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

DAVID PHILLIP WILSON,	)	
	)	
Petitioner,	)	
	)	
v.	)	CASE NO. 1:19-CV-284-RAH-CSC
	)	
JOHN Q. HAMM, Commissioner, Alabama Department of Corrections,	)	*** DEATH PENALTY CASE ***
	)	
	)	
Respondent.	)	

REPLY TO RESPONDENT'S ANSWER TO PETITIONER'S FIRST AMENDED PETITION

Petitioner David Wilson, through undersigned counsel, respectfully submits this Reply to Respondent's Answer to Petitioner's First Amended Petition (Doc. 129), pursuant to this Court's Order dated June 24, 2025 (Doc. 128), and Rule 5 of the Federal Rules Governing § 2254 Cases in the United States District Courts.

TABLE OF CONTENTS

JURISDICTION AND VENUE

1. The parties agree that this Court has jurisdiction to hear Mr. Wilson's petition for writ of habeas corpus pursuant to 28 U.S.C § 2254(a) and that venue is proper in the Middle District of Alabama. *See* Doc. 114, ¶¶ 1-4; Doc. 129, ¶ 2.

FACTS

2. Respondent refers to the victim in this case as "Lewis." *See* Doc. 129, ¶ 11 ("Wilson was twenty years old when he murdered Lewis"). That is factually incorrect. The victim's name is Mr. Dewey Walker. Doc. 114, ¶ 5.

3. In ¶¶ 132 and 147 of his Answer, Respondent twice refers to Mr. Wilson having pled guilty in this case. *See* Doc. 129, p. 71, ¶ 132 ("to the extent that Mr. Wilson is attempting to raise any challenge to the voluntariness of his guilty plea"); and Doc. 129, p. 85, ¶ 147 ("to the extent that Mr. Wilson is attempting to raise any challenge to the voluntariness of his guilty plea"). That is factually incorrect. Mr. Wilson did not plead guilty to capital murder. Mr. Wilson went to trial, and his jury returned a guilty verdict on two counts of capital murder. Doc. 114, ¶ 11.

4. In light of these errors, Petitioner realleges the factual allegations from the Amended Petition, which reference specific documents from the state and federal record.

AGREED UPON FACTS

5. The following agreed upon facts comprise factual allegations in Mr. Wilson's amended petition that are expressly admitted by Respondent in his Answer.

6. On April 13, 2004, the body of Mr. Dewey Walker was found dead in a house located at 127 Shield Court, Dothan, Alabama, in Houston County. A van with stereo electronics equipment was missing. An investigation determined that a homicide had been committed during a burglary and/or robbery. The State of Alabama conducted an autopsy of Mr. Walker's body and concluded that Mr. Walker had suffered strangulation and died of multiple blunt-trauma injuries. Doc. 114, ¶ 5; Doc 129, ¶ 4.[1]

7. Four persons were involved in the crime: (1) Catherine Nicole Corley, who went by the alias "Kittie Corley"; (2) Michael Jackson; (3) Matthew Marsh; and (4) Petitioner David Phillip Wilson. The police approached Marsh, Corley, and Jackson first, then David Wilson. Doc. 114, ¶ 7; Doc. 129 ¶¶ 4[2] and 9.

8. The trial court found that David Wilson was only 20 years old at the time and had "no significant history of prior criminal activity." Doc. 114, ¶ 17; Doc. 129, ¶¶ 11 and 13.

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[1] Admitted to the extent the facts alleged are consistent with facts found by the Alabama Court of Criminal Appeals. Doc. 129, ¶ 4. These allegations are consistent with the ACCA opinion.

[2] Again, these allegations are consistent with the ACCA opinion. Doc. 129, ¶ 4.

9. David Wilson was the only one of the four suspects who went to trial on capital murder charges. Doc. 114, ¶ 7; Doc. 129 ¶¶ 8-9. Mr. Wilson's three co-defendants pled guilty. Doc. 114, ¶ 12; Doc. 129, ¶ 8.

10. Kittie Corley was charged with capital murder during the course of a burglary and burglary in the second degree. Two weeks after Mr. Wilson's trial, on December 21, 2007, Corley pled guilty to murder and burglary in the second degree. She was sentenced to 25 years of imprisonment on the murder and 20 years on the burglary, to run concurrently. Doc. 118-8 (Appendix W, Alabama SJIS Case Detail, Catherine Nicole Corley (redacted)); Doc. 114-23 (unredacted version of Appendix W on file with the Court); Doc. 114, ¶ 13; Doc. 129, ¶ 9.

11. Matthew Marsh was charged with capital murder during the course of a robbery and receiving stolen property in the first degree. Less than two weeks after Mr. Wilson's trial, on December 18, 2007, Marsh pled guilty to murder and receiving stolen property in the first degree, and was sentenced to 25 years and 20 years of imprisonment, respectively, to run concurrently. Doc. 118-9 (Appendix X, Alabama SJIS Case Detail, Matthew Marsh (redacted)); Doc. 114-24 (unredacted version of Appendix X on file with the Court); Doc. 114, ¶ 14; Doc. 129, ¶ 9.

12. Michael Jackson was charged with capital murder during the course of a robbery and receiving stolen property in the first degree. Jackson pled guilty to murder and receiving stolen property in the first degree, and was sentenced to 23

years and 10 years of imprisonment, respectively, to run concurrently. Doc. 118-10 (Appendix Y, Alabama SJIS Case Detail, Michael Jackson (redacted)); Doc. 114-25 (unredacted version of Appendix Y on file with the Court); Doc. 114, ¶ 15; Doc. 129, ¶ 9.

A. The Corley Letter

13. There is a handwritten letter purportedly written by codefendant Kittie Corley on August 10, 2004 (hereinafter "the Corley letter"). The front side of the Corley letter is date-stamped August 31, 2004. Doc. 114, ¶¶ 22-23; Doc. 129, ¶ 15.

14. United States Magistrate Judge Charles S. Coody wrote in his opinion order dated June 21, 2023, that "The purpose of the letter 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." Doc. 79, p. 2; Doc. 114, ¶ 26; Doc. 129, ¶ 18.

15. Respondent stated in a motions hearing in the Rule 32 proceedings that the Corley letter is "an unsworn document that was produced at the behest of another inmate… it was produced in the hopes of obtaining an attorney…" Doc. 76-30 at PDF 82-83, Bates 5129-5130; Doc. 114, ¶ 27; Doc. 129, ¶ 19.

16. Magistrate Judge Coody determined in his order on June 21, 2023, "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.'" Doc 129, ¶ 5.

17. United States District Judge W. Keith Watkins found, in the Court's opinion dated March 27, 2023, that there were "[s]everal known, simple truths about the Corley letter," including the fact that "*[p]rosecutors possessed the letter before trial, investigated its origin, and concluded that Corley was its author*." Doc. 114, ¶ 28; Doc. 129, ¶ 20 (italics in original).

18. Respondent disclosed to Mr. Wilson under court order the front and back of the Corley letter as soon as it was ordered to produce the Corley letter by this Court. Doc. 129, ¶ 21; *see* Docs. 67 and 79 for the Court orders.

19. Magistrate Judge Coody summarized the frontside of the Corley letter as follows[3]: "Corley claims that she and petitioner entered Walker's home early one morning intent on stealing stereo equipment. Their accomplice, Matthew Marsh, waited outside the home in a truck. Walker was not at home when they entered. They were in the home for about an hour before Walker arrived and began yelling at Corley about calling the police. Corley froze; petitioner approached Walker from behind and began strangling him with an extension cord. When this failed to subdue Walker, Corley hit him with the bat 'till he fell.' With Walker thus neutralized,

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[3] Admitted to the extent it accurately presents Magistrate Judge Coody's findings. Doc. 129 ¶ 23. These are his findings.

Corley and petitioner 'loaded up all [they] could find' and spent a few days removing items from Walker's home. Corley 'pawned everything we got, split the money 3 ways.' She threw the baseball bat in a dumpster. It was, in her words, simply 'Dewey's time to go.' She also claims to have had 'sex adventures' in Walker's home but declines to explain what that means because 'that ain't no one's business.'" Doc. 79 at 3; Doc 114, ¶ 31; Doc 129, ¶ 23.

20. The frontside of the Corley letter reads, in its entirety[4]:

> Dear Sir
>
> My name is Catherine Nicole Corley & I am involved in 2 murders I am in jail for conspiracy to commit murder & 2nd degree burglary. Did I kill anyone I with David my boy friend & Matt Marsh a friend late one night we sat around talking. We needed some money. Old Dewey's name came up we knew he had a lot of stereo equip in a van at his house, so early next morning we went to Dewey's. Me & David went in, was not hard to get in the house Matt stayed in the truck. We took a baseball bat with us Dewey was not at home. I went in one room, David went in another room. About an hour later I heard Dewey hollering saying he was going to call the cops, he was hollering at me. I froze where I was David slipped up behind Dewey and put an extension cord Around his neck, Dewey would not fall. I did not know what to do so I grabbed the baseball bat & hit Dewey with it till he fell. David & I loaded up all we could find We were there a few days taking things out. I pawned everything we got, split the money 3 ways. We took Dewey's van also – About one week later we got caught. I threw baseball bat in trash dumpster.

[4] Admitted to the extent it accurately reflects the content of the letter. Doc 129, ¶ 24. The Corley letter reproduced here was transcribed by a Certified Court Reporter, Lane C. Butler, and is a true reflection of the document. *See* Doc. 114-1 and 114-2 (Appendices A and B).

can I plead insanity? I am on medications, lots of them. Was I on medications then – no but I needed them.

It was Dewey's time to go

This story is true, only thing I left out was the sex adventures at Dewey's & that ain't no one's business.

Story on other side is true also If I do not hear from you I know you did not want to take my case. Roll of the dice

Respectfully

Nicole

08-10-04

P.S. My nickname is Kittie

See Doc. 114-1 and 114-2 (Appendices A and B); Doc. 114, ¶ 32; Doc. 129, ¶ 24.

21. The backside of the Corley letter contains details about Kittie Corley's involvement in the earlier murder of C.J. Hatfield. On the back side, Kittie Corley confesses to being part of a violent drug trafficking gang that engaged in murder; to possession of the murder weapon; to being the intimate partner of one of the gang's leaders called "Bam Bam" (like the sound of a gun going off twice); to knowing who killed Mr. Hatfield; to knowing all the intimate details of the drug trafficking enterprise and everything that they planned to do; to covering up the murder; and to suffering from a mental health disorder. Doc. 114, ¶ 33; Doc. 129, ¶ 24.

22. The back side of the Corley letter reads, in its entirety[5]:

> C.J. Hatfield was murdered that's true, but David Stuckey did not do it. C.J. got 3 bullets in him from a gun I bought for David. When call came in from David about what C.J. wanted to do (take the money and say they were robbed) I rode up with Bam Bam & Tank. Bam Bam told me to go sit in truck where C.J. & David were & stay there. Shortly David came over & got in with me. I could see Bam Bam raise the pistol and fire, I did not know he was firing at C.J. till I saw C.J. go down. Bam Bam told me not to talk or he will kill my child and me. If David talks Bam Bam will kill me or my child or both of us. So David is in jail for something he did not do & he will die for something he did not do & I can not help him and I will not help him. He is safer in jail then [sic] on the street. I can never testify & I will never testify even if I get this death penalty. If Bam Bam does not kill me one of his friends will. C.J. was a runner as was David for Mexican weed and coke & for drug boys in Dothan. They were coming back from a drop in Atlanta, Ga. to Bankhead [illegible]. David is afraid of Bam Bam as is everyone else.
>
> Can the cops get me for with holding evidence? Bam Bam will follow through on his promises & threats. I have seen him in action before & I know how bad it will be for me & my child.
>
> Whoever is going to copy this letter maybe you should only copy the first one & Not this one. If an attorney will help me he may not want to help me on 2 & I am only charged with this one & frankly I don't know what the fuck I am writing this for, No one is going to help me I will plead insanity & I will get out of it. Will I help David *No*.
>
> Respectfully
>
> Nicole
>
> 08-10-04

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[5] Admitted to the extent the facts reproduced here accurately reflect the letter. Doc 129, ¶ 24. The back of the letter reproduced here was transcribed by a Certified Court Reporter, Lane C. Butler, and is an accurate reflection of the letter. See Appendices C & D.

See Docs. 114-3 and 114-4 (Appendices C and D); Doc. 114, ¶ 34; Doc. 129, ¶ 24.

B. Inconsistencies Between the Corley Letter and Corley Police Statement

23. Starting at 5:20 AM, Kittie Corley gave a recorded police statement to officers Jason Devane and Frank Meredith. Corley's police statement is in the state record at Doc. 76-24 at PDF 2533, Bates 3866-3874 (hereinafter referred to as "Corley police statement"). Doc. 114, ¶ 51; Doc 129, ¶ 31.[6]

24. In her police statement, Corley stated she "and Matt, Michael, and David were talking about fixing up Matthew's Geo, trying to make it look more up to date cause Matthew didn't like how it looked." Doc. 76-24 at PDF 26, Bates 3867. The conversation turned to Chris Walker's van, which contained several pieces of stereo and electronics equipment. Corley said that Matthew Marsh and David Wilson then decided to get the TV screen that Marsh wanted, "not [on] a definite date they just decided to do it." Doc. 76-24 at PDF 27, Bates 3868; Doc. 114, ¶ 52; Doc. 129, ¶ 31.

25. Corley admitted to the police that the day of the burglary of Dewey Walker's home, she entered the home with David Wilson. She explained that when

[6] Respondent admits ¶¶ 51-58 of the Amended Petition to the extent that they accurately reflect the content of the police statement marked Exhibit 7 and labeled "Catherine Corley statement to police" in Wilson's Rule 32 proceeding. Doc. 129, ¶ 31. The allegations in this paragraph and the following in this section are mostly verbatim from the Corley police statement and so accurately reflect the document.

she got to the Walker residence, "I saw David in the glass door and I saw the Geo and David told me to go around to the side door ah, which I had to find. It was right on the wooden planks that looks like they were building" […] "a deck or or a garage or extra room or something. And he opened the door and told me get in. And told me to step through ah, the wall it ah, got the words for that" […] "It's one they put up on like trailers and stuff. Ah, I made a comment that my fat ass wasn't gone fit through that hole. And stepped through and I was in a bedroom." Doc. 76-24 at PDF 27-28, Bates 3868-3869. Doc. 114, ¶ 53; Doc. 129, ¶ 31.

26. Corley told the police that David Wilson was the person who struck Mr. Walker with a bat and that, after that, he told her "we got to check for keys to make sure we have the van keys," to which Corley "was like well, already in here, fuck it." Doc. 76-24 at PDF 29-30, Bates 3870-3871; Doc. 114, ¶ 54; Doc. 129, ¶ 31.

27. Corley said she and David Wilson walked around the Walker residence looking for van keys and found several sets of keys. She said that as they were leaving, Mr. Wilson "was like well I want to see if the, what key opens the van doors, I was like it's got to be these, it was a set of black keys ah, that had the black plastic on the top and it had the unlock key on it. He was like no those are his dad's. I said here. I handed him those keys I said that's more than likely it. I said here here's all, a whole bunch of them mixed up they're like two key chains that has this, what look like house keys or you know little master lock keys on it. And I went behind the van.

I walked through some sticks and stuff that's like a little chicken wire thing. I walked to the van or walked to the car. I got in and I sat down. I cronk [sic] up the car and I heard the alarm. David said well I got the, I got it unlocked. And I remember his saying that he took his gloves off and he opened the van door without his gloves and he was gonna have to go back and wipe his prints off. He goes well I got it unlocked all I have to do now is figure out how to get the buttons…" Doc. 76-24 at PDF 30, Bates 3871; Doc. 114, ¶ 55; Doc. 129, ¶ 31.

28. Corley told the police that she and David Wilson "went straight back to Matt's." Doc. 76-24 at PDF 31, Bates 3872; Doc. 114, ¶ 56; Doc. 129, ¶ 31.

29. In that statement, Corley said that when they split the property taken from the Walker residence, "David handed the laptop to Matt. He said this is what you wanted." Doc. 76-24 at PDF 31, Bates 3872; Doc. 114, ¶ 57; Doc. 129, ¶ 31.

30. Corley's taped police statement ended at 5:42 a.m. on April 14, 2004. Doc. 76-24 at PDF 33, Bates 3874; Doc. 114, ¶ 58; Doc. 129, ¶ 31.

C. The Discovery of the Corley Letter

31. The frontside of the Corley letter bears an August 31, 2004 date stamp. Doc. 114, ¶ 62; Doc. 129, ¶ 33.

32. A police report—an excerpt marked Exhibit 4 and labeled "Dothan Police Department reports" in Mr. Wilson's Rule 32 proceedings (hereinafter called "the police report")—reflects that law enforcement spoke with Mr. Wilson and Kittie

Corley, references the arrest of Michael Jackson, David Wilson, Kittie Corley, and Matthew Marsh, and notes 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." Doc. 76-24 at PDF 11-17, Bates 3852-58. "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 nickname is Kittie.'" Doc. 76-24 at PDF 16, Bates 3857. 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.; Doc. 114, ¶ 63; Doc. 129, ¶ 30.

33. On September 2, 2004, the chief investigator of the Walker murder, Sgt. Tony Luker, met with District Attorney Douglas Valeska and attorney Kaylia Lane, who was then representing Ms. Joan Vroblick, a woman incarcerated in the Houston County jail. Doc. 76-24 at PDF 16, Bates 3857 (Police Report by Tony Luker generated on March 22, 2006). During this meeting, Ms. Lane identified the Corley

letter as a letter turned over to her by her client, Joan Ann Vroblick, written by Vroblick's cellmate, Kittie Corley, which, according to Sgt. Luker, "contained details of the murder of Dewey Walker which only the perpetrators would have known," and "described how the writer hit Mr. Walker with a baseball bat until he fell." *Id.*; Doc. 114, ¶ 63; Doc. 129, ¶ 34.[7]

34. Sgt. Luker notes, in his March 22, 2006 police report, that he interviewed Ms. Vroblick on September 9, 2004, and Ms. Vroblick confirmed the letter turned over by her attorney to Luker was in fact written by Kittie Corley. Doc. 76-24 at PDF 16, Bates 3857; Doc. 114, ¶ 64; Doc. 129, ¶ 34.

35. On September 30, 2004, according to his police report, Sgt. Luker searched Corley's jail cell and acquired handwriting samples that were, by her own admission, written by Ms. Corley herself. Doc. 76-24 at PDF 16-17, Bates 3857-3858. Among the handwriting samples acquired by Sgt. Luker in this search was the "Dearest David" letter produced by Respondent to Mr. Wilson on December 7, 2023. *See* Doc. 114-9 (Appendix I, Kittie Corley's "Dearest David" letter); Doc. 114-10 (Appendix J, Certified Court Reporter transcription of the letter); Doc. 114, ¶ 65; Doc. 129, ¶ 34.

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[7] Admitted to the extent that they are consistent with the excerpts marked Exhibit 4 and labelled "Dothan Police Department reports" and the documents marked Exhibit 8 in Wilson's Rule 32 proceeding. Doc. 76-24 at PDF 13, 24-32, Bates 3854, 3865-73; Doc. 129, ¶ 34. The allegations in this paragraph and the next in this section are consistent with those documents.

36. In the “Dearest David” letter, Corley takes greater responsibility for the Walker murder than in her police statement, admits to being under the influence prior to the murder, apologizes to Mr. Wilson for her role in his detention, and implies an intimate relationship with Mr. Wilson. *See* Docs. 114-9 and 114-10 (Appendices I and J); Doc. 114, ¶ 66; Doc. 129, ¶ 34.

37. Sgt. Luker compared Corley’s handwriting samples (which he purposefully seized during his search of her jail cell) and concluded that the Corley letter was written by Kittie Corley: “After comparing the hand written letter turned over to me from Kaylia Lane 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.” Doc. 76-24 at PDF 17, Bates 3858; Doc. 114, ¶ 67; Doc. 129, ¶ 34.

D. The Handwriting Expert Report

38. The state record from Mr. Wilson’s Rule 32 proceeding contains a letter dated January 12, 2007, from Gale Bolsover regarding “whether the questioned entries appearing on Exhibits Q-1-1 and Q-1-2 were written by Nicole Corley (K-1-1 thru K-1-11, K-1-14 thru K-1-24)” (hereinafter referred to as the “handwriting expert report” and appended to the First Amended Petition as Appendix T). Doc. 114-20; Doc. 129, ¶ 16.

39. On January 12, 2007, a U.S.P.S. handwriting expert, Gale Bolsover, filed a handwriting expert report concerning the Corley letter. The handwriting

expert concluded that, in her expert opinion, Kittie Corley wrote the Corley letter. She stated that "Nicole Corley (K-1) probably wrote the questioned entries appearing on Exhibit Q-1-1 (two-sided letter)." Doc. 76-24 at PDF 37, Bates 3878; *see* Doc. 114-20, Appendix T; Doc. 114, ¶ 70; Doc. 129, ¶ 34.[8]

B. Interrogations of Kittie Corley on the C.J. Hatfield Murder

40. Kittie Corley gave two other statements to police regarding the murder of C.J. Hatfield: a January 29, 2005 police interrogation (Doc. 114-5 (Appendix E) and Doc. 114-6 (Appendix F)) and a March 24, 2005 police interrogation (Doc. 114-7 (Appendix G) and Doc. 114-8 (Appendix H)). Those two police statements were produced to Mr. Wilson during this federal habeas corpus litigation. Doc. 114, ¶ 38; Doc. 129, ¶ 28.[9]

41. Based on those police interrogations of Kittie Corley dated January 29, 2005 and March 24, 2005, which were not produced to Mr. Wilson until December 7, 2023, Corley made statements to the police that corroborated the information on the back of the Corley letter, the extent of Corley's involvement in drug trafficking

[8] Respondent admitted ¶ 70 of Doc. 114 to the extent that it is consistent with the excerpts marked Exhibit 4 and labelled "Dothan Police Department reports" and the documents marked Exhibit 8 in Wilson's Rule 32 proceeding. Doc, 76-24 at PDF 13, 24-32, Bates 3854, 3865-73; Doc. 129, ¶ 34. This paragraph is mostly a verbatim restatement of those documents.

[9] Insofar as Respondent contends here and elsewhere in his Answer that certain documents are not part of the state-court record, Mr. Wilson refers the Court to the discussion in Claim I *infra* to the effect that *Cullen v. Pinsholster*, 563 U.S. 170 (2011) does not prevent this Court from considering downstream evidence of a *Brady* violation.

and violent crime in Dothan, and Corley's involvement in the Hatfield murder. *See* Doc. 114-5 through Doc. 114-8 (Appendices E, F, G, and H); Doc. 114, ¶ 68; Doc. 129, ¶ 34.[10]

42. At no time during those two police interrogations did Kittie Corley deny writing the Corley letter; to the contrary, she confirmed most of what was in the Corley letter during those interrogations. *See* Table of Correspondences Between Corley Letter and 2005 Police Interrogations in Doc. 114, ¶ 289; Doc. 114, ¶ 69; Doc. 129, ¶ 34.[11]

C. David Wilson's Police Statement

43. Starting at 5:02 AM, in another interrogation room, David Wilson was interrogated by Sergeant Tony Luker and Corporal Mike Etress. Doc. 76-3 at PDF 115, Bates 517. This statement was not fully recorded (Doc. 76-8 at PDF 127, Bates 1533); however, the recorded portion of the statement was played to the jury at trial and entered into evidence. Doc. 76-8 at PDF 162-165, Bates 1568-1571. A transcript

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[10] Respondent admitted ¶ 68 and 69 of the amended petition to the extent that they are consistent with the excerpts marked Exhibit 4 and labelled "Dothan Police Department reports" and the documents marked Exhibit 8 in Wilson's Rule 32 proceeding. Doc. 76-24 at PDF 13, 24-32, Bates 3854, 3865-73; Doc. 129, ¶ 34. This paragraph and the next are consistent with those documents.

[11] Again, admitted to the extent that they are consistent with the excerpts marked Exhibit 4 and labelled "Dothan Police Department reports" and the documents marked Exhibit 8 in Wilson's Rule 32 proceeding. Doc. 76-24 at PDF 13, 24-32, Bates 3854, 3865-73; Doc. 129, ¶ 34. The Table of Correspondences at Doc. 114, ¶ 289 is consistent with those documents.

of the statement was also admitted into evidence. Doc. 76-8 at PDF 177, Bates 1583; Doc. 114, ¶ 59; Doc. 129, ¶ 32.[12]

44. In his police interrogation, Mr. Wilson admitted to striking Dewey Walker once while attempting to disarm him of a knife, and to choking him with an extension cord until he "passed out" in order to subdue him. Doc. 76-3 at PDF 122-124, Bates 524-526. Mr. Wilson also stated that Mr. Walker struck his head on the corner of a wall when he fell. Doc. 76-3 at PDF 122-123, Bates 524-525. These were the only injuries described by Mr. Wilson in his statement. Mr. Wilson stated that before leaving Walker's house, he checked for and felt Mr. Walker's pulse, and Mr. Walker appeared to be breathing. Doc. 76-3 at PDF 124-125, Bates 526-527. Mr. Wilson maintained that he did not, intentionally or unintentionally, kill Mr. Walker. Doc. 114, ¶ 60; Doc. 129, ¶ 32.

45. Mr. Wilson told the police that Kittie Corley was inside Mr. Walker's home. Doc. 76-3 at PDF 127-128, Bates 529-530. He did not tell the police what she did, but told the police that Corley acted strangely: "she, she was, she was kind of I don't know what was her, what her, she seem like she said she got a little thrilled with it or some… something like that. She said she guess she was excited I don't

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[12] Admitted to the extent that it accurately reflects the state court record on direct appeal, no specific citation in Answer. Doc. 129, ¶ 32. The allegations in this paragraph and the following accurately reflect the state court record and are mostly verbatim accounts from Mr. Wilson's police statement.

[know] what was up with her." Doc. 76-3 at PDF 127, Bates 529. Mr. Wilson said, "I asked her if she was ok. She said yeah sure. Cause she use, cause she use to do stuff like that or something like that. I don't know exactly what was up with her, what her story is. Cause she's got in some weird cult thing." Doc. 76-3 at PDF 128, Bates 530; Doc. 114, ¶ 61; Doc. 129, ¶ 32.

AGREED UPON PROCEDURAL FACTS

46. The following agreed upon procedural facts comprise factual allegations in Mr. Wilson's amended petition that are expressly admitted by Respondent in his Answer.

47. Petitioner David Wilson was arrested on April 14, 2004. Doc. 76-2 at PDF 179, Bates 397; Doc. 114, ¶ 71; Doc. 129, ¶ 35.

48. Attorneys Matthew Lamere and Valerie Judah were appointed to represent him. Doc. 76-1 at PDF 15, Bates 15; Doc. 114, ¶ 72; Doc. 129, ¶ 36.

49. On June 18, 2004, a Houston County grand jury indicted Mr. Wilson on two counts of capital murder: Murder during a Burglary, Ala. Code 1975, § 13A-5-40(a)(4) (Houston County Case No. CC-04-1120), and Murder during a Robbery, Ala. Code 1975, § 13A-5-40(a)(2) (Houston County Case No. CC-04-1121). Doc. 76-1 at PDF 34-7, Bates 34-37; Doc. 114, ¶ 73; Doc. 129, ¶ 37.

50. Mr. Wilson was arraigned on October 12, 2004, and pled not guilty to both charges. Doc. 76-1 at PDF 23, Bates 23. He was denied youthful offender status on the same day. *Id.*; Doc. 114, ¶ 74; Doc. 129, ¶ 37.

51. Attorneys Judah and Lamere did not visit Mr. Wilson at the ADOC facilities. Doc. 76-24 at PDF 73, Bates 3914 (Judah attorney fee declaration showing mileage for five visits to client, each billed at only six miles); Doc. 76-24 at PDF 85, Bates 3926 (Lamere attorney fee declaration showing one visit to client in 2004); Doc. 114, ¶ 76; Doc. 129, ¶ 39.[13]

52. On August 21, 2006, attorney Judah moved to withdraw. Doc. 76-1 at PDF 65, Bates 65. A hearing was held on the motion to withdraw on November 14, 2006, at which time attorney Lamere also moved to withdraw. Doc. 76-11 at PDF 53, 55, Bates 2052, 2054. The court granted their requests and appointed Scott Hedeen and Ginger Emfinger to replace them. Doc. 76-11 at PDF 57, Bates 2056; Doc. 76-1 at PDF 69, Bates 69; Doc. 114, ¶ 77; Doc. 129, ¶ 40.

53. Trial began on December 3, 2007. Doc. 76-6 at PDF 143, Bates 1148. Kittie Corley was not called to testify at trial, nor were Michael Jackson or Matthew

[13] Respondent admits to the extent it is consistent with the "content of document marked Exhibit 4 [sic] and labeled 'Attorney Fee Declaration for Valerie Judah from the clerk's file for Houston County Case No. CC-04-1120.'" Doc. 76-24 at PDF 71-9, Bates 3912-20; Doc. 129, ¶ 39. This is consistent with the document, Exhibit 13 to the Rule 32 Petition labelled "Attorney Fee Declaration for Valerie Judah from the clerk's file for Houston County Case No. CC-04-1120."

Marsh. Doc. 76-6 at PDF 145-146, Bates 1150-1151 (index listing trial witnesses); Doc. 114, ¶ 79; Doc. 129, ¶ 42.

54. At the guilt phase, defense counsel waived closing argument. Doc. 76-9 at PDF 173-174, Bates 1780-1781; Doc. 114, ¶ 80; Doc. 129, ¶ 42.

55. The jury convicted Mr. Wilson of both counts of capital murder on December 5, 2007. Doc. 76-2 at PDF 170-171, Bates 370-371; Doc. 114, ¶ 81; Doc. 129, ¶ 42.

56. Following a 15-minute break, a jury penalty phase hearing was held. Doc. 114, ¶ 82; Doc. 129, ¶ 42.

57. At the penalty phase, the prosecution opened with a statement respecting the aggravating circumstances it would seek to prove. One of these was a prior conviction for attempted escape while in jail awaiting trial. Doc. 76-10 at PDF 37-38, Bates 1846-1847. The court noted that Mr. Wilson's attempted escape conviction did not qualify under any of the enumerated aggravating circumstances. Doc. 114, ¶ 83; Doc. 129, ¶ 43.

58. At the penalty phase, defense counsel called Mr. Wilson's mother, Linda Wilson, and a neighbor, Bonnie Anders, and admitted as an exhibit Mr. Wilson's school records. Doc. 114, ¶ 84; Doc. 129, ¶ 44.

59. Two jurors voted for life. The jury returned a 10-to-2 verdict in favor of death. Doc. 76-2 at PDF 172, Bates 372; Doc. 114, ¶ 89; Doc. 129, ¶ 46. On

January 8, 2008, during the judge sentencing hearing, defense counsel did not call any witnesses. The state court sentenced Mr. Wilson to death. Doc. 76-10 at PDF 186, Bates 1995; Doc. 114, ¶ 90; Doc. 129, ¶ 46.

60. A timely appeal was taken to the Alabama Court of Criminal Appeals ("ACCA"). Ala.Ct.Crim.App. Case No. CR-07-0684. New counsel, attorneys Brandon J. Buskey and Alicia D'Addario, were appointed to represent Mr. Wilson. Appellate counsel raised a claim under *Batson v. Kentucky,* 476 U.S. 79 (1986). Doc. 114, ¶ 91; Doc. 129, ¶ 47.

A. The *Batson* Remand

61. The ACCA remanded Mr. Wilson's case to the state trial court for a hearing to determine if the prosecution violated *Batson v. Kentucky*, 476 U.S. 79 (1986). *Wilson v. State*, 142 So. 3d 732, 747-48 (Ala. Crim. App. 2010) (hereinafter referred to as "*Wilson I*"). Counsel for Mr. Wilson challenged the trial court's findings regarding three jurors: Jehl Dawsey, Darran Williams, and James Collins. *Id*. at 752; Doc. 114, ¶ 92; Doc. 129, ¶ 48.

62. Then-District Attorney Douglas Valeska represented the State of Alabama at the *Batson* hearing. Retired Assistant Attorney General Gary Maxwell was the only witness presented to testify. Doc. 114, ¶ 93; Doc. 129, ¶ 49.

63. The ACCA found on direct appeal that Mr. Maxwell testified that he removed Mr. Dawsey because of his Law Enforcement Tracking System ("LETS")

record; that he removed Mr. Williams because he also had a LETS record; and that he removed Mr. Collins because of his reservations about his ability to vote for death. Doc. 76-15 at PDF 58, Bates 2421; *id.* at PDF 56-57, Bates 2419-2420; *id*. at PDF 62, Bates 2425; Doc. 114, ¶ 95; Doc. 129, ¶ 50.

64. The prosecution promised to provide a copy of the LETS reports, representing to the court that "what we have from LETS, we will provide them." Doc. 76-15 at PDF 141, Bates 2504; Doc. 114, ¶ 96; Doc. 129, ¶ 51.

65. Petitioner David Wilson maintains that, to date, the prosecution has never fulfilled its promise to provide the LETS records and has never submitted those LETS records to the state court or to Mr. Wilson. Doc. 76-17 at PDF 20, Bates 2554; Doc. 114, ¶ 96. Respondent denies the allegations, citing privacy protections; but those protections would not have prevented the State from providing those LETS records under seal or *in camera*. Doc. 129, ¶ 51; *id.* at p. 21, n. 7 (Respondent expresses a willingness to have this case adjudicated on the assumption that the prosecution never produced those records).

66. After the *Batson* remand hearing, the circuit court denied the *Batson* claim, accepting the prosecution's reasons as non-pretextual. Doc. 76-15 at PDF 41, Bates 2404; Doc. 114, ¶ 97; Doc. 129, ¶ 52.

67. On return to appeal at the ACCA, Mr. Wilson's appellate counsel rebriefed the *Batson* issue. The issues raised in the remand brief are set out in Doc.

114-28 (Appendix BB, Table of Contents to Brief of the Appellant on Return to Remand, No. CR-07-0684 (filed May 11, 2011), pp. i-ii); Doc. 114, ¶ 98; Doc. 129, ¶ 53.

68. On March 23, 2012, the ACCA affirmed Mr. Wilson's convictions and sentence, and denied all relief. *Wilson*, 142 So. 3d at 748, 758-59 (opinion on return to remand), and on June 22, 2012, the ACCA denied rehearing. *Id.*; Doc. 114, ¶ 99; Doc. 129, ¶ 54.

69. Mr. Wilson petitioned for a writ of certiorari from the Alabama Supreme Court ("ASC"). The issues raised to the ASC are set out in Appendix CC. The ASC denied certiorari on September 20, 2013. *Ex parte Wilson*, No. 1111254 (Ala. Sept. 20, 2013); Doc. 114, ¶ 100; Doc. 129, ¶ 55.

70. The United States Supreme Court denied Mr. Wilson's petition for writ of certiorari on May 19, 2014. *Wilson v. Alabama*, 134 S. Ct. 2290 (2014); Doc. 114, ¶ 101; Doc. 129, ¶ 56.

71. Mr. Wilson filed a state post-conviction petition pursuant to Rule 32 of the Alabama Rules of Criminal Procedure on September 19, 2014. Doc. 76-21 at PDF 17-89, Bates 3255-3327. He filed an Amended Petition on December 11, 2015, and a supplement on September 7, 2016. Doc. 76-22 at PDF 25, Bates 3464 to Doc. 76-26 at PDF 28, Bates 4271; Doc. 76-28 at PDF 30-62, Bates 4675-4707; Doc. 114, ¶ 102; Doc. 129, ¶ 57.

72. The State of Alabama filed an initial Answer and motion to dismiss on November 3, 2014, and an Amended Answer and motion to dismiss on February 24, 2016, and a response to the supplement on October 6, 2016. Doc. 76-26 at PDF 52-125, Bates 4295-4368; Doc. 76-28 at PDF 86-92; Bates 4731-4737; Doc. 114, ¶ 103; Doc. 129, ¶ 57.

73. Respondent did not answer Petitioner's ¶ 104[14], but it is not controversial, so Petitioner believes in good faith that the parties are in agreement: The state post-conviction court held a hearing on the Motion to Dismiss on November 8, 2016, and dismissed the petition in its entirety with prejudice on February 24, 2017, without granting discovery or holding an evidentiary hearing. Doc. 76-30 at PDF 98, Bates 5145; Doc. 76-28 at PDF 125, Bates 4770 to Doc. 76-29 at PDF 47, Bates 4893; Doc. 76-29 at PDF 48-170, Bates 4894-5016; Doc. 114, ¶ 104.

74. Mr. Wilson filed a Motion to Reconsider on March 24, 2017. Doc. 76-29 at PDF 173, Bates 5019 to Doc. 76-30 at PDF 62, Bates 5109; Doc. 114, ¶ 105; Doc. 129, ¶ 58. Mr. Wilson timely appealed to the ACCA. *Wilson v. State*, Ala. Crim. App. Case No. CR-16-0675; Doc. 114, ¶ 106; Doc. 129, ¶ 59.

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[14] Paragraph 104 of Doc. 114 is nowhere referenced in Respondent's Answer. *See* Doc. 129, ¶ 57-58.

75. The ACCA affirmed the the trial court's decision to summarily dimiss Mr. Wilson's Rule 32 petition on March 9, 2018, *Wilson v. State*, No. CR-16-0675 (Ala. Crim. App. Mar. 9, 2018) (unpublished table decision) ("*Wilson II*"), and denied rehearing on May 4, 2018. Doc. 114, ¶ 107; Doc. 129, ¶ 60.

76. On May 17, 2018, Mr. Wilson petitioned for a writ of certiorari from the Alabama Supreme Court ("ASC") (Ala. Case No. 1170747). The issues raised to the ASC are set out in Doc. 114-31 (Appendix EE, Table of Contents to Petition for Writ of Certiorari, No. 1170747 (filed May 17, 2018), pp. i-ii). The ASC denied certiorari on August 24, 2018. *Ex parte David Phillip Wilson*, No. 1170747 (Ala. Aug. 24, 2018); Doc. 114, ¶ 108; Doc. 129, ¶ 61.

77. Mr. Wilson filed a petition for writ of certiorari in the U.S. Supreme Court on January 18, 2019 (S. Ct. Case No. 18-7527). The Supreme Court denied the petition on April 29, 2019. Doc. 76-35 at PDF 161, Bates 6020; Doc. 114, ¶ 109; Doc. 129, ¶ 62.

78. On April 22, 2019, Mr. Wilson filed a petition for writ of habeas corpus in this Court. *David Wilson v. Jefferson Dunn*, Case No. 1:19-cv-00284-WKW-CSC, Doc. 1, Petition for Writ of Habeas Corpus (M.D.Ala., April 22, 2019). Mr. Wilson was represented by Anne E. Borelli of the Federal Defenders for the Middle District of Alabama. Doc. 1, p. 309. Mr. Wilson's case was originally assigned to the

Honorable United States District Judge W. Keith Watkins. Doc. 114, ¶ 110; Doc. 129, ¶ 63.

79. Mr. Wilson's federal habeas corpus petition was due for filing on or before April 23, 2019 and was timely filed. Doc. 114, ¶ 111; Doc. 129, ¶ 63.

80. On June 13, 2019, Mr. Wilson filed a *pro se* request with this Court asking for new counsel, alleging a conflict of interest. Doc. 15; Doc. 114, ¶ 112; Doc. 129, ¶ 63.

81. Undersigned counsel, Bernard E. Harcourt, was appointed to represent Mr. Wilson under the Criminal Justice Act, 18 U.S.C. § 3006A, on January 29, 2020. Doc. 43. Doc. 114, ¶ 113; Doc. 129, ¶ 63.

82. This case was held in abeyance due to the COVID-19 epidemic from March 25, 2020 (Doc. 54) through August 9, 2022 (Doc. 57). Doc. 114, ¶ 114; Doc. 129, ¶ 63.

B. The Production of the Corley Letter

83. On March 27, 2023, upon motion by Mr. Wilson's new counsel, Bernard E. Harcourt, District Judge W. Keith Watkins ordered Respondent to produce the Corley letter. Doc. 67; Doc. 114, ¶ 115; Doc. 129, ¶ 63.

84. Respondent provided Mr. Wilson with the front side of the Corley letter. *See* Doc. 79, p. 2; Doc. 69-2; Doc. 114-1 (Appendix A, Frontside of the Corley

Letter); Doc. 114-2 (Appendix B, Certified Court Reporter Transcription of the Frontside of the Corley Letter); Doc. 114, ¶ 116; Doc. 129, ¶ 64.

85. On June 21, 2023, Magistrate Judge Charles S. Coody ordered Respondent to produce the back side of the Corley letter. Doc. 79; Doc. 114, ¶ 117; Doc. 129, ¶ 65.

86. On June 28, 2023, Respondent produced the back side of the Corley letter via email. *See* Doc. 81-1 (Back Side of the Corley Letter) and Doc. 81-2 (email from Richard D. Anderson to Bernard E. Harcourt); Doc. 114-3 (Appendix C, Backside of the Corley Letter) and Doc. 114-4 (Appendix D, Certified Court Reporter Transcription of the Back Side of the Corley Letter); Doc. 114, ¶ 118; Doc. 129, ¶ 66.

87. On November 1, 2023, Mr. Wilson's case was reassigned to the Honorable United States District Judge R. Austin Huffaker, Jr. Doc. 82; Doc. 114, ¶ 119; Doc. 129, ¶ 67.

C. The Production of the Derivative ("Downstream") Evidence

88. On November 3, 2023, upon motion by Mr. Wilson's counsel, Judge Huffaker ordered Respondent to either certify that there was no other evidence related to the Corley letter that should be produced or show cause why any other covered material was not discoverable. Doc. 83; Doc. 114, ¶ 120; Doc. 129, ¶ 68.

89. On November 16, 2023, counsel for Respondent stated to this Court that he had found no additional materials related to the Corley letter, but requested an additional 21 days to continue to search. Doc. 84; Doc. 114, ¶ 121; Doc. 129, ¶ 68. 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." Doc. 129, ¶ 68.

90. Respondent did not answer Petitioner's ¶ 122[15]; however, the allegation is not controversial. Hence, Petitioner believes in good faith that the parties agree: On December 7, 2023, counsel for Respondent e-mailed undersigned counsel with four additional pieces of evidence related to the Corley letter. Doc. 89-7 (two emails from Richard D. Anderson to Bernard E. Harcourt dated Dec. 7, 2023). Respondent attached to his emails addional evidence. Doc. 114, ¶ 122.

91. As Respondent admits, 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 [sic] 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

[15] Paragraph 122 of Doc. 114 is nowhere referenced in Respondent's Answer. *See* Doc. 129, ¶ 68-69.

> the Houston County District Attorney) and indicates that she does not trust Vroblick and does not talk to her. […] No transcriptions of those recordings exist in the materials reviewed.

See Doc. 129, ¶ 69.

92. Moreover, as Respondent states in ¶ 70 of his Answer, Respondent also notified the Court that:

> [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 [sic] [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.

See Doc. 86, p. 7-8; see also *id*. at 5 (disclosing and producing "a two-page record of an interview with Joan Vrolick by Henry County investigators"); Doc. 129, ¶ 70.

93. On August 13, 2024, United States District Judge R. Austin Huffaker denied without prejudice Petitioner David Wilson's fifth motion for *Brady* production and ordered Mr. Wilson to file a motion for leave to file an amended petition for writ of habeas corpus. Doc. 102; Doc. 114, ¶ 139; Doc. 129, ¶ 72.

94. On November 12, 2024, Petitioner David Wilson filed this first amended petition for writ of habeas corpus as an attachment to a Motion for Leave to File an Amended Habeas Corpus Petition. The Court granted Mr. Wilson's

Motion for Leave to File an Amended Habeas Corpus Petition on February 4, 2025. Doc. 112. Mr. Wilson filed his First Amended Habeas Corpus Petition on February 10, 2025. Doc. 114, ¶ 140; Doc. 129, ¶ 72.

95. In addition to these agreed upon facts by the parties, Petitioner David Wilson here realleges and incorporates by reference all of the factual and procedural fact allegations in his Amended Petition, Doc. 114, ¶¶ 5-140.

96. Petitioner is also filing this day with the Clerk of the Court redacted versions of the pages in the federal record that contain private information, in order to correct the record, in response to Respondent's note 1 on page 2 of his Answer.

GROUNDS FOR RELIEF

I. THE PROSECUTION WITHHELD EVIDENCE CONTRARY TO *BRADY V. MARYLAND*, DENYING DAVID WILSON HIS CONSTITUTIONAL RIGHTS AT THE PENALTY PHASE OF HIS CAPITAL TRIAL AND AT THE JUDGE SENTENCING TO DUE PROCESS, A FAIR TRIAL, A RELIABLE JURY VERDICT, AND TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. MR. WILSON IS ENTITLED TO A NEW PENALTY PHASE TRIAL AND SENTENCING.

97. Mr. Wilson's first claim is that the State of Alabama suppressed the confession of a codefendant, Kitty Corley, hereinafter the Corley letter, as well as a handwriting expert report in violation of his constitutional rights, at the death penalty and sentencing phases of his capital trial, to due process, to a fair trial, to a reliable jury recommendation and judge sentence, and to be free from cruel and unusual

punishment, protected by the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution. In simpler terms, this is the penalty phase *Brady* claim.

98. In his Answer, Respondent raises two procedural defenses (failure to exhaust and procedural default) and also argues that the claim was properly rejected on the merits in the final state court ruling. Doc. 129, ¶¶ 80-86. In addition, Respondent states that the final state court made findings of fact that are entitled to deference. Doc. 129, ¶ 87 and 89. Finally, Respondent argues that Mr. Wilson is not entitled to a hearing on the substance of his claim in federal court. Doc. 129, ¶ 89.

99. Mr. Wilson already addressed these defenses in his First Amended Petition. *See* Doc. 114, pp. 63-68 (disclosure of a police report does not satisfy *Brady*); and pp. 134-140 (state court ruling was unreasonable). Respondent neither addresses, nor rebuts Mr. Wilson's arguments from his First Amended Petition, but instead simply notice pleads several defenses. None of Respondent's defenses prevent this Court from granting relief on the *Brady* penalty phase claim. Petitioner will counter these defenses once again, beginning with the state court ruling on the merits of the claim.

A. The State Court's Merits Ruling Amounts to an Unreasonable Application of Clearly Established Federal Law

100. In ¶¶ 84-86 of his Answer, Respondent admits that the final state court decision addressed and rejected Mr. Wilson's penalty phase *Brady* claim "on the

merits." Doc. 129, ¶ 84. Respondent argues, however, that the state court's merits ruling was not unreasonable because the material substance of the Corley letter was disclosed to Mr. Wilson in a police report in pretrial discovery. Doc. 129, ¶¶ 85-86.

101. Mr. Wilson already addressed and rebutted this argument in ¶¶ 195-203 and ¶¶ 334-352 of his First Amended Petition, incorporated herein by reference. Doc. 114, pp. 63-68 and 134-140. Mr. Wilson adds the following:

102. The state court's merits ruling involves an unreasonable application of clearly established federal law, because United States Supreme Court precedent is clear that a prosecutor does not comply with his *Brady* obligation by simply informing defense counsel that exculpatory material exists. In this case, defense counsel did more than what was required under *Brady*. In pretrial proceedings, defense counsel filed a formal *Brady* motion asking for co-defendant statements and then made two renewals of that *Brady* request asking for any co-defendant statements. *See* Doc. 76-1 at PDF 132-144, Bates 132-144 ("Motion for Discovery of Prosecution Files, Records, and Information Necessary to a Fair Trial," specifically requesting "Statements of Co-conspirators, Co-defendants, and Accomplices," *id.* at Bates 135); Doc. 76-2 at PDF 160, Bates 360 (renewed motion); Doc. 76-6 at PDF 117-118, Bates 1122-1123 (request at motions hearing). The state trial court entered a binding order for the production of *Brady* evidence. Doc 76-1 at PDF 15, Bates 15 ("Reciprocal Discovery Order"). To hold that defense counsel had

to do anything more would improperly shift the burden from a prosecutor's duty to disclose to a defense's duty to demand production for a fourth time, in violation of clearly established Supreme Court precedent. *Banks v. Dretke,* 540 U.S. 668, 696 (2004); *Strickler v. Greene*, 527 U.S. 263, 280 (1999); *United States v. Agurs,* 427 U.S. 97, 107 (1976).

103. The United States Supreme Court has made clear that if a prosecutor produces one document that hints at potential *Brady* material that is undisclosed, the defense is not required to "scavenge for hints" such as these. *Banks*, 540 U.S. at 695. "A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process," the Supreme Court has insisted. *Id*. at 696. United States District Judge W. Keith Watkins cited this well-established legal principle in an earlier memorandum opinion and order in this case, dated March 27, 2023. Judge Watkins wrote:

> At best, it appears the Corley confession was disclosed to the defense in a manner designed to not attract attention to it, thus to put the defense at a trial and sentencing disadvantage. As the Supreme Court has made clear, *Brady*'s disclosure obligation is not readily discharged via gamesmanship: "A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Banks v. Dretke*, 540 U.S. 668, 696 (2004). Here, a local prosecutor aggressively slighted his obligation to produce *Brady* material, and any expense of these proceedings to the public till results solely from that local decision.

Doc. 67, p. 18, n.6.

104. The state court ruling—and Respondent's argument—is that the prosecutor put defense counsel on notice of the existence of the Corley letter by producing the police report, and that defense counsel then had an obligation to file a motion claiming a *Brady* violation, instead of or in addition to filing the original and renewed motions for *Brady* evidence including co-defendant statements which defense counsel did file. That contradicts the Supreme Court's decision in *Brady*, which does not even require that defense counsel make a request for exculpatory evidence. *Brady* requires the prosecution to turn over exculpatory evidence regardless of whether defense counsel makes a motion. *Brady v. Maryland,* 373 U.S. 83 (1963); *United States v. Agurs*, 427 U.S. 97, 106-07, 110 (1976).

105. The police report does not substitute for the Corley letter. Neither as a matter of law under *Brady*, nor as a factual matter is it the functional equivalent of the Corley letter, especially because the police report only touched on one of several exculpatory dimensions of the Corley letter and did not include, for instance, information that Corley had confessed to involvement in a second homicide (the C.J. Hatfield murder). For a detailed list of all the different exculpatory information in the Corley letter, above and beyond the mention in the police report that she confessed to beating the victim with a bat, *see* Doc. 114, ¶¶ 233-273.

106. Respondent refers this Court to the Eleventh Circuit's decision in *Maharaj v. Sec'y for Dep't of Corr.*, 432 F.3d 1292, 1315 (11th Cir. 2005) to support

the reasonableness of the final state court's decision, writing: "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." Doc. 129, ¶ 85. However, Respondent's reliance on *Maharaj* is entirely misplaced and his argument is an incorrect usage of the "defendant's own knowledge" case law. *Maharaj* is entirely inapposite: it concerned a briefcase that was returned to the victim's family, and thus was *not within the control of the state*. The Eleventh Circuit specifically stated in *Maharaj* that there was no *Brady* violation because:

> Petitioner knew of their existence and had the power to compel their return from the Moo Young family by *subpoena*… Petitioner knew of the briefcase and knew how he could obtain it. The police could not give it to him because they no longer had it… In this case, the prosecution did not physically possess the documents Petitioner sought… Indeed, the police unambiguously directed the investigator to where he might obtain the evidence. When the defendant has "equal access" to the evidence disclosure is not required.

Maharaj, 432 F.3d at 1315. Mr. Wilson's situation differs on each relevant point: Mr. Wilson had no independent means to obtain the Corley letter and certainly did not have "equal access" to it. Rather, Respondent had entire control of the letter. *See Agurs*, 427 U.S. at 111 (1976).

107. In his Answer at ¶ 85, Respondent also contends that "In this case, the State *never suppressed* the [Corley] letter from his accomplice." Doc. 129, ¶85.[16] That statement is factually inaccurate. It is belied by the Alabama Court of Criminal Appeals decision, which specifically states that "the State does not contest Wilson's claim that neither the letter nor the expert report were produced." *Wilson v. State*, No. CR-16-0675 (Ala. Crim. App. Mar. 9, 2018) (unpublished table decision) ("*Wilson II*"), at *8-9; Doc. 76-33 at PDF 9-10, Bates 5614-15; Doc. 129, ¶ 84, p. 33-34. The State of Alabama did not produce the Corley letter until March 31, 2023 (for the front side) and June 28, 2023 (for the back side) under federal court order. Doc. 69 and 69-2 (front side); see Doc. 81, p. 1 and Doc. 81-1 (back side).

Re. The Handwriting Expert Report

108. Moreover, the final state court decision clearly involves an unreasonable application of *Brady* law with regard to the failure to produce the handwriting expert report. The police report never mentions anything about the

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[16] Respondent seems to suggest that the"suppression" element of *Brady* requires something more than failure to disclose. That has never been the law of due process. *See Brady*, 373 U.S. at 87-88: "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. ¶ . . . A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not 'the result of guile'. . . ."

Note also that Respondent immediately contradicts himself in the next sentence, where he states that "The record establishes that the Corley letter, *or at the very least its material substance*, was disclosed to Wilson in *pretrial discovery*." Doc. 129, ¶85 (first emphasis added). Respondent here and elsewhere alleges only that the police report was turned over.

handwriting expert report. It does not state that the Corley letter was sent for evaluation by an external expert, nor that the requested expertise was obtained, confirming Corley's authorship. *See* Doc. 76-24 at PDF 16-17, Bates 3857-3858 (Police Report by Tony Luker generated on March 22, 2006).

109. The State of Alabama never produced the handwriting expert report to Mr. Wilson. The handwriting expert report was first discovered by state post-conviction counsel in Kittie Corley's casefile at the Houston County Circuit Clerk's office. *See* Doc. 1, p. 20.

110. It was therefore unreasonable for the Alabama Court of Criminal Appeals to conclude in its *Brady* analysis that the police report alerted Mr. Wilson to the existence of the handwriting expert report. On the basis of the failure to produce the handwriting expert report alone, even setting aside the Corley letter, Mr. Wilson is entitled to relief, under clearly established federal *Brady* law, as determined by the Supreme Court of the United States.

Re. The Corley Letter

111. Returning to the Corley letter, the fundamental point is that the mention of exculpatory evidence in a police report does not satisfy the production requirements of *Brady*. The Supreme Court has made clear that prosecutors may not play hide and seek with favorable evidence that they are required to turn over under *Brady*. See *Banks v. Dretke*, 540 U.S. 668, 696 (2004) ("A rule thus declaring

'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process"); *Strickler v. Greene*, 527 U.S. 263, 280 (1999); *United States v. Agurs*, 427 U.S. 97, 107 (1976); *see also Goudy v. Cummings*, 922 F.3d 834, 840-41 (7th Cir. 2019) (explaining why second-hand statements about exculpatory evidence do not satisfy Brady); *Tennison v. City & County of San Francisco*, 570 F.3d 1078, 1090 (9th Cir. 2009) (placing notes regarding witness's statements in police file did not fulfill inspectors' *Brady* duty to disclose exculpatory information); *Floyd v. Vannoy*, 894 F.3d 143, 162-63 (5th Cir. 2018) (per curiam) (the prosecution's failure to disclose lab reports indicating that fingerprints lifted at the crime scene did not match the defendant's violated *Brady*: "The State's assertion the fingerprint-comparison results were effectively disclosed through the crime-scene report and list of evidence distorts *Brady*'s requiring prosecutors to offer exculpatory evidence absent a specific request by the defense. . . . Floyd's *Brady* claim does not stem from the fingerprints themselves, but from the results of the State's fingerprint-comparison test. ¶ The State does not demonstrate compliance with *Brady*'s disclosure requirement by asserting a possibility Floyd could deduce that, based on the general evidence provided to him, additional evidence likely existed. . . . Further, the State's assertions the evidence was not withheld because Floyd could have conducted his own analysis are in direct contrast to clearly established *Brady* law rejecting the defense's ability to conduct their own analysis as justification for prosecutorial non-disclosure."); *United States v. Paulus*, 952 F.3d 717, 725 (6th Cir. 2020) ("The prosecution is not obligated under *Brady* to disclose information to the defense that the defense already 'knew or should have known.' The government argues that Paulus knew the essential facts described in the . . . [undisclosed document] and that he could have gathered the missing [factual] detail with 'minimal investigation.' . . . ¶ . . . But . . . *Brady* 'does not [allow] the State simply to turn over some evidence, on the assumption that defense counsel will find the cookie from a trail of crumbs.' . . . [Here] Paulus would have had to follow a long trail of crumbs to get the missing details"; therefore, the prosecution's nondisclosure violated *Brady*). Defense counsel does not have a duty to conduct an independent search for exculpatory information that he or she does not have but which the prosecutor has. *Dennis v. Secretary, Pennsylvania Department of Corrections*, 834 F.3d 263 (3d Cir. 2016) (en banc) ("[U]nder United States Supreme Court precedent, it is clear that there is no additional prong to *Brady* and no 'hide and seek' exception depending on defense counsel's knowledge or diligence. *See Banks* [*v. Dretke*], 540 U.S. [668] at 696 [(2004)]." 834 F.3d at 293. "To the extent that we have considered defense counsel's purported obligation to exercise due diligence to excuse the government's non-disclosure of material exculpatory evidence, we reject that concept as an unwarranted dilution of *Brady*'s clear mandate. Subjective speculation as to defense counsel's knowledge or access may be inaccurate, and it breathes uncertainty into an area that should be certain and sure. . . . ('[P]rosecutors . . . cannot accurately speculate about what a defendant or defense lawyer could discover through due diligence. Prosecutors are not privy to the investigation plan or the investigative resources of any given defendant or defense lawyer.'). The United States Supreme Court agrees. It has recognized that ample disclosure is 'as it should be' because it 'tend[s] to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations . . . . The prudence of the careful prosecutor should not therefore be discouraged.' *Kyles* [*v. Whitley*], 514 U.S. [419] at 439-40 [(1995)]." *Id*. at 293.); *Bracey v. Superintendent, Rockview SCI*, 986 F.3d 274, 289 (3d Cir. 2021) ("There is no 'affirmative due diligence duty of defense counsel as part of *Brady*' and 'no support [for] the notion that defendants must scavenge for hints of undisclosed *Brady* material.' . . . Rather, 'the duty to disclose under *Brady* is absolute – it does not depend on defense counsel's actions.' . . . Consequently, the defense 'is entitled to presume that prosecutors have "discharged their official duties"' by sharing all material exculpatory information in their possession, . . . and the defense's diligence in seeking out exculpatory material on its own 'plays no role in the *Brady* analysis,' . . . ."); *Lewis v. Connecticut Commissioner of Correction*, 790 F.3d 109, 121 (2d Cir. 2015) ("The Supreme Court has never required a defendant to exercise due diligence to obtain *Brady* material. .

. . ¶ To be sure, we have held in several cases that '[e]vidence is not "suppressed" [for *Brady* purposes] if the defendant either knew, or should have known, of the essential facts permitting him to take advantage of any exculpatory evidence.' . . . [But] this requirement speaks to facts already within the defendant's purview, not those that might be unearthed. It imposes no duty upon a defendant, who was reasonably unaware of exculpatory information, to take affirmative steps to seek out and uncover such information in the possession of the prosecution in order to prevail under *Brady*."); *United States v. Tavera*, 719 F.3d 705, 711 (6th Cir. 2013) ("In defense of its failure to disclose Mendoza's statements, the government argues . . . that Tavera (although confined to his prison cell) or his lawyer should have exercised 'due diligence' and discovered the statements by asking Mendoza if he had talked to the prosecutor. This 'due diligence' defense places the burden of discovering exculpatory information on the defendant and releases the prosecutor from the duty of disclosure. It relieves the government of its *Brady* obligations. In its latest case on the issue, however, the Supreme Court rebuked the Court of Appeals for relying on such a due diligence requirement to undermine the *Brady* rule. In *Banks* . . . the Court considered the Fifth Circuit's use of a due diligence requirement to dismiss the defendant's *Brady* claim. As in this case, the diligence question in *Banks* was whether the defendant 'should have asked to interview' a witness who could have furnished the exculpatory evidence the prosecutor did not disclose. . . . The Supreme

Court rejected this requirement in no uncertain terms at page 696."); *Banks v. Reynolds*, 54 F.3d 1508, 1517 (10th Cir. 1995) ("[T]he prosecution's obligation to turn over the evidence in the first instance stands independent of the defendant's knowledge. Simply stated, '[i]f the prosecution possesses evidence that, in the context of a particular case is obviously exculpatory, then it has an obligation to disclose it to defense counsel whether a general request is made or whether no request is made.' . . . In this case, the fact that defense counsel 'knew or should have known' about the . . . information, therefore, is irrelevant to whether the prosecution had an obligation to disclose the information. The only relevant inquiry is whether the information was 'exculpatory.'")

112. The prosecution is obligated to turn over the source material itself, rather than a mere description of it. The reasons underpinning this rule are obvious: A summary of the evidence produced by the prosecution or police may reflect bias against the defendant by omitting or misconstruing key details. That is precisely what happened in Mr. Wilson's case. The police report, for instance, does not mention that Kittie Corley confessed to being involved in a second murder, nor does it mention that she confessed to disposing of the baseball bat by throwing it in a trash dumpster, that she had a motive to kill Mr. Walker because, in her own words, "It was Dewey's time to go," that she had "sex adventures at Dewey's" home, or that

she "pawned everything" that was stolen from Mr. Walker's home. *See* Doc. 114, ¶207 *et seq*.

B. There Is Cause and Prejudice to Excuse Any State Procedural Default Regarding Defense Counsel's Failure to Raise a *Brady* Violation Claim at Trial.

113. In ¶¶ 81 and 82, Respondent states that Mr. Wilson's penalty phase *Brady* claim is procedurally barred from review by this Court because the final state court decision held that Mr. Wilson had not raised a *Brady* violation claim at trial. Respondent contends that the state court's invocation of a state procedural bar amounts to "an 'independent and adequate' state law rule that bars his [Mr. Wilson's] claim in habeas." Doc. 129, ¶ 82. Respondent thus argues that the *Brady* penalty phase claim is procedurally defaulted under federal law.

114. Whether a federal court can consider a claim considered procedurally defaulted by the state court is a matter for the federal court to decide, a matter that has not and cannot be resolved by the state courts. *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977) (extending the cause and prejudice analysis conducted in federal court required by *Francis v. Henderson*, 425 U.S. 536 (1976) to instances where objections were waived during state trial). In addition, because the ACCA decided this claim on the merits, as Respondent claims in ¶84 of his Answer, this Court may not apply a procedural default on the state's behalf. Once a state court has chosen to

address a claim on the merits, a federal court cannot procedurally default the claim. *Freeman v. Atty. Gen.*, 536 F.3d 1225, 1231 (11th Cir. 2008).

115. In any event, it is well established that in federal court, "cause and prejudice" will excuse a state procedural default. *See Murray v. Carrier*, 477 U.S. 478 (1986). As Judge Watkins already declared in Mr. Wilson's case, "even if his [Petitioner David Wilson's] *Brady* claim is procedurally defaulted, he may obtain a merits review of the claim by demonstrating cause and prejudice to excuse his procedural default. *See, e.g., Green v. Sec'y, Dep't. of Corr.*, 28 F.4th 1089, 1129 (11th Cir. 2022)." Doc. 67, p. 20.

116. A prosecutor's suppression of evidence that amounts to a *Brady* violation constitutes "cause." *See, e.g.*, *Amadeo v. Zant*, 486 U.S. 214 (1988); *Banks v. Dretke*, 540 U.S. 668 (2004); Hertz & Liebman, *Federal Habeas Corpus Practice and Procedure* (7th ed., 12/22/22 update, Foreword, pages xi – xiv); Doc. 67, pp. 20-21. Again, as Judge Watkins already ruled in Mr. Wilson's case, "The Supreme Court has held that the State's suppression of evidence constitutes 'cause' for the failure to present, and thereby default, a *Brady* claim in the state courts, and that 'prejudice' has ensued if the suppressed evidence was 'material' for *Brady* purposes. *Strickler v. Greene*, 527 U.S. 263, 282 (1999). For this reason, as the Court of Appeals very recently observed, 'resolving the merits of a Brady claim

is essentially required to resolve the procedural default challenge.' *Rossell v. Macon SP Warden*, 2023 WL 34103, at *3 (11th Cir. Jan. 4, 2023)." Doc. 67, pp. 20-21.

117. In addition to the prosecutor's suppression of *Brady* material, defense counsel's failure to raise a constitutional issue such as *Brady* is another "situation in which the [cause] requirement is met." *Amadeo v. Zant*, 486 U.S. 214, 221-22 (1988); *see also Murray v. Carrier*, 477 U.S. 478 (1986). Ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), thus also satisfies the cause requirement. Mr. Wilson has raised a claim of ineffective assistance of counsel for failure to investigate and use the Corley letter in his First Amended Petition. *See* Doc. 114 (Claims II and IV). Mr. Wilson had raised a similar claim of ineffective assistance of counsel in his state Rule 32 petition and on appeal from the dismissal of his Rule 32 petition. *See* Doc. 76-31 at PDF 57, Bates 5271 (Brief of the Appellant, at 44-49).

118. In essence, the "cause and prejudice" standard for purposes of federal habeas corpus is a matter of federal law that cannot be resolved by the state courts. Thus, even if the Alabama Court of Criminal Appeals was correct that trial and appellate counsel should have but failed to raise a *Brady* claim—which Mr. Wilson contests, *see supra* Part A—the *Brady* claim would still have to be considered on the merits under a "cause and prejudice" analysis in federal court.

119. Under the unique procedural circumstances of this case, this Court may base its determination of cause and prejudice on the facts pleaded in Mr. Wilson's amended Rule 32 petition. *Cf. Shinn v. Ramirez*, 596 U.S. 366 (2022).

120. This federal habeas corpus case is procedurally unique because there were no state court factual findings, and therefore the state post-conviction record consists only of Mr. Wilson's lengthy and elaborate 242-page Rule 32 petition filed in state court on December 11, 2015 (Doc. 76-22, PDF 25, Bates 3464 through Doc. 76-26 at PDF 28, Bates 4271) and a supplement filed on September 7, 2016 (Doc. 76-28 at PDF 30-62, Bates 4675-4707). The state trial court dismissed his petition, with prejudice, for failure to plead his claims with sufficient detail under Ala. R. Crim. P. 32.7(d) ("the petition is not sufficiently specific" or "fails to state a claim"). *State of Alabama v. David Phillip Wilson*, Case No. CC-2004-001121.60, Circuit Court of Houston County, February 24, 2017 (Doc. 76-28 at PDF 125, Bates 4770). The state courts dismissed the amended Rule 32 petition on legal grounds. There was no Rule 32 hearing. There were no state court findings of fact. As a result, there has been no factual development at the state Rule 32 post-conviction stage. In fact, there was no factual development at all in Rule 32, because the amended Rule 32 petition was dismissed *on the pleadings.* Accordingly, the facts alleged in the amended Rule 32 pleading must be construed as the state record. *Borden v. Allen*, 646 F.3d, 785, 815 (11th Cir 2011).

121. In *Borden*, the petitioner had pled an ineffective assistance of penalty phase counsel claim in state-postconviction proceedings, and again in federal habeas proceedings. The final state court decision dismissed the claim under Ala. R. Crim. P. 32.6(b) for failure to plead the claim with sufficient specificity. As a result, there was no factual development of the claim in state court. In federal habeas proceedings, the federal district court certified to the Eleventh Circuit, and Eleventh Circuit considered, the question of whether the "specificity requirement" of Rule 32.6(b) was an adequate and independent state ground so that the *Strickland* claim was procedurally defaulted. The Eleventh Circuit held that it was not, and the state court had rendered a decision on the merits. Given that there was no factual development in state court, the Eleventh Circuit held that it must then decide the question of whether the state court's decision on Borden's *Strickland* claim was an unreasonable application of well-established federal law "accepting as true the facts asserted in support of Borden's ineffective assistance of counsel claims," and "based upon the allegations contained in his Amended Petition." *Borden*, 646 F.3d at 815, 817. Applying *Borden* here, given that the state courts permitted no evidentiary development, this Court must review his claims based upon the allegations in his Amended Rule 32 Petition and the assumption that those allegations are true.

122. The rule in *Borden* reflects a longstanding principle articulated by the United States Supreme Court: when a state post-conviction petition is dismissed without a hearing for failure to allege sufficient facts to establish a federal constitutional claim, federal courts must take allegations in the state post-conviction petition as true in adjudicating the claim. *Williams v. Kaiser*, 323 U.S. 471 (1945); *Cash v. Culver*, 358 U.S. 633 (1959); *McNeal v. Culver*, 365 U.S. 109 (1961). These are cases taken to the Supreme Court on certiorari from the state post-conviction proceeding. But the same rules that apply in the latter context also apply in federal habeas. *See Harris v. Reed*, 489 U.S. 255 (1989), following *Michigan v. Long*, 463 U.S. 1032 (1983).

123. Alternatively, this Court should conduct a hearing limited to procedural matters on the "cause and prejudice" questions for purposes of deciding whether the alleged state procedural default is an adequate and independent state ground to bar federal relief. Mr. Wilson is not at fault for having failed to develop the facts regarding the *Brady* claim in state court for at least three reasons: first, his amended Rule 32 petition was improperly dismissed with prejudice, *see*, *supra*, Section A; second, the prosecutor improperly withheld the *Brady* evidence, *see* Doc. 114, pp. 57-68; and third, his trial attorneys provided ineffective assistance of counsel in failing to obtain the *Brady* evidence, *see* Doc. 114, pp 160-168. *See Shinn v. Ramirez,* 142 S. Ct. at 1734 ("We interpret 'fail,' consistent with *Keeney*, to mean

that the prisoner must be 'at fault' for the undeveloped record in state court. A prisoner is 'at fault' if he 'bears responsibility for the failure' to develop the record.") (citations omitted); *Khamal Fooks v. Superintendent Smithfield SCI*, 96 F.4th 595, 597-98 (3d Cir. 2024) (*Pinholster* does not bar additional evidentiary development in federal court when state court denied petitioner a hearing due to an unreasonable ruling under federal law); *McMullen v. Dalton*, 83 F.4th 634 (7th Cir. 2023) (a federal court may conduct an evidentiary hearing during habeas proceedings "when the state court record does not contain sufficient factual information to adjudicate a claim, and the factual predicate could not have been previously discovered through the petitioner's exercise of due diligence"); *Mullis v. Lumpkin*, 70 F.4th 906, 911 (5th Cir. 2023) (holding that evidence outside the record is admissible for the purpose of establishing cause and prejudice). Where a federal petitioner is not at fault for failing to develop facts in state court necessary for a cause and prejudice determination, regarding a *Brady* claim, due to the prosecutor withholding the evidence, he is entitled to an an evidentiary hearing in federal court limited to the cause and prejudice determination.

124. In the alternative, Mr. Wilson has raised an actual innocence claim. *See* Doc. 114, Claim V; *supra*, Claim V. Accordingly, under *Schlup v. Delo*, 513 U.S. 298 (1995), Mr. Wilson's actual innocence claim, supported by evidence not presented at trial (the Corley letter), provides an independent reason to excuse his

procedural default. When a petitioner is able to show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." *Murray*, 477 U.S. at 496; *Schlup v. Delo*, 513 U.S. 298, 326-327 (1995) ("[W]e hold that the *Carrier* 'probably resulted' standard rather than the more stringent *Sawyer* standard must govern the miscarriage of justice inquiry when a petitioner who has been sentenced to death raises a claim of actual innocence to avoid a procedural bar to the consideration of the merits of his constitutional claims."). When a petitioner has raised a constitutional claim that has been alleged to be procedurally barred, he should be permitted to nonetheless present the claim through the *Schlup* gateway if "he presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error." *Schlup*, 513 U.S. at 316. As a result, Mr. Wilson is entitled to review by this Court through the *Schlup* actual innocence gateway.

C. Mr. Wilson Could Not Have Raised the *Brady* Claim on Direct Appeal.

125. In ¶ 81 and ¶ 83 of his Answer, Respondent argues that Mr. Wilson's *Brady* claim is procedurally barred at the federal level because the final state court decision held that Mr. Wilson had not raised his *Brady* claim on direct appeal. Respondent contends that "Alabama law precludes collateral review of issues that

could have been but were not raised on direct appeal." Doc. 129, ¶ 83. Accordingly, Respondent maintains that the *Brady* claim is procedurally defaulted under federal law.

126. The Alabama Court of Criminal Appeal's holding, however, "was 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)(2) The fact is, the *Brady* claim could not have been raised by appellate counsel. The police report mentioning the Corley letter was not part of the record on appeal. It was not included in the appellate record. Plus, there is no evidence to show that appellate counsel had the police report or knew of its existence. The issues that appellate counsel could raise on appeal were restricted to the record on appeal. For these reasons, the state court ruling does not bar federal review.

127. Moreover, even if the state court is correct that appellate counsel should have but failed to raise the claim on direct appeal, there is, again, cause and prejudice to excuse the state procedural default at the federal level. *See supra*.

D. Mr. Wilson's Penalty Phase *Brady* Claim Was Fully Exhausted in State Court.

128. In ¶ 80 of his Answer, Respondent also contends that Mr. Wilson is raising new factual allegations that are "unexhausted" and therefore "procedurally defaulted from habeas review," citing *Cullen v. Pinholster*, 563 U.S. 170, 181

(2011). Doc. 129, p. 31. Respondent maintains that "Wilson's new allegations are not properly before this Court." Doc. 129, ¶ 80.

129. Respondent lists three factual allegations that are supposedly "unexhausted": "a handwritten letter purportedly by Corley, a handwriting expert's report, and evidence allegedly implicating Corley in the unrelated murder of Hatfield." Doc. 129, p. 30.

130. As a preliminary matter, the exhaustion requirement of § 2254 pertains to the "exhaust[ion] of remedies." § 2254(b)(1)(A) As a result, *claims* must be exhausted. And thus, although § 2254(e)(2) and the Supreme Court have imposed certain limitations on factual development in federal court for reasons of comity, there is no independent exhaustion requirement for *factual allegations*. The Eleventh Circuit has held that "an issue is exhausted if 'the reasonable reader would understand the claim's particular legal basis and specific factual foundation' to be the same as it was presented in state court." *Pope v. Sec'y for Dep't of Corr.*, 680 F.3d 1271, 1286 (11th Cir. 2012).

131. Neither Congress in enacting AEDPA nor the federal courts have ever imposed an independent "exhaustion" requirement on facts. Thus, Petitioner will address Respondent's argument within the bounds of §2254 and the Supreme Court's prior precedents on limitations of factual development in federal habeas review.

132. In his Answer, Respondent fails to specify whether he believes this Court is prohibited from considering the evidence for purposes of its cause and prejudice analysis, its §2254(d)(1) analysis, or its merits analysis. But Respondent's argument is not compelling in any iteration. As explained in the following paragraphs, this Court may consider the new evidence (1) in its cause and prejudice analysis, (2) in its §2254(d)(1) analysis, and (3) on *de novo* merits review of the claim.

133. This Court may consider the new evidence in its cause or prejudice analysis of this claim. First, *Pinholster* does not apply in cause or prejudice analysis. The question presented to the *Pinholster* Court was "whether review under § 2254(d)(1) permits consideration of evidence introduced in an evidentiary hearing before the federal habeas court." *Pinholster*, 563 U.S. at 180. By its terms, §2254(d)(1) only applies to claims that have been "adjudicated on the merits in State court proceedings." As a result, it does not apply in cause or prejudice analysis. In ¶80 of his Answer, Respondent cites to three lower-court decisions in addition to *Pinholster*: *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); and *McKiver v. Sec'y, Fla. Dep't of Corr.,* 991 F.3d 1357, 1367 (11th Cir. 2021). Doc. 129, pp. 30-31. Those three cases, derivative of *Pinholster*, likewise only support the proposition that a federal court may be limited in considering new evidence in

§2254(d)(1) review, not cause and prejudice analysis. They do not preclude this Court from considering new evidence in cause and prejudice analysis. They likewise do not preclude this Court from considering the new evidence in *de novo* merits review.

134. Second, the United States Supreme Court has never reached the question of whether §2254(e)(2) applies in cause or prejudice hearings. *Shinn v. Ramirez*, 596 U.S. 366, 388-89 (2022) (finding that the Court need not reach the respondent's argument that "because § 2254(e)(2) bars only 'an evidentiary hearing on the claim,' a federal court may hold an evidentiary hearing to determine whether there is cause and prejudice," as the issue in *Shinn* could be decided on narrower grounds); *Mullis v. Lumpkin*, 70 F.4th 906, 910 (5th Cir. 2023) (finding that *Shinn* did not reach "and indeed expressly reserved" the question of whether evidence outside the record may be considered in cause and prejudice analysis); *Barbour v. Hamm*, No. 2:01-CV-612-ECM, 2022 WL 3570327, at *2 (M.D. Ala. Aug. 18, 2022) ("The State argues that *Shinn* held that federal courts may not order the expansion of the record and consider new evidence under the guise of determining whether a petitioner met his threshold burden to overcome a procedural bar. But that is not what *Shinn* held.").

135. Third, as noted *supra*, even if the Supreme Court were to hold that §2254(e)(2) can apply in cause and prejudice analysis, it would not constrain Mr.

Wilson here as he was not "at fault" for not presenting the evidence in state court and therefore overcomes the opening clause of §2254(e)(2). *Shinn*, 596 U.S. at 382-83 (holding that "We interpret 'fail,' consistent with *Keeney*, to mean that the prisoner must be 'at fault' for the undeveloped record in state court," and "[a] prisoner is 'at fault' if he 'bears responsibility for the failure' to develop the record." In addition, "'a failure to develop the factual basis of a claim,' as § 2254(e)(2) requires, 'is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel.'"). As noted *supra*, the evidence was suppressed by the state throughout state court proceedings. Therefore, neither Mr. Wilson nor his counsel "failed" to develop the state court record with these pieces of evidence, and as a result §2254(e)(2) does not prevent this court from considering this evidence in its cause and prejudice analysis.

136. Insofar as the ACCA made a merits determination on this claim, as Respondent alleges in ¶ 84 of his Answer, the ACCA's decision was an unreasonable application of well-established federal law. As a result, this Court owes the ACCA no deference under §2254(d)(1) and may consider this new evidence in *de novo* review. In addition, although the ACCA's decision is unreasonable based only on the factual allegations that were already presented in the original federal habeas corpus petition, should this Court require additional evidence supporting the

unreasonableness of the state court's decision, this Court may also consider the new evidence in its §2254(d)(1) analysis.

137. As a preliminary matter, this Court can review Mr. Wilson's penalty phase *Brady* claim and grant relief on the basis of the factual allegations that were already presented in the original federal habeas corpus petition—namely, (1) the information in the police report that the Corley letter contained a confession by a codefendant that she beat the victim to death and (2) the handwriting expert report stating that it was her handwriting—regardless of the later production by Respondent of the Corley letter. On the original federal habeas corpus factual allegations, which were similar to the amended Rule 32 petition's factual allegations, the Alabama Court of Criminal Appeals rendered a decision that was an unreasonable application of clearly established *Brady* law by relieving the state of its burden to produce *Brady* material. *See*, *supra*, Section A. The fact that Respondent finally turned over the *Brady* material nineteen years later does not change the legal analysis; the actual letter only provides more clarity to the materiality of the evidence. As a result, Mr. Wilson is not barred by § 2254(d)(1) on the state court record alone because the state court committed clear legal error, *see supra.* Petitioner can litigate the merits of his *Brady* claim unencumbered by the evidentiary limitations of *Cullen v. Pinholster*.

138. Even putting that aside though, the evidentiary limitations announced in *Cullen v. Pinholster* do not apply in Mr. Wilson's case because once the state

court decision does not withstand § 2254(d)(1) review, *Pinholster*'s evidentiary restrictions become inapplicable. In *Pinholster*, the Supreme Court held that "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." 563 U.S. at 181. The *Pinholster* Court, however, acknowledged that once a diligent petitioner has successfully overcome § 2254(d)(1), he may develop new evidence in federal court. *See id*. at 186 (holding that "state prisoners may sometimes submit new evidence in federal court"); *id*. at 184 n.5 (acknowledging that a prisoner who "was diligent in state habeas court and who can satisfy § 2254(d)" may receive an evidentiary hearing); *see also Williams v. Taylor*, 529 U.S. 362, 406 (2000) (once a petitioner shows that a state-court decision was contrary to federal law, "a federal court will be unconstrained by § 2254(d)(1)"); BRIAN MEANS, FEDERAL HABEAS MANUAL § 3.64 (2023 ed.) ("[T]he *Pinholster* rule does not apply where the state court decision was 'contrary to' clearly established Supreme Court precedent.").

139. The Fifth Circuit applied the *Cullen v. Pinholster* framework in *Smith v. Cain*, 708 F.3d 628 (5th Cir. 2013). In that case, the Court of Appeals decided that the District Court "appropriately and correctly" held an evidentiary hearing to consider evidence outside of the state court record because it first determined the state court had "committed legal error" under § 2254(d)(1) based solely on the state court record. *Id*. at 631, 635. Because the state court decision did not withstand §

2254(d)(1) review, *Pinholster*'s evidentiary restrictions became "inapplicable." *Id.* at 635. Other circuits that have considered the issue have come to the same conclusion. *See Harris v. Haeberlin*, 752 F.3d 1054, 1057 (6th Cir. 2014) ("*Pinholster* is inapplicable" once the court finds legal error in the state court's decision); *Garner v. Lee*, 908 F.3d 845, 860 (2d Cir. 2018) (same); *Crittenden v. Chappell*, 804 F.3d 998, 1011 (9th Cir. 2015) (same); *Sanchez v. Roden*, 753 F.3d 279, 307 (1st Cir. 2014) (same); *Mosley v. Atchison*, 689 F.3d 838, 842 (7th Cir. 2012) (same).

140. Respondent's *Pinholster* argument also fails for several other reasons as to each piece of evidence.

The Corley Letter

141. Regarding the first "new factual allegation," namely the Corley letter, Petitioner did not and does not have any way to present this evidence in state court. Mr. Wilson has already raised this exact *Brady* claim regarding the Corley letter in state Rule 32 proceedings, so it would be futile to return to state court with the Corley letter. As Repondent recognizes in other contexts, it would be "futile because he would be barred from raising it in state court under […] Rule 32.2(b) of the Alabama Rules of Criminal Procedure (successive petition bar)." Doc. 129, ¶¶ 131, 146, 168, and 223.

142. Rule 32.2(b) provides that "[i]f a petitioner has previously filed a petition that challenges any judgment, all subsequent petitions by that petitioner challenging any judgment arising out of that same trial or guilty-plea proceeding shall be treated as successive petitions under this rule. *The court shall not grant relief on a successive petition on the same or similar grounds on behalf of the same petitioner*." Rule 32.2(b) of the Alabama Rules of Criminal Procedure (emphasis added).

143. Since Mr. Wilson raised the *Brady* claim regarding the Corley letter in his first Rule 32 proceedings, he is barred from filing a successive petition on the *Brady* claim regardless of any newly discovered evidence on that claim. Thus it would be futile for Mr. Wilson to return to state court.

144. For this reason, Mr. Wilson has exhausted his *Brady* claim in state court under the definition set forth in the AEDPA. 28 U.S.C. § 2254(c).

145. This Court can consider the Corley letter pursuant to Rule 7 of the Rules Governing Section 2254 Cases in the United States District Courts, which allows for the expansion of the federal record. Here, it may expand the record to include the Corley letter that Respondent produced to Petitioner. *Pinholster* does not prevent this Court from considering the Corley letter for several reasons.

146. First, *Pinholster* involved a claim of ineffective assistance of counsel, whereas this *Brady* claim involves prosecutorial misconduct. Where the

responsibility for the failure to produce evidence, such as the Corley letter, falls squarely on state prosecutorial misconduct, the state cannot benefit from rules of comity. The Supreme Court has not applied *Pinholster* to a *Brady* violation. *Pinholster* should not be extended by this Court to reach *Brady* claims. *See Milke v. Ryan*, 711 F.3d 998, 1007 (9th Cir. 2013) ("It's an open question whether *Cullen v. Pinholster,* __ U.S. __, 131 S.Ct. 1388, 1398, 179 L.Ed.2d 557 (2011), applies to evidence that is suppressed by the prosecution in state proceedings yet introduced on federal habeas in support of a *Brady* claim already adjudicated by the state courts.").

147. Second, *Pinholster* does not apply here because Mr. Wilson was not responsible for failing to develop the factual basis of the *Brady* claim. *See Shinn v. Ramirez*, 142 S. Ct. at 1734 ("A prisoner is 'at fault' if he 'bears responsibility for the failure' to develop the record."). *Pinholster*'s 2254(d)(1) restrictions on the record, where the Court is considering a threshold question, cannot be more restrictive than the 2254(e)(2) restrictions that govern the Court's merits analysis. As a result, the Court should not be confined to the state court record. Here, both the State and the state courts prevented factual development of the *Brady* claim in state court. *See Pinholster*, 563 U.S. at 213 n. 5 (Sotomayor, J., dissenting) ("I assume that the majority does not intend to suggest that review is limited to the state-court record when a petitioner's inability to develop the facts supporting his claim was the

fault of the state court itself."); *Gonzalez v. Wong*, 667 F.3d 965, 1013–14 (9th Cir. 2011) (Fletcher, J., conc.) ("I would hold that when a petitioner's inability to present *Brady* evidence to the state courts is due to the refusal of the state court to allow appropriate discovery, *Pinholster* does not bar federal courts from considering that evidence in the first instance… The majority in *Pinholster* never contradicted Justice Sotomayor's assumption."); *Winston v. Pearson*, 683 F.3d 489, 501 (4th Cir. 2012) (petitioner is not at fault when lack of factual development in state court record was due to the "state court's unreasonable denial of discovery and an evidentiary hearing"). The Alabama circuit court and the ACCA erroneously dismissed Mr. Wilson's Rule 32 petition on the papers, and as a result, the lack of evidentiary development here was a result of the state court's actions. Had it permitted discovery and a full evidentiary hearing in state-postconviction proceedings, it is likely that the Corley letter and downstream evidence would have been discovered and presented.

148. Third, in the alternative, this Court may consider the new evidence as a new procedurally defaulted *Brady* claim subject to cause and prejudice analysis. As the majority and Justice Sotomayor's dissent indicate in *Pinholster*, when exculpatory evidence previously suppressed by the state is newly produced in federal habeas proceedings, the petitioner may have a new *Brady* claim entirely. Even when the petitioner may already have exhausted a *Brady* claim in state court, if there remain available state court avenues, he may present that evidence in state court.

There are no state avenues available to Mr. Wilson to present a new *Brady* claim since the production of the Corley letter and downstream evidence in 2023. A new *Brady* claim in state court would be a constitutional claim brought under Ala. R. Crim. P. 32.1(a). Unlike petitioners bringing claims under Ala. R. Crim. P. 32.1(e), petitioners bringing constitutional 32.1(a) claims are not entitled to a successive petition when new evidence is available to support the claim. As a result, a new *Brady* claim in Mr. Wilson's case would be procedurally defaulted and now subject to cause and prejudice analysis. This Court should find the same cause and prejudice to excuse the procedural default of this new *Brady* claim as it should find for the original *Brady* claim.

149. Moreover, *Pinholster* and §2254(d)(1) review only applies to inquiries that the state court has addressed on the merits. *Pinholster*, 563 U.S. at 185-86; *see also Toliver v. Pollard*, 688 F.3d 853, 859-60 (7th Cir. 2012) (holding that *Pinholster* does not apply to evidence related to the deficient performance prong of *Strickland* when the state court addressed the claim on the merits, but did not address that specific prong). Insofar as the ACCA made a merits decision on Mr. Wilson's *Brady* claim, it addressed only the suppression prong of *Brady* (*see* Doc. 129, ¶ 84). The ACCA never reached the materiality prong of Mr. Wilson's *Brady* claim. The Corley letter is relevant to the materiality prong of Mr. Wilson's *Brady* claim. As a result, *Pinholster* does not preclude this Court from considering the Corley letter for

purposes of the materiality prong of Mr. Wilson's *Brady* claim. At minimum, this new evidence may be used to assess the materiality prong of Mr. Wilson's *Brady* claim.

150. Finally, although federal habeas review is not "a substitute for ordinary error correction through appeal," and may be an "extraordinary remedy," it nevertheless must guard against "extreme malfunctions in the state criminal justice systems." *Harrington v. Richter,* 562 U. S. 86, 102–103 (2011). The *Brady* violation in Mr. Wilson's case is clearly such an extreme malfunction.

151. For the foregoing reasons, this Court can consider the Corley letter despite *Pinholster*'s limitations on §2254(d)(1) review. And in any event, Mr. Wilson is entitled to relief on his *Brady* claim under §2254(d)(1) on the basis of the well pled allegations in the amended Rule 32 petition regarding the Corley letter and the handwriting expert report.

152. Following cause and prejudice analysis and/or §2254(d)(1) review, this Court is unconstrained from considering the evidence when deciding the claim *de novo* under 2254(a). On *de novo* review, the only possible constraint on the Court's review of new evidence is §2254(e)(2), and as explained *supra*, Mr. Wilson is not at fault for not presenting the evidence during state court proceedings, and as a result §2254(e)(2) does not prohibit this Court from considering the new evidence.

The Handwriting Expert Report

153. Regarding the second "new factual allegation," namely "a handwriting expert's report," the evidence *was* presented to the state court in state post-conviction proceedings.

154. The handwriting expert report was submitted as Exhibit 8 to Mr. Wilson's Amended Rule 32 Petition filed on December 11, 2015, with the Circuit Court of Houston County, Alabama. *See* Doc. 76-24 at PDF 34-38, Bates 3875-3879 (Motion to Order Defendant to Provide Fingerprint and Palm Print, filed in *State v. Catherine Nicole Corley*, Houston Cnty. Case No. CC-05-1726).

155. So the handwriting expert report is not a new factual allegation as a factual matter.

156. This Court can consider the handwriting expert report.

The Hatfield Murder Evidence

157. Regarding the third "new factual allegation," the "evidence allegedly implicating Corley in the unrelated murder of Hatfield," Respondent must be referring to the back side of the Corley letter.

158. Regarding the backside of the Corley letter, *see supra* (discussion of the Corley letter).

159. In addition, insofar as Respondent may be referring to downstream evidence regarding Corley's involvement in the Hatfield murder, such as the two

police interrogations of Corley conducted on January 29, 2005 (Doc. 114-5 and Doc. 114-6) and on March 24, 2005 (Doc. 114-7 and Doc. 114-8), or other such materials, none of the downstream evidence is being presented as the basis of a new *Brady* violation. It is instead being used to demonstrate the materiality of the Corley letter and handwriting expert report, and the prejudice that resulted to Mr. Wilson for their suppression. The downstream evidence constitutes additional evidence that can be considered by the Court as part of the existing *Brady* claim under the supplemental evidence rule. *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986). The supplemental evidence rule provides that downstream evidence that does "not fundamentally alter the legal claim already considered by the state courts" does not have to be presented to the state courts again to be considered.

160. The AEDPA did not change the supplemental evidence rule. *See, e.g., Anderson v. Johnson*, 338 F.3d 382, 386-87 (5th Cir. 2003) (post-AEDPA Fifth Circuit case reiterating the supplemental evidence rule). The Fifth Circuit applies the supplemental evidence rule when "(1) the petitioner's state claim was 'detailed in both fact and law,' (2) the petitioner was 'diligent and consistent in arguing his claim" in state court, and (3) the evidence introduced in federal court was not 'deliberately with[e]ld' from the state court by the petitioner in an attempt to 'expedite federal review.'" *Anderson*, 338 F.3d at 386-87.

161. Under these circumstances, *Cullen v. Pinholster*, 563 U.S. 170 (2011) does not bar this Court from considering the downstream evidence for purposes of the legal determination of materiality and prejudice regarding a *Brady* claim exhausted in state court.

162. In sum, this Court can consider the downstream evidence regarding Corley's culpability for the Walker and Hatfield murders.

E. The State Court Did Not Make Findings of Fact that Would Be Entitled to Deference Under the AEDPA

163. In ¶¶ 87 and 89 of his Answer, Respondent contends that "the ACCA made findings of fact" and that "these fact-findings are presumed correct." Doc. 129, pp. 35-36. Respondent does not indicate what those findings of facts are. But Respondent intimates that those state court factual findings preclude relief for Mr. Wilson.

164. Petitioner is unaware of what fact-findings the Alabama Court of Criminal Appeals made that should be presumed correct under 28 U.S.C. § 2254(e)(1) and that bar relief.

165. As a general matter, appellate courts do not find facts. That judicial function is typically reserved for the trial courts, not appellate courts.

166. More specifically in this case, the Alabama Court of Criminal Appeals had no factual record to review and therefore could not have made any findings of

fact. The state-postconviction petition was dismissed with prejudice on the pleadings in Mr. Wilson's case. In order to dismiss the petition with prejudice on the pleadings, the state appellate court had to rely on legal, not factual grounds, because there were no facts established at a hearing and no factual record other than the Rule 32 petition.

167. The only state court record that exists in this case and that this Court must consider are the facts well pleaded in Mr. Wilson's amended Rule 32 petition. Those factual allegations in the Rule 32 petition must be accepted as true and all inferences must be draw in favor of the Petitioner. *Borden v. Allen*, 646 F.3d 785, 815 (11th Cir 2011).

168. Insofar as there are factual findings that could be imputed to the appellate court, those factual findings are unreasonable in light of the state court proceedings.

169. First, if it could be imputed to the ACCA that it found as a factual matter that trial counsel actually received the police report, that has never been established. There has never been an evidentiary hearing before a fact-finding court as to whether defense counsel, Mr. Scott Hedeen, received the police report prior to trial.

170. Second, even if it were imputed to the state appellate court that it found that defense counsel received the police report, there is no evidence in the record that Mr. Hedeen was able to or did read the police report. Mr. Hedeen was practically blind in the months prior to Mr. Wilson's capital trial as a result of severe cataract

problems and surgery. He also underwent open-heart surgery in the months before the trial. In fact, during the one-year period between his appointment as trial counsel and the start of Mr. Wilson's trial on December 3, 2007, Mr. Hedeen had open-heart surgery, cataract surgery, suffered from diabetes, went through a divorce, and was ordered to move from his home the very week of Mr. Wilson's trial. *See* Doc. 114, Claim II, ¶ 360 *et seq*.

171. Mr. Hedeen was experiencing extreme health problems around the time of trial. Mr. Hedeen could not see during most of the pre-trial litigation. He explained as much to the state trial court on several occasions:

> Mr. Hedeen: The soonest [we could try the case] would be in the winter, Your Honor. And I say that not only because of the open-heart surgery that I had and my stamina, but also, I went to the ophthalmologist last Wednesday, and I have cataracts in both eyes, and I am going to have to have surgery on that. And if I was to have to tell the Court that I could not read a normal piece of paper, that would not be an exaggeration. In fact, looking at you right now, Judge, all I see is a blur.

Doc. 76-6 at PDF 37, Bates 1042 (Motion Hearing on June 26, 2007, at 4); *see also* Doc. 76-6 at PDF 117, Bates 1122 (Motion and Suppression Hearing on October 9, 2007, at 67) ("Mr. Hedeen: I didn't have an eyesight to look at the pictures"). At this point, it is pure speculation as to whether Mr. Hedeen knew about the mention of Corley's confession. There are other indications that Mr. Hedeen was not functioning competently at the time. For instance, Mr. Hedeen retained the placeholder names and made typographic errors throughout his pre-trial motions, which were taken from the Equal Justice Initiative's template motions. On several pages, Mr. Hedeen failed even to change the names of those in the template—referring to the victim as "Nellie and Jim Rogers" rather than 'Dewey Walker," for example. Doc. 76-1 at PDF 128, Bates 128. He also referred to three witnesses as the template witness names "Mark Police, George Expert, and Donald Brown." Doc. 76-1 at PDF 131, Bates 131. His client, Mr. Wilson, was called "Mr. Accused" on several pages. Doc. 76-1 at PDF 190, Bates 190; Doc. 76-2 at PDF 24, 43, Bates 224, 243. He left repeated question marks on two pages, which likely indicated passages to which he planned to return to, but did not. Doc. 76-1 at PDF 141, 142, Bates 141, 142. He repeatedly misspelled DA Valeska's name — repeatedly referring to him as "Veleska" in the certificates of service. *See, e.g.*, Doc. 76-1 at PDF 148, 150, 173, Bates 148, 150, 173. Given that Mr. Hedeen did not even give a closing argument at the guilt phase of the capital trial (*see* Doc. 114, Claim IV, ¶ 634), there is no basis to impute a factual finding that he received or read the police report.

172. A third factual finding that might be imputed to the ACCA is that, if defense counsel had filed a fourth pretrial motion for the Corley letter styled as a *Brady* violation, the prosecutor would have produced the letter. That would be an unreasonable finding of fact given that the State of Alabama has demonstrated that it would not produce the letter for nineteen years despite a binding court order dated

July 27, 2004, and more than fifteen *Brady* requests over 19 years. *See* Doc. 114, pp. 58-63.

173. Finally, it would be an unreasonable finding of fact that had defense counsel demanded the Corley letter, the State of Alabama would have produced the handwriting expert report. *Wilson II*, No. CR-16-0675, at *9. There is no evidence to support this fact finding, even if we imputed it to the appellate court. The handwriting expert report was not mentioned in discovery materials or anywhere else.

174. For all these reasons, there are no valid state court findings that bar relief from this Court. The only state factual record is Mr. Wilson's Rule 32 petition.

F. Mr. Wilson Is Entitled to an Evidentiary Hearing

175. In ¶ 88 of his Answer, Respondent contends that Mr. Wilson "failed to develop the factual basis for this [*Brady*] claim in state-court proceedings" and therefore "is not entitled to any evidentiary hearing in this Court." Doc. 129, p. 36.

176. However, Respondent's argument fails to consider the opening clause of §2254(e)(2). It is well-established that "[i]f there has been no lack of diligence at the relevant stages in the state proceedings, the prisoner has not 'failed to develop' the facts under § 2254(e)(2)'s opening clause, and he will be excused from showing compliance with the balance of the subsection's requirements." *Williams v. Taylor*, 529 U.S. 420, 437 (2000).

177. Mr. Wilson did not fail to develop the factual basis for his *Brady* claim in state court. His state post-conviction petition was improperly dismissed on the pleadings, with prejudice, on improper legal grounds. *See supra,* Section A. For this reason, Mr. Wilson was improperly denied the opportunity to develop the factual basis of his *Brady* claim in state court and should be granted an evidentiary hearing in federal court. In effect, 28 U.S.C. § 2254(e)(2) does not apply in this case because Mr. Wilson's Rule 32 petition was improperly dismissed with prejudice.

178. *Shinn* does not prevent this Court from conducting an evidentiary hearing. As noted earlier, under *Shinn*, a petitioner is only "at fault" if "he 'bears responsibility for the failure' to develop the record." 142 S. Ct. at 1734. That is not the case here. Mr. Wilson will fully brief his right to an evidentiary hearing after the close of discovery and after he has had a chance to fully brief the question of procedural default.

E. Respondent Has Not Addressed the *Loper Bright* Challenge

179. Alternatively, this Court is not required to accord deference to the ACCA's decision on this or any other issue governed by federal law. Although 28 U.S.C. § 2254(d) was construed by Justice O'Connor's opinion in *Williams v. Taylor*, 529 U.S. 362 (2000), as requiring such deference, that construction has been implicitly overruled by *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024). In the wake of *Loper Bright*, the deference requirement which Justice

O'Connor read into § 2254(d) must be held to violate the Supremacy Clause (Article VI, clause 2) and Article III of the Constitution, or § 2254(d) must be given the converse construction that Justice Stevens attributed to it in *Williams*. *See* Appendix SS (Anthony G. Amsterdam & James S. Liebman, Loper Bright *and the Great Writ*, 56 Colum. Hum. Rts. L. Rev. 54 (2025).

180. Repondent has not answered this argument.

181. In sum, since the ACCA's ruling is in error, this Court should review Mr. Wilson's *Brady* claim *de novo* and find that the Corley letter and the handwriting expert report were suppressed and that—read in light of the downstream evidence—they were material. It should hold that the suppression prejudiced Mr. Wilson, and it should grant Mr. Wilson a new penalty phase trial and sentencing because of the prosecution's violation of his rights to due process and a fair trial.

II. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF MR. WILSON'S CAPITAL TRIAL AND AT THE JUDGE SENTENCING, IN VIOLATION OF THE CONSTITUTIONAL REQUIREMENTS OF *STRICKLAND V. WASHINGTON*. MR. WILSON IS ENTITLED TO A NEW PENALTY PHASE TRIAL AND SENTENCING.

182. Mr. Wilson's second claim is that he was deprived of the effective assistance of counsel at the penalty phase and sentencing, in violation of the Sixth and Fourteenth Amendments, and is entitled to a new penalty-phase proceeding and sentencing. *Strickland v. Washington*, 466 U.S. 668 (1984).

183. In his Answer, Respondent raises the same defenses to each of the five parts of Mr. Wilson's claim: (1) the final state court decision was not contrary to or an unreasonable application of federal law; (2) the state court made findings of fact entitled to deference; and (3) Mr. Wilson failed to develop the factual basis in state court. Doc. 129, pp. 37-60.

184. Respondent's assertions are not compelling. Mr. Wilson will address each part in order.

A. Trial counsel failed to provide effective assistance of counsel because they failed to properly investigate the State's case, especially the confession of co-defendant Kittie Corley to the murder of Dewey Walker.

185. The first part of Mr. Wilson's penalty phase claim of ineffective assistance of counsel ("IAC") concerns his attorneys' failure to investigate the State's evidence with regard to the Corley letter and the handwriting expert report.

The Final State Court Decision Is Contrary to or an Unreasonable Application of Clearly Established Federal Law.

186. In ¶ 90 and 91 of his Answer, Respondent admits that the final state court decision addressed the merits of Mr. Wilson's claim, but contends that the state court decision was not contrary to or an unreasonable application of federal law. Doc. 129, p. 37-38. Respondent writes that "A review of the ACCA's opinion demonstrates that the decision of the Alabama court was not an unreasonable one." Doc. 129, p. 38.

187. Respondent's argument is not persuasive.

188. In its ruling, the Alabama Court of Criminal Appeals denied Mr. Wilson's penalty phase IAC claim on the ground that "[e]vidence that an accomplice was involved is not mitigating." *Wilson II*, at 50-51; Doc. 76-33 at PDF 51-52, Bates 5656-57. As Judge Watkins explained in his memorandum opinion and order, "As to the claim of penalty phase ineffectiveness, the ACCA concluded that petitioner could not show prejudice because Corley's letter 'would establish, at most, that [petitioner] had an accomplice in his beating and strangling Walker to death. Evidence that an accomplice was involved is not mitigating.' [ACCA decision] at 50-51. The Alabama Supreme Court denied certiorari, *Ex parte Wilson*, No. 1170747 (Aug. 24, 2018) […]. *Wilson v. Alabama*, 139 S.Ct. 1620 (April 29, 2019)." Doc. 67, p. 9.

189. However, the state court ruling that "[e]vidence that an accomplice was involved is not mitigating" is contrary to or an unreasonable application of the United States Supreme Court's decision in *Lockett v. Ohio*, 438 U.S. 586, 597, 604 (1978).

190. Under clearly established federal law, the evidence that Corley may have killed the victim is mitigating as to Mr. Wilson in at least three ways. First, Mr. Wilson's reduced culpability, especially in relation to the enhanced culpability of a co-defendant, is one of the most important and impactful mitigating circumstances

that can be argued to a capital jury. Comparative culpability is specifically declared mitigating by Ala. Code § 13A-5-51(4), and is widely recognized as mitigating by state and federal courts. *See Lockett v. Ohio*, 438 U.S. 586, 597, 604 (1978) (Petitioner challenged Ohio death penalty statute on the grounds that it precluded the trial court from considering several factors as mitigating factors, including her lesser culpability, and the Court concluded that "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death"); *see also* Doc. 67, Judge Watkins's March 27, 2023 Memorandum Opinion and Order, p. 19 ("It is no stretch, however, to argue that a co-defendant's admission of a possibly greater role in the murder, if not proximate causation of the victim's death, might be a material consideration in a jury's deliberation on whether to recommend a death sentence, even where the defendant has confessed to actions that could have caused the victim's death."); *cf.* Federal Death Penalty Act, 18 U.S.C. § 3592(a)(4) (listing as a statutory mitigating factor the greater culpability of a codefendant not punished by death). Federal and state courts routinely consider lesser culpability as a mitigating circumstance and require reasonable symmetry between the culpability and the sentencing of codefendants. *See, e.g.*, *United States v. Jackson*, No. 22-12533, 2023 WL 2945162

(11th Cir. Apr. 14, 2023) (lesser culpability as compared to defendant's brother considered mitigating factor); *United States v. Harris*, 383 Fed. Appx. 551, 553 (7th Cir. 2010) (lesser culpability in relation to codefendants serves as basis for below-guidelines sentence); *People v. Kliner*, 705 N.E.2d 850, 897 (Ill. 1998) ("similarly situated codefendants should not be given arbitrarily or unreasonably disparate sentences."); *Larzelere v. State*, 676 So.2d 394, 406 (Fla.1996) ("When a codefendant ... is equally as culpable or more culpable than the defendant, disparate treatment of the codefendant may render the defendant's punishment disproportionate.").

191. Second, Mr. Wilson would also have used this evidence to rebut the prosecution's argument to his jury and judge regarding the presence of the "heinous, atrocious, and cruel" ("HAC") aggravating circumstance. The sentencing judge found the existence of the HAC aggravating circumstance when he sentenced Mr. Wilson to death. Doc. 76-2 at PDF 184, 186, Bates 384, 386. The HAC aggravating circumstance is one of the most weighty factors in death sentencing in Alabama. As Magistrate Judge Charles S. Coody declared in this case, "Alabama's 'heinous, atrocious, or cruel' aggravating circumstance has been recognized as especially hefty in the sentencing calculus requiring the weighing of aggravating and mitigating circumstances. *See Boyd v. Allen*, 592 F.3d 1274, 1302 n.7 (11th Cir. 2010) (describing Alabama's HAC aggravating circumstance as 'a particularly powerful

aggravator')." Doc. 79, p. 17 n.6. The United States Supreme Court has been especially attentive to evidence that aggravates punishment at the penalty phase of trials. *See Ring v. Arizona*, 536 U.S. 584 (2002); *Hurst v. Florida*, 577 U.S. 92 (2016); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt"); *Cunningham v. California*, 549 U.S. 270, 272 (2007) (reaffirming *Apprendi*'s bright-line rule).

192. The ACCA ruled that relative culpability has no bearing on the aggravating circumstance that the murder was especially heinous, atrocious, and cruel, relying on *Ex parte Bankhead*, 585 So. 2d 112, 125 (Ala. 1991), and unsupported assertions that the involvement of a co-defendant is therefore of no consequence respecting penalty. *Wilson II*, No. CR-16-0675, slip op. at 50-51. But this runs contrary to the constitutional requirement of individualized sentencing made clear in cases like *Lockett*, 438 U.S. at 608. The aggravating and mitigating circumstances must be individualized to the defendant in question. A finding that a murder was especially heinous, atrocious, and cruel, must take into account whether a defendant's own participation in the crime contributed to what may have made it heinous, atrocious, and cruel. To hold otherwise would run counter to every U.S. Supreme Court case addressing mitigating evidence in a capital case. *See*, *e.g.*,

Lockett, 438 U.S. at 608 (finding the Ohio death-penalty statute which did not allow for consideration of relative culpability unconstitutional).

193. The whole purpose of the penalty phase of a capital trial is to determine the moral culpability of the defendant in deciding whether he is deserving of death:

> Our line of cases in this area has long recognized that before a jury can undertake the grave task of imposing a death sentence, it must be allowed to consider a defendant's moral culpability and decide whether death is an appropriate punishment for that individual in light of his personal history and characteristics and the circumstances of the offense.

Abdul-Kabir v. Quarterman, 550 U.S. 233, 263-64 (2007). The "circumstances of the offense" necessarily include the defendant's role in the offense. While it may be true, as the ACCA said, that whether a particular murder is "especially heinous, atrocious, and cruel" "focuses on the manner of the killing," *Wilson II*, No. CR-16-0675, slip op. at 51, answering that question alone does not accord with the individualized sentencing the Eighth Amendment requires. It runs contrary to clearly established law that "the defendant's actual participation in the murder," *id.*, or non-participation, would count for nothing.

194. To make this point as clearly as possible, one need only recall the prosecutor's closing arguments in which he projected a vivid picture of Petitioner beating Mr. Walker to death by 114 blows of a baseball bat; or Judge Jackson's sentencing order, which based the finding of HAC on the number and force of the bat-blows inflicted on Mr. Walker, supposedly by David Wilson; or Magistrate

Judge Coody' comments about the prosecutor's closing argument. These passages make clear that the defendant's participation or non-participation is key to the HAC determination and to the individualized constitutional analysis.

195. Specifically, District Attorney Doug Valeska argued during the guilt-phase closing argument that Mr. Wilson inflicted the multiple injuries that caused Mr. Walker's death and that the number of injuries refuted his statement to the police that he did not mean to hit Mr. Walker in the head:

> 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.
>
> My goodness, good people, how many wounds, injuries, contusions, fractures – can you count to 114? Sure you can. 114 separate contusions, bruises, lacerations, tears on the body of Dewey Walker. Don't count the ribs.
>
> Don't count the skull. Don't count other things. Just count 114. Go back there and look at the clock and see how quickly you can do this 114 times.

Doc. 76-9 at PDF 152-153, Bates 1759-1760. Mr. Valeska repeated this theme throughout. *See, e.g.*, Doc. 76-9 at PDF 155-156, 158, 169, Bates 1762-1763, 1765, 1776.

196. Similarly, at the penalty phase, the State of Alabama rested its argument for the application of the HAC aggravating circumstance on the fact that it was Mr.

Wilson who inflicted the blunt force trauma. Doc. 76-10 at PDF 110-111, Bates 1919-1920. And again, at the sentencing hearing before the judge, the number of injuries inflicted by Mr. Wilson was given as a justification for a sentence of death. Doc. 76-10 at PDF 176-177, Bates 1985-1986.

197. As Magistrate Judge Coody explained, the sentencing court relied on the fact that Mr. Wilson had inflicted the bat blows to find the HAC aggravator. That was the central finding of the trial court. As Judge Coody wrote:

> The trial court's sentencing order similarly relied substantially on the finding that petitioner savagely beat Walker with a baseball bat. Summarizing the trial evidence, the trial judge concluded that "defendant . . . attacked Mr. Walker with a baseball bat which he had brought with him inflicting numerous broken bones in the chest area and strangling him with an extension cord." Doc. 76-2 at PDF 184, Bates 384. In particular, the trial judge found that "defendant hit the victim numerous times with a baseball bat breaking three ribs on one side, five ribs on the other side, and the victim's sternum[.] The defendant also hit the victim on the head with the bat causing skull fractures. Blows of tremendous force would have been necessary to have caused the injuries sustained." Id. at 185, Bates 385. The trial judge concluded that, because these injuries caused Walker tremendous pain, and considering evidence that Walker lived for two or more hours suffering from these injuries, Walker's death was "especially heinous, atrocious, or cruel as compared to other capital offenses." Id. at 186, Bates 386. With this substantial aggravating circumstance thus weighted against the mitigating circumstances, the trial judge sentenced petitioner to death. Id. at 187-88, Bates 387-88.
>
> In short, the allegation that petitioner caused Walker's death, at least in part if not entirely, by severely and repeatedly beating him with a baseball bat was integral to the grand jury's indictment, the prosecution's case at trial, and, most importantly, the trial court's order sentencing petitioner to death. Petitioner was not charged, in respondent's phrasing, with "participating" with Corley or anyone

> else in Walker's murder. He was not charged with contributing to Walker's death by strangling him during a mutual attack in which an accomplice beat Walker with a bat. He was charged simply and straightforwardly with wielding the bat and striking the blows that caused, or at least substantially contributed to, Walker's death. The Corley letter stands as evidence, however improbable or inconvenient, that someone else did the beating charged to petitioner. While it does not "exonerate" petitioner of culpability in the murder of Walker, its exculpatory character respecting the specific charges against petitioner, and his punishment, is evident.

Doc. 79, pp. 14-17.

198. Third, Mr. Wilson could also have used this evidence to create residual doubt at the penalty phase as to whether Mr. Wilson had an intent to kill, which was required for the jury to convict him of capital murder in Alabama. Ala. Code 1975, § 13A-5-40(a)(2) and (4). *See Deardorff v. Warden*, 2024 WL 3440177, at *8 ("When a petitioner denies his guilt at trial, 'residual doubt is perhaps the most effective strategy to employ at sentencing'"), and cases cited in ¶ 222 *infra*.

199. Respondent does not present any argument as to why the state court's ruling was not contrary to or an unreasonable application of federal law. *See* Doc. 129, ¶ 91. Respondent writes that "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." Doc. 129, p. 38. However, the Alabama Court of Criminal Appeals used different reasoning regarding the claims of ineffective assistance of counsel at the guilt and penalty phases. At the penalty phase, the state court ruled that "Evidence that an accomplice was involved is not mitigating." *Wilson II*, at 50-51; Doc. 76-33

at PDF 51-52, Bates 5656-5657. By contrast, and for an entirely different reason, the state court denied the guilt phase ineffectiveness claim because the Corley letter was (supposedly) not admissible. *See infra*, Claim IV. The analysis at the guilt phase has no bearing here.

The Alabama Court of Criminal Appeals Did Not Make Factual Findings in the State Post-Conviction Proceedings, But Merely Dismissed the State Post-Conviction Petition on the Pleadings

200. In ¶¶ 92 and 94 of his Answer, Respondent asserts that the Alabama Court of Criminal Appeals "made findings of fact" that are entitled to deference under the AEDPA. Doc. 129, p. 39.

201. Respondent does not state what facts the Alabama Court of Criminal Appeals found.

202. In Mr. Wilson's case, the state courts did not make factual findings regarding the ineffectiveness of penalty phase counsel. Mr. Wilson's amended Rule 32 petition was dismissed, with prejudice, on a legal ground, namely that an accomplice's involvement is not mitigating evidence. The Rule 32 petition was not dismissed based on a finding of fact, but based on an incorrect finding of law.

203. As a general matter, appellate courts do not make factual findings. In this case, the ACCA certainly did not. It ruled on legal grounds only.

Additional Points

204. In ¶ 93 of his Answer, Respondent states that Mr. Wilson "failed to develop the factual basis for this claim in state-court proceedings" and "is not entitled to any further evidentiary hearing in this Court." Doc. 129, p. 39. Again, Mr. Wilson's Rule 32 petition was improperly dismissed on an improper legal ground, making it impossible for him to develop the factual basis for his claim in state court. Therefore, this case does not fall under 28 U.S.C. § 2254(e)(2).

205. Insofar as Respondent's Answer could be construed as raising a procedural bar to this claim of ineffective assistance of trial counsel due to the conduct of his Rule 32 counsel, Petitioner replies that any procedural default is excused, under the "cause and prejudice" standard, by the prejudicial ineffective assistance of state post-conviction counsel under *Martinez v. Ryan*, 566 U.S. 1 (2012), insofar as any deficiency in the development of the factual basis in state post-conviction proceedings is attributable to the incompetent representation of Rule 32 counsel, which prejudiced Petitioner.

206. Respondent has failed to answer Mr. Wilson's argument that the Supreme Court's decision in *Loper Bright* vitiates the deference requirement of the AEDPA under 28 U.S.C. § 2254(d). *See* Doc. 114, ¶412 (referencing the *Loper Bright* argument in Doc. 114, ¶¶ 348-350).

207. In conclusion, defense counsel's failure to investigate the Corley letter prejudiced Mr. Wilson because it left him with no defense and thereby deprived him of a fair penalty trial. Where a co-defendant's confession is withheld from the jury, there can be no confidence in the jury's verdict. *See Brady*, 373 U.S. at 86 ("We agree ... that suppression of this [co-defendant's] confession was a violation of the Due Process Clause of the Fourteenth Amendment."). "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). That standard is met here. For these reasons, and those articulated in the First Amended Petition (Doc. 114, pp. 139-168, incorporated herein by reference), Mr. Wilson is entitled to relief and a new penalty and sentencing. Mr. Wilson requests discovery and a hearing on this issue.

B. Counsel were ineffective at the penalty and sentencing phases of Mr. Wilson's capital trial by failing to investigate and prepare for sentencing, and thereby failing to discover relevant and compelling mitigation in David Wilson's social history that would have persuaded the jury and the judge that death was not an appropriate sentence for Mr. Wilson.

208. In ¶¶ 95 and 96 of his Answer, Respondent admits that the final state court decision addressed Mr. Wilson's ineffective assistance of counsel at the penalty phase claim on the merits; but Respondent argues that the state courts'

rulings are not contrary to or an unreasonable application of clearly established federal law. Doc. 129, pp. 40-48.

209. Respondent's argument is not compelling. The ruling that the Alabama Court of Criminal Appeals issued represents an unreasonable application of *Strickland*, 466 U.S. at 687, *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Rompilla v. Beard*, 545 U.S. 374 (2005). The ACCA's analysis was unreasonable with regard to both the prejudice and deficient performance prongs of *Strickland*. As such, Mr. Wilson is entitled to a *de novo* ruling on his ineffective assistance of counsel at the penalty phase claim.

The ACCA's opinion was unreasonable with regard to the prejudice prong of Strickland*.*

210. To "establish prejudice, a 'defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Wiggins*, 539 U.S. at 534 (quoting *Strickland*, 466 U.S. at 694). "'To assess [the] probability [of a different outcome under *Strickland*], we consider the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—and reweig[h] it against the evidence in aggravation.' That same standard applies—and will necessarily require a court to 'speculate' as to the effect

of the new evidence—regardless of how much or how little mitigation evidence was presented during the initial penalty phase." *Sears v. Upton*, 561 U.S. 945, 955–56 (2010) (quoting *Porter v. McCollum*, 558 U.S. 30, 41 (2009) (internal citations omitted).

211. The ACCA made a legal determination that all the additional mitigating evidence would not have changed the outcome, and thus its absence was not prejudicial to Mr. Wilson:

> 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.

Wilson II, at 50; Doc. 76-33 at PDF 51, Bates 5656.

212. The ACCA concluded that, as a legal matter on the basis of the pleadings alone, Mr. Wilson had failed to plead sufficient facts to show prejudice: "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." *Wilson II*, at 50; Doc. 76-33 at PDF 51, Bates 5656.

213. Respondent contends that the ACCA's decision was not unreasonable given that "At bottom, Wilson simply failed to plead facts that would explain how he was actually prejudiced by counsel's alleged deficient performance." Doc. 129, ¶

96. Respondent claims that there was a lack of prejudice because Mr. Wilson's trial counsel did not leave the jury with "a false impression" of Mr. Wilson's upbringing, unlike the petitioners in *Wiggins* and *Rompilla*. Doc. 129, ¶ 96. However, this vastly overstates the distinction between the facts of *Wiggins* and *Rompilla* and Mr. Wilson's case. Like the jury in Mr. Wilson's case, the juries in *Wiggins* and *Rompilla* were provided an impression of the defendant's life that was whitewashed and incomplete. Insofar as the juries in either case were given a "false impression," Mr. Wilson's was too. In *Wiggins*, the mitigation evidence that trial counsel failed to present was found to be prejudicial because it omitted an available and "powerful mitigating narrative" that may have changed the outcome of the sentence. *Wiggins*, 539 U.S. at 537. The narrative in *Wiggins* consisted of severe abandonment during Mr. Wiggins' childhood, sexual molestation, and diminished mental capacities. At Mr. Wilson's trial, trial counsel presented two mitigation witnesses, neither of whom gave the jury a full and accurate picture of Mr. Wilson's childhood. His mother, Linda Wilson, was largely responsible for the abandonment that Mr. Wilson felt as a child. Trial counsel attempted to elicit some understanding of Mr. Wilson's childhood from her on the stand, but his wandering questioning instead gave her an opportunity to minimize the effects of her mental illnesses and resulting negligent parenting. In fact, on cross examination, Linda Wilson was given the opportunity to say that Mr. Wilson had "a good relationship" with her and the rest of their family,

omitting entirely the fact that her son had been abandoned by every adult figure in his family. Doc. 76-10 at PDF 85-86, Bates 1894-95. The other mitigation witness, neighbor Bonnie Anders, knew little about Mr. Wilson's childhood. In *Rompilla*, the undiscovered mitigating evidence refuted a "benign conception" of Mr. Rompilla's upbringing and mental health. *Rompilla*, 545 U.S. at 391. Mitigation that was never presented to the jury as a result of trial counsel's ineffective assistance in *Rompilla* included his undiagnosed schizophrenia and other mental disorders, as well as a chaotic childhood caused by alcoholism. *Rompilla*, 545 U.S. at 390-91. Likewise, at Mr. Wilson's trial, the jury never heard about his Asperger's Syndrome and childhood of abandonment. Insofar as the juries in *Wiggins* and *Rompilla* were given "false impressions" of the defendants' backgrounds, so was Mr. Wilson's jury.

214. Respondent further argues that the ACCA's decision was not unreasonable because Mr. Wilson failed to show how his "troubled, but certainly not horrific childhood would have equaled our [sic] outweighed" the aggravating circumstances of this case. Doc. 129, ¶ 96. This statement not only glosses over severe child abuse, but entirely omits the facts pled by Mr. Wilson concerning his Asperger's Syndrome. Doc. 114, ¶¶ 86-88, 415-465.

215. The State occludes the fact that in its decision, the ACCA discounted allegations of severe physical abuse—including a beating that left welts on Mr. Wilson's legs—as insufficiently pled, even though the pleading is comparable to the

facts of *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and the ACCA's decision deviates from *Wiggins*. The facts that Rule 32 counsel pled are similar to those which the U.S. Supreme Court described as compelling in *Eddings*:

> In mitigation, Eddings presented substantial evidence at the hearing of his troubled youth. The testimony of his supervising Juvenile Officer indicated that Eddings had been raised without proper guidance. His parents were divorced when he was 5 years old, and until he was 14 Eddings lived with his mother without rules or supervision. ... By the time Eddings was 14 he no longer could be controlled, and his mother sent him to live with his father. But neither could the father control the boy. Attempts to reason and talk gave way to physical punishment. The Juvenile Officer testified that Eddings was frightened and bitter, that his father overreacted and used excessive physical punishment: "Mr. Eddings found the only thing that he thought was effectful with the boy was actual punishment, or physical violence – hitting with a strap or something like this."

455 U.S. at 107. "[E]vidence of a turbulent family history, of beatings by a harsh father, and of severe emotional disturbance is particularly relevant." *Id.* at 115. It was unreasonable to find Mr. Wilson's pleading insufficiently specific.

216. The ACCA found Mr. Wilson's allegations that his uncle, Angelo Gabbrielli, repeatedly beat him with a belt and other implements was insufficiently pled, because:

> 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 Gab[b]rielli "often beat [him], usually with a belt, but sometimes with other things." C. 402. [Doc. 76-23 at PDF 3, Bates 3643.] 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 Gab[b]rielli" took a switch and beat [Wilson] until he had welts all over his legs." C. 402. [Doc. 76-23 at PDF 3, Bates 3643.] Likewise, Wilson pleaded only a few instances of verbal abuse.

Wilson II, No. CR-16-0675, slip op. at 49. The ACCA alleged that David Wilson had insufficiently pled his abuse because he did not have careful records of time, type, and frequency of his abuse. This standard is not required by clearly established federal law, and a mitigation witness — a lay witness such as a neighbor or family member — would not have been able to testify to this degree of specificity.

217. The ACCA unreasonably applied clearly established federal law in considering a defendant's difficult childhood to be "a double-edged sword." *Wilson II*, No. CR-16-0675, slip op. at 50; *Sears*, 561 U.S. at 951. Under federal law, all mitigating evidence presented by the defense must be considered by a jury and court. *See, e.g., Woodson v. North Carolina*, 428 U.S. 280, 303-05 (1976) (finding consideration of mitigating factors constitutionally required in death penalty cases); *Eddings*, 455 U.S. at 113–14 ("Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence."). The ACCA was unreasonable in assuming in its prejudice considerations that a jury and judge would abandon their constitutional obligation to consider all mitigating evidence.

218. Respondent provides no analysis for why the ACCA's decision regarding Mr. Wilson's Asperger's Syndrome was reasonable. The ACCA dismissed the Asperger's diagnosis' relevance because it is characterized as a "mild" form of autism. *Wilson II*, No. CR-16-0675, slip op. at 49. But the ACCA is unreasonable in their determination that a "mild" psychological condition indicates that it may be dismissed. "Mild" is a relative term. In fact, "mild" intellectual disability is still intellectual disability severe enough that the U.S. Supreme Court has held individuals diagnosed with it are exempt from the death penalty. *Atkins v. Virginia*, 536 U.S. 304, 308 and 308 n.3 (2002). By dismissing Mr. Wilson's Asperger's Syndrome because it is a "mild" form of autism, the ACCA contradicted well-established federal law under *Tennard v. Dretke*, 542 U.S. 274, 286-87 (2004), which held:

> We have never denied that gravity has a place in the relevance analysis [of mitigating evidence], insofar as evidence of a trivial feature of the defendant's character or the circumstances of the crime is unlikely to have any tendency to mitigate the defendant's culpability. . . . However, to say that only those features and circumstances that a panel of federal appellate judges deems to be "severe" (let alone "uniquely severe") could have such a tendency is incorrect. Rather, the question is simply whether the evidence is of such a character that it might serve as a basis for a sentence less than death . . . .

Moreover, at the time of Mr. Wilson's trial, Asperger's Syndrome was characterized as a distinct diagnosis from autism in the DSM-IV-TR.[17] While later editions of the DSM consolidated Asperger's Syndrome into the broader Autism Spectrum Disorder,[18] in the years leading up to Mr. Wilson's trial, Asperger's Syndrome was a standalone disorder not distinguished internally by severity.

219. Contrary to Respondent's argument that the available mitigating evidence would not have outweighed the aggravating facts of the case, Mr. Wilson's Asperger's Syndrome would have weighed heavily against the prosecution's characterization of Mr. Wilson as a remorseless and cold-blooded actor. Respondent correctly states that the jury heard "that Wilson and his accomplices repeatedly visited the victim's home over several days to steal from him as his body lay unattended." Doc. 129, ¶ 96. Respondent is correct that such a depiction likely permitted the jury to believe Mr. Wilson to be "callous" in his actions. *Id*. But such a depiction was the result of trial counsel's failure to present key mitigating evidence

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[17] At the time of Mr. Wilson's trial, the DSM-IV-TR, published in 2000, was the most updated diagnostic manual used by medical professionals. The diagnosis of Asperger's Syndrome was used in the DSM-IV-TR. In the next edition, DSM-V, published in 2013, Asperger's Syndrome was merged into the autism spectrum. Thus, where Mr. Wilson may have cited the DSM-V at earlier points in this litigation, and referenced its autism spectrum diagnosis, such references correspond to the Asperger's Syndrome diagnosis available in the DSM-IV-TR in use at the time of his trial in 2008. The diagnosis criteria of Asperger's Syndrome was incorporated into autism spectrum disorder, and thus the differences in the editions are not material for diagnostic purposes. Henceforth, Mr. Wilson will cite to the definitions in use in the DSM-IV-TR, which was operative at the time of his trial. Starting from DSM-V, Asperger's Syndrome was merged into general autism spectrum disorder.

[18] American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISODERS, FIFTH EDITION TEXT REVISION 53 (5th ed. 2013) ("Autism spectrum disorder encompasses disorders previously referred to as … [listing disorders] and Asperger's disorder.").

of Asperger's Syndrome that would have refuted this impression. Had the jury heard that Mr. Wilson had Asperger's Syndrome, in which one of the symptoms is unusually severe fixation on certain objects, especially electronics, the jury would have understood that Mr. Wilson's behavior was driven not from a lack of concern for the decedent, but with an uncontrollable fixation caused by his Asperger's Syndrome. In fact, had the jury heard the contents of Dr. Shaffer's report, they would have learned that Mr. Wilson had exhibited an obsession with electronics since he was a young child. Doc. 114, ¶ 87. They would have likewise heard that far from being a callous schemer, Mr. Wilson's Asperger's Syndrome rendered him easy to manipulate by his peers, such as his co-defendants. *Id.*

220. The ACCA also found that Rule 32 counsel did not plead the applicability of the Asperger's Syndrome diagnosis with sufficient specificity, because counsel "pleaded the typical symptoms of autism spectrum disorder, as opposed to the specific symptoms of Wilson's alleged affliction." *Wilson II*, No. CR-16-0675, slip op. at 49. This is an unreasonable finding. The professional diagnostic criteria were apt descriptors of Mr. Wilson's symptoms because Mr. Wilson has Asperger's Syndrome, much the same way as someone diagnosed with a femoral fracture would have as a symptom a fractured femur. Mr. Wilson was diagnosed with Asperger's Syndrome because he meets the criteria set out in the DSM-IV-TR. He exhibited three out of the four "qualitative impairment[s] in social interaction,"

when two are required for diagnosis: "(1) marked impairment in the use of multiple nonverbal behaviors such as eye-to-eye gaze, facial expression, body postures, and gestures to regulate social interaction (2) failure to develop peer relationships appropriate to developmental level (3) a lack of sponaenous seeking to share enjoyment, interests, or acheievements with other people… (4) lack of social or emotional reciprocity."[19] *See* Doc. 114-40, p. 5 (Appendix NN, Psychological Report from Dr. Shaffer) (Linda Wilson described how David would not make eye contact when speaking with others and struggled to play with other children); *id.* at p. 3 (Report summarizing David's struggle with social interactions in elementary school and years in special needs classrooms); *id.* at p. 6 (Angelo Gabrielli described David struggling to share his achievements with others and to celebrate other people's accomplishments); *id.* at p. 9-10 (Dr. Shaffer's "Structured Assessment of Observed Social Behaviors" based on tests of David's parents and uncle Angelo Gabrielli, reflecting impairments manifesting Asperger's Disorder). He showed two manifestation of "restricted repetitive and stereptyped patterns of behavior, interests, and activities," of which one is required for diagnosis: "(1) encompassing preoccupation with one or more stereotyped and restricted patterns of interests that

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[19] "Diagnostic criteria for 299.80 Asperger's Disorder," American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISODERS, FOURTH EDITION TEXT REVISION 84 (4th ed. 2000) (diagnostic criteria under point A). Dr. Shaffer's report included diagnostic analysis using the most updated version of the DSM, DSM-V, in which he found David exhibited the analogous diagnostic criteria listed in the DSM-V. Doc. 114-40, p. 13.

is abnormal either in intensity or focus (2) apparently inflexible adherence to specific, nonfunctional routines or rituals."[20] *See* Doc. 114-40, p. 6 (Linda Wilson describes that David would "line up his toys in an orderly, regimented fashion" rather than play with them); *id.* at p. 11 (Linda Wilson described David's "rigid and inflexible behavior," how he "focusses too much on parts of things and misses the big picture" and has difficulty with changes in his routine."); *id.* at p. 14 (David was obsessed with "electronics and other gadgetry" and "has always been observed to tinker with sound devices and other electronics."). Mr. Wilson's Asperger's Syndrome "causes clinically significant impairment in social, occupational, [and] other important areas of functioning." *See generally* Doc. 114-40. Regarding differential diagnosis – i.e., the alternative conditions that might explain Mr. Wilson's symptoms and therefore need to be excluded – there has been no evidence of delay in language or delay in cognitive development, nor has he met criteria for another specific Pervasive Developmental Disorder or Schizophrenia.[21] Thus, the quotation of symptoms from the DSM, *see* Doc. 76-23 at PDF 13, Bates 3653, shows what Mr. Wilson's symptoms are. But the ACCA was also factually in error. Following the quotation of symptoms, state post-conviction counsel named numerous witnesses who observed features such as those described in the DSM and

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[20] DSM-IV-TR 84 (diagnostic criteria under point B).
[21] DSM-IV-TR 84 (remaining diagnostic criteria under points C-F).

presented in their own words the content of what their testimony would have been. Doc. 76-23 at PDF 14-16, Bates 3654-3656. They would have testified to "specific symptoms of Wilson's alleged affliction."

221. Mr. Wilson was sentenced to death by a 10-2 non-unanimous jury vote. The only aggravating factor that the jury found during the penalty phase that was not already found during the guilt phase was the heinous, atrocious, and cruel ("HAC") aggravating factor. Contrary to the ACCA's conclusions, the evidence that trial counsel failed to investigate and present was not merely "cumulative." The jury never heard about Mr. Wilson's medical diagnosis of Asperger's Syndrome, and as a result had no explanation for Mr. Wilson's detached behavior during and after the alleged offense. In their closing statement during the penalty phase, to argue that the crime was especially heinous, atrocious, and cruel, the prosecutor asked the jury to consider how "[i]t was a murder because someone wanted speakers and amps. A total disregard for the value of human life. He cared less about Mr. Walker's life. The only thing he was interested in was getting that van and getting those speakers." Doc. 76-10 at PDF 112, Bates 1921. The jury never heard that there was a medical explanation for Mr. Wilson's behavior, rather than cold bloodedness. A lack of explanation for Mr. Wilson's fixation on electronics and behavior following the alleged offense is especially prejudicial given the HAC aggravating factor. If the

jury understood that Mr. Wilson's Asperger's Syndrome explained much of his seemingly callous behavior, the outcome of the sentence may have been different.

222. In addition, although trial counsel presented two mitigation witnesses —Linda Wilson and Bonnie Anders—trial counsel failed to elicit critical mitigating evidence from these witnesses. Notably, trial counsel tiptoed around Linda Wilson's debilitating mental illnesses and failed to present other readily-available witnesses who would have given a more candid assessment of how her neglectful parenting affected Mr. Wilson. Trial counsel likewise failed to elicit testimony regarding Linda's repeated abandonment of her children, oftentimes giving them back to their father in the middle of the night because she could no longer handle them. All the jury heard was that there were "interruptions" to her visits, not that her children were repeatedly shown that their mother did not want to be with them. Doc. 76-11 at PDF 65, Bates 1874.

223. Had the jury heard evidence of Mr. Wilson's Asperger's Syndrome diagnosis and abusive childhood, there is a reasonable probability that one additional juror may have voted for life, and the outcome would have been different. *Bertolotti v. Dugger*, 883 F.2d 1503, 1519 n.12 (11th Cir. 1989) ("[I]f there is a reasonable probability that one juror would change his or her vote, there is a reasonable probability that a jury would change its recommendation."). Trial counsel's failure to investigate and present mitigating evidence concerning Mr. Wilson's childhood

and Asperger's Syndrome prejudiced Mr. Wilson, and the ACCA's finding to the contrary was unreasonable.

224. The ACCA failed to grant Mr. Wilson an evidentiary hearing, despite the facts pled by Rule 32 counsel clearly indicating that a hearing on the readily-available mitigation evidence concerning Mr. Wilson's childhood and Asperger's Syndrome was warranted. The ACCA unreasonably interpreted the impact that such mitigating evidence may have had on the jury's interpretation of Mr. Wilson's moral blameworthiness. As a result, the ACCA's decision was an unreasonable application of clearly established federal law. *See Carnley v. Cochran*, 369 U.S. 506 (1962), and *McNeal v. Culver*, 365 U.S. 109, 117 (1961) ("[D]ue process of law required that petitioner have the assistance of counsel at the trial of this case, if the facts and circumstances alleged in his habeas corpus petition are true. On the present record it is not possible to determine their truth. But the allegations themselves made it incumbent on the Florida court to grant petitioner a hearing and to determine what the true facts are."). The absence of readily-available mitigation evidence from the case presented to the jury was prejudicial, especially where two jurors voted for life without parole even without it. The ACCA's treatment of this claim is an unreasonable deviation from U.S. Supreme Court precedent. *See Sears v. Upton*, 561 U.S. 945 (2010) (per curiam) (holding that petitioner was prejudiced when trial counsel failed to present mitigating evidence including his parents' abusive

relationship, his parents abuse to him, and severe learning disabitilies; and holding that prejudice inquiry has never been limited to cases in which only "little or no mitigation evidence" presented); *Williams v. Taylor*, 529 U.S. 362, 398 (2000) (holding that the aggregation of mitigation evidence presented at trial, cooperation with police and remorse, and mitigation evidence *not* presented at trial, including an abusive childhood and borderline mental retardation, may have changed the jury's decision); *Rompilla v. Beard*, 545 U.S. 392-93 (2005) (holding that evidence of organic brain damage, schizophrenia, and an abusive household not presented to the jury may have changed the jury's decision); *Porter v. McCollum*, 558 U.S. 30, 41-42 (2009) (holding that if mitigating evidence including "1) Porter's heroic military service in two of the most critical—and horrific—battles of the Korean War, (2) his struggles to regain normality upon his return from war, (3) his childhood history of physical abuse, and (4) his brain abnormality, difficulty reading and writing, and limited schooling" had been presented, the judge and jury may imposed a different sentence, and it would be unreasonable to conclude otherwise).

The ACCA's ruling concerning the deficient performance prong of Strickland *must be set aside by this Court.*

225. It is well established under Supreme Court precedent that trial counsel's performance is deficient when it falls "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 669. Morevoer, when trial counsel's

strategic choices are made after a less than complete investigation, such choices are reasonable to the extent that the decision to limit investigations was a reasonable professional judgment. *Wiggins*, 539 U.S. at 521-522.

226. The ACCA did not make a ruling on deficient performance and based its decision solely on lack of prejudice, and as such, there is no state decision to which a federal court can defer with respect to the deficient performance prong of *Strickland*. *See* Doc. 129, p. 47; *Wilson II*, No. CR-16-0675, slip op. at 50 ("Wilson has failed to allege sufficient facts to show that he was prejudiced by trial counsel's alleged ineffectiveness."). The ACCA's ruling rested entirely on lack of prejudice. Accordingly, this Court must make its own legal determination on the deficient performance prong. Where a state court addresses only one prong of a multi-pronged federal claim—like here, addressing only prejudice but not deficient performance—the federal habeas court must adjudicate the unaddressed prong independently, with no AEDPA deference. *See Hall v. Warden*, 686 Fed. Appx. 671, 678 (11th Cir. 2017) (per curiam) ("Because the Georgia Supreme Court did not rule on the performance prong [of an ineffective assistance claim because state court rejected the claim for lack of prejudice], our review of that [performance] issue is *de novo*"); *Johnson v. Sec'y, DOC*, 643 F.3d 907, 935 (11th Cir. 2011) ("Because the state courts did not decide the prejudice issue [under *Strickland v. Washington*'s second prong after ruling erroneously that counsel was not deficient under *Strickland*'s first prong], we

decide it *de novo*."); *Ferrell v. Hall*, 640 F.3d 1199, 1226 (11th Cir. 2011) ("since the Georgia Supreme Court did not reach this [second] prong of *Strickland*" after rejecting the claim under *Strickland*'s first prong, "we have no state court judgment to afford deference" on prejudice element and "[a]ccordingly, we evaluate this element *de novo*"); *Knight v. Florida Department of Corrections,* 958 F.3d 1035, 1046 & n.3 (11th Cir. 2020), *cert. denied*, 141 S. Ct. 2471 (2021) (because "Florida Supreme Court expressly declined to analyze *Strickland*'s second prong, prejudice[,] . . . 'our review is not circumscribed by a state court conclusion with respect to prejudice,' *Wiggins v. Smith*, 539 U.S. 510, 534 (2003), and we must review that prong de novo"; "To be clear, this case provides us no occasion to 'look through' the Florida Supreme Court's decision and defer to the state trial court's prejudice determination under *Wilson v. Sellers*, 138 S. Ct. 1188, 1196 (2018). *Wilson* addressed the question how a federal habeas court should deal with the circumstance in which a state supreme court's decision 'does not come accompanied by reasons'—where, for instance, it consists in only 'a one-word order.' *Id*. at 1192. Here, by contrast, we are confronted with a reasoned opinion from the Florida Supreme Court that addresses Knight's ineffective-assistance claim on the merits. We take the Florida Supreme Court's decision just as we find it—and under *Wiggins* and *Rompilla*, because that court declined to address *Strickland*'s prejudice prong, we must consider that issue de novo."). On the facts pleaded in the

Amended Petition, trial counsel was deficient in their performance under *Wiggins*, given their lack of mitigation investigation.

227. Insofar as the ACCA's decision concerning Mr. Wilson's penalty phase ineffective assistance of counsel claim might be interpreted as making any tangential references to the performance of defense counsel, the ACCA unreasonably relied on cases that are manifestly contrary to clearly established federal law. In his recitation of the ACCA's decision, which he notes has "citations edited or omitted," Respondent omits several cases on which the ACCA claims to have based its decision that are directly contrary to federal law. If we reintroduce the omitted lengthy quotation from *McWhorter v. State*, 142 So. 3d 1195, 1245-47 (Ala. Crim. App. 2011), which collects numerous statements of the method of review by lower courts, it becomes clear that many of those statements are unreasonable deviations from the U.S. Supreme Court's delineation of the appropriate analysis, *Wilson II*, No. CR-16-0675, slip op. at 37-44. For instance, the ACCA quoted a pre-*Wiggins* Sixth Circuit case for the proposition that where trial counsel conducted any investigation, a petitioner cannot show deficient performance. *Id*. (quoting *Campbell v. Coyle*, 260 F.3d 531, 552 (6th Cir. 2001)). This is an unreasonable deviation from the Supreme Court's holdings in *Wiggins* and *Porter v. McCollum*. *See also Sears*, 561 U.S. at 955 ("We certainly have never held that counsel's effort to present some mitigation evidence should foreclose an inquiry into whether a facially

deficient mitigation investigation might have prejudiced the defendant.”). While the ACCA acknowledged that “[t]he reasonableness of the investigation involves ‘not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further,’” *Wilson II*, No. CR-16-0675, slip op. at 40 (quoting *Wiggins*, 539 U.S. at 527) (other citations omitted), this quote is buried in seven pages of contrary quotations, like *Campbell*.

228. The omission of the lengthy quotation from *McWhorter* gives this Court an inaccurate understanding of the ACCA’s reasoning, as the ACCA failed to apply the central principle from *Wiggins* in Mr. Wilson’s case. The ACCA failed to apply the principle that the quantity of facts defense counsel gathered does not answer the question whether the investigation conducted was reasonable. An investigation is not reasonable where counsel are aware from the information they have gathered that more, and more compelling, information may be found elsewhere but they do not pursue it. In *Wiggins*, counsel conducted some investigation; they consulted with a psychologist who evaluated Mr. Wiggins, they had information collected in a pre-sentence investigation report, and they had records of Mr. Wiggins’ various foster-care placements. 539 U.S. at 523. But the Supreme Court found the investigation unreasonable because it did not examine Mr. Wiggins’ life history in any detail, although counsel had clues that much was available to be discovered. *Id*. at 524.

229. The ACCA has repeatedly ignored clear federal law by inventing new deficiencies to dismiss or deny well-pled claims. This practice has led to repeated vacaturs in federal courts. *See, e.g., Williams v. Allen*, 542 F.3d 1326, 1341 (11th Cir. 2008) ("By simply assuming that trial counsel's investigation was adequate, without considering the reasonableness of counsel's decision to limit the scope of their inquiry, the Alabama court unreasonably applied *Strickland*.") (reversing *Williams v. State*, 782 So. 2d 811 (Ala. Crim. App. 2000)) ("Herbert Williams"); *Daniel v. Comm'r, Ala. Dep't of Corr.*, 822 F.3d 1248, 1277-78 (11th Cir. 2016) ("[T]he Court of Criminal Appeals unreasonably failed to consider the prejudicial effect of trial counsel's deficient performance based on the 'totality of available mitigating evidence,' as established Supreme Court precedent clearly requires.") (citing *Wiggins*, 539 U.S. at 534) (reversing *Daniel v. State*, 86 So. 3d 405, 429-30 (Ala. Crim. App. 2011)). The ACCA conducted the same kind of faulty analysis here, finding that counsel did enough, without assessing what further information counsel should have pursued. The court even cited to its own discredited opinion in *Daniel*, *see Wilson II*, No. CR-16-0675, slip op. at 48, to deny Mr. Wilson relief.

230. In Mr. Wilson's case, with regard to the deficient performance prong of *Strickland*, the ACCA failed to address the reasonableness of counsel's failure to investigate mitigating circumstances in Mr. Wilson's life. They held that "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." *Wilson II*, No. CR-16-0675, slip op. at 48; Doc. 76-33 at PDF 49, Bates 5654. Whether or not evidence that should have been discovered upon investigation would have been "cumulative" is immaterial to an assessment of trial counsel's failure to investigate. Although cumulativeness may be relevant to an assessment of prejudice, or whether trial counsel was unreasonably in failing to present the mitigating evidence, it has no bearing on whether counsel should have procured the evidence. A decision whether to investigate necessarily would have been made prior to trial counsel knowing whether or not it was cumulative.

231. It was unreasonable for trial counsel to fail to investigate Mr. Wilson's upbringing and Asperger's Syndrome when it was clear from their cursory interactions with Mr. Wilson's family that there was significant trauma in Mr. Wilson's childhood and family history. Mr. Wilson's school records clearly indicated that he suffered from mental health difficulties that affected his behavior. The "mitigation leads" and "red flags" that should have alerted trial counsel that further investigation was necessary were clearly within counsel's possession prior to trial. *Rompilla*, 545 U.S. at 390, 392. Trial counsel gave hundreds of pages of school records to the jury without even providing the jury with a narrative framework within which to view the voluminous records. Within those school records were "red flags" indicating that Mr. Wilson needed prescriptions for Ritalin and Pamelor while

in school and struggled in mainstream classes. At trial, during trial counsel's direct examination of Linda Wilson, trial counsel evidenced some understanding that Mr. Wilson had a difficult childhood. However, given trial counsel's failure to fully investigate Mr. Wilson's childhood, counsel was unable to elicit critical details about Mr. Wilson's childhood abandonment, instead permitting the parent responsible for much of the abandonment to gloss over the effects on her son.

232. The ACCA's dismissal of Mr. Wilson's pleading respecting the results of a full mental health evaluation, had counsel sought one, ignored the facts pled by Mr. Wilson and showed a misunderstanding of how a diagnosis is arrived. It ignored how a lawyer investigating a defendant's life history has to proceed step by step, from "red flags" indicating that the client may suffer from some mental illness, to consultation with a relevant mental-health expert, to providing the expert with the relevant life-history information, to discussing possible diagnoses with the expert. The ACCA found that trial counsel were not on notice of the need for a mental health evaluation, because in previous mental health treatment, Mr. Wilson had not been diagnosed as on the autism spectrum. *Wilson II*, No. CR-16-0675, slip op. at 49-50. This puts the cart before the horse.

233. The ACCA was further unreasonable in noting that "Wilson's diagnosis of Asperger's Syndome [sic] 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 II*, No. CR-16-0675, slip op. at 49; Doc. 76-33 at PDF 50, Bates 5655. Granting that this statement, which boils down to the truism that counsel cannot be faulted for not presenting ephemera that have yet to exist, may be valid in the abstract, the two cases are inapplicable to the facts in Wilson's case. In *Clark*, the petitioner presented no evidence to support his allegation that another person was the shooter. As such, the court in *Clark* reasonably concluded that there had been no evidence to support Mr. Clark's allegation, and as a result his trial counsel could not be faulted for their inaction. But the facts of *Clark* differ critically from those in Mr. Wilson's case. Mr. Wilson pleaded ample evidence, and had he been granted an evidentiary hearing during Rule 32, he would have presented ample evidence that he suffered from Asperger's Syndrome and effective trial counsel could have presented that diagnosis to the jury. In *Wade*, while the case also concerned Asperger's Syndrome, its conclusions are likewise inapposite given the facts of Mr. Wilson's case. The court in *Wade* found that the key facts that may have pointed to Mr. Wade's Asperger's Syndrome—diagnoses of several of his family members with Asperger's Syndrome—did not occur until after trial. As such, at the time of Mr. Wade's trial, there would not have been indications that Mr. Wade had Asperger's Syndrome. By contrast, indication that Mr. Wilson had Asperger's Syndrome existed in the hundreds of pages of school records that trial counsel had at the time of trial. Insofar as the ACCA may have understood *Wade* to suggest that the diagnosis itself, rather than evidence indicating that a diagnosis should be sought, needed to exist at the time of trial, the ACCA misinterpreted the case. The fact that in Mr. Wilson's case an official diagnosis was made only after trial was a product of trial counsel's ineffectiveness, not an excuse for trial counsel's failures, when red flags indicating that such a diagnosis was needed existed prior to trial.

234. Mr. Wilson had been in treatment as a child with serious enough symptoms that he was prescribed Ritalin and Pamelor. *See* Doc. 76-23 at PDF 6, Bates 3646. These facts alone should have triggered a full evaluation by a professional, such as Dr. Shaffer, who would have explained to a jury what Mr. Wilson's mental problems were and how they affected his behavior. *See, e.g., Herbert Williams*, 542 F.3d at 1339 (noting that a defense psychologist conducted a partial evaluation of Williams, but that his report did not contain a social history and relied solely on Williams' self-report). Mr. Wilson's Rule 32 counsel pleaded in detail what that diagnosis would have been and what it means. *See* Doc. 76-23 at PDF 12-17, Bates 3652-3657. After seeing the prescriptions, effective trial counsel would have come to the conclusion that Mr. Wilson needed to be evaluated by a psychological expert.

235. Upon seeing indications that Mr. Wilson needed a thorough psychological evaluation, effective trial counsel would have also known to consult

with a professional who knew David Wilson as a child, such as Dr. Theresa Harden, who would have put them on notice of a likely diagnosis of Asperger's. Doc. 76-23 at PDF 24-25, Bates 3664-3665; Doc. 76-30 at PDF 58, Bates 5105. Dr. Harden was the Exceptional Student Education Resource Consultant for Santa Rosa County Schools at the time Mr. Wilson attended Berryill Elementary School. The ACCA found that trial counsel failed to discover the Asperger's Syndrome diagnosis because previous evaluators of Mr. Wilson did not make that diagnosis. *Wilson II*, No. CR-16-0675, slip op. at 49-50. But Dr. Harden explains why this is so:

> I remember David was very quiet and inward. Such children are difficult to diagnose, because you cannot see anything right off the bat. After reviewing his school records I feel that David reeked of Asperger's Syndrome. However, in 1994, when David was being tested, I did not know about Asperger's Syndrome. It was not until 2000 that I learned about it and began recognizing it. If I had known about it in 1994, I would have requested David be further tested for Asperger's Syndrome.

Doc. 76-30 at PDF 58, Bates 5105.

236. At the time David Wilson was in school, Asperger's Syndrome was not widely known to non-psychologists, but by the time of his trial in 2008, it was. The DSM-IV-TR, which was the standard professional manual in use at the time of Mr. Wilson's trial, had listed Asperger's Syndrome as a distinct and diagnosable disorder since 2000, and the DSV-IV before it had it listed since 1994. Trial counsel's performance must be judged as of the time they represented Mr. Wilson. *Strickland*,

466 U.S. at 689 (courts must "evaluate the conduct from counsel's perspective at the time."). At the time of Mr. Wilson's trial, Asperger's Syndrome had become more widely understood, and a psychologist such as Dr. Shaffer conducting a full evaluation of Mr. Wilson at that time would have discovered it.

237. In his response, Respondent tries to bolster the reasonability of the ACCA's finding in a footnote by claiming that the state psychologist who conducted Mr. Wilson's competency evaluation had found traits in Mr. Wilson that contradicted Dr. Shaffer's findings. Doc. 129, n. 8. But what a state expert may have found is irrelevant to what Mr. Wilson's trial counsel should have investigated had they been effective. It is well-established that the expert for the state cannot fulfill the same purpose as an expert for the defense. *See McWilliams v. Dunn*, 582 U.S. 183 (2017).

238. Trial counsel's failure to adequately investigate the case, despite the clear red flags concerning Mr. Wilson's upbringing and Asperger's Syndrome, fell below "an objective standard of reasonableness" and rendered trial counsel's performance deficient. *Strickland*, 466 U.S. at 669. As such, their strategic decisions based upon this unreasonably limited investigation likewise constituted deficient performance. Given the substantial evidence of deficient performance pled by Mr. Wilson's Rule 32 petition, the ACCA's conclusion is an unreasonable application of clearly established federal law. *Wiggins v. Smith*, 539 U.S. 510, 527 (2003).

The ACCA's reasoning was internally flawed and thus unreasonable.

239. The ACCA's reasoning leading to its conclusion concerning the balancing of mitigating and aggravating circumstances is also internally inconsistent. As a result, its conclusion is "unreasonable" under the AEDPA. *See Wiggins v. Smith*, 539 U.S. 510, 527 (2003); *Porter v. McCollum*, 558 U.S. 30, 42-44 (2009); *Sears v. Upton*, 561 U.S. 945, 953-53 (2010).

240. The ACCA, for example, is inconsistent or incoherent in its treatments of facts. The ACCA claimed that Mr. Wilson was insufficiently specific in pleading the abuse inflicted upon him by his uncle, as he did not plead the frequency or severity of the beatings. However, in the same paragraph, the ACCA acknowledged that Mr. Wilson did plead that he was beaten with a belt at least once by his uncle until there were welts on his legs; and Mr. Wilson had alleged "only a few instances of verbal abuse." Doc. 76-33 at PDF 50, Bates 5655. While the ACCA alleged that they were concerned with the *specificity* of the abuse pled, the court's examples showed instead a concern with the *quantity* of the abuse pled.

241. Likewise, the ACCA trivialized Asperger's Syndrome as only a "mild" form of autism, reflecting that the mental condition was properly and sufficiently pled; but at the same time, the ACCA dismissed the claim for being insufficiently pled. Again, the ACCA dismissed here a supposedly insufficiently *severe* mitigating factor, despite their claim that Mr. Wilson's claims were insufficiently *specific*.

242. The ACCA further declared that "Wilson pleaded evidence that was not presented by trial counsel and may or may not have been investigated." *Wilson II*, at 50; Doc. 76-33 at PDF 51, Bates 5656 (emphasis added). By disregarding whether evidence not presented was also not investigated, the ACCA overlooked the link between the reasonableness of a choice not to present certain evidence and the reasonableness of the investigation.

243. These internal inconsistencies by the ACCA add to the unreasonableness of the ACCA's ultimate conclusion that the balance of aggravating and mitigating circumstances would have been the same if defense counsel had investigated and developed the medical and social history information. "Unreasonable" for AEDPA purposes does not mean only that the bottom-line conclusion articulated by the state courts is off base. Flaws in a state court's explicit line of logical reasoning can be considered as evidence of unreasonableness. *See Wiggins*, 539 U.S. at 527; *Porter*, 558 U.S. at 42-44; *Sears*, 561 U.S. at 953-53.

Mr. Wilson is entitled to an evidentiary hearing in federal court.

244. In ¶¶ 97 through 99 of his Answer, Respondent argues that the state appellate court made findings of fact that are entitled to deference under the AEDPA. Doc. 129, pp. 48-49. However, the state court did not make findings of fact. The state court ruled on the pleadings as a matter of law. Therefore, 28 U.S.C. §

2254(e)(2) does not apply in this case. Mr. Wilson requests briefing on his right to a hearing in federal court.

245. Moreover, in ¶ 98 of his Answer, Respondent states that Mr. Wilson "failed to develop the factual basis for this claim in state-court proceedings" and "is not entitled to any further evidentiary hearing in this Court." Doc. 129, p. 49. Again, Mr. Wilson's Rule 32 petition was improperly dismissed as a matter of law, which rendered it impossible for him to develop the factual basis for his claim in state court. Therefore, this case does not fall under 28 U.S.C. § 2254(e)(2).

246. In his Response, the State argues that Dr. Shaffer's report and curriculum vitae cannot be considered "because they are not part of the state-court record. *Cullen v. Pinsholster*, 563 U.S. 170, 181-82 (2011)." Doc. 129, p. 7-8, n. 4. But the United States Supreme Court clearly established in *Vasquez v. Hillery* that both Dr. Shaffer's report and Dr. Harden's statement can be considered in federal habeas corpus, as expert testimony useful in evaluating the significance of factual evidence may be received for the first time by a federal habeas court. 474 U.S. 254, 260 (1986).

Procedural Default

247. Insofar as Respondent's Answer could be construed as raising a procedural bar to this claim of ineffective assistance of trial counsel due to the conduct of his Rule 32 counsel, Petitioner replies that any procedural default is

excused, under the "cause and prejudice" standard, by the ineffective assistance of state post-conviction counsel under *Martinez v. Ryan*, 566 U.S. 1 (2012), insofar as any deficiency in the development of the factual basis in state post-conviction proceedings is attributable to the incompetent representation of Rule 32 counsel, which prejudiced Petitioner.

The AEDPA deference requirement under 28 U.S.C. § 2254(d) is obsolete following the Supreme Court's decision in Loper Bright Enterprises v. Raimondo*.*

248. Respondent has failed to answer Mr. Wilson's argument that the Supreme Court's decision in *Loper Bright* vitiates the deference requirement of the AEDPA under 28 U.S.C. § 2254(d). *See* Doc. 114, ¶ 598 (referencing the *Loper Bright* argument in Doc. 114, ¶¶ 348-350).

Mr. Wilson's sentence should be vacated given the ACCA's unreasonable application of clearly established federal law.

249. Because the ACCA failed to follow the appropriate analysis laid out by clearly established federal law, including *Wiggins, Eddings, Sears*, and numerous other U.S. Supreme Court cases, Mr. Wilson is entitled to vacatur of his sentence and a new penalty phase trial where a full account of his personal characteristics and life history can be presented to a jury.

250. Had counsel discovered the mitigating evidence described in the First Amended Petition (Doc. 114, ¶¶ 359-536) and presented it fully, there is a reasonable

probability that David Wilson would not have been sentenced to death, especially as two jurors already voted for life (Doc. 76-2 at PDF 172, Bates 372). *Cf. Cooper v. Sec'y, Dep't of Corr.*, 646 F.3d 1328, 1356 (11th Cir. 2011), quoting *Blanco v. Singletary*, 943 F.2d 1477, 1505 (11th Cir. 1991): "Given that some jurors . . . 'were inclined to mercy even with[ ] having been presented with [so little] mitigating evidence and that a great deal of mitigating evidence was available to [Cooper's] attorneys had they more thoroughly investigated,' it is possible that, if additional mitigating evidence had been presented, more jurors would have voted for life." Moreover, trial counsel's performance was deficient as their failure to pursue investigation into Mr. Wilson's upbringing and Asperger's Syndrome fell below reasonable standards set by *Wiggins*. Counsel's deficient performance prejudiced Mr. Wilson and denied his rights to effective assistance of counsel, to due process, to a fair trial, to a reliable jury verdict, and to be free from cruel and unusual punishment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution. Thus, his sentence of death is due to be vacated. Mr. Wilson requests discovery and a hearing on this issue.

C. Counsel were ineffective at the penalty and sentencing phases of Mr. Wilson's capital trial by failing to object to numerous instances of prosecutorial misconduct at the penalty phase, thereby allowing Mr. Wilson's rights to be repeatedly violated.

251. In ¶¶ 100 and 101 of his Answer, Respondent contends that the Alabama Court of Criminal Appeals denied this claim on the merits and that its ruling was not an unreasonable application of federal law. Doc. 129, pp. 53-54.

252. Here again, though, the state appellate court's opinion was an unreasonable interpretation of clearly established federal law.

253. The ACCA's treatment of penalty-phase prosecutorial misconduct to which counsel did not object failed to consider the points raised as counsel error, rather than as trial-court error. *Wilson II*, No. CR-16-0675, slip op. at 51-56. The ACCA failed to admitt the deficiency in counsel's performance in incorrectly conceding that an attempted escape conviction qualified as an aggravating circumstance.

254. Instead, the ACCA merely found that the State's presentation of that conviction to the jury was not prejudicial because the trial court gave a curative instruction. *Id.* at 54. This finding ignores what the U.S. Supreme Court has held respecting the ineradicability of certain information from the minds of jurors, as well as the deliberateness of the prosecutor's misconduct. The ACCA further found no error in the prosecution's continued reliance on and defense counsel's concession of the false testimony about blood throughout the house to support the "especially heinous, atrocious, and cruel" aggravator. *Id.* at 54-55. And the court ignored the problem with the prosecution's misleading argument concerning Mr. Wilson's

statement claiming he "changed it all up," made right before the tape ran out. The prosecution suggested that the statement meant he decided not to assault Mr. Walker only, but instead to kill him, *id.* at 55-56. However, the testifying detective insisted that nothing said off the tape differed from what was on the tape, and the ACCA itself acknowledged on direct appeal that, on the tape, Mr. Wilson admitted only to striking one non-fatal blow.

255. State post-conviction counsel pled first that trial counsel were ineffective in conceding that the DA could argue his attempted escape conviction as an aggravating factor, since that concession was wrong as to the law. There is no doubt about deficient performance there, *see Hinton v. Alabama*, 134 S. Ct. 1081, 1089 (2014), though the ACCA glossed over that prong. The prejudice to Mr. Wilson is evident. A jury's decision to recommend life without parole hinges on an understanding that such a sentence means incarceration for life. *Kelly v. South Carolina*, 534 U.S. 246, 253 (2002). The DA's stated purpose in mentioning the escape was to sway the jury towards death. Doc. 76-10 at PDF 29, Bates 1838. Telling the jury that Mr. Wilson had already attempted escape undercut the attractiveness of the lesser sentence, despite the "curative" instruction. *Cf. Buck v. Davis*, 137 S. Ct. 759, 777 (2017) (condemning effect of "brief" mention of race as an aggravating factor: "Some toxins can be deadly in small doses."); *see also Ex parte Billups*, 86 So. 3d 1079, 1084 (Ala. 2010) ("Most agree that such evidence of

prior crimes has almost an irreversible impact upon the minds of the jurors.") (quotation marks and citations omitted). This mistake was not a slip of the tongue or inadvertence in the heat of argument. "'The Government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds.'" *Bruton v. United States*, 391 U.S. 123, 129 (1968) (citation omitted). The ACCA ignored that the prosecutor was experienced. Doc. 76-23 at PDF 34, Bates 3674 n.86. Counsel did not argue any of this. And the ACCA did not explain how or why Mr. Wilson's case falls outside the parameters of these decisions.

256. State post-conviction counsel pled further that defense counsel were ineffective in countering the DA's interpretation of his interrupted statement that he "changed it all up" to mean that he decided not only to assault Mr. Walker, but to kill him. The ACCA excused counsel's deficiency by finding, as it did on direct appeal, that the DA's argument was a permissible inference from the evidence. *Wilson II*, No. CR-16-0675, slip op. at 55-56. But the court ignored the one fact actually in evidence respecting its meaning: Sgt. Luker's testimony that the untaped portions of Mr. Wilson's statement did not differ from the taped portion. Doc. 76-9 at PDF 145, 152, Bates 1551, 1558. The tape was admitted on the basis of Sgt. Luker's representation that this was so. Doc. 76-9 at PDF 162-163, Bates 1568-1569. The ACCA also excused the prosecutor's conduct by saying that "Wilson's

statement contained no further explanation on what he meant by 'changed it all up,'" with only a footnote acknowledging that the tape, which was under police control, ran out at the moment Mr. Wilson made this statement. *Wilson II*, No. CR-16-0675, slip op. at 55 and 55 n.8. Putting these facts together, it is evident that the statement must be interpreted in light of what was actually recorded. Injecting some other meaning into the statement makes Sgt. Luker's testimony false. As the ACCA recounted in its statement of facts on direct appeal, Mr. Wilson, in the taped portion of his statement, admitted to striking Mr. Walker only once. *Wilson I*, 142 So. 3d at 750. Therefore, the DA's argument was contrary to the evidence, but counsel failed to object. The false interpretation was bound up with the DA's equally fabricated evidence about blood spattered throughout the house, *see* Doc. 114, ¶¶ 561, 594, 596, 656, 772-73, 775-76, 946-47, 991, to create a completely false image of Mr. Wilson rampaging through the house in search of buried treasure. Given that the prosecution is barred from submitting false evidence to the jury, *see Napue v. Illinois*, 360 U.S. 264, 269 (1959) and *Miller v. Pate*, 586 U.S. 1 (1967), it necessarily follows that counsel were ineffective for failing to challenge this argument.

257. Because trial counsel failed, at each step of the proceedings, to counter the prosecution's misconduct, there is more than a reasonable probability that the jury's penalty verdict was affected. *Strickland*, 466 U.S. at 694. Claims concerning

prosecutorial misconduct must be considered cumulatively. *Glossip v. Oklahoma,* 145 S. Ct. 612, 629 (2025); *Ex parte Tomlin*, 540 So. 2d 668, 672 (Ala. 1988). Here, there is deficient performance which prejudiced Mr. Wilson by providing a false basis for a sentence of death.

The ACCA Did Not Make Factual Findings But Dismissed the Rule 32 Petition on Legal Grounds.

258. In ¶102 of his Answer, Respondent contends that the state appellate court made findings of fact that are entitled to deference under the AEDPA. Doc. 129, pp. 54-55.

259. As noted earlier, however, the state courts did not make a factual record, did not conduct a hearing, and did not make findings of fact. The state court ruled on the pleadings as a matter of law. Therefore, 28 U.S.C. § 2254(e)(1) does not apply in this case.

Additional Points

260. In ¶ 103 of his Answer, Respondent states that Mr. Wilson "failed to develop the factual basis for this claim in state-court proceedings" and "is not entitled to any further evidentiary hearing in this Court." Doc. 129, p. 54.

261. Again, Mr. Wilson's Rule 32 petition was improperly dismissed as a matter of law, which rendered it impossible for him to develop the factual basis for

his claim in state court. Therefore, this case does not fall under 28 U.S.C. § 2254(e)(2).

262. Insofar as Respondent's Answer could be construed as raising a procedural bar to this claim of ineffective assistance of trial counsel due to the conduct of his Rule 32 counsel, Petitioner replies that any procedural default is excused, under the "cause and prejudice" standard, by the ineffective assistance of state post-conviction counsel under *Martinez v. Ryan*, 566 U.S. 1 (2012), which prejudiced Petitioner.

263. Respondent has failed to answer Mr. Wilson's argument that the Supreme Court's decision in *Loper Bright* vitiates the deference requirement of the AEDPA under 28 U.S.C. § 2254(d). *See* Doc. 114, ¶ 598 (referencing the *Loper Bright* argument in Doc. 114, ¶¶ 348-350).

264. Because the ACCA's ruling on this portion of Mr. Wilson's *Strickland* claim is an unreasonable application of *Strickland* itself, as well as other U.S. Supreme Court precedent governing the underlying issues of prosecutorial misconduct, Mr. Wilson is entitled to *de novo* review of this claim by the Court.

D. Counsel were ineffective at the sentencing phase of Mr. Wilson's capital trial by failing to present any evidence at the sentencing hearing before the judge.

265. In ¶¶ 105 through 109 of his Answer, Respondent presents three defenses to this claim: (1) the final state court decision was not unreasonable (¶¶ 105

and 106); the state court made findings of facts that are entitled to deference (¶¶ 107 and 109); and Mr. Wilson failed to develop the facts in state court so is not entitled to a hearing (¶ 108).

266. The Alabama Court of Criminal Appeals ruled that Mr. Wilson had failed to plead sufficient facts, relying on the reasons that it articulated in the context of the previous claim, immediately *supra*.

267. For the reasons stated above in Section C, Respondent's arguments are not persuasive and Mr. Wilson is entitled to *de novo* review of this claim.

268. Moreover, Respondent has failed to answer Mr. Wilson's argument that the Supreme Court's decision in *Loper Bright* vitiates the deference requirement of the AEDPA under 28 U.S.C. § 2254(d).

E. Counsel were ineffective at the penalty phase of Mr. Wilson's capital trial by failing to object to inappropriate contact between the prosecutor and the jury, thereby failing to protect Mr. Wilson's right to a fair jury determination.

269. In ¶¶ 110 through 115 of his Answer, Respondent presents again his three defenses to this part of Mr. Wilson's claim: (1) the final state court decision was not unreasonable (¶¶ 111-112); the state court made findings of facts that are entitled to deference (¶¶ 113 and 115); and Mr. Wilson failed to develop the facts in state court, so is not entitled to a hearing (¶ 114).

270. Mr. Wilson reiterates his replies to these defenses and incorporates herein Section C, *supra*.

271. Moreover, Respondent has failed to answer Mr. Wilson's argument that the Supreme Court's decision in *Loper Bright* vitiates the deference requirement of the AEDPA under 28 U.S.C. § 2254(d).

272. In denying this claim, the ACCA sidestepped the issue by finding that Mr. Wilson should have pled precisely when counsel were notified of the challengeable contact, *Wilson II*, No. CR-16-0675, slip op. at 36, even though it is evident from the Rule 32 petition that the notice to counsel occurred during deliberations, before the jury completed their deliberations. *See* Doc. 76-22 at PDF 187-190, Bates 3626-3629. The ACCA's ruling on this portion of Mr. Wilson's *Strickland* claim is an unreasonable application of *Strickland* itself, which requires consideration of the "totality of the evidence," 466 U.S. at 695, not mere speculation, and rests on unreasonable findings of fact, i.e., facts not in evidence. Therefore, this Court should review Mr. Wilson's claim using the appropriate *de novo* standard, find counsel performed deficiently and that their deficient performance prejudiced Mr. Wilson.

F. Counsel were ineffective at the penalty and sentencing phases of Mr. Wilson's capital trial by obstructing Mr. Wilson's right to testify on his own behalf.

273. In ¶¶ 599 and 602 of his First Amended Petition, Mr. Wilson alleges that defense counsel's failure to allow Mr. Wilson to testify (set forth in detail in Claim IV of the First Amended Petition) also prejudiced him at the penalty phase and therefore amounted to ineffective assistance of counsel at the penalty and sentencing stages of his capital trial. Doc. 114, pp. 267-268.

274. Respondent has not answered those allegations. They mistakenly lumped these allegations into their response to the claim that defense counsel failed to object to prosecutorial misconduct. Doc. 129, ¶ 100. Moreover, Respondent has failed to answer Mr. Wilson's argument that the Supreme Court's decision in *Loper Bright* vitiates the deference requirement of the AEDPA under 28 U.S.C. § 2254(d). Petitioner is therefore entitled to relief on this claim.

III. THE PROSECUTION WITHHELD EVIDENCE CONTRARY TO *BRADY V. MARYLAND*, DENYING DAVID WILSON HIS CONSTITUTIONAL RIGHTS AT THE GUILT PHASE OF HIS CAPITAL TRIAL TO DUE PROCESS, A FAIR TRIAL, A RELIABLE JURY VERDICT, AND TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. MR. WILSON IS ENTITLED TO A NEW GUILT PHASE TRIAL.

275. Mr. Wilson's third claim is that the prosecutor's failure to produce the Corley letter and the handwriting expert report deprived Mr. Wilson of his right, at the guilt phase of his trial, to due process under the Fourteenth Amendment of the U.S. Constitution. Doc. 114, pp. 268-276.

276. In ¶ 116 of his Answer, Respondent argues that this claim is barred for the same reason as the first claim. Respondent writes: "As shown above, *see supra* Issue I, Wilson has not met his burden under § 2254(d); thus, this claim warrants no relief." Doc. 129, p. 60. However, Respondent's argument is no more compelling here than it was in relation to the first claim. *See* Claim I *supra.*

277. The Alabama Court of Criminal Appeals rejected Mr. Wilson's third claim on the merits, holding that the prosecutor's production of the police report satisfied *Brady* with regard to the Corley letter and the handwriting expert report. The state court also ruled that the *Brady* claim was procedurally barred because defense counsel was aware of the suppressed evidence and could have raised the issue at trial or on appeal. *Wilson II*, No. CR-16-0675, at *9.

278. These rulings are contrary to or an unreasonable application of clearly established federal law for the reasons discussed *supra*, Claim I.

279. With regard to the other defenses, Petitioner incorporates herein his responses from Claim I, *supra.*

280. Insofar as any factual findings could possibly by imputed to the state appellate court, those are unreasonable findings of fact, *see* 28 U.S.C. § 2254(d)(2). *See supra*, Claim I.

281. Moreover, the ACCA's decision is not binding because the question of procedural default is a federal question for this Court to adjudicate. *See supra*, Claim I.

282. Finally, Respondent did not answer Mr. Wilson's argument that this Court should not accord deference to the ACCA's decision on this or any other issue governed by federal law. Doc. 114, ¶¶ 348 through 350.

IV. Trial Counsel Rendered Ineffective Assistance of Counsel at the Guilt Phase of Mr. Wilson's Capital Trial, Inconsistent with the Constitutional Requirements of *Strickland v. Washington*. Mr. Wilson Is Entitled to a New Guilt Phase Trial

283. Mr. Wilson's fourth claim is that defense counsel provided ineffective assistance of counsel at the guilt phase of his capital trial, in violation of *Strickland v. Washington*, 466 U.S. 668 (1984).

A. Trial counsel failed to provide effective assistance of counsel because they failed to investigate the Corley letter and the State's case, and failed to develop a reasonable theory of defense.

284. At the guilt phase of Mr. Wilson's trial, defense counsel failed to investigate, discover, and present evidence concerning the Corley letter and the handwriting expert report, and as a result, presented no theory of defense. Doc. 114, pp. 276-286.

285. In ¶¶ 120 and 121 of his Answer, Respondent admits that this claim was denied on the merits, but argues that the state court ruling was not unreasonable.

Doc. 129, pp. 61-640. Respondent merely states that "A review of the ACCA's opinion demonstrates that the decision of the Alabama court was not an unreasonable one." Doc. 129, ¶ 123.

286. In Mr. Wilson's case, Judge Watkins explained that "On the guilt phase component of the ineffective assistance claim, the ACCA agreed with the Circuit Court that the claim was insufficiently pleaded because petitioner failed to plead facts showing that the Corley letter would have been admissible at his trial and, accordingly, failed to show that he was prejudiced by any deficiency in failing to investigate Corley's confession." Doc. 67, p. 9.

287. The decision of the Alabama Court of Criminal Appeals, however, is a patently unreasonable application of *Strickland*, requiring reasonable investigation, and of *Chambers* and *Holmes*, prohibiting exclusion of reliable evidence of third-party guilt. The state court's reasoning is palpably wrong, under clearly established Supreme Court precedent, for several reasons.

288. First, the state court's decision is contrary to or an unreasonable application of clearly established federal law insofar as there is no requirement that the Corley letter be admissible in evidence in order to qualify as *Brady* material that must be disclosed. *See Kyles*, 514 U.S. at 445-47; *Johnson v. Folino*, 705 F.3d 107, 130 (3d Cir. 2013) ("we believe, as do the majority of our sister courts of appeals, that inadmissible evidence may be material if it could have led to the discovery of

admissible evidence"); *Bradley v. Nagle*, 212 F.3d 559, 567 (11th Cir. 2000) ("Each item of evidence was in fact inadmissible at trial under Alabama Rules of Evidence. . . . Thus, in order to find that actual prejudice occurred – that our confidence in the outcome of the trial has been undermined – we must find that the evidence in question, although inadmissible, would have led the defense to some admissible material exculpatory evidence; *Spaziano v. Singletary*, 36 F.3d 1028, 1044 (11th Cir. 1994) ('A reasonable probability of a different result is possible only if the suppressed information is itself admissible evidence or would have led to admissible evidence.')").

289. Second, the Corley letter is admissible under *Chambers v. Mississippi*, 410 U.S. 284 (1973), and *Holmes v. South Carolina*, 547 U.S. 319 (2006), and the state court's ruling to the contrary was unreasonable. The Corley letter creates a reasonable doubt about Mr. Wilson's guilt of capital murder because it provides convincing evidence that he did not strike the fatal blows or have the requisite intent to kill. That is all that Mr. Wilson has to plead to establish the letter's admissibility under *Chambers v. Mississippi*, 410 U.S. 284 (1973), and *Holmes v. South Carolina*, 547 U.S. 319 (2006). These cases squarely hold that a State cannot erect mechanistic procedural rules which exclude evidence that another person committed the crime with which the defendant is charged. Here the state court, by mechanistically applying a three-pronged test set out in *Ex parte Griffin*, 790 So. 2d 351 (Ala. 2000),

fell into the same trap as the Mississippi courts did in *Chambers* and the South Carolina courts did in *Holmes*. The Corley letter was admissible as a matter of clearly established U.S. Supreme Court law, and it would have raised a jury question whether the prosecution had proved Mr. Wilson's guilt beyond a reasonable doubt. Mr. Wilson was stripped of his right to have the jury's answer because of the deficient performance of his trial counsel.

290. What the Supreme Court requires under *Chambers* regarding evidence of third-party guilt is indicia of reliability, 410 U.S. at 300, and trustworthiness, *id.* at 302. The handwriting expert report identifying the letter as written by Corley provides such indicia of reliability (*see* Doc. 76-24 at PDF 37, Bates 3878), as well as the voluminous downstream evidence (*see* Doc. 114, ¶¶ 274 *et seq.*). Thus, there is no valid, constitutionally sound reason to exclude the letter.

291. Third, the handwriting expert report is clearly admissible under state law to cross-examine Sgt. Luker on his investigation of the case and what kinds of expert examinations he conducted. The evidence surrounding what the lead investigator did or did not do is the most basic trial evidence and is clearly admissible. *See Kyles v. Whitley*, 514 U.S. 419, 446 (1995):

> Even if Kyles's lawyer had followed the more conservative course of leaving Beanie off the stand, though, the defense could have examined the police to good effect on their knowledge of Beanie's statements and so have attacked the reliability of the investigation in failing even to consider Beanie's possible guilt and in tolerating (if

> not countenancing) serious possibilities that incriminating evidence had been planted. See, *e.g., Bowen v. Maynard,* 799 F.2d 593, 613 (CA10 1986) ("A common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such use in assessing a possible *Brady* violation"); *Lindsey v. King,* 769 F.2d 1034, 1042 (CA5 1985) (awarding a new trial to a prisoner convicted in Louisiana state court because undisclosed *Brady* evidence "carried within it the potential . . . for the . . . discrediting . . . of the police methods employed in assembling the case"). ¶ By demonstrating the detectives' knowledge of Beanie's affirmatively self-incriminating statements, the defense could have laid the foundation for a vigorous argument that the police had been guilty of negligence.

Accord, *e.g.*, *Alvarez v. Ercole*, 763 F.3d 223 (2d Cir. 2014); *Floyd v. Vannoy*, 894 F.3d 143, 165 (5th Cir. 2018) (per curiam) ("The Clegg statement is . . . favorable evidence because the fact that the statement was misrepresented in Detective Dillmann's report could have been used to impeach his testimony and call into question the 'thoroughness and even the good faith of the investigation' *Kyles*, 514 U.S. at 445, 115 S.Ct. 1555; *accord id.* at 446, 115 S.Ct. 1555 ('A common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such use in assessing a possible Brady violation' (quoting *Bowen v. Maynard*, 799 F.2d 593, 613 (10th Cir. 1986))); *Mendez v. Artuz*, 303 F.3d. 411, 416 (2d Cir. 2002) ("The defendant could . . . have used the suppressed information to challenge the thoroughness and adequacy of the police investigation. . . . [citing *Kyles*, 514 U.S. at 446 n.15] (stating that 'indications of conscientious police work will enhance probative force and slovenly work will diminish it')"); *and see United States v. Hannah*, 55 F.3d 1456, 1460 (9th Cir. 1995); *Gumm v. Mitchell*, *supra*, 775 F.3d at 274-75; *Dennis v. Sec'y, Pa. Dep't of Corr.*, 834 F.3d 263, 302 (3d Cir. 2016) (en banc); *Juniper v. Zook,* 876 F.3d 551, 570-71 (4th Cir. 2017); *People v. Ulett*, 33 N.Y.3d 512, 520-21, 129 N.E.3d 909, 914-15, 105 N.Y.S.3d 371, 376-77 (2019) (quoting the relevant passage in *Kyles*).

292. Fourth, the state court's decision rests on an unreasonable determination because defense counsel did plead sufficient facts regarding the potential admissibility of the Corley letter. In the state Rule 32 petition, counsel for Mr. Wilson specifically pleaded that:

> The confessional letter, or its contents, would have been admissible at Mr. Wilson's trial under *Holmes v. South Carolina*, 547 U.S. 319 (2006), and *Chambers v. Mississippi*, 410 U.S. 284 (1973). In *Chambers*, the Supreme Court found that exclusion of evidence supporting a finding of third-party guilt under a hearsay rule which did not include an exception for statements against penal interest violated the defendant's due process right to a fair trial. 410 U.S. at 298-302. *Holmes* held invalid another state evidentiary rule which excluded evidence of third-party guilt if the State's evidence was strong in the view of the trial court. 547 U.S. at 328-31.

Doc. 76-22 at PDF 152, Bates 3591 (Amended Petition for Relief from Judgment Pursuant to Rule 32, at 120). This is sufficient to plead that the Corley letter was likely admissible.

293. Fifth, the ACCA decision is an unreasonable application of clearly established federal law insofar as it misconstrues and incorrectly applies the *Brady* standard. The ACCA said that the Corley letter would not entirely exonerate Mr. Wilson from *injuring* Mr. Walker — "Corley's confession would not show that Wilson *did not strike* or kill Walker," *Wilson II*, No. CR-16-0675, slip op. at 21 (emphasis added) — and, therefore, would not "exclude [him] as a perpetrator," but that is not what Mr. Wilson has to show. Mr. Wilson was charged with capital murder. The Corley letter would be a critical piece of evidence to argue to the jury that Mr. Wilson did not kill Mr. Walker and did not intend that he be killed. Proving these points would render Mr. Wilson innocent of capital murder under clearly established U.S. Supreme Court precedent, which holds that negation of an element of the charged offense is an acquittal of that greater offense. *See, e.g.*, *Price v. Georgia,* 398 U.S. 323 (1970); *De Mino v. New York,* 404 U.S. 1035 (1972) (per curiam); *Harris v. Oklahoma,* 433 U.S. 682 (1977) (per curiam). This is true even where the element is intent: "[A] claim of actual innocence [of the death penalty would include] . . . whether . . . a killing was not intentional . . . ." *Sawyer v. Whitley*, 505 U.S. 333, 345-46 (1992). At trial, DA Valeska emphasized the number of injuries as proof of intent to kill. Doc. 76-9 at PDF 152-153, 155-156, 158, 169, Bates 1759-1760, 1762-1763, 1765, 1776. Evidence that another person inflicted those multiple injuries in Mr. Wilson's absence would serve to prove that the intent

to kill was not attributable to him. The ACCA gave no explanation for how Corley's letter would not be adequate to support such a defense.

294. Moreover, the state court's ruling on the Corley letter is not an adequate and independent state ground for three distinct (and each of them independently sufficient) reasons:

295. (a) The ACCA only considered state law and did not consider the federal due process argument that counsel raised in the Rule 32 petition. Rule 32 counsel relied on *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006), and *Chambers v. Mississippi,* 410 U.S. 284, 302 (1973), as evidenced in the paragraph beginning at Doc. 76-22 at PDF 152, Bates 3591. The ACCA failed to address the federal claim presented by these precedents. This makes § 2254 deference inapplicable. *See, e.g.*, *Wiggins*, 539 U.S. at 534 ("In this case, our review is not circumscribed by a state court conclusion with respect to prejudice, as neither of the state courts below reached this prong of the *Strickland* analysis."); *accord, Rompilla v. Beard,* 545 U.S. 374, 390 (2005).

296. Where a state court misunderstands or garbles a federal constitutional claim, so that the state court fails to address the claim distinctly and decisively, a federal habeas court must adjudicate the claim independently, with no AEDPA deference. *See Romine v. Head*, 253 F.3d 1349, 1365 (11th Cir. 2001) (holding section 2254(d)(1) inapplicable and reviewing issue *de novo* because state court

opinion's truncated analysis leaves federal court with "grave doubt that the Georgia Supreme Court applied federal law at all, let alone the governing law set down in Supreme Court decisions"); *Bauder v. Dep't of Corr.*, 619 F.3d 1272, 1273, 1274 n.3, 1275 (11th Cir. 2010) (per curiam) (Section 2254(d)(1) did not apply because "state courts failed to address the merits of Bauder's [ineffective assistance] claim," "misperceiv[ing]" it as claim that counsel committed ineffective assistance by "fail[ing] to inform [client] of the possibility for civil commitment" as result of plea, when actually counsel's "deficient performance was his affirmative representation" that "pleading to the criminal charge would *not* subject Bauder to civil commitment"); *Davis v. Sec'y, Dep't of Corr.*, 341 F.3d 1310, 1313 (11th Cir. 2003) (per curiam) ("present controversy falls outside of § 2254(d)(1)'s requirement that we defer to state court decisions" because state courts construed petitioner's ineffective assistance claim "as resting on the clearly unsupported assertion that trial counsel failed *to raise* a *Batson v. Kentucky* claim" when actually claim was that counsel "failed to *preserve* his *Batson* claim"); *Bester v. Warden*, 836 F.3d 1331, 1336-37 (11th Cir. 2016) ("The Alabama Court of Criminal Appeals, while permitting Bester to proceed *pro se*, rejected his *pro se* brief—not the arguments in his brief, but the brief itself—and considered only the claims that his (dismissed) habeas counsel had raised, which did not include a claim of ineffective assistance for failing to request a no-adverse-inference instruction. While the state appellate court may not have 'inadvertently overlooked' Bester's claim, it did not adjudicate the claim on the merits either. *See Johnson*, 133 S. Ct. at 1097. Neither did the state trial court. ¶ In the state collateral proceeding, the trial court acknowledged Bester's claim that trial counsel was ineffective for failing to request a no-adverse-inference instruction. But the reason for its denial of the claim, paradoxically, was that the trial court had not had the opportunity to decide whether to give the instruction because counsel had not requested it. Which was the point of the ineffective assistance of counsel claim, a point that the state court's circular reasoning missed. In the terms of the *Johnson* decision, the state trial court 'inadvertently overlooked' the actual claim, failing to rule on the merits of it. *Johnson*, 133 S. Ct. at 1097. We therefore must decide the claim *de novo*."); *Brewster v. Hetzel,* 913 F.3d 1042, 1051 (11th Cir. 2019) ("Because the claim that we must decide is not a 'claim that was adjudicated on the merits in [the] State court proceedings,' 28 U.S.C. § 2254(d), we cannot defer to the decisions of the state courts in this case."; "Neither the state post-conviction court nor the state appellate court ruled on the actual claim that Brewster presented to them and is now presenting to us. Instead, they recast his claim as an attack on the language of one of the supplemental instructions (without specifying which of the supplemental instructions they were examining or how they selected that one). . . . ¶ . . . Brewster's claim has never focused exclusively on the particular language of any one of the several supplemental instructions. Instead, his claim has always been based on his attorneys' failure to object or move for a mistrial given the totality of the circumstances involving the jury's inability to reach a unanimous verdict and the judges' reaction to the deadlock. His is a macro claim, not a micro one.").

297. (b) Rule 32 counsel was *correct* in stating that, as a matter of federal constitutional law under *Holmes* and *Chambers* (and under *Olden v. Kentucky*, 488 U.S. 227 (1988), as well), the Corley letter was admissible evidence. As Rule 32 counsel explicitly pleaded, the due-process/ confrontation-right rulings in these Supreme Court cases require that the Corley letter be received in evidence despite any state-law hearsay objection. The ACCA holding that it was not admissible under the state law case of *Griffin* was, for purposes of 28 U.S.C. § 2254(d)(1), an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States.

298. And (c) the question whether a state pleading alleges sufficient facts to state a federal claim inextricably involves federal law, namely the federal doctrines governing the claim (*see*, *e.g.*, *Williams v. Kaiser*, 323 U.S. 471 (1945); *Cash v. Culver*, 358 U.S. 633 (1959); *McNeal v. Culver*, 365 U.S. 109 (1961)), and so the state's ruling is not an independent and adequate state ground.

299. In sum, there is no requirement under *Brady* that the Corley letter or the handwriting expert report be admissible evidence, so long as it leads to admissible evidence, including impeachment evidence. *Bradley v. Nagle*, 212 F.3d 559, 567

(11th Cir. 2000). *See also*, *e.g.*, *Williamson v. Moore*, 221 F.3d 1177, 1183 (11th Cir. 2000); *Wright v. Hopper*, 169 F.3d 695, 703 (11th Cir. 1999). *See also Johnson v. Folino*, 705 F.3d 117, 130 (3d Cir. 2013) ("[W]e believe, as do the majority of our sister courts of appeals, that inadmissible evidence may be material if it could have led to the discovery of admissible evidence."); *Leka v. Portuondo*, 257 F.3d 89, 101 (2d Cir. 2001) (in explaining its holding that the prosecution's belated disclosure of a potential witness (only on "the eve of trial") violated *Brady*, the Second Circuit writes: "The limited *Brady* material disclosed to Leka could have led to specific exculpatory information only if the defense undertook further investigation. When such a disclosure is first made on the eve of trial, or when trial is under way, the opportunity to use it may be impaired. The defense may be unable to divert resources from other initiatives and obligations that are or may seem more pressing. And the defense may be unable to assimilate the information into its case.").

300. And regardless of that, the Corley letter and handwriting expert report were admissible as a matter of Due Process under clearly established federal law as determined by the Supreme Court of the United States since at least 1979 in *Green v. Georgia*, 442 U.S. 95 (1979). *See, e.g.*, *Boykins v. Wainwright*, 737 F.2d 1539, 1544 (11th Cir. 1984) ("Fundamental fairness is violated when the evidence excluded is 'material in the sense of a crucial, critical, highly significant factor'"). Alabama rules of evidence could not have barred the admissibility of this evidence

because state evidentiary rules cannot trump federal constitutional law. *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Holmes v. South Carolina*, 547 U.S. 319 (2006); *Green v. Georgia*, 442 U.S. 95 (1979). As the Supreme Court declared in *Green*:

> Regardless of whether the proffered testimony comes within Georgia's hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause of the Fourteenth Amendment. The excluded testimony was highly relevant to a critical issue in the punishment phase of the trial, *see Lockett v. Ohio*, 438 U. S. 586, 604-605 (1978) (plurality opinion); id., at 613-616 (opinion of BLACKMUN, J.), and substantial reasons existed to assume its reliability. …. In these unique circumstances, 'the hearsay rule may not be applied mechanistically to defeat the ends of justice.' *Chambers v. Mississippi*, 410 U. S. 284, 302 (1973). Because the exclusion of [the co-defendant's] testimony denied petitioner a fair trial on the issue of punishment, the sentence is vacated and the case is remanded for further proceedings not inconsistent with this opinion.

Green v. Georgia, 442 U.S. 95, 97 (1979).

301. The Supreme Court's decision in *Green* is perfectly applicable to Mr. Wilson's case. It is on all fours. Like Mr. Wilson and Kittie Corley, Mr. Green and Carzell Moore were co-defendants. At the penalty phase, Mr. Green tried to introduce as mitigation evidence at his death penalty sentencing hearing the confession that Mr. Moore made to a third party. Mr. Wilson also would have introduced the Kittie Corley letter as mitigation at the death penalty sentencing phase. In *Green*, the state trial court precluded the evidence under Georgia's hearsay rules. The U.S. Supreme Court then ruled that Georgia's evidentiary rule violated

Due Process under the principles of "*Chambers v. Mississippi*, 410 U. S. 284, 302 (1973)." *Green v. Georgia*, 442 U.S., at 97.

302. In Mr. Wilson's case, the Corley letter and handwriting expert report led to admissible evidence, including: potential impeachment evidence for cross-examination of Sgt. Luker, the lead investigator; potential mitigation evidence at the penalty phase and judge sentencing; potential rebuttal evidence regarding the HAC aggravator; potential evidence of a shabby investigation; and potential corroborating evidence by third-parties, such as Heather Lynn Brown, Mark Hammond, or Allen Hendrickson. *See Juniper v. Zook*, 876 F.3d 551, 568 (4th Cir. 2017) ("In determining whether "'there is a reasonable probability" that the result of the trial would have been different[,]' . . . a court must consider 'the aggregate effect that the withheld evidence would have had if it had been disclosed['] . . . . In order to determine 'the aggregate effect' of the withheld evidence, the court must both 'add[ ] to the weight of the evidence on the defense side . . . all of the undisclosed exculpatory evidence' and 'subtract[ ] from the weight of the evidence on the prosecution's side . . . the force and effect of all the undisclosed impeachment evidence.'"); *accord*, *Smith v. Sec'y, Dep't of Corr.*, 572 F.3d 1327, 1346-48 (11th Cir. 2009).

303. Trial counsel's failure to investigate the Corley letter and to present its admissions as a defense against the charge of capital murder was clearly deficient

performance. No reasonable attorney would fail to obtain and employ such exculpatory evidence, especially when he offered no alternative defense. *Strickland*, 466 U.S. at 690. That failure prejudiced Mr. Wilson, since there is a reasonable probability the jury would have had reasonable doubt that Mr. Wilson murdered Mr. Walker. *Id.* at 694.

304. Regarding the other defenses in Respondent's Answer—namely, the state court made findings of fact entitled to deference (¶ 122) and Mr. Wilson failed to develop the factual basis (¶123)—Petitioner reiterates that the state court ruled on the pleadings as a matter of law. Therefore, 28 U.S.C. § 2254(e)(2) does not apply in this case.

305. Insofar as Respondent's Answer could be construed as raising a procedural bar to this claim of ineffective assistance of trial counsel due to the conduct of his Rule 32 counsel, Petitioner replies that any procedural default is excused, under the "cause and prejudice" standard, by the ineffective assistance of state post-conviction counsel under *Martinez v. Ryan*, 566 U.S. 1 (2012), insofar as any deficiency in the development of the factual basis in state post-conviction proceedings is attributable to the incompetent representation of Rule 32 counsel, which prejudiced Petitioner.

306. Respondent has failed to answer Mr. Wilson's argument that the Supreme Court's decision in *Loper Bright* vitiates the deference requirement of the AEDPA under 28 U.S.C. § 2254(d).

307. Because the ACCA's ruling on this portion of Mr. Wilson's *Strickland* claim is an unreasonable application of *Strickland* and U.S. Supreme Court precedent governing admissibility of third-party confessions of guilt, this Court should review the claim *de novo.* Mr. Wilson requests discovery and a hearing on this issue.

B. The failure to investigate the Corley letter is compounded by multiple other instances of trial counsel ineffectiveness at the guilt stage, especially counsel's failing to deliver a closing argument presenting a coherent defense.

308. After the prosecutor gave a thorough closing argument, defense counsel waived closing argument as their final act in a trial in which they had done nothing to present a defense theory of the case. Doc. 76-9 at PDF 173-174, 176, Bates 1780-1781, 1783; *see* Doc. 114, ¶¶ 633-636.

309. In ¶¶ 125 and 126 of his Answer, Respondent contends that the Alabama Court of Criminal Appeals resolved this claim on the merits in a decision that was not unreasonable. Doc. 129, pp. 65-69. Respondent contends that the state court found that defense counsel made a strategic decision, and that this Court must defer to the state court under the AEDPA. Doc. 129, ¶ 126.

AEDPA deference is obsolete following the U.S. Supreme Court's decision in Loper Bright Enterprises v. Raimondo*.*

310. As noted *supra*, following the United States Supreme Court decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), AEDPA deference, like *Chevron* deference, is unconstitutional under Article III and the Supremacy Clause of the U.S. Constitution. Section 2254(d) must therefore be invalidated or reconstrued to eliminate the deference requirement that Respondent relies upon. *See* Anthony G. Amsterdam & James S. Liebman, Loper Bright *and the Great Writ*, 56 Colum. Hum. Rts. L. Rev. 54 (2025). As a result, Mr. Wilson contends that the Alabama Court of Criminal Appeals decision on the merits of this federal constitutional claim is owed no deference.

311. Putting AEDPA's current viability aside, it is well established that the question whether a counsel's decision is "strategic" for purposes of an ineffective assistance of counsel claim is a "mixed question" of fact and law. *See Wiggins v. Smith*, 539 U.S. 510 (2003) (reviewing and reversing the Maryland Court of Appeals' finding that defense counsel made a "strategic decision"). Federal habeas review of state-court decisions of "mixed questions" has been *de novo* since *Moore v. Dempsey*, 261 U.S. 86, 92 (1923). *See Thompson v. Keohane*, 516 U.S. 99, 112–13 (1995) (where adjudication of a claim "calls for application of the controlling legal standard to the historical facts[,] , . . [t]his ultimate determination, we hold, presents a 'mixed question of law and fact' qualifying for independent review."); *see*

also Fiske v. Kansas, 274 U.S. 380, 385–86 (1927); *Brown v. Mississippi*, 297 U.S. 278, 286–87 (1936); and *Norris v. Alabama*, 294 U.S. 587, 589–90 (1935). So this Court must independently review the question whether trial counsel's waiver of closing was "strategic."

Defense counsel's decision was not "strategic."

312. Trial counsel's decision to waive the defense's guilt-phase closing could not have been "strategic" for the purposes of insulating the decision from a finding of ineffectiveness under *Strickland*. In order for a decision to be insulated from a finding of ineffectiveness because it was "strategic," the strategy must have been reasonable. *Strickland*, 466 U.S. at 690. In other words, regardless of whether trial counsel claims a decision was strategic, counsel's expectations had to actually *be* strategic.

313. In other instances where the waiver of a guilt-phase closing had been considered strategic, the state had saved its strongest arguments for rebuttal. *See* Doc. 114, ¶ 651. Here, trial counsel chose to waive closing after the state had already given its full address; trial counsel knew that the state had already explained its case completely and saved nothing for rebuttal. *See* Doc. 76-9 at PDF 147-170, Bates 1754-77. Therefore, trial counsel's expectation that a waiver of his closing would have precluded the state from presenting critical arguments to the jury was

unreasonable, even if trial counsel may have mistakenly thought it was a viable strategy. As a result, trial counsel's performance was ineffective.

The ACCA's decision is owed no deference as it was an unreasonable application of clearly established federal law.

314. Even if the Court were to apply the AEDPA deferential standard, the ACCA's decision is an unreasonable application of *Strickland* and rests on unreasonable findings. First, as just discussed, the ACCA was unreasonable in finding that defense counsel's decision to waive was "strategic." Second, the ACCA was unreasonable in finding that Mr. Wilson failed to specify the lesser offense of which the jury may have convicted him had trial counsel given a closing argument that lessened his culpability. Third, the increased culpability of a co-defendant, contrary to the ACCA's unreasonable finding, would have undercut the prosecution's claim that Mr. Wilson intended to and did kill Dewey Walker, especially given the tenuous link between Mr. Wilson and the fatal blows that ultimately killed Mr. Walker. This is especially important since this was a capital case in which Mr. Wilson's intentions and the contribution of his own actions to Mr. Walker's death were determinative of whether he was eligible for the death penalty. Fourth, the ACCA was unreasonable in finding "there was scant evidence from which trial counsel could have argued that Wilson's statement was coerced," and that the evidence was strongly persuasive of Mr. Wilson's guilt. *Wilson II*, No. CR-

16-0675, slip op. at 31-35. And fifth, the ACCA was unreasonable in excusing trial counsel's failure to contest the State's speculative interpretation of Mr. Wilson's interrupted statement that he "changed it all up." Each of these conclusions is belied by the facts pled by Mr. Wilson in his Amended Petition and by the law.

315. First, then, the ACCA was unreasonable in finding that the decision to waive was "strategic." In the Rule 32 proceeding, Mr. Wilson specifically pled points the defense could have argued during its guilt-phase closing, but the ACCA rejected each for unreasonable reasons of law and fact. Rule 32 counsel for Mr. Wilson pled that after the state's robust and detailed initial closing address, even without thorough investigation, Mr. Wilson's trial counsel could have made the following points:

a. Mr. Wilson could have been convicted of lesser offenses due to the *lack* of evidence supporting a capital murder conviction;

b. Mr. Wilson's statement was unreliable given the circumstances of his arrest and the incompleteness of the statement, and the State's inculpatory interpretation of "changed it all up" was unsupported by the evidence;

c. Even if Mr. Wilson's statements were uncoerced, they did not support the state's claim that he, rather than co-defendant Kittie Corley, was responsible for the 114 blows that killed the decedent;

d. The crime could not have occurred the way that DA Valeska described, as the few droplets of blood that were found in the decedent's house did not support Valeska's narration of Mr. Wilson dragging and beating the decedent around the house;

e. The State had vastly exaggerated and inflated the evidence in order to cover up the hole in their theory—they had no account of what the co-defendants had done.

Doc. 76-22 at PDF 178-182, Bates 3617-21.

316. Defense counsel knew that the state's case had holes. In their opening, defense counsel noted the abrupt ending of Mr. Wilson's taped statement, the coercive environment in which Mr. Wilson's statement was taken, and the scarce forensic testing. Doc. 76-7 at PDF 154-57, Bates 1359-62. Yet, trial counsel nevertheless waived their opportunity to emphasize such holes in closing and point out additional deficiencies in the State's case, such as the role of the co-defendants in the crime.

317. Despite the possible defense theories that trial counsel could have presented in a guilt-phase closing at trial, defense counsel explained that their strategy in waiving their closing was to foreclose a rebuttal argument from the State. Doc. 76-9 at PDF 173-174, Bates 1780-1781. The ACCA ruled that because Mr. Wilson's trial counsel had spoken to Mr. Wilson and his co-counsel, and put on the record that the decision to forego the closing was a strategic consideration, they were not deficient in waiving the defense's closing at the guilt phase. This is an incorrect interpretation and application of the deficient performance prong of *Strickland*.

318. An attorney's claim that a choice was "strategic" does not necessarily make it so. In order for a "strategic" decision to be insulated from a finding of

ineffectiveness, it must also be reasonable. *Strickland*, 466 U.S. at 690. The court must consider whether the trial counsel's expectations for their strategy were reasonable. The ACCA failed to conduct such an analysis, instead taking trial counsel's word that his decision to waive the guilt phase closing was reasonable.

319. Such an analysis would have revealed that in other instances where the waiver of a guilt-phase closing had been considered strategic, the state had saved its strongest arguments for rebuttal. This was not the case in Mr. Wilson's trial, where the state left little for rebuttal following their initial address, and trial counsel waived his closing after the state had concluded their lengthy and complete initial closing. *See* Doc. 114 ¶ 651; Doc. 76-9 at PDF 147-170, 171, Bates 1754-1777, 1778. Even if waiving defense's closing may have been a viable strategy in other situations, and even if trial counsel believed that it was still a viable strategy during Mr. Wilson's trial, such a belief was unreasonable given the circumstances under which the guilt-phase closing was waived in Mr. Wilson's case. As a result, trial counsel's performance was ineffective and the ACCA's ruling to the contrary was unreasonable.

320. Second, the ACCA was unreasonable in finding that Mr. Wilson failed to specify the lesser offense of which the jury may have convicted him. Mr. Wilson was indicted for capital murder during two designated felonies—burglary and robbery. It is well known in Alabama that a lesser included offense of capital murder

during a designated felony is felony-murder. *See*, *e.g.*, *Ex parte Peterson*, 890 So. 2d 990, 992-93 (Ala. 2004) ("Lesser-included offenses are, by Ala. R.Crim. P. 13.2(c), necessarily charged in an indictment… Felony murder, as defined by Ala.Code 1975, § 13A–6–2(a)(3), is a *lesser-included offense* of the capital offense of intentional murder committed during the course of a robbery."). Mr. Wilson, in fact, specified felony-murder as a lesser included offense in pleading another claim. *See* ACCA Appellant's Br. at 84, Doc. 76-31 at PDF 97, Bates 5311. Moreover, during the court's jury charge, Mr. Wilson was charged with capital murder during a burglary, as well as the lesser-included charges of felony-murder (burglary as underlying felony) and burglary; and capital murder during a robbery, as well as the lesser-included charges of felony-murder (robbery as underlying felony) and robbery. *See* Doc. 76-9 at PDF 177, 183, Bates 1784, 1790; Doc. 76-9 at PDF 147-170, 171, Bates 1754-1777; Doc. 76-9 at PDF 183-193, Bates 1784, 1790-1800.

321. Third, the ACCA was unreasonable in deciding that "increased culpability on the part of his co-defendants would not have relieved Wilson of his own culpability." *Wilson II*, No. CR-16-0675, slip op. at 34. The increased culpability of a co-defendant would have supported an argument by defense counsel that Mr. Wilson neither intended to kill Dewey Walker nor was the agent of his death, given the tenuous linkage between Mr. Wilson and the fatal blows that

ultimately killed the decedent. A capital murder conviction requires that the individual acted with a specific intent to kill. *See Womack v. State*, 435 So. 2d 754, 762–63 (Ala. Crim. App.) (capital murder requires particularized intent to kill). Without a specific intent to kill, an individual cannot be convicted of capital murder under either accomplice or principal liability—only the non-capital offenses of felony-murder (if the death occurred during a felony), or reckless manslaughter under Ala. Code §13A-6-3(a)(1). *McLaughlin v. State*, 586 So. 2d 267, 271 (Ala. Crim. App. 1991) (A reckless manslaughter charge should be given as a lesser included charge to intentional murder when under the facts of the case, the jury may find that the defendant acted "recklessly" rather than "intentionally" when causing death.).

322. The evidence presented at trial never demonstrated who actually struck the 114 blows that killed the decedent. If trial counsel had adequately presented the significant culpability of co-defendants, one of whom likely struck the fatal blows, Mr. Wilson may have been convicted of participating as a non-trigger-person accomplice., but his particularized intent to kill would have been unclear. "'[w]hether a non-trigger man aided and abetted the actual killing itself, such as by being present to render assistance in the killing itself if it becomes necessary, will almost always be a jury question.'" *Sneed v. State*, 1 So. 3d 104, 125 (Ala. Crim. App. 2007) (quoting *Gamble v. State*, 791 So. 2d 409, 445 (Ala. Crim. App. 2000)).

With an adequate presentation of Mr. Wilson's mitigated culpability relative to his co-defendants, the jury likely would not have found a particularized intent to kill, and thus Mr. Wilson could not have been convicted of a capital crime, even if he had aided and abetted an underlying non-capital felony. *Enmund v. Florida*, 458 U.S. 782 (1982). By waiving the guilt-phase closing, defense counsel ceded this jury question to the State's inflated yet unopposed interpretation. As a result, trial counsel was deficient in failing to present a competing narrative in a guilt-phase closing.

323. Fourth, the ACCA was further unreasonable in finding that "there was scant evidence from which trial counsel could have argued that Wilson's statement was coerced," *Wilson II*, No. CR-16-0675, slip op. at 34. Contrary to the ACCA's statement, the facts of Mr. Wilson's arrest were almost identical to the facts of *Kaupp v. Texas*, 538 U.S. 626 (2003), and trial counsel would likely have succeeded in analogizing the facts of Mr. Wilson's arrest to those in *Kaupp*. Thus, there was ample evidence that Mr. Wilson's statement was taken after an illegal arrest with no "meaningful intervening event" between the illegal arrest and his confession, and as a result, the statement should have been suppressed and was unreliable, as the confession was not shown to be "an act of free will [sufficient] to purge the primary taint of the unlawful invasion." *Kaupp*, 538 U.S. at 633.

324. Finally, the ACCA was unreasonable in rejecting Mr. Wilson's argument that trial counsel was ineffective in failing to challenge the prosecution's

interpretation of his interrupted comment that he "changed it all up." Doc. 76-3 at PDF 133, Bates 535. Rule 32 counsel pled that trial counsel were ineffective in failing to provide an alternative explanation to counter the DA's speculative interpretation of "changed it all up," which the DA claimed was an admission by Mr. Wilson that he had decided not only to assault Mr. Walker, but to kill him. Such a speculative interpretation could only be supported if the evidence at trial was otherwise overwhelmingly persuasive of Mr. Wilson's guilt. *Wilson II*, No. CR-16-0675, slip op. at 34-35. The ACCA unreasonably assumed that this was true, finding that Mr. Wilson's admission to choking and striking the decedent once—neither of which was established to be fatal—somehow proves further actions leading to murder, even though none were admitted in the recording. This is counterfactual to the State's position during the pre-trial suppression hearing, which was that the unrecorded section of the statement mirrored the recorded section. Doc. 76-6 at PDF 73, Bates 1078. The State cannot have it both ways, and the ACCA was unreasonable in finding that the unrecorded section of the statement both mirrored the recorded part *and* included additional inculpatory admissions.

325. Had trial counsel presented a closing statement during the guilt phase following the State's thorough initial closing address, the jury would have taken note of the paucity of evidence supporting a capital murder conviction, the speculative nature of the state's interpretation of "changed it all up," the unreliability of Mr.

Wilson's statement given the circumstances of his arrest, the impossible nature of DA Valeska's story of Mr. Wilson dragging the decedent around the house, and the State's failure to account for the co-defendant's actions. Trial counsel's decision to waive defense's closing after a thorough and dramatic initial closing by the State was not reasonable, and as a result cannot be shielded from ineffectiveness despite counsel's claim that the decision was "strategic." Therefore, trial counsel's waiver of the defense's guilt-phase closing was ineffective, and the waiver prejudiced Mr. Wilson by leaving the State's inflated theory completely uncontested.

326. Because the ACCA's ruling on this claim was an unreasonable application of law, and because AEDPA deference is obsolete following the decision in *Loper Bright*, Mr. Wilson is entitled to *de novo* review of this claim. On *de novo* review this court should find that trial counsel was ineffective in failing to present a closing argument during the guilt phase of Mr. Wilson's capital trial, as this decision was not reasonable or strategic. Furthermore, had Mr. Wilson's counsel presented a guilt-phase closing, there was a reasonable possibility that Mr. Wilson would only have been convicted of a lesser-included offense, such as felony-murder, rather than the death-eligible offense of intentional capital murder. Thus, Mr. Wilson was prejudiced by trial counsel's deficient performance.

The ACCA made no findings of fact that are owed deference by a federal court.

327. In ¶ 127 of his Response, Respondent claims that the ACCA made findings of fact pertaining to this claim that must be presumed correct under §2254(e)(1), and as a result Mr. Wilson is not entitled to an evidentiary hearing. Doc. 129, ¶127.

328. Petitioner is unaware of what fact-findings the Alabama Court of Criminal Appeals made that should be presumed correct under 28 U.S.C. § 2254(e)(1) and that bar relief.

329. As a general matter, appellate courts do not find facts. That judicial function is typically reserved for the trial courts, not appellate courts.

330. More specifically in this case, the Alabama Court of Criminal Appeals had no factual record to review and therefore could not have made any findings of fact. The state post-conviction petition was dismissed with prejudice on the pleadings in Mr. Wilson's case. In order to dismiss the petition with prejudice on the pleadings, the state appellate court had to rely on legal, not factual grounds, because there were no facts established at a hearing and no factual record.

331. The only state record that exists in this case and that this Court must consider are the facts well pleaded in Mr. Wilson's amended Rule 32 petition. Those factual allegations in the Rule 32 petition must be accepted as true and all inferences must be drawn in favor of the Petitioner.

332. Insofar as there are factual findings that could be imputed to the appellate court, those factual findings are unreasonable in light of the state court proceedings.

333. First, if it could be imputed to the ACCA that it found that "there was scant evidence from which trial counsel could have argued that Wilson's statement was coerced," such a finding was unreasonable. *Wilson II*, No. CR-16-0675, slip op. at 31-35. There was ample evidence, as discussed *supra*, that the circumstances surrounding Mr. Wilson's arrest rendered his statement involuntary. Even if the ACCA took the position that such evidence did not reach the legal standard required to find a confession involuntary under the Fourth Amendment, its factual finding that such evidence was "scant" was unreasonable. Mr. Wilson's Rule 32 petition pled ample evidence concerning the illegality of his statement, including the late hour of his arrest, the lack of a warrant, and the lack of meaningful intervening events between his illegal arrest and his statement.

334. Second, if it could be imputed to the ACCA that it found that the unrecorded section of Mr. Wilson's statement would have supported the State's allegation that Mr. Wilson had confessed to committing fatal acts against the decedent, such a finding is unreasonable. The State of Alabama proffered during pre-trial proceedings that the unrecorded sections of the statement mirrored the content of the recorded sections. Doc. 76-6 at PDF 73, Bates 1078. The recorded

sections showed that Mr. Wilson admitted to striking the decedent once and choking him. It did not contain any confession to striking the repeated blows that ultimately killed the decedent. Moreover, if it could be imputed to the ACCA that it found Mr. Wilson admitted to "chok[ing] him for six minutes," such a finding is unreasonable. In his statement, Mr. Wilson admitted to choking the decedent for "[a]bout" or what "felt like six minutes." Doc. 76-3 at PDF 124, Bates 526. Such a statement does not equate to a fact finding that Mr. Wilson admitted to choking the decedent for six minutes.

335. Third, if it could be imputed to the ACCA that it found that Mr. Wilson's explanation that he carried a baseball bat to protect himself against a small dog was "dubious," this finding is unreasonable. Mr. Wilson's trial counsel did not need to argue that Mr. Wilson had been in mortal fear of a small dog, merely that he would have considered a baseball bat a necessary precaution against a small animal that could have hindered or harmed him, even if the dog could not have maimed or killed him. The ACCA's decision to assess Mr. Wilson's choice to bring a baseball bat solely based on the size of the dog was unreasonable.

Mr. Wilson is entitled to an evidentiary hearing on this claim in federal court.

336. In ¶ 128 of the Answer, Respondent alleges that "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." Doc. 129, ¶128. Once again, Respondent's allegation fails to consider the opening clause of §2254(e)(2). It is well-established that "[i]f there has been no lack of diligence at the relevant stages in the state proceedings, the prisoner has not 'failed to develop' the facts under § 2254(e)(2)'s opening clause, and he will be excused from showing compliance with the balance of the subsection's requirements." *Williams v. Taylor*, 529 U.S. 420, 437 (2000).

337. As Mr. Wilson has already pled *supra*, Claim I.A, Mr. Wilson's Rule 32 petition was dismissed on the papers. Mr. Wilson was not given the opportunity to present any evidence during state collateral review. As a result, he is not at fault for the lack of evidentiary development in state court.

338. Insofar as Respondent's Answer could be construed as raising a procedural bar to this claim of ineffective assistance of trial counsel due to the conduct of his Rule 32 counsel, Petitioner replies that any procedural default is excused, under the "cause and prejudice" standard, by the ineffective assistance of state post-conviction counsel under *Martinez v. Ryan*, 566 U.S. 1 (2012), which prejudiced Petitioner.

339. Moreover, Respondent has failed to answer Mr. Wilson's argument that *Loper Bright* vitiates the deference requirement of the AEDPA under 28 U.S.C. § 2254(d).

340. Because the ACCA's ruling on this portion of Mr. Wilson's *Strickland* claim is an unreasonable application of *Strickland* and of U.S. Supreme Court precedent respecting the underlying issues, and because it rests on unreasonable findings of fact, this Court should grant the writ and order a new trial to correct the violation of Mr. Wilson's right to effective assistance of counsel and the other rights affected by counsel's ineffectiveness enumerated above.

C. Trial counsel violated Mr. Wilson's right to due process by preventing him from testifying on his own behalf, despite his wish and willingness to do so.

341. Mr. Wilson also claims that his counsel were ineffective because he wanted to testify to explain what was missing from the tape, but trial counsel would not call him as a witness. The trial court did not inquire of Mr. Wilson on the record whether he understood his right to testify and waived it. This violated his clearly established right to testify on his own behalf. *See McCoy v. Louisiana*, 584 U.S. 414, 422 (2018) ("Trial management is the lawyer's province: Counsel provides his or her assistance by making decisions such as 'what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence.' . . . Some decisions, however, are reserved for the client – notably, whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal."); *Jones v. Barnes,* 463 U.S. 745, 751 (1983) ("[i]t is . . . recognized that the accused has the ultimate authority to make certain fundamental

decisions regarding the case, as to whether to . . . testify in his or her own behalf . . . ."); *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975). The U.S. Supreme Court has made plain that this right, while not enumerated in the Constitution, is an essential element of the Fourteenth Amendment right to due process, *Rock v. Arkansas*, 483 U.S. 44, 51 n.8 (1987), and the Sixth Amendment right to call witnesses "material and favorable to [the accused's] defense," *id.* at 52 (citation omitted).

342. In ¶ 131 of his Answer, Respondent argues that Mr. Wilson did not raise this claim in the state courts, that it is unexhausted, and that he is therefore procedurally barred from raising the claim in federal court. Doc. 129, pp. 70-71.

343. Any failure to raise this claim in state post-conviction proceedings is attributable to the incompetent representation of Rule 32 counsel, which prejudiced Petitioner, and thus Mr. Wilson is entitled to have this claim reviewed by the Court, under *Martinez v. Ryan*, 566 U.S. 1 (2012).

344. In ¶ 132 of his Answer, Respondent argues that this claim fails to state a valid claim for relief "to the extent that Wilson is attempting to raise any challenge to the voluntariness of his guilty plea." Doc. 129, p. 71.

345. Mr. Wilson did not enter a guilty plea, so Respondent's argument makes no sense.

346. In that same paragraph, Respondent contends that, had he testified, Mr. Wilson "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.)" Doc. 129, p. 71.

347. Respondent is distorting the actual evidence in this case. Mr. Wilson never said that he "strangled Walker for six minutes"; instead, he told the police in his statement that, when he tried to subdue Mr. Walker, it felt like he was choking him for what "felt like six minutes," by which he meant that it felt like a long time, in other words his appreciation of time had slowed down compared to reality. Doc. 76-3 at PDF 124, Bates 526. As for what Mr. Wilson would have testified to, he would have clarified the meaning of his statements to the police.

348. In ¶ 133 of his Answer, Respondent states that Mr. Wilson "failed to develop the factual basis for this claim in state-court proceedings" and "is not entitled to any further evidentiary hearing in this Court." Doc. 129, p. 73. Again, Mr. Wilson's Rule 32 petition was improperly dismissed on legal grounds, making it impossible for him to develop the factual basis for his claim in state court.

349. In addition, Respondent has failed to answer Mr. Wilson's argument that the Supreme Court's decision in *Loper Bright* vitiates the deference requirement of the AEDPA under 28 U.S.C. § 2254(d).

350. For the foregoing reasons, this Court should review this claim *de novo*.

D. Trial counsel failed to adequately challenge the illegality of Mr. Wilson's arrest and the inadmissibility of his statement.

351. The most incriminating piece of evidence admitted at trial implicating Mr. Wilson in Mr. Walker's murder was Mr. Wilson's own police statement. Its admissibility could not have been more critical to the defense. Mr. Wilson claims that his defense counsel were ineffective in trying to exclude his police statement.

352. In ¶¶ 135 and 136 of his Answer, Respondent admits that the final state court ruling addresses this claim on the merits, but argues that the decision was not an unreasonable application of clearly established federal law. Doc. 129, pp. 73-80.

353. However, the Alabama Court of Criminal Appeals' decision is an unreasonable application of *Strickland*'s required assessment of the "totality of the evidence," and of *Kaupp v. Texas*, 538 U.S. 626 (2003), *Wong Sun v. United States*, 371 U.S. 471 (1963), and an extensive body of U.S. Supreme Court precedent respecting probable cause to arrest.

354. It is indisputable that Mr. Wilson was illegally arrested in his home. The police had no warrant, and, per *Kaupp*, 538 U.S. at 630, Mr. Wilson did not go voluntarily. There is no legitimate distinction to be made between the circumstances of Mr. Wilson's arrest and the circumstances of Kaupp's arrest. Because counsel failed to challenge Mr. Wilson's arrest on this basis, their representation was deficient. Because of the illegality, Mr. Wilson's statement and the evidence seized at his home were due to be suppressed. Since the State presented no other evidence

at his trial linking him to the death of Mr. Walker, trial counsel's deficient performance prejudiced Mr. Wilson. This is the analysis that the ACCA should have made and the result it should have reached. But as a result of trial counsel's incompetent handling of all of the suppression issues, the ACCA's resolution of those issues was fundamentally misguided. *See also supra*, ¶¶ 348-350.

355. The ACCA sidestepped acknowledging the fact that Mr. Wilson was illegally arrested under *Payton* (*see* Doc. 114, ¶¶ 684 *et seq.*)[22] and moved on to the issue of probable cause:

> Although the facts in *Kaupp* share some similarities to those present here . . . . The circuit court noted several points on which to distinguish the facts in the present case from those in *Kaupp*,[23] *see* (C. 1538-39) [Doc. 76-28 at PDF 139-140, Bates 4784-4785], but most significant is this: here, the officers here [*sic*] had probable cause to arrest Wilson.

Wilson II, No. CR-16-0675, slip op. at 13. This is one instance of a pattern evident throughout the court's opinion, arguing with the facts pled by Rule 32 counsel for

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[22] The ACCA found, on direct appeal, that Mr. Wilson had not been arrested in his home, because he went with police "voluntarily." *Wilson I*, 142 So. 3d at 765-68. In the Rule 32 appeal, it declined to correct this error. *Wilson II*, No. CR-16-0675, slip op. at 11-13.

[23] The ACCA failed to address the illegitimacy of these "distinctions," which included such irrelevancies as that Kaupp was 17, while Mr. Wilson was 20 (Doc. 76-28 at PDF 139, Bates 4784); and that Kaupp was taken to the police station in his underwear, while Mr. Wilson was allowed to dress. *Id.*

Mr. Wilson,[24] ignoring violations of law by police and by prosecutorial misconduct, and disregarding the deficiencies of counsel's performance in challenging those violations. An ineffectiveness claim must be evaluated by considering the "totality of the evidence." *Strickland*, 466 U.S. at 695. Every error of fact and law which trial counsel committed or permitted the trial court to commit and which the ACCA failed even to acknowledge rendered its assessment of that totality an unreasonable application of *Strickland*. The adjudication of an ineffective assistance of counsel claim requires cumulative assessment of all of defense counsel's failings at each stage of the proceedings. *See Cargle v. Mullin*, 317 F.3d 1196 (10th Cir. 2003).

356. Having erroneously found no deficiency in trial counsel's performance, the ACCA did not assess prejudice. But, because the underlying Fourth Amendment challenge has merit, trial counsel performed deficiently in failing to raise it fully. *See Kimmelman v. Morrison*, 477 U.S. 365 (1986). Had they done so, Mr. Wilson's statement and the evidence seized from his home would all have been suppressed. The State's case against Mr. Wilson would have been reduced to nothing, since his confession and the equipment seized from his home were the only evidence linking

[24] At the pleading stage of the Rule 32 proceedings, which was the farthest Mr. Wilson advanced in the circuit court, Alabama law requires that the court accept the facts pled as true. *Ex parte Boatwright*, 471 So. 2d at 1259. But Mr. Wilson also supported his factual assertions with documentary evidence which neither the circuit court nor the ACCA had any reasonable basis to dispute.

him to the crime, such that there is more than a reasonable probability of a different outcome at trial. This is more than the showing of prejudice required to succeed on a *Strickland* claim. 466 U.S. at 694. Mr. Wilson is entitled to *vacatur* of his conviction and a new trial.

357. Where a state court addresses only one prong of a multi-pronged federal claim—like here, addressing only deficient performance but not prejudice for purposes of the two-prong IAC analysis, or addressing nondisclosure but not materiality for purposes a two-prong *Brady* analysis, or in the paragraph above, addressing probable cause, but not the *Payton* violation—the federal habeas court must adjudicate the unaddressed prong independently, with no AEDPA deference. *See Hall v. Warden*, 686 Fed. Appx. 671, 678 (11th Cir. 2017) (per curiam); *Johnson v. Sec'y*, 643 F.3d 907, 935 (11th Cir. 2011); *Ferrell v. Hall*, 640 F.3d 1199, 1226 (11th Cir. 2011); *Knight v. Florida Dep't of Corr.,* 958 F.3d 1035, 1046 & n.3 (11th Cir. 2020), *cert. denied*, 141 S. Ct. 2471 (2021).

358. In ¶¶ 137 and 138 of his Answer, Respondent argues that the state appellate court made findings of fact that are entitled to deference under the AEDPA and that Mr. Wilson "failed to develop the factual basis for this claim in state-court proceedings" and "is not entitled to any further evidentiary hearing in this Court." Doc. 129, p. 80. Again, Mr. Wilson's Rule 32 petition was improperly dismissed as a matter of law, which rendered it impossible for him to develop the factual basis for

his claim in state court. Therefore, this case does not fall under 28 U.S.C. § 2254(e)(2).

359. Insofar as Respondent's Answer could be construed as raising a procedural bar to this claim of ineffective assistance of trial counsel due to the conduct of his Rule 32 counsel, Petitioner replies that any procedural default is excused, under the "cause and prejudice" standard, by the ineffective assistance of state post-conviction counsel under *Martinez v. Ryan*, 566 U.S. 1 (2012), which prejudiced Petitioner.

360. Respondent has failed to answer Mr. Wilson's argument that the Supreme Court's decision in *Loper Bright* vitiates the deference requirement of the AEDPA under 28 U.S.C. § 2254(d).

361. Because the ACCA's ruling on this portion of Mr. Wilson's *Strickland* claim is an unreasonable application of *Strickland* itself and of U.S. Supreme Court precedent governing illegal arrest and probable cause, and because it rests on unreasonable fact finding, this Court should grant the writ and order a new trial to correct the violation of Mr. Wilson's right to effective assistance of counsel and the other rights guaranteed by the Fourth, Fifth, Sixth, and Fourteenth Amendments which were undermined by counsel's ineffectiveness.

E. Trial counsel were ineffective for failing to object adequately to the involuntariness of Mr. Wilson's custodial statement.

362. Mr. Wilson also challenged the effectiveness of his defense counsel for failing to object adequately to the admission of his police statement on voluntariness grounds. Doc. 114, pp. 325-353.

363. In ¶¶ 140 and 141 of his Answer, Respondent states that the state appellate court addressed the merits of this claim in state post-conviction proceedings, and argues that the decision was not an unreasonable interpretation of federal law. Doc. 129, pp. 81-83.

364. However, the ACCA's decision is an unreasonable application of *Strickland*, requiring assessment of the "totality of the evidence," and of *Miranda, Kaupp, Brown, Spano*, and numerous other U.S. Supreme Court decisions respecting police coercion and personal characteristics of the accused as relevant to the voluntariness and "knowing and intelligent" analyses. The basis for the ACCA's decision also rests on unreasonable findings of fact.

365. At the Rule 32 stage, the ACCA affirmed dismissal of Mr. Wilson's involuntary-confession claim on the ground that it had conducted a review of a voluntariness claim on direct appeal, based on the totality of the circumstances,

though premised on different grounds.[25] As all of the facts pled by Mr. Wilson in Rule 32 for this claim were in the record during direct appeal (though not pled by appellate counsel), they were considered by the ACCA on direct appeal. *Wilson II*, No. CR-16-0675, slip op. at 22-23. But there was at least one major element of the present matter which the ACCA mischaracterized in its prior review and failed to correct in Rule 32: its erroneous conclusion that Mr. Wilson went with police voluntarily.

366. This point is highly relevant, as the U.S. Supreme Court's decision in *Kaupp* demonstrates. Where a person is arrested, whether legally or not, with a show of force in circumstances which serve to disorient—the early hour, the rush to the police station, the immediate interrogation in a secluded place—there must be serious doubt about the voluntariness of his co-operation with the police. *Miranda*, 384 U.S. at 461 ("An individual swept from familiar surroundings into police custody; surrounded by antagonistic forces, and subjected to [police] techniques of persuasion ... cannot be otherwise than under compulsion to speak."); *Brown*, 422 U.S. at 605 ("The manner in which Brown's arrest was effected gives the appearance of having been calculated to cause surprise, fright, and confusion."). The Supreme

[25] The direct appeal challenged the admissibility of Mr. Wilson's statement based on its incompleteness. *Ex parte Wilson*, Pet. for Writ of Cert., No. 1111254 (Ala. filed Aug. 10, 2012), at 32-37.

Court found, under circumstances virtually identical to those in this case, that Kaupp's statement was no more voluntary than his compliance with the police demand to "go and talk." 538 U.S. at 633-34. Even if the police had probable cause to arrest Mr. Wilson, that does not dissipate the coerciveness of these elements. The ACCA demonstrably did not consider this factor at all, because it previously found Mr. Wilson went with police voluntarily, *Wilson I*, 142 So. 3d at 767, and in its opinion respecting Mr. Wilson's ineffectiveness claim gave no further analysis of the facts of the case, but merely quoted at length from its previous opinion, *Wilson II*, No. CR-16-0675, slip op. at 22-23.

367. Thus, the ACCA's unreasonable finding that Mr. Wilson went to the police station voluntarily distorted its analysis in two different (though related) ways. First, as already indicated, it wrongly prevented Mr. Wilson from invoking the fear produced by police lawlessness as one element in the voluntariness inquiry. Second, it speaks directly – and falsely – to Mr. Wilson's state of mind, affirmatively suggesting that he was unafraid and comfortable with accompanying the police to the station.

368. The court's previous decision addressed a different issue, in any event, since it focused primarily on the recording of Mr. Wilson's statement, *Wilson I*, 142 So. 3d at 763-64, which occurred an hour after he was arrested and brought to the police station, *see supra*. Mr. Wilson's condition at that time, even if it could be

evaluated on the basis of whether he sounded intoxicated,[26] *Wilson II*, No. CR-16-0675, slip op. at 23 (quoting *Wilson I*, 142 So. 3d at 763-64), does not answer the question of his condition and circumstances when he first gave a statement. The Supreme Court has clearly established that a second, recorded or signed statement given after a first has already been elicited must be assessed in light of the circumstances existing at the time that first statement was made. *Miranda v. Arizona*, 384 U.S. 436, 495-96 (1966) (addressing the facts of No. 761, *Westover v. United States*); *Missouri v. Seibert*, 542 U.S. 600, 611, 617 (2004). This the ACCA never did.

369. Furthermore, the ACCA never addressed the factors making Mr. Wilson's statement neither knowing nor intelligent. It was also unreasonable to review only a portion of the statement, the recorded portion, *id.* at 764, to determine voluntariness when Mr. Wilson's claim is that the missing portions of the statement are critical to such a determination. No official documentation exists of Mr. Wilson's unrecorded statements. Doc. 76-8 at PDF 155, Bates 1561. In a case where the State relied so heavily upon a recorded statement to prove its case against the defendant, it is highly suspicious that the State would fail to record such a significant portion of

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[26] The challenge to the voluntariness of Mr. Wilson's statement raised on direct appeal was not premised on intoxication, but on failure to record in full. *See* Doc. 76-23 at PDF 128-132, Bates 3768-3772 (Appellant's Br. on direct appeal).

that statement. It is also dubious that the State offers no reasonable explanation for this omission, especially where investigators could have easily documented their entire interactions with Mr. Wilson.

370. Because the ACCA adopted its holding from direct appeal, finding no constitutional violation, it did not assess trial counsel's performance. But the underlying Fifth Amendment challenge, as pled here and in state court, has merit, and trial counsel performed deficiently in failing to raise it competently. Had they done so, Mr. Wilson's statement and the evidence seized from his home would all have been suppressed. The State's case against Mr. Wilson would have been reduced to nothing, as explained above, such that there is more than a reasonable probability of a different outcome at trial. This is more than the showing of prejudice required to succeed on a *Strickland* claim. 466 U.S. at 694. Mr. Wilson is entitled to *vacatur* of his conviction and a new trial where his statement and the seized evidence will be excluded.

371. Because the ACCA's ruling on this portion of Mr. Wilson's *Strickland* claim is an unreasonable application of *Strickland* itself and of U.S. Supreme Court precedent governing the necessity for voluntariness, knowingness, and intelligence of confessions, and because it rests on unreasonable fact finding, this Court should grant the writ and order a new trial to correct the violation of Mr. Wilson's right to

effective assistance of counsel and the other rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments affected by counsel's ineffectiveness.

372. In ¶ 142 of his Answer, Respondent argues that the Alabama Court of Criminal Appeals "made factual findings" that are entitled to deference under the AEDPA. Doc. 129, p. 83. However, the state court made no fact findings on this claim but instead dismissed it as a legal matter.

373. In ¶ 143 of his Answer, Respondent contends that Mr. Wilson "failed to develop the factual basis for this claim in state-court proceedings" and is therefore not entitled to a hearing in federal court. Doc. 129, pp. 83-84. As argued above, Mr. Wilson's Rule 32 petition was improperly dismissed and therefore he did not have the opportunity to develop the facts.

374. Insofar as Respondent's Answer could be construed as raising a procedural bar to this claim of ineffective assistance of trial counsel due to the conduct of his Rule 32 counsel, Petitioner replies that any procedural default is excused, under the "cause and prejudice" standard, by the ineffective assistance of state post-conviction counsel under *Martinez v. Ryan*, 566 U.S. 1 (2012), which prejudiced Petitioner.

375. Respondent has failed to answer Mr. Wilson's argument in paragraphs 348-350 of his First Amended Petition that AEDPA deference is unconstitutional. Doc. 114, ¶ 766.

F. Trial counsel failed to object to the seating of an all-white jury as a result of racially discriminatory peremptory strikes by the State, in violation of *Batson v. Kentucky*.

376. Mr. Wilson also claims that his counsel were ineffective for failing to raise a *Batson* challenge at trial. *See* Doc. 114, Claim VI; Claim VI *infra* (setting forth in detail Mr. Wilson's *Batson* claim). To be brief here, the State used five of its 16 peremptory strikes to remove all remaining African-Americans after removals for cause. No reasonable attorney would have failed to object. Counsel's performance prejudiced Mr. Wilson, because his claim for equal protection under *Batson* was reviewed for plain error only. *Wilson I*, 142 So. 3d at 751.

377. In ¶¶ 145 and 146 of his Answer, Respondent argues that Mr. Wilson is barred from raising this claim because it was not presented in his Rule 32 petition and is therefore unexhausted and procedurally barred. Doc. 129, pp. 84-85.

378. Insofar as any deficiency in the development of the factual basis in state post-conviction proceedings is attributable to the incompetent representation of Rule 32 counsel, Petitioner replies that any procedural default would be excused under the "cause and prejudice" standard by the ineffective assistance of state post-conviction counsel under *Martinez v. Ryan*, 566 U.S. 1 (2012), which prejudiced Petitioner.

379. In ¶ 147 of his Answer, Respondent argues that this claim fails to state a valid claim for relief "to the extent that Wilson is attempting to raise any challenge to the voluntariness of his guilty plea." Doc. 129, p. 85.

380. That argument does not make any sense. Mr. Wilson did not plead guilty.

381. In ¶ 148 of his Answer, Respondent contends that Mr. Wilson "failed to develop the factual basis for this claim in state-court proceedings" and is therefore not entitled to a hearing in federal court. Doc. 129, p. 86. As argued above, Mr. Wilson's Rule 32 petition was improperly dismissed, and therefore he did not have the opportunity to develop the facts.

382. Moreover, Respondent has failed to answer Mr. Wilson's argument that the Supreme Court's decision in *Loper Bright* vitiates the deference requirement of the AEDPA under 28 U.S.C. § 2254(d).

G. Counsel failed to object to numerous instances of prosecutorial misconduct at the guilt phase of Mr. Wilson's trial, thereby allowing Mr. Wilson's rights to be repeatedly violated.

383. Mr. Wilson also claims that trial counsel failed to object to the prosecutor's improper actions at the guilt phase, thus allowing the jury to consider unlawful evidence and impermissible arguments in assessing Mr. Wilson's guilt or innocence of the charge of capital murder. *See* Doc. 114, Claim VII and Claim VII

infra (setting forth the nature and extent of the prosecutorial misconduct at issue in detail). Had counsel objected, there is a reasonable probability that the objections would have been sustained and Mr. Wilson would not have been convicted of capital murder. Doc. 114, ¶¶ 771-782.

384. In ¶¶ 150 and 151 of his Answer, Respondent acknowledges that the state appellate court ruled on the merits of this claim in state post-conviction, and argues that the state court's ruling was not unreasonable. Doc. 129, pp. 86-93.

385. However, the Alabama Court of Criminal Appeals' decision is an unreasonable application of *Strickland*, requiring assessment of the "totality of the evidence"; of *United States v. Cronic*, 466 U.S. 648, 656 (1984), defining defense counsel's duty as subjecting the State's case to "the crucible of meaningful adversarial testing"; and of *Napue v. Illinois,* 360 U.S. 264, 269 (1959) and *Miller v. Pate,* 586 U.S. 1 (1967), respecting the prosecution's impermissible introduction of and reliance on false or misleading testimony. The basis for the ACCA's decision also rests on unreasonable findings of fact.

386. In denying Mr. Wilson's claim of prosecutorial misconduct, the ACCA relied on its decision of substantive issues on direct appeal to find that counsel were not ineffective. *Wilson II*, No. CR-16-0675, slip op. at 25-31. But the issues on direct appeal did not encompass the full factual basis of Mr. Wilson's Rule 32 claims. The ACCA's reliance on its prior decision thus was an unreasonable application of

Strickland, which requires consideration of the "totality of the evidence," 466 U.S. at 695, as well as U.S. Supreme Court precedent respecting the underlying misconduct of the prosecutor in presenting false or misleading evidence.

387. The ACCA, on plain error review on direct appeal, limited its review to Sgt. Luker's testimony on direct, *Wilson I*, 142 So. 3d at 804, and did not discuss his further opinions expressed on redirect.

388. In ¶ 152 of his Answer, Respondent argues that the Alabama Court of Criminal Appeals "made factual findings" that are entitled to deference under the AEDPA. Doc. 129, p. 93. However, the state court made no factual findings on this claim. Instead, it dismissed the claim as a legal matter.

389. In ¶ 153 of his Answer, Respondent contends that Mr. Wilson "failed to develop the factual basis for this claim in state-court proceedings" and is therefore not entitled to a hearing in federal court. Doc. 129, pp. 93. As argued above, Mr. Wilson's Rule 32 petition was improperly dismissed and therefore he did not have the opportunity to develop the facts.

390. Respondent has failed to answer Mr. Wilson's argument that AEDPA deference is unconstitutional. Doc. 114, ¶ 781.

391. Insofar as Respondent's Answer could be construed as raising a procedural bar to this claim of ineffective assistance of trial counsel due to the conduct of his Rule 32 counsel, Petitioner replies that any procedural default is

excused, under the "cause and prejudice" standard, by the ineffective assistance of state post-conviction counsel under *Martinez v. Ryan*, 566 U.S. 1 (2012), which prejudiced Petitioner.

H. Direct appeal counsel rendered ineffective assistance under *Strickland*.

392. Mr. Wilson also claims that his appellate counsel failed to adequately argue on appeal the the illegality of Mr. Wilson's arrest, the failure of the trial court to suppress evidence seized as a result of that illegality, and the involuntariness of Mr. Wilson's custodial statement. Doc. 114, ¶¶ 783-809.

393. In ¶¶ 155-165 of his Answer, Respondent contends that the state appellate court addressed the merits of this claim and that its ruling was not unreasonable. Doc. 129, pp. 94-99.

394. The Alabama Court of Criminal Appeals' decision, however, is an unreasonable application of *Strickland* and rests on unreasonable findings of fact.

395. Mr. Wilson's Rule 32 motion pled that appellate counsel were ineffective in their arguments supporting the issues of the illegality of his arrest and the involuntariness of his statement. Doc. 76-23 at PDF 62-73, Bates 3702-3713. The issues raised by counsel on direct appeal differed from the claims related to the same constitutional rights raised in Mr. Wilson's Rule 32 petition. Yet, the ACCA found no error or showing of prejudice, because of its review of the direct-appeal

issues for plain error. *Wilson II*, No. CR-16-0675, slip op. at 60-61 (adopting the court's ruling on Mr. Wilson's trial-counsel ineffectiveness claim respecting his arrest), at 14 (discussing the court's ruling on direct appeal, which was conducted on plain error review, *see Wilson I*, 142 So. 3d at 765), and at 61 ("[a]lthough this Court conducted a plain-error analysis, it held that no error occurred in the admission of Wilson's statement"). These rulings are erroneous for the same reasons, *mutatis mutandi*, stated in Doc. 114, ¶¶ 720 *et seq.*

396. Such rulings effectively eviscerate the right to effective appellate counsel in a capital case. They flout the clearly established law the of the U.S. Supreme Court requiring effective counsel in every criminal appeal as of right. *Evitts v. Lucey,* 469 U.S. 387, 396 (1985); *see also Ex parte Dunn*, 514 So. 2d 1300, 1303 (Ala. 1987).

397. As to the substantive matter of Mr. Wilson's claims, the ACCA did not address any of the specifics of appellate counsel's performance, but simply adopted its holdings with respect to trial counsel's ineffectiveness. *Wilson II*, No. CR-16-0675, slip op. at 60-61. Mr. Wilson, thus, relies on his discussion of the ACCA's errors on the trial counsel claims.

398. Because the ACCA unreasonably applied U.S. Supreme Court precedent, this Court should grant the writ and order a new appeal to correct the

violation of Mr. Wilson's right to effective assistance of appellate counsel and the other rights affected by counsel's ineffectiveness enumerated above.

399. In ¶¶ 158 and 163 of his Answer, Respondent argues that the Alabama Court of Criminal Appeals "made factual findings" that are entitled to deference under the AEDPA. Doc. 129, p. 96 and p. 98. However, the state court made no factual findings on this claim. It dismissed the claim on the basis of a legal determination.

400. In ¶¶ 159 and 164 of his Answer, Respondent contends that Mr. Wilson "failed to develop the factual basis for this claim in state-court proceedings" and is therefore not entitled to a hearing in federal court. Doc. 129, p. 96 and pp. 98-99. As argued above, Mr. Wilson's Rule 32 petition was improperly dismissed and therefore he did not have the opportunity to develop the facts.

401. Respondent has failed to answer Mr. Wilson's argument that AEDPA deference is unconstitutional. Doc. 114, ¶ 805.

V. Petitioner David Wilson Is Innocent of Capital Murder and also Innocent of the Death Penalty Because the State Has Not Proved that He Had the Intent to Kill Mr. Dewey Walker. For this Reason, Mr. Wilson's Convictions and Sentence of Death Must Be Vacated and He Must Be Granted A New Trial on a Lesser Included Offense.

402. Mr. Wilson's fifth claim is that, as a result of an array of constitutional errors—including the State of Alabama's suppression of the Corley letter and the handwriting expert report, and the resulting *Brady* violations, the ineffective

assistance of trial counsel, and wide-ranging prosecutorial misconduct, *see supra* and *infra*—and due to the paucity of evidence of Mr. Wilson's *mens rea* of intent to kill or *actus reus* of inflicting the fatal blunt force trauma, Mr. Wilson is actually innocent of capital murder and actually innocent of the death penalty. David Wilson's claim of actual innocence is anchored in his *Brady*, ineffective assistance of counsel, and prosecutorial misconduct claims, and is thus inextricably tethered to the violations of Mr. Wilson's Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendment rights that occurred during Mr. Wilson's trial proceedings.

403. At trial, the prosecution presented testimony and argument to the jury that Mr. Walker was killed as a result of 114 blunt trauma blows to the body. *See* Doc. 114, ¶ 224 (discussion of evidence and argument presented at trial concerning the 114 blows); Doc. 76-9 at PDF 61-62, Bates 1668-69. No evidence was presented to the jury that Mr. Wilson caused those 114 blows, and Mr. Wilson has maintained his innocence of those 114 blows since his arrest. Mr. Wilson was prevented from testifying at his own trial to his innocence of those 114 fatal blows. *See* Doc. 114, Claim IV.C. Since then, Mr. Wilson has been attempting to raise his actual innocence claim. Due to external factors outside of Mr. Wilson's control, including but not limited to the State of Alabama's suppression of the Corley letter, the instant federal habeas proceeding is the first opportunity Mr. Wilson has had to present his actual innocence claim.

404. In ¶¶ 166-172 of his Answer, Respondent raises three defenses: (1) that Mr. Wilson did not raise this claim in state court, and it is therefore unexhausted and procedurally barred; (2) that there is no cognizable innocence claim under *Rozzelle v. Sec'y, Fla. Dep't of Corr.*, 672 F.3d 1000 (11th Cir. 2012); and (3) that Mr. Wilson failed to develop the factual basis for this claim in state-court proceedings. Doc. 129, pp. 99-105. Respondent's defenses are not compelling.

A. Mr. Wilson's procedural default of his actual innocence is excused by cause and prejudice or, in the alternative, permitted by the *Schlup* fundamental miscarriage of justice gateway.

405. Despite Mr. Wilson's diligent efforts in seeking that this claim be reviewed by the state and federal courts, this claim has been procedurally defaulted by his previous counsel's failure to plead this claim.

406. Mr. Wilson has been procedurally barred from raising a successive Rule 32 petition since September 20, 2014. Doc. 76-18 at PDF 125, Bates 2743 (certiorari was denied by the Alabama Supreme Court on September 20, 2013, and under Ala. R. App. P. Rule 41(b), certificate of judgment from the ACCA was issued the same day). The disclosure of the suppressed Corley letter on June 28, 2023, did not authorize a successive petition based on Ala. R. Crim. P. 32.1(a) after the one-year statute of limitations had elapsed.

407. However, it is well-established that procedural default is excused when the petitioner is able to show "cause and prejudice." *Sykes*, 433 U.S. at 86-87;

Amadeo, 486 U.S. 214; *Murray*, 477 U.S. at 492. Cause has been defined by the Supreme Court as "some objective factor external to the defense" that prevented the petitioner from complying with state procedural rules. *Murray*, 477 U.S. at 488. Factors that are "external to the defense" "cannot be fairly attributed to" the petitioner. *Coleman v. Thompson*, 501 U.S. 722, 753 (1991). "Prejudice" requires that the petitioner show "actual prejudice" resulting from the constitutional violation that led to his "actual and substantial disadvantage." *Murray*, 477 U.S. at 494.

408. Several external factors impeded Mr. Wilson's ability to raise his actual innocence claim in state court and constitute "cause" for purposes of cause and prejudice.

409. First, Mr. Wilson was effectively abandoned by his state post-conviction counsel, who refused to raise his actual innocence claim despite his repeated requests. Such abandonment constitutes cause to excuse procedural default. Although ordinary, "negligent" behavior by postconviction counsel binds the petitioner under principles of agency law and cannot constitute cause to excuse procedural default, it is well-established that "a markedly different situation is presented… when an attorney abandons his client without notice, and thereby occasions the default. Having severed the principal-agent relationship, an attorney no longer acts, or fails to act, as the client's representative." *Maples v. Thomas*, 565 U.S. 266, 281 (2012). As Justice Alito noted in his concurrence in *Holland v.*

Florida, when counsel fails "to communicate with petitioner or to respond to petitioner's many inquiries and requests over a period of several years … [c]ommon sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word." 560 U.S. 631, 659 (2010) (Alito, J., concurring).

410. Mr. Wilson was abandoned like the petitioner in *Maples*, and as a result, "under agency principles," he "cannot be charged with the acts or omissions of an attorney who has abandoned him." *Maples*, 565 U.S. at 283. Mr. Wilson diligently and consistently wrote to his attorneys at various stages of his postconviction proceedings to raise this substantive actual innocence claim. Mr. Wilson specifically asked his state post-conviction counsel to raise this legal claim of actual innocence by letter dated November 11, 2015, prior to the filing of his amended Rule 32 petition in state court. *See* Doc. 114-41 (Appendix OO, Notarized letter by David Wilson to counsel dated Nov. 11, 2015, redacted).[27] Mr. Wilson's amended Rule 32 petition was filed on December 11, 2015, with no such claim included. Doc. 76-22 at PDF 25, Bates 3464. Mr. Wilson again specifically asked his state post-conviction counsel to raise this legal claim of actual innocence as part of another round of

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[27] All of the client-attorney letters (Appendices OO through RR) are redacted to preserve the attorney-client privilege.

amendments to the amended Rule 32 petition in state court. *See* Doc. 114-42 (Appendix PP, Notarized letter by David Wilson to counsel dated July 5, 2017, redacted); Doc. 114-43 (Appendix QQ, Letter by David Wilson to counsel dated August 4, 2017, redacted). Again, no actual innocence claim was included in the amendments. In fact, as a layperson unaware that his statute of limitations to plead the actual innocence claim in state court had already terminated, Mr. Wilson continued to ask his original federal habeas counsel to raise an actual innocence claim. *See infra* (discussing the statute of limitations in Rule 32 for a claim raised under Ala. R. Crim. P. 32.1(a)). And, right after he received a copy of the filed federal habeas petition, he asked his federal habeas corpus attorney why the claim had not been included in the federal habeas corpus petition. *See* Doc. 114-44 (Appendix RR, Letter by David Wilson to counsel dated June 1, 2019). On June 13, 2019, Mr. Wilson filed a *pro se* request with this Court asking for the appointment of new counsel to raise his legal claim of actual innocence. Doc. 15. Undersigned counsel was appointed as Mr. Wilson's new counsel and is raising the claim in the Amended Petition. Doc. 115, Claim V. Until the appointment of undersigned counsel, long after the statute of limitations to raise this claim in Rule 32 had terminated, none of Mr. Wilson's attorneys attended to his requests for an actual innocence claim. Mr. Wilson has thus been effectively abandoned with regard to this claim, and the actions of his previous counsel cannot bind him under principles of agency. The procedural default on this claim must therefore be excused due to this external impediment.

411. Second, and related to the abandonment of Mr. Wilson by postconviction counsel, the default on this claim must also be excused as a result of ineffective assistance of state postconviction counsel during initial collateral proceedings. As the United States Supreme Court held in *Martinez v. Ryan*, when a claim may only be raised for the first time during initial-review collateral proceedings, the ineffective assistance of postconviction counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), constitutes cause to excuse procedural default, as the initial collateral review is "in many ways the equivalent of a prisoner's direct appeal" as to that claim. 566 U.S. 1, 11, 17 (2012); *Trevino v. Thaler*, 569 U.S. 413, 429 (2013) (extending *Martinez* to cases where state law may not explicitly prohibit the bringing of a claim on direct appeal, but the "procedural framework, by reason of its design and operation, makes it unlikely in a typical case that a defendant will have a meaningful opportunity to raise" the claim). Such a principle recognizes that otherwise, "no court will review the prisoner's claims." *Martinez*, 566 U.S. at 11. Mr. Wilson could not have raised his actual innocence claim until state collateral appeals, just like an ineffective assistance of trial counsel claim, since direct appeal is not a viable proceeding through which to raise a claim necessitating evidentiary development outside of the trial record.

412. Mr. Wilson's actual innocence claim could be raised for the first time only on initial-review collateral proceedings, in Rule 32 proceedings in Houston County Circuit Court. To overcome procedural default under *Martinez*, Mr. Wilson must show, first, that the underlying defaulted actual innocence claim is meritorious. And second, that postconviction counsel was ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984), meeting both the deficient performance and prejudice prongs of the standard. *Martinez*, 566 U.S. at 14. Mr. Wilson demonstrates that his actual innocence claim is meritorious in Doc. 114, ¶¶ 810-820. Mr. Wilson's postconviction counsel were also ineffective under *Strickland*. By abandoning Mr. Wilson despite his repeated pleas for them to raise an actual innocence claim, postconviction counsel showed obvious deficient performance. *See* ¶ 410, *supra*. Postconviction counsel's deficient performance was prejudicial to Mr. Wilson, as their failure to raise his actual innocence claim led to the instant procedural default of the meritorious claim.

413. The *Brady* violation resulting in the decades-long suppression of the Corley letter did not excuse counsel's deficient performance. Knowing that Mr. Wilson believed he had an actual innocence claim and that there was suppressed exculpatory evidence yet to be disclosed, postconviction counsel had the responsibility to ensure that the actual innocence claim be preserved. Postconviction counsel had raised a *Brady* claim, and so clearly knew that there was likely

suppressed exculpatory evidence that would support an actual innocence claim. Thus, even if postconviction counsel believed the actual innocence claim to be futile at the time, given the suppressed evidence, they were nevertheless deficient in failing to preserve the claim while knowing that supporting evidence was likely in the state's possession.

414. Third, the key evidentiary support for Mr. Wilson's innocence claim—the Corley letter demonstrating that it was his co-defendant who struck the fatal blows on the decedent—was suppressed by the State through trial, direct appeals, and state post-conviction. By the time the letter was turned over during federal habeas discovery, the statute of limitations under Ala. R. Crim. P. 32.2(c) precluded Mr. Wilson from raising an actual innocence claim. The State's suppression of the Corley letter and resulting *Brady* violation constitutes cause to excuse the procedural default of Mr. Wilson's actual innocence claim. It is well-established that "a showing that the factual or legal basis for a claim was not reasonably available to counsel" constitutes cause for purposes of overcoming procedural default. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). Postconviction counsel's errors do not nullify the prosecutorial misconduct that contributed to the procedural default of this claim.

415. Respondent's allegation that undersigned counsel could have filed a successive Rule 32 petition to raise an actual innocence claim in state court after the Corley letter had been produced on June 28, 2023, misconstrues Mr. Wilson's claim

and the Alabama Rules of Criminal Procedure. *See* Doc. 129, p. 100-101. Contrary to Respondent's assumptions, had Mr. Wilson had the opportunity to raise his actual innocence claim in Rule 32, the proper vehicle through which to do so would have been Ala. R. Crim. P. 32.1(a) (authorizing review when "[t]he constitution of the United States or of the State of Alabama requires a new trial, a new sentence, or other relief"), not Ala. R. Crim. P. 32.1(e) (authorizing review when "[n]ewly discovered material facts exist which require that the conviction or sentence be vacated by the court"). While a claim under Ala. R. Crim. P. 32.1(e) may be raised in a successive petition within the six months after new evidence is unearthed (*see* Ala. R. Crim. P. 32.2(c)), regardless of how much time has passed since the conclusion of direct appeals proceedings, the same cannot be said for *constitutional claims* raised under Ala. R. Crim. P. 32.1(a). Such constitutional claims may only be raised "within one (1) year after the issuance of the certificate of judgment by the Court of Criminal Appeals under Rule 41, Ala.R.App.P." Ala. R. Crim. P. 32.2(c). Regardless of whether newly produced evidence may support such a claim, Petitioner may not file a successive petition on a constitutional claim outside of this one-year statute of limitations, which terminated on September 20, 2014. As a result, Petitioner was precluded by state procedural rules from seeking state court review of his actual innocence claim after the Corley letter was produced.

416. In the alternative, ineffective assistance of counsel at trial and direct appeal also constitute cause to excuse the procedural default of this actual innocence claim. Trial counsel prevented Mr. Wilson from taking the stand when Mr. Wilson was willing to testify to his innocence of capital murder. Although direct appeal would have been a poor posture under which to present an actual innocence claim requiring significant evidentiary development outside the record, appellate counsel's failure to raise a *Brady* claim on direct appeal prejudiced Mr. Wilson's ability to raise an actual innocence claim supported by suppressed exculpatory evidence.

417. It is difficult to overstate the actual prejudice suffered by a person who has been convicted of a capital crime despite being actually innocent of the offense. Surely, a wrongful conviction of a capital offense based upon a trial riddled with constitutional errors "worked to his *actual* and substantial disadvantage." *Murray v. Carrier*, 477 U.S. 478, 494 (1986). Had Mr. Wilson had the opportunity to properly show his actual innocence during his state trial and appellate proceedings, he would have demonstrated that without the constitutional errors in his trial, he could not be convicted of capital murder, as he never struck the fatal blows against Mr. Walker and never formed a specific intent to kill.

418. Fourth, under *Schlup v. Delo*, 513 U.S. 298 (1995), Mr. Wilson's actual innocence claim, supported by evidence not presented at trial (the Corley letter and the handwriting expert report), provides an independent reason to excuse his

procedural default. When a petitioner is able to show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." *Murray*, 477 U.S. at 496; *Schlup v. Delo*, 513 U.S. 298, 326-327 (1995). When a petitioner has raised a constitutional claim that has been alleged to be procedurally barred, he should be permitted to nonetheless present the claim through the *Schlup* gateway if "he presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error." *Schlup*, 513 U.S. at 316. Here, numerous constitutional violations—most notably those raised by Mr. Wilson's *Brady* and ineffective assistance of trial counsel claims, which led to the suppression of Corley's letter for two decades—have "probably resulted" in Mr. Wilson's capital conviction, despite his actual innocence of the capital offense. The Corley letter, in which Mr. Wilson's co-defendant took responsibility for striking repeated blows on the decedent, is evidence of innocence that erodes critical elements needed to uphold Mr. Wilson's capital murder conviction. At a minimum, the Corley letter is evidence that Mr. Wilson had no specific intent to kill and as a result could not be convicted of capital murder. *See* ¶ 429, *infra.* Thus, in addition to showing cause and prejudice, Mr. Wilson's claim that he is actually innocent of capital murder permits him to plead this otherwise procedurally defaulted claim under *Schlup*.[28]

B. Mr. Wilson's actual innocence claim is meritorious.

419. Mr. Wilson is actually innocent of the crime of capital murder, and his actual innocence is rooted in constitutional violations that occurred during his state trial and appellate procedurals. As a result, his actual innocence claim fits neatly into the narrow tranche of actual innocence claims "made after trial" that "would render the execution of a defendant unconstitutional, and warrant federal habeas relief," as there is "no state avenue open to process such a claim" and there are "independent constitutional violation[s] occurring in the underlying state criminal proceeding." *In re Davis*, 565 F.3d 810, 816-17 (11th Cir. 2009) (footnote omitted) (quoting *Herrera v. Collins*, 506 U.S. 390, 417, 400 (1993)); *see Barbour v. Hamm*, No. 2:01-CV-612-ECM, 2025 WL 2434283, at *65 (M.D. Ala. Aug. 22, 2025) (finding that although the burden for a freestanding actual innocence claim is high, such a claim may justify relief in federal court when no state court avenues are available); *see also* Doc. 129, pp. 99-100, n. 9.

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[28] This miscarriage of justice exception and its "probably results standard" includes instances where a petitioner can show that he is "actually innocent" of a death-eligible offense, even if he is not necessarily innocent of lesser-included offenses. *Sawyer v. Whitley*, 505 U.S. 333, 343 (1992); *Schlup,* 513 U.S. at 435.

420. As discussed *supra*, ¶ 415, there is no longer an avenue available in state court in which to bring Mr. Wilson's actual innocence claim.

421. Mr. Wilson's actual innocence claim is tethered to an array of constitutional errors—including the State of Alabama's suppression of the Corley letter and the resulting Brady violations, the ineffective assistance of trial counsel, and wide-ranging prosecutorial misconduct—and due to the paucity of any evidence of Mr. Wilson's *mens rea* of intent to kill or *actus reus* of inflicting the fatal blunt force trauma, Mr. Wilson is actually innocent of capital murder and actually innocent of the death penalty. The only evidence to establish any person's *mens rea* and *actus reus* of capital murder in this case is the Corley letter and the downstream evidence, which establish that Kittie Corley was the one who beat Mr. Walker to death with a baseball bat and had both a motive and a specific intent to kill. *See* Doc. 114, Claim I and III. Thus, while there is evidence that Corley had a motive, had the intent to kill, and did kill the victim with multiple blows of the bat, there was no evidence presented at trial, other than speculative inferences, that Mr. Wilson was guilty of capital murder. See Ala. Code 1975, §§ 13A-5-40(b) and 13A-6-2(a)(1) (requiring a specific intent to cause death). Petitioner David Wilson is actually innocent of capital murder because he did not kill Mr. Walker or have the intent to kill him, and as a result he is also not eligible for the death penalty.

422. Respondent suggests that under *Rozzelle v. Sec'y, Fla. Dep't of Corr.*, 672 F.2d 1000, 1012 (11th Cir. 2012), new evidence supporting a lesser *mens rea* is insufficient for a cognizable "actual innocence" claim, as the petitioner would be nevertheless convicted of a lesser-included offense. Respondent's argument is not compelling.

423. As a preliminary matter, the actual innocence claim presented by Mr. Wilson is qualitatively different from the claim presented in *Rozzelle.* It is well-established that the punishment of death is qualitatively different from a term of imprisonment. *See, e.g.*, *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) ("Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two."). *Rozzelle* concerned the possible reduction of a second-degree murder conviction to a conviction of manslaughter. Here, without a showing of specific intent to kill, Mr. Wilson could not be convicted of intentional murder, and thus would not have been eligible for the death penalty.

424. The *Rozzelle* court specifies that they have "decide[d] only 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." *Rozzelle v. Sec., Fla. Dep't. of Corr.*, 672 F.3d 1000, 1015 (11th Cir. 2012) (emphasis added). Such a narrow holding is not apposite here.

425. First, insofar as the holding in *Rozzelle* affects the *Schlup* gateway in Mr. Wilson's case, the holding in *Rozzelle* concerns the scope of *Schlup* in excusing default only in the cases of *non-capital* homicides. It is concerned about "opening federal habeas review to petitions involving degrees of *non-capital* state crimes." *Rozzelle*, 672 F.3d at 1016 (emphasis added). Mr. Wilson is actually innocent of *capital* homicide. The *Rozzelle* court's holding that "actual innocence" as defined for *Schlup* excludes cases where such innocence is the mere reduction of a *non-capital* homicide to a lesser-included offense cannot apply in a *capital* case, where permitting such a gateway would only open federal habeas review to the far more limited class of *capital* state crimes. Furthermore, the *Rozzelle* court explicitly declared that their holding applied only to petitioners like Rozzelle, "who did the killing." *Rozzelle*, 672 F.3d at 1015. Mr. Wilson's actual innocence claim shows precisely the opposite. He did not do the killing. Mr. Wilson is not merely alleging a lack of *mens rea*, but also a lack of *actus reus*—he did not strike the 114 fatal blows.

426. The Eleventh Circuit has left open the question of whether a reduction in *mens rea* that would correspond to a change in eligibility for a capital murder conviction constitutes "actual innocence" for a *Schlup* gateway. *Rozzelle* governs actual innocence claims concerning differences between convictions of non-capital offenses. *McKay v. United States*, 657 F.3d 1190 (11th Cir. 2011) governs actual

innocence claims regarding sentences for non-capital offenses. *Sawyer v. Whitley*, 505 U.S. 333 (1992) governs actual innocence claims regarding sentences for capital offenses. There remains a gap in the law concerning actual innocence claims, such as Mr. Wilson's, concerning a wrongful *conviction* of a capital offense, when the maximum conviction the defendant may have received was a non-capital conviction. Supreme Court precedent on capital sentencing, however, sheds light on the matter and militates in favor of a finding that claims of actual innocence are cognizable in such cases. In capital cases, "[t]o show actual innocence of a capital *sentence*, a movant 'must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found [him] eligible for the death penalty under the applicable state law.'" *McKay v. United States*, 657 F.3d 1190, 1196–97 (11th Cir. 2011) (quoting *Sawyer v. Whitley*, 505 U.S. 333, 336 (1992)) (emphasis added). Such a showing would require that "no reasonable juror would have found him eligible for the death penalty … on the elements of the crime itself and the existence of aggravating circumstances." *Sawyer*, 505 U.S. at 334. While reduction from a more severe non-capital homicide to a less severe non-capital homicide does not constitute actual innocence under *Rozzelle*, reduction from a death-eligible to a non-death-eligible sentencing range does under *Sawyer*. The same should apply when a conviction moves a defendant from an LWOP/death sentencing range (capital murder), to a term-of-years sentencing range (non-capital homicide). In other words, if innocence of the death penalty is considered "actual innocence" for the *Schlup* gateway under *Sawyer*, then innocence of capital murder should be considered "actual innocence" as well.

427. Second, Mr. Wilson's constitutional claim of actual innocence merits relief on its own. Unlike the claim in *Rozzelle*, it was not raised merely to authorize a *Schlup* gateway. Mr. Wilson's actual innocence claim, tethered to his *Brady*, ineffective assistance of counsel, and prosecutorial misconduct claims, and the violations of Mr. Wilson's Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendment rights that occurred during Mr. Wilson's trial proceedings, independently warrants relief from this federal habeas court. Insofar as the *Rozzelle* opinion dictates the outer bounds of a cognizable "actual innocence" claim in a non-capital case outside of the *Schlup* context, *Rozzelle* supports a finding of actual innocence in Mr. Wilson's case that merits relief.

428. In the Eleventh Circuit, actual innocence claims meriting relief are, critically, distinguishable from mere legal innocence claims. *Rozzelle*, 672 U.S. at 1013. The *Rozzelle* court's analysis evidences that "when [an innocence claim] negates an essential element of a capital conviction," such a claim is an actual innocence claim and not a mere legal innocence claim. *Rozzelle*, 672 F.3d 1000, 1015 (summarizing the Eighth Circuit's holding in *Jones v. Delo*, 56 F.3d 878, 883 (8th Cir. 1995) that an actual innocence claim in a capital case does not need to be

the "prototypical" innocence claim where the state has convicted the wrong person, but rather can be when "an essential element of the crime of capital murder" has not been proven); *see also Rozzelle*, 672 F.3d at 1015 (declaring that the court's decision in *Rozzelle* does not touch the required elements of capital offenses).

429. Mr. Wilson's actual innocence claim demonstrates that "an essential element of the crime of capital murder" has not been proven. *Id.* at 1015 (quoting *Jones v. Delo*, 56 F.3d at 883). In Alabama, a specific intent to kill is required for a murder to be capital murder. Ala. Code §13A-5-40(b) (capital murder can only be murder as defined under §13A-2-6(a)(1)); Ala. Code §13A-6-2(a)(1) ("a person commits the crime of murder if: with intent to cause the death of another person, he causes the death of that person or of another person"). Assuming but not conceding, as Respondent suggests (*see* Doc. 129, p. 103-104), that Mr. Wilson would still be convicted of the lesser-included offense of felony-murder even if he was not responsible for the 114 blows, Mr. Wilson would have a cognizable actual innocence claim under *Rozzelle*. Felony murder does not require a specific intent to kill. Ala. Code §13(A)-6-2(a)(3); *Mitchell v. State*, 706 So.2d 787, 800 (1997) (specific intent to kill distinguishes felony murder from a capital murder during a felony). In addition, "[u]nder the Alabama death penalty statute the requisite intent to kill may not be supplied by the felony-murder doctrine." *Beck v. Alabama*, 447 U.S. 625, 627-28 (1980). Had Mr. Wilson been convicted of felony murder, the specific intent

to kill element necessary for capital murder would not have been proven. This is a showing of actual innocence rather than mere legal innocence.

430. Third, if the Court is persuaded that Respondent's interpretation of *Rozzelle* is correct, that even in the case of capital crimes, an innocence claim "premised on being guilty of only a lesser degree of homicide" is insufficient to constitute an actual innocence claim either to justify a *Schlup* gateway or to merit relief, Mr. Wilson raises this actual innocence claim to preserve it for future review. Federal courts have established the universal rule that convictions in the absence of evidence of *mens rea* violate due process in equal measure as convictions in the absence of evidence of *actus reus* or of identity. *In re Winship*, 397 U.S. 358, 364 (1970) ("the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of *every fact* necessary to constitute the crime with which he is charged") (emphasis added); *Clark v. Arizona*, 548 U.S. 735, 765-766 (2006) (holding that due process requires a presumption of innocence until every element of the offense, including *mens rea*, is proven); *United States v. Guadin*, 515 U.S. 506, 510 (1995) (due process requires "criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt"); *Thompson v. City of Louisville*, 362 U.S. 199, 204 (1960) (due process right of defendant is violated by conviction obtained without evidence supporting an essential element of the offense); *Vachon*

v. New Hampshire, 414 U.S. 478, 479-480 (1974) (due process violated when there was no evidence defendant knew the illegal act had been done); *Jackson v. Virginia*, 443 U.S. 307, 324 (1979); *Doe v. U. S. Dep't. of Just*., 650 F. Supp. 3d 957, 994 (C.D. Cal. 2023) ("Without exception, due process forbids criminalizing 'entirely passive and innocent nonconduct with no *mens rea* or guilty mind.'"); *Keating v. Hood*, 191 F.3d 1053, 1061 (9th Cir. 1999); *Langford v. Warden, Ross Corr. Inst.*, 593 Fed. Appx. 422, 432 (6th Cir. 2014) (unpublished) (holding that trial court's error in failing to instruct jury on required *mens rea* element justified relief in post-conviction), *United States v. Vargas-Cordon*, 733 F.3d 366, 375, 384 (2d. Cir. 2013) (analyzing the sufficiency of the evidence used to prove a *mens rea* element); *United States v. Sheehan*, 512 F.3d 621, 631 (9th Cir. 2008); *Smith v. Horn*, 120 F.3d 400, 414 (3d Cir. 1997). *Rozzelle* cannot be reconciled with this general due process rule. It is indisputable that an element of *mens rea* cannot be removed from a trial court's instructions to the jury. It would make a mockery of due process to assume that a reviewing court may do so on appeal. As a result, *Rozzelle* must be reconsidered at the circuit and Supreme Court levels, and Mr. Wilson seeks an adjudication of his actual innocence claim for purposes of preservation.

C. Mr. Wilson is not at fault for failing to develop the record in state court, and as a result is entitled to an evidentiary hearing in federal court.

431. Respondent alleges that Mr. Wilson has not met the conditions of §2254(e)(2)(A) and (B), and as a result is not entitled to an evidentiary hearing before this Court. Doc. 129, p. 104-105, ¶ 172.

432. However, once again, Respondent's allegation fails to consider the opening clause of §2254(e)(2). It is well-established that "[i]f there has been no lack of diligence at the relevant stages in the state proceedings, the prisoner has not 'failed to develop' the facts under § 2254(e)(2)'s opening clause, and he will be excused from showing compliance with the balance of the subsection's requirements." *Williams v. Taylor*, 529 U.S. 420, 437 (2000).

433. As Mr. Wilson has already pled *supra*, Claim I.A, Mr. Wilson's Rule 32 petition was dismissed on the pleadings only. Mr. Wilson was not given the opportunity to present any evidence during state collateral review. Due to the ineffective assistance of trial counsel, Mr. Wilson was likewise not permitted to present testimony at trial. Moreover, even if Mr. Wilson had been granted an evidentiary hearing during postconviction proceedings, the state's decades-long suppression of the Corley letter would have prevented him fully substantiating his actual innocence claim. As a result, Mr. Wilson was not at fault for the lack of evidentiary development in state court. He is entitled to an evidentiary hearing in this Court on this claim without meeting the burdens of §§ 2254(e)(2)(A) and (B).

VI. MR. WILSON'S TRIAL BY AN ALL-WHITE JURY SELECTED THROUGH RACIALLY DISCRIMINATORY PEREMPTORY STRIKES BY THE PROSECUTOR VIOLATED HIS RIGHTS TO EQUAL PROTECTION, DUE PROCESS, AN IMPARTIAL JURY, AND OTHER RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, CONTRARY TO *BATSON V. KENTUCKY*. MR. WILSON IS ENTITLED TO A NEW TRIAL.

434. Mr. Wilson's sixth claim is that the prosecution in his case violated *Batson v. Kentucky*, 476 U.S. 79 (1986). The State's racially discriminatory jury selection violated Mr. Wilson's rights to equal protection, to due process, to a fair trial, to an impartial jury, to a reliable jury verdict, and to be free from cruel and unusual punishment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution.

435. In ¶¶ 173 and 174 of his Answer, Respondent contends that the state appellate court addressed the *Batson* claim on the merits on direct appeal, and that the ruling was not unreasonable. Doc. 129, pp. 105-115. Respondent argues that "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." Doc. 129, p. 115.

436. However, a close reading of the state court's decision demonstrates that it is an unreasonable application of well-established *Batson* case law as interpreted by the U.S. Supreme Court.

437. The state court's decision on return to remand denying relief, *Wilson I*, 142 So. 3d at 751-59, is an unreasonable application of clearly established federal law because it failed to assess the relation of purported nonracial reasons to the case being tried, overlooked the State's failure to question on subjects purportedly of interest to it, applied an erroneous analysis to disparate treatment, speculated as to possible reasons (not articulated by the prosecutor) for racially targeted questioning, discounted the prosecutor's history of discrimination, ignored the highly relevant factor that all available black jurors were struck by the State, leaving an all-white jury, and disregarded the prosecution's burden at the second step of *Batson*, placing the burden instead on Mr. Wilson to disprove the contents of LETS records to which he did not have access. The state court's analysis in no way comported with consideration of "the totality of relevant facts" required by *Batson*. 476 U.S. at 94.

438. It is well-established that a *Batson* inquiry has three steps for assessing claims of racial discrimination. *Miller-El v. Cockrell*, 537 U.S. 322, 328-29 (2003) ("*Miller-El I*") (citing *Batson*, 476 U.S. at 96-98). In the first step, the challenging party must make a *prima facie* showing of discrimination. *Snyder v. Louisiana*, 552 U.S. 472, 476 (2008); *Foster v. Chatman*, 578 U.S. 488, 499 (2016); *see Madison v. Comm'r, Ala. Dept. of Corr.*, 677 F.3d 1333, 1338-39 (11th Cir. 2012). In the second step, the challenged party "must give a clear and reasonably specific explanation of . . . legitimate reasons for exercising the challenges," *Batson*, 476 U.S. at 98 n.20

(internal quotations omitted), "related to the particular case to be tried," *id*. at 98. At the third and final step, the challenger may present evidence or argument showing that the stated reasons are pretextual. *Snyder*, 552 U.S. at 479-85; *Miller-El v. Dretke*, 545 U.S. 231, 246 (2005) ("*Miller-El II*"). The court must then conduct a "sensitive inquiry," *Batson*, 476 U.S. at 93, considering "the totality of relevant facts" to determine whether the defense had met its burden of showing purposeful discrimination, *id*. at 94.

439. On direct appeal, Mr. Wilson challenged three of the State's peremptory strikes against Black venirepersons, those of Darran Williams, Jehl Dawsey, and James Collins. The State conceded that Mr. Wilson made a *prima facie* showing of racial discrimination in the State's peremptory strikes, as Mr. Wilson was tried by an all-white jury. *Wilson I*, 142 So. 3d at 747-48. The two parties then agreed that the case should be remanded from the ACCA to the circuit for a hearing on the second and third steps of *Batson*. *Wilson I*, 142 So. 3d at 747-48. The circuit court conducted this hearing on February 23, 2011.

440. At the hearing, to meet its burden at the second step of *Batson*, the State gave the following purported race-neutral reasons for striking each of the jurors:

441. The State claimed that it struck **Darran Williams** because he had a LETS record and 14 traffic violations. Doc. 76-15 at PDF 56, Bates 2419.

442. The State claimed that it struck **Jehl Dawsey** because he had a LETS record and because he was 26 years old. Doc. 76-15 at PDF 58, Bates 2421.

443. The State claimed that it struck **James Collins** because he stated that it would be "tough" for him to impose a sentence of death. Doc. 76-15 at PDF 52, Bates 2415; *compare* Doc. 76-7 at PDF 38-39, Bates 1243-1244 (colloquy during *voir dire*).

444. Following the *Batson* hearing, the circuit court found that the prosecutors had proffered a race-neutral reason for each African-American potential juror that they struck. Doc. 76-15 at PDF 81, Bates 2444.

445. The circuit court found that the State did not use its peremptory strikes to remove jurors based on race, and that Mr. Wilson failed to show that any of the State's reasons were sham or pretext. On return to remand, the ACCA found that the circuit court's findings were not clearly erroneous and affirmed the circuit court's judgment. Doc. 76-18 at PDF 152-55, Bates 2770-73. The ACCA's decision made unreasonable application of clearly established federal law and unreasonable findings of fact.

446. First, the ACCA's decision failed to assess the relation of the state's purported race-neutral reasons to the case being tried. At the second step of *Batson*, the State's proffered race-neutral reasons must be "related to the particular case to be tried," *Batson*, 476 U.S. at 98. The ACCA conducted no such analysis. It failed

to consider, for example, that the State proffered that it struck Dawsey because of his young age based on the assumption that younger jurors were less likely to impose death, yet Dawsey explicitly stated to the contrary that he would be willing to impose death. Doc. 76-7 at PDF 39, Bates 1244. The ACCA did not consider that there was thus no relation between the proffered reason and the case to be tried. In addition, the ACCA failed to consider how the LETS records that Williams and Dawsey allegedly had related to the case to be tried. The LETS records were not, and are still not, available to the court, and as a result neither the circuit court nor the ACCA could have assessed whether the records were related to this particular case. Moreover, given that LETS records contain not just convictions, but also charges that resulted in acquittals, the blanket assumption that a LETS record is relevant is not available either. *See* Doc. 76-15 at PDF 85, Bates 2448.

447. Second, the ACCA overlooked the State's failure to question on subjects purportedly of interest to it. During the *Batson* hearing, the state proffered that one of the reasons it struck jurors Williams and Dawsey was that they had criminal records. Doc. 76-15 at PDF 56, Bates 2419; Doc. 76-15 at PDF 58, Bates 2421. The State specified that Williams had 14 traffic violations, but the two jurors' records and why they were determinative of the State's decision to strike were not clear. Despite their purported interest in these jurors' criminal records, at the *Batson*

hearing, the State did not question Williams or Dawsey on their LETS records at trial.

448. Moreover, at the *Batson* hearing, the State asserted ignorance of the criminal records of several white jurors. *See* Doc. 76-15 at PDF 131-33, Bates 2494-96. It was ultimately the defense that represented to the court at the hearing that at least four white jurors served despite their traffic violations. Doc. 76-15 at PDF 84-85, Bates 2447-48. The ACCA upheld the circuit court's finding of no discriminatory intent in part because Mr. Maxwell asserted ignorance of the white jurors' records. *Wilson I*, 142 So. 3d at 757. The ACCA stated that "[n]othing in the record establishes that the circuit court's credibility determination was clearly erroneous …." *Id.* But multiple facts in the record support a high degree of suspicion. First, at trial, the State stated on the record that it did not want jurors to inform it of any speeding tickets. Doc. 76-7 at PDF 52, Bates 1257. Second, the State did not ask either Mr. Williams or Mr. Dawsey about their LETS records. Third, at the *Batson* hearing, the State asserted that one of its main goals was to eliminate *any* juror with a criminal record. Doc. 76-15 at PDF 57, Bates 2420. Fourth, when confronted with the criminal records of white jurors, the State gave questionable explanations about their process, asserting that not all jurisdictions report to LETS and that they had no access to Alacourt records. Doc. 76-15 at PDF 133, Bates 2496.

449. This is particularly suspicious, in light of the first point. If the State cared so much about removing jurors with *any* criminal history, including traffic violations, and if it believed LETS to be deficient in its coverage, it would not have excluded speeding tickets from its inquiry at the outset. And if the State did in fact consider any criminal history to be disqualifying, it is suspicious that they chose to rely on LETS to do so, which they claim is an incomplete database. *See* Doc. 76-15 at PDF 133, Bates 2496. The State's failure to question a prospective juror regarding an issue that it propounds as a reason for striking him or her is compelling evidence that the reason is pretextual. *Miller-El II*, 545 U.S. at 246.

450. Third, the ACCA applied an erroneous analysis to disparate treatment. The ACCA misapplied comparative juror analysis in addressing the fact that at least five white jurors served despite their traffic violations. In failing to conduct the kind of "sensitive inquiry" required by the third step of *Batson*, the ACCA committed an unreasonable error under the AEDPA by applying the *Batson* framework in a flagrantly incorrect manner. *McGahee v. Ala. Dep't. of Corr.*, 560 F. 3d 1252, 1256 (11th Cir. 2009). When determining whether a State engaged in disparate treatment in exercising its peremptory strikes, the question is whether the race-neutral reason proffered by the State for a strike of a Black juror also applied to a white juror who *served. Miller-El II*, 545 U.S. at 241; *Snyder v. Louisiana*, 552 U.S. 472, 483 ("The implausibility of this explanation is reinforced by the prosecutor's acceptance of

white jurors who disclosed conflicting obligations that appear to have been at least as serious as Mr. Brooks'"). The ACCA justified the State's actions in striking Jurors Dawsey and Williams because a number of white jurors with criminal records were struck.[29] *Wilson I*, 142 So. 3d at 758. The question, though, is whether any similarly-situated white jurors *served*, not whether similarly-situated white jurors were struck: "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination …." *Miller-El II*, 545 U.S. at 241. The matter at issue is racial discrimination. If two jurors, one black and one white, are similarly situated, and the black juror is struck, but the white juror is not, the question is whether some distinction besides race justifies the strike. The ACCA never addressed the comparison of Jurors Dawsey and Williams with the white jurors with traffic tickets who served. Therefore, there is no state court opinion to defer to on that point, and this court should decide *de novo* the question of whether the State engaged in disparate treatment when failing to strike white jurors who had criminal records that were as serious as, or more serious than, Dawsey's and Williams'. *See Romine v. Head*, 253 F.3d 1349, 1365 (11th Cir. 2001) ("[W]hen there is grave doubt

[29] The white jurors who were struck had more serious charges than speeding tickets. One had a controlled substance offense. Doc. 76-15 at PDF 55, Bates 2418. All but one of the remainder had DUIs, one having seven of these. Doc. 76-15 at PDF 54-56, 60, 130, Bates 2417-2419, 2423, 2493.

about whether the state court applied the correct rule of governing federal law, § 2254(d)(1) does not apply. That is what we have here, so we proceed to decide the issue *de novo,* as the district court did.”).

451. The ACCA also declined to address Juror Dawsey’s age as a reason to strike, since it found the “criminal history” reason permissible. *Wilson I*, 142 So. 3d at 758 n.9. It cursorily applied the same improper comparative analysis as for criminal history, “noting” again that both black and white jurors were struck for this reason. *Id.* It failed to engage at all with the facts discussed above, that age was given as a reason because the State believed younger jurors less likely to vote for a death sentence (Doc. 76-15 at PDF 51, Bates 2414), but Mr. Dawsey affirmatively answered that he could impose such a sentence (Doc. 76-7 at PDF 39, Bates 1244). This reason, like criminal history, was pretextual.

452. The ACCA further dismissed any difference in the questions posed to black and white jurors without any discussion. *Wilson I*, 142 So. 3d at 755. There is no doubt that Mr. Collins, the third person questioned, was subjected to a long, leading introduction to the critical question. *See* Doc. 76-7 at PDF 38-39, Bates 1243-1244. In contrast, Mr. Bond, the second, and white, juror, was asked only:

> I will ask you, are you morally opposed to the death penalty, or can you sit on a case and make a decision and tell Judge Jackson, if you are satisfied beyond a reasonable doubt that an aggravating circumstance exists and it outweighs any mitigating, can you tell

> Judge Jackson if you are on this jury, my decision for this defendant, Wilson, at 20 years old, is death? Can you do that?
>
> Doc. 76-7 at PDF 37, Bates 1242.

453. Only after Mr. Bond responded by nodding his head, did the prosecutor indicate that "it is very difficult" (*id.*), but even then, he did not cajole Mr. Bond in the same way he did with Mr. Collins. Instead, he limited himself to the need to get a clear answer on the record:

> I am not singling you out but you see why it is kind of important that I ask you – and I need to get a response. If you want to come up and tell us why, that's fine. But you indicated – if I'm wrong, correct me. You indicated you could do that. Correct?
>
> Doc. 76-7 at PDF 37-38, Bates 1242-1243.

454. In fact, the prosecutor encouraged Mr. Bond to confirm a positive, rather than a negative response, unlike Mr. Collins. Mr. Wilson does not have to demonstrate that every African-American juror was given the same treatment as Mr. Collins, or that no white jurors were subjected to a lengthier preamble to the question. *See Miller-El II*, 545 U.S. at 255-60. He need only show that blacks were addressed in this way in disproportion to their numbers in the venire. *Id.* Again, the fact that seven of eight black jurors were addressed at all, but only five white jurors, must be considered in assessing the significance of the laboriously leading form of the questioning specifically addressed to Mr. Collins. But the ACCA did not.

455. Fourth, the ACCA speculated as to possible reasons (not articulated by the prosecutor) for racially targeted questioning, which was unreasonable under well-established federal law. Under *Batson*, it is the State's burden to provide the court with the actual race-neutral reason underlying each disputed strike to contest the *prima facie* showing of racial discrimination by the defense. The court is not permitted to substitute its own reasons when the State has failed to meet its burden, as such a speculated reason has no discernible connection with the actual intentions of the prosecutor who made the strike. In its consideration of the State's strike of Mr. Collins for purported hesitation respecting the death penalty, it suggested a possible race-neutral reason that had never been proffered by the State. *Wilson I*, 142 So. 3d at 754-55. The court discounted the disproportionate number of African-Americans queried by positing that the prosecutor might have selected these jurors because of "some nonverbal response to [his] general question regarding their belief in the death penalty." *Id.* at 755. The prosecutor made no such allegation. Therefore, the ACCA misapplied *Batson* in creating reasons which the prosecutor himself did not assert. *Miller-El II*, 545 U.S. at 252 ("A *Batson* challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false. The Court of Appeals's and the dissent's substitution of a reason for eliminating Warren does

nothing to satisfy the prosecutors' burden of stating a racially neutral explanation for their own actions."); *see also Johnson v. Martin*, 3 F.4th 1210, 1224 (10th Cir. 2021) ("'[O]nce a prima facie case of racial discrimination has been established, the prosecutor must provide race-neutral reasons for the strikes.' . . . Thus, when a trial court offers its own speculation as to the prosecutor's reasons for striking minority jurors, it essentially disregards its own core function under *Batson* – to evaluate the reasons offered by the prosecutor, including the prosecutor's demeanor and other contextual information, in order to determine the prosecutor's true intent. . . . And in that regard, it matters not a whit that the trial court may have offered perfectly good reasons for striking the minority jurors."); *accord*, *Upshaw v. Stephenson*, 97 F.4th 365, 377 (6th Cir. 2024); *People v. Ojeda*, 2022 CO 7, 503 P.3d 856, 865 (Colo. 2022) ("by providing its own race-neutral reasons to explain the strike, the trial court answered the wrong question. The question under *Batson* is: Whether the prosecutor actually struck the potential juror based on race. By supplying its own reasons, the trial court instead answered whether there was some race-neutral explanation for the strike that could be gleaned from the record irrespective of the prosecutor's actual reason for doing so. . . . Thus, the trial court erred by supplying its own reasons for the peremptory strike."); *and see People v. Barnes*, 107 Cal. App. 5th 560, 328 Cal. Rptr. 3d 276 (2024). But the record, in fact, refutes this speculation: after targeting first Juror Baker, who had already indicated his opposition, the prosecutor asked: "Ryan Bond – where is Mr. Bond?" Doc. 76-7 at PDF 37, Bates 1242. Obviously, the prosecutor had not noticed any "nonverbal response" in calling on this juror, since he did not even know where he was. And if the prosecutor were concerned about "nonverbal responses," surely he would have addressed those jurors first, before calling on someone he could not have seen respond.

456. The ACCA's decision unreasonably applied *Batson* by ignoring the disparity between the number of black jurors questioned, by suggesting reasons for the DA that he himself did not articulate, and by overlooking a clear indication in the record that its speculation was plainly wrong.

457. Mr. Wilson has proved that Mr. Collins was so struck. The ACCA's findings otherwise are an unreasonable application of *Batson* premised on unreasonable findings of fact.

458. Fifth, the ACCA was unreasonable in discounting the prosecutor's history of discrimination, in contravention of well-established federal law. Although *Batson* did away with the requirement under *Swain v. Alabama*, 380 U.S. 202 (1965) that the defense show a systemic exclusion of Black individuals from the jury, the United States Supreme Court has held that the falsity of the State's purportedly race-neutral reasons may sometimes be determined only through examining factors outside of the individual case, *Miller-El II*, 545 U.S. at 240, and a history of racial discrimination within a prosecutor's office "is relevant to the extent it casts doubt on

the legitimacy of the motives underlying the State's actions in [a] petitioner's case," *Miller-El I*, 537 U.S. at 347.

459. In its opinion on return to remand, the ACCA discounted the Houston County District Attorney's history of *Batson* reversals as "attenuated" and so held that history irrelevant. *Wilson I*, 142 So. 3d at 759. But the court's arithmetical calculations are in error. The most recent case cited was from 1998. *Id.* That was only nine years before Mr. Wilson's trial in 2007, not "[over 12] years ago," as the opinion states, *id.* (alteration in original). In *Miller-El I*, the U.S. Supreme Court considered the history of the Dallas County, Texas, District Attorney's office relevant, even though the most recent evidence of discrimination came from a former ADA's account dating to his tenure ending in 1978, while Miller-El's trial was in 1986, eight years later. 537 U.S. at 328, 334. Furthermore, the testifying prosecutor in Mr. Wilson's case, Gary Maxwell, had worked in the DA's office for more than 30 years, including 24 to 25 years as chief assistant under Valeska, who was doing the questioning on voir dire. Doc. 76-15 at PDF 47, Bates 2410. Thus, he was employed in that office during the entire time it was being reversed for violations of multiple defendants' and jurors' rights. This history was not irrelevant.

460. Sixth, the ACCA ignored altogether the highly relevant factor that all available black jurors were struck by the State, leaving an all-white jury. In denying Mr. Wilson's *Batson* claim, the Alabama Court of Criminal Appeals on remand

erroneously failed to consider the prosecutor's total exclusion of available black jurors as required by *Batson v. Kentucky*, 476 U.S. 79 (1986). *See McGahee*, 560 F.3d at 1265 (court's failure to consider State's total removal of African-Americans with for-cause and peremptory strikes was unreasonable application of *Batson*). The prosecution's total exclusion of black venirepersons establishes a strong inference of racial discrimination. *Johnson*, 545 U.S. at 169-70 (recognizing that evidence that State struck all black persons on venire was basis for inference of discrimination found in *Batson*). As Alabama courts have elsewhere acknowledged, total exclusion "reveals a disparate impact and immediately arouses suspicion of the existence of discriminatory intent." *Ex parte Bird*, 594 So. 2d 676, 680 (Ala. 1991) (finding inference of discriminatory intent where African-Americans comprised 36% of the venire but only 8% of the trial jury); *see also Ex parte Branch*, 526 So. 2d 609, 624 (Ala. 1987) (citing as strong evidence of racial discrimination that "the prosecutor, having 6 peremptory challenges, used 2 to remove the only 2 blacks remaining on the venire"). Because of the strength of the inference of discrimination, on remand, the State was required to provide clear and specific race-neutral reasons to avoid a finding of illegal discrimination. *Ex parte Bankhead*, 625 So. 2d 1146, 1147 (Ala. 1993) ("[T]he State's burden of rebutting a defendant's *prima facie* case of discrimination increases in proportion to the strength of the *prima facie* case."); *Ex parte Bird*, 594 So. 2d at 680 (same). The ACCA's failure to consider the State's reasons within the context of this highly relevant fact renders its opinion unreasonable.

461. Seventh, the ACCA was unreasonable in affirming the circuit court's finding that the State met its burden at the second step of *Batson* with regard to Williams and Dawsey's criminal records, and that the State's proffered reason was not pretextual. In ¶ 51 of his Answer, Respondent admits that "[a]t the conclusion of the Batson hearing, the prosecutor offered to provide a copy of the LETS report." Doc. 129, p. 21. To date, no LETS report or record has ever been produced by the State.

462. At the *Batson* hearing, the State proffered that it struck jurors Dawsey and Williams at least in part because of their LETS records, which were state records, unavailable to the public, that tracked traffic and criminal records.

463. As a replacement for the ordinary voir dire questioning that would have been available at trial, both the defense and the State agreed to submit documentation concerning the criminal and traffic records of jurors to substantiate their respective arguments. Doc. 76-15 at PDF 125-26, Bates 2488-2489. DA Valeska represented to the court that the State would provide Mr. Wilson's counsel with the LETS records of struck jurors in the State's possession. Doc. 76-15 at PDF 141, Bates 2504. And the defense offered to provide the Alacourt records of the white jurors with traffic violations who served. Doc. 76-15 at PDF 125-26, Bates 2488-2489.

464. At the hearing, the State was first to point out the necessity of having documentation to substantiate claims concerning the struck jurors' criminal records.

> Mr. Valeska: First of all, as they pointed out, they said they [the defense] checked records, you know, once again – but they offered no evidence to this Court on the jurors that they talked about… All they did was argue that to you. There was no documentation produced to you from the defense that the State's answers based on LETS or traffic or what we have was incorrect. They had a chance to pull up their documentation, as they said, Alacourt. But they didn't produce it to the Court. Okay? So my answer to you is, you should exclude that, because all they had to do was produce the Alacourt…

Doc. 76-15 at PDF 116-17, Bates 2479-80.

465. As a result, the defense agreed to produce documentation substantiating their claims, to assuage the State's concern about the lack of evidence. The defense also pointed out that the State had not substantiated their claims concerning LETS records either. In response, the State requested permission to submit rebuttal evidence. As a result, the parties stipulated that both would provide records to support their argument concerning jurors' criminal records.

> Mr. Buskey: I think when Mr. Valeska was speaking earlier, he mentioned the records that we mentioned concerning jurors who served who had traffic violations and that we haven't introduced evidence of that. **And we are prepared to submit those case numbers of the jurors that we are alleging have violations. I also want to point out that the only thing that we have as to LETS violations or to DUIs as justifications are from the testimony. It's not actually evidence of those DUIs or LETS hits, whatever they refer to as.** But if it would satisfy Your Honor, we are prepared to make copies and provide these as evidence of our disparate treatment.

> Mr. Valeska: Judge, I have no objection, as long as we are entitled to submit ours. In other words, what's fair for them is fair for us. So I don't have any problem with that.
>
> The Court: Do you stipulate to that, Mr. Buskey?
>
> Mr. Buskey: That's fine.
>
> The Court: Okay. Then both of you can submit the documents you need to submit supporting the reasons that you have an argument that they struck these black jurors when they didn't strike white jurors with the same type traffic offenses or whatever they may have been – LETS records. But Mr. Valeska gets to do the same thing if you are going to get to do them.

Doc. 76-15 at PDF 125-26, Bates 2488-2489.

466. At the end of the hearing, the State once again reiterated that the State would have no problem with the defense submitting evidence as long as the State was permitted to do the same.

> Mr. Valeska: And we have no problem with them submitting their documents, as he said, and make a copy. And we can submit ours.
>
> …
>
> Mr. Valeska: And what we have from LETS, we will provide to them.

Doc. 76-15 at PDF 140-41, Bates 2503-04.

467. Immediately after the hearing, Mr. Wilson provided copies of the Alacourt records of jurors Cauley E. Kirland, Robert Lewis, Richard Morris, and Sidney Timbie to the Court and the State to substantiate his argument that white jurors with traffic records were permitted to serve on the jury. Doc. 76-16 at PDF 6,

Bates 2515. On March 18, 2011, Mr. Wilson filed a Motion to Supplement following the *Batson* hearing with copies of the Alacourt records of those same jurors. Doc. 76-16 at PDF 5-14, Bates 2514-23. The circuit court granted Mr. Wilson's Motion to Supplement on March 31, 2011. Doc. 76-16 at PDF 18, Bates 2527.

468. By contrast, the State never provided Mr. Wilson or his counsel with copies of the LETS records on which the State said it based its decision to strike potential jurors Williams and Dawsey. Unlike Alacourt records, which are available to the public, LETS records are maintained by the Alabama Department of Public Safety and is a law enforcement tool inaccessible to the public. Doc. 76-15 at PDF 56, Bates 2419; Doc. 76-15 at PDF 133, Bates 2496. As a result, Mr. Wilson had and still has no ability to access those LETS records.

469. The ACCA affirmed the circuit court finding that the defense failed to meet its burden to show that one of the State's proffered race neutral reason—that jurors Williams and Dawsey had LETS records—was pretextual because "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." Doc. 76-18 at PDF 154, Bates 2772. And moreover, "[t]his 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)."

470. As Mr. Wilson first pled in his brief on return to remand, the State has not yet satisfied their burden at the second step of *Batson* given that the validity of the State's race-neutral reason for striking jurors Williams and Dawsey—their criminal records—hinged upon the contents of their LETS records. Doc. 76-17 at PDF 19-20, Bates 2553-54; Doc. 76-17 at PDF 23, Bates 2557. As a result of the State's failure to satisfy its burden at the second step, the defense was disabled from arguing that the reason was pretextual. It is impossible for Mr. Wilson to demonstrate that a list of criminal records that he has no access to were used in a pretextual manner. As a result, the ACCA's decision is based on unreasonable findings of fact and unreasonable applications of clearly established federal law for three reasons. *Id.*

471. First, the ACCA was unreasonable in functionally eliminating the State's burden under *Batson.*

472. The production of Williams and Dawsey's LETS records was necessary for the State to satisfy its burden at the second step of *Batson*, as the State's claim was not that the mere *existence* of LETS records was the reason for the strike, but rather that the *contents* of the LETS records were significant in the decision to strike the two jurors. Thus, by failing to produce the LETS records of Dawsey and Williams despite promising the court it would do so, the State never satisfied its burden at the second step of *Batson*.

473. The State explained the significance of a LETS record to the court when testifying about their strike of juror Williams as follows:

> A [Maxwell]: Number six strike was number 73, which is Darren [sic] DeLawrence Williams, age 34. 14 speeding convictions, and he had a LETS record. And I – I don't know if the Court is familiar with LETS, but it's Law Enforcement Tracking System, I think, and it covers people who are – have been charged with – anywhere from a speeding offense all the way up in the state of Alabama.
>
> …
>
> Q [Valeska]. Okay. Do we have anything else besides the speeding?
>
> A. I've got my – I have got in my notes that he had a LETS record.
>
> Q. Okay.
>
> A. Okay. And 14 speedings.

Doc. 76-15 at PDF 56-57, Bates 2419-20.

474. By indicating that there were 14 speeding tickets *in addition to* a LETS record, the State implied that the LETS records reflected charges that were more serious than speeding tickets. And the State's insistence that it be permitted to submit the LETS records demonstrates that it was the substantive list of charges on the LETS records that was significant, not the mere existence of a LETS record. If the State believed that Williams' LETS record contained only the 14 speeding tickets it already represented to the court, there would have been no need to bring up the LETS record at all.

475. As a result, the *contents* of the LETS record constituted a reason proffered for the strikes of Williams and Dawsey to satisfy their burden at the second step of *Batson*. By failing to produce the LETS records, the State substituted a promise of a reason for the reason itself necessary to satisfy its burden at the second step of *Batson*.

476. In addition, the State's failure to produce the LETS records rendered it impossible for Mr. Wilson and the court to determine its credibility. At the third step of *Batson*, Mr. Wilson has the opportunity to argue that the State's proffered race-neutral reason was pretextual; the court must then determine its credibility based on "all of the circumstances that bear upon the issue of racial animosity." *Snyder*, 552 U.S. at 478; *see also Miller-El II*, 545 U.S. at 239. It was impossible to determine whether the contents of the LETS records were pretextual reasons for the strikes because neither Mr. Wilson's counsel nor the court knew what the contents were. Such a situation is distinguishable from one where the State provides inaccurate information that the defendant may later rebut through external investigation or other sources. If the State had provided a list of charges that were false, and the defense had a means through which to determine that such charges were false, it may be argued that the defense had a burden to make that argument at the third step of *Batson*. But that was not a possibility here. LETS records are law enforcement records that are not available to the public. And the State failed to specify the precise

charges reflected in Williams and Dawsey's LETS records that caused them concern. The race neutral reason proffered was the fact that the LETS records may have included charges more serious than traffic violations. Mr. Wilson could not have argued that they were pretextual without knowing what those charges were.

477. By accepting the State's unspecified and unsubstantiated reason, the ACCA functionally eliminated the State's burden at the second step of *Batson* and made impossible the "sensitive inquiry" necessary at the third step of *Batson*. Through this decision, the ACCA ensured the State no longer had any burden under *Batson* and imposed an impossible burden on the Mr. Wilson: to not only demonstrate that the State's strikes were racially discriminatory, but also to disprove confidential government records to which he had no access.

478. Second, the circuit court and ACCA made an unreasonable finding of fact in claiming that Mr. Wilson could have questioned the State's witness on the LETS records' contents at the *Batson* hearing. The State represented during the *Batson* hearing that it did not bring the records that the prosecutor's office prepares for voir dire. Doc. 76-15 at PDF 49, Bates 2412. The only materials that the State and its witness brought were the strike list and prosecutor Maxwell's notes from the trial *voir dire*. *Id*. As a result, there would have been no reason for the defense to ask Maxwell any questions about the LETS records, as he did not have them available to him at the hearing. Thus, the ACCA's factual finding that the defense may have

discredited the State's proffered reason by asking additional questions about the LETS records was an unreasonable finding of fact.

479. Third, the ACCA unreasonably applied clearly established federal law in crediting the State's reasons for striking Williams and Dawsey based on their criminal records, despite the State's failure to produce either venireperson's LETS records. While the ACCA may be correct that under state law there is no requirement that every peremptory strike be backed up with evidentiary support, the State's proffered race neutral reason cannot be deemed credible and facially valid when the State itself represented to the court that it had evidentiary support, that it would provide it to the defense and court, and it failed to fulfill that promise. The State's credibility was especially weak in this circumstance given that Valeska himself pointed out to the circuit court during the *Batson* hearing that the defense's arguments needed to be backed up with evidentiary support, and then requested the opportunity for the State to do the same. The court could not have fulfilled its duty as required by federal law to determine the credibility of the State's proffered reason based on "all of the circumstances that bear upon the issue of racial animosity" when it did not even know the contents of the State's proffered reason. *Snyder*, 552 U.S. at 478.

480. In discussing strikes based on "criminal" history, *Wilson I*, 142 So. 3d at 756-58, the court simply accepted that Jurors Dawsey and Williams had criminal

histories and that a criminal history of unspecified degree of seriousness was "related to the particular case to be tried," *Batson*, 476 at 98. The State never explained the relevance, and an appellate court is not permitted to fill in the gaps. *Miller-El II*, 545 U.S. at 252. As discussed *supra*, the LETS database analysis used to identify Jurors Dawsey and Williams' "criminal histories" of traffic violations was far from sufficient. Because the State gave no reason for this factor, it must be considered pretextual. In refusing to conduct any sort of "sensitive inquiry" into the state's proffered excuse about criminal histories, the ACCA committed more than an error of fact. The ACCA engaged in an unreasonable application of controlling federal law. *McGahee*, 560 F. 3d at 1256.

481. The ACCA's findings supporting the peremptory challenges to Dawsey and Williams represent an unreasonable application of clearly established federal *Batson* law premised on unreasonable findings of fact.

482. Finally, because the ACCA found reasons to deny relief on every individual aspect of Mr. Wilson's *Batson* claim in a piecemeal manner, it never considered the "totality of relevant facts," as *Batson* requires. 476 U.S. at 94. Since the ACCA's decision of this claim constitutes an unreasonable application of clearly established *Batson* law, this Court should review the claim using the appropriate analysis, find that the State employed its peremptory strikes for racially discriminatory reasons, thus prejudicing Mr. Wilson, and grant Mr. Wilson a new

trial because of the prosecution's violation of his rights to equal protection, due process, a fair trial, and all other rights enumerated throughout this Claim. Mr. Wilson requests discovery and a hearing on this issue.

483. In ¶ 175 of their Answer, Respondent contends that the ACCA's determinations of fact should be presumed correct under §2254(e)(1). However, Mr. Wilson is able to rebut by "clear and convincing evidence," and as a result is entitled to an evidentiary hearing on, the ACCA's following factual determinations:

484. (1) The contents of the LETS records of venirepersons Williams and Dawsey. As discussed *supra*, the State never produced the LETS records on which it based its strikes of the two Black venirepersons. The ACCA's speculation that the LETS records supported a strike that was race-neutral and for a reason relevant to the case to be tried is unsubstantiated and incorrect.

485. (2) Whether the State questioned Mr. Collins, and a disproportionate number of African American venirepersons, for purported hesitation respecting the death penalty based on "some nonverbal response" to the State's generally query on the death penalty. Contrary to the court's determination, as discussed *supra*, the record refutes this speculation: after targeting first Juror Baker, who had already indicated his opposition, the prosecutor asked: "Ryan Bond – where is Mr. Bond?" Doc. 76-7 at PDF 37, Bates 1242. Obviously, the prosecutor had not noticed any "nonverbal response" in calling on this juror, since he did not even know where he

was. And if the prosecutor were concerned about "nonverbal responses," surely he would have addressed those jurors first, before calling on someone he could not have seen respond. At minimum, Mr. Wilson is entitled an evidentiary hearing on these two questions of fact.

486. In ¶ 176 of his Answer, Respondent further contends that Mr. Wilson is not entitled to further evidentiary development under §2254(e)(2). Respondent once again fails to consider the opening clause of §2254(e)(2), which requires that Mr. Wilson be at fault for failing to further develop the record in state court. Mr. Wilson's Rule 32 petition was dismissed on the papers, and as a result he was granted no opportunity to develop any evidence during state postconviction proceedings. Furthermore, at minimum, Mr. Wilson is entitled to further factual development on the contents of Williams and Dawsey's LETS records. They are law enforcement records not available to the public and have never been produced by the State, despite their reliance on its contents and their promise to produce it in state court during direct appeals. State postconviction, during which Mr. Wilson was denied the opportunity to develop any evidence, would have been the only opportunity during which the State may have been compelled to produce the LETS records. Given that no evidentiary development was permitted during state postconviction, such a possibility was foreclosed. As a result, Mr. Wilson is at least entitled to an

evidentiary hearing on the contents of Williams and Dawey's LETS records in federal court.

487. As noted *supra*, following the United States Supreme Court decision in *Loper Bright v. Raimondo*, 603 U.S. 369 (2024), AEDPA deference, like *Chevron* deference, has been unveiled as unconstitutional under Article III and the Supremacy Clause of the U.S. Constitution. Section 2254(d) must therefore be invalidated or reconstrued to eliminate the deference requirement that Respondent relies upon. *See* Anthony G. Amsterdam & James S. Liebman, Loper Bright *and the Great Writ*, 56 Colum. Hum. Rts. L. Rev. 54 (2025). As a result, Mr. Wilson contends that the Alabama Court of Criminal Appeals decision on the merits of this federal constitutional claim does not bind this federal court and is owed no deference.

VII. PROSECUTORIAL MISCONDUCT INFECTED THE GUILT PHASE PROCEEDINGS IN VIOLATION OF MR. WILSON'S CONSTITUTIONAL RIGHTS. THE TRIAL COURT PERMITTED OR FAILED TO CURE THESE IMPROPER ACTIONS. MR. WILSON IS ENTITLED TO A NEW TRIAL.

A. The prosecutors deliberately interjected irrelevant and inflammatory testimony regarding the personal characteristics of Mr. Walker, the pain from the injuries inflicted on him, and other sentencing phase matters during the guilt phase, and the trial court failed to take curative action.

488. Mr. Wilson's seventh claim is that the state trial court permitted and failed to take curative actions in the face of clear prosecutorial misconduct that injected sentencing phase issues—including victim characteristics, victim impact

evidence, and the death penalty itself—at the guilt phase of Mr. Wilson's trial, thereby undermining the validity of Mr. Wilson's convictions and death sentence in violation of his rights to due process, a fair trial, and a reliable sentence, protected by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

489. In ¶¶ 178 and 179 of his Answer, Respondent admits that the final state court decision denied the claim on the merits, but argues that the ruling was not an unreasonable application of clearly established federal law. Doc. 129, pp. 117-122. Without more, Respondent states: "A review of the ACCA's opinion demonstrates that the decision of the Alabama court was not an unreasonable one." Doc. 129, ¶ 179.

490. A close review of the decision by the Alabama Court of Criminal Appeals demonstrates that the ruling amounts to an unreasonable application of clearly established federal law. The ACCA's ruling goes against the U.S. Supreme Court's clear rejection of the injection of penalty phase issues into the question of guilt in the aftermath of *Furman v. Georgia*, 408 U.S. 238 (1972). In *Beck v. Alabama*, the Supreme Court explained:

> To insure that the death penalty is indeed imposed on the basis of "reason rather than caprice or emotion," we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination.

447 U.S. 625, 638 (1980). The Court went on to state that:

> In the final analysis the difficulty with the Alabama statute [prohibiting instruction on lesser included offenses] is that it interjects irrelevant considerations into the factfinding process, diverting the jury's attention from the central issue of whether the State has satisfied its burden of proving beyond a reasonable doubt that the defendant is guilty of a capital crime.

Id. at 642. The Court found there that:

> [T]he Alabama statute makes the guilt determination depend, at least in part, on the jury's feelings as to whether or not the defendant deserves the death penalty, without giving the jury any standards to guide its decision on this issue.

Id. at 640. The Court stated with disapproval that

> The closing arguments in this case indicate that under the Alabama statute the issue of whether or not the defendant deserves the death penalty will often seem more important than the issue of whether the State has proved each and every element of the capital crime beyond a reasonable doubt. Thus, in this case both the prosecutors and defense attorneys spent a great deal of argument time on the desirability of the death penalty in general and its application to the petitioner in particular, rather than focusing on the crucial issue of whether the evidence showed that petitioner had possessed the intent necessary to convict on the capital charge.

Id. at 643 n.19. And in *Payne v. Tennessee*, while the Court allowed evidence of victim impact in the penalty phase, such evidence was restricted to that second phase only:

> A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family *is relevant to the jury's decision as to whether or not the death penalty should be imposed*.

501 U.S. 808, 827 (1991) (emphasis added). Such evidence or argument should not be heard as to whether a particular defendant committed the crime:

> In addition to the historical basis for different evidentiary rules governing trial and sentencing procedures there are sound practical reasons for the distinction. In a trial before verdict the issue is whether a defendant is guilty of having engaged in certain criminal conduct of which he has been specifically accused. Rules of evidence have been fashioned for criminal trials which *narrowly confine the trial contest to evidence that is strictly relevant to the particular offense charged*. These rules rest in part on a necessity to prevent a time consuming and confusing trial of collateral issues.

Williams v. New York, 337 U.S. 241, 246–47 (1949) (emphasis added). The improper admission of sentencing phase issues, including victim characteristics, victim impact evidence, and the death penalty itself, at the guilt phase undermines the validity of Mr. Wilson's convictions and death sentence under clearly established federal law. *See id.*

491. The ACCA articulated several specific reasons to excuse these errors, but each of them is unreasonable. First, with regard to Mr. Walker's personal characteristics, the ACCA held that "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 I*, 142 So. 3d at 785. While Jimmy Walker's testimony may have been relevant to why he checked on the victim and discovered the victim's body, the manner in which the victim's body was discovered was not a material issue of fact in this case. The ACCA acknowledged

the rule established in *Payne v. Tennessee*, 501 U.S. 808, 825 (1991), that victim impact statements are inadmissible in the guilt phase of a criminal trial, but excused the admission of the irrelevant victim impact statements about Mr. Walker as "relevant to a material issue of the guilt phase." *Wilson I*, 142 So. 3d at 765 (quoting *Ex parte Crymes*, 630 So. 2d 125, 126 (Ala. 1993). However, in relying on *Ex Parte Crymes*, the ACCA failed to note that the Supreme Court of Alabama held in that case that "[t]estimony that has *no probative value on any material question of fact* or inquiry is inadmissible." *Ex parte Crymes*, 630 So. 2d at 126 (emphasis added). There was no material dispute over the circumstances of Mr. Walker's discovery, so the admission Jimmy Walker's testimony regarding Mr. Walker's characteristics had no probative value. Moreover, in *Ex parte Crymes*, the Alabama Supreme Court explicitly held that testimony regarding the ages of the victim's children during the guilt phase of a capital trial was improperly admitted, and only denied relief because the defendant did not object to prior testimony regarding how long the victim had been married and how many children they had. 630 So. 2d at 127. Unlike in *Ex parte Crymes*, Mr. Wilson did not invite Jimmy Walker's improper testimony which was highly prejudicial.

492. The Alabama Supreme Court has held: "If the statements are not material and relevant, they are not admissible" and that victim-related evidence is generally not relevant "to a *material issue* of the guilt phase." *Ex parte Crymes*, 630

So. 2d at 126 (emphasis in original). Clearly established federal jurisprudence confirms the Alabama Supreme Court's materiality and relevance criteria for admissible evidence. In *Old Chief v. United States*, 519 U.S. 172, 180 (1995), the U.S. Supreme Court recognized that not only evidence must be relevant but also that its probative value must not be substantially outweighed by unfair prejudice. In *Old Chief*, the defendant offered to stipulate to a prior conviction which would satisfy one element of the crime charged, so that the prosecution would not present evidence of the prior conviction which would have been prejudicial. The Court held that where the probative value of the evidence of the prior conviction is diminished because the State can establish an element of the crime without it, and where the evidence would be highly prejudicial, it is not admissible. *Id*. at 191-92. An instructive line of Fifth Circuit cases demonstrates the application of this rule to prohibit prosecutors from eliciting evidence of a police officer's reasons for initiating an investigation that eventually produces incriminating information. *Taylor v. Cain,* 545 F.3d 327, 331, 335 (5th Cir. 2008) (the Confrontation Clause was violated when a police officer was permitted to testify that he "had a conversation with an individual and during this conversation, learned some information. I took this information that I learned and from that information was able to develop a suspect" and was then asked "And Detective, as per this end of your investigation, what was the name of your suspect?" and answered "First name only was Bruce [the defendant's given name]":

"'Allowing agents to narrate the course of their investigations, and thus spread before juries damning information that is not subject to cross-examination . . . would eviscerate the constitutional right to confront and cross-examine one's accusers.'"); *United States v. Kizzee*, 877 F.3d 650, 655, 659 (5th Cir. 2017) (the Confrontation Clause was violated when a detective was permitted to testify that he asked a narcotics arrestee whether the defendant had sold the arrestee narcotics on the present occasion and on previous occasions and whether the arrestee had observed additional narcotics at the defendant's residence, and then "'Based on your observations the day before that involved the surveillance at Mr. Kizzee's residence, the [police] stop . . . [of the informant which resulted in] the discovery of narcotics, and your subsequent interview of . . . [the arrestee], what did you . . . do?," to which the detective answered: "I was able to obtain a search warrant for . . . [Kizzee's address].": "Testifying officers may provide context for their investigation or explain 'background' facts. . . . Such out-of-court statements are not offered for the truth of the matter asserted therein, but instead for another purpose: to explain the officer's actions. . . . These statements often provide necessary context where a defendant challenges the adequacy of an investigation. But absent such claims, there is a questionable need for presenting out-of-court statements because the additional context is often unnecessary, and such statements can be highly prejudicial. . . . 'The need for this evidence is slight, and the likelihood of misuse great.'. . . Statements exceeding the limited need to explain an officer's actions can violate the Sixth Amendment – where a nontestifying witness specifically links a defendant to the crime, testimony becomes inadmissible hearsay."); *United States v. Hamann*, 33 F.4th 759, 763 (5th Cir. 2022) ("In the last fifteen years, we have vacated at least six convictions and affirmed at least two writs of habeas corpus for kindred reasons. The most recent of those cases was decided just a year before Hamann's trial. There, we reaffirmed what we had said many times: If the government elects to introduce out-of-court statements to attempt to provide context for its investigation, its use must be 'circumspect' and 'limited.' . . . Trial courts must be 'vigilant in preventing . . . abuse' to avoid 'the backdoor introduction of highly inculpatory statements.' . . . We reaffirm those principles today."). The statements about Mr. Walker's personal characteristics had no probative value on the issue of Mr. Wilson's guilt or innocence but were highly prejudicial to Mr. Wilson as they inflamed the jury's sympathies for Mr. Walker. *See also Williams*, 337 U.S. at 247 ("Rules of evidence have been fashioned for criminal trials which narrowly confine the trial contest to evidence that is strictly relevant to the particular offense charged.").

493. In fact, the ACCA even acknowledged elsewhere that "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." *Wilson I*, 142 So. 3d at 786. Insofar as the ACCA also elsewhere found "harmless error," relying

on *Ex parte Rieber*, 663 So. 2d 999 (Ala. 1995), *see Wilson I*, 142 So. 3d at 785, the ACCA ignored the substantial differences between this case and *Rieber*. In *Rieber*, the victim-related testimony at the guilt phase was limited to the custody and age of the victim's children. 663 So. 2d at 1005. In this case, the testimony ranged from the sickness, weight loss, and frailty of the victim to his wife's death and his imminent retirement. This testimony was irrelevant to the material issues at trial, served only to focus the jurors' sympathies on the tragedy of Mr. Walker's death, and prejudiced Mr. Wilson's substantial rights.

494. U.S. Supreme Court case law clearly establishes that when "evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." *Payne*, 501 U.S. at 825. Moreover, the Supreme Court has held that "the underlying fundamental fairness principle in the jury-impartiality context…" serves as clearly established federal law for the purpose of the AEDPA. *Andrew v. White*, 145 S. Ct. 75, 82 (2025) (per curiam). Applying this principle, the Court has found that the introduction of irrelevant evidence or statements which only serves to vilify the defendant or focus the jury's sympathies on a victim violate due process. *See id*. (holding the introduction of evidence regarding the defendant's sex life was unduly prejudicial and granting habeas relief); *Donnelly v. DeChristoforo*, 416 U.S. 637

(1974) (holding that prejudicial or misleading statements by the prosecution violate due process).

495. Second, the ACCA's suggestion that the pain and suffering of Mr. Walker were relevant to demonstrate the force element of robbery, because the State's theory of the case was that Mr. Wilson tortured Mr. Walker in order to rob him, *Wilson I*, 142 So. 3d at 774, ignores the fact that pain and suffering were not necessary to establishing the use of force under Alabama law. *See*, *e.g.*, *Kent v. State*, 504 So. 2d 373, 376 (Ala. Crim. App. 1987) (brandishing pistol and demanding money sufficient to prove force element of robbery). The force element of robbery could have been established without speculating as to the pain and suffering of the victim. Additionally, in this case, the indictment charging robbery specifically indicated the object of the robbery as the audio-equipped van. *See* Doc. 76-1 at PDF 36, Bates 36. The State's theory about pain inflicted on Mr. Walker, as part of its dragging-and-beating scenario, went to the speculative search for his coin collection, which was found by the police, not Mr. Wilson. Doc. 76-8 at PDF 14-15, Bates 1420-1421). Therefore, this evidence was not necessary, but improper.

496. As the Alabama Supreme Court explained in *Ex parte Berard*:

> [T]he central issue in the guilt phase of a capital murder trial is whether the State has satisfied its burden of proving beyond a reasonable doubt that the defendant is guilty of the crime charged. This kind of question [of future dangerousness] could have easily

> shifted the focus of the jury's attention to the issue of punishment, which is an improper consideration at the guilt phase of the trial.

486 So. 2d 476, 479 (Ala. 1985) (citation omitted). Likewise, the Eleventh Circuit has held: "It is clear that the question of suffering or emotional or mental trauma experienced by the victims was entirely irrelevant to the determination of whether the defendant was guilty of the crimes charged." *Knight v. Dugger*, 863 F.2d 705, 739 (11th Cir. 1988). The Supreme Court has held that reviewing courts must "consider the relevance of the disputed evidence to the charges or sentencing factors, the degree of prejudice [the defendant] suffered from its introduction, and whether the trial court provided any mitigating instructions." *Andrew*, 145 S. Ct. at 82 (citing *Romano v. Oklahoma*, 512 U.S. 1, 12 (1994)). As the Supreme Court of Alabama (*see Ex parte Berard*, 486 So. 2d at 479), the Eleventh Circuit (*see Knight*, 863 F.2d at 739), and the Supreme Court of the United States (*see Old Chief*, 519 U.S. at 179; *see also Andrew*, 145 S. Ct. at 82 (regarding clearly established federal law, holding that "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question")), have held, evidence which does not serve to establish an element of a crime and has no probative value bearing on any material question of fact is not admissible. Given the patent irrelevance of the evidence of Mr. Walker's pain and suffering during the guilt phase of the trial, as it did not support the State's theory of the case, it was plainly inadmissible. Here, the admission of the testimony regarding Mr. Walker's pain and suffering were

plainly prejudicial and only served to enrage the jury and attack Mr. Wilson's character. Clearly established federal law has held that evidence which is only admitted to establish a defendant's evil character is prohibited. *Michelson v. United States*, 335 U.S. 496, 475 (1948) (holding that courts "unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt"). The gratuitous account of Mr. Walker's injuries served no other purpose than to undermine Mr. Wilson's character and as such made his trial fundamentally unfair.

497. Respecting the statement, "Come on, Valeska, this is a death penalty case" (Doc. 76-9 at PDF 164, Bates 1771), the ACCA found it "was isolated" and thus did not entitle Mr. Wilson to relief. *Wilson I*, 142 So. 3d at 775. In so holding, the ACCA ignored that the statement was not isolated when viewed in conjunction with the multitude of other improper and irrelevant evidence introduced and comments made by the prosecutor during the guilt phase, as described above. As the U.S. Supreme Court has explained, prosecutorial misconduct of the sort here must be assessed "in context." *Darden v. Wainwright*, 477 U.S. 168, 179 (1986). The *Darden* Court excused prosecutorial argument which it condemned as "offensive" and "improper," *id.* at 180, for a number of reasons, the most significant being that it "did not manipulate or misstate the evidence, nor did it implicate other specific rights of the accused such as the right to counsel or the right to remain silent." *Id.* at

182. Additionally, "[m]uch of the objectionable content was invited by or was responsive to the opening summation of the defense." *Id.* Neither of these excuses applies here. DA Valeska did "manipulate" the evidence by injecting penalty phase issues into the guilt phase and by creating a completely hypothetical scenario of dragging and beating Mr. Walker launched from Valeska's wholly unjustifiable "inference" from the truncated recording of Mr. Wilson's statement. None of the prosecutor's misconduct in this case was prompted by any defense action.

498. The Supreme Court has held that direct references to considerations which are relevant only to the death penalty are highly prejudicial during the guilt phase. In *Simmons v. South Carolina*, 512 U.S. 154, 163 (1994), the Supreme Court recognized that capital defendants have a heightened need for procedural protections, including the separation of guilt and penalty determinations. "Arguments relating to a defendant's future dangerousness ordinarily would be inappropriate at the guilt phase of a trial, as the jury is not free to convict a defendant simply because he poses a future danger; nor is a defendant's future dangerousness likely relevant to the question whether each element of an alleged offense has been proved beyond a reasonable doubt." *Id.* Similarly, a jury is not free to consider, as a factor bearing on the defendant's guilt, that the prosecutor has seen fit to decide that the crime at issue is one deserving the death penalty: "'Come on, Valeska, this is a

death penalty case. You are asking us to convict him of capital murder.'" 142 So.3d at 774.

499. In *Taylor v. Kentucky*, 436 U.S. 478, 487-88 (1978), the Supreme Court held that the cumulative effect of prosecutorial misconduct can violate due process even where individual instances might not warrant reversal standing alone. The systematic injection of penalty phase considerations into the guilt phase, as here through victim characteristic evidence, pain and suffering testimony, and direct death penalty references, fundamentally undermines the reliability that the Constitution demands in capital cases. In *Glossip v. Oklahoma*, 145 S. Ct. 612 (2025), the U.S. Supreme Court recently reaffirmed the cumulative standard as applied to prosecutorial misconduct in finding constitutional error in a capital conviction, noting that "additional conduct by the prosecution further undermines confidence the verdict" and including "violation of the rule of sequestration… destruction of evidence…" and additional documents which showed that the State's star witness supplied false testimony as part of the prejudice analysis. *Id. at* 629. The Supreme Court went on to hold that "[b]ecause prejudice analysis requires a cumulative evaluation of all the evidence, whether or not that evidence is before the Court in the form of an independent claim for relief, these documents reinforce our conclusion that the *Napue* error here prejudiced the defense." *Id.* (quoting *Kyles v. Whitley*, 514 U.S. 419, 441 (1995)) (internal quotation markes omitted).

500. Ultimately, "[t]he relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden*, 477 U.S. at 181 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974)). Because prosecutorial misconduct claims must be considered cumulatively, *see e.g. Taylor*, 436 U.S. at 487-88; *Glossip*, 145 S. Ct. at 629; *Kyles*, 514 U.S. at 441; *Ex parte Tomlin*, 540 So. 2d at 672, this Court must consider not only the flagrantly unconstitutional actions here, but also the other grounds enumerated in the Amended Petition both as to trial court error and prosecutorial misconduct.

501. Since the ACCA's ruling on the injection of sentencing considerations into the guilt phase is unreasonable, this Court should review Mr. Wilson's claim using the appropriate analysis, find that the prosecutor's conduct and the trial court's failure to correct it were improper and prejudicial, and grant Mr. Wilson a new trial because of the violation of his rights to due process and a fair trial.

502. In ¶ 180 of his Answer, Respondent argues that the Alabama Court of Criminal Appeals "made factual findings" on direct appeal that are entitled to deference under the AEDPA. Doc. 129, p. 122. As argued above, there are no state fact findings in this case because the state courts dismissed the Rule 32 petition with prejudice as a legal matter.

503. In ¶ 181 of his Answer, Respondent contends that Mr. Wilson "failed to develop the factual basis for this claim in state-court proceedings" and is therefore not entitled to a hearing in federal court. Doc. 129, p. 122. As argued above, Mr. Wilson's Rule 32 petition was improperly dismissed and therefore he did not have the opportunity to develop the facts.

504. Respondent has failed to answer Mr. Wilson's argument in paragraph 914 of his First Amended Petition that AEDPA deference is unconstitutional. Doc. 114, ¶ 914; *see* Doc. 114, ¶¶ 348-350.

505. For the foregoing reasons, this Court should address Mr. Wilson's seventh claim *de novo*.

B. The prosecutor improperly sought to inflame the passions of the jurors against Mr. Wilson and deflect them from deciding his guilt or innocence on the facts alone.

506. Mr. Wilson also alleges that the prosecutor's guilt phase closing arguments violated long-settled principles of federal law that prohibit prosecutors from making arguments "calculated to inflame the passions or prejudices of the jury," *Berger v. United States*, 295 U.S. 78, 85-89 (1935); *Viereck v. United States*, 318 U.S. 236, 247 (1943); and that this violated Mr. Wilson's rights to due process, to a fair trial, to a reliable jury verdict, and to be free from cruel and unusual punishment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution. Doc. 114, ¶¶ 915-930.

507. In ¶¶ 183 and 184 of his Answer, Respondent admits that the last state court opinion on direct appeal addressed this claim on the merits; but Respondent argues that the state court ruling was not unreasonable. Doc. 129, pp. 123-128. Respondent writes in conclusory terms that "A review of the ACCA's opinion demonstrates that the decision of the Alabama court was not an unreasonable one." Doc. 129, p. 128.

508. A close reading of the Alabama Court of Criminal Appeals' ruling on direct appeal, however, demonstrates that the holding amounts to an unreasonable application of clearly established federal law.

509. With regard to the first part of Mr. Wilson's argument, namely that the prosecutor sought to arouse in jurors a personal hostility toward and fear of Mr. Wilson (Doc. 114, ¶¶ 916-924), the state court ruling is unreasonable.

510. Rather than condemning these improprieties, the ACCA excused them. *Wilson I*, 142 So. 3d at 780-83. "Wilson correctly argues that the prosecutor improperly told the jury that after the murder, Wilson or Corley went into Wilson's [sic] kitchen, drank Wilson's [sic] milk, and ate Wilson's [sic] 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 [sic] 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." 142 So.3d at 781. This whole graphic image of murderers drinking milk and eating candy over the prostrate body of Mr. Walker was an arrant fabrication. The ACCA ignored this invention and failed to address the inflammatory character of the remarks. Further, "[d]uring 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." 142 So.3d at 772. By upholding these theatrics as mere "demonstration," *id.* at 772, the ACCA ignored the U.S. Supreme Court decisions cited above condemning such inflammatory tactics. Thus, its decision constituted an unreasonable application of clearly established federal law, as well as an unreasonable determination of the facts of record.

511. The U.S. Supreme Court has been emphatic that "appeals to passion and prejudice may so poison the minds of jurors even in a strong case that an accused may be deprived of a fair trial." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 240 (1940). In determining whether the accused has been deprived of a fair trial, "each case turns on its own facts," *id.*, and where, as here, the prosecutor's statements are so inflammatory and baseless in the facts in evidence, Mr. Wilson was deprived of a fair trial. The impropriety of the prosecution's statements and "demonstrations" rise to the level of reversable error because they were not merely offhand remarks or isolated incidents, but rather played a key role in the State's

closing arguments. *Cf. id.* ("[w]here… the record convinces us that these statements were minor aberrations in a prolonged trial and not cumulative evidence of a proceeding dominated by passion and prejudice, reversal would not serve the ends of justice").

512. The U.S. Supreme Court has held that in cases in which the improper statements played a significant role in the ultimate disposition of the case, those statements are more likely to result in a fundamentally unfair trial. In *New York C. R. Co. v. Johnson*, the Supreme Court held that a passionate attack on a petitioner "under circumstances tending to stir the resentment and arouse the prejudice of the jury" should be suppressed, and the trial court's failure to do so "could only have left [the jury] with the impression that they might properly be influenced by it in rendering its verdict." 279 U.S. 310, 318 (1929). Moreover, the Court has held that where a prosecutor is "guilty of misstating the facts… of suggesting by his questions that statements had been made to him… in respect of which no proof was offered… of assuming prejudicial facts not in evidence," a trial court merely sustaining some objections to the conduct and instructing the jury to disregard misstatements is insufficient to cure the fundamental unfairness that such conduct produces. *Berger v. United States*, 295 U.S. 78, 84-85 (1935) ("it is impossible to say that the evil influence upon the jury of these acts of misconduct was removed by such mild judicial action as was taken"). In Mr. Wilson's case, the prosecution's flagrant

fabrication of facts and events and excessive demonstrations of the state's theory of the case constitute such misconduct.

513. As with Mr. Wilson's other prosecutorial misconduct claims, the prejudicial effect of prosecutorial misconduct must be determined based on the cumulative effect of all the improper acts. *Glossip v. Oklahoma*, 145 S. Ct. at 629 (reaffirming this cumulative standard with regard to prosecutorial misconduct).

514. Regarding the ACCA's determination that the prosecution's use of unfavorable terms to describe Mr. Wilson did not constitute misconduct because it was supported by the evidence, these statements taken with the prosecution's other inflammatory statements and dramatizations amount to a due process violation. Statements regarding the characteristics of the defendant which have no probative value are not admissible, *see supra*. In *Darden*, the U.S. Supreme Court disapproved of closing arguments that expressed such an "emotional reaction." 477 U.S. at 180 (condemning prosecutor's name-calling the defendant an "animal"). Additionally, the ACCA's finding that the unfavorable terms used to describe Mr. Wilson are supported by the evidence is not borne out by the record. There is nothing in Mr. Wilson's statement or anywhere in the trial record to support the prosecution's assertion that Mr. Wilson and Kittie Corley stood in Mr. Walker's kitchen and "stood over his body and drank his milk." Doc. 76-9 at PDF 153, Bates 1760. The ACCA's repeated invocation of the medical examiner's finding of 114 contusions and

abrasions only reinforces the prosecution's spurious reenactment of the crime and misstatement of the evidence. Doc. 76-9 at PDF 43, Bates 1650.

515. With regard to the second part of Mr. Wilson's argument, namely that the prosecutor impermissibly appealed to the jurors' sympathies for the victim as a reason to convict (Doc. 114, ¶¶ 925-930), the state court ruling is unreasonable.

516. In denying this part of Mr. Wilson's claim, the ACCA reviewed for plain error, even though the defense objected, because Mr. Hedeen's stated grounds were that the DA was "fantasizing" (Doc. 76-9 at PDF 154, Bates 1761), rather than that his arguments were meant to inflame the jury. *Wilson I*, 142 So. 3d at 773. The court went on to hold that such imagined scenarios are permissible if based on the evidence. *Id.* Again, the court declined to consider the inflammatory character of the DA's arguments. In so doing, the ACCA ignored the U.S. Supreme Court decisions cited above condemning such inflammatory tactics and reached a result that was unreasonable as a matter of clearly established federal law as well as unreasonable on the facts.

517. In ¶ 185 of his Answer, Respondent argues that the Alabama Court of Criminal Appeals "made factual findings" on direct appeal that are entitled to deference under the AEDPA. Doc. 129, p. 128. However, there were no state fact findings in this case because the state courts dismissed the Rule 32 petition with prejudice as a legal matter.

518. In ¶ 186 of his Answer, Respondent contends that Mr. Wilson "failed to develop the factual basis for this claim in state-court proceedings" and is therefore not entitled to a hearing in federal court. Doc. 129, p. 129. Once again, Mr. Wilson's Rule 32 petition was improperly dismissed and therefore he did not have the opportunity to develop the facts.

519. Respondent has failed to answer Mr. Wilson's argument that the Supreme Court's decision in *Loper Bright* vitiates the deference requirement of the AEDPA under 28 U.S.C. § 2254(d).

C. The prosecutor made improper comments on silence during closing argument, in violation of *Griffin v. California*.

520. Thirdly, Mr. Wilson also pleaded that the prosecutor made improper comments on silence during closing argument, in violation of *Griffin v. California*, 380 U.S. 609 (1965) and Mr. Wilson's right to due process, a fair trial, and a reliable sentencing determination under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution. Doc. 114, ¶¶ 931-936. Specifically, District Attyorney Valeska argued:

> "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." 142 So.3d at 760.

521. In ¶¶ 188 and 189 of his Answer, Respondent admits that the last state court opinion on direct appeal addressed this claim on the merits; but Respondent argues that the state court ruling was not unreasonable. Doc. 129, pp. 129-133. Respondent writes in cursory terms that "A review of the ACCA's opinion demonstrates that the decision of the Alabama court was not an unreasonable one." Doc. 129, pp. 132-133.

522. A careful reading of the Alabama Court of Criminal Appeals' ruling on direct appeal, however, reveals that the court's decision is an unreasonable application of clearly established federal law.

523. The ACCA held that the prosecutor's remarks amounted to a permissible "rhetorical question." *Wilson I*, 142 So. 3d at 761. That is plainly an unreasonable determination of the facts. There is nothing rhetorical about directly addressing the defendant in the second person and asking him a question.

524. In this case, the prosecutor prejudiced Mr. Wilson by using his closing argument to invite the jury to draw conclusions based on Mr. Wilson's failure to answer his question. Since a major component of the State's evidence was proving that the victim's injuries were intentionally, not accidentally, inflicted, "the

prosecutor's comment could have been construed as 'alerting the jury to [Mr. Wilson's] opportunity to refute the State's case.'" *Id.* at 92 (quoting *Ex parte Tucker*, 454 So. 2d 552, 553 (Ala. 1984)). The ACCA's decision to the contrary here, excusing the question as "rhetorical," is palpably unreasonable.

525. Since the ACCA's ruling on the prosecutor's improper comment on silence was unreasonable, this Court should review Mr. Wilson's claim using the appropriate analysis, find that the comment was impermissible and that it prejudiced Mr. Wilson, and grant Mr. Wilson a new trial because of the prosecution's violation of his rights to due process and a fair trial.

526. In ¶ 190 of his Answer, Respondent argues that the state appellate court made findings of fact that are entitled to deference under the AEDPA. However, the state court did not make findings of fact. Therefore, 28 U.S.C. § 2254(e)(1) does not apply in this case. Mr. Wilson requests briefing on his right to a hearing in federal court.

527. Moreover, in ¶ 191 of his Answer, Respondent states that Mr. Wilson "failed to develop the factual basis for this claim in state-court proceedings" and "is not entitled to any further evidentiary hearing in this Court." Doc. 129, p. 133. Again, Mr. Wilson's Rule 32 petition was improperly dismissed as a matter of law, which rendered it impossible for him to develop the factual basis for his claim in state court. Therefore, 28 U.S.C. § 2254(e)(2) does not apply in this case.

528. Respondent has failed to answer Mr. Wilson's argument that the Supreme Court's decision in *Loper Bright* vitiates the deference requirement of the AEDPA under 28 U.S.C. § 2254(d).

D. The prosecutor made repeated references to the non-testifying co-defendants' confessions, in violation of Mr. Wilson's confrontation rights, and the trial court failed to take curative action.

529. Fourthly, Mr. Wilson also claimed that the prosecutor made repeated references to confessions of non-testifying co-defendants, in violation of his right to confront witnesses, and that the state trial court failed to take curative action, in violation of Mr. Wilson's rights to due process, to confront the witnesses, to a fair trial, and to a reliable sentencing determination under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution. Doc. 114, ¶¶ 937-942.

530. In ¶¶ 193 and 194 of his Answer, Respondent notes that the last state court decision on direct appeal addressed this claim on the merits; but Respondent argues that the state court ruling was not unreasonable. Doc. 129, pp. 134-137. Respondent simply writes that "A review of the ACCA's opinion demonstrates that the decision of the Alabama court was not an unreasonable one." Doc. 129, p. 136.

531. A close review of the Alabama Court of Criminal Appeals' decision on direct appeal, however, indicates that the court's ruling is an unreasonable application of clearly established federal law.

532. The ACCA denied this claim by declaring these references "harmless." *Wilson I*, 142 So. 3d at 814. But in other cases the ACCA has acknowledged that the status of an alleged accomplice's criminal case, including whether the accomplice has confessed, "is simply irrelevant to the guilt or innocence of the defendant and may not be received as substantive evidence at defendant's trial." *Whitt v. State*, 733 So. 2d 463, 483 (Ala. Crim. App. 1998) (quotations omitted). The ACCA, in fact, premised its discussion of this matter with a half-page string-cite of cases finding reference to a co-defendant's confession or guilty plea improper. The State's case against Mr. Wilson was not supported by any forensic testing or witness testimony about his involvement. It hinged entirely on Mr. Wilson's incomplete statement. Repeated references to the co-defendants' confessions, which Sgt. Luker testified led to recovery of stolen property and obviated the need for DNA testing, were impermissible violations of the Sixth Amendment (see *supra*, ¶ 492), and these clear attempts to bolster the State's case were hardly "harmless."

533. Since the ACCA's assessment of the damage these repeated references caused to Mr. Wilson's confrontation rights was unreasonable, this Court should review Mr. Wilson's claim using the appropriate analysis, find that Mr. Wilson's confrontation rights were violated with prejudice to Mr. Wilson, and grant Mr. Wilson a new trial because of the trial court's failure to cure this violation of his

rights to confrontation, due process and a fair trial. Mr. Wilson requests discovery and a hearing on this issue.

534. In ¶ 195 of his Answer, Respondent argues that the state appellate court made findings of fact that are entitled to deference under the AEDPA. Once again, 28 U.S.C. § 2254(e)(1) does not apply in this case because the ACCA made no such findings.

535. Moreover, in ¶ 196 of his Answer, Respondent states that Mr. Wilson "failed to develop the factual basis for this claim in state-court proceedings" and "is not entitled to any further evidentiary hearing in this Court." Doc. 129, p. 137. Again, Mr. Wilson's Rule 32 petition was improperly dismissed, which rendered it impossible for him to develop the factual basis for his claim in state court. Therefore, this case does not fall under 28 U.S.C. § 2254(e)(2).

536. Respondent has failed to answer Mr. Wilson's argument that the Supreme Court's decision in *Loper Bright* vitiates the deference requirement of the AEDPA under 28 U.S.C. § 2254(d).

E. The prosecutor made improper comments by fabricating evidence that did not exist.

537. Finally, Mr. Wilson alleged that the prosecutor made improper comments by fabricating evidence that did not exist in violation of Mr. Wilson's right to due process, a fair trial, and a reliable sentencing determination under the

Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution. Doc. 114, ¶¶ 943-945.

538. Respondent includes ¶¶ 943-945 of the Amended Petition among the paragraphs that are referenced in ¶ 193 of the Answer. But nowhere in ¶¶ 193-197 of the Answer — which purport to respond to ¶¶ 937-945 of the Amended Petition — does Respondent say anything bearing on the claim pled by ¶¶ 943-945.

539. Thus, Respondent does not provide any anwer to this claim.

VIII. Prosecutorial Misconduct Infected the Penalty Phase Proceedings in Violation of Mr. Wilson's Constitutional Rights. The Trial Court Permitted or Failed to Cure These Improper Actions. Mr. Wilson Is Entitled to a New Penalty Phase Trial and Sentencing.

A. The prosecutor repeatedly overstepped the bounds of propriety and permissibility by arguing an inapplicable aggravator and from facts not in evidence.

540. Mr. Wilson's eighth claim is that prosecutor's baseless, false, and misleading statements to the jury at the penalty phase violated Mr. Wilson's rights to due process, to a fair trial, to a reliable jury verdict, to a reliable sentence, and to be free from cruel and unusual punishment as protected by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution. Doc. 114, ¶¶ 946-950.

541. In ¶¶ 198-200 of his Answer, Respondent admits that the Alabama Court of Criminal Appeals addressed this claim on the merits on direct appeal;

however, Repondent argues that their decision was not an unreasonable application of federal law. Doc. 129, p. 138-141.

542. The ACCA acknowledged that the milk-and-candy-bar comment was unsupported by any evidence, but it excused this misconduct because "other" evidence proved the "unusual, cold, and callous" character of "Wilson's behavior and his accomplices' behavior." *Wilson I*, 142 So. 3d at 781. The ACCA thus compounded the harm to Mr. Wilson by lumping his behavior together with "his accomplices," which was an unreasonable deviation from the constitutionally mandated individualized sentencing to which Mr. Wilson was entitled. *See*, *e.g.*, *Abdul-Kabir*, 550 U.S. at 263-64. As to Valeska's baseless argument that photographs on Mr. Walker's walls were those of his wife and children, the ACCA noted that Mr. Wilson "correctly" challenged this comment, *id.* at 782, but excused the comment because "[i]t is important to note that the jury was informed that Walker had had a wife who had passed away before his murder," *id.* at 782. But the ACCA later agreed that reference to Mr. Walker's deceased wife was "irrelevant" to Mr. Wilson's guilt. *Id.* at 786. It was equally irrelevant to Mr. Wilson's sentencing. As to the "up there at the top" argument, the ACCA again acknowledged that "the prosecutor's statement was not totally consistent with Dr. Enstice's testimony," but found the error "slight" and that "the gist of his statement was correct – that Dr. Enstice was experienced and Walker suffered many painful injuries during the

attack." *Id.* at 783. The court then constructed a false syllogism: "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," *id.*, it must follow that this case was "up there at the top" among capital crimes. Such erroneous logic was particularly harmful where the State was seeking application of the "*especially* heinous, atrocious, and cruel" aggravator. Doc. 76-10 at PDF 110, Bates 1919. The ACCA never considered the accumulated harm from all of these errors and the multitude of other misconduct the DA engaged in. "The relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden*, 477 U.S. at 181 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974)). In evaluating this question, a court cannot consider flagrantly unconstitutional actions, as here, each in isolation, but must consider them in the context of the trial as a whole.

543. The ACCA's approach to these claims of prosecutorial misconduct involves the same hide-the-forest-in-the-trees tactic that the ACCA uses throughout its Rule 32 opinion, to fragment Mr. Wilson's claims and thereby sap their strength. Instead of considering all of the instances and kinds of prosecutorial misconduct cumulatively – as clearly established federal law requires (*see Glossip v. Oklahoma*, 145 S. Ct. 612, 629 (2025)) – the ACCA dispatches each piece of misconduct in isolation and never asks whether 2 and 2 and 2 may add up to 6.

544. The ACCA's finding that "Wilson has not established that the prosecutor's comment resulted in plain error," *Wilson I*, 142 So. 3d at 783, repeated for each of the DA's multiple improprieties, constitutes an unreasonable application of *Darden*'s due process standard. *See also Tucker v. Kemp*, 802 F.2d 1293, 1299 (11th Cir. 1986) (holding that prosecutorial comments at the sentencing phase of a capital trial are subject to "enhanced scrutiny"); *McNair v. State*, 653 So. 2d 320, 341 (Ala. Crim. App. 1992) (warning the same Houston County DA "to temper his remarks at the new sentence proceeding" because "[m]any of the guilt-phase arguments, which we have found improper but not prejudicial enough to cause a reversal of the conviction, would not – if made in the context of the sentence phase – be equally amenable to harmless error analysis."). Therefore, this Court should review Mr. Wilson's prosecutorial misconduct claim using the appropriate analysis, find that the misconduct prejudiced Mr. Wilson, and grant Mr. Wilson a new penalty phase trial and sentencing because of the prosecution's violation of his rights to due process and a fair trial.

545. In ¶ 201 of his Answer, Respondent argues that the state appellate court findings are entitled to deference under the AEDPA. Once again, the state court did not make findings of fact. Therefore, 28 U.S.C. § 2254(e)(1) does not apply in this case.

546. Moreover, in ¶ 202 of his Answer, Respondent states that Mr. Wilson "failed to develop the factual basis for this claim in state-court proceedings" and "is not entitled to any further evidentiary hearing in this Court." Doc. 129, p. 142. Again, Mr. Wilson's Rule 32 petition was improperly dismissed, so he was unable to develop the factual basis for his claim in state court. Therefore, this case does not fall under 28 U.S.C. § 2254(e)(2).

547. Respondent has failed to answer Mr. Wilson's argument that the Supreme Court's decision in *Loper Bright* vitiates the deference requirement of the AEDPA.

B. The prosecutor improperly urged the jury to "do what's right," rather than follow the law.

548. In addition, Mr. Wilson claims that the prosecutor engaged in misconduct at the penalty phase by urging the jury to "have the courage and the strength" (Doc. 76-10 at PDF 141, Bates 1950), and "do what's right" (Doc. 76-10 at PDF 142, Bates 1951), in violation of *United States v. Young*, 470 U.S. 1, 18 (1985), and Mr. Wilson's rights to due process, to a fair trial, to a reliable jury verdict, and to be free from cruel and unusual punishment in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution. Doc. 114, ¶¶ 951-954.

549. In ¶¶ 204 and 205 of his Answer, Repondents notes that the Alabama Court of Criminal Appeals addressed this claim on the merits on direct appeal; but Respondent maintains that the state court ruling was not unreasonable. Doc. 129, pp. 143-145.

550. The ACCA's conclusion that the prosecutor's remarks "[did] not urge the jury to sentence the defendant to death without regard to the facts or law," *Wilson I*, 142 So. 3d at 779, once again ignored the whole context in which these repeated unconstitutional actions occurred. This reasoning constitutes an unreasonable determination of the facts. Therefore, this Court should review Mr. Wilson's prosecutorial misconduct claim using the appropriate analysis, find that the misconduct prejudiced Mr. Wilson, and grant Mr. Wilson a new penalty phase trial because of the prosecution's violation of his rights to due process and a fair trial. Mr. Wilson requests discovery and a hearing on this issue.

551. Respondent's other defenses raised in ¶¶ 206-208 are not compelling for the reasons stated *supra.* The state court did not make findings of fact. Mr. Wilson's Rule 32 petition was improperly dismissed as a matter of law, which rendered it impossible for him to develop the factual basis for his claim in state court. Therefore, this case does not fall under 28 U.S.C. § 2254(e)(2).

552. Respondent has failed to answer Mr. Wilson's argument that the Supreme Court's decision in *Loper Bright* vitiates the deference requirement of the AEDPA.

IX. THE TRIAL COURT ERRED IN ITS PENALTY PHASE INSTRUCTIONS TO THE JURY THEREBY VIOLATING MR. WILSON'S CONSTITUTIONAL RIGHTS. MR. WILSON IS ENTITLED TO A NEW PENALTY PHASE TRIAL AND SENTENCING.

A. The trial court omitted any instruction informing the jury that jurors could consider a mitigating factor even if not all jurors agreed.

553. Mr. Wilson's ninth claim is that the state trial court erred in its penalty phase instructions to the jury, first by omitting an instruction about the non-unanimity requirement for mitigating circumstances, in violation of his rights to due process, to a fair trial, to a reliable jury verdict, and to be free from cruel and unusual punishment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution. Doc. 114, ¶¶ 946-950.

554. In ¶¶ 209 and 210 of his Answer, Respondent admits that the Alabama Court of Criminal Appeals addressed the merits of this claim on direct appeal, but contends that the ruling was not unreasonable. Doc. 129, pp. 146-147. Again, Respondent writes that "A review of the ACCA's opinion demonstrates that the decision of the Alabama court was not an unreasonable one." Doc. 129, ¶ 210.

555. A review of the state court's opinion, however, indicates that it is an unreasonable application of clearly established federal law.

556. The ACCA unreasonably decided that "there was no reasonable likelihood or probability that the jurors were required to agree unanimously on the existence of any particular mitigating circumstances." *Wilson I*, 142 So. 3d at 797-98. The only indication in the record to support this supposition was this instruction:

> 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.

Doc. 76-10 at PDF 160, Bates 1969. But this instruction does not say anything about whether jurors must agree unanimously or not concerning the disproof of mitigation. Like the instruction in *Mills v. Maryland*, this one creates "at least a substantial risk that the jury was misinformed." 486 U.S. 367, 381 (1988).

557. Since the ACCA's ruling is an unreasonable application of *Mills*, this Court should review Mr. Wilson's claim using the appropriate analysis, find that the instruction was inadequate and prejudiced Mr. Wilson, and grant Mr. Wilson a new penalty phase trial because misleading the jury violated his rights to due process and a fair sentencing.

558. Respondent's other defenses raised in ¶¶ 211-213 are not compelling for the reasons stated *supra.* The state appellate court did not make findings of fact but improperly dismissed the Rule 32 petition on the pleadings; as a result, Mr.

Wilson was prevented from developping the factual basis for his claim in state court, and this case does not fall under 28 U.S.C. § 2254(e)(2).

559. Respondent has failed to answer Mr. Wilson's argument that the Supreme Court's decision in *Loper Bright* vitiates the deference requirement of the AEDPA.

B. The trial court improperly diminished the jury's role in sentencing.

560. Moreover, Mr. Wilson claimed that the trial mischaracterized and diminished the jury's role in the sentencing process by telling the jury that, "in the sentencing phase, the procedure is generally the same as in the guilt phase, except the sentencing phase is not near as involved." Doc. 114, ¶ 960. This mischaracterization was an error in violation of *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985), and of Mr. Wilson's rights to due process, to a fair trial, to a reliable jury verdict, and to be free from cruel and unusual punishment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution.

561. In ¶¶ 214 through 218 of his Answer, Respondent notes that the Alabama Court of Criminal Appeals addressed the merits of this claim on direct appeal, but contends that the ruling was not unreasonable. Doc. 129, pp. 149-152. Respondent again writes that "A review of the ACCA's opinion demonstrates that the decision of the Alabama court was not an unreasonable one." Doc. 129, ¶ 218.

Respondent refers the Court to the Eleventh Circuit decision in *Carr v. Schofield*, 364 F.3d 1246, 1258 (11th Cir. 2004).

562. But *Carr v. Schofield* is inapplicable here. As a preliminary matter, *Carr* concerned comments made by the trial *prosecutor* during its closing argument. By contrast, the statement at issue here was made by the trial *court*. But even setting that distinction aside, the holding in *Carr* does not apply here. In *Carr*, the Eleventh Circuit held that the trial prosecutor did not err when it accurately informed the jury that their role was to make a recommendation of life or death, and it would be the judge who would ultimately sentence the defendant. *Carr*, 364 F.3d at 1256. The statement at issue in *Carr* thus concerned the ultimate *effect* of the jury's determination on the sentence imposed. But here, the trial court informed the jury that the sentencing phase would be less complex and involved than the guilt phase, and thus would require less *effort*. Such a statement diminished the importance of the jury's sentencing phase determination based not on its weight in the ultimate sentence, but rather on the reduced effort it will require from the jury. *Carr* is silent on the propriety of informing the jury that the sentencing phase would be easier and simpler than the guilt phase. Moreover, the holding in *Carr* hinged on the fact that the prosecutor's description of the jury's role was "accurate" under state law. *Carr*, 364 F.3d at 1258. Here, the trial court's depiction of the jury's sentencing determination as "not near as involved" as the guilt-phase determination is not

accurate. *See infra*, at ¶ 564. As a result, *Carr* does not support the reasonableness of the ACCA's decision.

563. A review of the state court's opinion, however, indicates further that it is an unreasonable application of clearly established federal law.

564. The ACCA excused the trial court's instruction, "[t]aken in context," as "merely informing the jury that the penalty-phase would not be as lengthy as the guilt phase." *Wilson I,* 142 So. 3d at 798. But length is not the purport of this statement; difficulty is. The statement indicated that penalty phase deliberations would be a less-demanding process than deciding guilt, which is not the case, as the Supreme Court clearly indicated in *Caldwell*. The ACCA's upholding of the circuit court's characterization of the jury's role as "not near as involved" also discounts the complex weighing process an Alabama jury must engage in when determining its sentencing verdict in a capital case. *See*, *e.g.*, *Ex parte McGriff*, 908 So. 2d 1024, 1038 (Ala. 2004).

565. Because the ACCA's ruling on this jury instruction constitutes an unreasonable application of *Caldwell*, this Court should review Mr. Wilson's claim using the appropriate analysis, find that the instruction improperly lessened the jury's responsibility, prejudicing Mr. Wilson, and grant Mr. Wilson a new penalty phase trial because of the trial court's violation of his rights to due process and a fair trial.

566. Respondent's other defenses at ¶¶ 219-221 are not compelling. The state appellate court did not make findings of fact and its denial of the Rule 32 petition on the pleadings, with prejudice, deprived Mr. Wilson of the opportunity to develop the facts. Therefore, this case does not fall under 28 U.S.C. § 2254(e).

567. Respondent has also failed to answer Mr. Wilson's argument that the Supreme Court's decision in *Loper Bright* vitiates the deference requirement of the AEDPA.

X. THE TRIAL COURT FAILED TO MAKE FINDINGS REGARDING AND, SO, CONSIDER, MANY OF THE NON-STATUTORY MITIGATING FACTORS PRESENTED THROUGH MR. WILSON'S SCHOOL RECORDS, IN VIOLATION OF U.S. SUPREME COURT PRECEDENT. MR. WILSON IS ENTITLED TO A NEW SENTENCING.

568. Mr. Wilson's tenth claim is that the sentencing court failed to consider and make factual findings regarding a number of non-statutory mitigating factors presented through Mr. Wilson's school records, in violation of his rights to due process, a fair trial, a reliable sentencing, and to be free from cruel and unusual punishment under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution. Doc. 114, ¶¶ 964-975.

569. In ¶¶ 222 of his Answer, Respondent states that this claim was not raised at trial or on appeal; however, any procedural default would be excused by defense counsel's ineffective assistance of counsel. It is well established that in federal court, "cause and prejudice" will excuse a state procedural default. *See*

Murray v. Carrier, 477 U.S. 478 (1986). Defense counsel's failure to raise a constitutional issue such as this one amounts to a "situation in which the [cause] requirement is met." *Amadeo v. Zant*, 486 U.S. 214, 221-22 (1988); *see also Murray*, 477 U.S. 478 (1986). Ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), thus satisfies the cause and prejudice requirement.

570. In any event, the ACCA did review the propriety of Mr. Wilson's sentence, and merely repeated the same five mitigators identified in the sentencing order. *Wilson I*, 142 So. 3d at 818. It failed to engage with Mr. Wilson's school records. *See Parker v. Dugger*, 498 U.S. 308, 322 (1991).

571. Because the ACCA's ruling is unreasonable in failing to give proper effect to the non-statutory mitigators submitted for the court's review through Mr. Wilson's school records, this Court should review his claim using the appropriate analysis, find that the mitigators exist and that the failure to weigh them prejudiced Mr. Wilson, and grant Mr. Wilson a new sentencing because of the violation of his Eighth Amendment right to be heard in mitigation and of his rights to due process and a fair trial.

572. Respondent's other defenses at ¶¶ 224-226 are not compelling. The state appellate court did not make findings of fact and its denial of the Rule 32 petition on the pleadings, with prejudice, deprived Mr. Wilson of the opportunity to develop the facts. Therefore, this case is not limited by 28 U.S.C. § 2254(e).

573. Respondent has also failed to answer Mr. Wilson's argument that the Supreme Court's decision in *Loper Bright* vitiates the deference requirement of the AEDPA.

XI. MR. WILSON WAS SENTENCED TO DEATH FOLLOWING A NON-UNANIMOUS 10-TO-2 JURY RECOMMENDATION OF DEATH THAT INVOLVED A PROCESS NOT COMPLIANT WITH *RING V. ARIZONA, RAMOS V. LOUISIANA, MONTGOMERY V. LOUISIANA, AND CALDWELL V. MISSISSIPPI*, THEREBY VIOLATING HIS RIGHTS TO TRIAL BY JURY AND TO DUE PROCESS. MR. WILSON IS ENTITLED TO A NEW PENALTY PHASE TRIAL AND SENTENCING.

574. Mr. Wilson's eleventh claim is that his non-unanimous 10-to-2 jury verdict of death violated his rights to due process and a jury trial protected by *Ring v. Arizona*, 536 U.S. 584 (2002), *Ramos v. Louisiana*, 590 U.S. 83 (2020), *Montgomery v. Louisiana*, 577 U.S. 190 (2016), and *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

575. In ¶¶ 227 and 228 of his Answer, Respondent notes that the Alabama Court of Criminal Appeals addressed this claim on the merits on direct appeal and on Rule 32 state post-conviction. The state court's decisions were unreasonable applications of clearly-established federal law and as a result are owed no deference under §2254(d)(1).

576. In addressing Mr. Wilson's *Ring* and *Hurst* claims on direct appeal and in Rule 32 proceedings, the Alabama Court of Criminal Appeals relies on two

Alabama Supreme Court cases: *Ex Parte Waldrop*, 859 So.2d 1181 (Ala. 2002) and *Ex parte Bohannon*, 222 So. 3d 525, 532-33 (Ala. 2016).

577. Enumerated aggravating factors necessary for the imposition of a death penalty are "'the functional equivalent of an element of a greater offense,'" and thus must be found by a jury. *Ring v. Arizona*, 536 U.S. at 605 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 495 (2000)). Following the U.S. Supreme Court's decision in *Ramos v. Louisiana*, all elements of an offense must be found by a *unanimous* jury. In the death penalty context, *Ramos* functions as a substantive rule that applies retroactively in federal habeas proceedings. *Montgomery v. Louisiana*, 577 U.S. 190, 201 (2016) (holding that a new rule adding to the procedural requirements for imposing a particular sentence to a certain class of people is a substantive rule that applies retroactively, as "substantive rules… set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose."); *see also Teague v. Lane*, 489 U.S. 288 (1989) (holding that new substantive rules apply during federal habeas proceedings). Thus, the ACCA's decision of Mr. Wilson's *Ring* claim must be reviewed under the unanimous jury rule in *Ramos*.

578. When read in conjunction with *Ramos*, applied retroactively as required by *Montgomery*, *Ring* requires a unanimous jury finding of each aggravating factor ultimately weighed by the judge in determining the sentence.

579. Neither *Ex Parte Waldrop* nor *Ex parte Bohannon* address the issues superimposed upon *Ring* by the U.S. Supreme Court's rulings in *Ramos* and *Montgomery*. Both Alabama Supreme Court cases address whether the jury, rather than the judge, found an aggravating factor that would expose the defendant to the death penalty. But given that both cases were decided prior to the U.S. Supreme Court's decision in *Ramos*, the Alabama Supreme Court did not address in either case whether the jury finding the aggravating factor was *unanimous*.

580. Because Mr. Wilson's jury divided 10-2 in recommending the death penalty, there is no basis in this record for concluding that more than ten jurors at the penalty phase found any aggravating factor.

581. The jury's unanimous verdict during the guilt phase does not satisfy the Sixth Amendment requirements of *Ring*, *Ramos*, and *Montgomery* either. *See* Doc. 114 at ¶984. In short, the jury was explicitly instructed that their decision during the guilt phase would not affect the penalty imposed upon Mr. Wilson. A jury decision made by a jury that was misled as to the consequences of their decision, that was not aware of its grave responsibility, is insufficient to justify a death sentence. *Caldwell v. Mississippi*, 472 U.S. 320, 328-39 (1985) (holding that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere.").

582. In relying solely on *Ex parte Waldrop* and *Ex parte Bohannon*, the ACCA's decisions are unreasonable applications of clearly-established federal law as determined by the U.S. Supreme Court in *Ring*, *Ramos*, *Montgomery*, and *Caldwell*.

583. Consequently, this Court should review Mr. Wilson's claim using the appropriate analysis, find that the required jury findings were not made here, and grant Mr. Wilson a new penalty phase trial and sentencing because of the violation of his rights to jury trial and due process.

584. In ¶230 of his Answer, Respondent claims that the ACCA made findings of fact entitled deference under §2254(e)(1), and as a result Mr. Wilson is not entitled to an evidentiary hearing on this claim.

585. Respondent does not indicate what those findings of facts are. But Respondent intimates that those state court factual findings preclude relief for Mr. Wilson. Petitioner is unaware of what fact-findings the Alabama Court of Criminal Appeals made that should be presumed correct under 28 U.S.C. § 2254(e)(1) and that bar relief.

586. Moreover, Mr. Wilson did not request an evidentiary hearing on this claim. At issue here is whether the jury ever made a unanimous finding of an aggravating factor during the guilt phase. The record makes clear that such a

unanimous finding was not reflected in the record, where the jury voted 10-2 for death.

587. Insofar as there could be any factual findings imputed to the appellate court that contradict the jury vote reflected in the federal record, those factual findings are unreasonable.

588. In ¶ 231, Respondent further claims that "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" under §2254(e)(2). Mr. Wilson is unaware of any extent to which this claim's factual basis is underdeveloped. However, to any extent that Mr. Wilson may need to develop the factual basis of this claim, he is entitled to under §2254(e)(2)(A)(i) and §2254(e)(2)(B).

XII. THE CUMULATIVE EFFECT OF ALL TRIAL-LEVEL ERROR VIOLATED MR. WILSON'S RIGHTS UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION. MR. WILSON IS ENTITLED TO A NEW TRIAL, PENALTY PHASE TRIAL, AND SENTENCING.

589. Mr. Wilson's twelfth claim is that the cumulative effect of all the errors at the guilt, penalty, and sentencing phases of his trial deprived him of due process of law in violation of the Fourteenth Amendment to the U.S. Constitution. Doc. 114, ¶¶ 989-1000.

590. In ¶ 235 of his Answer, Respondent argues that any claims or subclaims that this Court would deem defaulted should not be included in the purview of this Court's cumulative effect analysis. Petitioner agrees that any subclaim excluded from review by this Court would not form part of the analysis. Petitioner is nevertheless entitled to relief on this claim.

591. In ¶ 236 of his Answer, Respondent recognized that the final state court decision addresses this claim on the merits, finding that there is no cumulative effect, but maintains that the ruling was not unreasonable. Doc. 129, p. 163.

592. However, here too, Respondent is not persuasive. Although Mr. Wilson pled both that prejudice from all instances of ineffective assistance of counsel and from all trial-level errors must be considered cumulatively (Doc. 76-23 at PDF 51-62, Bates 3691-3702), the ACCA did not apply the correct standard when reviewing these issues. The ACCA did not actually conduct cumulative review, though it claimed to do so. *See Wilson II*, No. CR-16-0675, slip op. at 57-58. In assessing each subpart of Mr. Wilson's ineffective assistance of counsel claim, the court found most insufficiently pled, and many insufficiently pled because Mr. Wilson could not meet the court's definition of prejudice on the basis of each individual subpart. *See*, *e.g.*, *id.* at 21 ("even assuming trial counsel were deficient ..."), 51 (same), 54 (same). The court's "cumulative" analysis did not revisit these rulings and thus the court did not actually conduct cumulative error review.

593. Again, as noted earlier, where a state court jumbles a federal constitutional claim or fails to properly address the claim, the federal habeas court must adjudicate the claim *de novo*, with no AEDPA deference. *See Romine*, 253 F.3d at 1365; *Bauder*, 619 F.3d at 1273, 1274 n.3, 1275; *Davis*, 341 F.3d at 1313; *Bester*, 836 F.3d at 1336-37; and *Brewster,* 913 F.3d at 1051.

594. In this situation, the state court opinion amounts to an unreasonable application of *Strickland*, 466 U.S. at 694, and conficts with the ASC's admonition in *Ex parte Woods*, 789 So. 2d 941, 942 n.1 (Ala. 2001).

595. Similarly, instances of prosecutorial misconduct and trial court error were each treated individually with no consideration of the accumulated harm.

596. The accumulation of error in this case was particularly harmful. For example, regardless of whether the State, under *Brady*, or defense counsel, under *Strickland*, were at fault for the failure to disclose or employ the Corley letter, that error deprived Mr. Wilson of a clear defense to capital murder. That error set the scene for the jury, and the ACCA, to misconstrue Mr. Wilson's own admission of guilt and attribute all of Mr. Walker's injuries and the harm from this crime to Mr. Wilson, even though, with Corley's confession, it is clear that his role was much more attenuated than the State argued at his trial. No assessment of this accumulated error has ever been undertaken.

597. Because the ACCA's ruling on all of Mr. Wilson's claims combined is an unreasonable application of U.S. Supreme Court precedent respecting holistic review, this Court should grant the writ and order a new trial, a new penalty phase, and a new sentencing to correct the violation of Mr. Wilson's rights enumerated above.

598. Respondent's other defenses at ¶¶ 237-239 are also not compelling. The state appellate court did not make findings of fact and its denial of the Rule 32 petition on the pleadings, with prejudice, deprived Mr. Wilson of the opportunity to develop the facts. Therefore, this case is not limited by 28 U.S.C. § 2254(e).

599. Respondent has failed to answer Mr. Wilson's argument that the Supreme Court's decision in *Loper Bright* vitiates the deference requirement of the AEDPA.

CONCLUSION

For all of the reasons set forth in this Reply and in the First Amended Petition, Mr. Wilson respectfully requests that this Court grant him habeas corpus relief from his conviction and sentence of death.

Mr. Wilson is refiling discovery motions contemporaneously with this Reply. Petitioner's Fifth *Brady* Motion was denied by this Court *without prejudice* in order to allow Petitioner to first file his First Amended Petition. Doc. 102. This Court held that the request was "premature" (Doc. 102, p. 7) pending the filing of his amended petition. Now that Mr. Wilson has amended his petition and replied to Respondent's answer, Mr. Wilson will renew his Fifth *Brady* motion. Doc. 136. Petitioner is also simultaneously filing a general discovery request (Doc. 137) and correcting the record in response to Respondent's note 1 on page 2 of his Answer. Doc. 138.

To ensure the orderly resolution of this federal habeas corpus action, Mr. Wilson respectfully asks this Court to order the following process:

(A) Grant Petitioner discovery under Rule 6 of the Rules Governing Section 2254 Cases and a sufficient period of time to conduct discovery, and further grant Petitioner authority to obtain subpoenas to document and prove the facts set forth in his amended petition;

(B) Grant Petitioner and Respondent an opportunity to file briefs regarding the federal questions of "cause and prejudice" and other procedural matters necessary to resolve the federal procedural defenses raised in Respondent's Answer;

(C) Grant Petitioner an evidentiary hearing limited to the procedural defenses raised in Respondent's Answer;

(D) Grant Petitioner and Respondent an opportunity to file briefs regarding Petitioner's right to an evidentiary hearing on the merits of his claims;

(E) Grant Petitioner an evidentiary hearing on the merits of his claims;

(F) Permit Petitioner, after additional factual development and an evidentiary hearing, an opportunity to brief and argue the claims presented in his amended petition; and after full briefing,

(G) Issue a writ of habeas corpus granting Petitioner relief from his unconstitutionally obtained conviction and sentence of death, and ordering a new guilt phase trial, a new penalty phase trial, and a new sentencing; and

(H) Grant such further and other relief as may be appropriate.

Dated this 30th day of October, 2025.

Respectfully submitted,

____

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CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2025, the foregoing Reply has been electronically filed with the Clerk of the Court, and therefore a copy has been electronically served upon counsel for Respondent:

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