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

DAVID WILSON, Petitioner, v. JOHN Q. HAMM, Commissioner, Alabama Department of Corrections, Respondent.	))))))))))	Case No. 1:19-cv-284

ANSWER TO WILSON'S FIRST AMENDED PETITION

Comes now Respondent John Q. Hamm, by and through the Attorney General of Alabama, and respectfully answers David Wilson's first amended 28 U.S.C. § 2254(d) petition as follows:

RESPONSE TO INTRODUCTION

1. Wilson's unnumbered introductory paragraphs are denied. Wilson is not in custody in violation of the laws or Constitution of the United States.

RESPONSE TO JURISDICTION AND VENUE

2. Paragraphs 1-4 are admitted.

RESPONSE TO FACTS[1]

3. In paragraphs 5-70, Wilson sets forth his interpretation of the testimony and underlying facts in this case. Respondent adopts the Alabama Court of Criminal Appeals' (hereinafter "ACCA") finding of facts on direct appeal:

> David Phillip Wilson appeals his two capital-murder convictions and sentences of death. Wilson was convicted of one count of capital murder for taking the life of Dewey Walker during the course of a robbery, *see* § 13A-5-40(a)(2), Ala. Code 1975, and a second count of capital murder for taking the life of Dewey Walker during the course of a burglary, *see* § 13A-5-40(a)(4), Ala. Code 1975. By a vote of 10-2, the jury recommended that Wilson be sentenced to death. The circuit court accepted the jury's recommendation and sentenced Wilson to death.
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> After Walker, a 64-year-old man suffering from cancer, failed to show up for work for several consecutive days in April 2004, his supervisor, Jimmy Walker, went to his house to check on him. After two trips to check on Walker were unsuccessful, Jimmy Walker spoke with Walker's neighbor, and the neighbor telephoned the police. On April 13, Officer Lynn Watkins and Officer Rhett Davis of the Dothan Police Department responded to the call and conducted a "welfare check" at Walker's house.
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> During the welfare check, Officer Watkins walked around to the back of the house. The back of the house had two doors, a wooden door and a sliding-glass door. Officer Watkins noticed that the door knob to the wooden door was missing. She entered through that doorway and found herself in a storage area, separated from the primary residence by a

1. References to the state-court record manually filed by Wilson (*see* DE68:2 (order granting Wilson's request to file an updated record)) are cited according to its designated docket entry number ("DE76") followed by the page number assigned when filed. Notably, portions of this record contain personal information, such as dates of birth, home addresses, and social security numbers. (*See, e.g.*, DE76-16:19, 21-23 (personal information regarding jurors).) Such information should be redacted. FED. R. CRIM. P. 5.2(a); M.D. ALA. CIV. R. 5.2.

panel of drywall. The wall had a hole in it leading to a bedroom. It appeared to Officer Watkins that someone had created the hole from the outside because there was broken drywall on the bedroom floor. Officer Watkins entered the bedroom through the hole in the drywall. She testified at trial that, in her opinion, the hole was large enough for Wilson. Officer Watkins and Officer Davis conducted a search of Walker's residence. Walker's body was found in the kitchen with a large amount of dried blood surrounding his head.

Investigator Tony Luker of the Dothan Police Department was assigned to investigate Walker's death. In addition to the blood found near Walker's body, Investigator Luker discovered blood droplets throughout the house. He also discovered that the doors to multiple bedrooms, which apparently had been locked, were pried open and that there were holes in the walls of several rooms. Investigator Luker testified that it appeared as though someone had been searching for something hidden in the walls.

In the kitchen, Investigator Luker recovered an extension cord and a computer-mouse with the attached cord snapped into two pieces, which, based on the ligature marks on Walker's neck and the dried blood on the cords, appeared to have been used to strangle Walker. Investigator Luker also found a screwdriver and a portion of the computer-mouse cord in the refrigerator.

Investigator Luker also noticed that Walker's custom van, replete with stereo equipment estimated to be worth $20,000, was missing. A search for the van and the stereo equipment led investigators to Matthew Marsh. Investigator Luker interviewed Marsh, and then interviewed Catherine Corley and Michael Jackson. These interviews led Investigator Luker to Wilson.

Officers arrived at Wilson's home in the early morning hours of April 14. Wilson voluntarily went with the officers to the Dothan Police Department. After waiving his *Miranda* rights, Wilson gave a statement to Investigator Luker and Sergeant Mike Etress.

Wilson told the officers that he went to Walker's house around 3 p.m. on April 6. Walker was home, and Wilson spoke to him about Walker's son Chris. Wilson left, but came back a few hours later. Wilson said

that the front door was partially open when he returned, so he walked into the house. Walker was not home when Wilson arrived. While Wilson was inside Walker's house, he received a telephone call from Marsh, asking him to steal the keys to Walker's van. Wilson explained to the officers that he, Marsh, Jackson, and Corley had previously discussed "hitting Mr. Walker and knocking him out and taking the keys." (C. 517.) Wilson took the keys and went to Marsh's house.

According to Wilson, he returned to Walker's house the next evening to steal a laptop computer. He went to the back of the house and entered the storage area. Wilson stated that there was a small crack in the wall and that he made it large enough to enter the main house. Wilson took a metal baseball bat with him because, according to him, he was scared of Walker's dog. Once inside, he again received a telephone call from Marsh asking him to search for items in addition to the laptop that would be worth stealing. Wilson used a screwdriver to pry open several doors in the house.

After approximately 20 minutes, Walker returned home and went to the kitchen. Wilson assumed that Walker heard him because he picked up a knife. Wilson said that he approached Walker from behind with the baseball bat and attempted to disarm Walker by striking him on his right shoulder. According to Wilson, he missed and accidentally struck Walker in the back of his head. Walker fell into the wall, cutting his head, but stood back up. Wilson grabbed a nearby computer-mouse cord and wrapped it around Walker's neck in an attempt to make Walker drop the knife. The computer-mouse cord snapped, so Wilson grabbed a nearby extension cord. Wilson stated that he wrapped the extension cord around Walker's neck and held it until Walker passed out. He estimated that he choked Walker for six minutes. Wilson told the officers that he threw the extension cord down in front of the refrigerator and placed the computer-mouse cord inside the refrigerator. Wilson was scared, so he left the house, taking with him Walker's laptop and one of Walker's baseball hats. Wilson further indicated that he did not telephone an ambulance for Walker because he was in a state of panic. According to Wilson, Walker was still breathing when he left.

Wilson went back to Marsh's house where he, Marsh, and Corley unsuccessfully attempted to login to Walker's password-protected laptop. The three individuals then went back to Walker's house in order

> to steal the van. During their first attempt to take the van, however, the alarm on the van went off, so they left.
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> Wilson made similar attempts to steal Walker's van on Thursday and Friday, but was foiled both times by the alarm on the van. Wilson spoke with Corley, who was familiar with alarm systems, about disabling the alarm in Walker's van. Wilson returned to the van on Sunday morning. He lifted the hood of the van to access the alarm system, and the alarm again sounded. Wilson left and drove around for about 20 minutes before returning. When he returned, he was able to disable the alarm system by cutting two wires. Wilson drove to Marsh's house, picked up Marsh, and drove back to Walker's house. Wilson drove the van to Marsh's house. At Marsh's house, they removed the stereo equipment from the van and split it among Wilson, Marsh, Jackson, and Corley. Then they hid the van on Marsh's property located outside the city limits of Dothan.
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> Dr. Kathleen Enstice, who at the time of Walker's death was a forensic pathologist with the Alabama Department of Forensic Sciences, performed Walker's autopsy. The results of the autopsy conflicted with Wilson's account of a single, accidental blow to Walker's head. Dr. Enstice testified that Walker had fresh defensive wounds on his hands and arms. She gave a conservative estimate of 114 contusions and abrasions on Walker's body, 32 of which were on his head. Additionally, Walker had multiple skull fractures and three separate lacerations on his scalp. Walker also suffered eight broken ribs and a fracture to his sternum. Dr. Enstice ruled out the possibility that these injuries could have been sustained by a single blow to the head and a subsequent fall.

Wilson v. State, 142 So. 3d 732, 748-50 (Ala. Crim. App. 2010) (footnotes omitted).

The remaining facts alleged are denied.[2]

4. Paragraphs 5-8 are admitted to the extent the facts alleged are consistent

2. Respondent denies all factual allegations asserted in Wilson's amended petition that are not expressly admitted in the instant answer.

with facts found by the ACCA. The remaining facts alleged are denied.

5. In paragraph 9, Respondent admits that United States Magistrate Judge Charles Coody issued an order on June 21, 2023, wherein he determined that a letter written by codefendant Corley "undermines the State's theory that [Wilson] alone entered Walker's home and, when confronted by Walker, beat and strangled Walker to death." (DE79:8.) The remaining facts alleged are denied.

6. In paragraph 10, Respondent admits that during guilt-phase closing argument, the prosecutor argued:

> From the statement, Mr. Wilson, you said you hit him accidentally. Accidentally.
>
> What part of your body tells you to take this bat and swing it and hit somebody? It's the brain. The brain tells the body—it runs down through the nerves and the hands and tells you to swing that bat.
>
> Accidentally. Accidentally.
>
> My goodness, good people, how many wounds, injuries, contusions, fractures…. 114 separate contusions, bruises, lacerations, tears on the body of Dewey Walker.

(DE76-9:152) He went on to state, "You hit them, you strike them, you injure them, you continue to beat them—you are using this force against them to perpetrate, to finish out the intent to commit your crime, the burglary and the robbery to get the property." (*Id.* at 162.) Respondent also admits that the prosecution requested during its penalty-phase closing argument that the jury sentence Wilson to death. (DE76-10:142 ("It's hard. It's not easy. But this case calls for death.").) The remaining facts

alleged are denied.

7. Paragraph 11 is admitted. *See Wilson*, 142 So. 3d at 748 (DE59-10:18.)

8. In paragraph 12, Respondent admits that the same year Wilson was convicted and sentenced to death, his codefendants pled guilty to murder.[3] The remaining facts alleged are denied.

9. Paragraphs 13-15 are admitted.

10. In paragraph 16, Respondent admits that on December 5, 2007, the jury recommended that Wilson be sentenced to death. (DE76-10:165.) Following the jury's recommendation, the trial court subsequently sentenced Wilson to death. (*Id.* at 186; *see also* DE76-2:188.) The remaining facts alleged are denied.

11. In paragraph 17, Respondent admits that the trial court found as a mitigating factor that Wilson was twenty years old when he murdered Lewis. (DE76-2:187.) The remaining facts alleged are denied.

12. Paragraph 18 is denied.[4]

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3. According to state-court records on AlaCourt, of which this Court may take judicial notice, *see Minnifield v. Ward*, 2:20-cv-933, 2022 WL 17479797, at *1 n.2 (M.D. Ala. Oct. 24, 2022) (taking judicial notice of records found on AlaCourt), Michael Ray Jackson pleaded guilty and was sentenced on February 8, 2007, *see State v. Jackson*, 38-CC-2006-135 (Houston Cnty. Cir. Ct.), Matthew Marsh pleaded guilty and was sentenced on December 18, 2007, *see State v. Marsh*, 38-CC-2006-134 (Houston Cnty. Cir. Ct.), and Catherine Nicole Corley pleaded guilty and was sentenced on December 21, 2007, *see State v. Corley*, 38-CC-2005-1726 (Houston Cnty. Cir. Ct.).
4. Wilson refers this Court to Appendix NN, which is labeled as containing a psychological report from Dr. Robert Shaffer and Dr. Shaffer's curriculum vita.

13. In paragraph 19, Respondent admits that the trial court found as a mitigating circumstance that Wilson had "no significant history of prior criminal activity." (DE76-2:186.) The presentence report reflected that Wilson escaped the Houston County Jail in early 2005 and subsequently pled guilty to second-degree escape in May 2006. (DE76-2:180.) The remaining facts alleged are denied.

14. Paragraphs 20-21 are denied.

15. In paragraphs 22-23, Respondent admits that there is a handwritten letter purportedly written by codefendant Corley on August 10, 2004. (DE69-2:2; DE89-4:2) Respondent also admits that the front side of the letter is date-stamped August 31, 2004. (DE69-2:2.) The remaining facts alleged are denied.

16. In paragraph 24, Respondent admits that the record from Wilson's Rule 32 proceeding contains a letter[5] dated January 12, 2007, from Gale Bolsver regarding "whether the questioned entries appearing on Exhibits Q-1-1 and Q-1-2 were written

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But neither document is properly before this Court for consideration because they are not part of the state-court record. *Cullen v. Pinsholster*, 563 U.S. 170, 181-82 (2011) (review in federal habeas is "limited to the record that was before the state court that adjudicated the claim on the merits"); *Curry v. Dep't of Corr.*, 8:19-cv-00798, 2022 WL 1773969, at *7 n.2 (M.D. Fla. June 1, 2022) (citing *Cullen*, 563 U.S. at 181-82) ("The Respondent submits a motion to suppress that Curry filed before his first trial and a transcript of a hearing on that motion.…Because neither the motion nor the transcript was transmitted with the record on state post-conviction appeal, this Court cannot consider those documents on federal habeas.").

5. This letter was attached as an exhibit to Wilson's Rule 32 petition. (*See* DE76-23:79; DE59-24:34-38.).)

by Nicole Corley (K-1-1 thru K-1-11, K-1-14 thru K-1-24).” (DE76-24:37-38.) The examined documents are not contained in the state-court record. The remaining facts alleged are denied.

17. In paragraph 25, Respondent admits that when summarizing a *Brady* claim raised in Wilson’s Rule 32 petition, the ACCA, citing a Dothan Police offense report attached to Wilson’s petition, stated:

> Wilson argues that the circuit court erred in dismissing his claim that the State committed a *Brady* violation…. Specifically, Wilson pleaded that on September 2, 2024, the district attorney and Investigator Luker met with an attorney representing an inmate who was incarcerated with Corley. During the meeting, the attorney presented the man with a “handwritten letter [that contained details of the murder of Dewey Walker which only the perpetrators would have known.”

(DE59-33:9 (citing C. 615).) The ACCA held that the circuit court properly summarily dismissed the claim because “[e]ven if the State failed to disclose the letter and the expert report, Wilson was aware of the State’s failure to disclose the evidence prior to trial.” (*Id.* at 10.) The remaining facts alleged are denied.

18. Respondent admits in paragraph 26 that Judge Coody wrote in his June 21, 2023, order that “[t]he purpose of the letter [Doc. 69-2], appears to be Corley’s solicitation of legal representation and advice concerning charges of ‘conspiracy to commit murder’ and ‘2nd degree burglary’ in the death of Dewey Walker.” (DE79:2.) The remaining facts alleged are denied.

19. In paragraph 27, Respondent admits that during a hearing on the State’s

motion for summary dismissal in Wilson's Rule 32 proceeding, counsel for the State asserted:

> The second reason that that *Brady* claim ought to be dismissed is because it's also just facially [non]meritorious in that the letter is a hearsay document. The allegation is that this document wasn't disclosed.
>
> In order to meet *Brady*, it needs to be something that could have been admitted or that, you know—there's no allegation that would have led to something else that was admissible.
>
> It's just an unsworn document that was produced at the behest of another inmate. It doesn't have any indicia for reliability. It is—there is an allegation that it was authenticated as something written by [] Corley, but there is no—no indicia that it is reliable. I mean, even if it's authentic, there is no indicia that it is reliable, because it was produced in the hopes of obtaining an attorney.

(DE59-30:82-83.) The remaining facts alleged are denied.

20. Respondent admits in paragraph 28 that United States District Judge Keith Watkins found in his March 27, 2023, order on discovery that:

> Several known, simple truths about the Corley letter and its surrounding circumstances collectively illustrate good cause for its disclosure to petitioner. In the letter, Corley confesses to having hit Walker with a bat "until he fell." The letter also contains other details about the crime which could have only been known by the perpetrators. Prosecutors possessed the letter before trial, investigated its origin, and concluded that Corley was its author….The jury was not told that an accomplice of petitioner's who admitted entering Walker's home also claimed that she beat the victim with a baseball bat while he was alive…It is plausible that, depending on what the Corley letter reveals, petitioner might still have been convicted and sentenced to death even if he had been provided with the letter and succeeded in introducing it into evidence. It is this Court's firm conviction, however, that the question

> of the letter's materiality cannot reliably be resolved without its disclosure.

(DE67:22 (emphasis omitted).) The remaining facts alleged are denied.

21. In paragraph 29, Respondent admits that Respondent complied with this Court's orders to disclose to Wilson the front and back of the letter purportedly written by Corley. The remaining facts alleged are denied.

22. Respondent admits in paragraph 30 that the state-court record from Wilson's Rule 32 proceeding contains a copy of the prosecution's motion for fingerprint analysis for Corley, the January 2007 letter from Larry Harper, and the January 2007 letter from Gale Bolsover. (DE76-24:35-38.) The remaining facts are neither admitted nor denied.

23. Paragraph 31 is admitted to the extent that it accurately reflects the findings of Judge Coody in his discovery order dated June 21, 2023. (*See* DE79.) The remaining facts alleged are denied.

24. Paragraphs 32-34 are admitted to the extent they accurately reflect the content of the letter purportedly written by Corley. The remaining facts alleged are denied.

25. Paragraph 35 is denied.

26. Paragraph 36 is introductory and denied.

27. Paragraph 37 is denied. Further, Appendices P and Z are not a part of the state-court record; thus, they are not properly before this Court for consideration.

Cullen, 563 U.S. at 181-82; *Curry*, 2022 WL 1773969, at *7 n.2.

28. In paragraphs 38-44, Respondent admits that electronic copies of Corley's statements to police taken on January 29, 2005, and March 24, 2005, regarding the unrelated murder of C.J. Hatfield were provided to Wilson. (*See* DE86 ¶ 9.) Neither these statements nor the 2024 transcriptions attached to the instant amended petition (*see* DE114-E–H) are part of the state-court record, and they are not properly before this Court, 563 U.S. at 181-82; *Curry*, 2022 WL 1773969, at *7 n.2. The remaining facts alleged are denied.

29. Respondent admits in paragraph 45 that Judge Watkins found in his March 2023 order, "After Walker failed to show up at work for several days, and his supervisor unsuccessfully attempted to contact him at his home, Dothan police were summoned to the residence to conduct a welfare check." (DE67:2 (citing *Wilson*, 142 So. 3d at 748).) Respondent also admits that during the welfare check, police found a deceased male, who was identified as Walker, on the floor with a "large amount of dried blood around his head." (DE76-7:188.) The remaining facts alleged are denied.

30. In paragraphs 46-50, Respondent admits that an excerpt marked Exhibit 4 and labeled "Dothan Police Department reports" in Wilson's Rule 32 proceeding reflects that law enforcement spoke with Wilson and Corley, references the arrest of Jackson, Wilson, Corley, and Marsh, and noted that attorney Kaylia Lane "turned

over a hand written letter which she had received from a client, Joan Ann Vroblick. The letter contained details of the murder of Dewey Walker which only the perpetrators would have known." (DE76-24:11-17.) "Th[e] letter further described how the writer hit Mr. Walker with a baseball bat until he fell. The letter was signed 'Nicole.' It also stated 'My nicknames is Kittie.'" (*Id.* at 16.) The document reflects that Vroblick, who was an inmate in the county jail, was interviewed on September 9, 2004. (*Id.*) Vroblick stated that, on August 8, 2004, "she got Kittie to write the letter by saying she would send it to a friend to make copies and send it to an attorney who might take her case 'pro bono.'" (*Id.*)

> Vroblick identified the letter…as written by Corley. [She] also stated she had seen Corley writing and sending letters to another inmate by the name of Bernard Eugene Sanchez. Sanchez is of Mexican decent and had written Corley that if she could make bond she should flee to Mexico where his mother lives.

(*Id.*) The remaining facts alleged are denied.

31. Paragraphs 51-58 are admitted to the extent they accurately reflect the content of the excerpt marked Exhibit 4 and labeled "Dothan Police Department reports" and the except marked Exhibit 7 and labeled "Catherine Corley statement to police" in Wilson's Rule 32 proceeding. (*See* DE76-24:13; DE76-24:24-32.) The remaining facts alleged are denied.

32. Paragraphs 59-61 are admitted to the extent that they are consistent with the state-court record on direct appeal. The remaining facts alleged are denied.

33. Respondent admits in paragraph 62 that there is a handwritten letter purportedly written by codefendant Corley (DE69-2:2; DE89-4:2), and that the front side of the letter is date-stamped August 31, 2004, (DE69-2:2), *see supra* paragraph 15. The remaining facts alleged are denied.

34. Paragraphs 63-70 are admitted to the extent that they are consistent with the excerpt marked Exhibit 4 and labeled "Dothan Police Department reports" and the documents marked Exhibit 8 in Wilson's Rule 32 proceeding, *see supra* paragraphs 22, 30. The remaining facts alleged are denied. Additionally, Appendices E-J are not part of the state-court record and are not properly before this Court. *Cullen*, 563 U.S. at 181-82; *Curry*, 2022 WL 1773969, at *7 n.2.

RESPONSE TO PROCEDURAL FACTS

35. Paragraph 71 is admitted. (*See* DE76-1:15.)

36. Paragraph 72 is admitted. (*See* DE76-1:40.)

37. Paragraphs 73-74 are admitted.

38. In paragraph 75, Respondent admits the presentence report completed before sentencing reflected that Wilson escaped the Houston County Jail in early 2005 and subsequently pleaded guilty to second-degree escape in May 2006 (DE76-2:180), *see supra* paragraph 13. Respondent admits that the record on direct appeal reflects that trial counsel (Valerie Judah) advised the trial court during a pretrial hearing on October 12, 2006, that Wilson was "serving time on an escape." (DE76-

6:27.) The remaining facts alleged are denied.

39. Paragraph 76 is admitted to the extent that it is consistent with the content of document marked Exhibit 4 and labeled "Attorney Fee Declaration for Valerie Judah from the clerk's file for Houston County Case No. CC-04-1120." (DE76-24:71-79.) The remaining facts alleged are denied.

40. In paragraph 77, Respondent admits that trial counsel Judah moved to withdraw on August 21, 2006, based on Wilson's "request" that Judah "be removed." (DE76-1:65.) The trial court held a motion hearing on November 14, 2006, regarding Wilson's "request[for] a change of lawyer[.]" (DE76-11:55.) He complained that he "want[ed] to take [his case] to trial and [his attorneys] d[id]'t want to do it…. I wasn't to get it changed—taken out of the county, and they don't want to even do that." (*Id.*) Trial counsel (Lamere) stated:

> Judge, for the record, first of all, we have not been made any offer to plea, number one. Number two, this Court knows me better than that. You know, I have never been afraid to take a case to trial.
>
> There is another issues, but before I get to that, you know, we have had a breakdown in communication that—that he just doesn't want to deal with us, and I can't prepare a case—a capital case for trial when I have got a client that doesn't want to cooperate with me, doesn't want to talk to me, doesn't want to have anything to do with me or Ms. Judah. And that's the kind of situation we're here on.
>
> There is another issue related to our motion to withdraw that, Ms. Judah, I don't even know, is aware of, because I have been made aware of it in the last few minutes, from—(A), from his mother, and (B) from him. And I need to take that up—and we need to take that up at the bench ex parte, if we can, but on the record, though.

(*Id.* 55-56.) During an ex parte bench conference, the following occurred:

> [Trial counsel]: Judge, we have had extensive discussions with our client about the facts of this case. There is also a taped statement—I would call it a confession—from our client that's in the discovery that we have received. Through our extensive conversations with him on numerous occasions regarding the facts of this case—I have now been informed by him that he plans to testify in his own defense in the trial of this case. And he has told me the testimony that he plans to give in this case. And based on what he intends to testify to and what he has previously told us, we cannot go forward as his lawyers.
>
> [Judge]: Because it may be a perjury situation?
>
> [Trial counsel]: Yes, sir. And as you know, we are required to not allow that to happen. And my understanding of the rules is we are supposed to ask to withdraw immediately when something like that happens. And based on that, I think, regardless of the other issues, I think our motions are due to be granted.

(*Id.* at 56-57.) Thereafter, the trial court granted counsel's request to withdraw and Wilson's motion for new attorneys. (*Id.* at 57.) The following day, the judge appointed Scott Hedeen and Ginger Emfinger to represent Wilson. (DE76-1:69.) The remaining facts alleged are denied.

41. In paragraph 78, Respondent admits that trial counsel Hedeen and Emfinger filed a pretrial motion to suppress Wilson's statement. (DE76-1:73-75.) The ACCA found the following facts regarding Wilson's statement to police:

> During the suppression hearing and at trial, Investigator Luker testified that he and Officer Jeff Lindsey, a transport officer, went to Wilson's mobile home and asked Wilson to come with them to the police station to be interviewed about an incident. Wilson agreed, and he rode with Officer Lindsey to the police station. Officer Lindsey did not question Wilson during the drive between Wilson's mobile home and the police

station.

After they arrived at the police station, Officer Lindsey escorted Wilson to the "detective bureau" where Investigator Luker and Sergeant Etress were waiting. (R. 13.) Wilson was then taken into the conference room. At that time, the conference room was not equipped with video equipment capable of producing visual recordings.

Before Wilson was asked any questions, Investigator Luker read Wilson his *Miranda* rights, and he went over a waiver-of-rights form with Wilson. According to Investigator Luker, Wilson appeared to understand each of the rights on the waiver-of-rights form and voluntarily signed the waiver. Investigator Luker further explained that Wilson did not appear to be under the influence of alcohol or drugs when he waived his *Miranda* rights. Investigator Luker also stated that no one offered Wilson any promises or inducements to waive his rights and that he was not threatened in any manner. According to Investigator Luker, Wilson understood his rights and voluntarily waived those rights.

Investigator Luker stated that Wilson signed the waiver-of-rights form at 4:12 a.m. Thereafter, between 4:12 a.m. and 5:02 a.m., Wilson outlined the events surrounding Walker's murder. According to Investigator Luker, he did not know what Wilson was going to say, so he did not initially record the interview. Thus, the conversation between 4:12 a.m. and 5:02 a.m. was not recorded. However, at 5:02 a.m., after Wilson made incriminating statements, Investigator Luker audio-recorded Wilson's statement. After Investigator Luker began recording the statement, Wilson stated that he had been read his rights, that he understood those rights, and that he had voluntarily waived them. He further stated that he had not been threatened, coerced, or promised anything in exchange for his statement.

Investigator Luker testified that although the beginning of the statement was not recorded, the portion of the statement Wilson made before Investigator Luker began recording did not differ from the recorded portion of the statement. In other words, after Wilson made his initial incriminating statement, Investigator Luker immediately had Wilson repeat his statement while tape-recording it. Investigator Luker further explained that during the interview, the tape they were using to record

> Wilson ran out without Investigator Luker noticing. Thus, Investigator Luker failed to turn the tape over and did not record the last 10 minutes of the interview. Investigator Luker stated that the recorded portion of Wilson's statement did not differ from the portions that were not recorded. Stated differently, the last 10 minutes of Wilson's statement did not provide any new or differing details of the crime.

Wilson, 142 So. 3d at 761-62. The remaining facts alleged are denied.

42. Paragraphs 79-82 are admitted. (*See* DE76-10:19-20 ("I am going to ask you to return to the jury, and we will take up the sentencing phase of the trial in a few minutes. It will probably, say, at least a 15-minute break, even though you have been down to the jury room.").)

43. In paragraph 83, Respondent admits that before opening arguments in the penalty phase, the parties presented arguments on Wilson's motion in limine to exclude evidence of his escape conviction. (DE76-10: 20-32.) Trial counsel argued that his escape conviction was not an aggravating circumstance. (*Id.* at 29.) The prosecutor noted during opening statements that "[t]he capital offense was committed by a person, David Wilson, who was under a sentence of imprisonment." (*Id.* at 37.) The prosecutor stated that one of the aggravating circumstances he expected to provide was that after Wilson's arrest for capital murder, Wilson attempted to escape the county jail and was ultimately convicted and sentenced for that offense. (*Id.*) After opening statements, the trial court reviewed the statutory aggravating circumstances and found that the escape charge did not fall within the enumerated aggravating circumstances. (*Id.* at 53-54.) Thereafter, the court

instructed the jury:

> Ladies and gentlemen, there was a legal issue that we had to address in regard to which aggravating circumstances the State will be relying on. The Court was of the opinion and [the prosecutor] had also pointed out that the State—one of the aggravating circumstances would be that Mr. Wilson was under a sentence of imprisonment at the time. That was the first one the State mentioned. But under the legal definition and requirements of conviction at the time of the imprisonment, the conviction that was referred to—the escape conviction will not be presented, because it will not be an aggravating circumstance in the case. But the State will still be relying on the three they mentioned….So those will be presented, but not the one about being under a prior conviction at the time of the offense in this case.
>
> […]
>
> You should disregard that. And that ground is stricken from your consideration in this case, that ground about being previously convicted of escape.

(*Id.* at 54-55.) The remaining facts alleged are denied.

44. In paragraph 84, Respondent admits that trial counsel called Linda Wilson (Wilson's mother) and Bonnie Anders[6] to testify during the penalty phase (*see* DE76-10:58, 97) and admitted Wilson's school records (*id.* at 95). The remaining facts alleged are denied.

45. Paragraphs 85-88 are denied.

46. In paragraphs 89-90, Respondent admits that the jury recommended 10-

6. Anders testified that she lived next door to Linda and Wilson (when he lived with his mother) and had worked disaster relief as a volunteer with the American Red Cross with Wilson. (DE76-10:99-100.)

2 that Wilson be sentence to death (DE76-10:165), that on January 8, 2008, the trial court followed the jury recommendation (DE:76-2:188), and that no witnesses were called to testify during the sentencing hearing. The remaining facts alleged are denied.

47. In paragraph 91, Respondent admits that Wilson timely appealed his conviction and sentence, that he was represented by counsel from the Equal Justice Initiative (Brandon Buskey and Alicia D'Addario), and that Wilson's direct appeal brief raised a *Batson* challenge. (*See* DE76-13:26); *see also Wilson*, 142 So. 3d at 754. The remaining facts alleged are denied.

48. In paragraph 92, Respondent admits that Wilson's case was remanded to the trial court for a *Batson* hearing, and on return to remand, Wilson challenged the trial court's findings regarding jurors J.C., J.D., and D.W. *Wilson,* 142 So. 3d at 752. The remaining facts alleged are denied.

49. In paragraphs 93-94, Respondent admits that the State was represented by then–District Attorney Douglas Valeska and Assistant District Attorney Patrick Amason. (DE76-15:43.) Respondent also admits that retired Assistant District Attorney Gary Maxwell was the only witness presented to testify. (*Id.* at 44.) The remaining facts alleged are denied.

50. In paragraph 95, Respondent admits the ACCA found on direct appeal that "[t]he prosecutor testified that he struck J.D. because J.D. had a LETS record.

According to the prosecutor, LETS tracks individuals' criminal histories. The prosecutor also testified that he struck D.W. because D.W. had received 14 traffic tickets and also had a LETS record." *Wilson*, 142 So. 3d at 756. Additionally, the court found that "[t]he prosecutor testified that he struck J.C. because J.C. stated that it would be tough for him to recommend a sentence of death." *Id.* at 754. The remaining facts alleged are denied.

51. Paragraph 96 is admitted in part. At the conclusion of the *Batson* hearing, the prosecutor offered to provide a copy of the LETS report. (DE76-15:141.) The remaining facts alleged are denied.[7]

52. In Paragraph 97, Respondent admits that the trial court entered a ten-

7. Wilson complains that the juror's LETS (criminal) records were never disclosed. (Am. Pet. ¶ 96.) Even assuming this allegation is true, dissemination of law enforcement's sensitive records is subject to heightened protections under both state and federal law. *See* ALA. CODE §§ 12-23.1, 41-9-590 *et seq.*, 41-9-602 *et seq.*; 28 CFR § 20:33; *see also Kelley v. State*, 602 So. 2d 473, 477 (Ala. Crim. App. 1992) (finding that "arrest and conviction records of potential jurors do not qualify as the type of discoverable evidence that falls with the scope of *Brady* and trial court found will not be held in error for denying an appellant's motion to discover such documents"); *U.S. Dep't of Just. v. Reps. Comm. for Freedom of Press*, 489 U.S. 749, 752 (1989) ("As a matter of executive policy, the Department [of Justice] has generally treated rap sheets as confidential and, with certain exceptions, has restricted their use to governmental purposes. Consistent with the Department's basic policy of treating these records as confidential, Congress in 1957 amended the basic statute to provide that the FBI's exchange of rap-sheet information with any other agency is subject to cancellation 'if dissemination is made outside the receiving departments or related agencies.'"); *Criminal Justice Information Services (CJIS) Security Policy*, FBI (June 1, 2020), https://www.fbi.gov/file-repository/cjis/cjis_security_policy_v5-9_20200601.pdf/view (June 1, 2020).

page order (*see* DE76-15:32-41) denying Wilson's *Batson* claim, finding that "the State articulated clear specific and legitimate reasons for each peremptory strike exercised by the State…[and] that [Wilson] has not proven purposeful discrimination by showing that the race neutral reasons given by the State for each peremptory strike used to remove each of the identified African-American veniremembers was merely a pretext or sham for discrimination" (*id.* at 41).

53. In paragraph 98, Respondent admits that the parties briefed the *Batson* claim on return to remand. (*See* DE79-17:2 (Wilson's brief); *id.* at 30 (State's brief).)

54. Paragraph 99 is admitted.

55. In paragraph 100, Respondent admits that Wilson filed a petition for writ of certiorari in the Alabama Supreme Court on direct appeal and that his petition was denied on September 20, 2013. (*See* DE73-19:2); *Wilson*, 142 So. 3d at 732.

56. Paragraph 101 is admitted.

57. Paragraphs 102-103 are admitted. Additionally, the State filed an initial answer and motion to dismiss Wilson's original postconviction petition on November 3, 2014. (DE76-21:94-132.)

58. In paragraph 105, Respondent admits that Wilson filed a motion to reconsider on March 24, 2017. (DE76-29:173.) Wilson filed a notice of appeal on April 6, 2017. (DE76-30:63.) Respondent denies that Wilson's motion to reconsider was denied by operation of law on March 26, 2017. *See Harden v. Laney*, 118 So.

3d 186, 187 (Ala. 2013) ("The timely filing of a notice of appeal invokes the jurisdiction of an appellate court and divests the trial court of jurisdiction to act except in matters entirely collateral to the appeal."); *Matthews v. State*, 363 So. 3d 1028, 1031 (Ala. Crim. App. 2021) (finding that "the circuit court lost jurisdiction to modify its summary dismissal of Matthews's petition 30 days after" its order). The remaining facts alleged are denied.

59. Respondent admits in paragraph 106 that Wilson timely appealed, *see supra* ¶ 58, the trial court's decision and that the parties submitted briefs to the ACCA. (DE76-31:2, 116.) The remaining facts alleged are denied.

60. In paragraph 107, Respondent admits that the ACCA affirmed the trial court's decision to summarily dismiss Wilson's Rule 32 petition on March 9, 2018, (DE76-33:2-68); *Wilson v. State*, 273 So. 3d 862 (Ala. Crim. App. 2018) (table), and that his application for rehearing was denied on May 4, 2018, (DE76-33:69); *Wilson v. State*, 279 So. 3d 4 (Ala. Crim. App. 2018) (table). The remaining facts alleged are denied.

61. Respondent admits in paragraph 108 that Wilson filed a petition for writ of certiorari in the Alabama Supreme Court on May 17, 2018, (DE76-34:2), which was denied on August 24, 2018, (DE76-34:185); *Ex parte Wilson*, 288 So. 3d 426 (Ala. 2018) (table).

62. In paragraph 109, Respondent admits that Wilson filed a petition for

writ of certiorari in the United States Supreme Court (DE76-35:2), which was denied on April 29, 2019, (DE76-35:161); *Wilson v. Alabama*, 587 U.S. 972 (2019) (table).

63. Paragraphs 110-15 are admitted.

64. Respondent admits in paragraph 116 that Respondent provided Wilson with the front side of the handwritten letter purportedly written by codefendant Corley. (DE69-2:2.) Appendix B is not a part of the state-court record and is not properly before this Court for consideration. *Cullen*, 563 U.S. at 181-82; *Curry*, 2022 WL 1773969, at *7 n.2. The remaining facts alleged are denied.

65. Respondent admits in paragraph 117 that Judge Coody issued an order on June 21, 2023, for Respondent to provide the back portion of the handwritten letter purportedly written by codefendant Corley. (DE79.) The remaining facts alleged are denied.

66. In paragraph 118, Respondent admits that Respondent provided the back portion of the handwritten letter purportedly written by codefendant Corley on June 28, 2023, via email. (*See* DE81-1; DE81-2.) Appendices C and D (DE81-3, DE81-4) are not part of the state-court record and are not properly before this Court for consideration. *Cullen*, 563 U.S. at 181-82; *Curry*, 2022 WL 1773969, at *7 n.2. The remaining facts alleged are denied.

67. Paragraph 119 is admitted.

68. Paragraphs 120-21 are admitted. Aside Respondent's objection to this

Court's order, Respondent noted the ongoing efforts to comply with this Court's order and stated Respondent was unable "to certify at this time that no documents responsive to Wilson's desired discovery exist." (DE84:5; *see also* DE86 (apprising the Court of materials reviewed and provided to Wilson).)

69. In paragraphs 123-24, Respondent admits that Respondent notified the Court that:

> [T]wo audiotapes of recorded statements (Dated January 29, 2008 and March 24, 2005) by Catherine Corely were located in the Henry County District Attorney's filed regarding the Hatfield murder. These recordings were taken by Henry County law enforcement officers and concerned Corley's knowledge, or alleged knowledge of the Hatfield murder. Corely does not claim to have witnessed the murder in either statement and specifically denies having witnessed it in the first statement. Neither statement directly addresses Corley's alleged 'confession' letter, though in one Corley is asked about her familiarity with Joan Vroblick (who delivered the original letter to the Houston County District Attorney) and indicates that she does not trust Vroblick and does not talk to her. Respondent does not concede that these statements were discoverable, material, exculpatory, or otherwise relevant to this action. However, in the interests of judicial economy, Respondent will produce electronic copies of those recordings to Wilson's counsel. No transcriptions of those recordings exist in the materials reviewed.

(DE89:4.) Neither these statements nor the 2024 transcriptions attached to the instant amended petition (*see* DE114-E–H) are part of the state-court record, and they are not properly before this Court. *Cullen*, 563 U.S. at 181-82; *Curry*, 2022 WL 1773969, at *7 n.2., *see supra* ¶ 28. The remaining facts alleged are denied.

70. Paragraphs 125-26 are denied. Appendices I, K, and L are not a part of

the state-court record and are not properly before this Court. *Cullen*, 563 U.S. at 181-82; *Curry*, 2022 WL 1773969, at *7 n.2. Further, as Respondent has previously asserted:

> [A] sealed envelope of handwriting exemplars was located at the Houston County Police Department. Upon the unsealing of that envelope several purported writings of Catherine Corley were found. One of those documents, a letter addressed only to "David," states that the writer was "asked to testify" and "refused" because "I am loyal." Because this document could be read as evincing a reason why Corley did not wish to testify in the Walker matter, it is arguably response [to this Court's production order]. (Doc. 81.) Respondent does not concede that this document was discoverable, material, exculpatory, or otherwise relevant to this action. However, in the interests of judicial economy, Respondent will produce an electronic copy of that document to Wilson's counsel.

(DE86:7-8; *see also id.* at 5 (disclosing and producing "a two-page record of an interview with Joan Vrolick by Henry County investigators").)

71. Paragraphs 127-38 are denied. Respondent asserts that the murder of Hatfield is unrelated and irrelevant to the instant proceeding. Further, the facts alleged in these paragraphs, as well as in Appendices M, N, O, P, Q, S, V, and MM, are not part of the state-court record and are not properly before this Court. *Cullen*, 563 U.S. at 181-82; *Curry*, 2022 WL 1773969, at *7 n.2.

72. Paragraphs 139-140 are admitted.

STANDARDS GOVERNING HABEAS REVIEW

73. Wilson's petition is governed by 28 U.S.C. § 2254(d), as amended by the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). A petitioner's

burden in habeas is a heavy one, particularly where, as here, the state courts have already addressed and disposed of the petitioner's claims. Under AEDPA, federal habeas review of state-court decisions is "greatly circumscribed" and "highly deferential." *Bates v. Sec'y, Fla. Dep't of Corr.*, 768 F.3d 1278, 1287 (11th Cir. 2014). AEDPA prohibits federal habeas relief unless the state court's decision was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law," or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. §§ 2254(d)(1)-(2).

74. "A state court decision is 'contrary to' clearly established federal law if it applies a rule that contradicts the governing law set forth by the United States Supreme Court, or arrives at a result that differs from Supreme Court precedent when faced with materially indistinguishable facts." *Ferguson v. Sec'y, Fla. Dep't of Corr.*, 716 F.3d 1315, 1331 (11th Cir. 2013). Clearly established federal law "is the governing legal principle or principles set forth by the Supreme Court *at the time* the state court renders its decision." *Kilgore v. Sec'y, Fla. Dep't of Corr.*, 805 F.3d 1301, 1310 (11th Cir. 2015). "A state court decision involves an 'unreasonable application' of clearly established federal law 'if the state court correctly identifies the governing legal principle' from the relevant Supreme Court decisions but unreasonably applies it to the facts of the particular case." *Lee v. Comm'r, Ala. Dep't of Corr.*, 726 F.3d 1172, 1192 (11th Cir. 2013) (quoting *Bell v. Cone*, 535 U.S. 685, 694 (2002)).

75. "[W]hen a federal habeas petitioner challenges the factual basis for a prior state-court decision rejecting a claim, the federal court may overturn the state court's decision only if it was 'based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" *Burt v. Titlow*, 571 U.S. 12, 18 (2013) (quoting § 2254(d)(2)). A state court's "determination of the facts is unreasonable only if no fairminded jurist could agree with the state court's determination or conclusion." *Holsey v. Warden, Ga. Diagnostic Prison*, 694 F.3d 1230, 1257 (11th Cir. 2012).

76. If a state inmate's claim was adjudicated on the merits in state court, then federal habeas review is limited to the state-court record. *Cullen v. Pinholster*, 563 U.S. 170, 181-82 (2011). "AEDPA also requires federal habeas courts to presume the correctness of state courts' factual findings unless applicants rebut this presumption with 'clear and convincing evidence.'" *Schriro v. Landrigan*, 550 U.S. 465, 473-74 (2007); *see also Dill v. Allen*, 488 F.3d 1344, 1354 (11th Cir. 2007) ("AEDPA codifies a presumption that the factual findings of state courts are correct, which may be rebutted only by clear and convincing evidence."). "This presumption applies to fact findings made by both state trial courts and state appellate courts." *Hannon v. Sec'y, Dep't of Corr.*, 562 F.3d 1146, 1150 (11th Cir. 2009).

77. On federal habeas review, courts "assess the reasonableness of the last state-court adjudication on the merits of the petitioner's claim." *Brown v. Davenport*,

596 U.S. 118, 141 (2022) (cleaned up). But federal habeas courts "are not required, in assessing the reasonableness of a state court's reasons for its decision, to strictly limit [their] review to the particular *justifications* that the state court provided." *Pye v. Warden, Ga. Diagnostic Prison*, 50 F.4th 1025, 1036 (11th Cir. 2022) (en banc). Where "a state court rejects a petitioner's claim in a written opinion accompanied by an explanation, the federal habeas court reviews only the state court's 'decision' and is not limited to the particular justifications that the state court supplied." *Id.* at 1037-38; *King v. Warden, Ga. Diagnostic Prison*, 69 F.4th 856, 867 (11th Cir. 2023) ("We evaluate the reasons offered by the court, but if we can justify those reasons on a basis the state court did not explicate, the state-court decision must still stand.").

78. "AEDPA thus imposes a highly deferential standard for evaluating state-court rulings and demands that state-court decisions be given the benefit of the doubt." *Renico v. Lett*, 559 U.S. 766, 773 (2010) (cleaned up); *Lee v. Comm'r, Ala. Dep't of Corr.*, 726 F.3d 1172, 1192 (11th Cir. 2013) (AEDPA "impose[s] a highly deferential standard for evaluating state-court rulings and demands that state-court decisions be given the benefit of the doubt."). Applying § 2254(d), the Supreme Court affirmed that district courts cannot grant habeas petitions merely because they disagree with the state court's decision or view it as erroneous. *Williams v. Taylor*, 529 U.S. 362, 411-12 (2000). The Eleventh Circuit has followed this mandate, saying that habeas petitions are not vehicles for error correction and should only be

granted for extreme malfunctions in the state criminal justice system. *Cave v. Sec'y Dep't of Corr.*, 638 F.3d 739, 744 (11th Cir. 2011). Thus, at a bare minimum, a habeas petitioner "must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

RESPONSE TO GROUNDS FOR RELIEF

I. Wilson's claim that the prosecution withheld exculpatory evidence in violation of *Brady v. Maryland*.

79. Wilson's first claim, spanning from paragraph 142-352, alleges that the prosecution withheld exculpatory evidence of a confession by codefendant Corley in violation of *Brady v. Maryland*, 373 U.S. 83 (1963).

80. The bulk of Wilson's argument attempts to add new factual allegations and were not presented to the state courts, i.e., a handwritten letter purportedly by Corley, a handwriting expert's report, and evidence allegedly implicating Corley in the unrelated murder of Hatfield. "AEDPA precludes a habeas petitioner from relying on new factual allegations." *Morris v. Mitchell*, 2:18-cv-1578, 2024 WL 3800386, at *124 (N.D. Ala. Aug. 13, 2024); *Powell v. Allen*, 602 F.3d 1263, 1273 n.8 (11th Cir. 2010) ("Powell has made additional allegations and submitted more evidence in support of his claim of ineffective assistance of counsel in his federal habeas petition. In accordance with AEDPA, however, we do not consider such

supplemental allegations or evidence when reviewing the reasonableness of the state court's resolution of this claim, which was based on the allegations before it."). Because he failed to raise these allegations in state court, his new factual allegations are unexhausted and procedurally defaulted from habeas review. *Cullen*, 563 U.S. at 181 ("[R]eview under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits."); *McKiver v. Sec'y, Fla. Dep't of Corr.*, 991 F.3d 1357, 1367 (11th Cir. 2021) ("It would contravene AEDPA to allow a petitioner to overcome an adverse state-court decision with new evidence introduced in a federal habeas court and reviewed by that court int eh first instance effectively de novo.") (cleaned up). Wilson's new allegations are not properly before this Court.

81. Additionally, this claim is procedurally defaulted because Wilson could have, but did not, raise the claim at trial or on direct appeal. Wilson concedes that the State disclosed the fact that his accomplice Kitty Corley wrote a letter containing allegations about her participation in the murder of Dewey Walker. As the ACCA held:

> Even if the State failed to disclose the letter and the expert report, Wilson was aware of the State's failure to disclose the evidence prior to trial. In other words, Wilson could have raised this *Brady* claim at trial or on appeal. As such, this claim is procedurally barred by Rules 32.2(a)(3) and 32.2(a)(5), and the circuit court did not err in dismissing this claim.

(DE76-33:10.)

82. It is well-established that Rule 32.2(a) is an "independent and adequate" state law rule that bars his claim in habeas. *See, e.g.*, *Mason v. Allen*, 605 F.3d 1114, 1121 (11th Cir. 2010) (Rule 32.2(a) is an "independent and adequate ground"). Because Wilson knew about the Corley letter prior to trial, he had the opportunity to raise a *Brady* claim at that time or on direct appeal. The State's rejection of this claim on independent and adequate state law grounds operates as a bar to Wilson's claim for relief in habeas. Wilson's failure to raise this claim at trial was a procedural default under state law, which bars consideration of this claim on federal habeas review. *See, e.g.*, *Engle v. Isaac*, 456 U.S. 107 (1982); *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Baldwin v. Johnson*, 152 F.3d 1304, 1318-20 (11th Cir. 1998). Alabama law precludes collateral review of issues that could have been but were not raised at trial. ALA. R. CRIM. P. 32.2(a)(3); *see, e.g.*, *Lee v. State*, 44 So. 3d 1145, 1174-74 (Ala. Crim. App. 2009); *Daniels v. State*, 650 So. 2d 544, 551 (Ala. Crim. App. 1994).

83. Wilson did not raise this claim on direct appeal. His failure to do so was a procedural default under state law, which bars federal review of this claim. *See, e.g.*, *Caniff v. Moore*, 269 F.3d 1245, 1246-47 (11th Cir. 2001); *Baldwin*, 152 F.3d at 1318-20. Alabama law precludes collateral review of issues that could have been but were not raised on direct appeal. ALA. R. CRIM. P. 32.2(a)(5); *see McGahee v. State*, 885 So. 2d 191, 228 (Ala. Crim. App. 2003); *Tarver v. State*, 761 So. 2d 266,

268 (Ala. Crim. App. 2000).

84. Further, the ACCA correctly rejected Wilson's claim on the merits, holding:

> Wilson argues that the circuit court erred in dismissing his claim that the State committed a *Brady* violation. In his petition, Wilson pleaded that the State suppressed exculpatory evidence in the form of a letter written by Catherine Corley, one of his codefendants, and an expert report generated in conjunction with the State's investigation of this letter. On April 14, 2004, Corley gave a statement to law enforcement which she admitted to entering Walker's residence after he had been killed and to rummaging through his property. Wilson pleaded, however, that the State was made aware of Corley's admitting to a more significant role in murder. Specifically, Wilson pleaded that on September 2, 2004, the district attorney and Investigator Luker met with an attorney representing an inmate who was incarcerated Corley. During that meeting, the attorney presented the men with a "handwritten letter [that] contained details murder of Dewey Walker which only the perpetrators would have known." The letter "described how the writer hit Mr. Walker with a baseball bat until he fell." The letter was signed "Nicole" and also stated that the nickname was "Kittie." Investigator Luker's report indicated that Corley's middle name was "Nicole" and that her was "Kittie."
>
> The State initiated an investigation into the letter. State sought an order for Corley to provide palm prints to compared to those found on the letter, and Investigator Luker executed a search warrant on Corley's jail cell during which he collected writing samples. The State employed the of a handwriting expert who determined, based on the known samples, that the letter had "probably" been written by Corley. Wilson pleaded that neither the letter nor the expert report have ever been produced to him and that the evidence favorable and material. The circuit court dismissed this claim as being procedurally barred by Rules 32.2(a)(3) and 32.2(a)(5), Ala. R. Crim. P., and without merit.
>
> Wilson argues that the instant petition provided him with first opportunity to raise this *Brady* claim. Although the State does not contest Wilson's claim that neither the letter nor the expert report were

> produced, the State does assert that the existence of the evidence was disclosed to Wilson.
>
> The State's position is supported by Wilson's own petition. Wilson attached to his petition a copy of the police report in which Investigator Luker described the letter v allegedly authored by Corley and his efforts to investigate the matter. Each page of the police report bears the initials of one of Wilson's trial counsel, and Wilson acknowledges in his petition that the police report was included in discovery.
>
> Even if the State failed to disclose the letter and the expert report, Wilson was aware of the State's failure to disclose the evidence prior to trial. In other words, Wilson could have raised this *Brady* claim at trial or on appeal. As such, this claim is procedurally barred by Rules 32.2(a)(3) and 32.2(a)(5), and the circuit court did not err in dismissing this claim.

(DE76-33:9-10 (citations omitted).)

85. Wilson cannot show that the denial of relief on this claim in state court "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." 28 U.S.C. § 2254(d). It is well established that there is no suppression "where the defendant had within [his] knowledge the information by which [he] could have ascertained the alleged *Brady* material." *Maharaj v. Sec'y for Dep't of Corr.*, 432 F.3d 1292, 1315 (11th Cir. 2005). In this case, the State *never suppressed* the letter from his accomplice (hereinafter "the Corley letter"). The record establishes that the Corley letter, or at the very least its material substance, was

disclosed to Wilson in *pretrial discovery*. (DE76-29:53 (Trial counsel "initialed the police report which referenced the alleged confession letter.").) The police report referenced in the ACCA's opinion was attached to Wilson's Rule 32 petition as "Exhibit 4" and stated:

> This letter contained details of the murder of Dewey Walker which only the perpetrators would have known. This letter further described how the writer hit Mr. Walker with a baseball bat until he fell. The letter was signed "Nicole." It also stated "My nickname is Kittie." Through the investigation of the murder of Mr. Walker it has been determined that Catherine Nicole Corley's nickname is "Kittie."
>
> After comparing the hand written letter…and the hand written documents seized in the search of Corley's cell I believe that the author of both documents are Catherine Nicole Corley."

(DE76-24:11-17.)

86. Thus, Wilson has, for over fifteen years, known both that a letter existed stating that Corley also struck Walker and that the State believed that Corley was its author. Based on the findings of the state courts, which are owed AEDPA deference, no reasonable basis exists for granting Wilson relief. As Wilson has not shown that the Alabama courts decided this claim in a manner that was contrary to or involves an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States, this Court should deny relief. 28 U.S.C. § 2254(d).

87. Without waiving the foregoing, in deciding this claim, the ACCA made findings of fact. Pursuant to 28 U.S.C. § 2254(e)(1), these fact-findings are presumed

correct. Wilson is not entitled to an evidentiary hearing on this claim.

88. Without waiving the foregoing, to the extent that Wilson failed to develop the factual basis for this claim in state-court proceedings, he is not entitled to any further evidentiary hearing in this Court. His claim is not based on a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" or "a factual predicate that could not have been previously discovered through the exercise of due diligence," and the facts underlying the claims would not be sufficient to establish by clear and convincing evidence that but for the constitutional error alleged in this claim, no reasonable fact-finder would have found him guilty of capital murder. 28 U.S.C. § 2254(e)(2).

89. Without waiving the foregoing, the factual averments made in support of this claim are denied. The state-court findings of fact constitute the proper factual basis for consideration of this claim.

II. Wilson's claim that he received ineffective assistance during the penalty phase and sentencing.

In paragraphs 353-602, Wilson alleges that he received ineffective assistance of trial counsel during the penalty phase and sentencing. This claim has five subparts, which will be separately addressed below. An introduction to these claims is found in paragraphs 353-94. To the extent that Wilson is attempting to raise any claims in those paragraphs, such claims are conclusory in nature and fail to state a valid claim

for relief under 28 U.S.C. § 2254. *See, e.g.*, *Mayle v. Felix*, 545 U.S. 644, 655 (2005) ("Habeas Corpus Rule 2(c) is more demanding. It provides that the petition must 'specify all the grounds for relief available to the petitioner' and 'state the facts supporting each ground.'"); *Tejada v. Dugger*, 941 F.2d 1551, 1559 (11th Cir. 1991) ("a petitioner is not entitled to an evidentiary hearing when his claims are merely conclusory allegations unsupported by specifics"); *Lindsey v. Thigpen*, 875 F.2d 1509, 1513 (11th Cir. 1989) (holding that conclusory assertions that are unsupported by any allegation of fact fail to state a claim for which habeas relief can be granted).

A. Wilson's claim that trial counsel failed to investigate Corley's alleged confession.

90. In paragraphs 394-411 and 590-93, Wilson claims that trial counsel provided ineffective assistance when they failed to adequately investigate the alleged confession of his codefendant. The merits of this claim were addressed by the ACCA in Wilson's Rule 32 proceedings:

> Wilson asserted that he received ineffective assistance of counsel because trial counsel failed to investigate Corley's letter for evidence of reduced culpability. Again, Wilson refers to the letter, allegedly written by Corley, in which the author admitted to striking Walker with a bat until he fell. Wilson pleaded in his petition that had trial counsel discovered and presented this evidence, it would have called into question Wilson's cruelty and responsibility for all of Wilson's injuries. The circuit court dismissed this claim as being insufficiently pleaded.
>
> As discussed in Part II(A)(2) of this memorandum opinion, Corley's admitting that she struck Walker "with a baseball bat until he fell" would not exclude Wilson as the perpetrator of capital murder. Specifically, it does not negate Wilson's intent to kill Walker or that the

> murder was committed in a heinous, atrocious, or cruel manner. See *Ex parte Bankhead*, 585 So. 2d 112, 125 (Ala. 1991), rev'd on other grounds, 625 So. 2d 1146 (Ala. 1993) (holding that the application of the especially heinous, atrocious, or cruel aggravating circumstance focuses on the manner of the killing and not the defendant's actual participation in the murder). Corley's admission, if true, would establish at most that Wilson had an accomplice in his beating and strangling Walker to death. Evidence that an accomplice was involved is not mitigating. Consequently, even assuming trial counsel were deficient in failing to investigate and to offer the letter as evidence during the penalty phase, Wilson has failed to show that he was prejudiced by the deficiency. As such, the circuit court did not err in dismissing this claim. *See* Rule 32.7(d), Ala. R. Crim. P.

(DE76-33:51-52 (citation omitted); *see also id.* at 18-22.)

91. Wilson has not shown, and cannot show, that the denial of relief on this claim in state court "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." 28 U.S.C. § 2254(d). For the same reasons as the ACCA found this claim to be meritless in the guilt-phase context, it is meritless in the penalty-phase context. Because Wilson has not shown that the Alabama courts decided this claim in a manner that was contrary to or involves an unreasonable application of clearly established federal law as determined by the Supreme Court, this Court should deny relief on this claim. A review of the ACCA's opinion demonstrates that the decision of the Alabama court was not an unreasonable one.

Thus, according to the habeas statute, the application for a writ of habeas corpus before this Court "shall not be granted." 28 U.S.C. § 2254(d).

92. Without waiving the foregoing, in deciding this claim, the Court of Criminal Appeals made findings of fact. Pursuant to 28 U.S.C. § 2254(e)(1), these fact-findings are presumed correct. Wilson is not entitled to an evidentiary hearing on this claim.

93. Without waiving the foregoing, to the extent that Wilson failed to develop the factual basis for this claim in state-court proceedings, he is not entitled to any further evidentiary hearing in this Court. His claim is not based on a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" or "a factual predicate that could not have been previously discovered through the exercise of due diligence," and the facts underlying the claims would not be sufficient to establish by clear and convincing evidence that but for the constitutional error alleged in this claim, no reasonable fact-finder would have found him guilty of capital murder. 28 U.S.C. § 2254(e)(2).

94. Without waiving the foregoing, the factual averments made in support of this claim are denied. The state court findings of fact constitute the proper factual basis for consideration of this claim.

B. Wilson's claim that trial counsel failed to adequately investigate his background.

95. In paragraphs 413-536 and 578-89, Wilson contends that trial counsel provided ineffective assistance when counsel failed to adequately investigate his "troubled upbringing and psychological challenges." (Am. Pet. 414.) This claim was addressed by the ACCA in Wilson's Rule 32 proceeding. The state court found:

> Wilson asserted that he received ineffective assistance of counsel because trial counsel failed to investigate and to present available and compelling mitigation evidence. Wilson pleaded that had trial counsel conducted a sufficient mitigation investigation, they would have discovered and could have presented to the jury that Wilson suffered from generational poverty, familial mental illness and abandonment, neglect and abuse, and mental and learning difficulties. The circuit court dismissed this claim as being insufficiently pleaded and without merit.
>
> [….]
>
> "Although [Wilson]'s claim is that his trial counsel should have done something more, we first look at what the lawyer[s] did in fact." *Chandler v. United States*, 218 F.3d 1305, 1320 (11th Cir. 2000). Trial counsel presented two witnesses at the penalty phase—Linda Wilson and Bonnie Anders—and introduced into evidence Wilson's school records.
>
> Linda Wilson testified that Wilson was the second of three children, all boys, she had with her then-husband, Roland Wilson. Linda Wilson touched on her own emotional problems, describing an attempted suicide that occurred when Wilson was three years old. Linda Wilson overdosed on medication and then carried her youngest son next door, where her in-laws lived. Linda Wilson lost consciousness in her inlaws' backyard. Wilson, who was outside, witnessed the event. Linda Wilson testified that she later discussed her suicide attempt with Wilson when he was 13 years old.

Linda Wilson's marriage to Roland Wilson ended in divorce the next year. The boys stayed in Milton, Florida, with their father and Linda Wilson moved to Dothan, Alabama. Linda Wilson visited her children when she could, but admitted that visits were sporadic due to a lack of transportation. Even so, Linda Wilson spoke to Wilson on the telephone once a week. Linda Wilson stated that Wilson began a regimen of medication and therapy in kindergarten. Wilson lived with his father for approximately 10 years before moving to Dothan, where he lived with his mother at the house of his uncle Angelo Gabrielli. Linda Wilson stated that Wilson had no friends during this stay in Dothan and that he was on various medications. According to Linda Wilson, Wilson was taking three drugs–Prozac, a second that was likely Ritalin, and a third that she described only as a "psychotic drug." Without consulting a doctor, Wilson's mother took him off these medications because she believed he could not function on them. Wilson's stay in Dothan lasted less than two years because he was unhappy; Linda Wilson identified her brother Gabrielli as the source of Wilson's unhappiness. Linda Wilson testified that when Wilson "would come home from school with an off-task mark, my brother would want to take the belt and tear his butt up with it. And [Wilson] got tired of it." "Off-task" could mean something as insignificant as dropping a pencil on the floor or looking up in class.

Wilson moved back to Milton to live with his father. There his medications were resumed. Wilson returned to Dothan, however, after a couple of years because his father was planning to remove him from high school and enroll him in a trade school. Wilson completed high school in Dothan, graduating with a vocational diploma. Linda Wilson testified that Wilson stayed in his room and was not social with others. Linda Wilson repeatedly characterized Wilson as a follower.

Bonnie Anders, who was a neighbor of Wilson in Dothan, testified that she was a volunteer with the American Red Cross and that Wilson had aided her, without pay, in her disaster relief work approximately a dozen times.

Wilson first asserted trial counsel should have investigated and presented evidence of the generational poverty from which Wilson's family suffered. For instance, Wilson asserted that trial counsel should have presented evidence of his mother's impoverished background—

Wilson pleaded that she was raised in a shack with a leaky roof and that the family subsisted on a mixture of cornmeal and powdered milk—and the severe abuse she suffered at the hands of her alcoholic father and, after her parents' divorce, her older brother. Wilson also pleaded that his mother was overwhelmed as a caregiver to three young boys and that she and his father fought frequently.

Wilson pleaded that trial counsel should have investigated and presented evidence of familial mental illness and abandonment. Here, Wilson asserted that trial counsel should have presented evidence of his mother's suicide attempt and that his father was fearful that his mother was a danger to Wilson and his brothers. Two years after Wilson's parents' divorce, Linda Wilson moved to Dothan and rarely saw Wilson until he moved to Dothan years later. Wilson asserted that Roland Wilson would have testified that Wilson's separation from his mother was traumatic as were the occasions when Linda Wilson failed to see her sons as she had promised. Also, Wilson pleaded that trial counsel should have offered evidence that Linda Wilson's mother suffered from a mental illness, was abusive and neglectful, and had threatened suicide.

Wilson asserted that trial counsel should have investigated and presented evidence of the neglect and abuse he suffered. Specifically, Wilson pleaded that he was often left in the care of his grandparents and that they had to devote much of their attention to his younger brother, who suffered from cystic fibrosis. Wilson was neglected by his father and grandparents and rarely saw his mother. Family members recall Wilson's grandmother screaming at him, telling him that he was stupid and that he would never amount to anything. Wilson's father remarried when Wilson was seven years old, but this did not lead to increased attention—Wilson's step-mother showed preference for her own children over Wilson and his brothers. Wilson's step-mother would not prepare food for Wilson or his brothers and she isolated Wilson from the rest of his family. In contrast to her own children, Wilson's step-mother would not allow Wilson to have friends visit him or to visit his friends. Wilson's aunt Pamela Tankersley would have testified that she could tell Wilson was unhappy with his living situation in Milton. Wilson pleaded that moving to Dothan in sixth grade provided little relief. Although his uncle Gabrielli became a surrogate father to him—taking him fishing and allowing him to leave his room—Gabrielli was physically abusive. Linda Wilson would have testified

that Gabrielli often beat Wilson, usually with a belt, and on one occasion dumped a pot of hot water on him. Wilson moved back to Milton to escape Gabrielli.

Wilson pleaded that trial counsel should have investigated and presented evidence of Wilson's mental health and learning deficiencies. Wilson pleaded that he was diagnosed with Attention Deficit Hyperactivity Disorder in kindergarten and declared eligible for exceptional education in fourth grade. At that time, Wilson was taking Ritalin and the antidepressant Pamelor. In sixth grade, Wilson's psychologist noted that he seemed unhappy and isolated, and Wilson's fourth-grade teacher would have testified that Wilson had difficulty communicating and lacked friends. Wilson's school records from Dothan indicated that he had social difficulties and that his reading, writing, and math skills lagged several grade levels behind. Linda Wilson would have testified that on two occasions she saw Wilson banging his head on a car and punching himself in the face while upset. Wilson pleaded that he had to repeat tenth grade, which led to his father's wanting Wilson to enroll in a trade school. In response, Wilson returned to Dothan to live with his mother. During this stay in Dothan, Gabrielli's physical abuse of Wilson abated and Wilson, according to a number of family members, felt wanted and loved. Wilson began to open up socially and his grades and behavior at school improved. Nevertheless, Wilson was classified as having an emotional disturbance and placed in special-needs classes. Wilson's special-needs teacher, Donna Arieux, would have testified that she wished she had had more students like Wilson—although quiet, she felt he cared for others, and she never saw him bully other students.

In the context of mental health, Wilson pleaded that trial counsel should have retained Dr. Robert Shaffer, a forensic and neuropsychologist who would have testified that Wilson suffers from Asperger's Syndrome, a constituent of autism spectrum disorder. Those that suffer from autism spectrum disorder often lack social abilities and are prone to anxiety, depression, and self-harm. Wilson pleaded that had trial counsel spent more time interviewing him, his family, and his caregivers, and reviewing his school records, they would have identified red flags that could have alerted them to his disorder. Further, had trial counsel discovered his disorder, they would have learned that those who suffer from Asperger's Syndrome are susceptible to influence, which would

have allowed them to place Wilson's offense in context for the jury. Wilson pleaded that individuals with his disorder are typically gullible, naive, and vulnerable to manipulation. Wilson specifically cited Marsh and Jackson, who were also taught by Arieux, as sources of trouble. If trial counsel had interviewed Arieux, Wilson asserted, they would have learned that Marsh had stolen from her three times, that she considered Jackson to be a liar, and that Jackson had self-destructive tendencies. Gabrielli would have testified that he believed Marsh and Jackson influenced Wilson to smoke and drink and to skip work. Gabrielli also could have testified to an incident between Marsh and Walker in which Walker forced Marsh to pay for tire rims that Walker's son had installed on Marsh's vehicle. Wilson pleaded that this incident precipitated Marsh's planning to rob Walker to get his money back.

Wilson asserted that trial counsel was ineffective in failing to present the foregoing mitigation evidence and in failing to retain the assistance of experts. Wilson pleaded that experts would have been valuable in diagnosing and explaining to the jury Wilson's mental deficiencies, and in explaining Wilson's school records to the jury. Wilson stated that "[h]ad the mitigating evidence described above been presented *fully*, there is a reasonable probability that David Wilson would not have been sentenced to death, especially as two jurors already voted for life."

However, a review of the evidence that was presented shows that much of what Wilson pleaded trial counsel should have investigated and presented to the jury would have been cumulative. For instance, Linda Wilson testified to her own emotional issues, including her attempted suicide, and her leaving her children after divorcing Wilson's father. Linda Wilson admitted to seeing her children infrequently and presented testimony about Wilson's taking Ritalin and other prescription medication from a young age. Linda Wilson also testified to Gabrielli's whipping Wilson for even minor transgressions at school and to Wilson's desire to move back to Milton to get away from Gabrielli. Finally, Linda Wilson testified on multiple occasions that Wilson was a follower. Bonnie Anders offered testimony to the jury about Wilson's willingness to volunteer, which showed Wilson's concern for others and his potential for rehabilitation if spared. "[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." *Daniel v. State*, 86 So. 3d 405, 429-30 (Ala.

Crim. App. 2011). Certainly, trial counsel could have offered additional witnesses during the penalty phase, but this Court has recognized that "[t]here has never been a case where additional witnesses could not have been called." *State v. Tarver*, 629 So. 2d 14, 21 (Ala. Crim. App. 1993). '[E]ven if alternate witnesses could provide more detailed testimony, trial counsel is not ineffective for failing to present cumulative evidence.' *Darling v. State*, 966 So. 2d 366, 377 (Fla. 2007)." *Daniel*, 86 So. 3d at 430.

Further, the mitigating effect of much of this evidence is difficult to assess because of the dearth of specific facts pleaded in support. For instance, Wilson pleaded that Gabrielli "often beat [him], usually with a belt, but sometimes with other things." There are no specific facts to indicate the actual frequency of these alleged beatings or, significantly, to indicate their severity. The only injury pleaded by Wilson is that on one occasion Gabrielli "took a switch and beat [Wilson] until he had welts all over his legs." Likewise, Wilson pleaded only a few instances of verbal abuse. With respect to Wilson's alleged affliction with Asperger's Syndrome, Wilson pleaded that he was diagnosed with the condition by Dr. Shaffer, who was retained by postconviction counsel. Wilson pleaded that Asperger's Syndrome is a "constituent of autism spectrum disorder," and then pleaded the typical symptoms of autism spectrum disorder, as opposed to the specific symptoms of Wilson's alleged affliction. Asperger's Syndrome, though, "is essentially a mild form of autism." U*nited States v. Lange*, 445 F.3d 983, 985 (7th Cir. 2006) (emphasis added).

It is important to note that Wilson's diagnosis of Asperger's Syrndome came well after his trial had concluded. "'Trial counsel cannot be ineffective for failing to present evidence that did not exist at the time of trial.' *Clark v. State*, 35 So. 3d 880, 888 (Fla. 2010)." *Wade v. State*, 156 So. 3d 1004, 1030 (Fla. 2014). Wilson pleaded, though, that had "trial counsel met with [Wilson] more regularly, and interviewed him about his behavioral and social history, they would have learned that David exhibited several 'red flags' for autism spectrum disorder, including poor social and communicative skills, consistently flat affect, and a history of depression and self-harming behavior." Yet, it would be unreasonable to expect trial counsel to recognize these traits as red flags for Wilson's alleged disorder when the disorder had gone

> undiagnosed despite Wilson's seeing psychologists since he was a small child.[8]
>
> Indeed, Wilson pleaded evidence that was not presented by trial counsel and may or may not have been investigated, such as evidence regarding his suffering from generational poverty, familial mental illness, abandonment, and neglect. This Court has recognized, though, that evidence of a troubled childhood may be a double-edged sword. *Davis v. State*, 44 So. 3d 1118, 1141 (Ala. Crim. App. 2009). This is so because many jurors have had difficult childhoods, but have not turned to criminal conduct. *Id*. (quoting *Card v. Dugger*, 911 F.2d 1494, 1511 (11th Cir. 1990)); *see also Johnson v. Cockrell*, 306 F.3d 249, 253 (5th Cir. 2002) (evidence of brain injury, abusive childhood, and drug and alcohol abuse was 'double edged' because it would support a finding of future dangerousness).
>
> After reweighing the omitted mitigation evidence that was sufficiently pleaded along with the mitigation evidence presented by trial counsel, this Court holds that there is no reasonable probability that the balance of aggravating and mitigating circumstances that led to the imposition of the death penalty would have been different. Although the facts pleaded in Wilson's petition depict a troubled childhood, the depiction is not compelling enough to overcome the circumstances of Wilson's crime and the three strong aggravating factors proven by the State—that the capital offense was committed while Wilson was engaged in

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8. The record further demonstrates the reasonableness of this conclusion. Upon Wilson's motion, the clerk's record was supplemented on appeal with the pretrial competency evaluation conducted (upon Wilson's motion) by Dr. Doug McKeown, a clinical and forensic psychologist. (DE76-11:7-8, 19-22.) Counsel thus had available to him Dr. McKeown's evaluation of Wilson, in which he found that Wilson spoke with "normal flow and expressive tone" and that he maintained "reasonable eye contact" with "no unusual mannerisms or gesturing." (*Id.* at 21.) Dr. McKeown concluded that "[h]is current range of affect is considered both constant and appropriate." *Id.* This evaluation could not be less consistent with Wilson's description of someone suffering from Asperger's with "absent, reduced, or atypical eye contact, gestures, facial expressions, body orientation, or speech intonation" and "'severe deficits' in verbal social communication." (*See id.*; *see also* Am. Pet. ¶ 442.) Nor, indeed, did Dr. McKeown diagnose Wilson with Asperger's or autism. (DE76-11:22.)

> the commission of or an attempt to commit or flight after committing or attempting to commit a burglary; that the capital offense was committed while Wilson was engaged in the commission of or an attempt to commit or flight after committing or attempting to commit a robbery; and that the capital offense was especially heinous, atrocious, or cruel compared to other capital offenses. Wilson has failed to allege sufficient facts to show that he was prejudiced by trial counsel's alleged ineffectiveness. As such, this claim is insufficiently pleaded and the circuit court did not err in dismissing it. *See* Rule 32.7(d), Ala. R. Crim. P.

(DE76-33:38-51 (citations edited or omitted).)

96. Wilson has not shown, and cannot show, that the denial of relief on this claim in state court "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." 28 U.S.C. § 2254(d). The ACCA considered all of Wilson's allegations as true, reweighed the aggravating and mitigating evidence, and held that there was "no reasonable probability that the balance of aggravating and mitigating circumstances that led to the imposition of the death penalty would have been different." (DE76-33:51.) At bottom, Wilson simply failed to plead facts that would explain how he was actually prejudiced by counsel's alleged deficient performance. Unlike in *Wiggins* and *Rompilla*, trial counsel's investigation and presentation did not leave the jury with a false impression regarding Wilson's childhood. Moreover, the jury also heard extensive evidence regarding the brutal

nature of Wilson's crime, as well as Wilson's own admission to the crime and to the callous manner in which he and his accomplices treated the dead man. They heard that Wilson and his accomplices repeatedly visited the victim's home over several days to steal from him as his body lay unattended. The trial court found the existence of three aggravating circumstances: capital murder during a burglary, capital murder during a robbery, and that the offense was especially heinous, atrocious or cruel. Wilson made no meaningful attempt to plead facts to explain how testimony regarding his troubled, but certainly not horrific, childhood would have equaled our outweighed the significant aggravating evidence in this matter. Consequently, the ACCA's conclusion that no prejudice occurred was a reasonable one. Because Wilson has not shown that the Alabama courts decided this claim in a manner that was contrary to or involves an unreasonable application of clearly established federal law as determined by the Supreme Court, this Court should deny relief on this claim. A review of the ACCA's opinion demonstrates that the decision of the Alabama court was not an unreasonable one. Thus, according to the habeas statute, the application for a writ of habeas corpus before this Court "shall not be granted." 28 U.S.C. § 2254(d).

97. Without waiving the foregoing, in deciding this claim, the Court of Criminal Appeals made findings of fact. Pursuant to 28 U.S.C. § 2254(e) (1), these

fact-findings are presumed correct. Wilson is not entitled to an evidentiary hearing on this claim.

98. Without waiving the foregoing, to the extent that Wilson failed to develop the factual basis for this claim in state-court proceedings, he is not entitled to any further evidentiary hearing in this Court. His claim is not based on a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" or "a factual predicate that could not have been previously discovered through the exercise of due diligence," and the facts underlying the claims would not be sufficient to establish by clear and convincing evidence that but for the constitutional error alleged in this claim, no reasonable fact-finder would have found him guilty of capital murder. 28 U.S.C. § 2254(e)(2).

99. Without waiving the foregoing, the factual averments made in support of this claim are denied. The state court findings of fact constitute the proper factual basis for consideration of this claim.

C. Wilson's claim that trial counsel provided ineffective assistance when counsel failed to object to prosecutorial misconduct.

100. In paragraphs 537-68 and 594-602, Wilson alleges that trial counsel provided ineffective assistance when they failed to object to prosecutorial misconduct. The ACCA addressed the merits of this claim during Wilson's Rule 32 proceeding:

Wilson asserted that he received ineffective assistance of counsel because trial counsel failed to object to prosecutorial misconduct. Specifically, Wilson pleaded that trial counsel should have objected to the following instances of prosecutorial misconduct: a) the prosecutor's presenting the aggravator of escape; b) the prosecutor's presenting an argument based on an unqualified witness's expert testimony; and c) the prosecutor's repeated questioning and arguments based on facts not in evidence.

Wilson asserted that trial counsel were ineffective for failing to object to the prosecutor's presenting to the jury the aggravator of escape. Ten months after Wilson's arrest for capital murder, Wilson was charged with second-degree escape. Wilson pleaded guilty to the charge before his trial. Prior to the commencement of the penalty phase, Wilson's trial counsel filed a motion in limine to prohibit evidence of Wilson's jail records and the escape charge. The prosecutor argued that evidence of Wilson's escape was admissible to prove the aggravating circumstance that the capital offense was committed while the person was under a sentence of imprisonment. *See* § 13A-5-49(1), Ala. Code 1975. Trial counsel conceded the point but argued that the prosecutor could not offer details of the conviction. The trial court agreed that the prosecutor could not offer details of the conviction unless Wilson opened the door.

During opening arguments in the penalty phase, the prosecutor stated that he was relying on four aggravating factors. The first was that

> "[t]he capital offense was committed by a person, David Wilson, who was under a sentence of imprisonment. I expect the evidence to be, after David Wilson was arrested and charged with the capital murder and the burglary, that while he was pending trial, that he did, to wit, escape or attempt to escape from the penal facility, the Houston County Jail, and he was convicted of that offense in May of 2006 and received a sentence for five years pending trial."

Following opening arguments the trial court excused the jury and held a bench conference. The trial court explained to the parties that after further research he had determined that the aggravating circumstance that the capital offense was committed while the person was under a

sentence of imprisonment would be inapplicable. The trial court stated, "So I think we have got a problem with that first one. And I think that will be a reversible problem." The trial court called the jury back into the courtroom and instructed them as follows:

> "Ladies and gentlemen, there was a legal issue that we had to address in regard to which aggravating circumstances the State will be relying on. The Court was of the opinion and [the prosecutor] had also pointed out that the State—one of the aggravating circumstances would be that Mr. Wilson was under a sentence of imprisonment at the time. That was the first one the State mentioned. But under the legal definition and requirements of conviction at the time of the imprisonment, the conviction that was referred to—the escape conviction will not be presented, because it will not be an aggravating circumstance in the case. But the State will still be relying on the three they mentioned, that the offense was committed while the defendant was engaged in a burglary, and then, that the offense was committed while he was engaged in a robbery, and that the offense was especially heinous, atrocious or cruel compared to other capital cases. So those will be presented, but not the one about being under a prior conviction at the time of the offense in this case."

The prosecutor asked for an instruction that the jury disregard that circumstance, and the trial court agreed: "Yeah. You should disregard that. And that ground is stricken from your consideration in the case, that ground about being previously convicted of escape."

Wilson asserted that trial counsel was ineffective for failing to argue the law correctly during his motion in limine and for failing to object to the prosecutor's argument. Wilson acknowledged the trial court's instruction but pleaded that the instruction did not erase the prejudice he had suffered. The circuit court dismissed this claim as being insufficiently pleaded and without merit.

The prosecutor's reference to Wilson's conviction for escape was brief and he related no details of the offense to the jury. As discussed above, the trial court instructed the jury that evidence of Wilson's escape could

not form the basis of an aggravating circumstance and that the prosecutor's mentioning of it should be disregarded. Also, the trial court properly instructed the jury only on the three relevant, aggravating circumstances. "[A]n appellate court 'presume[s] that the jury follows the trial court's instructions unless there is evidence to the contrary.'" *Thompson v. State*, 153 So. 3d 84, 158 (Ala. Crim. App. 2012) (quoting *Ex parte Belisle*, 11 So. 3d 323, 333 (Ala. 2008)). Even assuming trial counsel were deficient in failing to argue the law correctly during the motion in limine and for failing to object to the prosecutor's argument, Wilson was not prejudiced by the alleged deficiency. As such, this claim is without merit and the circuit court did not err in dismissing it. *See* Rule 32.7(d), Ala. R. Crim. P.

Wilson asserted that trial counsel were ineffective because trial counsel failed to object to the prosecutor's presenting an argument based on an unqualified witness's expert testimony. Here, Wilson referred again to Investigator Luker's testimony regarding blood evidence found in Walker's house, on which the prosecutor relied to argue to the jury that Wilson dragged and beat Walker throughout the house. This evidence was used by the State in the penalty phase to support the aggravating circumstance that the offense was especially heinous, atrocious, or cruel compared to other capital offenses. Wilson pleaded that had trial counsel objected to the evidence, it would have been excluded and the State would have lost its basis for its argument that Walker was dragged and beaten throughout the house.

In part II(A)(5)(a) of this memorandum opinion, this Court noted that it had held on direct appeal that Investigator Luker "did not offer expert scientific testimony, [thus,] the State was not required to establish his qualifications as an expert in blood-spatter analysis." *Id*. at 804. Consequently, trial counsel's objecting to this evidence would have been meritless. Trial counsel cannot be held ineffective for failing to raise a meritless objection. *See Bearden*, 825 So. 2d at 872. As such, this claim is without merit, and the circuit court did not err in dismissing it. *See* Rule 32.7(d), Ala. R. Crim. P.

Wilson asserted that trial counsel were ineffective for failing to object to the prosecutor's repeated questioning and arguments based on facts not in evidence. Specifically, Wilson referred to the prosecutor's arguing that Wilson changed his plan from knocking out Walker to

> beating him to death. During his statement to Investigator Luker, Wilson stated that he, Marsh, and Corley had a "sarcastic conversation" about "knocking [Walker] out" and stealing his van; Wilson added, however, "when I got there, I changed it all up cause I didn't want to you know just knock him out." Wilson's statement contained no further explanation on what he meant by "changed it all up." The prosecutor argued during the penalty phase that Wilson had changed his plan to a murderous one. The prosecutor also used his interpretation of Wilson's statement to challenge on cross-examination Wilson's mitigation witnesses' testimony that Wilson was a follower. Wilson pleaded that the prosecutor's interpretation was an unsupported extrapolation to which trial counsel should have objected. Wilson asserted that a more reasonable interpretation was that Wilson changed the plan to one in which he would avoid making contact with Walker. Wilson also reasserted his earlier claim that the prosecutor's argument was based on false testimony from Investigator Luker regarding blood being found throughout the house. The circuit court dismissed this claim as being without merit.
>
> The prosecutor, as well as defense counsel, has a right to present his or her reasonable impressions from the evidence and may argue every legitimate inference. *Reeves v. State*, 807 So. 2d 18, 45 (Ala. Crim. App. 2000) (citations and quotations omitted). Here, the prosecutor's argument was a reasonable inference from the evidence. Any objection based on prosecutorial misconduct would have been meritless. Trial counsel cannot be ineffective for failing to raise meritless objection. *Jackson v. State*, 133 So. 3d 420, 453 (Ala. Crim. App. 2009) (citations omitted). Further, as this Court held earlier in this memorandum opinion, Wilson has failed to plead sufficient facts to show that Investigator Luker testified falsely. As such, the circuit court did not err in dismissing this claim. *See* Rule 32.7(d), Ala. R. Crim. P.

(DE76-33:52-57.)

101. Wilson has not shown, and cannot show, that the denial of relief on this claim in state court "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the

Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." 28 U.S.C. § 2254(d). Because Wilson has not shown that the Alabama courts decided this claim in a manner that was contrary to or involves an unreasonable application of clearly established federal law as determined by the Supreme Court, this Court should deny relief on this claim. A review of the ACCA's opinion demonstrates that the decision of the Alabama court was not an unreasonable one. Thus, according to the habeas statute, the application for a writ of habeas corpus before this Court "shall not be granted." 28 U.S.C. § 2254(d).

102. Without waiving the foregoing, in deciding this claim, the Court of Criminal Appeals made findings of fact. Pursuant to 28 U.S.C. § 2254(e)(1), these fact-findings are presumed correct. Wilson is not entitled to an evidentiary hearing on this claim.

103. Without waiving the foregoing, to the extent that Wilson failed to develop the factual basis for this claim in state-court proceedings, he is not entitled to any further evidentiary hearing in this Court. His claim is not based on a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" or "a factual predicate that could not have been previously discovered through the exercise of due diligence," and the facts underlying the claims would not be sufficient to establish by clear and

convincing evidence that but for the constitutional error alleged in this claim, no reasonable fact-finder would have found him guilty of capital murder. 28 U.S.C. § 2254(e)(2).

104. Without waiving the foregoing, the factual averments made in support of this claim are denied. The state court findings of fact constitute the proper factual basis for consideration of this claim.

D. Wilson's claim that trial counsel failed to present evidence during the sentencing hearing.

105. In paragraphs 569-72, Wilson alleges that trial counsel provided ineffective assistance when counsel failed to present evidence to the sentencing judge. This claim was addressed by the ACCA in Wilson's Rule 32 proceeding:

> Wilson asserted that trial counsel were ineffective for failing to present any evidence at his sentencing hearing. During the hearing, the prosecutor revisited the facts of the case and asked the trial court to follow the jury's recommendation of a death sentence. Trial counsel presented some argument to the trial court regarding mitigating evidence—that Wilson's parents were divorced when he was four years old; that Wilson's school records indicated he was emotionally handicapped, that Wilson was a loving son and brother; that he was under 21 years old at the time of the offense; that he graduated from high school; that Wilson voluntarily gave a statement to law enforcement; that Walker may not have been conscious during the entire assault; that Wilson had been on several behavior-regulating medications for many years; that his psychological evaluations indicated he had significant self-blame, which caused an exaggerated need to accept responsibility; that Wilson performed volunteer work; that Wilson had been respectful during trial; and that there had been two jurors who had voted to recommend a sentence of life in prison without the possibility of parole. The prosecutor responded by mentioning Wilson's escape, and trial counsel objected to the argument.

> The trial court sustained the objection. The prosecutor then revisited Dr. Enstice's findings, and while acknowledging some of Wilson's mitigating evidence, argued that the aggravating circumstances outweighed Wilson's mitigating evidence.
>
> With respect to what evidence Wilson pleaded should have been presented at the sentencing hearing, Wilson incorporated by reference the mitigating evidence addressed in Part II(B)(1). The circuit court dismissed this claim as being insufficiently pleaded.
>
> Based on this Court's reasoning in Part II(B)(1), this Court holds that Wilson has failed to show that he was prejudiced by trial counsel's alleged ineffectiveness. As such, this claim is insufficiently pleaded and the circuit court did not err in dismissing it. *See* Rule 32.7(d), Ala. R. Crim. P.

(DE76-33:57-58.)

106. Wilson has not shown, and cannot show, that the denial of relief on this claim in state court "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." 28 U.S.C. § 2254(d). Because Wilson has not shown that the Alabama courts decided this claim in a manner that was contrary to or involves an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States, this Court should deny relief on this claim. A review of the ACCA's opinion demonstrates that the decision of the Alabama court was not an unreasonable one. Thus, according to the habeas statute, the application

for a writ of habeas corpus before this Court "shall not be granted." 28 U.S.C. § 2254(d).

107. Without waiving the foregoing, in deciding this claim, the Court of Criminal Appeals made findings of fact. Pursuant to 28 U.S.C. § 2254(e)(1), these fact-findings are presumed correct. Wilson is not entitled to an evidentiary hearing on this claim.

108. Without waiving the foregoing, to the extent that Wilson failed to develop the factual basis for this claim in state-court proceedings, he is not entitled to any further evidentiary hearing in this Court. His claim is not based on a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" or "a factual predicate that could not have been previously discovered through the exercise of due diligence," and the facts underlying the claims would not be sufficient to establish by clear and convincing evidence that but for the constitutional error alleged in this claim, no reasonable fact-finder would have found him guilty of capital murder. 28 U.S.C. § 2254(e)(2).

109. Without waiving the foregoing, the factual averments made in support of this claim are denied. The state court findings of fact constitute the proper factual basis for consideration of this claim.

E. Wilson's claim that trial counsel failed to protect his right to a fair jury determination.

110. In paragraphs 573-57, Wilson asserts that trial counsel provided ineffective assistance when counsel failed to protect his right to a fair trial. The ACCA addressed the merits of this claim in Wilson's Rule 32 proceeding:

> Wilson asserted that trial counsel were ineffective during the penalty phase for failing to protect his right to a fair and honest jury determination. Wilson incorporated by reference his claims addressed in Part II(A)(7) in which he asserted that trial counsel were ineffective in failing: a) to argue for the removal of a biased juror and b) to object to inappropriate contact between the prosecutor and the jury. The circuit court dismissed this claim as being insufficiently pleaded.
>
> Based on this Court's reasoning in Part II(A)(7), this Court holds that Wilson has failed to show that he was prejudiced by trial counsel's alleged ineffectiveness. As such, this claim is insufficiently pleaded and the circuit court did not err in dismissing it. *See* Rule 32.7(d), Ala. R. Crim. P.

(DE76-33:58.)

111. In Part II(A)(7), the ACCA found Wilson's ineffectiveness claim challenging counsel's failure to raise an objection to inappropriate contact between the prosecutor and the jury was insufficiently pleaded because Wilson "failed to plead when trial counsel was notified of the alleged contact, and, more importantly, failed to describe any contact at all. (*Id.* at 37.) "Even taking Wilson's assertions as true, there is nothing in this claim to suggest that any jurors even noticed the prosecutor's entering the jury room." (*Id.*)

112. Wilson has not shown, and cannot show, that the denial of relief on this claim in state court "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." 28 U.S.C. § 2254(d). Because Wilson has not shown that the Alabama courts decided this claim in a manner that was contrary to or involves an unreasonable application of clearly established federal law as determined by the Supreme Court, this Court should deny relief on this claim. A review of the ACCA's opinion demonstrates that the decision of the Alabama court was not an unreasonable one. Thus, according to the habeas statute, the application for a writ of habeas corpus before this Court "shall not be granted." 28 U.S.C. § 2254(d).

113. Without waiving the foregoing, in deciding this claim, the Court of Criminal Appeals made findings of fact. Pursuant to 28 U.S.C. § 2254(e)(1), these fact-findings are presumed correct. Wilson is not entitled to an evidentiary hearing on this claim.

114. Without waiving the foregoing, to the extent that Wilson failed to develop the factual basis for this claim in state-court proceedings, he is not entitled to any further evidentiary hearing in this Court. His claim is not based on a "new rule of constitutional law, made retroactive to cases on collateral review by the

Supreme Court, that was previously unavailable" or "a factual predicate that could not have been previously discovered through the exercise of due diligence," and the facts underlying the claims would not be sufficient to establish by clear and convincing evidence that but for the constitutional error alleged in this claim, no reasonable fact-finder would have found him guilty of capital murder. 28 U.S.C. § 2254(e)(2).

115. Without waiving the foregoing, the factual averments made in support of this claim are denied. The state court findings of fact constitute the proper factual basis for consideration of this claim.

III. Wilson's claim that the prosecution withheld evidence in violation of *Brady*.

116. In paragraphs 603-23, Wilson reasserts that the prosecution violated *Brady* when it did not provide him with the Corley letter and the handwriting expert's report, arguing the ACCA's decision was an unreasonable application of *Brady* and an unreasonable finding of fact. As shown above, *see supra* Issue I, Wilson has not met his burden under § 2254(d); thus, this claim warrants no relief.

117. Without waiving the foregoing, in deciding this claim, the ACCA made findings of fact. Pursuant to 28 U.S.C. § 2254(e)(1), these fact findings are presumed correct. Wilson is not entitled to an evidentiary hearing on this claim.

118. Without waiving the foregoing, to the extent that Wilson failed to develop the factual basis for this claim in state-court proceedings, he is not entitled

to any further evidentiary hearing in this Court. His claim is not based on a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" or "a factual predicate that could not have been previously discovered through the exercise of due diligence," and the facts underlying the claims would not be sufficient to establish by clear and convincing evidence that but for the constitutional error alleged in this claim, no reasonable fact-finder would have found him guilty of capital murder. 28 U.S.C. § 2254(e)(2).

119. Without waiving the foregoing, the factual averments made in support of this claim are denied. The state-court findings of fact constitute the proper factual basis for consideration of this claim.

IV. Wilson's claim that trial counsel provided ineffective assistance during the guilt phase.

In paragraphs 624-809, Wilson alleges that he received ineffective assistance of counsel during the guilt phase of his trial. This claim contains eight subclaims, which are answered individually.

A. Wilson's claim that trial counsel were ineffective for failing to investigate the Corley letter and develop a reasonable theory of defense.

120. In paragraphs 630-48, Wilson argues that trial counsel rendered ineffective assistance when counsel failed to investigate the state's case and "develop a reasonable theory of defense." The merits of this claim were addressed

by the ACCA:

> Wilson asserted that he received ineffective assistance of counsel because trial counsel failed to investigate Corley's confession. Wilson admitted in his petition that trial counsel received police reports that referenced a letter—allegedly written by Corley, in which the author admitted to striking Walker with a bat until he fell—and details of the investigation into the letter. Wilson pleaded that a confession by a co-defendant would have been critical evidence at trial, yet trial counsel failed to obtain the letter, which could have been located in Corley's case file. Wilson further pleaded that had trial counsel investigated the letter, they would have learned of the State's investigation into the letter, which determined that the letter was likely authored by Corley. The circuit court dismissed this claim as being insufficiently pleaded and without merit.
>
> [….]
>
> > "Like the federal courts, Alabama courts have long recognized the right of a defendant to prove his innocence by presenting evidence that another person actually committed the crime. *See Ex parte Walker*, 623 So. 2d 281 (Ala. 1992); *Thomas v. State*, 539 So. 2d 375 (Ala. Crim. App. 1988)…. In addition, Alabama courts have also recognized the danger in confusing the jury with mere speculation concerning the guilt of a third party:
> >
> > "It generally is agreed that the defense, in disproving the accused's own guilt, may prove that another person committed the crime for which the accused is being prosecuted.... The problem which arises in the application of this general rule, however, is the degree of strength that must be possessed by the exculpatory evidence to render it admissible. The task of determining the weight that must be possessed by such evidence of another's guilt is a difficult one.'
> >
> > "Charles W. Gamble, McElroy's Alabama Evidence § 48.01(1) (5th ed. 1996). To remove this difficulty, this Court has set out a test intended to ensure that any

> evidence offered for this purpose is admissible only when it is probative and not merely speculative. Three elements must exist before this evidence can be ruled admissible: (1) the evidence 'must relate to the "res gestae" of the crime'; (2) the evidence must exclude the accused as a perpetrator of the offense; and (3) the evidence 'would have to be admissible if the third party was on trial.' *See Ex parte Walker*, 623 So. 2d at 284, and *Thomas*, 539 So. 2d at 394-96.

Griffin, 790 So. 2d at 353-54 (some citations omitted).

> Here, Wilson's claim is insufficiently pleaded because he failed to plead facts to satisfy the elements for admissibility established in *Griffin*. Specifically, Corley's admitting that she hit Walker "with a baseball bat until he fell" would not exclude Wilson as the perpetrator of capital murder. Dr. Enstice "gave a conservative estimate of 114 contusions and abrasions on Walker's body, 32 of which were on his head." *Wilson*, 142 So. 3d at 750. Corley's confession would not show that Wilson did not strike or kill Walker, or that he lacked the intent to kill Walker. Because Wilson failed to plead sufficient facts to satisfy the test established in *Griffin*, he has failed to show that the letter would have been admissible. Consequently, even assuming trial counsel were deficient in failing to investigate the letter and the expert reports generated in conjunction with its investigation, Wilson has failed to show that he was prejudiced by the deficiency. As such, the circuit court did not err in dismissing this claim. *See* Rule 32.7(d), Ala. R. Crim. P.

(DE76-33:18-22 (citation omitted).)

121. Wilson has not shown, and cannot show, that the denial of relief on this claim in state court "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the

State court proceedings." 28 U.S.C. § 2254(d). Because Wilson has not shown that the Alabama courts decided this claim in a manner that was contrary to or involves an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States, this Court should deny relief. A review of the ACCA's opinion demonstrates that the application of clearly established federal law by the Alabama court was not an unreasonable one. Thus, according to the habeas statute, the application for a writ of habeas corpus before this Court "shall not be granted." 28 U.S.C. § 2254(d).

122. Without waiving the foregoing, in deciding this claim, the ACCA made findings of fact. Pursuant to 28 U.S.C. § 2254(e)(1), these fact-findings are presumed correct. Wilson is not entitled to an evidentiary hearing on this claim.

123. Without waiving the foregoing, to the extent that Wilson failed to develop the factual basis for this claim in state-court proceedings, he is not entitled to any further evidentiary hearing in this Court. His claim is not based on a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" or "a factual predicate that could not have been previously discovered through the exercise of due diligence," and the facts underlying the claims would not be sufficient to establish by clear and convincing evidence that but for the constitutional error alleged in this claim, no reasonable fact-finder would have found him guilty of capital murder. 28 U.S.C.

§ 2254(e)(2).

124. Without waiving the foregoing, the factual averments made in support of this claim are denied. The state-court findings of fact constitute the proper factual basis for consideration of this claim.

B. Wilson's claim that trial counsel's waiver of closing argument constituted ineffective assistance.

125. In paragraphs 649-72, Wilson claims that trial counsel provided ineffective assistance when counsel made the strategic choice to waive closing arguments. The merits of this claim were addressed on by the ACCA in Wilson's Rule 32 proceeding:

> Wilson asserted that he received ineffective assistance of counsel because trial counsel waived closing argument. Wilson characterized the State's closing argument as a "full and dramatic closing argument that presented the State's theory and detailed each piece of evidence." Wilson pleaded that trial counsel should have argued that he "could be found guilty only of a lesser offense because of the absence of evidence." Also, Wilson asserted that trial counsel should have argued his statement's "unreliability, given both the circumstances of his arrest and its incompleteness," and that, even if the jury viewed his statement as uncoerced, Wilson admitted only to striking Walker in the head and to choking him. Other lines of argument Wilson advanced in his petition were that trial counsel should have pointed out to the jury that the State failed to put on evidence that it was not Corley who had subjected Walker to more than 100 injuries, that Marsh benefitted the most from the crimes and was the instigator, and that the baseball bat was found in Jackson's vehicle. Finally, Wilson pleaded that trial counsel could have refuted some of the State's interpretations of the blood evidence and his confession. The circuit court dismissed this claim as being insufficiently pleaded and without merit.
>
> Following the State's closing argument, trial counsel requested a bench

conference:

> Defense: "I am getting my exercise this week. On the record, but away from the hearing of the jury, Your Honor, it's my understanding, and correct me if I'm wrong—procedurally, okay—Mr. Valeska has given the opening part of his closing statement. If I waive my portion and don't do a closing statement, I believe that that precludes Mr. Valeska from doing the closing part, because he has already had the last say. That's my understanding."
>
> State: "That's fine. I agree. But if they are going to do that, that's their choice. All I want to ask the Court is, once again, this is a capital. And once again, you know, if that's the defense counsel strategy, both of them, as well as their client's—"
>
> Defense: "I have already talked to my client. I will put that on the record. And you are right. I mean, you're absolutely right."
>
> State: "That's fine."
>
> Defense: "Let me just touch bases with Ms. Emfinger. We have talked to my client. And let me just touch base with her that that's for sure what we're going to do. That is what I am anticipating."
>
> […]
>
> "(Whereupon, the trial jury is excused from the courtroom, to which the following occurred outside the hearing and presence of the trial jury, to wit:)"
>
> […]
>
> Defense: "Yes, Your Honor. I have talked with Ms. Emfinger and with my client, Your Honor. And particularly after consulting with the Court and Mr. Valeska, it is my understanding that if the defendant waives his closing statement, then that precludes the

> prosecution from going before the jury again and giving what essentially would have been the closing argument or the second part of the closing—"
>
> […]
>
> Court:"And, Mr. Wilson, you are agreeable to that?"
>
> Wilson: "Yes, sir."

(Trial R. 625-28.)

In his petition Wilson relied on the holding of the Alabama Supreme Court in *Ex parte Whited*, 180 So. 3d 69 (Ala. 2015), in which the Court held trial counsel ineffective for failing to present a closing argument. Whited, however, is factually distinguishable from the instant case. Most significant is that the trial counsel in Whited could not articulate a strategic reason for waiving closing argument. The portion of the record quoted above shows that trial counsel made a strategic decision to waive closing argument to prevent the State's rebuttal. "This is exactly the sort of strategic decision which the United States Supreme Court has held to be virtually unchallengeable in *Strickland v. Washington*." *Floyd v. State*, 517 So. 2d 1221, 1227 (Ala. Crim. App. 1989), *rev'd on other grounds*, *Ex parte Floyd*, 571 So. 2d 1234 (Ala. 1990). Notably, trial co-counsel and Wilson himself agreed with this strategic decision. "Even if [trial counsel's] failure to make a closing argument is ultimately viewed as a mistake unfavorable to [their] client, that alone is not sufficient to demonstrate inadequate representation." *Behel v. State*, 405 So. 2d 51, 53 (Ala. Crim. App. 1981) (citing *Robinson v. State*, 361 So. 2d 1172, 1174 (Ala. Crim. App. 1978)). Further, in *Whited*, trial counsel had strong arguments against guilt; Wilson has not identified them here. Wilson suggests that arguing an absence of evidence could have garnered him a conviction on a lesser offense, but he has failed to identify the offense or to explain how any of his other arguments would have accomplished a conviction other than capital murder. For instance, arguing an increased culpability on the part of his co-defendants would not have relieved Wilson of his own culpability, *see, e.g.*, *Sneed v. State*, 1 So. 3d 104, 125-26 (Ala. Crim. App. 2007), and there was scant evidence from which trial counsel could have argued that Wilson's statement was coerced. With respect

> to the statement, the State asserted in closing that Wilson's deciding to "change[] it all up" indicated he decided to abandon the co-defendants' plan to knock Walker unconscious and to kill him. Wilson pleaded that trial counsel should have challenged this interpretation because "none of what Mr. Wilson said in the recorded parts of his statement correspond[ed] with changing the 'plan' to a murderous one." This argument ignores, of course, Wilson's admission that he struck Walker in the head with a baseball bat and choked him for six minutes. More importantly, the counter-argument Wilson suggested trial counsel should have made—that Wilson decided not to harm Walker—is dubious given that Wilson entered Walker's home with a bat and the only explanation Wilson offered was that he was afraid of Walker's dog—a two-pound Chihuahua.
>
> Trial counsel's decision to waive closing argument was a strategic decision and Wilson failed to plead sufficient facts otherwise. As such, the circuit court did not err in dismissing this claim. *See* Rule 32.7(d), Ala. R. Crim. P.

(DE76-33:32-36) (citations and footnote omitted).

126. Wilson has not shown, and cannot show, that the denial of relief on this claim in state court "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." 28 U.S.C. § 2254(d). Further, the ACCA's finding that trial counsel had a strategic reason for declining to present a closing argument is due AEDPA deference. Because Wilson has not shown that the Alabama courts decided this claim in a manner that was contrary to or involves an unreasonable application of clearly established federal law as determined by the Supreme Court, this Court

should deny relief. A review of the ACCA's opinion demonstrates that the application of clearly established federal law by the Alabama court was not an unreasonable one. Thus, according to the habeas statute, the application for a writ of habeas corpus before this Court "shall not be granted." 28 U.S.C. § 2254(d).

127. Without waiving the foregoing, in deciding this claim, the ACCA made findings of fact. Pursuant to 28 U.S.C. § 2254(e)(1), these fact findings are presumed correct. Wilson is not entitled to an evidentiary hearing on this claim.

128. Without waiving the foregoing, to the extent that Wilson failed to develop the factual basis for this claim in state-court proceedings, he is not entitled to any further evidentiary hearing in this Court. His claim is not based on a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" or "a factual predicate that could not have been previously discovered through the exercise of due diligence," and the facts underlying the claims would not be sufficient to establish by clear and convincing evidence that but for the constitutional error alleged in this claim, no reasonable fact-finder would have found him guilty of capital murder. 28 U.S.C. § 2254(e)(2).

129. Without waiving the foregoing, the factual averments made in support of this claim are denied. The state court findings of fact constitute the proper factual basis for consideration of this claim.

C. Wilson's claim that trial counsel prevented him from testifying.

130. In paragraphs 673-82, Wilson claims that trial counsel prevented him from testifying.

131. This claim is raised for the first time in Wilson's habeas petition and was not raised in the state courts. Thus, this claim is procedurally defaulted from this Court's review because Wilson did not fairly present it as a federal claim in state court. 28 U.S.C. § 2254(c); *see Henderson v. Campbell*, 353 F.3d 880, 891 (11th Cir. 2003) ("A state prisoner seeking federal habeas relief cannot raise a federal constitutional claim in federal court unless he first properly raised the issue in the state courts."). By failing to raise this claim at trial or on direct review, Wilson failed to "give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999); *see Dill v. Holt*, 371 F.3d 1301, 1303 (11th Cir. 2004). As a result, Wilson has not met the exhaustion requirement of § 2254(b)(1), and he is procedurally barred from raising this claim in a federal habeas petition. *See Pope v. Rich*, 358 F.3d 852, 853 (11th Cir. 2004) ("[The petitioner] has failed to exhaust all of his available state remedies. Consequently, [he] is procedurally barred from raising his [unexhausted claims]…in a federal § 2254 petition."); *see also* 28 U.S.C. § 2254(c); *O'Sullivan*, 526 U.S. at 842; *Mancill v. Hall*, 545 F.3d 935, 940 (11th Cir. 2008); *Dill*, 371 F.3d at 1303; *Pruitt v. Jones*,

348 F.3d 1355, 1358-59 (11th Cir. 2003). Dismissal of his habeas petition to allow Wilson to present this claim fairly as a federal claim in state court now would be futile because he would be barred from raising it in state court under Rule 32.2(c) of the Alabama Rules of Criminal Procedure (statute of limitations bar) and Rule 32.2(b) of the Alabama Rules of Criminal Procedure (successive petition bar). Thus, because any state remedy with respect to these claims is procedurally barred by the state procedural rules noted above, Wilson's claim is procedurally defaulted from habeas review.

132. Without waiving the foregoing, to the extent that Wilson is attempting to raise any challenge to the voluntariness of his guilty plea, the claim fails to state a valid claim for relief under 28 U.S.C. § 2254. *See, e.g.*, *Mayle*, 545 U.S. at 655; *Tejada*, 941 F.2d at 1559; *Lindsey*, 875 F.2d at 1513. Wilson appears to be alleging that had he testified, he would have admitted on the stand that he hit Walker with the bat that he carried into Walker's house and that he strangled Walker for six minutes with an extension cord. (DE1:160.) The forensic examiner testified that the injuries from strangulation were capable of causing Walker's death:

> Q: But any other bruises or markings to the neck that were fresh or—
>
> A: Internally, underneath—deep to the ligature marks in the muscle of the base of the tongue, which actually goes down into the chin region underneath the very corner, if you will, and all of the muscles hemorrhaged throughout all of those deep, deep neck muscles.

> […]
>
> Q: Now, if I could, the ligature marks, can you look at the jury and tell them, those three ligature marks, did they cause his death independently, just those themselves?
>
> A: They themselves, if that was all I found, they had the potential and the capability of doing so. And another supportive finding were hemorrhages in the eyes, the inner eyelids, which are known as the conjunctiva and the whites of the eyes.

(DE76-9:60-61.) Wilson's strangulation of Walker was so severe that it caused extensive trauma to his neck, and "certainly contributed" to his death. (*Id.* at 61.) Moreover, the victim's other blunt force injuries came before the fatal strangulation, a finding that would tend to discredit any theory that relied on Corley arriving on the scene later and striking additional blows. (*Id.*)

> Q: Choked to death? In other words, if he got injuries after he was choked for six minutes, then he would have to have received all those injuries after he was already dead. So, what I'm asking is, that would have taken time, too. Right?
>
> A: Yes, it would have. You wouldn't see swelling and things like that. You just wouldn't see it.

(*Id.* at 138) Thus, Wilson's proposed testimony would have given the jury uncontradicted evidence of his fatal strangulation of Walker, and thus of his guilt of capital murder. *See Ex parte Raines*, 429 So. 2d 1111, 1113 (Ala. 1982) ("Pulling the trigger is only one factor in determining intent to kill.") Wilson offers no meaningful argument that any reasonable attorney, much less *every* reasonable attorney, would have permitted his client to testify under these circumstances.

Wilson has failed to show either that trial counsel's performance was actually deficient or that the result of his trial would have been different had he testified.

133. Without waiving the foregoing, to the extent that Wilson failed to develop the factual basis for this claim in state-court proceedings, he is not entitled to any further evidentiary hearing in this Court. His claim is not based on a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" or "a factual predicate that could not have been previously discovered through the exercise of due diligence," and the facts underlying the claims would not be sufficient to establish by clear and convincing evidence that but for the constitutional error alleged in this claim, no reasonable fact-finder would have found him guilty of capital murder. 28 U.S.C. § 2254(e)(2).

134. Without waiving the foregoing, the factual averments made in support of this claim are denied.

D. Wilson's claim that trial counsel failed to adequately challenge his arrest and the admissibility of his statement.

135. In paragraphs 683-723, Wilson challenges the adequacy of trial counsel's efforts to challenge the legality of his arrest and the suppression of his statement. The merits of this claim were addressed by the ACCA in Wilson's Rule 32 proceeding:

Wilson asserted in his petition that he received ineffective assistance of

counsel because trial counsel failed to adequately challenge the legality of his arrest or the admissibility of his statement. Wilson gave an inculpatory statement to law enforcement on the morning of April 14. Officers had arrived at the mobile home of Wilson's mother at 3:47 a.m. Wilson's mother allowed the officers inside while she roused Wilson. Wilson came into the living room where Investigator Luker "told him that we needed to talk with him, that he needed to come—if he would come with us to talk with us about an incident." According to Investigator Luker, Wilson voluntarily agreed to go with the officers to the Dothan Police Department. There, Wilson was informed of and waived his *Miranda* rights. Wilson then gave a detailed statement to Investigator Luker and Sergeant Etress in which he admitted to striking Walker with a bat, to choking him with a computer-mouse cord and an extension cord, and to stealing various items of Walker's property. Investigator Luker obtained a search warrant for the mobile home of Wilson's mother, which led to the discovery of Walker's car stereo equipment in Wilson's bedroom.

Trial counsel for Wilson filed a motion to suppress Wilson's statement and all evidence gathered as a result thereof in which he challenged the legality of Wilson's arrest. Nonetheless, Wilson pleaded in his petition that trial counsel were ineffective because they failed to argue the issue adequately. Specifically, Wilson pleaded that trial counsel should have argued that he was illegally arrested in his home under the holding of the Supreme Court of the United States in *Kaupp v. Texas*, 538 U.S. 626 (2003). Although trial counsel briefly cited to Kaupp in their motion to suppress, Wilson pleaded that the facts in his case mirrored those in Kaupp and that trial counsel failed to draw parallels to Kaupp to make the motion meritorious. Instead, trial counsel merely copied a sample motion from a capital-defense handbook and failed to tailor the motion to Wilson's case. Wilson further pleaded that had trial counsel effectively drafted and argued his motion to suppress, his statement would have been suppressed as well as all the evidence obtained from the search of his mother's mobile home. The circuit court dismissed this claim as being insufficiently pleaded and without merit.

In *Kaupp*, the Supreme Court considered whether Kaupp's confession should be suppressed under the following facts:

> "After a 14-year-old girl disappeared in January 1999, the

Harris County Sheriff's Department learned she had had a sexual relationship with her 19-year-old half brother, who had been in the company of petitioner Robert Kaupp, then 17 years old, on the day of the girl's disappearance. On January 26th, deputy sheriffs questioned the brother and Kaupp at headquarters; Kaupp was cooperative and was permitted to leave, but the brother failed a polygraph examination (his third such failure). Eventually he confessed that he had fatally stabbed his half sister and placed her body in a drainage ditch. He implicated Kaupp in the crime.

"Detectives immediately tried but failed to obtain a warrant to question Kaupp. Detective Gregory Pinkins nevertheless decided (in his words) to 'get [Kaupp] in and confront him with what [the brother] had said.'…In the company of two other plainclothes detectives and three uniformed officers, Pinkins went to Kaupp's house at approximately 3 a.m. on January 27th. After Kaupp's father let them in, Pinkins, with at least two other officers, went to Kaupp's bedroom, awakened him with a flashlight, identified himself, and said, ""we need to go and talk."'…Kaupp said "'Okay.'"…The two officers then handcuffed Kaupp and led him, shoeless and dressed only in boxer shorts and a T-shirt, out of his house and into a patrol car. The State points to nothing in the record indicating Kaupp was told that he was free to decline to go with the officers.

"They stopped for 5 or 10 minutes where the victim's body had just been found, in anticipation of confronting Kaupp with the brother's confession, and then went on to the sheriff's headquarters. There, they took Kaupp to an interview room, removed his handcuffs, and advised him of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). Kaupp first denied any involvement in the victim's disappearance, but 10 or 15 minutes into the interrogation, he was told of the brother's confession, he admitted having some part in the crime. He did not, however, acknowledge causing the fatal wound or confess to murder, for which

> he was later indicted."

Kaupp, 538 U.S. at 627-29 (footnote omitted). The Supreme Court held that "[s]ince Kaupp was arrested before he was questioned, and because the State [did] not even claim that the sheriff's department had probable cause to detain him at that point, well-established precedent require[d] suppression of the confession." *Id*. at 632.

Although the facts in *Kaupp* share some similarities to those present here, trial counsel's reliance on *Kaupp* would have been unavailing. The circuit court noted several points on which to distinguish the facts in the present case from those in *Kaupp*, *see* (C. 1538-39), but most significant is this: here, the officers here had probable cause to arrest Wilson. As this Court stated on direct appeal:

> "Here, Investigator Luker had probable cause to arrest Wilson for Walker's murder. [FN 11] *See Dixon v. State*, 588 So. 2d 903, 906 (Ala. 1991) ('Probable cause exists if facts and circumstances known to the arresting officer are sufficient to warrant a person of reasonable caution to believe that the suspect has committed a crime.'). Prior to Investigator Luker's contact with Wilson, each of Wilson's accomplices had confessed, and one of his accomplices had informed Investigator Luker that 'Wilson was to get half of the audio equipment from the van because he had taken all of the chances in [the] burglary, theft and murder.' Based on the accomplice's confession implicating Wilson in the murder, Investigator Luker had probable cause to arrest Wilson for Walker's murder. *See Vincent v. State*, 349 So. 2d 1145, 1146 (Ala. 1977) (holding that the uncorroborated testimony of accomplice is a sufficient basis for a finding of probable cause).
>
> "[FN 11] Wilson rightly does not argue that Investigator Luker lacked probable cause to arrest him; instead, Wilson argues only that the State failed to establish exigent circumstances to justify his warrantless, in-home arrest."

Wilson, 142 So. 3d at 767. This Court did not address the existence of an exigent circumstance that would justify Wilson's arrest in his home,

see *Payton v. New York*, 445 U.S. 573, 588–602 (1980), instead holding that Wilson "voluntarily left his home and was in a public place where he could be arrested based on probable cause alone." *Id*. (citing *State v. Solberg*, 861 P.2d 460, 465 (Wash. 1993)). This Court went on to hold that even if Wilson had been "illegally arrested in his home based on probable cause alone, *Payton*, 445 U.S. at 587-88, the exclusionary rule would not require suppression of his confession because his confession was given at the police station as opposed to in his home." See *New York v. Harris*, 495 U.S. 14, 21 (1990). Consequently, trial counsel's analogizing Wilson's case to *Kaupp* would have been meritless. *See Bearden v. State*, 825 So. 2d 868, 872 (Ala. Crim. App. 2001) (trial counsel cannot be ineffective for failing to raise meritless claim).

Wilson also challenged trial counsel's effectiveness in litigating the existence of probable cause to arrest him. Wilson pleaded that the State's evidence at the suppression hearing was insufficient to show the existence of probable cause because the State did not present the contents of the co-defendants' statements and because the statements of codefendants are inherently unreliable. Wilson alleged that trial counsel were ineffective because they failed to object to the State's failure to meet its burden of proof at the suppression hearing.

As Wilson pleaded, the State did not offer extensive detail of the statements made by Wilson's co-defendants. There was evidence, however, from which the contents of the statements could have been inferred. Investigator Luker testified that he had interviewed Wilson's co-defendants first, that all had confessed, and that there was nothing in their statements to indicate that Wilson was innocent in the killing of Walker. Importantly, Wilson has not pleaded the contents of the co-defendants' statements. It appears, based on the record, that the codefendants implicated Wilson in Walker's murder. Had Wilson's trial counsel raised the objection Wilson now asserts they should have made, the State could have offered the statements. Because Wilson has failed to plead the contents of the statement, and, more specifically, that the statements did not implicate him in Walker's murder, there are insufficient facts pleaded to show prejudice in trial counsel's failing to make the objection.

In support of his pleading that co-defendant statements are insufficient to create probable cause to arrest, Wilson has cited to a number of

federal and Alabama cases and an Alabama statute that directly or indirectly discuss the reliability of such evidence. *See, e.g., Lee v. Illinois*, 476 U.S. 530 (1986); *Bruton v. United States*, 391 U.S. 123 (1968); *Lilly v. Virginia*, 527 U.S. 116 (1999); *Wong Sun v. United States*, 371 U.S. 471 (1963); *Bone v. State*, 706 So. 2d 1291 (Ala. Crim. App. 1997); *Steele v. State*, 512 So. 2d 142 (Ala. Crim. App. 1987); and § 12-21-222, Ala. Code 1975. Not one of these sources supports Wilson's argument that a co-defendant's statement cannot create probable cause to arrest. There is, however, precedent in Alabama to the contrary. In *McWhorter v. State*, 781 So. 2d 257, 287-88 (Ala. Crim. App. 1999), this Court held that the arresting officer had probable cause to arrest McWhorter based on a statement given by his accomplice. *See also Vincent v. State*, 349 So. 2d 1145, 1146 (Ala. 1977) and *R.J. v. State*, 627 So. 2d 1163, 1165 (Ala. Crim. App. 1993). Consequently, Wilson has failed to show that trial counsel's objecting to the sufficiency of the State's evidence at the suppression hearing would have had merit.

Wilson has made a number of other related claims, such as alleging that Investigator Luker failed to testify at the suppression hearing to exigent circumstances, that Wilson's waiver of his *Miranda* rights did not cure an illegal arrest, and that the search warrant for the mobile home of Wilson's mother was invalid as it relied on false information and a statement that should have been suppressed. Wilson pleaded that trial counsel were ineffective for failing to raise each of these claims.

These related claims are all reliant on a finding that Wilson's statement should have been suppressed based on a lack of probable cause to arrest Wilson at his mother's mobile home. For instance, Wilson pleaded that the search warrant for his mother's mobile home was defective because the warrant's affidavit relied on his illegally-obtained statement and a false statement made by Investigator Luker. In the affidavit, Investigator Luker stated that, according to Corley, Wilson was going to hide Walker's stereo equipment in and under his mother's mobile home. Because Investigator Luker was not listed as being present during Corley's statement and because the alleged location of the stereo equipment did not appear in the transcript of Corley's statement, Wilson asserted that the assertion was false. Even if Wilson could prove that Investigator Luker was not present during Corley's statement and/or that Corley did not make the assertion during her recorded

> statement, Wilson would still not be entitled to relief. At most, the statement would be taken out of consideration for making a determination of probable cause, and the affidavit would still support the search warrant based on Wilson's confession. *See Moore v. State*, 570 So. 2d 788, 789-90 (Ala. Crim. App. 1990) ("[W]e must delete that information and 'determine whether the rest of the information contained in the affidavit was sufficient to support a finding of probable cause.'" (quoting *Villemez v. State*, 555 So. 2d 344, 344 (Ala. Crim. App. 1989))); *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978) (same). Wilson's remaining related claims must likewise fail. This Court held on direct appeal that there was probable cause to arrest Wilson and that, even in the absence of exigent circumstances, Wilson's statement was not due to be suppressed. *Wilson*, 142 So. 3d at 767-68. Although Wilson has identified a number of arguments trial counsel could have raised, he has failed to plead sufficient facts to show that any of these arguments would have been meritorious. *See Bearden*, 825 So. 2d at 872 (trial counsel cannot be ineffective for failing to raise meritless claim). As such, the circuit court did not err in dismissing this claim. *See* Rule 32.7(d), Ala. R. Crim. P.

(DE76-33:12-18) (citations and footnotes omitted).

136. Wilson has not shown, and cannot show, that the denial of relief on this claim in state court "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." 28 U.S.C. § 2254(d). Because Wilson has not shown that the Alabama courts decided this claim in a manner that was contrary to or involves an unreasonable application of clearly established federal law as determined by the Supreme Court, this Court should deny relief on this claim. A review of the ACCA's

opinion demonstrates that the application of clearly established federal law by the Alabama court was not an unreasonable one. Thus, according to the habeas statute, the application for a writ of habeas corpus before this Court "shall not be granted." 28 U.S.C. § 2254(d).

137. Without waiving the foregoing, in deciding this claim, the ACCA made findings of fact. Pursuant to 28 U.S.C. § 2254(e)(1), these fact findings are presumed correct. Wilson is not entitled to an evidentiary hearing on this claim.

138. Without waiving the foregoing, to the extent that Wilson failed to develop the factual basis for this claim in state-court proceedings, he is not entitled to any further evidentiary hearing in this Court. His claim is not based on a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" or "a factual predicate that could not have been previously discovered through the exercise of due diligence," and the facts underlying the claims would not be sufficient to establish by clear and convincing evidence that but for the constitutional error alleged in this claim, no reasonable fact-finder would have found him guilty of capital murder. 28 U.S.C. § 2254(e)(2).

139. Without waiving the foregoing, the factual averments made in support of this claim are denied. The state-court findings of fact constitute the proper factual basis for consideration of this claim.

E. Wilson's claim that trial counsel provided ineffective assistance when counsel failed to adequately challenge his statement.

140. In paragraphs 724-66, Wilson argues that trial counsel did not adequately challenge the admissibility of his confession. The merits of this claim were addressed by the ACCA in Wilson's Rule 32 proceeding:

> Wilson asserted that he received ineffective assistance of counsel because trial counsel failed to object adequately to the voluntariness of Wilson's custodial statement. Although trial counsel filed a motion challenging the voluntariness of his custodial statement, Wilson pleaded that the motion was a sample motion from a capital-defense handbook that lacked any relevant facts. Wilson pleaded that trial counsel should have presented the following relevant facts in his motion and at the suppression hearing:
>
> > "[T]he timing of the initial encounter early in the morning with Mr. Wilson being roused from his bed, the show of force by the presence of at least five officers in his home, the quick transport to the police station in handcuffs and in a police vehicle, the proximity of the interrogation to his arrival, the location in isolation in a 'conference' room at the police station, the deliberate decision not to tape the beginning of the questioning, the continuity of the questioning (with off-the-record preliminaries and conclusion), as well as Mr. Wilson's youth, somewhat limited intellectual capabilities, emotional instability, and inexperience with the criminal justice system—show that Mr. Wilson was in no frame of mind to 'volunteer' a statement to police, with knowledge and understanding of what rights he was forgoing, notwithstanding Sgt. Luker's self-serving assertions to the contrary."
>
> According to Wilson's petition, had the trial court been presented with these facts, the trial court would have found, under the totality of the circumstances, that his statement was involuntary. The circuit court dismissed this claim as being without merit. None of the facts Wilson claims his trial counsel should have presented to the trial court were

outside the record on direct appeal. Consequently, these facts were already considered by this Court on direct appeal when it engaged in a totality-of-the-circumstances analysis:

> "Considering the totality of the circumstances, the State presented sufficient evidence to establish the prerequisites to the admission of Wilson's statement. Investigator Luker testified that before Wilson gave his statement, Investigator Luker read Wilson his *Miranda* rights. Wilson did not appear to be under the influence of alcohol or drugs and appeared to understand his rights. Wilson signed the waiver-of-rights form. The form Wilson signed stated that he had read his rights, that he understood his rights, and that he waived those rights without being offered any promises or receiving any threats. Investigator Luker further testified that no one offered Wilson any promises or made any threats before or during Wilson's statement.
>
> In addition to Investigator Luker's testimony, this Court has listened to the recorded portion of Wilson's statement. On the recording, Wilson states that he was read his rights and that he understood those rights. Wilson does not sound as though he was under the influence of any intoxicant. Further, Wilson states that he has voluntarily waived his rights. Finally, Wilson states that no one made any promises or threatened him in an attempt to force him to give his statement.
>
> "Based on the foregoing evidence indicating that Wilson was read his *Miranda* warnings, that he understood and voluntarily waived his *Miranda* rights, and that he chose to make a statement without any promises or threats, Wilson has not established that the admission of his statement resulted in any error, plain or otherwise. Therefore, Wilson is entitled to no relief on this claim."

Wilson, 142 So. 3d at 763-64 (emphasis added).

Although this Court conducted a plain-error analysis, it held that no

> error occurred in the admission of Wilson's statement. Trial counsel cannot be held ineffective for failing to raise meritless arguments. *See Bearden*, 825 So. 2d at 872. As such, the circuit court did not err in dismissing this claim. See Rule 32.7(d), Ala. R. Crim. P.

(DE76-33:23-25 (citations omitted).)

141. Wilson has not shown, and cannot show, that the denial of relief on this claim in state court "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." 28 U.S.C. § 2254(d). Because Wilson has not shown that the Alabama courts decided this claim in a manner that was contrary to or involves an unreasonable application of clearly established federal law as determined by the Supreme Court, this Court should deny relief on this claim. A review of the ACCA's opinion demonstrates that the application of clearly established federal law by the Alabama court was not an unreasonable one. Thus, according to the habeas statute, the application for a writ of habeas corpus before this Court "shall not be granted." 28 U.S.C. § 2254(d).

142. Without waiving the foregoing, in deciding this claim, the ACCA made findings of fact. Pursuant to 28 U.S.C. § 2254(e)(1), these fact findings are presumed correct. Wilson is not entitled to an evidentiary hearing on this claim.

143. Without waiving the foregoing, to the extent that Wilson failed to

develop the factual basis for this claim in state-court proceedings, he is not entitled to any further evidentiary hearing in this Court. His claim is not based on a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" or "a factual predicate that could not have been previously discovered through the exercise of due diligence," and the facts underlying the claims would not be sufficient to establish by clear and convincing evidence that but for the constitutional error alleged in this claim, no reasonable fact-finder would have found him guilty of capital murder. 28 U.S.C. § 2254(e)(2).

144. Without waiving the foregoing, the factual averments made in support of this claim are denied. The state court findings of fact constitute the proper factual basis for consideration of this claim.

F. Wilson's claim that trial counsel was ineffective for failing to raise a *Batson* objection.

145. In paragraphs 767-70, Wilson claims for the first time that trial counsel's decision not to raise an objection under *Batson v. Kentucky*, 476 U.S. 79 (1986), amounted to ineffective assistance. This claim was not brought in Wilson's Amended Rule 32 petition.

146. As this claim was not presented to the state courts, it is procedurally defaulted. 28 U.S.C. § 2254(c); *see Henderson*, 353 F.3d at 891 ("A state prisoner seeking federal habeas relief cannot raise a federal constitutional claim in federal

court unless he first properly raised the issue in the state courts."). By failing to raise this claim at trial or on direct review, Wilson failed to "give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan*, 526 U.S. at 845; *see Dill*, 371 F.3d at 1303. As a result, Wilson has not met the exhaustion requirement of § 2254(b)(1), and he is procedurally barred from raising this claim in a federal habeas petition. *See Pope*, 358 F.3d at 853 ("[The petitioner] has failed to exhaust all of his available state remedies. Consequently, [he] is procedurally barred from raising his [unexhausted claims]…in a federal § 2254 petition."); *see also* 28 U.S.C. § 2254(c); *O'Sullivan*, 526 U.S. at 842; *Mancill*, 545 F.3d at 940; *Dill*, 371 F.3d at 1303; *Pruitt*, 348 F.3d at 1358-59. Dismissal of his habeas petition to allow Wilson to present this claim fairly as a federal claim in state court now would be futile because he would be barred from raising it in state court under Rule 32.2(c) of the Alabama Rules of Criminal Procedure (statute of limitations bar) and Rule 32.2(b) of the Alabama Rules of Criminal Procedure (successive petition bar). Thus, because any state remedy with respect to these claims is procedurally barred by the state procedural rules noted above, Wilson's claim is procedurally defaulted from habeas review.

147. Without waiving the foregoing, to the extent that Wilson is attempting to raise any challenge to the voluntariness of his guilty plea, the claim fails to state

a valid claim for relief under 28 U.S.C. § 2254. *See, e.g.*, *Mayle*, 545 U.S. at 655; *Tejada*, 941 F.2d at 1559; *Lindsey*, 875 F.2d at 1513. As the ACCA correctly concluded on direct appeal, no violation of *Batson* occurred. Wilson has failed to show either that trial counsel's performance was actually deficient or that the result of his trial would have been different had trial counsel challenged the jury's composition.

148. Without waiving the foregoing, to the extent that Wilson failed to develop the factual basis for this claim in state-court proceedings, he is not entitled to any further evidentiary hearing in this Court. His claim is not based on a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" or "a factual predicate that could not have been previously discovered through the exercise of due diligence," and the facts underlying the claims would not be sufficient to establish by clear and convincing evidence that but for the constitutional error alleged in this claim, no reasonable fact-finder would have found him guilty of capital murder. 28 U.S.C. § 2254(e)(2).

149. Without waiving the foregoing, the factual averments made in support of this claim are denied.

G. Wilson's claim that trial counsel provided ineffective assistance when counsel failed to object to prosecutorial misconduct.

150. In paragraphs 771-82, Wilson alleges that trial counsel unreasonably

failed to object to alleged prosecutorial misconduct. The merits of this claim were addressed by the ACCA in Wilson's Rule 32 proceeding:

> Wilson asserted that he received ineffective assistance of counsel because trial counsel failed to object to numerous instances of prosecutorial misconduct. Specifically, Wilson pleaded that trial counsel was ineffective for failing to object: a) to testimony from an unqualified State witness as a purported serologist and blood-spatter expert; b) to the false testimony of Investigator Luker elicited by the State; and c) to repeated introduction at the guilt phase of evidence relating to the "especially heinous, atrocious, or cruel" aggravating factor. Wilson also pleaded: d) that he was prejudiced by the cumulative effect of trial counsel's failures to object to prosecutorial misconduct.
>
> Wilson pleaded that trial counsel were ineffective for failing to object to testimony from an unqualified State witness as a purported serologist and blood-spatter expert. Here, Wilson referred to Investigator Luker's testimony in which he drew "conclusions about what certain reddish spots he observed in areas of the house away from Mr. Walker's body were, *i.e.*, blood, and what the shape and location of these purported blood droplets meant about the course of the attack on Mr. Walker." Wilson pleaded that Investigator Luker's testimony "impermissibly assumed what needed to be proved as the foundation for everything else he said about blood droplets, i.e., that the droplets were, in fact, blood." Additionally, Wilson pleaded that Investigator Luker concluded "that Mr. Walker must have been in other parts of the house than the kitchen after being struck because of the blood found in other areas." The circuit court dismissed this claim as being insufficiently pleaded and without merit.
>
> This Court addressed on direct appeal the substantive argument at issue here:
>
> > "This Court has held:
> >
> > "'In general, blood-spatter analysis is the process of examining the size, location, and configuration of bloodstains at a crime scene and using the general characteristics of blood to determine the direction, angle,

> and speed of the blood before it impacts on a surface in order to recreate the circumstances of the crime. *See* generally Danny R. Veilleux, Annotation, *Admissibility, in Criminal Prosecution, of Expert Opinion Evidence as to "Blood Sp[l]atter" Interpretation*, 9 A.L.R.5th 369 (1993), and the cases cited therein. Blood-spatter analysis is typically used to determine the position of the victim and the assailant at the time of a crime.'
>
> "*Gavin v. State*, 891 So. 2d 907, 969 (Ala. Crim. App. 2003).
>
> "Here, Investigator Luker did not analyze the blood spatter to determine the positions of Walker and Wilson at the time of the crime. Rather, his testimony related to his identification of blood at the scene and his common-sense observation that there would be some indication if blood had flowed from one area of the scene to another. Thus, Investigator Luker did not offer expert scientific testimony, and the State was not required to establish his qualifications as an expert in blood-spatter analysis. *See Leonard v. State*, 551 So. 2d 1143, 1146 (Ala. Crim. App. 1989) (reaffirmance that lay witnesses may identify a substance as blood); *Gavin*, 891 So. 2d at 967-70 (holding that it was not error to allow lay testimony that 'the blood flow coming from the body ran away from the area of the seat that [defendant] would have been seated in'). Accordingly, this issue does not entitle Wilson to any relief."

Wilson, 142 So. 3d 804-05.

Although this Court conducted a plain-error review on this issue, it examined Investigator Luker's testimony and determined that he "did not offer expert scientific testimony, [thus,] the State was not required to establish his qualifications as an expert in blood-spatter analysis." *Id.* at 804. As part of that analysis, this Court recognized that lay witnesses may identify substances as blood. *Id*. (citing *Leonard*, 551 So. 2d at 1146).

Trial counsel's objecting to this testimony would have been meritless, and trial counsel cannot be held ineffective for failing to raise a meritless objection. *See Bearden*, 825 So. 2d at 872. As such, this claim is without merit, and the circuit court did not err in dismissing it. See Rule 32.7(d), Ala. R. Crim. P.

Wilson pleaded that trial counsel were ineffective for failing to object to the false testimony of Investigator Luker elicited by the State. In his petition Wilson cited Investigator Luker's testimony in which he stated that he did not send for forensic testing blood droplets he found down the hallway, in the living room, or bedrooms. Wilson then pleaded:

> "But the 'other droplets' in 'the bedrooms' were not sent off for testing, because they did not exist. The evidence log from the crime scene lists fourteen swabs of 'red stain.'…The 'location' column of the log shows that all of these were taken from the kitchen or areas immediately contiguous to it."

Wilson pleaded that he was prejudiced by this false testimony because it rebutted his defense that he struck Walker only in the kitchen while trying to disarm him and because it was used to support the aggravating circumstance that the murder was especially heinous, atrocious, or cruel. The circuit court dismissed this claim as being insufficiently pleaded.

Wilson predicated his claim that Investigator Luker presented false testimony based on his conclusion that the other blood droplets did not exist. This conclusion, in turn, was based on his asserting that the evidence log showed only that swabs were taken from red stains in the kitchen or areas immediately contiguous to it. This assertion, even if proven, would not support the conclusion that the other blood droplets did not exist. At most, it would show that the investigators did not take swabs from those other blood droplets. Wilson has failed to plead sufficient facts to show that Investigator Luker testified falsely. As such, the circuit court did not err in dismissing this claim. See Rule 32.7(d), Ala. R. Crim. P.

Wilson pleaded that trial counsel were ineffective for failing to object to repeated introduction during the guilt phase of evidence relating to

the "especially heinous, atrocious, or cruel" aggravating factor. Specifically, Wilson pleaded that trial counsel was ineffective for failing to object to Dr. Enstice's testimony during the guilt phase regarding the pain suffered by Wilson. Wilson asserted that the testimony was irrelevant and highly prejudicial. The circuit court dismissed this claim as being insufficiently pleaded and without merit.

On direct appeal, this Court stated:

> "To the extent Wilson argues that the prosecutor improperly injected into the guilt phase of the trial issues relating to the pain Wilson caused Walker, this Court disagrees. In *McCray v. State*, 88 So. 3d 1, 38 (Ala. Crim. App. 2010), this Court rejected the premise underlying Wilson's argument—that the pain a capital-murder victim suffers is irrelevant and inadmissible during the guilt phase of a capital-murder trial. Specifically, this Court held that '[t]he pain and suffering of the victim is a circumstance surrounding the murder—a circumstance that is relevant and admissible during the guilt phase of a capital trial.' *Id.* (citing *Smith v. State*, 795 So. 2d 788, 812 (Ala. Crim. App. 2000) (no error in trial court's questioning witness regarding the number of wounds on the murder victim's body during guilt phase of capital-murder trial despite appellant's argument that the number of wounds was relevant only to the penalty-phase issue of whether the murder was especially heinous, atrocious, or cruel)).
>
> "More importantly, victim-impact statements typically 'describe [only] the effect of the crime on the victim and his family' and, although relevant to the penalty-phase, are inadmissible in the guilt-phase. *Payne v. Tennessee*, 501 U.S. 808, 821 (1991). However, statements relating to the effect of the crime on the victim 'are admissible during the guilt phase of a criminal trial…if the statements are relevant to a material issue of the guilt phase.' *Ex parte Crymes*, 630 So. 2d 125, 126 (Ala. 1993) (emphasis in original); *see also Gissendanner v. State*, 949 So. 2d 956, 965 (Ala. Crim. App. 2006) (holding that victim-impact

> type evidence is admissible in the guilt phase if it is relevant to guilt-phase issues). Rule 401, Ala. R. Evid., provides that "'[r]elevant evidence" [is any] evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'
>
> "Here, the State's theory of the case was that Wilson broke into Walker's house, attacked him, and tortured him in an attempt to force Walker to relinquish his property. During his guilt-phase closing argument, the prosecutor reminded the jury that Wilson was charged with murder committed during the course of a robbery and of a burglary. The prosecutor then argued that it had proved the force element of robbery by establishing that Wilson tortured Walker and caused him a great deal of pain. Because the pain Wilson caused Walker was relevant and admissible to show the force Wilson used against Walker during the robbery, the prosecutor's argument did not constitute error."

Wilson, 142 So. 3d at 773-74 (footnote omitted); *see also Wilson*, 142 So. 3d at 792-93 ("Wilson next argues that the circuit court erroneously allowed the State to elicit testimony in the guilt phase establishing that Walker felt pain while being murdered.…Because the pain Wilson caused Walker was relevant and admissible to show the force Wilson used against Walker during the robbery, Dr. Enstice's testimony relating to the pain Walker suffered did not constitute error.").

This Court has already considered the testimony offered by Dr. Enstice during the guilt phase and the argument based upon it and determined that no error occurred. Trial counsel's objecting to this testimony would have been meritless, and trial counsel cannot be held ineffective for failing to raise a meritless objection. *See Bearden*, 825 So. 2d at 872. As such, this claim is without merit, and the circuit court did not err in dismissing it. *See* Rule 32.7(d), Ala. R. Crim. P.

Wilson also pleaded that he was prejudiced by the cumulative effect of trial counsel's failures to object to prosecutorial misconduct. The circuit

> court dismissed this claim as being without merit.
>
> Here, Wilson has failed to plead sufficiently any claims of ineffective assistance of counsel related to trial counsel's failure to object to prosecutorial misconduct. *See Mashburn v. State*, 148 So. 3d 1094, 1117 (Ala. Crim. App. 2013) (quoting *Taylor v. State*, 157 So. 3d 131, 140 (Ala. Crim. App. 2010)). As a result, there is no cumulative effect to consider. The circuit court did not err in dismissing this claim.

(DE76-33:26-32) (citations and footnote omitted).

151. Wilson has not shown, and cannot show, that the denial of relief on this claim in state court "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." 28 U.S.C. § 2254(d). Indeed, each of Wilson's allegations of "prosecutorial misconduct" amounts to nothing more than his disagreement with the ACCA's determination of state-law evidentiary questions that underlie his IAC claim. On each of these issues, the ACCA applied the relevant state case law and found against Wilson. "[I]t not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). Because Wilson has not shown that the Alabama courts decided this claim in a manner that was contrary to or involves an unreasonable application of clearly established federal law as determined by the Supreme Court, this Court should deny relief on this claim. A review of the ACCA's opinion demonstrates that

the application of clearly established federal law by the Alabama court was not an unreasonable one. Thus, according to the habeas statute, the application for a writ of habeas corpus before this Court "shall not be granted." 28 U.S.C. § 2254(d).

152. Without waiving the foregoing, in deciding this claim, the ACCA made findings of fact. Pursuant to 28 U.S.C. § 2254(e)(1), these fact-findings are presumed correct. Wilson is not entitled to an evidentiary hearing on this claim.

153. Without waiving the foregoing, to the extent that Wilson failed to develop the factual basis for this claim in state-court proceedings, he is not entitled to any further evidentiary hearing in this Court. His claim is not based on a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" or "a factual predicate that could not have been previously discovered through the exercise of due diligence," and the facts underlying the claims would not be sufficient to establish by clear and convincing evidence that but for the constitutional error alleged in this claim, no reasonable fact-finder would have found him guilty of capital murder. 28 U.S.C. § 2254(e)(2).

154. Without waiving the foregoing, the factual averments made in support of this claim are denied. The state-court findings of fact constitute the proper factual basis for consideration of this claim.

H. Wilson's claim that appellate counsel provided ineffective assistance.

155. In paragraphs 783-809, Wilson asserts that he received ineffective assistance of appellate counsel on direct appeal. This claim has two subclaims, which are answered separately below. An introduction to these claims is found in paragraphs 783-86. To the extent that Wilson is attempting to raise any claims in those paragraphs, such claims are conclusory in nature and fail to state a valid claim for relief under 28 U.S.C. § 2254. *See*, *e.g.*, *Mayle*, 545 U.S. at 655; *Tejada*, 941 F.2d at 1559; *Lindsey*, 875 F.2d at 1513.

1. Wilson's claim that appellate counsel did not adequately challenge his arrest.

156. In paragraphs 787-96 and 805-09, Wilson's alleges that appellate counsel provided ineffective assistance when counsel failed to adequately challenge the legality of his arrest on direct appeal. The merits of this claim were addressed by the ACCA in Wilson's Rule 32 proceeding:

> Wilson asserted that he received ineffective assistance of counsel because appellate counsel failed to argue adequately that his arrest was illegal. Appellate counsel challenged his arrest on appeal, but Wilson pleaded that appellate counsel were ineffective because their discussion of the facts in their appellate brief omitted important details. For example, Wilson pleaded that appellate counsel should have pointed out that the five officers who took him into custody all entered his home, that Investigator Luker was close enough to Wilson's bedroom to make observations about the clothing inside it, and that Wilson was placed in handcuffs before being transported to the police station. Wilson also pleaded that appellate counsel were ineffective because they failed to mention *Kaupp v. Texas* to demonstrate the lack of

> consent and absence of probable cause, and failed to challenge adequately in their application for rehearing this Court's holding regarding the existence of probable cause to arrest Wilson. The circuit court dismissed this claim as being without merit.
>
> This Court has already addressed in Part II(A)(1) of this memorandum opinion the substance of this claim as it related to trial counsel, holding that Wilson had failed to plead sufficient facts to show that any of these arguments would have been meritorious. This claim of ineffective assistance of appellate counsel must likewise fail. *See Bearden v. State*, 825 So. 2d 868, 872 (Ala. Crim. App. 2001) (trial counsel cannot be ineffective for failing to raise meritless claim). As such, the circuit court did not err in dismissing this claim. *See* Rule 32.7(d), Ala. R. Crim. P.

(DE76-33:61-62.)

157. Wilson has not shown, and cannot show, that the denial of relief on this claim in state court "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." 28 U.S.C. § 2254(d). Because Wilson has not shown that the Alabama courts decided this claim in a manner that was contrary to or involves an unreasonable application of clearly established federal law as determined by the Supreme Court, this Court should deny relief on this claim. A review of the ACCA's opinion demonstrates that the decision of the Alabama court was not an unreasonable one. Thus, according to the habeas statute, the application for a writ of habeas corpus before this Court "shall not be granted." 28 U.S.C. § 2254(d).

158. Without waiving the foregoing, in deciding this claim, the Court of Criminal Appeals made findings of fact. Pursuant to 28 U.S.C. § 2254(e)(1), these fact-findings are presumed correct. Wilson is not entitled to an evidentiary hearing on this claim.

159. Without waiving the foregoing, to the extent that Wilson failed to develop the factual basis for this claim in state-court proceedings, he is not entitled to any further evidentiary hearing in this Court. His claim is not based on a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" or "a factual predicate that could not have been previously discovered through the exercise of due diligence," and the facts underlying the claims would not be sufficient to establish by clear and convincing evidence that but for the constitutional error alleged in this claim, no reasonable fact-finder would have found him guilty of capital murder. 28 U.S.C. § 2254(e)(2).

160. Without waiving the foregoing, the factual averments made in support of this claim are denied. The state-court findings of fact constitute the proper factual basis for consideration of this claim.

2. Wilson's claim that appellate counsel provided ineffective assistance when counsel did not adequately appeal the admissibility of his confession.

161. In paragraphs 797-804, Wilson contends that appellate counsel inadequately challenged the admissibility of his confession on direct appeal. The merits of this claim were addressed by the ACCA in Wilson's Rule 32 proceeding. The court found:

> Wilson asserted that he received ineffective assistance of counsel because appellate counsel failed to argue adequately that his statement was involuntary. Appellate counsel challenged the admissibility of Wilson's statement, arguing that its being incomplete rendered the statement unreliable. Wilson asserted in his petition that this argument was doomed to failure because appellate counsel failed to demonstrate harm. Wilson pleaded that appellate counsel should have instead challenged the voluntariness of the statement, and should have called this Court's attention to the relevant circumstances surrounding Wilson's waiver—the time of day, the invasion of Wilson's home by multiple officers, his transport to the police station while wearing handcuffs, the immediate commencement of interrogation, the isolation created by his removal to an interrogation room, his age, his emotional stability, and his special-education status. The circuit court dismissed this claim as being without merit.
>
> As discussed in Part II(A)(3) of this memorandum opinion, "[n]one of the facts Wilson claims his [appellate] counsel should have presented [on direct appeal] were outside the record on direct appeal. Consequently, these facts were already considered by this Court on direct appeal when it engaged in a totality-of-the-circumstances analysis." Further, "[a]lthough this Court conducted a plain-error analysis, it held that no error occurred in the admission of Wilson's statement." Appellate counsel cannot be held ineffective for failing to raise meritless arguments. *See Bearden*, 825 So. 2d at 872. As such, the circuit court did not err in dismissing this claim.

(DE76-33:62.)

162. Wilson has not shown, and cannot show, that the denial of relief on this claim in state court "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." 28 U.S.C. § 2254(d). Because Wilson has not shown that the Alabama courts decided this claim in a manner that was contrary to or involves an unreasonable application of clearly established federal law as determined by the Supreme Court, this Court should deny relief on this claim. A review of the ACCA's opinion demonstrates that the decision of the Alabama court was not an unreasonable one. Thus, according to the habeas statute, the application for a writ of habeas corpus before this Court "shall not be granted." 28 U.S.C. § 2254(d).

163. Without waiving the foregoing, in deciding this claim, the Court of Criminal Appeals made findings of fact. Pursuant to 28 U.S.C. § 2254(e) (1), these fact-findings are presumed correct. Wilson is not entitled to an evidentiary hearing on this claim.

164. Without waiving the foregoing, to the extent that Wilson failed to develop the factual basis for this claim in state-court proceedings, he is not entitled to any further evidentiary hearing in this Court. His claim is not based on a "new rule of constitutional law, made retroactive to cases on collateral review by the

Supreme Court, that was previously unavailable" or "a factual predicate that could not have been previously discovered through the exercise of due diligence," and the facts underlying the claims would not be sufficient to establish by clear and convincing evidence that but for the constitutional error alleged in this claim, no reasonable fact-finder would have found him guilty of capital murder. 28 U.S.C. § 2254(e)(2).

165. Without waiving the foregoing, the factual averments made in support of this claim are denied. The state court findings of fact constitute the proper factual basis for consideration of this claim.

V. Wilson's claim that he is actually innocent.

166. In paragraphs 810-28, Wilson meshes three Supreme Court cases involving a petitioner's alleged lack of guilt—*Jackson v. Virginia*, 44 U.S. 307 (1979), *Herrera v. Collins*, 506 U.S. 390 (1990),[9] and *Schlup v. Delo*, 513 U.S. 298

9. To the extent Wilson is attempting to raise a free-standing actual innocence claim, Wilson has not shown such a claim is viable.

> In *Herrera*…, the Supreme Court assumed "for the sake of argument in deciding [the] case, that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim." We likewise have recognized the possibility of freestanding actual innocence claims, *see Felker v. Turpin*, 83 F.3d 1303, 1312 (11th Cir. 1996), *cert. granted*, 517 U.S. 1182 (1996) and *cert. dismissed*, 518 U.S. 651 (1996), ("[*Herrera*] left open the difficult question of whether federal habeas courts may entertain convincing claims of actual

(1995)—in an attempt to cobble together an actual innocence claim. His argument appears to hinge on the theory that Corley, instead of Wilson, struck the fatal wounds that resulted in Walker's death, and thus, Wilson did not kill Walker and had no intent to kill Walker. (Am. Pet. ¶ 812.)

167. Wilson acknowledges that he did not raise this claim in state court. (Am. Pet. ¶ 821.) To overcome his lack of exhaustion and procedural default, he asserts that his claim could not be presented until he received the Corley letter and learned of its contents.[10] (*Id.*) Even assuming this is true, Wilson was provided a copy of the Corley letter, at the latest, by June 28, 2023. (*See* DE81-1; DE81-2.) From that point, Wilson had six months to timely present his actual innocence claim

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> innocence."), but have also recognized that "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding;" *Brownlee v. Haley*, 306 F.3d 1043, 1065 (11th Cir. 2002) (quoting *Herrera*, 506 U.S. at 400).

In re Davis, 565 F.3d 810, 816-17 (11th Cir. 2009) (footnote omitted). "The prohibition on freestanding claims of actual innocence in a habeas petition respects the nature of our federal system: "Federal courts are not forums in which to relitigate state trials." *Raulerson v. Warden*, 928 F.3d 987, 1004 (11th Cir. 2019) ("When reviewing a habeas petition, we 'sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact.' And '[f]ew rulings would be more disruptive of our federal system than to provide for federal habeas review of freestanding claims of actual innocence.'") (citations omitted).

10. Appendices OO and QQ are not a part of the state-court record; thus, they are not properly before this Court for consideration. *Cullen*, 563 U.S. at 181-82; *Curry*, 2022 WL 1773969, at *7 n.2.

to the state courts. *See* ALA. R. CRIM. P. 32.1(e) (providing an opportunity to review "newly discovered material facts" that "require that the conviction or sentence be vacated"); ALA. R. CRIM. P. 32.2(b) (petitioner can overcome successive bar if he "shows both good cause exists why the new ground or grounds were not know or could not have been ascertained through reasonable diligence when the first petition was heard, and that failure to entertain the petition will result in a miscarriage of justice"); ALA. R. CRIM. P. 32.2(c) (petitioner has six months "after the discovery of the newly discovered material facts"). He failed to do so.

168. But Wilson never provided the state courts an opportunity to consider this claim, and he is now barred from doing so. Consequently, this claim is procedurally defaulted. 28 U.S.C. § 2254(c); *see Henderson*, 353 F.3d at 891 ("A state prisoner seeking federal habeas relief cannot raise a federal constitutional claim in federal court unless he first properly raised the issue in the state courts."). By failing to raise this claim at trial or on direct review, Wilson failed to "give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan*, 526 U.S. at 845; *see Dill*, 371 F.3d at 1303. As a result, Wilson has not met the exhaustion requirement of § 2254(b)(1), and he is procedurally barred from raising this claim in a federal habeas petition. *See Pope*, 358 F.3d at 853 ("[The petitioner] has failed to exhaust all of his available state remedies. Consequently, [he] is procedurally barred

from raising his [unexhausted claims]…in a federal § 2254 petition."); *see also* 28 U.S.C. § 2254(c); *O'Sullivan*, 526 U.S. at 842; *Mancill*, 545 F.3d at 940; *Dill*, 371 F.3d at 1303; *Pruitt*, 348 F.3d at 1358-59. Dismissal of his habeas petition to allow Wilson to present this claim fairly as a federal claim in state court now would be futile because he would be barred from raising it in state court under Rule 32.2(c) of the Alabama Rules of Criminal Procedure (statute of limitations bar) and Rule 32.2(b) of the Alabama Rules of Criminal Procedure (successive petition bar). Thus, because any state remedy with respect to these claims is procedurally barred by the state procedural rules noted above, Wilson's claim is procedurally defaulted from habeas review

169. Moreover, Wilson has not presented a cognizable actual innocence claim under *Schlup*. In *Rozzelle v. Secretary, Florida Department of Corrections*, 672 F.2d 1000, 1012 (11th Cir. 2012), the Eleventh Circuit addressed a petitioner's claimed that he was "actually innocent of second-degree murder and guilty of only manslaughter because 'new' evidence show[ed] he lacked a 'depraved mind' and killed Leier only in the heat of passion" and argued that "this latter type of mens rea, allegedly shown by his 'new' evidence, is legally sufficient to support only a conviction for manslaughter, a lesser included offense of murder in Florida." The court held that "the narrow and extraordinary nature of *Schlup*'s actual innocence 'gateway' does not extend to petitioners, like Rozzelle, who did the killing and

whose alleged 'actual innocence' of a non-capital homicide conviction is premised on being guilty of only a lesser degree of homicide." *Id.* at 1015.

170. Even assuming, though not conceding, Wilson correctly asserted that the Corley letter shows she struck the fatal blow and there was no other evidence that Walker had intent to commit murder, as in *Rozzelle*, his "actual innocence" claim is still "premised on being guilty of only a lesser degree of homicide." As the ACCA found when reviewing the sufficiency of the evidence to support Wilson's capital murder during the commission of the robbery conviction on direct appeal:

> [T]he State presented evidence from which the jury could have found beyond a reasonable doubt that Wilson murdered Walker during an attempt to take Walker's van. Although Wilson did state that it was his intent to steal Walker's laptop on the night of Walker's murder, he also stated that the "original plan was going over there and taking the van" and that he and his codefendants had talked about "going over there and hitting Mr. Walker and knocking him out and taking the keys." From these statements, the jury could have reasonably inferred that, although the van may not have been taken the evening Walker was murdered, Wilson was attempting to rob Walker of his van when he murdered Walker.

Wilson, 142 So. 3d at 810 (citations omitted). Wilson does not dispute that he and his accomplices planned to rob Walker, entered his home with the intent to rob Walker, or that Walker's death occurred as a result of those activities. Assuming, though not conceding, Wilson was merely an accomplice to the underlying felony, he would still be guilty of felony murder. *See Rozzelle*, 672 F.3d at 1017 (finding that under *Schlup*, "[t]The new evidence must be so significant and reliable that,

considered with the trial record as a whole, it 'undermine[s] confidence in the result of the trial' such that 'it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.' Evidence that would at best substitute one criminal homicide conviction for another homicide conviction is ordinarily not of this caliber.") (internal citation omitted); *see also* ALA. CODE § 13A-6-2(a)(3) ("A person commits the crime of murder if he…commits or attempts to commit…burglary in the first or second degree…robbery in any degree…and, in the course of and in furtherance of the crime that he…is committing or attempting to commit, or in immediate flight therefrom, he…or another participant if there be any, causes the death of any person.").

171. Alternatively, this claim is denied.

172. Without waiving the foregoing, to the extent that Wilson failed to develop the factual basis for this claim in state-court proceedings, he is not entitled to any further evidentiary hearing in this Court. His claim is not based on a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" or "a factual predicate that could not have been previously discovered through the exercise of due diligence," and the facts underlying the claims would not be sufficient to establish by clear and convincing evidence that but for the constitutional error alleged in this claim, no reasonable fact-finder would have found him guilty of capital murder. 28 U.S.C.

§ 2254(e)(2).

VI. Wilson's claim that the prosecutor's use of peremptory strikes violated *Batson*.

173. In paragraphs 829-899, Wilson claims that the prosecution violated *Batson v. Kentucky*, 476 U.S. 79 (1986), during jury selection. The ACCA addressed this claim on direct appeal:

> Wilson first argues that the State used its peremptory strikes in a racially discriminatory manner in violation of *Batson v. Kentucky*, 476 U.S. 79, 85 (1986). This issue was not raised at trial; therefore, it was initially reviewed for plain error only. Rule 45A, Ala. R. App. P.
>
> On November 5, 2010, this Court stated:
>
> > "Here, both Wilson and the State ask this Court to remand this cause to the circuit court to provide the State with an opportunity to explain its reasons for striking African-American veniremembers. This Court's 'review of the record indicates that, if the defense had filed a *Batson* motion at trial raising the arguments he now raises, the trial court would have been obligated to require the prosecution to state the reasons for each of its peremptory challenges.' *Whatley v. State*, 146 So.3d 437, 448-49 (Ala. Crim. App. 2010). Because Wilson did not raise a *Batson* objection at trial, the State did not have an opportunity to respond to his allegations or to provide its reasons for striking African-American veniremembers. Further, the circuit court is in a better position to evaluate the parties' arguments and to rule on the propriety of the State's reasons for striking African-Americans because it was present during the jury-selection proceedings."
>
> *Wilson v. State*, 142 So.3d 732, 747 (Ala. Crim. App. 2010).
>
> > "Thus, in accordance with the parties' request, this Court remand[ed] this cause to the circuit court for that court to

> hold a hearing during which it [was] to require the State to provide its reasons for striking African-American veniremembers and [was] to provide Wilson with an opportunity to 'offer evidence showing that the [State's] reasons or explanations are merely a sham or pretext.'"

Wilson, 142 So. 3d at 747-48 (quoting *Preachers v. State*, 963 So. 2d 161, 166 (Ala. Crim. App. 2006)).

On February 23, 2011, the circuit court conducted a hearing in accordance with this Court's instructions. On March 15, 2011, the circuit court issued a detailed order finding that the State had not used its peremptory strikes to remove jurors based on race. Specifically, the circuit court found:

> "that the State articulated clear specific and legitimate reasons for each peremptory strike exercised by the State to strike an African-American veniremember. Further, the Court finds that [Wilson] has not proven purposeful discrimination by showing that the race neutral reasons given by the State for each peremptory strike used to remove each of the identified African-American veniremembers was merely a pretext or sham for discrimination."

On return to remand, Wilson argues that the circuit court erroneously found that the State met its burden to provide valid race-neutral reasons for striking potential jurors J.C., J.D., and D.W. Specifically, Wilson argues that the State's reason for striking potential juror J.C.—that it would be tough for him to recommend a sentence of death—was pretextual because the prosecutor targeted African-Americans with leading questions regarding their ability to recommend a sentence of death. Wilson also argues that the State's reasons for striking potential juror J.D.—he was young and had a Law Enforcement Tactical System ("LETS") record—were pretextual because age is a suspect reason and because other white jurors who had traffic tickets were not struck. Wilson next argues that the State's reason for striking potential juror D.W.—that he had 14 traffic violations and a LETS record—was pretextual because white jurors who had traffic tickets were not struck and because the prosecutor did not question D.W. regarding his LETS

record. Finally, Wilson argues that the circuit court erroneously failed to consider a history of racial discrimination by the Houston County District Attorney's Office.

In evaluating a *Batson* claim, a three-step process must be followed. As explained by the United States Supreme Court in *Miller–El v. Cockrell*, 537 U.S. 322 (2003):

> "First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race. [*Batson v. Kentucky*,] 476 U.S. [79,] 96-97, [(1986)]. Second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question. *Id.*, at 97-98. Third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination. *Id.*, at 98."

537 U.S. at 328–29.

[…]

Wilson first argues that the State failed to rebut the prima facie showing of racial discrimination with respect to potential juror J.C. Specifically, he argues that the prosecutor's reason for striking potential juror J.C. was pretextual; therefore, he is entitled to a new trial.

The prosecutor testified that he struck J.C. because J.C. stated that it would be tough for him to recommend a sentence of death. The circuit court found, and this Court agrees, that the prosecutor's proffered reason is facially race neutral. *Mashburn v. State*, 7 So. 3d 453, 461 (Ala. Crim. App. 2007); *Hocker v. State*, 840 So. 2d 197, 210 (Ala. Crim. App. 2002). Thus, the burden shifted to Wilson to establish that the prosecutor's reason was pretextual. *Ex parte Branch*, 526 So. 2d 609, 624 (Ala. 1987).

Wilson argues that the prosecutor's reason was pretextual because the prosecutor targeted African-Americans with questions regarding their opposition to the death penalty. In addressing this argument, the circuit court found:

> "[Wilson] argues that the State's questioning or addressing directly seven out of the eight African-Americans on the venire panel during voir dire as opposed to only addressing five out of thirty-eight whites with regard to their ability to impose death indicates disparate treatment of African-American veniremembers. Further, [Wilson] argues that such direct questioning is an indicator that veniremember number 13, [J.C.], received disparate treatment because he was struck based on his response that it would be tough to render a death penalty recommendation. According to the testimony of [the prosecutor], no white veniremembers indicated that they would have difficulty in imposing the death penalty. However, the State proffered testimony that it struck [B.S.C.], a seventy-two year white female veniremember, because Lt. Luker personally knew her and thought she would be weak. Lastly, the Court finds no merit in [Wilson's] argument that the form of the questions posed to individual veniremembers with regard their ability to impose the death penalty somehow constitutes disparate treatment. The Court finds that [Wilson's] argument is without merit and the State's reasons for striking [J.C.] [were] race neutral."

Based on the record, this Court cannot say that the circuit court's finding were clearly erroneous.

The record indicates that the prosecutor asked the entire venire whether there was anyone who "just do[es not] believe in the death penalty." The prosecutor then questioned the five Caucasians, seven African-Americans, and one Asian regarding their feelings toward the death penalty. The record is unclear whether these jurors indicated some nonverbal responses to the prosecutor's general question regarding their belief in the death penalty, thus prompting the prosecutor to question them further. However, Wilson has not offered any evidence to establish that these jurors did not take some action to indicate a possible opposition to the death penalty and, therefore, prompted the prosecutor's direct questions about the death penalty. Furthermore, the record does not indicate that the questions posed to white potential jurors about the death penalty differed materially from those posed to African-American jurors. Therefore, Wilson has not established that the

prosecutor targeted African-Americans with his questions about the death penalty.

Because the record does not establish that the prosecutor targeted African-Americans with questions about the death penalty, this Court cannot say that the circuit court clearly erred in finding that Wilson had not met his burden to establish that the State's facially race-neutral reason for striking J.C. was pretextual. Therefore, Wilson is not entitled to any relief on this issue.

Wilson next argues that the State failed to rebut the prima facie showing of racial discrimination with respect to potential jurors J.D. and D.W. Specifically, he argues that the State's reasons for striking potential jurors J.D. and D.W. were pretextual; therefore, he is entitled to a new trial.

The prosecutor testified that he struck J.D. because J.D. had a LETS record. According to the prosecutor, LETS tracks individuals' criminal histories. The prosecutor also testified that he struck D.W. because D.W. had received 14 traffic tickets and also had a LETS record. The circuit court found, and this Court agrees, that J.D.'s and D.W.'s criminal histories were a facially race-neutral reason for the State's use of its peremptory strikes. *Welch v. State*, 63 So. 3d 1275, 1283 (Ala. Crim. App. 2010); *Thomas v. State*, 611 So. 2d 416, 418 (Ala. Crim. App. 1992). Thus, the burden shifted to Wilson to establish that the prosecutor's reasons were pretextual. *Ex parte Branch*, 526 So. 2d at 624.

Wilson argues that the prosecutor's reliance on criminal histories to strike J.D. and D.W. was pretextual because the "prosecution allowed three white individuals to serve on the jury who had at least one and as many as five traffic violations." (Wilson brief on remand, at 13.) In addressing this argument, the circuit court found as follows:

> "[Wilson]…argues that the State relied upon the [criminal] record of certain black veniremembers as a pretext in striking them. The State indicated that it relied upon the record, in whole or part, of the following veniremembers in reaching its decision to strike them: veniremember number 73, [D.W.], veniremember number 14, [J.D.,] and

veniremember number 41, [B.L.]. With regard to veniremember number 73, [D.W.], the State specifically relied upon his LETS record and fourteen speeding citations. In reaching the decision to strike veniremember number 14, [J.D.], the State specifically relied upon his LETS record. The State relied upon the DUI conviction of veniremember number 41, [B.L.], in making the decision to strike her.

"[Wilson] further argues that the State engaged in disparate treatment of African-American veniremembers who had some type of record by not striking white veniremembers who had similar records. Specifically, [Wilson] argues that the State did not strike veniremember number 36, [C.K.], who had a speeding ticket, veniremember number 67, [S.T.], who had a speeding ticket and a [ticket for] failure to stop, and veniremember number 42, [R.L.], who had two speeding tickets and a no-seatbelt violation. In response, [the prosecutor] testified that he did not have any information regarding the traffic violations for those veniremembers.

"The State actually struck certain white veniremembers based in whole or part, on their records, specifically, veniremember number 54, [A.P.], veniremember number seven, [C.M.B.], veniremember number 58, [D.E.S.], Jr., veniremember number 9, [G.C.], and veniremember number 18, [C.L.G.]. The State relied upon [A.P.'s] conviction for driving while licensed revoked and seven DUI charges, which he did not disclose during voir dire, in making its decision to strike him. Regarding [C.M.B.], the State relied upon a DUI conviction which she did not disclose. With regard to [D.E.S.], the State relied upon his conviction for unlawful possession of a controlled substance. With regard to [G.C.] the State relied upon his conviction for DUI. Although the State did not specifically identify a particular crime or traffic violation for [C.L.G.], it did rely upon the fact that she had a record in reaching its decision to strike her. A further analysis of the State's use of peremptory strikes to remove veniremembers with

> criminal convictions reveals that veniremember 41, [B.L.], had a DUI conviction and white veniremember 54, [A.P.], 7, [C.B.] and 18, [C.L.G.], had DUI convictions. With regard to the existence of a record as a basis for striking veniremembers, the State's reason for striking veniremember number 73, [D.W.], and veniremember 14, [J.D.], who are African-Americans, was based in whole or part on the existence of a LETS record and veniremember number 18, [C.L.G.], a white female, was struck for the existence of a record which was not specifically identified. The fact that the State struck white veniremembers with the same or similar records as the African-American veniremembers clearly rebuts the argument by [Wilson's] counsel that the State's reliance on the records of African-Americans as basis to strike them was merely a pretext. Accordingly, the Court finds that the State did not engage in disparate treatment of African-American veniremembers who had some sort of record, whether it was a LETS record, traffic violation, or other criminal history."

The circuit court's findings are supported by the record.

Wilson, however, argues that the circuit court clearly erred by determining that the prosecutor's reasons for striking J.D. and D.W. were not pretextual. First, he argues that the record establishes that the prosecutor's reliance on J.D.'s and D.W.'s LETS records and traffic tickets was pretextual because the State did not strike three white juror who had traffic tickets. He then argues that "the trial court improperly credited the prosecution's excuse that it did not possess any information about these [white] juror's traffic violations." (Wilson's brief on remand, at 14.) This Court disagrees.

It is well settled that "[a] trial court's ruling on a *Batson* motion depends on its credibility determinations." *Douglas v. State*, 740 So. 2d 485, 487 (Ala. Crim. App. 1999) (citing *Smith v. State*, 590 So. 2d 388, 390 (Ala. Crim. App. 1991)). This Court has "recognized that these determinations of credibility and demeanor lie peculiarly within a trial judge's province, and ... in the absence of exceptional circumstances, [this Court] defer[s] to the [the trial court]." *Thompson*, [153 So. 3d at

126] (internal citations and quotations omitted). In other words, this Court "will give a trial court's ruling great deference, and we will reverse its ruling only if it is clearly erroneous." *Douglas*, 740 So.2d at 487.

Here, the prosecutor testified that he did not have any information regarding the three white jurors' traffic tickets. The circuit court believed the prosecutor and credited his reasons for failing to strike those white jurors. Thus, the circuit court found that Wilson had not established disparate treatment. Nothing in the record establishes that the circuit court's credibility determination was clearly erroneous; therefore, Wilson is not entitled to any relief on this issue.

Second, Wilson argues that the trial court improperly credited the prosecutor's reliance on J.D.'s LETS record to strike him because the prosecutor failed to specify what type of crime J.D. may have committed. While the prosecutor did not specify what crime or crimes were reflected on J.D.'s LETS record, he did testify that LETS covers people who have been charged with all types of crimes. Thus, the fact that J.D. had a LETS records is facially race neutral, and the burden shifted to Wilson to show that the reason was a pretext. *Ex parte Branch*, 526 So.2d at 624.

Third, Wilson argues that the circuit court should not have credited the prosecutor's reasons for striking both J.D. and D.W. because the prosecutor did not admit documentary evidence of those individuals' LETS records. This Court has held that "[t]here is no requirement that a prosecutor establish evidentiary support for every strike in every case…." *Hall v. State*, 816 So. 2d 80, 85 (Ala. Crim. App. 1999). Rather, during the third step in the *Batson* process, Wilson had the burden to establish that the prosecutor's reason was a pretext. *Ex parte Branch*, 526 So. 2d at 624. However, when cross-examining the prosecutor during the hearing, Wilson failed to ask the prosecutor any questions regarding the prosecutor's records relating to J.D.'s and D.W.'s criminal records. *See Welch v. State*, 63 So. 3d 1275, 1278 (Ala. Crim. App. 2010) (recognizing that the State's burden is to offer facially race-neutral reasons, after which the burden shifts to the defendant "to offer evidence showing that those reasons are merely a sham or pretext"). Thus, Wilson failed to meet his burden "to offer evidence showing that those reasons are merely a sham or pretext."

Welch, 63 So.3d at 1278.

Finally, the State struck similarly situated white potential jurors. As the circuit court found in its order, the State struck a number of white jurors because they had traffic tickets and other convictions. The State also struck one juror based on an unspecified criminal record. The prosecutor's use of its peremptory strikes to remove white jurors who were similarly situated to J.D. and D.W. weighs against Wilson's claim of racial discrimination and supports the circuit court's judgment. *See Hall*, 816 So. 2d at 86 (holding that "comparable treatment of similarly situated jurors of both races tends to rebut any inference of discriminatory intent in the prosecutor's strikes against black jurors").

For the foregoing reasons, Wilson failed to meet his burden to establish that the prosecutor's reason for striking J.D. and D.W. was a pretext. Further, based on the record, the circuit court's ruling was not clearly erroneous. Therefore, Wilson is not entitled to any relief on this issue.

Wilson next argues that the circuit court erroneously failed to consider seven court opinions that he asserts support his argument that the Houston County District Attorney's Office struck J.C., J.D., and D.W. for racial reasons. Specifically, Wilson argues that the circuit court should have considered the following cases: 1) *Grimes v. State*, 93–cv–215 (M.D. Ala. June 12, 1996) (unpublished); 2) *McCray v. State*, 738 So.2d 911 (Ala. Crim. App. 1998); 3) *Ashley v. State*, 651 So. 2d 1096 (Ala. Crim. App. 1994); 4) *Andrews v. State*, 624 So. 2d 1095 (Ala. Crim. App. 1993); 5) *Bush v. State*, 615 So. 2d 137, 140 (Ala. Crim. App. 1992); 6) *Williams v. State*, 620 So. 2d 82 (Ala. Crim. App. 1992); and 7) *Roger v. State*, 593 So. 2d 141 (Ala. Crim. App. 1991). According to Wilson, these cases establish that the Houston County District Attorney's Office has a history of racial discrimination and thus should have been considered.

Initially, the record is unclear as to whether the circuit court considered these cases. Although the circuit court stated during the hearing that it was not going to consider Wilson's cases, it stated in its order that Wilson "raise[d] an argument that the Houston County District Attorney's Office has a history of discrimination against African-American jurors and *in support of that argument cited seven cases*." Therefore, it appears that the circuit court was aware of the fact that

convictions secured by the Houston County District Attorney's Office had been reversed on *Batson* grounds seven times.

In any event, assuming, without deciding, that the circuit court did not, but should have, considered the cases Wilson cited, this Court finds any error harmless. Rule 45, Ala. R. App. P.

In *McCray v. State*, 88 So. 3d 1, 24 (Ala. Crim. App. 2010), this Court stated:

> "[T]o the extent that the Houston County District Attorney's Office has a history of racial discrimination, that history is attenuated. 'The opinions reversing the Houston Circuit Court on *Batson* grounds date from 1991, [over 20] years ago. The most recent of those opinions was published in 1998, [over 12] years ago.' *Floyd*[*v. State*, [Ms. CR–05–0935, Aug. 29, 2008] —— So.3d —— (Ala. Crim. App. 2007)] (opinion on return to remand) (Welch, J., dissenting). *See McCray v. State*, 738 So. 2d 911, 914 (Ala. Crim. App. 1998) (reversing the judgment of the Houston County Circuit Court based on a *Batson* violation). Accordingly, although the Houston County District Attorney's Office ha[d] a history of using its peremptory strikes in an improper manner, this factor, based on the passage of time, does not establish a prima facie case of racial discrimination."

In addition to the passage of time attenuating the significance of the history of discrimination, Wilson's counsel conceded at the hearing that "one of the factors that is just a factor in this case—*it's a very, very small part of our case*—is that the Court is supposed to look to a history discrimination."

As discussed above, the State gave valid reasons for striking potential jurors J.C., J.D., and D.W. Based on the attenuated significance of the history of discrimination by the Houston County District Attorney's Office and the fact that the history was "a very, very small part" of Wilson's case, this Court holds that if the circuit court did not consider Wilson's seven cases, that error did not affect the outcome of the proceeding and, thus, any error was harmless. Rule 45, Ala. R. App. P.;

> *Hinkle v. State*, 67 So. 3d 161, 166 (Ala. Crim. App. 2010) (finding an error harmless when it did "not affect the outcome of the trial, or otherwise prejudice a substantial right of the [appellant]"). Therefore, Wilson is not entitled to any relief on this issue.

Wilson, 142 So. 3d at 751-59 (footnote omitted).

174. Wilson has not shown, and cannot show, that the denial of relief on this claim in state court "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." 28 U.S.C. § 2254(d). Because Wilson has not shown that the Alabama courts decided this claim in a manner that was contrary to or involves an unreasonable application of clearly established federal law as determined by the Supreme Court, this Court should deny relief on this claim. The ACCA cited the governing federal law and did, in fact, properly apply *Batson* and its progeny. A review of the ACCA's opinion demonstrates that the application of federal law by the Alabama court was not an unreasonable one. Thus, according to the habeas statute, the application for a writ of habeas corpus before this Court "shall not be granted." 28 U.S.C. § 2254(d).

175. Without waiving the foregoing, in deciding this claim, the Court of Criminal Appeals made findings of fact. Pursuant to 28 U.S.C. § 2254(e)(1), these

fact-findings are presumed correct. Wilson is not entitled to an evidentiary hearing on this claim.

176. Without waiving the foregoing, to the extent that Wilson failed to develop the factual basis for this claim in state-court proceedings, he is not entitled to any further evidentiary hearing in this Court. His claim is not based on a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" or "a factual predicate that could not have been previously discovered through the exercise of due diligence," and the facts underlying the claims would not be sufficient to establish by clear and convincing evidence that but for the constitutional error alleged in this claim, no reasonable fact-finder would have found him guilty of capital murder. 28 U.S.C. § 2254(e)(2).

177. Without waiving the foregoing, the factual averments made in support of this claim are denied. The state court findings of fact constitute the proper factual basis for consideration of this claim.

VII. Wilson's guilt-phase prosecutorial misconduct claim.

In paragraphs 900-45, Wilson alleges that prosecutorial misconduct occurred during the guilt phase of his trial. This claim contains four subclaims, which are answered separately below.

A. Wilson's claim that evidence about the victim and the pain he suffered was irrelevant and inflammatory.

178. In paragraphs 900-14, Wilsom claims that the prosecutor impermissibly introduced evidence of Walker's personal characteristics and the pain he suffered. The merits of this claim were addressed by the ACCA on direct appeal:

> Wilson next argues that the prosecutor improperly interjected penalty-phase considerations during his guilt-phase closing argument. Specifically, Wilson argues that the prosecutor improperly argued to the jury that Wilson tortured Walker and caused him a great deal of pain before Walker died. According to Wilson, victim-impact evidence in the form of the level of pain Walker suffered during the murder was irrelevant in the guilt phase of the trial. Wilson also argues that the prosecutor improperly informed the jury during the guilt phase that this was a death-penalty case.
>
> To the extent Wilson argues that the prosecutor improperly injected into the guilt phase of the trial issues relating to the pain Wilson caused Walker, this Court disagrees. In *McCray v. State*, 88 So. 3d 1, 38 (Ala. Crim. App. 2010), this Court rejected the premise underlying Wilson's argument—that the pain a capital-murder victim suffers is irrelevant and inadmissible during the guilt phase of a capital-murder trial. Specifically, this Court held that "[t]he pain and suffering of the victim is a circumstance surrounding the murder—a circumstance that is relevant and admissible during the guilt phase of a capital trial." *Id.* (citing *Smith v. State*, 795 So. 2d 788, 812 (Ala. Crim. App. 2000) (no error in trial court's questioning witness regarding the number of wounds on the murder victim's body during guilt phase of capital-murder trial despite appellant's argument that the number of wounds was relevant only to the penalty-phase issue of whether the murder was especially heinous, atrocious, or cruel)).
>
> More importantly, victim-impact statements typically "describe [only] the effect of the crime on the victim and his family" and, although relevant to the penalty-phase, are inadmissible in the guilt-phase. *Payne v. Tennessee*, 501 U.S. 808, 821 (1991). However, statements relating to the effect of the crime on the victim "are admissible during the guilt

phase of a criminal trial ... if the statements are relevant to a *material issue* of the guilt phase." *Ex parte Crymes,* 630 So. 2d 125, 126 (Ala. 1993) (emphasis in original); *see also Gissendanner v. State,* 949 So. 2d 956, 965 (Ala. Crim. App. 2006) (holding that victim-impact type evidence is admissible in the guilt phase if it is relevant to guilt-phase issues). Rule 401, Ala. R. Evid., provides that "'[r]elevant evidence' [is any] evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

Here, the State's theory of the case was that Wilson broke into Walker's house, attacked him, and tortured him in an attempt to force Walker to relinquish his property. During his guilt-phase closing argument, the prosecutor reminded the jury that Wilson was charged with murder committed during the course of a robbery and of a burglary. The prosecutor then argued that it had proved the force element of robbery by establishing that Wilson tortured Walker and caused him a great deal of pain. Because the pain Wilson caused Walker was relevant and admissible to show the force Wilson used against Walker during the robbery, the prosecutor's argument did not constitute error.

To the extent Wilson argues that the prosecutor improperly injected penalty-phase considerations into the guilt phase when he informed the jury that the case was a death-penalty case, this argument does not entitle Wilson to any relief. The comment of which Wilson complains reads as follows:

> "I told you on voir dire. Look at the evidence. I told you you would look at me and say, Valeska, you are the prosecution. The burden is beyond a reasonable doubt. It's the same as a shoplifting case. Come on, Valeska, this is a death penalty case. You are asking us to convict him of capital murder. There are two offenses charged."

(R. 618-19.)

First, it does not appear that the prosecutor's comment was an attempt to inject penalty-phase considerations into the guilt phase. Instead, it appears that the prosecutor was attempting, although somewhat inartfully, to explain that the State's burden in a capital-murder case is

the same as in any criminal case—beyond a reasonable doubt. This Court finds no error in the prosecutor's explaining the State's burden of proof.

Moreover, even if this comment were improper, this Court would not find reversible error. This Court has explained:

> "'In judging a prosecutor's closing argument, the standard is whether the argument "so infected the trial with unfairness as to make the resulting conviction a denial of due process."' *Bankhead*[*v. State*], 585 So. 2d [97,] 107 [(Ala. Crim. App. 1989),] quoting *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974)). 'A prosecutor's statement must be viewed in the context of all of the evidence presented and in the context of the complete closing arguments to the jury.' *Roberts v. State*, 735 So. 2d 1244, 1253 (Ala. Crim. App. 1997), aff'd, 735 So. 2d 1270 (Ala.), cert. denied, 5[2]8 U.S. 939, (1999). Moreover, 'statements of counsel in argument to the jury must be viewed as delivered in the heat of debate; such statements are usually valued by the jury at their true worth and are not expected to become factors in the formation of the verdict.' *Bankhead*, 585 So. 2d at 106. 'Questions of the propriety of argument of counsel are largely within the trial court's discretion, *McCullough v. State*, 357 So. 2d 397, 399 (Ala. Crim. App. 1978), and that court is given broad discretion in determining what is permissible argument.' *Bankhead*, 585 So. 2d at 105. We will not reverse the judgment of the trial court unless there has been an abuse of that discretion. *Id.*"

Ferguson v. State, 814 So. 2d 925, 945-46 (Ala. Crim. App. 2000).

Here, the prosecutor's reference to Wilson's case as being "a death penalty case" (R. 618-19) was isolated. Further, the jury was well aware from the outset of this trial that the State had charged Wilson with two counts of capital murder and that the case might involve the death penalty. More importantly, the prosecutor was not attempting to tell the jury what sentence Wilson should receive; instead, he was merely

reminding the jury of the type of case the trial involved. *Cf. Stallworth v. State*, 868 So.2d 1128, 1157 (Ala. Crim. App. 2001) (finding no reversible error in the prosecutor's guilt-phase argument that the defendant "should face Alabama's electric chair").

Because the prosecutor's guilt-phase statement was isolated, merely reminded the jury of a fact of which it was already aware, and did not relate to what sentence Wilson should receive, this Court holds that the comment did not "so infect[ ] the trial with unfairness as to make the resulting conviction a denial of due process." *Ferguson*, 814 So. 2d at 945. Therefore, this issue does not entitle Wilson to any relief.

Wilson next argues that the State improperly elicited victim-impact evidence during the guilt phase of the trial. Specifically, Wilson argues that the State should not have been allowed to elicit testimony from Jimmy Walker, Walker's supervisor, indicating: 1) that Walker had cancer, that he had lost weight, and that he was frail; 2) that Walker's wife had died; 3) that Walker was a reliable employee; and 4) that Walker made a decent salary and would have qualified for retirement. According to Wilson, this testimony was irrelevant to the material issues at trial, and served only to focus the jurors' sympathies on the tragedy of Mr. Walker's death. Wilson did not object to Jimmy Walker's testimony; therefore, this Court will review these claims for plain error only. Rule 45A, Ala. R. App. P.

To the extent Wilson argues that Jimmy Walker's testimony relating to Walker's illness, his frailty, and his reliability constituted improper victim-impact evidence, this Court disagrees. As stated in Part VII of this opinion, "victim-impact statements typically 'describe [only] the effect of the crime on the victim and his family' and, although relevant to the penalty-phase, are inadmissible in the guilt phase." 142 So. 3d at 774 (quoting *Payne*, 501 U.S. at 821)). However, such statements "are admissible during the guilt phase of a criminal trial ... if the statements are relevant to a *material issue* of the guilt phase." *Ex parte Crymes*, 630 So. 2d 125, 126 (Ala. 1993); *see also Gissendanner v. State*, 949 So. 2d 956, 965 (Ala. Crim. App. 2006) (holding that victim-impact type evidence is admissible in the guilt phase if it is relevant to guilt-phase issues). Rule 401, Ala. R. Evid., provides: "'Relevant evidence' [is any] evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable

or less probable than it would be without the evidence."

Here, Jimmy Walker's testimony describing Walker as having cancer, as being frail, and as being a reliable employee was admissible in the guilt phase of the trial to establish the events that led to the discovery of the crime and the discovery of Walker's body. *See Gissendanner*, 949 So. 2d at 965. Jimmy Walker testified that Walker had cancer, that he had lost weight, and that he was frail. He also testified that Walker was a reliable employee. According to Jimmy Walker, because Walker was a reliable employee who was ill, when Walker did not show up for work, Jimmy Walker went to Walker's house twice to check on him by knocking on the door and looking in a window. Jimmy Walker stated that after getting no response from inside Walker's house on either visit, Jimmy Walker spoke with Walker's neighbor, and the police were telephoned. While Jimmy Walker was still at Walker's house, the police came, entered Walker's house, and found his body.

Because facts establishing that Walker was sick, frail, and reliable were relevant to establish the events that led to the discovery of the crime and the discovery of Walker's body, Wilson has not established any error, much less plain error. *See Gissendanner*, 949 So. 2d at 965. Therefore, Wilson is not entitled to any relief on this issue.

To the extent Wilson argues that the State improperly admitted testimony establishing that Walker's wife had died, that he made a decent salary, and that he would have qualified for retirement, any error was harmless, Rule 45, Ala. R. App. P., and certainly did not rise to the level of plain error. Rule 45A, Ala. R .App. P. [….]

Here, testimony establishing that Walker's wife had died, that he made a decent salary, and that he would have qualified for retirement was irrelevant to Wilson's guilt. However, after reviewing the record as a whole, this Court holds that the testimony did not affect the outcome of the trial or otherwise prejudice Wilson's substantial rights. The testimony was brief and to the point. At most, the testimony established that Walker was not a "human island" but instead had had a family and a job. *Id.* Further, the trial court properly instructed the jury that it should base its decision on the evidence presented during trial and should not allow "bias or sympathy or prejudice which [it] might have concerning either side" affect that decision. (R. 636.) For the foregoing

> reasons, Wilson has not shown that this issue rises to the level of plain error; therefore, it does not entitle him to any relief. Rule 45A, Ala. R. App. P.

Wilson, 142 So. 3d at 764-65 (footnote omitted).

179. Wilson has not shown, and cannot show, that the denial of relief on this claim in state court "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." 28 U.S.C. § 2254(d). Because Wilson has not shown that the Alabama courts decided this claim in a manner that was contrary to or involves an unreasonable application of clearly established federal law as determined by the Supreme Court, this Court should deny relief on this claim. A review of the ACCA's opinion demonstrates that the decision of the Alabama court was not an unreasonable one. Thus, according to the habeas statute, the application for a writ of habeas corpus before this Court "shall not be granted." 28 U.S.C. § 2254(d).

180. Without waiving the foregoing, in deciding this claim, the ACCA made findings of fact. Pursuant to 28 U.S.C. § 2254(e)(1), these fact findings are presumed correct. Wilson is not entitled to an evidentiary hearing on this claim.

181. Without waiving the foregoing, to the extent that Wilson failed to develop the factual basis for this claim in state-court proceedings, he is not entitled

to any further evidentiary hearing in this Court. His claim is not based on a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" or "a factual predicate that could not have been previously discovered through the exercise of due diligence," and the facts underlying the claims would not be sufficient to establish by clear and convincing evidence that but for the constitutional error alleged in this claim, no reasonable fact-finder would have found him guilty of capital murder. 28 U.S.C. § 2254(e)(2).

182. Without waiving the foregoing, the factual averments made in support of this claim are denied. The state-court findings of fact constitute the proper factual basis for consideration of this claim.

B. Wilson's claim that the prosecutor impermissibly "inflamed the passions" of the jury.

183. In paragraphs 915-30, Wilson alleges that the prosecutor impermissible inflamed the jury's passions against him. The merits of this claim were addressed by the ACCA on direct appeal:

> Wilson next argues that the State engaged in illegal misconduct when it made inflammatory remarks during closing arguments. This Court has explained:
>
> > "The following standard of review is used when reviewing claims of improper prosecutorial argument:
> >
> > "'"'The relevant question is whether the prosecutor's comments "so infected the trial with unfairness as to make

> the resulting conviction a denial of due process."' *Darden v. Wainwright*, 477 U.S. 168, 181 (1986), quoting *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974). Comments made by the prosecutor must be evaluated in the context of the whole trial. *Duren v. State*, 590 So.2d 360, 364 (Ala. Crim. App. 1990), aff'd, 590 So. 2d 369 (Ala. 1991), cert. denied, 503 U.S. 974 (1992)."'
>
> "*Bonner v. State*, 921 So. 2d 469, 473 (Ala. Crim. App. 2005), quoting *Simmons v. State*, 797 So. 2d 1134, 1162 (Ala. Crim. App. 1999)."

Brown v. State, 11 So.3d 866, 907 (Ala.Crim.App.2007). With these principles in mind, this Court turns to Wilson's arguments.

Wilson argues that the prosecutor made comments for the purpose of arousing the jurors' personal hostility toward and fear of Wilson. Because Wilson did not object to these alleged instances of misconduct, this claim will be reviewed for plain error only. Rule 45A, Ala. R. App. P.

First, during opening arguments, the prosecutor referenced Wilson returning to Walker's house with Corley because she wanted to see Walker's body and referenced Wilson joking with his accomplices about failing to steal the keys to Walker's van. Wilson asserts that those statements incorporated inadmissible prior-bad-acts and character evidence.

As will be discussed in Part XII of this opinion, the statements cited by Wilson do not constitute "other crimes, wrongs, or acts" prohibited by Rule 404(b), Ala. R. Evid. The statements to which Wilson now objects were based on his statement to police and constituted evidence of the crime for which he was being tried. Therefore, the statements at issue were not instances of prosecutorial misconduct and did not "'so infect[] the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden*, 477 U.S. at 181, quoting *Donnelly*, 416 U.S. at 643.

Second, during closing arguments, the prosecutor referred to Wilson as a "coward," "death and destruction," and a "cold, calculated, depraved, evil, wicked person." (R. 607, 612, 613.) Wilson argues that the

statements constituted prosecutorial misconduct because they were inflammatory and constituted outright character assaults.

> "This Court has repeatedly held that the prosecutor may refer to an accused in unfavorable terms, so long as the evidence warrants the use of such terms. *E.g.*, *Nicks v. State*, 521 So. 2d 1018, 1022-23 (Ala. Crim. App. 1987), affirmed, 521 So. 2d 1035 (Ala.), cert. denied, 487 U.S. 1241 (1988); *Barbee v. State*, 395 So. 2d 1128, 1134-35 (Ala.Cr.App.1981), and cases cited therein. *See also State v. Wilson–Bey*, 21 Conn. App. 162, 572 A.2d 372, cert. denied, 215 Conn. 806, 576 A.2d 537 (1990) (characterization of accused as 'peddling death' borne out by the evidence); *State v. Wiles*, 59 Ohio St.3d 71, 571 N.E.2d 97, 117 (1991) (reference to the accused as an 'ogre,' a 'man-eating monster,' a 'hideous brutish person,' and an 'animal' were supported by the evidence). While we do not condone the remarks, the characterization of the appellant as 'death' and 'death and destruction' were amply supported by the evidence."

McNair v. State, 653 So. 2d 320, 341 (Ala. Crim. App. 1992). Further,

> "'Questions of the propriety of argument of counsel are largely within the trial court's discretion, *McCullough v. State*, 357 So. 2d 397, 399 (Ala. Crim. App. 1978), and that court is given broad discretion in determining what is permissible argument. *Hurst v. State*, 397 So. 2d 203, 208 (Ala. Crim. App.), cert. denied, 397 So. 2d 208 (Ala. 1981). Moreover, this Court has stated that it will not reverse unless there has been an abuse of that discretion. *Miller v. State*, 431 So. 2d 586, 591 (Ala. Crim. App. 1983).'"

Pierce v. State, 576 So. 2d 236, 249 (Ala. Crim. App. 1990) (quoting *Bankhead v. State*, 585 So. 2d 97, 105 (Ala. Crim. App. 1989)).

Here, the evidence indicated that Wilson attacked Walker, a frail, 64-year-old man suffering from cancer, from behind with a baseball bat. Further, Dr. Enstice gave a conservative estimate of 114 contusions and

abrasions on Walker's body, 32 of which were on his head. Wilson also used a computer-mouse cord and, when the computer-mouse cord snapped, an extension cord to strangle Walker.

While this Court has viewed with disfavor similar uses of language like that used by the prosecutor here, it has also consistently held that when such language is supported by the evidence, it does not rise to the level of reversible error. Because the prosecutor's characterizations of Wilson were supported by the record, the circuit court did not abuse its discretion, much less commit plain error, in allowing the prosecutor's characterizations of Wilson.

Third, during closing arguments, the prosecutor brandished a baseball bat, swung the baseball bat, and asked the jury how long it would take to swing it 114 times. Wilson argues that the prosecutor's demonstration was a "theatrical tirade." (Wilson's brief, at 41-42.)

> "There is no rule of law which limits counsel in debate to mere articulation. Argument by means of illustration, such as exhibiting to the jury models, tools, weapons, implements, and the like, is a matter of every day practice, and the abuse of the utilization of such illustration is a matter for the trial court's discretion, not to be interfered with unless there has been an abuse of discretion. Accordingly, it has been recognized that an attorney may employ demonstrations during his or her argument if they are reasonably sustained by the evidence, and in a number of cases a demonstration by counsel during closing argument has been held proper." Jacob Stein, *Stein Closing Arguments* § 1:68 (2011-2012 ed.) (footnotes omitted). "Demonstrations and experiments are permitted or prohibited in the trial court's discretion." *Gobble v. State*, 104 So.3d 920, 961 (Ala. Crim. App. 2010) (quoting William A. Schroeder and Jerome A. Hoffman, *Alabama Evidence* § 12:25 (3d ed. 2006) (footnotes omitted)).

It was undisputed that Wilson attacked Walker with a baseball bat, and there was testimony from Dr. Enstice that Walker sustained at least 114 contusions and abrasions. Thus, the record contains sufficient evidence to sustain the prosecutor's demonstration during closing arguments.

For the foregoing reasons, Wilson has not met his burden to show that the prosecutor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process" or resulted in plain error. *Brown*, 11 So. 3d at 907 (citations and quotations omitted); Rule 45A, Ala. R. App. P. Therefore, Wilson is not entitled to any relief on these issues.

Wilson also argues that the prosecutor made improper appeals to the jurors' sympathies toward Walker. Specifically, Wilson cites instances when the State asked the jurors to imagine how Walker felt during the attack. (R. 614-16, 624.) Wilson argues that the State's most extreme argument was:

> "And Dewey would have been able if he were alive to get on this witness stand and say, that's the man that came in and robbed and burglarized my own home, but I can't get up here and speak to you, good people, because he splattered me all the way to eternity and back and tortured me and beat me and struck me and ran around, as I laid on the ground, I was in my house—why are you doing this? Quit hitting me. Leave me alone. I am elderly. What do you want from me?"

(R. 607-08.)

Initially, Wilson did not preserve this issue for appellate review. Although Wilson did object to some of the statements at issue, he did not do so on the ground that the State was making improper appeals to the jurors' sympathies. (R. 608, 614–16.) The statement of specific grounds of objection waives all grounds not specified. *Click v. State*, 695 So. 2d 209, 224 (Ala. Crim. App. 1996). Therefore, this issue will be reviewed for plain error only. Rule 45A, Ala. R. App. P.

Further, this Court has consistently held that appeals to jurors, asking them to imagine how a victim felt, do not rise to the level of plain error so long as those appeals are based on the evidence. *See Bush v. State*, 695 So. 2d 70, 135-36 (Ala. Crim. App. 1995); *Daniels v. State*, 650 So.2d 544, 560-61 (Ala.Crim.App.1994); *McNair v. State*, 653 So. 2d 320, 333-35 (Ala.Crim.App.1992). Here, the prosecutor's statement regarding what Walker might say is based on evidence establishing that

> Wilson attacked Walker and tortured him in an attempt to force Walker into relinquishing his property. *See* Part VII of this opinion, *see McCray v. State*, 88 So. 3d 1, 39-40 (Ala.Crim.App.2010) (holding that no error occurred by the prosecutor's relaying to the jury what the victim might say when the statements contained therein are based on the evidence presented at trial). Because the statements at issue were based on the evidence, the statements did not constitute plain error. Accordingly, this issue does not entitle Wilson to any relief.

Wilson, 142 So. 3d at 770-43 (footnote omitted).

184. Wilson has not shown, and cannot show, that the denial of relief on this claim in state court "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." 28 U.S.C. § 2254(d). Because Wilson has not shown that the Alabama courts decided this claim in a manner that was contrary to or involves an unreasonable application of clearly established federal law as determined by the Supreme Court, this Court should deny relief on this claim. A review of the ACCA's opinion demonstrates that the decision of the Alabama court was not an unreasonable one. Thus, according to the habeas statute, the application for a writ of habeas corpus before this Court "shall not be granted." 28 U.S.C. § 2254(d).

185. Without waiving the foregoing, in deciding this claim, the ACCA made findings of fact. Pursuant to 28 U.S.C. § 2254(e)(1), these fact-findings are presumed correct. Wilson is not entitled to an evidentiary hearing on this claim.

186. Without waiving the foregoing, to the extent that Wilson failed to develop the factual basis for this claim in state-court proceedings, he is not entitled to any further evidentiary hearing in this Court. His claim is not based on a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" or "a factual predicate that could not have been previously discovered through the exercise of due diligence," and the facts underlying the claims would not be sufficient to establish by clear and convincing evidence that but for the constitutional error alleged in this claim, no reasonable fact-finder would have found him guilty of capital murder. 28 U.S.C. § 2254(e)(2).

187. Without waiving the foregoing, the factual averments made in support of this claim are denied. The state court findings of fact constitute the proper factual basis for consideration of this claim.

C. Wilson's claim that the prosecutor impermissibly commented on his failure to testify.

188. In paragraphs 931-36, Wilson contends that the prosecutor impermissible commented on his failure to testify during closing arguments. The merits of his claim were addressed by the ACCA on direct appeal:

> Wilson next argues that during closing arguments in the guilt phase, the prosecutor improperly questioned him after he had exercised his Fifth Amendment right not to testify. Specifically, Wilson asserts that during the guilt-phase closing argument, the prosecutor "directly questioned Mr. Wilson in front of the jury…." (Wilson's brief, at 8.) According to

Wilson, "[b]y questioning [him] in front of the jury…[the prosecutor] violated [his] right to remain silent." (Wilson's brief, at 25.) Wilson further argues that the prosecutor's "direct confrontation of [him], at a time when [he had invoked his right not to testify and] was powerless to respond, exploited Mr. Wilson's decision not to take the stand" and constituted reversible error. (Wilson's brief, at 26.) This Court notes that Wilson did not object to the prosecutor's statements at trial; therefore, this issue will be reviewed for plain error only. Rule 45A, Ala. R. Crim. P.

Wilson bases his assertion that the prosecutor directly questioned and confronted him after he had invoked his right to remain silent on the following portion of the prosecutor's closing argument:

> "This is the back of his head, good people, that was crushed with the lacerations where the bleeding came from the scalp from the back where he was hit.
>
> "Oh, excuse me. From the statement, Mr. Wilson, you said you hit him accidentally. Accidentally.
>
> "What part of your body tells you to take this bat and swing it and hit somebody? It's the brain. The brain tells the body—it runs down through the nerves and the hands and tells you to swing that bat.
>
> "Accidentally. Accidentally."

(R. 606.)

This Court has explained that "[i]n judging a prosecutor's closing argument, the standard is whether the argument 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Phillips v. State*, 65 So. 3d 971, 1033 (Ala. Crim. App. 2010) (citations and quotations omitted). Further, "[a] prosecutor's statement must be viewed in the context of all of the evidence presented and in the context of the complete closing arguments to the jury." *Id.* (citations and quotations omitted). "Questions of the propriety of argument of counsel are largely within the trial court's discretion…[and this Court] will not reverse the judgment of the trial court unless there has been an abuse of that discretion." *Id.* (citations and quotations omitted).

The Court has further explained:

> "'A comment on the defendant's failure to testify is to be "scrupulously avoided." *Arthur v. State*, 575 So. 2d 1165, 1186 (Ala. Crim. App. 1990), cert. denied, 575 So. 2d 1191 (Ala. 1991). "Every time a prosecutor stresses a failure to present testimony, the facts and circumstances must be closely examined to see whether the defendant's right to remain silent has been violated." *Windsor v. State*, 593 So. 2d 87, 91 (Ala. Crim. App. 1991), quoting *Padgett v. State*, 45 Ala. App. 56, 223 So. 2d 597, 602 (1969). "In a case where there has been only an indirect reference to a defendant's failure to testify, in order for the comment to constitute reversible error, there must be a close identification of the defendant as the person who did not become a witness." *Windsor v. State*, supra, quoting, *Ex parte Williams*, 461 So.2d 852 (Ala.1984).
>
> "'Alabama law clearly holds that "[w]here there is the possibility that a prosecutor's comment could be understood by the jury as reference to failure of the defendant to testify, Art. I, § 6 [Const. of Alabama of 1901], is violated."' *Ex parte Wilson*, 571 So. 2d 1251, 1262 (Ala. 1990). However, "*a prosecutor may legitimately base his argument on the evidence of the appellant's statement" to the police. Hereford v. State*, 608 So.2d 439, 442 (Ala. Crim. App. 1992)…."Argument by the prosecution concerning omissions and inconsistencies in the defendant's version of the case is not improper." *Salter v. State*, 578 So. 2d 1092, 1096 (Ala. Crim. App. 1990), cert. denied, 578 So. 2d 1097 (Ala. 1991).'"

Phillips, 65 So. 3d at 1033 (quoting *Taylor v. State*, 808 So. 2d 1148, 1185-87 (Ala. Crim. App. 2000), quoting in part *Mosely v. State*, 628 So. 2d 1041, 1042 (Ala. Crim. App. 1993)). *See also Burgess v. State*, 827 So. 2d 134, 168 (Ala. Crim. App. 1998) ("It was not an impermissible comment on Burgess's right to remain silent for the prosecutor to question Burgess's truthfulness in making his statement.").

> Contrary to Wilson's assertions, the prosecutor did not question or confront him during closing arguments. Instead, the prosecutor addressed a portion of Wilson's statement in which Wilson told law-enforcement officers that he accidentally hit Walker in the head with the baseball bat. Specifically, after acknowledging for the jury that Wilson told the officers that he accidentally hit Walker, the prosecutor asked the jury the following rhetorical question: "What part of your body tells you to take this bat and swing it and hit somebody?" (R. 606.) Thereafter, in arguing that Wilson did have the requisite intent, the prosecutor answered his question saying, "It's the brain." *Id.* In other words, the prosecutor did not improperly question Wilson after he had invoked his right not to testify. Instead, the prosecutor permissibly argued that the jury could infer from the manner in which Walker was murdered that Wilson had the intent to murder Walker.
>
> Because Wilson has not established that the prosecutor's argument was improper, he has not met his burden to establish plain error. Therefore, Wilson is not entitled to any relief on this issue.

Wilson, 142 So. 3d at 759-61.

189. Wilson has not shown, and cannot show, that the denial of relief on this claim in state court "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." 28 U.S.C. § 2254(d). Because Wilson has not shown that the Alabama courts decided this claim in a manner that was contrary to or involves an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States, this Court should deny relief on this claim. A review of the opinion of the ACCA demonstrates that the decision of the Alabama

court was not an unreasonable one. Thus, according to the habeas statute, the application for a writ of habeas corpus before this Court "shall not be granted." 28 U.S.C. § 2254(d).

190. Without waiving the foregoing, in deciding this claim, the ACCA made findings of fact. Pursuant to 28 U.S.C. § 2254(e)(1), these fact findings are presumed correct. Wilson is not entitled to an evidentiary hearing on this claim.

191. Without waiving the foregoing, to the extent that Wilson failed to develop the factual basis for this claim in state-court proceedings, he is not entitled to any further evidentiary hearing in this Court. His claim is not based on a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" or "a factual predicate that could not have been previously discovered through the exercise of due diligence," and the facts underlying the claims would not be sufficient to establish by clear and convincing evidence that but for the constitutional error alleged in this claim, no reasonable fact-finder would have found him guilty of capital murder. 28 U.S.C. § 2254(e)(2).

192. Without waiving the foregoing, the factual averments made in support of this claim are denied. The state court findings of fact constitute the proper factual basis for consideration of this claim.

D. Wilson's claim that the prosecutor referenced codefendants' confessions.

193. In paragraphs 937-45, Wilson claims that the prosecutor impermissibly referenced "confessions of [his] co-defendants and alluded to their contents." (Am. Pet. ¶ 937.) Though this claim is included as a subclaim to his prosecutorial misconduct claim, it does not appear to actually allege prosecutorial misconduct. Rather, it appears to be an argument that his confession was not admissible because it was allegedly incomplete, and that the ACCA's ruling on the reliability of his incomplete statement was in error. The ACCA addressed the merits of his claim as follows:

> To the extent Wilson argues that the circuit court erroneously allowed the State to admit the recording of his statement because the State cannot meet its burden to establish that the statement was voluntarily given when the statement was not fully recorded, he has not met his burden to establish that plain error occurred.
>
> […]
>
> Considering the totality of the circumstances, the State presented sufficient evidence to establish the prerequisites to the admission of Wilson's statement. Investigator Luker testified that before Wilson gave his statement, Investigator Luker read Wilson his *Miranda* rights. Wilson did not appear to be under the influence of alcohol or drugs and appeared to understand his rights. Wilson signed the waiver-of-rights form. The form Wilson signed stated that he had read his rights, that he understood his rights, and that he waived those rights without being offered any promises or receiving any threats. Investigator Luker further testified that no one offered Wilson any promises or made any threats before or during Wilson's statement.

In addition to Investigator Luker's testimony, this Court has listened to the recorded portion of Wilson's statement. On the recording, Wilson states that he was read his rights and that he understood those rights. Wilson does not sound as though he was under the influence of any intoxicant. Further, Wilson states that he has voluntarily waived his rights. Finally, Wilson states that no one made any promises or threatened him in an attempt to force him to give his statement.

Based on the foregoing evidence indicating that Wilson was read his *Miranda* warnings, that he understood and voluntarily waived his *Miranda* rights, and that he chose to make a statement without any promises or threats, Wilson has not established that the admission of his statement resulted in any error, plain or otherwise. Therefore, Wilson is entitled to no relief on this claim.

To the extent Wilson argues that the recording of his confession was unreliable and misleading because the statement was not fully recorded, this argument is also without merit.

This Court has held that omissions in a recording of a statement do not render the recording inadmissible unless the omitted "'portions were "so substantial as to render the recording as a whole untrustworthy."'" *Revis v. State*, 101 So. 3d 247, 265 (Ala. Crim. App. 2011) (quoting *United States v. Greenfield*, 574 F.2d 305, 307 (5th Cir. 1978), quoting in turn *United States v. Avila*, 443 F.2d 792, 795 (5th Cir. 1971)). *See Blanton v. State*, 886 So.2d 850, 868 (Ala. Crim. App. 2003) (holding that inaudible or missing portions of a recording will not render the recording inadmissible when the missing portions do not appear to affect "the accuracy of the substance of the conversations or otherwise detract from the purpose for which the audiotapes were admitted"). The failure to record a part or parts of a statement will not render the recording of the statement inadmissible so long as the recorded portion "include[s] 'substantially' all of the 'pertinent conversations.'" *Revis*, 101 So. 3d at 264 (quoting *State v. Hester* (No. A-7130-03T4, November 14, 2006) (N.J. Super. A.D. 2006) (not reported in A.2d)).

Here, Investigator Luker testified that the statement Wilson made before Luker began recording did not differ from the recorded statement. That is, during the recorded portion of the statement, Wilson merely repeated information he had already provided to Luker.

> Investigator Luker also explained that Wilson did not say anything materially different after the recording stopped as compared to what was recorded. Additionally, this Court has listened to the recording of Wilson's statement, and there is no indication that the recording is unreliable or untrustworthy. Finally, Wilson has not pointed to any portion of the recording that he believes is inaccurate, unreliable, untrustworthy, or distorts the meaning of the confession. Consequently, Wilson has not established that the omitted portions of the statement rendered the statement, as a whole, untrustworthy and thus has not established that any error, much less plain error, resulted from admitting the recording. Therefore, Wilson is not entitled to any relief on this issue.

Wilson, 142 So. 3d at 764-65 (citation omitted).

194. Wilson has not shown, and cannot show, that the denial of relief on this claim in state court "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." 28 U.S.C. § 2254(d). Because Wilson has not shown that the Alabama courts decided this claim in a manner that was contrary to or involves an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States, this Court should deny relief on this claim. A review of the opinion of the ACCA demonstrates that the decision of the Alabama court was not an unreasonable one. Thus, according to the habeas statute, the application for a writ of habeas corpus before this Court "shall not be granted." 28 U.S.C. § 2254(d).

195. Without waiving the foregoing, in deciding this claim, the ACCA made findings of fact. Pursuant to 28 U.S.C. § 2254(e)(1), these fact findings are presumed correct. Wilson is not entitled to an evidentiary hearing on this claim.

196. Without waiving the foregoing, to the extent that Wilson failed to develop the factual basis for this claim in state-court proceedings, he is not entitled to any further evidentiary hearing in this Court. His claim is not based on a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" or "a factual predicate that could not have been previously discovered through the exercise of due diligence," and the facts underlying the claims would not be sufficient to establish by clear and convincing evidence that but for the constitutional error alleged in this claim, no reasonable fact-finder would have found him guilty of capital murder. 28 U.S.C. § 2254(e)(2).

197. Without waiving the foregoing, the factual averments made in support of this claim are denied. The state court findings of fact constitute the proper factual basis for consideration of this claim.

VIII. Wilson's penalty-phase prosecutorial misconduct claim.

In paragraphs 946-54, Wilson claims that prosecutorial misconduct occurred during the penalty phase of his trial. This claim contains two subclaims, which are answered separately below.

A. Wilson's claim that the prosecutor argued facts not in evidence.

198. In paragraphs 946-50, Wilson asserts that the prosecutor argued facts not in evidence during the penalty phase. This claim was addressed on direct appeal.

199. On direct appeal, the ACCA held:

> Wilson next argues that the prosecutor argued facts not in evidence during his closing argument in the penalty phase. Specifically, Wilson complains of the following: 1) the prosecutor's statement that Wilson or an accomplice drank Walker's milk and ate his candy bar after the murder; 2) the prosecutor's statement, "remember the pictures on the walls of his house, of his wife and his children"; and 3) the prosecutor's statement "that Dr. Enstice had done over a thousand autopsies in murder cases, and ... she concluded the injuries Mr. Walker suffered were up there at the top compared to other cases she had observed." (Wilson's brief, at 53–54) (citations and quotations omitted.) The State concedes that the prosecutor's comments were not specifically supported by evidence in the record. The State, however, argues that Wilson did not object to the statements on the ground that they were unsupported by the evidence; therefore, this Court should review them for plain error only. Rule 45A, Ala. R. Crim. P. The State further argues that the prosecutor's misstatements did not have an adverse affect on the jury's deliberations; therefore, Wilson cannot establish plain error. Rule 45A, Ala. R. App. P. This Court agrees.
>
> [….]
>
> First, Wilson correctly argues that the prosecutor improperly told the jury that after the murder, Wilson or Corley went into Wilson's kitchen, drank Wilson's milk, and ate Wilson's candy bar because that statement is not supported by evidence in the record. In making this statement, the prosecutor was attempting to show that Wilson and his accomplices were "cold and callous." Although there is no evidence in the record indicating that anyone drank Wilson's milk or ate his candy bar, there is ample evidence establishing that Wilson's behavior and his accomplices' behavior during and after the murder were unusual, cold, and callous.

The evidence presented at trial established that Wilson broke into Walker's home and viciously attacked him with a baseball bat, a computer-mouse cord, and an extension cord. During the attack, Walker sustained: 1) multiple fractures to the skull bones; 2) eight broken ribs; 3) a fractured sternum; 4) ligature marks on his neck; and 5) a contusion on his lung. After viciously attacking Walker, Wilson left Walker on the floor of his house to die. Later, Wilson and his accomplices returned to Walker's house many times. During one of those times, he and Corley went into Walker's house because Corley wanted to see Wilson's body. According to Wilson, Corley was excited by and a little thrilled with seeing Walker's body.

Based on this evidence, the jury must have been well aware that Walker's murder was vicious. Further, from this evidence, the jury must have inferred that both Wilson's and his accomplices' behavior after the murder was unusual, cold, and callous. Because there was more than sufficient evidence from which the jury could have inferred the aspect of the crime for which the prosecutor's improper comment was directed to show, this Court cannot say that the prosecutor's improper comment had an "unfair prejudicial impact on the jury's deliberations." *Ex parte Brown*, 11 So. 3d 933, 938 (Ala. 2008) (citations omitted). Therefore, Wilson has not established plain error. Rule 45A, Ala. R. App. P.

Second, Wilson correctly argues that the prosecutor should not have said, "[R]emember the pictures on the walls of his house, of his wife and his children," because there was no evidence establishing that the people in the photographs on Walker's walls were, in fact, his wife and children. However, viewing this comment in conjunction with all the evidence presented at trial; this Court cannot say that the comment had an "unfair prejudicial impact on the jury's deliberations." *Ex parte Brown*, 11 So. 3d at 938 (citations omitted).

It is important to note that the jury was informed that Walker had had a wife who had passed away before his murder. Further, this Court has reviewed the video of the crime scene. During a small portion of that video, family-type photographs are visible on the walls of Walker's house. The photographs depict, among other things, an adult woman and small children. Although there was no evidence establishing that the people in the photographs were Walker's wife and children, a reasonable inference from the fact that Walker had photographs of these

people on his wall is that they were people for whom Walker cared. Thus, the fact that he had family-type photographs of people on his wall establishes the point the prosecutor was attempting to make, *i.e.*, that Wilson "was not a 'human island,' but a unique individual whose murder had inevitably had a profound impact on [others]." *Ex parte Rieber*, 663 So.2d 999, 1005-06 (Ala. 1995).

Because the jury must have been well aware that Walker was not a human island, but instead would be missed by others, this Court cannot say that the prosecutor's improper comment "aversely affected the outcome of the trial." *McCray v. State*, 88 So.3d 1, 27 (Ala. Crim. App. 2010); *see also Ex parte Walker*, 972 So. 2d 737, 752 (Ala. 2007) (recognizing that the appellant has the burden to establish prejudice relating to an issue being reviewed for plain error); *Thomas v. State*, 824 So. 2d 1, 13 (Ala. Crim. App. 1999) (recognizing that to rise to the level of plain error, an error must have affected the outcome of the trial). Therefore, Wilson has not established that the prosecutor's comment resulted in plain error. Rule 45A, Ala. R. App. P.

Finally, Wilson argues that the prosecutor should not have stated that Dr. Enstice testified that she had done over 1,000 autopsies in murder cases and that she concluded the injuries Mr. Walker suffered were "at the top" compared to other cases she had observed. This Court has compared the prosecutor's statement with Dr. Enstice's testimony and agrees that the prosecutor's statement was not entirely correct; however, the Court is convinced that the minor differences in the prosecutor's statement and Dr. Enstice's testimony did not have an "unfair prejudicial impact on the jury's deliberations." *Ex parte Brown*, 11 So. 3d at 938 (citations omitted). For instance, Wilson correctly points out that Dr. Enstice never stated that she had done over 1,000 autopsies *in murder cases;* however, she did testify that she had done over 1,000 autopsies without specifying whether those autopsies involved a murder. Further, Dr. Enstice never stated that "the injuries Mr. Walker suffered were up there at the top compared to other cases she had observed." (Wilson brief, at 54.) However, when asked whether the number of injuries Walker had received was large or small when compared to the number of injuries she had seen during other autopsies, Dr. Enstice testified that she has "seen several other cases and actually performed autopsies on cases where there were large numbers of injuries[,] [a]nd…Walker certainly had *a very large number* of

> injuries." Dr. Enstice also testified that many of Walker's injuries would have been very painful.
>
> Although the prosecutor's statement was not totally consistent with Dr. Enstice's testimony, the gist of his statement was correct—that Dr. Enstice was experienced and Walker suffered many painful injuries during the attack. Because the jury was aware that Dr. Enstice was experienced and that Wilson had inflicted a very large number of very painful injuries on Walker, this Court cannot say that the prosecutor's slight error in recounting Dr. Enstice's testimony "aversely affected the outcome of the trial." *McCray*, 88 So. 3d at 27; *see also Ex parte Walker*, 972 So. 2d at 752 (recognizing that the appellant has the burden to establish prejudice relating to an issue being reviewed for plain error); *Thomas*, 824 So. 2d at 13 (recognizing that to rise to the level of plain error, an error must have affected the outcome of the trial). Therefore, Wilson has not established that the prosecutor's comment resulted in plain error. Rule 45A, Ala. R. App. P.

Wilson, 142 So. 3d at 780-83 (citations edited or omitted).

200. Wilson has not shown, and cannot show, that the denial of relief on this claim in state court "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." 28 U.S.C. § 2254(d). Because Wilson has not shown that the Alabama courts decided this claim in a manner that was contrary to or involves an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States, this Court should deny relief on this claim. A review of the opinion of the ACCA demonstrates that the decision of the Alabama

court was not an unreasonable one. Thus, according to the habeas statute, the application for a writ of habeas corpus before this Court "shall not be granted." 28 U.S.C. § 2254(d).

201. Without waiving the foregoing, in deciding this claim, the ACCA made findings of fact. Pursuant to 28 U.S.C. § 2254(e)(1), these fact-findings are presumed correct. Wilson is not entitled to an evidentiary hearing on this claim.

202. Without waiving the foregoing, to the extent that Wilson failed to develop the factual basis for this claim in state-court proceedings, he is not entitled to any further evidentiary hearing in this Court. His claim is not based on a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" or "a factual predicate that could not have been previously discovered through the exercise of due diligence," and the facts underlying the claims would not be sufficient to establish by clear and convincing evidence that but for the constitutional error alleged in this claim, no reasonable fact-finder would have found him guilty of capital murder. 28 U.S.C. § 2254(e)(2).

203. Without waiving the foregoing, the factual averments made in support of this claim are denied. The state-court findings of fact constitute the proper factual basis for consideration of this claim.

B. Wilson's claim that the prosecutor impermissibly argued for the death penalty.

204. In paragraphs 951-54, Wilson argues that the prosecutor impermissibly argued for the death penalty when he urged the jury to "do what's right." (Am. Pet. ¶ 951.) This claim was addressed on direct appeal. The ACCA held:

> Wilson alleges the prosecutor made improper comments during its penalty-phase closing argument in violation of state and federal law.
>
> [….]
>
> Wilson contends that during the penalty-phase closing arguments the prosecutor impermissibly informed the jurors that they had a duty to impose a death sentence. Specifically, the prosecutor stated:
>
> > "I ask you to go back there and go over the evidence as the judge charges you, and come back in like I told you on voir dire, have the courage and the strength—come back in here and look at him and say, we, the jury, in this case, tell you, [Judge], our decision on both of these cases is death, for what the crime you committed against the peace and dignity of the State of Alabama and a 64-year-old man…."
>
> Shortly thereafter, the prosecutor stated: "It's hard. It's not easy. But this case calls for death. Do what's right."
>
> Wilson contends these comments improperly informed the jury it was its duty to return a death sentence and that the comments suggested that voting for a death sentence was both courageous and virtuous. Wilson also argues these comments "severely undermined the reliability of Mr. Wilson's sentencing determination, and also denied him due process in violation of the Fifth, Sixth, Eight[h], and Fourteenth Amendments to the United States Constitution, the Alabama Constitution, and Alabama law." (Wilson's brief, at 49-50.) Wilson did not raise these arguments at trial; therefore, this issue will be reviewed for plain error only. Rule 45A, Ala. R. App. P.
>
> When addressing this issue previously, this Court stated:

> "Of course, a prosecutor seeking a death penalty will argue that the aggravating factors outweigh the mitigating factors and that the defendant should receive the death penalty. There is no plain error here."

McWhorter v. State, 781 So. 2d 257, 321 (Ala. Crim. App. 1999) (quoting *Smith v. State*, 727 So. 2d 147, 171 (Ala. Crim. App. 1998)). Further, a prosecutor's statement indicating that under the law and the facts of the case, the jury has a duty to recommend a death sentence is not impermissible because the comment does not urge the jury to sentence the defendant to death without regard for the facts or law. *Cf. McWhorter v. State*, 781 So. 2d 257, 321 (Ala. Crim. App. 1999). Rather, such comments urge the jury to apply the facts to the law and to impose a death sentence. *Id.*; *Windsor v. State*, 89 So. 3d 805, 829 (Ala. Crim. App. 2011) (upholding prosecutor's comment that "[t]he right thing to do is sentence Harvey Lee Windsor to death").

Here, when the comments are read in context, the prosecutor was not urging the jury to sentence Wilson to death regardless of the facts or the law. Instead, the prosecutor informed the jury that when it applies the facts to the law, the appropriate sentence is death. He then urged the jury to be courageous and to do the right thing, which was apply the facts to the law and sentence Wilson to death.

Because the prosecutor did not urge the jury to disregard the facts and the law when recommending a sentence, but instead, argued that a death sentence is appropriate under the facts and the law, no error, much less plain error, occurred. Rule 45A, Ala. R. App. P. Therefore, Wilson is not entitled to any relief on this issue.

Wilson, 142 So. 3d at 775-77 (citations edited or omitted).

205. Wilson has not shown, and cannot show, that the denial of relief on this claim in state court "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on

an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." 28 U.S.C. § 2254(d). Because Wilson has not shown that the Alabama courts decided this claim in a manner that was contrary to or involves an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States, this Court should deny relief on this claim. A review of the ACCA's opinion demonstrates that the decision of the Alabama court was not an unreasonable one. Thus, according to the habeas statute, the application for a writ of habeas corpus before this Court "shall not be granted." 28 U.S.C. § 2254(d).

206. Without waiving the foregoing, in deciding this claim, the ACCA made findings of fact. Pursuant to 28 U.S.C. § 2254(e)(1), these fact-findings are presumed correct. Wilson is not entitled to an evidentiary hearing on this claim.

207. Without waiving the foregoing, to the extent that Wilson failed to develop the factual basis for this claim in state-court proceedings, he is not entitled to any further evidentiary hearing in this Court. His claim is not based on a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" or "a factual predicate that could not have been previously discovered through the exercise of due diligence," and the facts underlying the claims would not be sufficient to establish by clear and convincing evidence that but for the constitutional error alleged in this claim, no

reasonable fact-finder would have found him guilty of capital murder. 28 U.S.C. § 2254(e)(2).

208. Without waiving the foregoing, the factual averments made in support of this claim are denied. The state court findings of fact constitute the proper factual basis for consideration of this claim.

IX. Wilson's claim that the trial court erroneously instructed the jury during the penalty phase.

A. Wilson's claim that the trial court omitted any instruction informing the jury that it could consider a mitigating factor even if not all jurors agreed.

209. In paragraphs 955-59, Wilson argues that the trial court erred when it "ever informed the jurors that…they could consider mitigating circumstances even if they did not all agree on its existence." (Am. Pet. ¶ 955.) This claim was raised and addressed on direct appeal. Specifically, the ACCA found:

> Wilson argues that the circuit court erred by leading the jury to believe it could not consider a mitigating factor unless the entire jury agreed upon its existence. Wilson does not assert that the jury was improperly instructed that it could not consider a mitigating factor unless the entire jury agreed upon its existence; rather, he argues that the circuit court led the jury to believe it had to be unanimous because the circuit court failed to instruct the jury otherwise.
>
> "As we stated in *Tyson v. State*, 784 So. 2d 328 (Ala. Crim. App.), aff'd, 784 So.2d 357 (Ala. 2000):
>
> > "'The appellate courts of this state have consistently held, since the United States Supreme Court's decision in *Mills* [*v. Maryland*, 486 U.S. 367 (1988)], that as long

> as there is no "reasonable likelihood or probability that the jurors believed that they were required to agree unanimously on the existence of any particular mitigating circumstances," there is no error in the trial court's instruction on mitigating circumstances. *Freeman* [*v. State*], 776 So. 2d [160] at 195 [(Ala. Crim. App. 1999)]. *See also Ex parte Martin,* 548 So. 2d 496 (Ala. 1989), cert. denied, 493 U.S. 970 (1989); *Williams v. State,* 710 So. 2d 1276 (Ala. Crim. App. 1996), aff'd, 710 So.2d 1350 (Ala. 1997), cert. denied, 524 U.S. 929 (1998); *Brown v. State,* 686 So. 2d 385 (Ala. Crim. App. 1995); *Rieber v. State,* 663 So. 2d 985 (Ala. Crim. App. 1994), aff'd, 663 So. 2d 999 (Ala.), cert. denied, 516 U.S. 995 (1995); *Holladay v. State,* 629 So. 2d 673 (Ala. Crim. App. 1992), cert. denied, 510 U.S. 1171 (1994).'
>
> "784 So. 2d at 351."

Calhoun v. State, 932 So. 2d 923, 972 (Ala. Crim. App. 2005).

Wilson has failed to cite any authority to support his argument that the circuit court is required to affirmatively instruct the jury that it need not be unanimous in finding mitigation. Moreover, during its penalty-phase instructions, the circuit court stated:

> "So in order to find an aggravating circumstance, you must find it unanimously, beyond a reasonable doubt. *A mitigating circumstance merely has to be raised for you to consider it.* And the—any dispute on a mitigating circumstance has to be disproved by the State by a preponderance of the evidence."

This Court has reviewed the circuit court's instructions on mitigating circumstances and holds that there is no "reasonable likelihood or probability that the jurors believed that they were required to agree

> unanimously on the existence of any particular mitigating circumstances." *Calhoun*, 932 So. 2d at 972. Therefore, there was no error in the circuit court's instructions. Accordingly, this issue does not entitle Wilson to any relief.

Wilson, 142 So. 3d at 797-98 (citations edited or omitted).

210. Wilson has not shown, and cannot show, that the denial of relief on this claim in state court "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." 28 U.S.C. § 2254(d). Because Wilson has not shown that the Alabama courts decided this claim in a manner that was contrary to or involves an unreasonable application of clearly established federal law as determined by the Supreme Court, this Court should deny relief on this claim. A review of the ACCA's opinion demonstrates that the decision of the Alabama court was not an unreasonable one. Thus, according to the habeas statute, the application for a writ of habeas corpus before this Court "shall not be granted." 28 U.S.C. § 2254(d).

211. Without waiving the foregoing, in deciding this claim, the ACCA made findings of fact. Under § 2254(e)(1), these fact-findings are presumed correct. Wilson is not entitled to an evidentiary hearing on this claim.

212. Without waiving the foregoing, to the extent that Wilson failed to develop the factual basis for this claim in state-court proceedings, he is not entitled

to any further evidentiary hearing in this Court. His claim is not based on a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" or "a factual predicate that could not have been previously discovered through the exercise of due diligence," and the facts underlying the claims would not be sufficient to establish by clear and convincing evidence that but for the constitutional error alleged in this claim, no reasonable fact-finder would have found him guilty of capital murder. 28 U.S.C. § 2254(e)(2).

213. Without waiving the foregoing, the factual averments made in support of this claim are denied. The state-court findings of fact constitute the proper factual basis for consideration of this claim.

B. Wilson's claim that the trial court improperly diminished the jury's role in sentencing.

214. In paragraphs 960-63, Wilson alleges that the ACCA unreasonably applied *Caldwell v. Mississippi*, 472 U.S. 320, 320-29 (1985), when it reviewed the trial court's statement, "And in the sentencing phase, the procedure is generally the same as in the guilt phase, except the sentencing phase is not near as involved." (Am. Pet. ¶ 960 (citing DE76-10:36).) This claim was raised and addressed on direct appeal.

215. When the penalty phase began, the trial court informed the jury:

Ladies and gentlemen, we are going to begin the sentencing phase of

> the case. And in the sentencing phase, the procedure is generally the same as in the guilt phase, except the sentencing phase is not near as involved. In the sentencing phase, both sides will, in a few moments, make opening statements to you. Similar, but not quite as lengthy, I don't think, as in the guilt phase. Then, after opening statements, the State would put on evidence concerning aggravating circumstances.
>
> And in the sentencing phase, the State is limited to eight statutory areas of aggravating circumstances…..
>
> Now, after the evidence is put on, then there will be brief closing arguments where each side highlights their–the issues and matters they have presented. And then, after the closing arguments, I will give you a jury instruction concerning the—your role in the sentencing phase, after which you will go out and deliberate which of the two verdicts your number selects.

(DE76-10:36-37.)

216. The ACCA found that the complained of statement, when "[t]aken in context, … merely inform[ed] the jury that the penalty phase would not be as lengthy as the guilt phase. This statement did not, as Wilson suggests, diminished the jury's role in a way that made it feel less responsible than it should for sentencing." *Wilson*, 142 So. 3d at 789.

217. Moreover, the record on direct appeal reflects that when the parties rested, the trial court properly then instructed the jury that its role was to recommend a punishment. (*See, e.g.*, DE76-10:143 ("In making your recommendation of what punishment should be, you must determine whether any aggravating circumstances exist. And if so, you must determine whether any mitigating circumstances exist."); *id.* at 144 ("The law of this state provides a list of aggravating circumstances why

may be considered by the jury in recommending punishment"); *id.* at 145 ("then the jury must recommend that the defendant's punishment be life without parole"). The court instructed the jury, "It is your responsibility to determine the facts and recommend the punishment." (*Id.* at 154.)

218. Wilson has not shown, and cannot show, that the denial of relief on this claim in state court "resulted in a decision that was contrary to, or involved an unreasonable application of" *Caldwell*. 28 U.S.C. § 2254(d)(1); *see also Carr v. Schofield*, 364 F.3d 1246, 1258 (11th Cir. 2004) (quoting *Davis v. Singletary*, 119 F.3d 1471, 1482 (11th Cir. 1997)) ("references to and descriptions of the jury's sentencing verdict…as an advisory one, as a recommendation to the judge, and of the judge as the final sentencing authority" do not constitute *Caldwell* violations where they "accurately characterize the jury's and judge's sentencing roles under [state] law."). Because Wilson has not shown that the Alabama courts decided this claim in a manner that was contrary to or involves an unreasonable application of clearly established federal law as determined by the Supreme Court, this Court should deny relief on this claim. A review of the ACCA's opinion demonstrates that the decision of the Alabama court was not an unreasonable one. Thus, according to the habeas statute, the application for a writ of habeas corpus before this Court "shall not be granted." 28 U.S.C. § 2254(d).

219. Without waiving the foregoing, in deciding this claim, the ACCA made

findings of fact. Under § 2254(e)(1), these fact findings are presumed correct. Wilson is not entitled to an evidentiary hearing on this claim.

220. Without waiving the foregoing, to the extent that Wilson failed to develop the factual basis for this claim in state-court proceedings, he is not entitled to any further evidentiary hearing in this Court. His claim is not based on a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" or "a factual predicate that could not have been previously discovered through the exercise of due diligence," and the facts underlying the claims would not be sufficient to establish by clear and convincing evidence that but for the constitutional error alleged in this claim, no reasonable fact-finder would have found him guilty of capital murder. 28 U.S.C. § 2254(e)(2).

221. Without waiving the foregoing, the factual averments made in support of this claim are denied. The state court findings of fact constitute the proper factual basis for consideration of this claim.

X. Wilson's claim that the trial court did not make findings of fact regarding non-statutory mitigating factors presented through school records.

222. In paragraphs 964-75, Wilson claims for the first time that that the trial court erred when it failed to make specific, enumerated findings regarding the non-statutory mitigating circumstances that trial counsel presented through his school records. This claim was not raised at trial or on direct appeal.

223. As this claim was not presented to the state courts, it is procedurally defaulted. 28 U.S.C. § 2254(c); *see Henderson*, 353 F.3d at 891 ("A state prisoner seeking federal habeas relief cannot raise a federal constitutional claim in federal court unless he first properly raised the issue in the state courts."). By failing to raise this claim at trial or on direct review, Wilson failed to "give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan*, 526 U.S. at 845; *see Dill*, 371 F.3d at 1303. As a result, Wilson has not met the exhaustion requirement of § 2254(b)(1), and he is procedurally barred from raising this claim in a federal habeas petition. *See Pope*, 358 F.3d at 853 ("[The petitioner] has failed to exhaust all of his available state remedies. Consequently, [he] is procedurally barred from raising his [unexhausted claims]…in a federal § 2254 petition."); *see also* 28 U.S.C. § 2254(c); *O'Sullivan*, 526 U.S. at 842; *Mancill*, 545 F.3d at 940; *Dill*, 371 F.3d at 1303; *Pruitt*, 348 F.3d at 1358-59. Dismissal of his habeas petition to allow Wilson to present this claim fairly as a federal claim in state court now would be futile because he would be barred from raising it in state court under Rule 32.2(c) of the Alabama Rules of Criminal Procedure (statute of limitations bar) and Rule 32.2(b) of the Alabama Rules of Criminal Procedure (successive petition bar). Thus, because any state remedy with respect to these claims is procedurally barred by the state procedural rules noted above, Wilson's claim is procedurally defaulted from habeas

review

224. Without waiving the foregoing, to the extent that Wilson is attempting to raise any challenge to the sufficiency of the sentencing order, the claim fails to state a valid claim for relief under § 2254. *See, e.g.*, *Mayle*, 545 U.S. at 655; *Tejada*, 941 F.2d at 1559; *Lindsey*, 875 F.2d at 1513.

225. Without waiving the foregoing, to the extent that Wilson failed to develop the factual basis for this claim in state-court proceedings, he is not entitled to any further evidentiary hearing in this Court. His claim is not based on a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" or "a factual predicate that could not have been previously discovered through the exercise of due diligence," and the facts underlying the claims would not be sufficient to establish by clear and convincing evidence that but for the constitutional error alleged in this claim, no reasonable fact-finder would have found him guilty of capital murder. 28 U.S.C. § 2254(e)(2).

226. Without waiving the foregoing, the factual averments made in support of this claim are denied.

XI. Wilson's claim that his death sentence violates *Ring v. Arizona*.

227. In paragraphs 976-88, Wilson asserts that his death sentence was obtained in violation of *Ring v. Arizona*, 536 U.S. 584 (2002). This claim was raised

on direct appeal. The ACCA found:

> Wilson next argues that his sentence of death must be vacated in light of *Ring v. Arizona*, 536 U.S. 584 (2002), and state and federal law. He further argues that the Supreme Court of the United States' decision in *Ring* invalidated Alabama's capital-sentencing scheme.
>
> In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the United States Supreme Court held that any fact that increases the maximum punishment must be presented to a jury and proven beyond a reasonable doubt. This holding was extended to death-penalty cases in *Ring v. Arizona*.
>
> Here, the jury specifically found beyond a reasonable doubt that the capital offense was committed while Wilson was committing the offenses of burglary and robbery. *See* § 13A-5-49(4), Ala. Code 1975. The finding of these aggravating circumstances made Wilson eligible to receive the death penalty. Therefore, the requirements of *Ring* were satisfied. *See also* Annot., *Application of Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona, 536 U.S. 584 (2002) to State Death Penalty Proceedings*, 110 A.L.R.5th 1 (2003).
>
> Wilson's argument that *Ring* invalidated Alabama's capital-sentencing scheme is also without merit. In *Ex parte Waldrop*, 859 So.2d 1181 (Ala. 2002), the Alabama Supreme Court held:
>
> > "[W]hen a defendant is found guilty of a capital offense, 'any aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentencing hearing.' Ala. Code 1975, § 13A-5-45(e)….
> >
> > "Because the jury convicted Waldrop of two counts of murder during a robbery in the first degree, a violation of Ala. Code 1975, § 13A-5-40(a)(2), the statutory aggravating circumstance of committing a capital offense while engaged in the commission of a robbery, Ala. Code 1975, § 13A-5-49(4), was 'proven beyond a reasonable doubt.' Ala. Code 1975, § 13A-5-45(e); Ala. Code 1975,

> § 13A-5-50. Only one aggravating circumstance must exist in order to impose a sentence of death. Ala. Code 1975, § 13A-5-45(f). Thus, in Waldrop's case, the jury, and not the trial judge, determined the existence of the 'aggravating circumstance necessary for imposition of the death penalty.' *Ring* [*v. Arizona*], 536 U.S. [584,] 609 [(2002)]. Therefore, the findings reflected in the jury's verdict alone exposed Waldrop to a range of punishment that had as its maximum the death penalty. This is all *Ring* and *Apprendi* [*v. New Jersey*, 530 U.S. 466 (2000),] require." 859 So.2d at 1188 (footnote omitted). The Alabama Supreme Court reaffirmed its holding in *Ex parte Waldrop* in *Ex parte Martin*, 931 So. 2d 759, 770 (Ala. 2004).

> Here, as in *Waldrop*, the jury, not the circuit court, determined beyond a reasonable doubt that aggravating circumstances existed. Therefore, the requirements of *Ring* were satisfied. Accordingly, this issue does not entitle Wilson to relief.

Wilson, 142 So. 3d at 802-03.

228. During his Rule 32 proceeding, Wilson reasserted his claim, arguing that the Supreme Court's decision in *Hurst v. Florida*, 577 U.S. 92 (2016), gave rise to a new claim. The ACCA again addressed his claim on the merits, holding:

> Wilson asserted in an amendment to his petition that the holding of the Supreme Court of the United States in *Hurst v. Florida*, 136 S. Ct. 616 (2016), rendered Alabama's capital sentencing scheme unconstitutional. In *Hurst*, the Supreme Court of the United States held Florida's capital-sentencing scheme unconstitutional. Wilson asserted that Alabama's capital-sentencing scheme is indistinguishable from Florida's on the salient components. According to Wilson, neither Florida nor Alabama require the jury to make the critical findings necessary to impose the death penalty, but rather leave such findings to the trial judge; Florida and Alabama utilize an advisory jury verdict; and neither Florida nor Alabama juries make specific factual findings with regard to the existence of mitigating or aggravating circumstances.

Also, Wilson pleaded that there were case-specific reasons his sentence of death was unconstitutional under *Hurst*. Specifically, Wilson pleaded that there was no evidence in the record to prove that the jury found the existence of the aggravator that the murder was especially heinous, atrocious, or cruel compared to other capital offenses. As a result, Wilson asserted, the aggravator was invalid and, because the trial court considered it, his sentence of death is likewise invalid. The circuit court dismissed this claim as being without merit.

The constitutionality of Alabama's sentencing scheme in light of *Hurst* was squarely addressed by the Alabama Supreme Court:

> "Bohannon contends that, in light of *Hurst*, Alabama's capital-sentencing scheme, like Florida's, is unconstitutional because, he says, in Alabama a jury does not make 'the critical findings necessary to impose the death penalty.' 577 U.S. ___, 136 S. Ct. at 622. He maintains that *Hurst* requires that the jury not only determine the existence of the aggravating circumstance that makes a defendant death-eligible but also determine that the existing aggravating circumstance outweighs any existing mitigating circumstances before a death sentence is constitutional. Bohannon reasons that because in Alabama the judge, when imposing a sentence of death, makes a finding of the existence of an aggravating circumstance independent of the jury's fact-finding and makes an independent determination that the aggravating circumstance or circumstances outweigh the mitigating circumstance or circumstances found to exist, the resulting death sentence is unconstitutional. We disagree.
>
> "Our reading of *Apprendi* [*v. New Jersey*, 530 U.S. 466 (2000)], *Ring* [*v. Arizona*, 536 U.S. 584 (2002)], and *Hurst* leads us to the conclusion that Alabama's capital-sentencing scheme is consistent with the Sixth Amendment. As previously recognized, *Apprendi* holds that any fact that elevates a defendant's sentence above the range established by a jury's verdict must be determined by the jury. *Ring* holds that the Sixth Amendment right to a jury trial requires that a jury 'find an aggravating

circumstance necessary for imposition of the death penalty.' *Ring*, 536 U.S. at 585. *Hurst* applies *Ring* and reiterates that a jury, not a judge, must find the existence of an aggravating factor to make a defendant death-eligible. *Ring* and *Hurst* require only that the jury find the existence of the aggravating factor that makes a defendant eligible for the death penalty–the plain language in those cases requires nothing more and nothing less.

Accordingly, because in Alabama a jury, not the judge, determines by a unanimous verdict the critical finding that an aggravating circumstance exists beyond a reasonable doubt to make a defendant death-eligible, Alabama's capital-sentencing scheme does not violate the Sixth Amendment.

"Moreover, *Hurst* does not address the process of weighing the aggravating and mitigating circumstances or suggest that the jury must conduct the weighing process to satisfy the Sixth Amendment. This Court rejected that argument in *Ex parte Waldrop*, holding that the Sixth Amendment 'do[es] not require that a jury weigh the aggravating circumstances and the mitigating circumstances' because, rather than being 'a factual determination,' the weighing process is 'a moral or legal judgment that takes into account a theoretically limitless set of facts.' 859 So. 2d at 1190, 1189. *Hurst* focuses on the jury's factual finding of the existence of an aggravating circumstance to make a defendant death-eligible; it does not mention the jury's weighing of the aggravating and mitigating circumstances. The United States Supreme Court's holding in *Hurst* was based on an application, not an expansion, of *Apprendi* and *Ring*; consequently, no reason exists to disturb our decision in *Ex parte Waldrop* with regard to the weighing process. Furthermore, nothing in our review of *Apprendi*, *Ring*, and *Hurst* leads us to conclude that in *Hurst* the United States Supreme Court held that the Sixth Amendment requires that a jury impose a capital sentence. *Apprendi* expressly stated that trial courts may 'exercise discretion–taking into consideration

> various factors relating both to offense and offender–in imposing a judgment within the range prescribed by statute.' 530 U.S. at 481. *Hurst* does not disturb this holding.
>
> "Bohannon's argument that the United States Supreme Court's overruling in *Hurst* of *Spaziano v. Florida*, 468 U.S. 447 (1984), and *Hildwin v. Florida*, 490 U.S. 638 (1989), which upheld Florida's capital-sentencing scheme against constitutional challenges, impacts the constitutionality of Alabama's capital-sentencing scheme is not persuasive. In *Hurst*, the United States Supreme Court specifically stated: 'The decisions [in *Spaziano* and *Hildwin*] are overruled to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty.' *Hurst*, 577 U.S. ___, 136 S. Ct. at 624 (emphasis added). Because in Alabama a jury, not a judge, makes the finding of the existence of an aggravating circumstance that makes a capital defendant eligible for a sentence of death, Alabama's capital-sentencing scheme is not unconstitutional on this basis." *Ex parte Bohannon*, 222 So. 3d 525, 532-33 (Ala. 2016).

> Here, by virtue of its verdict in the guilt-phase the jury unanimously found the existence of aggravating circumstances that made Wilson eligible for imposition of the death penalty. "[T]he plain language in [*Ring* and *Hurst*] requires nothing more and nothing less." *Bohannon*, 222 So. 3d 532. As such, Wilson's claim is without merit and the circuit court did not err in dismissing it. Rule 32.7(d), Ala. R. Crim. P.

(DE76-33:62-66.)

229. Wilson has not shown, and cannot show, that the denial of relief on this claim in state court "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on

an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." 28 U.S.C. § 2254(d). Because Wilson has not shown that the Alabama courts decided this claim in a manner that was contrary to or involves an unreasonable application of clearly established federal law as determined by the Supreme Court, this Court should deny relief on this claim. A review of the ACCA's opinion demonstrates that the decision of the Alabama court was not an unreasonable one. Thus, according to the habeas statute, the application for a writ of habeas corpus before this Court "shall not be granted." 28 U.S.C. § 2254(d).

230. Without waiving the foregoing, in deciding this claim, the ACCA made findings of fact. Under § 2254(e)(1), these fact-findings are presumed correct. Wilson is not entitled to an evidentiary hearing on this claim.

231. Without waiving the foregoing, to the extent that Wilson failed to develop the factual basis for this claim in state-court proceedings, he is not entitled to any further evidentiary hearing in this Court. His claim is not based on a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" or "a factual predicate that could not have been previously discovered through the exercise of due diligence," and the facts underlying the claims would not be sufficient to establish by clear and convincing evidence that but for the constitutional error alleged in this claim, no reasonable fact-finder would have found him guilty of capital murder. 28 U.S.C.

§ 2254(e)(2).

232. Without waiving the foregoing, the factual averments made in support of this claim are denied. The state-court findings of fact constitute the proper factual basis for consideration of this claim.

XII. Wilson's claim that the cumulative effect of all trial-level errors violated his right to due process.

233. In paragraphs 989-1000, Wilson claims that the "harm from all the [above alleged] errors combined to completely undercut the fairness of the proceedings and render the result of [his] trial and sentencing fatally unreliable." (Am. Pet. ¶ 992.) He encourages this Court to apply a cumulative error analysis to the errors he alleges occurred during *both* the guilt and penalty phases and directs this Court to the Tenth Circuit's decision in *Cargle v. Mullin*, 317 F.3d 1196, 1207 (10th Cir. 2003). He alleges that "the ACCA's ruling on all of [his] claims combined is an unreasonable application of [United States] Supreme Court precedent respecting holistic review[.]" (Am. Pet. ¶ 1000.)

234. Wilson does not identify what "clearly established federal law" is applicable in this instance. *White v. Woodall*, 572 U.S. 415, 419 (2014) ("[C]learly established Federal law for purposes of § 2254(d)(1) includes only the holdings, as opposed to the dicta, of this Court's decisions.") (cleaned up); *Putman v. Head*, 268 F.3d 1223, 1241 (11th Cir. 2001) ("[I]n the habeas context, clearly established federal law "refers to the holdings, as opposed to the dicta, of [the Supreme Court's]

decisions as of the time of the relevant state court decision.") (citation omitted).

235. Wilson raised a trial-level cumulative error claim in his Rule 32 proceeding. (*See* DE76-34:97-98.) His claim was limited to error resulting from alleged ineffective assistance of counsel and alleged *Brady* violation surrounding the letter purportedly written by Corley. (*Id.*) Wilson's attempts to add new factual allegations as part of his analysis—alleged prosecutorial misconduct of "conjuring up a false tale" and "twisting" Wilson's statement to police (Am. Pet. ¶ 991)—were not presented on direct appeal. (*See* DE76-34:97-98.) "AEDPA precludes a habeas petitioner from relying on new factual allegations." *Morris*, 2024 WL 3800386, at *124; *Powell*, 602 F.3d at 1273 n.8 ("Powell has made additional allegations and submitted more evidence in support of his claim of ineffective assistance of counsel in his federal habeas petition. In accordance with AEDPA, however, we do not consider such supplemental allegations or evidence when reviewing the reasonableness of the state court's resolution of this claim, which was based on the allegations before it."). Because Wilson failed to raise these allegations in state court, his new factual allegations are unexhausted and procedurally defaulted from habeas review. *Cullen*, 563 U.S. at 181 ("[R]eview under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits."); *McKiver*, 991 F.3d at 1367 ("It would contravene AEDPA to allow a petitioner to overcome an adverse state-court decision with new evidence introduced in a federal

habeas court and reviewed by that court int eh first instance effectively de novo.") (cleaned up). Thus, Wilson's new allegations are not properly before this Court.

236. Further, without waiving the above, the ACCA found that "there is no cumulative effect of trial counsel's ineffectiveness to consider" and that "[b]ecause the substantive *Brady* claim raised by Wilson was procedurally barred, there [wa]s nothing to add to this analysis." (DE76-33:59.) Wilson has not shown that the ACCA's decision was contrary to or involved an unreasonable application of clearly established federal law or was based on an unreasonable determination of the facts.

237. Without waiving the foregoing, the state courts made findings of fact. Under § 2254(e)(1), those fact-findings are presumed correct.

238. Without waiving the foregoing, to the extent that Wilson failed to develop the factual basis for this claim in state-court proceedings, he is not entitled to any further evidentiary hearing in this Court. His claim is not based on a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" or "a factual predicate that could not have been previously discovered through the exercise of due diligence," and the facts underlying the claims would not be sufficient to establish by clear and convincing evidence that but for the constitutional error alleged in this claim, no reasonable fact-finder would have found him guilty of capital murder. 28 U.S.C. § 2254(e)(2).

239. Without waiving the foregoing, the factual averments made in support of this claim are denied. The state-court findings of fact constitute the proper factual basis for consideration of this claim.

MISCELLANEOUS PROVISIONS

240. The responses herein are based on Respondent's understanding of the claims alleged in Wilson's first amended petition. If Wilson is attempting to raise any other claims, Respondent requests a more definite statement. Respondent further requests the opportunity to respond if Wilson amends his claims in any way.

241. All of the averments in Wilson's first amended petition that are not expressly admitted are denied.

242. The responses and defenses that are set forth in Respondent's answer are pleaded separately and severally.

RESPONSE TO PRAYER FOR RELIEF

243. Wilson is not entitled to any further discovery or an evidentiary hearing.

244. The claims in Wilson's first amended petition can be addressed sufficiently in briefs. The interests of justice will best be served by full briefing on the issues rather than further unnecessary delay for discovery and a hearing.

245. Wilson is not entitled to habeas relief. His capital murder conviction and death sentence were constitutionally obtained. His petition should be denied.

Respectfully submitted,

Steve Marshall
Attorney General

s/ Audrey Jordan
Audrey Jordan
Assistant Attorney General
Counsel of Record *

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of July 2025, I electronically filed the foregoing with the Clerk of the Court using the ECF system, which will serve electronic notice upon counsel of record.

s/Audrey Jordan
Audrey Jordan
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