommended the death penalty for Dantae – not just once, but multiple times." (Pet. at 107.) It is clear from the face of the record that counsel expected different testimony and was surprised when Ms. Brown answered as she did. Counsel attempted to clarify Ms. Brown's opinion. (R. 1245-47.) To the extent that Callen claims that he was prejudiced by this testimony, he has failed to plead sufficient facts that would show how this comment, taken in context with the overwhelming evidence of guilt, actually affected the judge's verdict. Trial judges are presumed to follow the law. See Ex parte Slaton, 680 So. 2d 909, 924 (Ala.1996) (citing Ex parte Harrell, 470 So. 2d 1309, 1318 (Ala.1985)); Stewart v. State, 730 So.2d 1203, 1212 (Ala. Crim. App. 1997). Claims such as these that do not plead these types of facts do not

comply with Rule 32.6(b). Mashburn, 148 So. 3d at 1150. Thus, this claim should be summarily dismissed under Rules 32.3, 32.6(b), and 32.7(d).

109. Alternatively, and without waiving the foregoing, this claim is denied.

Claim III - The claim that Callen was denied effective assistance of counsel during the guilt phase of his trial.

110. Claim III is simply a heading with no narrative. (Pet. at 108.) Claim III is divided into four subclaims, one of which has additional subclaims.

Claim III(A) - The claim that Callen's trial counsel failed to conduct an adequate investigation to support their sole defense – intoxication.

111. In paragraphs 237-43, Callen claims his counsel were ineffective for failing to support the theory of intoxication. (Pet. at 108-11.) This claim is answered as follows:

112. First, in paragraphs 238 and 241, Callen claims trial counsel failed to present any available evidence of his use of alcohol. This claim is without merit and insufficiently pleaded. Callen cites to his own statement to police in support of his use of alcohol on the night of the murder, State's Exhibit 112A. This evidence was obviously presented to the jury. Callen pleads no facts to further clarify his level of intoxication

on the night of the murders. Callen criticizes his counsel for their cross-examination of Lisa Brown, Faye Budgess, and Jerrell Williams about the use of alcohol by Quortes, but not by Callen. He fails to plead the questions counsel should have asked and the answers these witnesses would have given. He also fails to plead how his drinking habits would be relevant to his level of intoxication on the night of the murders. In paragraph 241, Callen lists several friends and family members he claims counsel should have questioned about "significant alcohol abuse in the family" and his and Quortes' "history of drinking." (Pet. at 110.) Callen again fails to plead that any of these witnesses could testify that he was drinking at the time of the murders, or how this testimony would be relevant in the guilt phase of trial. Counsel cannot be found ineffective for failing to present inadmissible evidence. See Daniel, 86 So. 3d at 420-21. Logic dictates that the only person who could testify that Callen was under the influence of narcotics is Callen himself. Reasonable counsel could easily decide to avoid putting his client on the stand. This claim is without merit and insufficiently pleaded.

113. Second, in paragraphs 239-40, Callen claims trial counsel failed to present any available evidence of use of prescribed narcotics.

This claim is without merit and insufficiently pleaded. Callen's claim has no merit because he pleads no facts to suggest that he was using narcotics, prescribed or otherwise, at the time of the murders. He recites dates and conditions for which he was prescribed narcotics, but he does not claim that he was under the influence of narcotics at the time of the murders, nor does he claim that he provided any information about narcotic use at the time to his counsel. "'Counsel cannot be found ineffective for failing to introduce information uniquely within the knowledge of the defendant and his family which is not provided to counsel.'" Waldrop, 987 So. 2d at 1195 (citation omitted). Further, while Callen claims that the narcotics would have supported his theory of intoxication (Pet. at 110), he does not, however, claim that he was suffering from these effects.

> 'It is well established that, in a claim of ineffective assistance of counsel, "[m]ere conjecture and speculation are not enough to support a showing of prejudice."' McMillan v. State, 258 So. 3d 1154, 1178 (Ala. Crim. App. 2017)

Woodward, 276 So. 3d at 786. Further, Callen does identify any witness who would have testified about his narcotic use, the substance of their testimony, or how presentation of these facts would have produced a different result. Logic dictates that the only person who could testify that

Callen was under the influence of narcotics is Callen himself. A reasonable strategy of counsel would be to avoid Callen's testimony. This claim is without merit and insufficiently pleaded.

114. Third, in paragraph 240, Callen claims that counsel should have obtained and presented the testimony of a medical expert, such as Dr. Dueffer, to testify about the "effects of Dantae's use of prescription opioids, particularly when mixed with alcohol." (Pet. At 110.) But Callen has not identified any witness who could have testified that he was actually taking opioids on the day of the murder. Consequently, testimony about their supposed effects would be nothing more than speculation. This claim in insufficiently pleaded. While Callen pleads generally that Dr. Dueffer could testify about the effects of combining alcohol and opioids, he fails to plead that Dr. Dueffer was willing and available to testify at his trial, that Dr. Dueffer would testify that Callen was suffering from any of these effects at the time of the murder, or that such testimony would reasonably affect the outcome of the trial. See Harris v. State, No. CR-19-0231, 2021 WL 2882472, at *29 (Ala. Crim. App. July 9, 2021); Lockhart v. State, CR-19-0703, 2021 WL 1589157, at *18 (Ala. Crim. App. April 23, 2021); Brooks v. State, 340 So. 3d 410, 437

(Ala. Crim. App. 2020); Thompson v. State, 310 So. 3d 850, 870 (Ala. Crim. App. 2018.) This claim is without merit and insufficiently pleaded.

115. Fourth, in paragraph 242, Callen claims that counsel should have called Dr. Meredith as a witness at the guilt phase to testify that Callen drank significant amounts of alcohol every night beginning at 15 or 16 years old[12]. Alternatively, Callen claims that counsel should have called the State's expert, Dr. King to testify about Callen's history of alcohol use. Callen fails to plead how second-hand evidence regarding historical accounts of his drinking would have been admissible in the guilt phase. Counsel cannot be found ineffective for failing to present inadmissible evidence. See Daniel, 86 So. 3d at 420-21. Furthermore, this evidence would not be relevant to Callen's intoxication immediately preceding and at the time of the murder. This claim is without merit and insufficiently pleaded.

116. Thus, this claim is without merit and insufficiently pleaded and should be dismissed under Rules 32.3, 32.6(b), and 32.7(d).

[12] Notably, Callen's claim here contradicts his earlier claims that Dr. Meredith should not have been called as an expert because he was not qualified.

117. Alternatively, and without waiving the foregoing, this claim is denied.

Claim III(B) - The claim that Callen's trial counsel presented inconsistent arguments regarding intoxication.

118. In paragraphs 244-51, Callen alleges his trial counsel presented inconsistent arguments regarding intoxication. (Pet. at 111-16.) This claim is answered as follows:

119. This claim is meritless and insufficiently pleaded. On the face of the record, trial counsel's strategy in the guilt phase of the trial was clearly to raise intoxication to negate intent in order to argue Callen's guilt to the lesser included offense of manslaughter. Counsel argued intoxication in closing by weaving in Callen's own statements to police. (R. 920-47.) Based on the facts, counsel chose the best theory of defense available to them based on the evidence. This is not ineffective assistance of counsel. See Clark v. State, 196 So. 2d 285, 307 (Ala. Crim. App. 2015) (finding no IAC when it was clear from the record that the "theories that counsel pursued [were] reasonable and strategic and [were] based on the evidence and circumstances known to counsel at the time of [the defendant's] trial."); Davis v. State, 44 So. 3d 1118, 1132 (Ala. Crim. App. 2009) ("Hindsight does not elevate unsuccessful trial tactics into

ineffective assistance of counsel."). Callen failed to meet his "burden to [plead and] prove that no reasonable attorney would have chosen the course of action that his attorneys chose. Bryant, 181 So. 3d at 1142–43.

120. Callen's claim is also without merit. In paragraph 245, Callen includes only four excerpts about the defense of intoxication from Mr. Collee's closing argument. (Pet. at 112.) In paragraph 246, Callen includes only one excerpt from the argument of Mr. Thrasher and asserts that this was "contradictory" to the theory of intoxication. (Pet. at 112-13.) A plain reading of the trial transcript shows that the chosen excerpt was preceded with a plea for the jury to listen closely to Callen's statement to the police: "Go back to the statement, please. I beg you to go back and listen to this statement more than anything else." (R. 943.) Further, Mr. Thrasher, like Mr. Collee, argued lack of intent and facts about Callen's intoxication and lack of memory throughout his closing. (R. 937-40, 944-45.) Callen fails to plead how Mr. Thrasher or Mr. Collee should have argued differently or show a reasonable probability that, but for counsel's errors, the results of the proceeding would have been different. "The fact that [a] defense strategy was ultimately unsuccessful

with the jury does not render counsel's performance deficient." Lewis, 2020 WL 2820551, at *18.

121. Thus, this claim is without merit and insufficiently pleaded and should be dismissed under Rules 32.3, 32.6(b), and 32.7(d).

122. Alternatively, and without waiving the foregoing, this claim is denied.

Claim III(C) - The claim that Callen's trial counsel failed to investigate and present evidence of sexual abuse and severe mental illness that would have supported jury instructions for the lesser-included offense of manslaughter and defense to negate specific intent.

123. In paragraphs 252-57, Callen appears to claim his trial counsel should have presented evidence of his sexual abuse and dissociation to support jury instructions related to manslaughter and heat of passion. (Pet. at 116-18.) This claim is answered as follows:

124. This claim is insufficiently pleaded and without merit. Like in claim II(A), Callen claims counsel should have called Dr. Dueffer, a medical expert, to testify about Callen's medical records at age 10 where he was diagnosed with a UTI and was tested for STDs and Dr. Grant to testify about "shame-based avoidance." (Pet. at 102.) Callen does not specifically allege the dates of these records, the treating doctor, that Drs.

Dueffer and Grant were available and willing to testify at his trial, and the specific content of their testimony. See Brooks, 340 So. 3d at 437. Further, Callen does not plead what red flags would have led to these records or that counsel were told about Callen's treatment. See Waldrop, 987 So. 2d at 1195. Counsel's investigation was clearly reasonable. Callen cannot show that no reasonable counsel would have failed to locate these alleged records. Lastly, Callen does not plead facts to show a reasonable probability of a different outcome. It is clear from the face of the record that Callen did not want to present testimony about the alleged sexual abuse. (C. 602-03.) In Dr. Meredith's report, he stated "[Callen] was extremely self-conscious about revealing this information and asked if he would have to talk about this in Court in front of his family." (C. 602.) Callen had not pleaded facts that, if proven, would show no reasonable counsel would have proceeded in this fashion. In order for counsel to have presented admissible evidence of lawful provocation to support an instruction on heat of passion, Callen himself would have had to testify as the only living witness, and reasonable counsel could easily decide to avoid putting his client on the stand. Moreover, Callen does not specifically allege what happened prior to the murders or how those the

events would have provided legal provocation, and he gives no consideration at all to the potential pitfalls of testifying on his own behalf. These are the types of facts that Callen is required to allege to sufficiently plead his claims. Mashburn, 148 So. 3d. at 1150.

125. This claim is without merit and insufficiently pleaded. Thus, this claim should be summarily dismissed under Rules 32.3, 32.6(b), and 32.7(d).

126. Alternatively, and without waiving the foregoing, this claim is denied.

Claim III(D) - The claim that counsel failed to object to the presentation of prejudicial evidence to the jury.

127. Claim III(D) is simply a heading with no narrative. (Pet. at 118.)

Claim III(D)(1) - The claim that Callen's trial counsel failed to object to a highly prejudicial video showing Callen in handcuffs and a jail uniform.

128. In paragraphs 258-61, Callen claims his counsel were ineffective for failing to object to a highly prejudicial video showing Callen in handcuffs and a jail uniform. (Pet. at 118-20.)

129. This claim is meritless because the Court of Criminal Appeals addressed the underlying substantive claim and found no plain error:

"This Court has recognized that there is a distinction between the jury's observing a defendant wearing handcuffs in the courtroom for his or her trial and the jury's observing the defendant wearing handcuffs in a videotape that is shown to the jury during trial. We have stated:

> " ' " 'The presumption of innocence, although not articulated in the Constitution, is a basic component of our system of criminal justice.' United States v. Dawson, 563 F.2d 149, 151 (5th Cir. 1977) (citations omitted). A government entity violates that presumption of innocence when it 'compels an accused to stand trial before a jury while dressed in identifiable prison garb.' United States v. Birdsell, 775 F.2d 645, 652 (5th Cir. 1985)."
>
> " 'United States v. Pryor, 483 F.3d 309, 311 (5th Cir. 2007). However, we have not extended the violation of the presumption of innocence to the viewing of the defendant on a videotape while he is in handcuffs."

Shaw v. State, 207 So.3d 79, 97 (Ala. Crim. App. 2014).

> More importantly, Callen did not object. In declining to find plain error when a defendant was tried while wearing prison clothing, the United States Court of Appeals for the Fifth Circuit stated:
>
> "This Court, in Hernandez v. Beto, 443 F.2d 634, 636–37 (5th Cir.), cert. denied, 404 U.S. 897, 92 S.Ct. 201, 30 L.Ed.2d 174 (1971), determined that trying a defendant in prison clothing infringes his fundamental right to the presumption of innocence. That right is only infringed, however, when a state compels an accused to stand trial before a jury while dressed in identifiable prison garb. Estelle v. Williams, 425 U.S. 501, 512, 96 S.Ct. 1691, 1696, 48 L.Ed.2d 126 (1976). If, for whatever reason, the defendant fails to object to

> his attire, the presence of compulsion necessary to establish a constitutional violation is negated. Id. at 512–13, 96 S.Ct. at 1696–97. Accordingly, a 'defendant may not remain silent and willingly go to trial in prison garb and thereafter claim error.' Hernandez v. Beto, 443 F.2d at 637.
>
> "...In any event, the failure to object negates the presence of compulsion and, thus, there was no plain error. See also Gray v. Estelle, 538 F.2d 1190, 1190–91 (5th Cir. 1976)."
>
> United States v. Birdsell, 775 F.2d 645, 652 (5th Cir. 1985).
>
> As was the case in Birdsell, Callen's failure to object "negates the presence of compulsion and, thus, there was no plain error." 775 F.2d at 652. For the reasons stated above, we find no plain error in Callen's appearance in the video in handcuffs and prison clothes. Accordingly, Callen is due no relief on this claim.

Callen, 284 So. 3d at 206. Callen attempts to use the failure to object to show that had "counsel objected to the video, there is a reasonable likelihood that the State would have had to find an alternative method of presenting Dantae's statements, and the jury would not have seen Dantae in an inherently prejudicial manner." (Pet. at 119.) This attempt fails because it ignores the "distinction between the jury's observing a defendant wearing handcuffs in the courtroom for his or her trial and the jury's observing the defendant wearing handcuffs in a videotape that is shown to the jury during trial." Callen, 284 So. 3d at 206. Likewise, the

case law cited by Callen is not persuasive because in each case cited, the defendant was constrained or in prison uniforms in trial in front of the jury. See Holbrook v. Flynn, 475 U.S. 560, 569 (1986); Estelle v. Williams, 425 U.S. 501, 503 (1976); Allen v. Montgomery, 728 F.2d 1409, 1413 (11th Cir. 1984.) Because the underlying claim has no merit, trial counsel cannot be ineffective for failing to object to it. It is only in a rare case that a finding of no plain error on direct appeal does not foreclose a corresponding ineffective assistance claim. Ex parte Taylor, 10 So. 3d at 1078. But, Callen has not pleaded any facts whatsoever in his petition that would show that his is such a "rare case." See Lee v. State, 44 So. 3d 1145, 1162-63 (Ala. Crim. App. 2009.) Indeed, this is not one of those rare cases. The Court of Criminal Appeals has recently reaffirmed, where an underlying substantive claim caused "no error," an IAC claim that relies on that issue is "without merit." Brooks, 340 So.3d at 425. For that reason, this Court should summarily dismiss Callen's claim under Rule 32.7(d).

130. Alternatively, and without waiving the foregoing, this claim is denied.

Claim III(D)(2) - The claim that Callen's trial counsel failed to object to prejudicial victim impact testimony introduced during the culpability phase.

131. In paragraphs 262-64, Callen claims his counsel were ineffective for failing to object to prejudicial victim impact testimony introduced during the culpability phase. (Pet. at 120-21.) This claim is answered as follows:

132. Callen fails to specifically plead why no reasonable attorney in counsel's position would have failed to object to testimony about the family structure in a case involving family structure. Callen completely fails to plead how these actions prejudiced him. Instead, Callen makes a conclusory allegation that counsel's actions were deficient, but does not explain how an objection would have changed the outcome of his trial. Moreover, Callen does not explain how this testimony is improper victim impact evidence. Callen relies on the Alabama Supreme Court's finding that emotional victim impact testimony distracted the jury in Ex parte Jackson, 68 So. 3d 211, 217 (Ala. 2010), but this reliance is misplaced. The facts in Jackson are highly distinguishable and included emotional outbursts: "She also, while crying, described how badly her son's death had affected her: "I ain't able to take it"; "I never be okay anymore"; "it

hurts so bad." Id. Ms. Brown's testimony was not emotional and was not victim-impact testimony. Thus, this claim should be summarily dismissed under Rules 32.3, 32.6(b), and 32.7(d).

133. This claim is also meritless because the Court of Criminal Appeals addressed the underlying victim-impact testimony issue on direct appeal and held that no plain error existed:

> The record shows that Brown identified photographs of the three victims, that she discussed her relationship with the three victims and who was living with her mother at the time of her death, that she gave the jurors the layout of her mother's apartment, and that she spoke of her last meeting with her mother.
>
> The Alabama Supreme Court in Ex parte Rieber, 663 So. 2d 999 (Ala. 1995), upheld the admission of similar victim-impact evidence at the guilt phase of a capital-murder trial. The court stated:
>
> > "It is presumed that jurors do not leave their common sense at the courthouse door. It would elevate form over substance for us to hold, based on the record before us, that Rieber did not receive a fair trial simply because the jurors were told what they probably had already suspected—that [the victim] was not a 'human island,' but a unique individual whose murder had inevitably had a profound impact on [his] children, spouse, parents, friends, or dependents (paraphrasing a portion of Justice Souter's opinion concurring in the judgment in Payne v. Tennessee, 501 U.S. 808, 838, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991))."
>
> 663 So. 2d at 1006.

> "Many other courts have likewise found no reversible error in the admission of limited victim impact evidence in the guilt phase of a capital murder trial. See Commonwealth v. Jordan, 65 A.3d 318 (Pa. 2013); State v. Jackson, 410 S.W.3d 204 (Mo. Ct. App. 2013); Moore v. Mitchell, 708 F.3d 760, 805 (6th Cir. 2013); Schreibvogel v. State, 228 P.3d 874 (Wy. 2010); State v. Ott, 247 P.3d 344 (Utah 2010); Goff v. State, 14 So. 3d 625 (Miss. 2009); State v. Hale, 119 Ohio St.3d 118, 892 N.E.2d 864 (2008); Coulthard v. Commonwealth, 230 S.W.3d 572 (Ky. 2007); Dodd v. State, 100 P.3d 1017 (Okla. Crim. App. 2004)."
>
> Wiggins v. State, 193 So. 3d 765, 794 (Ala. Crim. App. 2014).
>
> There was no reversible error in the admission of Brown's testimony during the guilt phase of Callen's trial. Callen is due no relief on this claim.

Callen, 284 So. 3d at 222-23. Callen makes no attempt to counter this portion of the Court of Criminal Appeals' holding. Because the underlying claim has no merit, trial counsel cannot be ineffective for failing to object to it. The State recognizes that a finding of no plain error on direct appeal does not foreclose Callen from arguing that he was prejudiced by his counsel's failure. Taylor, 10 So. 3d at 1078 ("Although it may be the rare case in which the application of the plain-error test and the prejudice prong of the Strickland test will result in different outcomes, a determination on direct appeal that there has been no plain error does

not automatically foreclose a determination of the existence of the prejudice required under Strickland to sustain a claim of ineffective assistance of counsel."). But, Callen has not pleaded any facts whatsoever in his petition that would show that his is such a "rare case." See Lee, 44 So. 3d at 1162-63. This is not one of those rare cases.

134. For these reasons, this Court should summarily dismiss Callen's claim under Rules 32.3, 32.6(b), and 32.7(d).

135. Alternatively, and without waiving the foregoing, this claim is denied.

CONCLUSION

136. Callen is not entitled to discovery, an evidentiary hearing, or relief on the claims that are not supported by a "full disclosure of the factual basis" for such claims as is required by Rules 32.3 and 32.6(b) or on the claims that are procedurally barred.

137. Callen was properly convicted of capital murder and sentenced to death. He is not entitled to any relief from his capital murder conviction or death sentence. Thus, the State respectfully moves this Court to summarily dismiss Callen's second amended Rule 32 petition in its entirety without further proceedings.

Respectfully submitted,

Steve Marshall
Attorney General

s/ Polly S. Kenny
Polly S. Kenny
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2023, I filed the foregoing with the Clerk of the Court. A copy of the foregoing was served upon petitioner's counsel via electronic mail:

Joshua Fougere
jfougere@sidley.com
Jacquelyn Fradette
jfradette@sidley.com
Alaric R. Smith
Alaric.smith@sidley.com
Kayla M. Scott
Kayla.scott@sidley.com
Lindsey A. Ricchi
lricchi@sidley.com
David R. Carpenter
drcarpenter@sidley.com
Patrick D. Rubalcava
prubalcava@sidley.com
Mehzabin Lora Chowdhury
lchowdhury@sidley.com
Susan E. McGahan
Sm1561@att.com

s/ Polly S. Kenny
Polly S. Kenny
Assistant Attorney General

State of Alabama
Office of the Attorney General
501 Washington Avenue
Montgomery, AL 36130-0152
Polly.Kenny@AlabamaAG.gov
Phone: 334.353.9218
Fax: 334.353.8400