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

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

FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS

Petitioner David Phillip Wilson is incarcerated on Alabama's Death Row at the William C. Holman Correctional Facility in Atmore, Escambia County, Alabama, under a sentence of death ordered by the Circuit Court of Houston County, Alabama, on January 8, 2008. Mr. Wilson petitions this court for a writ of habeas corpus pursuant to 28 U.S.C § 2254 because he is a person in state custody, pursuant to the judgment of a state court, in violation of the Constitution, laws, and treaties of the United States. In support of his request for a writ of habeas corpus, Mr. Wilson submits this First Amended Petition for Writ of Habeas Corpus.

For purposes of this First Amended Petition, all paragraphs are hereby incorporated into each and every part, section, and subsection of the petition.

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JURISDICTION AND VENUE

1. This Court has jurisdiction to hear Mr. Wilson's petition for writ of habeas corpus pursuant to 28 U.S.C § 2254(a).

2. Petitioner David Wilson was convicted and sentenced to death in Houston County, Alabama.

3. Respondent, John Q. Hamm, Commissioner of the Alabama Department of Corrections, is located in Montgomery County, Alabama.

4. Venue is thus proper in the Middle District of Alabama. 28 U.S.C. § 2241(d); *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 495 (1973).

FACTS

5. 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. Doc. 76-1 at PDF 49, Bates 49.[1] A van with stereo electronics equipment was missing. Doc.

[1] In this amended petition, Mr. Wilson is adopting the citation form used by United States Magistrate Judge Charles S. Coody in this case, which references unique pages in the federal record based on a universal Bates stamping of the entire federal record. Thus, the references are to, first, the volume number and PDF page, and second, the unique universal Bates page.

76-7 at PDF 165, 171-172, Bates 1370, 1376-1377. An investigation determined that a homicide had been committed during a burglary and/or robbery.

6. 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. The cause of death was "multiple traumatic injuries." Doc. 76-9 at PDF 107-108, Bates 1714-1715. The pathologist concluded that Mr. Walker received all these injuries while still alive (Doc. 76-9 at PDF 45, 49-50, 59, Bates 1652, 1656-1657, 1666), and that he was alive for multiple hours after first being injured. Doc. 76-9 at PDF 45, 47-48, Bates 1652, 1654-1655.

7. Four persons were suspected of having participated in the homicide of Mr. Walker: (1) Catherine Nicole Corley, who went by the alias of "Kittie Corley" (hereinafter referred to as Kittie Corley); (2) Michael Jackson; (3) Matthew Marsh; and (4) Petitioner David Phillip Wilson. The police arrested Marsh and Jackson first, then David Wilson and Kittie Corley. Doc. 76-24 at PDF 12-13, Bates 3853-3854 (police reports recording times of arrest).

8. David Wilson was the only one of the four suspects who went to trial on capital murder charges. His capital murder trial took place from December 3 to 5, 2007. Doc. 76-6 at PDF 143, Bates 1148; Doc. 76-2 at PDF 170-171, Bates 370-371.

9. At his trial, the prosecution team, led by District Attorney Douglas Valeska, argued that Mr. Wilson beat Mr. Walker to death with a bat and was the only person involved in the beating. As United States Magistrate Judge Charles S. Coody held in his opinion order dated June 21, 2023, "the State's theory [was] that petitioner alone entered Walker's home and, when confronted by Walker, beat and strangled Walker to death." Doc. 79, p. 8.

10. The prosecution argued that the large number of blunt force trauma injuries proved that Mr. Wilson intended to kill Mr. Walker and should be sentenced to death. Doc. 76-9 at PDF 153-154, 156-157, 159, 170, Bates 1760-1761, 1763-1764, 1766, 1777.

11. Mr. Wilson was convicted of two counts of capital murder (murder during a burglary and murder during a robbery) on December 5, 2007. Doc. 76-10 at PDF 165, Bates 1974.

12. None of the three co-defendants testified at Mr. Wilson's trial. None of the three co-defendants ever went to trial. Each of the co-defendants pled guilty to a lesser offense.

13. 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. Appendix W (Alabama SJIS Case Detail, Catherine Nicole Corley).

14. 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. Appendix X (Alabama SJIS Case Detail, Matthew Marsh).

15. 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. Appendix Y (Alabama SJIS Case Detail, Michael Jackson).

16. On January 8, 2008, Mr. Wilson was sentenced to death. Doc. 76-10 at PDF 186, Bates 1995.

17. At the time of the incident, Petitioner David Wilson was 20 years old. He was born on March 7, 1984. Doc. 76-1 at PDF 48, Bates 48.

18. David Wilson had undiagnosed Asperger's Syndrome that made him susceptible to being manipulated by his peers. *See* Appendix NN; *see also infra*, Claim II.

19. David Wilson had no prior arrests or convictions, and no prior criminal record. Doc. 76-2 at PDF 180, Bates 380; *see also* Sentencing Order, Doc. 76-2 at PDF 186, Bates 386. Mr. Wilson had not previously been arrested, accused of a crime, or convicted. He had no history of prior involvement in any violent crime.

A. The Corley Letter

20. Unbeknownst to Mr. Wilson, a month prior to the homicide of Dewey Walker, Kittie Corley had been involved in the murder of another man by the name of Charles James ("C.J.") Hatfield.

21. David Wilson was not involved in any way in the Hatfield murder. Mr. Wilson was never accused of being involved in any way in the Hatfield murder.

22. The information about Kittie Corley's involvement in the murder of C.J. Hatfield was included in a handwritten letter dated August 10, 2004, signed "Nicole," then "P.S. My nickname is Kittie." Appendix A (hereinafter referred to as "the Corley letter").

23. The Corley letter was obtained by the State of Alabama on or around August 31, 2004. *See* Appendix A (date stamped).

24. A police investigation concluded that Kittie Corley had written the Corley letter. The State of Alabama subjected the Corley letter to handwriting analysis, and a handwriting expert from the United States Postal Service concluded

that Kittie Corley likely wrote the Corley letter. Doc. 76-24 at PDF 37, Bates 3878; *see* Appendix T (hereinafter referred to as "the handwriting expert report").

25. As the Alabama Court of Criminal Appeals found, the Corley letter "contained details of the murder of Dewey Walker which only the perpetrators would have known." *David Phillip Wilson v. State of Alabama*, Memorandum, CR-16-0675 (Ala.Ct.Crim.App, March 9, 2018), at 8 (Doc. 76-33 at PDF 9, Bates 5614).

26. As Judge Coody wrote in his opinion order dated June 21, 2023, "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.

27. As Respondent stated in a motions hearing in the Rule 32 proceedings, 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.

28. As United States District Judge W. Keith Watkins found, in the Court's opinion dated March 27, 2023, there are "[s]everal known, simple truths about the Corley letter," the most important of those truths being that: "*Prosecutors possessed the letter before trial, investigated its origin, and concluded that Corley was its author*." Doc. 67 at p. 21 (italics in original).

29. The State of Alabama did not produce the Corley letter to Mr. Wilson until March 31, 2023 (for the frontside) and June 28, 2023 (for the backside), which was over nineteen years after the Corley letter was written and obtained by the State of Alabama. Doc. 69 and 69-2 (frontside); *see* Doc. 81, p. 1 and Doc. 81-1 (backside).

30. 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.

31. Magistrate Judge Coody summarized the frontside of the Corley letter as follows: "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, 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.

32. The frontside of the Corley letter reads, in its entirety:

> 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.
>
> 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 Appendix A and B.

33. 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 who is 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.

34. The backside of the Corley letter reads, in its entirety:

> 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 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 <u>No</u>.
>
> Respectfully
>
> *Nicole*
>
> 08-10-04

See Appendix C and D.

35. As a result of the State of Alabama not producing the Corley letter, Mr. Wilson and his defense counsel did not know about Kittie Corley's earlier involvement in the murder of C.J. Hatfield.

36. In order to maintain the chronology of the facts, Petitioner will begin with the Hatfield murder, which occurred three weeks prior to the murder of Mr. Dewey Walker.

B. Kittie Corley's Earlier Involvement in the Hatfield Murder

37. On the morning of Saturday, March 13, 2004, Henry County coroner Derek Wright was out turkey hunting and accidentally found a dead body near the

side of a dirt road on the outskirts of Dothan. *See* Matt Elofson, "Slocomb man gets life without parole for murder," *Dothan Eagle*, December 20, 2008; Appendix Z (Leon Neyfakh, "James Bailey is a Liar. Is He a Murderer?," *Slate*, February 7, 2017); Appendix P (Law Enforcement "Final Summary" of Investigation into Murder of C.J. Hatfield, dated April 4, 2005. The decedent was shot three times: once each in the right eye, left cheek, and throat. *See* Matt Elofson, "Man found guilty in 2004 Henry County slaying," *Dothan Eagle*, November 19, 2008. Local investigators found two wet spots near the area where the body was found; there were also tire tracks from what seemed like a large truck. The decedent was found without any form of identification. He remained unidentified until his mother, Doni Mobley, identified him as Charles James (C.J.) Hatfield when she heard about his tattoos on the evening news. *See* Appendix Z.

38. In the Corley letter and two police interrogations of Kittie Corley conducted on January 29, 2005 (Appendix E and F) and on March 24, 2005 (Appendix G and H),[2] Corley stated that she was involved in a drug trafficking ring in Dothan, Alabama, that resulted in the murder of C.J. Hatfield. Corley said that Scott Mathis ("Bam Bam") and Mark Hammond were the kingpins of the drug trafficking ring in Dothan (Appendix D, Transcription at p. 2, lines 4-7); that she

[2] Respondent produced these two police interrogations to Mr. Wilson for the first time on December 7, 2023. *See infra.*

was the "fiancée" of Bam Bam (Appendix F, Transcription at p. 4, lines 1-2); and that she was friends with Mark Hammond, was willing to give him a false alibi, and had an intimate relationship with him as well (Appendix F, Transcription at p. 4, lines 11-12 and at p. 8, lines 6-7).

39. In the police interrogations, Corley said that she had a safety deposit box in her name at the bank in which she deposited a .38 caliber revolver that was used to murder C.J. Hatfield; that she was one of three people who had access to the .38 caliber gun; and that the safety deposit box was used for myriad other illicit activities, including holding narcotics for other people (Appendix F, Transcription at p. 28, lines 4-15; Appendix H, Transcription at p. 14, lines 8-9) . Corley said she was familiar with finding guns for illicit purposes (Appendix F, Transcription at p. 33, lines 1-3, "The .38s were hard enough for us to find, let alone unregistered."); that she and other members of the drug ring passed weapons between them (Appendix H, Transcription at p. 11, lines 20-21) ("between all the boys, we pass knives and guns off all the time."); that Bam Bam directed her to hide the gun in her safety deposit box after the murder of Hatfield (Appendix H, Transcription at p. 14, lines 16-21); and that "It was nothing for somebody to talk about killing folks, you know, back then, especially with the business that we were doing" (Appendix F, Transcription at p. 24, line 18 through p. 25, line 2).

40. Corley told the police that, shortly before or on March 13, 2004, Bam Bam, in her presence, received a phone call indicating that C.J. Hatfield intended to steal money from the drug trafficking ring (Appendix F, Transcription at p. 9, line 12 through p. 10, line 7); that Bam Bam and Mark Hammond admitted to Corley involvement in the murder of Hatfield (Appendix H, Transcription at p. 20, lines 10-13); that she knew approximately where the Hatfield murder occurred in the outskirts of Dothan (Appendix F, Transcription at p. 6, line 20 through p. 7, line 13); and that after the murder of Hatfield, Hammond and Stuckey urinated next to Mr. Hatfield's body (Appendix H, Transcription at p. 29, line 20 through p. 30, line 1).

41. Corley told the police that after the murder of C.J. Hatfield, Bam Bam got rid of evidence from the murder, including clothes worn at the scene (Appendix F, Transcription at p. 35, line 11 through p. 36, line 20); and that Hammond gave Sarah Drescher, another member of the gang, the jewelry that C. J. Hatfield was wearing (Appendix H, Transcription at p. 26, line 7 through p. 28, line 19).

42. Corley also told the police that during the time of Hatfield's murder, she was suffering from severe mental health troubles (Appendix F, Transcription at p. 20, lines 12-13) ("I have [dis]sociative disorder, and I'm a paranoid schizophrenic"); and that she was also suicidal during that time (Appendix F, Transcription at p. 35, lines 8-9) ("I was hanging from a rope from a tree trying to kill myself.").

43. A review of the public records, news reports, and investigative journalism surrounding the murder of C.J. Hatfield indicates that five individuals were convicted in relation to that murder based on conflicting and divergent prosecutorial theories of what happened. David Stuckey (also known as James or Jason Stuckey in the public record) was convicted of murder on a theory that he alone shot Mr. Hatfield to death by the side of a road outside Dothan. James Bailey was convicted of murder on the testimony of a co-defendant, John Edward Parmer, on a theory that Hatfield was lured to the front of his girlfriend Sarah Drescher's home, killed there, and only later transported to where his body was found on the side of the road. John Edward Parmer pled guilty to manslaughter in 2009 on the transported-body theory. Scott "Bam Bam" Mathis pled guilty to hindering prosecution, after an initial murder charge, on a theory that he had sold the murder weapon for Stuckey after the homicide. Mark Hammond pled guilty to hindering prosecution, after an initial murder charge. Three women who were involved were not convicted of any crime related to the Hatfield murder: Heather Lynn Brown, Kittie Corley, and Sarah Drescher. *See* Appendix Z.

44. Corley told the police that after she was arrested for her involvement in the Dewey Walker murder, she remained in contact with other members of the drug ring that killed C.J. Hatfield. Appendix H, Transcription at p. 23, line 12 through p. 25, line 20.

C. The Dewey Walker Homicide

45. About a month later, on April 13, 2004, after Dewey Walker failed to show up to work for several days and his supervisor was unsuccessful in reaching him at his home, Dothan police were summoned to his home to conduct a welfare check. Doc. 67 at 2. Mr. Walker's body was found dead in his home. Doc. 76-7 at PDF 182-188, Bates 1387-1393.

46. Four suspects were questioned for their involvement in the homicide of Mr. Walker on April 13 and April 14, 2004: Kittie Corley, Michael Jackson, Matthew Marsh, and David Wilson. Doc. 76-24 at PDF 12-13, Bates 3853-3854.

47. Jackson and Marsh were interrogated first. Doc. 76-24 at PDF 108, Bates 3949; Doc. 76-24 at PDF 12, Bates 3853.

48. In the early morning of April 14, 2004, Kittie Corley and David Wilson were interrogated separately at the same time. Doc. 76-24 at PDF 25, Bates 3866; Doc. 76-3 at PDF 115, Bates 517.

49. Corporal Jason Devane and Corporal Frank Meredith interrogated Kittie Corley. Doc. 76-24 at PDF 25, Bates 3866.

50. Sergeant Tony Luker and Corporal Mike Etress interrogated David Wilson. Doc. 76-3 at PDF 115, Bates 517.

51. Starting at 5:20 AM, Kittie Corley gave a recorded police statement to officers Devane and Meredith. Doc. 76-24 at PDF 25, Bates 3866. Corley's police statement is in the state record at Doc. 76-24 at PDF 2533, Bates 3866-3874.

52. 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 had a lot of stereo and electronics equipment in it, and Corley said that Matthew Marsh and David Wilson decided to get the TV screen that Marsh wanted on "not a definite date they just decided to do it." Doc. 76-24 at PDF 27, Bates 3868.

53. Corley told the police that the day of the burglary of Dewey Walker's home, she entered into the home with David Wilson. She explained that when 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.

54. 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.

55. 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.

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

57. In that police 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.

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

59. 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 of the statement was also admitted into evidence. Doc. 76-8 at PDF 177, Bates 1583.

60. 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 the house he checked for and felt Mr. Walker's pulse and that 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.

61. 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 [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.

D. The Discovery of the Corley Letter

62. On August 31, 2004, the State of Alabama received the Corley letter. The frontside of the Corley letter bears an August 31, 2004, date stamp, indicating that it was catalogued by state law enforcement on that date. Appendix A.

63. 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.*

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

65. 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* Appendix I (Kittie Corley's "Dearest David" letter); Appendix J for a Certified Court Reporter transcription of the letter.

66. 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* Appendices I and J.

67. Sgt. Luker compared Corley's handwriting samples (which he purposefully seized during the search he conducted 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.

68. Based on police interrogations of Kittie Corley dated January 29, 2005 and March 24, 2005 (that 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 and the extent of Corley's involvement in drug trafficking and violent crime in Dothan and the Hatfield murder. *See* Appendices E, F, G, and H.

69. 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, *infra* paragraph 289.

70. On January 12, 2007, a U.S.P.S. handwriting expert, Gale Bolsover, the Laboratory Unit Manager, 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* Appendix T.

PROCEDURAL FACTS

71. Petitioner David Wilson was arrested on April 14, 2004. Doc. 76-2 at PDF 179, Bates 397.

72. Attorneys Matthew Lamere and Valerie Judah were appointed to represent him. Doc. 76-1 at PDF 15, Bates 15.

73. 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.

74. 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.*

75. While in the Houston County Jail awaiting trial, Mr. Wilson was charged with attempted escape in Houston County Case No. CC-2005-1138 (indictment June 9, 2005). Judah advised Mr. Wilson to plead guilty to the escape charge. *Id.* (guilty plea entered May 17, 2006). As a result, Mr. Wilson was delivered

to the Alabama Department of Corrections ("ADOC") and sent to serve his escape sentence at Donaldson Correctional Facility in Bessemer, Alabama, and other ADOC facilities, including Mount Meigs. Doc. 76-6 at PDF 27-28, Bates 1032-1033; Doc. 76-24 at PDF 75, Bates 3916.

76. 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).

77. 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 attorney Lamere also moved to withdraw. Doc. 76-11 at PDF 53, 55, Bates 2052, 2054. Mr. Wilson was returned to Dothan for this hearing. *Id*. at PDF 55, Bates 2054; Doc. 76-1 at PDF 68, Bates 68. 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.

78. Counsel filed motions to suppress Mr. Wilson's statement to the police and the evidence seized during the search of his home. Doc. 76-1 at PDF 73-80, Bates 73-80. A hearing was held on both motions on October 9, 2007. Doc. 76-6 at PDF 52, Bates 1057. After extensive testimony from Sgt. Luker of the Dothan Police

Department, counsel made no further argument and the court denied the motions. Doc. 76-6 at PDF 115-117, Bates 1120-1122.

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

80. At the guilt phase, defense counsel waived closing argument. Doc. 76-9 at PDF 173-174, Bates 1780-1781.

81. 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.

82. Following a 15-minute break, a jury penalty phase hearing was held.

83. 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. Defense counsel erroneously conceded that this aggravator was applicable. Doc. 76-10 at PDF 26, Bates 1835. But, after the damaging information was already before the jury, the court, rather than defense counsel, noted that Mr. Wilson's attempted escape conviction did not qualify under any of the prior conviction aggravators. Doc. 76-10 at PDF 51, Bates 1860. The trial court commented that "I think that will be a reversible problem." Doc. 76-10 at PDF 51,

Bates 1860. Even after that, however, defense counsel failed to object or call for a mistrial. Doc. 76-10 at PDF 51, Bates 1860.

84. At the penalty phase, defense counsel called two unprepared witnesses, Mr. Wilson's mother, Linda Wilson, and a neighbor for very brief testimony (Doc. 76-10 at PDF 59-108, Bates 1868-1917), and dumped 400 pages of school records on the jury without explanation (Doc. 76-10 at PDF 94-95, Bates 1903-1904).

85. Because counsel failed to properly investigate Mr. Wilson's background, counsel failed to identify potential witnesses who would have provided mitigation evidence. For example, though Mr. Wilson's father, Roland Wilson, was interviewed on one occasion and attended the trial, counsel failed to call him as a witness, even though he would have informed the jury about Linda Wilson's repeated suicide attempts and psychiatric hospitalizations during David's childhood, Linda's abandonment of David and his siblings, and David's own psychological condition. Doc. 76-22 at PDF 195-198, Bates 3634-3637, Doc. 76-23 at PDF 6-8, Bates 3646-3648. Trial counsel also failed to interview, or call at sentencing, many other family members, including David's uncle, Angelo Gabbrielli; David's older brother, Edward Wilson; David's aunt, Pamela Tankersly; and David's stepmother, Jane Wilson. These available witnesses would have testified about the generational poverty and history of mental illness in David's family (Doc. 76-22 at PDF 193-197, Bates 3632-3636); David's developmental delays and special education placements

(Doc. 76-23 at PDF 6-8, Bates 3646-3638); the psychiatric medications David was prescribed from an early age, including Ritalin and Pamelor (Doc. 76-23 at PDF 6, 11, Bates 3646, 3651); the untimely death of David's younger brother, Steven, from cystic fibrosis (Doc. 76-23 at PDF 4-5, Bates 3644-3645); the impact of Steven's illness on David's family (Doc. 76-23 at PDF 5, Bates 3645); and the neglect, abuse, and abandonment David suffered in childhood (Doc. 76-22 at PDF 201, Bates 3640 to Doc. 76-23 at PDF 6, Bates 3646).

86. Teachers from Mr. Wilson's elementary schools, such as Dr. Theresa Harden and Jill Byerley had relevant information about his social and academic difficulties that would have supported an Asperger's Syndrome diagnosis (*see* Doc. 76-30 at PDF 57-59, Bates 5104-5106 and PDF 61-62, Bates 5108-5109), information which his mother could not provide, because Mr. Wilson was living with his father at that time. Dr. Harden would further have explained what the school records disclose about Mr. Wilson's mental health issues, in particular, his Asperger's Syndrome. Doc. 76-30 at PDF 58, Bates 5105. She would have testified that "David interpreted things differently from the average student" and that "his reality level was behind [, which] indicates that David could not process things he was observing as real; for instance, he would not have understood cartoons." *Id.* Ms. Byerley would have explained that David often had a "vacant look about him," "had

no social skills and did not know how to interact with other children," and "was a loner who did not know how to be a friend." Doc. 76-30 at PDF 61, Bates 5108.

87. A mental health expert, such as neuropsychologist Dr. Robert Shaffer, would have testified that Mr. Wilson's behavior during his upbringing and young adulthood were consistent with a diagnosis of Asperger's. He would have explained that Asperger's caused Mr. Wilson's inability to interact socially with his peers and gain acceptance from them. Most importantly, he would have testified that Mr. Wilson's Asperger's Syndrome made him an easy target for peers to manipulate toward harmful or innapropriate actions. Dr. Shaffer would have testified that Mr. Wilson's peers took advantage of his vulnerability to manipulation, and Mr. Wilson often engaged in excessive behavior to please his peers. *See, e.g.*, Appendix NN (Psychological Report from Dr. Robert Shaffer) at 14 ("David Wilson displayed a desperate need to believe that he fit in with other people. Due to his Autism, he was easy to manipulate by his peers because he was so desperate to maintain friendships. He would do anything asked of him by people he considered friends or potential friends, and he would often over-do it, exhibiting excessive behavior to prove himself in front of his peers."); Doc. 76-23 at PDF 12-17, Bates 3652-3657. Dr. Shaffer would have also testified that "an additional symptom of Mr. Wilson's ASD is a fascination with the obsession of electronics or other gadgetry" to a degree where he was blind to any consequences that may result from his fascination, and this

obsession motivated many of the actions that he described to the police in his police statement. Appendix NN at 14. Finally, Dr. Shaffer would have testified that a deficient theory of mind, a classic symptom of Asperger's Syndrome, prevented Mr. Wilson from appreciating the consequences of his actions, especially when he was in single-minded pursuit of a particular obsession. *Id.*

88. Although all of these witnesses were available to testify on Mr. Wilson's behalf, none of them were called, leaving the jury with a partial image of the man whose life-worthiness they were tasked with evaluating.

89. Despite all of this, 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.

90. On January 8, 2008, the state trial court held a sentencing hearing. Defense counsel did not call any witnesses or present any evidence. The state court sentenced Mr. Wilson to death. Doc. 76-10 at PDF 186, Bates 1995.

91. 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. The issues raised to the ACCA are set out in Appendix AA (Table of Contents to Brief of Appellant, No. CR-07-0684 (filed July 10, 2008), pp. ii-vii). Among those claims, appellate counsel raised a challenge under *Batson v. Kentucky*, 476 U.S. 79

(1986), because the District Attorney, Doug Valeska, used his peremptory challenges to strike Black jurors, and Mr. Wilson was tried before an all-white jury.

A. The *Batson* Remand

92. On November 5, 2010, 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 removal of three jurors in particular: Jehl Dawsey, Darran Williams, and James Collins. *Id*. at 752.

93. The *Batson* proceedings on remand were unusual in that the District Attorney himself, Doug Valeska, who was the lead prosecutor at Mr. Wilson's trial and who conducted the voir dire, represented the State of Alabama at the *Batson* hearing and called as a witness his Chief Assistant, Gary Maxwell. *Compare* Doc. 76-6 at PDF 144, Bates 1149 (listing counsel for the State at trial) *with* Doc. 76-15 at PDF 43, Bates 2406 (listing counsel for State at *Batson* hearing). Doug Valeska, who had struck the jury, served as counsel examining his assistant at the hearing, and he repeatedly interjected his own testimony, which could not be cross-examined, about his own and his office's practices. *See, e.g.* Doc. 76-15 at PDF 47-48, 57-58, 65, 68-71, 77-79, Bates 2410-2411, 2420-2421, 2428, 2431-2434, 2440-2442.

94. At the *Batson* hearing, Gary Maxwell testified respecting the State of Alabama's reasons for each of its strikes.

95. At the *Batson* hearing on remand, Mr. Maxwell testified that he removed Mr. Dawsey because of his Law Enforcement Tracking System ("LETS") record and his young age; that he removed Mr. Williams because of his 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.

96. When challenged by appellate counsel regarding those LETS records, the prosecution promised to submit those records to the state court at the conclusion of the hearing. Doc. 76-15 at PDF 140-141, Bates 2503-2504. To date, the prosecution has never fulfilled that promise and has never submitted those LETS records to the state court or to Mr. Wilson. Doc. 76-17 at PDF 20, Bates 2554.

97. 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.

98. 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 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).

99. 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*.

100. 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. That court denied certiorari on September 20, 2013. *Ex parte Wilson*, No. 1111254 (Ala. Sept. 20, 2013).

101. 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).

102. Mr. Wilson filed a state post-conviction petition pursuant to Rule 32 of the Alabama Rules of Criminal Procedure on September 19, 2014.[3] 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.

103. The State of Alabama filed 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.

[3] Houston County Case Nos. CC-04-1120.60 and CC-04-1121.60. Days elapsed on federal statute of limitations ("SOL"): 123.

104. 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.[4] 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.

105. 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), which was denied by operation of law on March 26, 2017. Doc. 76-29 at PDF 173, Bates 5019 to Doc. 76-30 at PDF 62, Bates 5109. *But see* Doc. 76-30 at PDF 74, 75, Bates 5121, 5122 (orders dated April 7, 2017, incorrectly stating that Mr. Wilson's notices of appeal divested the court of jurisdiction to rule on his motion to reconsider).

106. Mr. Wilson timely appealed to the ACCA on April 6, 2017 (Ala. Crim. App. Case No. CR-16-0675). The issues raised on appeal are set out in Appendix DD (Table of Contents to Brief of the Appellant, No. CR-16-0675 (filed August 15, 2017), pp. ii-iv).

107. The ACCA affirmed the dismissal of the 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.

[4] The Rule 32 record on appeal contains two copies of each court order, for each of the indictments, but only one copy of each party's pleadings.

108. On May 17, 2018, Mr. Wilson petitioned for a writ of certiorari from the ASC (Ala. Case No. 1170747). The issues raised to the ASC are set out in 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).

109. 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.

110. 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.

111. Mr. Wilson's federal habeas corpus petition was due for filing on or before April 23, 2019 and was timely filed.

112. 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.

113. 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.

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

B. The Production of the Corley Letter

115. On March 27, 2023, upon motion by undersigned counsel, District Judge W. Keith Watkins ordered Respondent to produce the Corley letter. Doc. 67.

116. On March 31, 2023, counsel for Respondent "provided petitioner and the court with a single-page photocopy of a handwritten letter from Corley to an unknown attorney." Doc. 79, p. 2; *see* Doc. 69-2; Appendix A (Frontside of the Corley Letter) and Appendix B (Certified Court Reporter Transcription of the Frontside of the Corley Letter).

117. On June 21, 2023, upon motion by undersigned counsel, Magistrate Judge Charles S. Coody ordered Respondent to produce the back side of the Corley letter. Doc. 79.

118. On June 28, 2023, counsel for Respondent produced the back side of the Corley letter via email to undersigned counsel. Doc. 81-1 (Backside of the Corley Letter) and Doc. 81-2 (email from Richard D. Anderson to Bernard E. Harcourt);

see Appendix C (Backside of the Corley Letter) and Appendix D (Certified Court Reporter Transcription of the Back Side of the Corley Letter).

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

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

120. On November 3, 2023, upon motion by undersigned 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.

121. 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.

122. 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 the following four pieces of evidence:

123. First, a Waveform audio recording of a police interrogation of Kittie Corley conducted on January 29, 2005, lasting 27 minutes. Doc. 89-8; Doc. 89-9; and Doc. 90; *see* Appendix E (Audio of Jan. 29, 2005 Interrogation of Kittie Corley,

filed conventionally with the Court via flash drive) and Appendix F (Certified Court Reporter Transcription of Interrogation of Kittie Corley on January 29, 2005).

124. Second, a Windows Media Audio recording of a police interrogation of Kittie Corley dated March 24, 2005, lasting 33 minutes. Doc. 89-10; Doc. 89-11; and Doc. 90; *see* Appendix G (Audio of March 24, 2005 Interrogation of Kittie Corley, filed conventionally with the Court via flash drive) and Appendix H (Certified Court Reporter Transcription of Interrogation of Kittie Corley on March 24, 2005).

125. Third, the first two pages of a "Dearest David," undated, personal letter that Kittie Corley wrote to Petitioner David Wilson while she was in jail pending trial for charges in connection with the murder of Mr. Dewey Walker. Doc. 89-12 and Doc. 89-13; *see* Appendix I (Kittie Corley's "Dearest David" Letter from 2004) and Appendix J (Certified Court Reporter Transcription of "Dearest David" Letter).

126. Fourth, a police interview worksheet from a police interrogation of Joan Dixia Vroblick dated August 3, 2004. Doc. 89-14 and Doc. 89-15; *see* Appendix K (Police Interview Worksheet of Vroblick Interrogation dated August 3, 2004) and Appendix L (Certified Court Reporter Transcription of Police Interview Worksheet of Vroblick interrogation).

127. After the production of the backside of the Corley letter, undersigned counsel initiated a preliminary investigation into Kittie Corley's role in the murder

of C.J. Hatfield. Counsel quickly discovered that the Hatfield murder is a sensational case that has drawn significant media attention and investigative journalism. *Slate* magazine published a lengthy, thirty-two page, long-form, investigative reporting article about the case. *See* Leon Nayfakh, "James Bailey Is a Liar. Is He a Murderer?" *Slate*, February 7, 2017, available at https://www.slate.com/articles/news_and_politics/crime/2017/02/will_new_evidence_in_a_dothan_alabama_murder_case_prove_james_bailey_is.html (Appendix Z).

128. One of the reasons that the Hatfield murder is such a sensational case is that five suspects have been convicted and punished for the murder under very different prosecutorial theories of who did what, where, and when. The only known and consistent thread throughout is that the murder of C.J. Hatfield was related to ongoing drug trafficking activities. On one of the prosecutor's theories, C.J. Hatfield was shot dead in the woods by James Stuckey, Scott "Bam Bam" Mathis, and Mark Hammond, and there are multiple different stories about who was present. On another of the prosecutor's theories, C.J. Hatfield was shot dead at his girlfriend Sarah Drescher's house by Bam Bam, Hammond, and Stuckey, with James Bailey and Drescher present; then Hatfield's dead body was transported by Bam Bam and Hammond in a toolbox in the back of Hammond's truck and dumped in the woods. *See* Appendix O (document titled "Work Product | James William Bailey").

129. Throughout all this, Kittie Corley, by her own account, knew every detail about the murder and its planning, agreed to be a false alibi for Hammond, had possession and control of the murder weapon, at one point confessed to being present at the shooting death, at another point claimed to have driven at least one of the alleged murderers to the crime scene, apparently had intimate relations with two of the drug ring's leaders, and more.

130. As a result of preliminary investigations, which have been paused pending the filing of this amended petition, undersigned counsel obtained from confidential sources additional pieces of evidence that were never produced to Mr. Wilson by the State of Alabama.

131. First, counsel obtained a police interrogation of a suspect in the Hatfield murder, Heather Lynn Brown, dated January 29, 2005, in which Brown confirms that Kittie Corley had possession of the murder weapon (a gun) used in the Hatfield murder and put it in her safe lock box in her apartment. *See* Appendix M. The State of Alabama has never produced this evidence to Mr. Wilson.

132. Second, counsel obtained a police interrogation of a suspect in the Hatfield murder, Mark Hammond, dated February 26, 2005, in which Hammond confirms that Kittie Corley was Scott "Bam Bam" Mathis's girlfriend. During this interrogation, the investigator, Hendrickson, confirms that Corley has Bam Bam's name tattooed on her body. *See* Appendix N. The latter is confirmed by the Alabama

Department of Corrections that states on its "Incarceration Details" for Catherine Nicole Corley (AIS# 00256533) under "Scars, Marks, and Tattos": "2 HEART SYMBOLS WITH SCOTT." *See* Appendix MM. The State of Alabama has never produced this police interrogation to Mr. Wilson.

133. Third, counsel obtained a summary of law enforcement's conclusions about the various suspects in the Hatfield murder. The document is titled "Work Product | James William Bailey" at the top and is dated 2005. *See* Appendix O. It describes Kittie Corley's involvement in the Hatfield murder. The State of Alabama has never produced this evidence to Mr. Wilson.

134. Fourth, counsel obtained another document that represents a police summary of the evidence and investigation (two partial versions of which are attached to the previous document under the date of March 31, 2005 and April 4, 2005). *See* Appendix P (Document titled "Final Summary" and dated April 4, 2005). It also describes Kittie Corley's involvement in the Hatfield murder. The State of Alabama has never produced this evidence to Mr. Wilson.

135. Fifth, counsel obtained another document that represents a police transcription of Kittie Corley's police interrogation dated January 29, 2005. *See* Appendix Q (Police Transcript of Kittie Corley Interrogation). The State of Alabama has never produced this police transcript to Mr. Wilson.

136. Sixth, counsel obtained a Henry County Sheriff's Department Property/Evidence Sheet from approximately March 21, 2005, that refers to a "Kathy Corely (sic) Statement," alongside statements of John Parmer, James Bailey, Mark Hammond, and other suspects in the murder of C.J. Hatfield. *See* Appendix R (Henry County Sheriff's Department Property/Evidence Sheet from approximately March 21, 2005). The State of Alabama never produced the property/evidence sheet to Mr. Wilson.

137. Seven, counsel obtained a transcript of a video recording of an interview by a documentary filmmaker with one of the suspects in the Hatfield murder who, when asked about Catherine Corley, responds on camera: "Catherine Corley, they called her Kitty. Yeah, that's a loco psycho chick that actually killed someone herself." *See* Appendix S (redacted transcript of video footage by documentary filmmaker). It is likely that this refers to the killing of Dewey Walker, although it is possible that this may refer to a third murder.

138. Kittie Corley was evidently one of the persons of interest in the Hatfield murder. At the trial of James Bailey for the murder of Mr. Hatfield, the trial judge asks potential jurors during jury *voir dire* whether they were related by blood or by marriage to, or knew, Catherine Corley. *See* Appendix V (Transcript of *voir dire,* November 18, 2008, p. 15).

139. 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.

140. 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.

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.

141. The State of Alabama only produced the Corley letter under federal court order on March 31, 2023 (frontside) and June 28, 2023 (backside). *See* Appendices A, B, C, and D. That was 19 years and 10 months after the State of Alabama first obtained the Corley letter on August 31, 2004. The State of Alabama did not produce the handwriting expert report matching the handwriting of Kittie Corley to the Corley letter. *See* Appendix T. The State of Alabama's suppression of the Corley letter and handwriting expert report violated Mr. Wilson's rights to due

process, to a fair trial, to a reliable jury recommendation and judge sentence at the death penalty phase of his capital trial, and to be free from cruel and unusual punishment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Therefore, Mr. Wilson's sentence of death is due to be vacated.

A. The Corley Letter and the Derivative ("Downstream") Evidence

142. By withholding the Corley letter, the State of Alabama shielded four categories of evidence that would have been available to Mr. Wilson in his defense at the penalty phase of his capital trial and sentencing.

143. First, the State of Alabama hid direct evidence that was contained on the frontside of the Corley letter. This included evidence regarding Kittie Corley's greater culpability for the murder of Mr. Dewey Walker and deeper involvement in the burglary and robbery. *See* Appendix A and B. The State of Alabama also hid the direct evidence that was contained in the handwriting expert report matching the handwriting of Kittie Corley to the Corley letter. *See* Appendix T.

144. Second, the State of Alabama hid the direct evidence that was contained on the backside of the Corley letter. This included evidence of Kittie Corley's involvement in the murder of C.J. Hatfield, including her possession of the murder weapon, agreement to serve as an alibi, and other actions in furtherance of the murderous drug-trafficking ring. *See* Appendix C and D.

145. Third, the State of Alabama hid derivative (hereafter, "downstream") evidence regarding Kittie Corley's greater role in the murder of Dewey Walker that Petitioner would have discovered if the Corley letter had been produced to him. This downstream evidence, which includes the "Dearest David letter" (Appendix I and J), is the fruit of a hidden tree, namely the Corley letter. Had the Corley letter and the handwriting expert report been produced to Mr. Wilson, defense counsel would have known to pursue the downstream evidence of Kittie Corley's other letters and would have discovered this evidence of her deeper involvement in the murder of Mr. Walker.

146. Fourth, the State of Alabama hid downstream evidence regarding Kittie Corley's involvement in the murder of C.J. Hatfield that would have been discovered by defense counsel if the Corley letter had been produced to him, including: (1) a police interrogation of Kittie Corley on January 29, 2005, regarding her role in the murder of C.J. Hatfield (Appendix E and F); (2) a police interrogation of Kittie Corley on March 24, 2005, regarding her role in the murder of C.J. Hatfield (Appendix G and H); (3) a police interview worksheet of the interrogation of Joan Vroblick dated August 3, 2004 (Appendix K and L); (4) a police interrogation of Heather Lynn Brown dated January 29, 2005 (Appendix M); (5) a police interrogation of Mark Hammond dated February 26, 2005 (Appendix N); (6) a summary of law enforcement's conclusions about Kittie Corley's involvement in the

Hatfield murder titled "Work Product | James William Bailey" (Appendix O); (7) a police summary of the evidence and investigation regarding Corley's involvement in the Hatfield murder titled "Final Summary" (Appendix P); (8) a police transcription of Kittie Corley's police interrogation dated January 29, 2005 (Appendix Q); and (9) a Henry County Sheriff's Department Property/Evidence Sheet from approximately March 21, 2005, that refers to a Kittie Corley statement (Appendix R). Defense counsel would also have discovered other evidence, such as the kind of evidence contained in a transcript of a video recording of an interview by a documentary filmmaker with one of the suspects in the Hatfield murder who refers to Kittie Corley as "a loco psycho chick that actually killed someone herself" (Appendix S).

147. Petitioner David Wilson would have used these four categories of direct and downstream fruit-of-the-hidden-tree evidence to demonstrate to his jury that he had less culpability than Kittie Corley in the death of Mr. Walker. 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 courts everywhere. *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, 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); *U.S. 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.")

148. Petitioner David Wilson would also have used these four categories of direct and downstream evidence to rebut the prosecution's argument to his jury and judge regarding the presence of the aggravating circumstance of "heinous, atrocious, and cruel" ("HAC"). The sentencing judge found the existence of the HAC aggravator 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).

149. Petitioner David Wilson would also have used these four categories of direct and downstream 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 paragraph 222 *infra*.

B. The Brady Standard

150. A defendant is constitutionally entitled to favorable evidence in a criminal proceeding. *Brady v. Maryland*, 373 U.S. 83 (1963). Under *Brady* and its progeny, the state has an affirmative duty to disclose evidence that is favorable to a defendant. *Kyles v. Whitley*, 514 U.S. 419, 432 (1995).

151. As this Court has already held, "The traditional articulation of the *Brady* test is familiar: 'To establish a *Brady* violation, a defendant must prove three essential elements: (1) that the evidence was favorable to the defendant, either because it is exculpatory or impeaching; (2) that the prosecution suppressed the evidence, either willfully or inadvertently; and (3) that the suppression of the

evidence resulted in prejudice to the defendant.'" Doc. 67 p. 16 (citing *Rimmer v. Sec'y, Fla. Dept. of Corr*., 876 F.3d 1039, 1054 (11th Cir. 2017) (citations omitted)); see also *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999); *Banks v. Dretke*, 540 U.S. 668, 691 (2004).

152. Evidence favorable to the defendant is that which "tend[s] to exculpate him or reduce the penalty." *Brady*, 373 U.S. 83 at 88. Thus, undisclosed evidence may be equally material at either the guilt or sentencing stages of a trial. *Id*. at 87.

153. Evidence is suppressed, within the meaning of *Brady*, when it is withheld from the defense. *Id*. at 84, 86-87. The duty of a prosecutor to disclose favorable material evidence is independent of defense counsel's actions and does not require a specific request by the accused. *United States v. Agurs*, 427 U.S. 97, 107 (1976). A prosecutor is not absolved of his obligations under *Brady* by defense counsel's failure to act in a certain manner, and the prosecution's obligation to disclose *Brady* material is unaffected by the excuse that defense counsel might have discovered the material independently through the exercise of due diligence. *See*, *e.g.*, *Dennis v. Secretary, Pennsylvania Department of Corrections*, 834 F.3d 263 (3d Cir. 2016) (en banc); *Bracey v. Superintendent, Rockview SCI*, 986 F.3d 274, 289 (3d Cir. 2021); *Lewis v. Connecticut Commissioner of Correction*, 790 F.3d 109, 121 (2d Cir. 2015); *United States v. Tavera*, 719 F.3d 705, 711 (6th Cir. 2013); *Banks v. Reynolds*, 54 F.3d 1508, 1517 (10th Cir. 1995).

154. Evidence is material if prejudice ensued to the defendant: "[F]avorable evidence is material, and constitutional error results from its suppression by the government, 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Kyles v. Whitley*, 514 U.S. 419, 433 (1995); *see also Strickler v. Green*, 527 U.S. 263, 281-82 (1999); *Banks v. Dretke*, 540 U.S. 668, 698-99 (2004).

155. The "reasonable probability" hurdle does not require a "demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal," *Kyles*, 514 U.S. at 434, or in a lesser sentence. The materiality question in a *Brady* analysis is not a "sufficiency of the evidence test," and the defendant does not need to show that the suppressed evidence renders his conviction or his death sentence implausible; the question is only whether or not the defendant received a fair trial and whether the addition of the suppressed evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 434-35.

156. A confession by a co-defendant is clearly favorable as it is inherently exculpatory: it is the very evidence at the heart of *Brady* itself. 373 U.S. at 84.

157. Even 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." *Id*. at 696.

158. The United States Supreme Court has made clear that a *Brady* analysis must consider the impact of impeachment evidence regardless of whether the witness testified at trial. *See Kyles v. Whitley*, 514 U.S. 419 (1995). Moreover, evidence does not need to be admissible at trial in order to qualify as *Brady* material that is required to be disclosed. *See, e.g., Johnson v. Folino*, 705 F.3d 107, 130 (3d Cir. 2013); *Bradley v. Nagle*, 212 F.3d 559, 567 (11th Cir. 2000); *Spaziano v. Singletary*, 36 F.3d 1028, 1044 (11th Cir. 1994). In *Kyles*, the prosecution suppressed impeachment evidence concerning an informant known as ''Beanie,'' who was never called to testify. Despite the fact that Beanie did not testify at trial, the Supreme Court evaluated the materiality of his withheld statements by analyzing what would have happened if defense counsel had called Beanie to the stand: "If the defense had called Beanie as an adverse witness, he could not have said anything of any significance without being trapped by his inconsistencies." *Kyles*, 514 U.S. at 446. On this ground, *inter alia*, the Court concluded that the suppressed impeachment evidence would have made a different result reasonably probable in that capital murder case, and thus the nondisclosure violated *Brady*. *See Bagley*, 473 U.S. at 682 (holding that evidence is material for *Brady* purposes where there is a

"reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.")

159. Furthermore, "suppressed evidence [must be] considered collectively, not item-by-item." *Kyles*, 514 U.S. at 436.

160. Thus, a *Brady* challenge need only show a reasonable probability that the totality of suppressed evidence would have created reasonable doubt. Where the State fails to comply with its obligation, the accused is denied a fair trial, and the sentence must be reversed. *Id*. at 421-22.

C. The Corley Letter and Expert Report Were Favorable to Petitioner

161. The Corley letter and handwriting expert report were favorable to Mr. Wilson at the penalty phase and sentencing, and thus constituted exculpatory material under the terms of *Brady*.

162. As United States Magistrate Judge Charles S. Coody stated, in his Order dated June 21, 2023, the frontside of the Corley letter was "broadly favorable" to Mr. Wilson because it "obviously undermines the State's theory that petitioner alone entered Walker's home and, when confronted by Walker, beat and strangled Walker to death." Doc. 79, p. 8. Refering to *Spirko v. Mitchell*, 368 F.3d 603, 611 (6th Cir. 2004) and *Jamison v. Collins*, 291 F.3d 380 (6th Cir. 2002), Judge Coody emphasized their "holding that withheld evidence was favorable to the defendant because, 'while it did not eliminate him as the perpetrator of the crime, it did

contradict the testimony of the chief prosecution witness' and 'undermine the prosecution's theory of how the murder was committed.'" Doc. 79, pp. 8-9. Judge Coody underlined that "Corley's account of her involvement in the murder of Walker directly and materially conflicts with the statement she provided to police, which was provided to the defense, and with the prosecution's theory of the case as revealed in the evidence and argument that was presented at petitioner's trial." Doc. 79, p. 3.

163. Judge Coody minutely explained, in that Order, how the frontside of the Corley letter is favorable to Petitioner David Wilson:

> To review: the grand jury of Houston County charged that petitioner "did intentionally cause the death of DEWEY WALKER by HITTING DEWEY WALKER WITH A BAT AND CHOKING DEWEY WALKER WITH AN EXTENSION CORD[.]" Doc. 76-1 at PDF 34, Bates 34 (capitalization in original). As was described in the District Judge's order, at trial the prosecution introduced evidence that Walker was repeatedly and severely beaten with a baseball bat, causing devastating injuries that could not have been caused by the single blow petitioner claimed to have struck against Walker. The prosecution even introduced evidence that Walker continued to breathe for hours after he was attacked by petitioner, his lungs filling with blood over that time, notwithstanding petitioner's admission that he strangled Walker for up to six minutes with an extension cord. See Doc. 76-9 at PDF 45, Bates 1652 (testimony of the medical examiner). A juror could reasonably infer from such evidence that it was the progressive deterioration in Walker's condition caused by the beating he endured, including multiple skull fractures and broken bones in his chest, sternum, and ribs, rather than any momentary constriction of his airways, that ultimately resulted in his hours of suffering and eventual death.

The prosecution did not introduce direct evidence that petitioner specifically inflicted these many injuries with a baseball bat. Rather, it presented petitioner's statement that he struck Walker one time and said nothing of Corley's claim to have struck Walker with a bat until he fell. In essence, therefore, the prosecution proved to the jury that a severe beating occurred and argued that the jury should disbelieve petitioner's claim that he struck Walker only once with a bat. And, as was discussed in the previous order, the prosecution repeatedly emphasized its contention that petitioner delivered the beating in its closing arguments in the guilt and penalty phases of the trial. The jury found petitioner guilty as charged in the indictment and recommended, by a vote of 10-2, that he be sentenced to death. Doc. 76-10 at PDF 165, Bates 1974.

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.

164. Judge Coody added another element favorable to the defense:

> Corley's reference in her letter to "sex adventures" in Walker's home, which is not referenced in the previously disclosed police reports, is telling in this regard. Petitioner and Corley are known to have entered Walker's home unaccompanied, possibly several times over a period of days. Petitioner even argues that, had Corley's letter been known to the jury, "[a] reasonable juror could have concluded that David Wilson lied to the police to protect Kittie Corley, rather than to protect himself, and that Corley was the one who killed Mr. Walker." Doc. 75 at 13. The record suggests this premise—that petitioner sought to protect Corley—is not just idle speculation. At a hearing more than a year before trial, petitioner's attorneys sought to be withdrawn because of a conflict with petitioner. One of the appointed attorneys informed the trial court that she had "suspicions about a codefendant and a possible relationship [petitioner] has with that co-defendant that might be influencing his decision and influencing the reason why he doesn't want us to be his lawyer." Doc. 76-6 at PDF 23, Bates 1028.

Doc. 79, pp. 9-10, n.4.

165. Judge Coody also explained in detail, in his Order dated June 21, 2023, how the backside of the Corley letter was favorable to Mr. Wilson and could be used to his advantage:

[I]t is plausible that, had it been known to petitioner's trial counsel, Corley's involvement in another murder, coupled with her confession to substantially greater involvement in Walker's murder, would have presented avenues for further investigation for the defense in preparation for both the guilt and penalty phases of trial.

Such avenues might have included attacking the State's investigation of the Walker murder and/or impeachment of the State's lead investigator for the apparent decision to focus primarily on petitioner despite evidence that Corley was at the scene at the time of the murder, that she beat Walker with a bat, and that she was involved in another murder. First and foremost, the Corley letter disrupts "the State's narrative of the crime." *Bies v. Sheldon*, 775 F.3d 386, 398 (6th Cir. 2014). […] Minimally, Corley's possible involvement in another murder, coupled with her confession to beating Walker while he was alive, suggests that she should have been subject to greater scrutiny for her role in Walker's murder.

The defense also might have developed and presented evidence of petitioner's possibly lesser culpability relative to Corley. Armed with her letter, the defense might have called Corley to the stand and impeached her police statement, in which she did not admit striking Walker or even being present at the time of his attack, with her letter's claim that she beat walker with a bat "till he fell" because petitioner's effort to subdue Walker apparently was not succeeding. The defense might even have explored whether petitioner was being manipulated or dominated by Corley such that he chose to shield her from greater police scrutiny by implicating only himself in the physical confrontation that caused Walker's death. […] [E]vidence of Corley's apparent propensity to involve herself in murders, especially if the "backside" murder bears any similarity to the circumstances of the "frontside" murder, likely would be "advantageous" in a defense effort to apportion greater culpability onto Corley and away from petitioner.

In general, evidence probative of these guilt and punishment lines of investigation is "favorable" such that it falls within the reach of *Brady*. *See Kyles v. Whitley*, 514 U.S. 419, 442 n.13 (1995) (evidence that police informant, and possible suspect, was involved in criminal activity similar to that for which defendant was convicted constituted "*Brady* evidence on which the defense could have attacked the

> investigation as shoddy"); *id*. at 445-449 (defense could have used non-testifying police informant's suppressed statements to challenge "the reliability of the investigation" and "laid the foundation for a vigorous argument that the police had been guilty of negligence").

Doc. 79, pp. 8-10. *See*, *e.g.*, *Kyles,* 514 U.S. at 446‑447 (finding that undisclosed *Brady* material could have been used to attack "the thoroughness and even the good faith of the investigation"); *Stano v. Dugger*, 901 F.2d 898, 903 (11th Cir. 1990), and cases cited together with *Stano* in paragraph 213 and 218 *infra*.

166. United States District Judge W. Keith Watkins, in his order dated March 27, 2023, expressly reiterated Magistrate Judge Coody's statement that the Corley letter was favorable and exculpatory evidence that should have been produced under *Brady*: "At the hearing on the first motion to disclose, the Magistrate Judge expressed his unequivocal belief that the Corley letter, as described in the pleadings, is exculpatory: 'I think you're right in the sense this obviously was exculpatory material which should have been turned over.' Doc. 42 at 11:16-18." Doc. 67, p. 16 n.4.

D. The Corley Letter Was Suppressed by the State of Alabama for Over 19 Years

167. It took two federal court orders compelling discovery (Doc. 67 and Doc. 79) for the State of Alabama to produce the Corley letter (frontside and backside) to Mr. Wilson, and another federal court order requiring certification (Doc. 83), for the

State of Alabama to produce some of the downstream evidence, including two police interrogations of Kittie Corley from 2005.

168. During this time, Respondent repeatedly stated to state and federal courts that the Corley letter was not favorable, nor exculpatory, and did not need to be produced under *Brady*. *See*, *e.g.*, Doc. 33 at p. 1 (Corley letter was a "non-exculpatory document"); Doc. 42 at p. 21 ("No, Your Honor, we're not [agreeing the Corley letter is excupatory]. Having seen the letter myself"); Doc. 64 at p. 8 ("the Corley letter is not exculpatory"); Doc. 76-30 at PDF 82-83, Bates 5129-5130 ("It's just an unsworn document that was produced at the behest of another inmate… it was produced in the hopes of obtaining an attorney… This is a document allegedly written in the hopes of finding a lawyer. So it's not a clear admission against any kind of interest. It's a – it's a writing in furtherance of her interest.")

169. The State of Alabama only produced the Corley letter to Mr. Wilson under federal court order on March 31, 2023 (frontside) and June 28, 2023 (backside), which was over nineteen years after the Corley letter was written and obtained by the State of Alabama. The State of Aabama only produced the four pieces of downstream, fruit-of-the-hidden-tree evidence on December 7, 2023. Doc. 89-7.

170. Since pre-trial proceedings, counsel for Mr. Wilson repeatedly requested all statements by Kittie Corley.

1. Defense counsel requested all Corley statements for decades.

171. Since the very beginning of this capital case, the State of Alabama was under a binding court order requiring the production of exculpatory evidence. The very first docket entry in Mr. Wilson's capital case, dated July 27, 2004, is a reciprocal discovery order entered by the state trial court directing the prosecutor to "make any exculpatory materials available to the defense." Doc 76-1 at PDF 15, Bates 15 ("Reciprocal Discovery Order"). The Reciprocal Discovery Order specifically states:

> Within 14 days of this order, the State and Defendant will make available for inspection and copying all materials discoverable under the Alabama Rules of Criminal Procedure. In addition the State will make any exculpatory materials available to the defense. The State will make its materials available at the District Attorney's office and the defense will do likewise at defense counsel's office.

172. Thus, at the time that the State obtained the Corley letter on August 31, 2004, the State of Alabama was already under a court order directing the prosecution to "make any exculpatory materials available to the defense." *Id*.

173. From that date forward, counsel for Mr. Wilson or Mr. Wilson *pro se* filed over a dozen *Brady* motions specifically requesting statements by the co-defendant Kittie Corley and/or specifically requesting the Corley letter.

174. On March 1, 2007, prior to trial, counsel for Mr. Wilson filed a *Brady* motion with a specific request for any and all statements by the co-defendants, which covered Kittie Corley and the Corley letter. Doc. 76-1 at PDF 132-144, Bates 132-

144 ("Motion for Discovery of Prosecution Files, Records, and Information Necessary to a Fair Trial"). This motion specifically requested "Statements of Co-conspirators, Co-defendants, and Accomplices." *Id*. at Bates 135.

175. Four days later, on March 5, 2007, the trial court effectively granted the *Brady* motion by referencing its earlier "Reciprocal Discovery Order," entered on July 27, 2004, which ordered the prosecutor to make all exculpatory materials available to the defense. Doc. 76-1 at PDF 25, Bates 25.

176. Seven months later, on October 4, 2007, defense counsel filed a "Motion to Reconsider Denial of Defendant's Motions and Motion for Hearing on Those Motions Denied Without a Hearing," which specifically included in the list of motions to reconsider, just in case, the "Motion for Discovery of Prosecution Files, Records, and Information" filed on March 1, 2007. Doc. 76-2 at PDF 160, Bates 360.

177. At a motions and suppression hearing on October 9, 2007, defense counsel reargued the motions, including, just in case, the "Motion for Discovery of Prosecution Files, Records, and Information" filed on March 1, 2007. Doc. 76-6 at PDF 117-118, Bates 1122-1123.

178. As Judge Watkins held in his Memorandum Opinion and Order, "It is inarguable that petitioner specifically requested, prior to trial, the disclosure of the precise material that would include the Corley letter." Doc. 67, p. 8 n.3.

179. Despite all those requests for production and the binding "Reciprocal Discovery Order" entered on July 27, 2004, the State of Alabama did not produce the Corley letter or the downstream evidence, including police interrogations of Kittie Corley, until 2023.

180. The prosecution did produce to defense counsel in 2007 the physical evidence that was going to be used at trial—jeans, speakers, baseball hat, blood swabs, etc. *See* Doc. 76-6 at PDF 43, Bates 1048; Doc. 76-6 at PDF 105, Bates 1110; Doc. 76-24 at PDF 21, Bates 3862. But the prosecution did not produce the Corley letter until 2023.

181. Prior to undersigned counsel being appointed to represent Mr. Wilson in January 2020, Mr. Wilson's Rule 32 attorneys and Mr. Wilson *pro se* filed another four *Brady* motions specifically asking for the Corley letter and/or any Corley statements. These included the following:

- Motion for Discovery of Law Enforcement and Prosecution Files, Records, and Information (specifically requesting Kittie Corley's confession on pages 6, 7, 8, et seq. of the motion), dated September 7, 2016. Doc. 76-28 at PDF 4-26, Bates 4649- 4671.
- Response to State's Motion to Withhold Ruling on Motion for Discovery (requesting previous discovery motion be granted), dated October 4, 2016. Doc. 76-28 at PDF 82-84, Bates 4727-4729.
- Hearing on Rule 32 Motions, at which Rule 32 counsel specifically states: "And we're entitled to the [Kittie Corley] letter. We still don't have the letter," dated November 8, 2016. Doc. 76-30 at PDF 114, Bates 5161.
- *Pro se* Letter by Mr. Wilson to this Court asking for the Kittie Corley letter, stating that "[I]f this issue was litigated in the first place like I tried to have done I would have more than likely received an evidentiary hearing and

> obtained the newly discovered evidence which is in the Brady issue that was filed," dated June 13, 2019. Doc. 15 at p. 2.

182. Undersigned counsel entered an appearance in Mr. Wilson's federal habeas corpus proceedings on November 20, 2019, stating that he would take the appointment only if the Corley letter was produced, effectively filing his first *Brady* motion on Mr. Wilson's behalf. *See* Doc. 19.

183. Undersigned counsel once again requested the production of the Corley letter in Petitioner's "Reply to Respondent's Response," filed on December 29, 2019 (Doc. 36), and at the hearing held on January 23, 2020, before Magistrate Judge Coody in this case. *See* Doc. 42.

184. Undersigned counsel filed a "Renewed Motion for Disclosure of Ongoing *Brady* Material" on November 7, 2022, specifically requesting the Corley letter for what was effectively the eleventh time since proceedings against Mr. Wilson began in 2004. *See* Doc. 60.

185. This Court granted Petitioner's *Brady* motion on March 27, 2023, and ordered the State of Alabama to turn over the Kittie Corley letter. Doc. 67.

186. However, on March 31, 2023, Respondent produced only the frontside of the Corley letter. Doc. 69-2; Appendices A and B.

187. Even after disclosing the front side of the Corley letter, Respondent continued to maintain that both sides of the letter were "neither exculpatory nor

material as required for *Brady* purposes." Doc. 73 at p. 1 and p. 4. In fact, Respondent went so far as to claim that, "to the extent the letter has any materiality at all, it is *inculpatory*." Doc. 73 at ¶ 8 (emphasis added).

188. Petitioner moved for disclosure of the backside of the Kittie Corley letter on the same day, March 31, 2023, in Petitioner's third *Brady* motion. Doc. 70 ("Motion for Full Disclosure of the Kittie Corley Letter and For a Hearing at the Court's Earliest Convenience.").

189. The Court granted Petitioner's third *Brady* motion on June 21, 2023, and compelled production of the backside of the Corley letter. Doc. 79.

190. After Respondent, under court order, produced the backside of the Corley letter on June 28, 2023, at 11:54 PM (Doc. 81-1, backside of Corley letter; and Doc. 81-2, email from Richard D. Anderson to Bernard E. Harcourt; *see* Appendices C and D), Petitioner filed his fourth and fifth *Brady* motions to this Court for further exculpatory material. Doc. 81 and Doc. 100.

191. This Court entered an order compelling Respondent to "certify in his response that no covered material exists." Doc. 83.

192. This ultimately led the State of Alabama to produce additional police interrogations of Kittie Corley, the "Dearest David" letter, and other downstream evidence. *See* Appendices E, F, G, H, I, J, K, and L.

193. After more than 19 years and practically as many *Brady* motions, Petitioner David Wilson finally received the Corley letter and downstream evidence under federal court order. Doc. 67; Doc. 79; Doc. 83. Those should have been produced to Petitioner the minute that the State of Alabama obtained them, as required under *Brady*. Accordingly, the Corley letter was suppressed.

194. As prior counsel noted in Mr. Wilson's original habeas corpus petition, the handwriting expert report was also suppressed. Unlike the Corley letter, the expert report was not mentioned in the police report or anywhere else. It 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.

2. *A mention in a police report does not satisfy* Brady

195. Respondent contends that a police report mentions the Corley letter, that the police report was produced to defense counsel, and that this satisfies the production requirement under *Brady*.[5] Doc. 56, at p. 12-13 (Answer to Petition); Doc. 64, at p. 6, n.2 (Response to Motion). That is incorrect as a matter of law for several reasons. A mention of exculpatory evidence in a police report does not satisfy the production requirement of *Brady*.

[5] There is no mention of the handwriting expert report in the police report, and therefore Respondent cannot argue that Mr. Wilson knew about this piece of evidence.

196. First, 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. Mr. Wilson's lengthy, elaborate, 242-page Rule 32 petition was dismissed on the pleadings, with prejudice, for failure to plead sufficient facts, without any factual development. *See* Doc. 76-28 at PDF 130, Bates 4775 (Circuit Court); Doc. 76-33 at PDF 22, Bates (ACCA).

197. Second, even if it were established as a factual matter 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 infra*, Claim II, paragraph 360 *et seq*.

198. 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. Given that Mr. Hedeen did not even give a closing argument at the guilt phase of the capital trial (*see infra*, Claim IV, paragraph 634), there is no basis to assume that he received or read the police report.

199. Third, even assuming that Mr. Hedeen received the police report, production of the police report does not absolve the state of its *Brady* duty to produce the Corley letter itself. A prosecutor does not comply with its duty to disclose simply by informing defense counsel that exculpatory evidence exists. Under *Brady*, Mr. Wilson was entitled to the Corley letter itself, not just a mention of it in other reports.

200. The Supreme Court has made clear that the prosecution may not play hide and seek with favorable evidence that it is 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 does 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.").

201. As Judge Watkins stated in the Memorandum Opinion and Order, "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.

202. 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 infra*, paragraph 207 *et seq.*

203. For the foregoing reasons, the mention of the Corley letter in the police report does not satisfy *Brady*'s production requirements. Thus, the Corley letter was suppressed.

E. The Corley Letter and Expert Report Were Material and Their Withholding Prejudiced Mr. Wilson

204. The Corley letter and handwriting expert report were material evidence under *Brady* and their withholding by the State of Alabama caused prejudice to Mr. Wilson, because the cumulative effect of the Corley letter and the downstream fruit-of-the-hidden-tree evidence lessened Mr. Wilson's culpability and increased the responsibility and culpability of Kittie Corley, thus amounting to mitigation evidence; rebutted the "heinous, atrocious, and cruel" aggravating circumstance, one of the most powerful aggravators; and created residual doubt that it was Kittie Corley rather than Mr. Wilson who beat Mr. Walker to death. Even if the jury had convicted Mr. Wilson of capital murder at the guilt phase, the Corley letter, expert report, and downstream, fruit-of-the-hidden-tree evidence would have weighed heavily as mitigating evidence and would have rebutted the HAC aggravating circumstance.

205. In what follows, Petitioner will review the materiality of each piece of direct and downstream evidence. The analysis of materiality under *Brady* requires a

collective consideration of all the direct and downstream evidence, not item by item. As the Supreme Court stated in *Kyles v. Whitley*, 514 U.S. 419, 436 (1995), an "aspect of *Bagley* materiality to be stressed here is its definition in terms of suppressed evidence considered collectively, not item by item." *See also*, *e.g.*, *Rodriguez v. Secretary, Florida Department of Corrections*, 756 F.3d 1277, 1303 (11th Cir. 2014) ("We consider the materiality of the evidence withheld 'collectively, not item by item'", citing *Kyles*); *Ponticelli v. Secretary, Florida Department of Corrections*, 690 F.3d 1271, 1294 (11th Cir. 2012); *Allen v. Secretary, Florida Department of Corrections*, 611 F.3d 740, 747-50 (11th Cir. 2010); *Smith v. Secretary, Department of Corrections*, 572 F.3d 1327, 1334, 1347-48 (2009). Nevertheless, for purposes of clarity, Petitioner will go over all of the pieces of direct and downsteam evidence in order:

1. The materiality of the frontside of the Corley letter

206. The frontside of the Corley letter is material evidence under *Brady* because it contains a confession by Kittie Corley to the murder of Mr. Walker and to greater involvement in the planned burglary and robbery, and indicates as well that she was involved in a second murder. It is strong evidence of Kittie Corley's greater culpability for the murder of Mr. Dewey Walker. *See* Appendix A and B.

207. On the frontside of the letter, Corley writes:

- that she alone, and not the Petitioner, bludgeoned the victim, Mr. Dewey Walker, to death with a baseball bat;
- that she alone disposed of the baseball bat by throwing it in a trash dumpster;
- that she had 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, and some kind of personal relationship with the victim that allowed her to refer to him by his first name;
- that she alone is the one who "pawned everything" that was stolen from Mr. Walker's home; and
- that she was involved in another murder.

208. The frontside of the Corley letter (as well as the backside and the downstream evidence, *see infra*) constitutes classic impeachment evidence regarding the prosecution's lead trial witness, Sgt. Tony Luker, and would have served as the basis for calling Kittie Corley as an adverse witness during the defense case. *See United States v. Bagley*, 473 U.S. 667 (1985) (clarifying that *impeachment* evidence is both material and favorable to the accused under *Brady*).

209. At trial, the prosecution called Sgt. Luker as the lead witness to recount David Wilson's admission of involvement in his police statement. During direct examination, investigator Luker testified that he had interviewed Corley, who gave a police statement. This testimony about Corley came immediately before Luker was asked about the police interrogation of Mr. Wilson. Doc. 76-8 at PDF 26, Bates 1432. Luker testified:

> Q. [District Attorney Doug Valeska]: Did you talk to Catherine Corley?

A. [Sgt. Luker]: Yes, sir.

Q. And then you talked to Wilson?

A. That's correct.

Doc. 76-8 at PDF 26, Bates 1432.

210. Later, Sgt. Luker effectively told the jury that what Kittie Corley said in her police statement was totally consistent with what David Wilson had said in his. The prosecutor asked Sgt. Luker why he had not ordered DNA testing in the investigation, and Luker responded: "We had Mr. Wilson's confession, as well as the other co-defendants saying the same thing." Doc. 76-8 at PDF 39, Bates 1445.

211. Those lines of questioning and response communicated to the jury that Kittie Corley did not tell Sgt. Luker anything inconsistent with Mr. Wilson's police statement. The lines of questioning that the prosecutor's direct examination took are a standard prosecution device for suggesting to the jury that a hearsay declarant alerted the authorities to the defendant as the perpetrator of a crime under investigation. *See, e.g.*, *United States v. Kizzee*, 877 F.3d 650, 655, 659 (5th Cir. 2017); *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.")

212. Those lines of questioning gave an opening to defense counsel to impeach Sgt. Luker and bring in all the incriminating evidence of Corley's confession to the Walker murder from the frontside of the Corley letter (and her

involvement in the Hatfield murder, *see infra* paragraph 261 *et seq.*). Armed with the Corley letter and downstream evidence, defense counsel would have engaged in a classic form of impeachment: "*At any time during the course of your investigation, Sgt. Luker, did you ever come across evidence that another person beat Dewey Walker to death with a bat, disposed of the murder weapon in a dumpster, and pawned his stolen property? Did you ever come across any information that this person was involved in a second murder as well?*" And so on. With this impeachment evidence, defense counsel would have cast doubt on the prosecution's theory that David Wilson was the one who bludgeoned Dewey Walker to death.

213. Just as the Supreme Court found in *Kyles*, defense would also have cross-examined Sgt. Luker to discredit the caliber of the investigation and "so have attacked the reliability of the investigation in failing even to consider [Corley's] possible guilt." *Kyles* 514 U.S. at 445-46 (citing *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 new trial of prisoner convicted in Louisiana state court because withheld *Brady* evidence "carried within it the potential ... for the ... discrediting ... of the police methods employed in assembling the case")).

214. Moreover, as Magistrate Judge Coody ruled, "defense counsel might have called Corley to the stand and impeached her police statement, in which she did not admit to striking Walker or to even being present at the time of the attack. . . ." Doc. 79, p. 9.

215. Just as the Supreme Court found in *Kyles v. Whitley*, 514 U.S. 419, 445-46 (1995), if defense counsel had called Kittie Corley as an adverse witness, she would not have said anything of any significance without being trapped by her inconsistencies. The Corley letter directly contradicts what Kittie Corley told the police in her statement upon arrest. In the Corley letter, she takes full responsibility for the over 100 contusions and abrasions on Mr. Walker's body—all of which the prosecutor attributed to David Wilson. She also confesses to being involved in a second murder. As Judge Watkins found, "The jury was not told that an accomplice of petitioner's who admitted entering Walker's home also claimed that she beat the victim with a baseball bat while he was alive." Doc. 67, p. 22. That is the most material evidence possible.

216. Defense attorneys will often call a co-perpetrator, under circumstances like this, as an adverse defense witness and impeach them. Under certain circumstances, counsel will aim to have the adverse witness invoke their Fifth Amendment privilege against self-incrimination and thereby rebut the inference that they were not involved. Had defense counsel called Kittie Corley to the stand at

David Wilson's trial, he would have rebutted the prosecutor's implication that Corley's statement to the police was consistent with the State's case, and impeached her testimony with her prior inconsistent statement in the Corley letter if she testified to facts that hurt the defense. Defense counsel would have then argued that Corley had a motive to mislead the jury (namely, her relatively greater criminal responsibility) by falsely casting blame for Dewey Walker's death on David Wilson. *See, e.g., State v. Whitt*, 220 W. Va. 685, 688-89, 696, 649 S.E.2d 258, 260-61, 269 (2007). This common impeachment practice is what underlies the analysis of materiality in the *Kyles* opinion. *See Kyles v. Whitley*, 514 U.S. at 446.

217. In addition, the Corley letter was material to the defense because it undermined the reliability of the investigation. As this Court held in its decision on June 21, 2023, it likely "suggests that [Corley] should have been subject to greater scrutiny for her role in Walker's murder." Doc. 79 at p. 9. This is evidence which would have allowed defense counsel to have "attacked the reliability of the investigation" and "attacked the investigation as shoddy." *See* Doc. 79 at p. 10 (citing *Kyles v. Whitley*, 514 U.S. 419 (1995)).

218. Had the State of Alabama turned over the Corley letter (and the downstream evidence), the defense would have successfully attacked the credibility of the investigation of the Walker case. *See Stano v. Dugger*, 901 F.2d 898, 903 (11th Cir. 1990) (evidence of a dishonest investigation is considered material for

Brady purposes); *Lindsey v. King*, 769 F.2d 1034, 1042–43 (5th Cir. 1985) (evidence that discredits the state's investigation is material); and *see, e.g., Floyd v. Vannoy*, 894 F.3d 143, 165 (5th Cir. 2018); *Dennis v. Secretary, Pennsylvania Department of Corrections*, 834 F.3d 263, 302 (3d Cir. 2016) (en banc); *Juniper v. Zook*, 876 F.3d 551, 570-71 (4th Cir. 2017); *Gumm v. Mitchell*, 775 F.3d 345, 274-75 (6th Cir. 2014); *Mendez v. Artuz*, 303 F.3d. 411, 416 (2d Cir. 2002); *United States v. Hannah*, 55 F.3d 1456, 1460 (9th Cir. 1995); *Bowen v. Maynard*, 799 F.2d 593, 613 (10th Cir. 1986).

219. On cross-examination of Sgt. Luker, defense counsel would have emphasized the misdirected and shabby investigation. There is no evidence in the record that Sgt. Luker interrogated Kittie Corley after receiving the Corley letter. There is no indication in the police report of a subsequent interrogation. Doc. 76-24 at PDF 17, Bates 3858 (police report of investigations ends with Tony Luker's comparison of the Corley letter and handwritten documents seized from Ms. Corley's cell and his conclusion that the two documents were both written by Ms. Corley, with no indication of a subsequent interrogation of Ms. Corley). There is no *Miranda* rights waiver form or invocation form signed by Corley in the record after the date of the Corley letter. There is nothing in the police report indicating that Luker investigated Corley's confession to beating Mr. Walker with a bat. An effective cross-examination of Sgt. Luker would have eviscerated the State's case.

220. Not only would the Corley letter, considered cumulatively with all the other downstream evidence showing that Corley was involved in the murder of C.J. Hatfield, have served as mitigation and as evidence of a shabby investigation, it would have served to rebut the HAC aggravator and, thus, served to "undermine confidence in the outcome of the trial." *Kyles*, at 434, 115 S.Ct. 1555 (quoting *Bagley* at 678, 105 S.Ct. 3375).

221. At trial, during the examination of Sgt. Luker or of Kittie Corley if she had been called as an adverse witness, defense counsel would have created residual doubt among the jurors, which would have extended into the penalty phase. The Corley letter and the downstream evidence created a reasonable doubt and a residual doubt that Kittie Corley was the person who beat Mr. Walker to death, and not Mr. Wilson. As Judge Coody underscored in his opinion on June 21, 2023, "evidence of Corley's apparent propensity to involve herself in murders, especially if the 'backside' murder bears any similarity to the circumstances of the 'frontside' murder, likely would be 'advantageous' in a defense effort to apportion greater culpability onto Corley and away from petitioner." Doc. 79, at p. 10.

222. Residual doubt is a key reason jurors decline to vote for death. *See, e.g.*, *Lockhart v. McCree*, 476 U.S. 162, 181 (1986) ("[A]s several courts have observed, jurors who decide both guilt and penalty are likely to form residual doubts or 'whimsical' doubts . . . about the evidence so as to bend them to decide against the

death penalty. Such residual doubt has been recognized as an extremely effective argument for defendants in capital cases" (citation omitted)); *Parker v. Sec'y for Dep't of Corr.*, 331 F.3d 764, 787-88 (11th Cir. 2003) ("[c]reating lingering or residual doubt over a defendant's guilt is not only a reasonable strategy, but is perhaps the most effective strategy to employ at sentencing" (citations omitted); *Tarver v. Hopper*, 169 F.3d 710, 715 (11th Cir. 1999) ("[c]reating lingering doubt has been recognized as an effective strategy for avoiding the death penalty"); *Magill v. Dugger*, 824 F.2d 879, 889 (11th Cir. 1987) ("Lingering doubts as to whether the murder was premeditated can be an important factor when the jurors consider whether to recommend the death penalty"); *Johnson v. Wainwright*, 806 F.2d 1479, 1482 (11th Cir. 1986) (assuming that "lingering doubt is properly considered a nonstatutory mitigating factor" which the jury cannot be precluded from considering under the doctrine of *Lockett v. Ohio*, 438 U.S. 586 (1978)); *King v. Strickland*, 748 F.2d 1462, 1464 (11th Cir. 1984) (doubts about defendant's guilt may rise "to a sufficient level that, though not enough to defeat conviction, [they] might convince a jury and a court that the ultimate penalty should not be exacted, lest a mistake may have been made"); *Smith v. Wainwright*, 741 F.2d 1248, 1255 (11th Cir. 1984) ("The fact that jurors have determined guilt beyond a reasonable doubt does not necessarily mean that no juror entertained *any* doubt whatsoever. There may be no *reasonable* doubt – doubt based on reason – and yet some *genuine* doubt exists. It may reflect a

mere possibility; it may be but the whimsy of one juror or several. Yet this whimsical doubt – this absence of absolute certainty – can be real" (citation omitted) (emphasis in original)); *Smith v. Balkcom*, 660 F.2d 573, 581 n.23 (5th Cir. Unit B 1981) ("The statutory scheme for capital sentencing is designed to channel the jury's discretion, not to eliminate all interaction among the jurors in which one juror attempts to convince others, based perhaps only on the presence of whimsical doubt, to vote against the death penalty"); *Johnson v. Kemp*, 615 F. Supp. 355, 364 (S.D. Ga. 1985) ("By bolstering the exculpatory evidence, the mitigation evidence would have created a discernible degree of additional doubt about Johnson's culpability for the murder. The Court cannot say with confidence that the additional *quantum of doubt* would not have affected the sentence which petitioner received") (emphasis added).

223. In this case specifically, the material in the Corley letter that defense counsel would have elicited at trial went directly to the matter of residual doubt concerning the most important question at trial, namely who beat Mr. Walker with the baseball bat?

224. Doug Valeska did everything in his power during both the guilt and penalty phases to convince the jury that it was Mr. Wilson who beat Mr. Walker to death with a bat and that Mr. Walker died as a result of the blunt force trauma of the battery, rather than of the strangulation. Mr. Valeska was trying to get the jury and the sentencing judge to find the HAC aggravator at the penalty phase. As a result,

he did not want the jury to believe that Mr. Walker died quickly from suffocation. He did everything possible to lead the pathologist to say that Mr. Walker was not killed as a result of the neck injuries. Valeska's theory at trial was that the murder involved long drawn-out torture, where Mr. Walker was *first* choked *then* beaten repeatedly until he died, as evidenced by his examination of the pathologist:

> Q: And so, in other words, if I'm wrong—and correct me, or I apologize—those marks alone [the ligature marks from strangulation]—because you found other injuries and contusions and bruises to his body—didn't just cause his death, because there were so many others in your opinion?
>
> A. They could very well have by themselves. Did they? They certainly contributed in my opinion.
>
> Q. And I apologize. The question I should have asked you is, then, all the other injuries—if he received the ligature marks and they caused the death, all the other injuries would have been after he was dead, postmortem. That didn't happen. *He was still alive on all of them. Correct?*
>
> A. Yes, he was.
>
> Q. Okay. And I apologize if I asked—but *that's what I wanted get you to ascertain to the jury.*

Doc. 76-9 at PDF 61-62, Bates 1668-69 (emphasis added).

225. Moreover, during that guilt-phase closing argument, Valeska continuously attacked Mr. Wilson's statement to the police that he did not mean to hit Mr. Walker in the head once, arguing that the number of injuries refuted his statement:

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

226. This point was reiterated at the penalty phase, in which the State of Alabama sought application of the "heinous, atrocious, and cruel" ("HAC") aggravating circumstance. The prosecutor re-emphasized the state's theory of the case that the blunt force trauma was all inflicted by Mr. Wilson as proof of the HAC aggravator:

> You heard Dr. Enstice describe to you the number of injuries that the victim in this case suffered through, 114, I believe, is what she said, different injuries . . .
>
> I don't think that any of you, when you see the pictures and after you have heard the testimony from the doctor, will believe that this was not especially heinous, atrocious and cruel.

Doc. 76-10 at PDF 110-111, Bates 1919-1920.

227. And again, at the sentencing hearing before the judge, the number of injuries was given as a justification for a sentence of death. Doc. 76-10 at PDF 176-177, Bates 1985-1986.

228. By contrast, Petitioner's entire defense at trial was that he was not the person who bludgeoned Mr. Walker repeatedly with the bat. In his police statement, Mr. Wilson told the police that he tried to subdue Mr. Walker with an electric cord and mistakenly hit Mr. Walker once with the bat, but he consistently maintained that he did not commit the multiple fatal batteries with the bat. The only other person who entered Mr. Dewey's home was Kittie Corley. She told the police that she had stepped through a hole in the sheet rock wall into Walker's bedroom, walked from the bedroom to the living area, and saw Mr. Walker's body in a different room. Doc. 76-24 at PDF 27-28, Bates 3868-3869 (Catherine Corley Statement to Police). So everything turned on who beat Mr. Walker to death with the bat. Petitioner denied doing so and told the police:

> 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 know what was up with her.
>
> . . .
>
> 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. 67 at p. 5.

229. The evidence presented at Mr. Wilson's trial never resolved the inconsistency between, on the one hand, Mr. Wilson's statement to the police that he did not beat Mr. Walker to death and, on the other hand, the 114 blows that were inflicted on Mr. Walker's body.

230. Armed with the Corley letter (and downstream evidence), defense counsel would have shown through Sgt. Luker or Kittie Corley that it was Corley who—after being involved in a prior murder just a month before—actually beat Mr. Walker with the baseball bat and killed him.

231. As the Eleventh Circuit held in *Guzman v. Secretary, Department of Corrections*, 663 F.3d 1336, 1353-54 (11th Cir. 2011), "In determining the impact of the State's action in suppressing favorable evidence, courts should consider how the defense's knowledge of the withheld information would have impacted not just the evidence presented at trial, but also the strategies, tactics, and defenses that the defense could have developed and presented to the trier of fact."

232. The materiality of the frontside of the Corley letter is clear upon reviewing all the individual elements on the frontside of the letter:

Kittie Corley Confessed to Beating Dewey Walker with the Bat

233. First, on the frontside of her letter, Kittie Corley takes responsibility for bludgeoning Mr. Dewey Walker to death with a baseball bat. The way she writes her confession, Corley says that she was the only one who hit Mr. Walker with the baseball bat. In other words, she was the one who inflicted the fatal contusions and broken bones. Corley writes: "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." Appendix A and B. Here Corley is saying that David was not able to subdue the victim with the extension cord, and that she was the one who perpetrated the battery. She is taking sole responsibility for beating Mr. Walker to death with the bat.[6]

234. Defense counsel would have used this to show that Corley's admission directly contradicts Corley's statement given to the police. In her police interrogation, she claimed that:

[6] Incidentally, even though this does not matter because the Kittie Corley letter was suppressed and not produced in response to multiple *Brady* motions, it is important to emphasize that her confession letter is far more damning on this point than the simple reference in the police report that she "hit Mr. Walker with a baseball bat until he fell." Doc. 73, Exhibit A. In the confessional letter, Corley takes full responsibility for being the only one who battered Mr. Dewey Walker. The reference in the police report could have been consistent with David Wilson having administered all the contusions and broken bones. The confessional letter, by contrast, is totally inconsistent with that, insofar as she attributes to Mr. Wilson only the choking.

- the first time that she saw Mr. Walker in his home, after breaking in, he was already on the floor unconscious, and she "looked around the corner and… saw a left leg with a sock." (Doc. 76-24 at PDF 28, Bates 3869); and that
- David Wilson told her "that Dewey had walked in and he, it had scared him. And he got his, a bat I [Corley] don't know if he had it with him he had to cause he said it was his favorite one. And he hit him." (Doc. 76-24 at PDF 29, Bates 3870)

235. Had defense counsel called Corley as an adverse witness, she would have been trapped by these inconsistencies.

236. Defense counsel would also have crossed-examined the lead police investigator, Sgt. Luker, in a way that would have completely undermined the state's theory of the case against David Wilson at trial, in which Valeska asserted that David alone inflicted Mr. Walker's injuries. Doc. 76-7 at PDF 139, Bates 1344; Doc. 76-7 at PDF 141-142, Bates 1346-1347. During the penalty phase, Valeska made the same argument about David Wilson inflicting the blows with the bat, saying that "David Wilson continued to inflict those injuries upon Mr. Walker while he was still alive." Doc. 76-10 at PDF 40, Bates 1849.

237. Valeska convinced the jury that it was David Wilson who inflicted the fatal blows, and the jury agreed. *See, e.g.*, *Wilson v. State*, 142 So. 3d 732, at 750 (Ala.Cr.App. 2010). However, with the evidence in the Kittie Corley letter, a reasonable juror would have found that it was Kittie Corley, not David Wilson, who administered the beating that resulted in Dewey Walker's death.

238. There are, naturally, some inconsistencies between Kittie Corley's confessional letter, her police statement, and the other evidence presented at trial. Where there are inconsistencies, it is up to the jury to decide what to believe. On the full record of this case, with the Corley letter (and downstream evidence, *see infra*), a reasonable juror would have found that David Wilson was trying to protect Kittie Corley and took the rap for the murder during his police interrogation, but that Kittie Corley accompanied David into the home of Dewey Walker and was the one who administered the bat blows that caused his death.

239. For all these reasons, the Corley letter (and downstream evidence) were material evidence under a *Brady* analysis. *See Clemmons v. Delo*, 124 F.3d 944, 947 (8th Cir. 1997) (finding a *Brady* violation where the prosecution did not disclose a statement made to a state investigator who was a trial witness by an individual who was not called to testify, but who told the investigator that he was present at the scene of the crime, saw the crime committed, and identified the perpetrators in terms that excluded Clemmons; this statement was held material even though the investigator's notes relating it expressed the view that the declarant "did not make sense and further investigation reflects that . . . [his] statement is untrue"); *see also United States v. Kiszewski*, 877 F.2d 210 (2d Cir. 1989) (finding a *Brady* violation where evidence usable to impeach a police witness was not disclosed); *Jackson v. City of Cleveland*, 925 F.3d 793, 813-15 (6th Cir. 2019) (same); *Douglas v.*

Workman, 560 F.3d 1156 (10th Cir. 2009) (a co-defendant's confession is impeachment material to which the *Brady* rule clearly applies).

Kittie Corley Took Responsibility for the Stolen Property

240. Second, on the frontside of the Corley letter, Kittie Corley takes responsibility for pawning the property that was stolen from Mr. Walker's home, giving her a far greater role in the burglary. "I pawned everything we got, split the money 3 ways," she wrote. Appendix A and B.

241. Defense counsel would have shown, through cross-examination of Sgt. Luker, that this contradicts the state's case against David Wilson at trial, which made him primarily responsible for the burglary and stolen property. At trial, Valeska placed primary responsibility on David Wilson, telling the jury that, apart from the speakers and amplifier, it was David Wilson who pawned the stolen property. Doc. 76-7 at PDF 147, Bates 1352. Consistent with that argument, the Alabama Court of Criminal Appeals found that "According to Catherine Nicole Corley[,] a co-defendant[,] Wilson was to get half of the audio equipment from [Walker's] van because he had taken all of the chances in [the] burglary, theft and murder." *Wilson v. State*, 142 So. 3d 732, 765 (Ala. Crim. App. 2010); Doc. 87-18 at PDF 159, Bates 2777. Kittie Corley's confession to pawning the property and splitting the proceeds three ways presents a different story. A reasonable juror would have inferred that she had a far greater role in the burglary than Valeska suggested.

242. There were many inconsistencies at trial as to what happened to the audio equipment and the other property. Sgt. Luker testified at trial that they seized audio equipment from Michael Ray Jackson's home, as well as a baseball bat, black baseball hat, two basketballs, and some papers found near Mr. Walker's body with red stains. Doc. 76-6 at PDF 111, Bates 1116. Luker said that they returned to the victim's family the speakers and audio equipment that was seized from Jackson's home. *Id*.

243. There was audio equipment that the police seized from David Wilson's home, but it was not identified as having been stolen from Dewey Walker's house. Luker testified at trial that speakers were found at David Wilson's home when he executed a search warrant he obtained from Judge Mendheim. According to the return and inventory list from the search of Mr. Wilson's home, Luker recovered items including "1 Swiss Audio Crossover" and "2 Swiss Audio Speakers." Doc. 76-3 at PDF 22, Bates 424. Despite the apparently inculpatory nature of these items, and despite Luker's claim that there was no need to test any of the items (Doc. 76-6 at PDF 113, Bates 1118), no witness and no evidence identified the audio equipment that was taken from Mr. Wilson's home as items that he or his co-defendants had taken from the home of Mr. Walker. Doc. 76-8 at PDF 108-109, Bates 1514-1515.

244. David Wilson, in the portion of the police interrogation that was recorded, told the police that the stolen property was left at Matt Marsh's house, who

then disposed of it. Wilson said he did not know where most of the property ended up, because Marsh hid it somewhere or disposed of it in some way. Doc. 76-3 at PDF 132, Bates 534.

245. In her police statement, Kittie Corley said that David Wilson was the one who split the property among her, Matthew Marsh, Michael Ray Jackson, and himself. Doc. 76-24 at PDF 31, Bates 3872 ("David split it [the stolen property] between everybody. Matthew, for some reason ah, David handed the laptop to Matt. He said this is what you wanted. Ah, Michael picked up the camera and David said no you don't get the camera. Ah. David got the jersey. Matt got the baseball cap and the candy bar. Michael got the chocolate milk and the orange and black basketball.")

246. Also, in her police statement, Corley told officer Jason Devane that she and her codefendants were planning to give fifty percent of the stolen property to David Wilson. Doc. 76-24 at PDF 32, Bates 3873. In his application and affidavit for a search warrant, Officer Luker reiterated this claim by Corley. Doc. 76-3 at PDF 20, Bates 422. The Alabama Court of Criminal Appeals relied on this and quoted this passage in extenso in its opinion. *See Wilson v. State*, 142 So. 3d 732, 765 (Ala. Crim. App. 2010); Doc. 76-19 at PDF 161, Bates 2982.

247. By contrast, in her confessional letter, Kittie Corley said it was she who got rid of the property by pawning it. Appendix A and B.

248. Investigator Luker testified that the State never tested the evidence they seized. The reason that Luker gave for not testing the evidence was that "all of the defendants confessed to the murder of Dewey Walker." Doc. 76-6 at PDF 113, Bates 1118. But clearly even though they all confessed and gave statements, their statements regarding the property were contradictory. Because the evidence that was seized was not tested, there is no way of knowing whose fingerprints were all over the seized property—in other words, who was in charge of disposing of it.

249. Presented with all of this inconsistent information, defense counsel would have cross-examined Luker or called Corley as an adverse witness to demonstrate that there was evidence that Corley had a greater role in pawning the stolen property and greater responsibility for the theft of property. Defense counsel would also have argued that the investigation was shabby and did not properly investigate the culpability regarding the burglary and robbery. A reasonable juror could have believed from the Corley letter that she had played a far greater role in disposing of the stolen property that was not retrieved. A reasonable juror could have believed that Kittie Corley felt she was the principal actor and primarily in charge of fencing the stolen property. If the defense had engaged in these lines of questioning, Kittie Corley's criminal responsibility would have increased, and thus, the information was material to the defense.

Kittie Corley Took Responsibility for the Bat

250. Third, on the frontside of the Corley letter, Kittie Corley takes responsibility for the bat she used to attack Dewey Walker. In her confessional letter, Corley writes, "I threw baseball bat in trash dumpster." Appendix A and B.

251. This too indicates a far greater role in the death of Dewey Walker than what Valeska argued at trial.

252. Defense counsel would have used this evidence at trial to show that it contradicted what Corley told the police. Doc. 76-24 at PDF 32, Bates 3873.

253. Through a cross-examination of Luker or an adverse-witness examination of Corley, defense counsel would have used this information to show Corley's greater involvement in the murder and to impugn the caliber of the investigation.

254. The jury was presented with conflicting evidence about the circumstances surrounding one or more bats. A bat was introduced at trial as one of the trial exhibits, Exhibit #18. Doc. 76-6 at PDF 147, Bates 1152. That bat was marked "4-J," which means that it was seized from Michael Ray Jackson's car, hence the "J" designation. Doc. 76-6 at PDF 111, Bates 1116. In his police interrogation, which was consulted during the prosecution's direct examination of Luker in front of the jury (Doc. 76-8 at PDF 161, Bates 1567), Michael Ray Jackson stated that the bat was in his car and was retrieved from there. In his police interrogation, David

Wilson identified a bat that was later introduced at trial as Exhibit #18. Doc. 76-3 at PDF 118, Bates 520. In the Corley letter, Kittie Corley said she disposed of the bat by throwing it in a dumpster. As Respondent states, "if the letter is to be believed, there were two bats at the scene." Doc. 73 at 6.

255. Defense counsel would have pressed on these inconsistencies at trial, through Luker or Corley, to convince a reasonable juror that there may have been more than one bat and that Corley disposed of the bat that she used to bludgeon Mr. Walker. Alternatively, a reasonable juror would have believed that Corley did not dispose of the bat but felt so responsible and associated with the bat which she used that she mistakenly recalled that she was the one who had thrown the baseball bat in a trash dumpster to get rid of the evidence. Corley's mental health problems and suicidal ideation (*see supra*, paragraph 42 and *infra*, paragraph 261) make this sort of mistake entirely plausible. On this understanding, Kittie Corley may have felt she desperately needed to get rid of the bat to cleanse her hands of guilt—to the point that she believed that she herself had thrown the bat in the dumpster. In either case, this would be material to the defense at trial.

The Question of Motive

256. Fourth, on the frontside of the Corley letter, there is an indication that Kittie Corley had a possible motive to kill Mr. Walker because, in her own words, "It was Dewey's time to go." The letter indicates that Kittie Corley had "sex

adventures at Dewey's" home, and some kind of personal relationship with the victim that allowed her to refer to him by his first name. Appendix A and B.

257. Once again, through Luker or Corley, defense counsel would have convinced a reasonable juror that Kittie Corley had a personal relationship with Mr. Walker, had a motive, and was engaged in other forms of foul play. This evidence would have been material to the defense at the penalty phase.

258. Respondent has claimed that "the letter refers to Petitioner as Corley's 'boyfriend,' [and] a reasonable jury would likely believe that the 'sex adventures' were between her and Petitioner." Doc. 73, p. 7. If Respondent is right that a reasonable juror would have believed that David Wilson was Kittie Corley's boyfriend, that would be even more material evidence for the defense, because it would explain why David Wilson tried to protect Corley and take the rap for the murder when he was interrogated by the police. It could lead a reasonable juror to believe that David Wilson lied to the police to protect Kittie Corley.

Kittie Corley's Confession to Mental Illness

259. Fifth, on the frontside of the Corley letter, Kittie Corley confesses to having suffered from untreated mental health problems at the time of Dewey Walker's murder that affected her behavior. Kittie Corley writes that she is on "lots" of medications, but that she was not at the time of the crime and that she should have been because she "needed them." Appendix A and B. On the backside, *see supra*

paragraph 34, Corley says she would invoke an insanity defense. Appendix C and D. This too is material evidence for the defense. Through Luker or Corley, defense counsel could have convinced a reasonable juror that Corley's untreated mental health issues affected her judgment and explained why she beat Mr. Walker to death.

Kittie Corley Confession to Involvement in a Second Murder

260. Sixth, on the frontside of the letter, Kittie Corley confessed to involvement in a second murder. This information is material to the defense because it suggests that Kittie Corley is involved in other criminal behavior, whereas David Wilson had no prior involvement in any criminal matter, let alone another murder. Petitioner will address the materiality of this next, in connection with the backside of the Corley letter, which describes her involvement in the Hatfield murder in great detail.

2. The materiality of the backside of the Corley letter

261. On the backside of the Corley letter, Kittie Corley confesses to being part of a violent drug gang that engages in murder, to having had possession of the murder weapon, to covering up for the murder, and to having serious mental health problems. Corley confesses to being the intimate partner of one of the leaders, who is called Scott ("Bam Bam") Mathis. Corley confesses to knowing who killed C.J. Hatfield. Corley confesses to knowing who the drug runners are for the drug

trafficking enterprise and everything that they planned to do (steal the money and pretend to be robbed) and why Hatfield was murdered. *See* Appendix C and D.

262. The backside of the letter is material under a *Brady* analysis for many reasons. Importantly, it supports the theory—confirmed on the frontside of the letter—that Corley had greater culpability for the murder of Dewey Walker, relative to Petitioner, who had no prior criminal history and no previous brushes with the law. As Corley herself writes, the truth of the information on the frontside is corroborated by the truth of the information on the backside. And what Corley said on the backside is confirmed by her two subsequent police interrogations (produced on December 7, 2023) and the wealth of other downstream evidence, including third-party evidence corroborating that Kittie Corley had possession of the murder weapon. *See infra* paragraph 298 *et seq*.

263. The backside of the Corley letter constitutes classic impeachment evidence of the prosecution's lead trial witness, Sgt. Tony Luker, and would have served as the basis for calling Kittie Corley as an adverse witness during the defense case. Defense counsel would have used it to undermine Luker's testimony and to discredit the competency of the police investigation by asking whether he had obtained evidence that the person who had confessed to beating Dewey Walker to death with the bat had also been involved in another murder beforehand and whether she had possession of the murder weapon, just as she claimed to have possession and

to have disposed of the murder weapon in the Walker murder. This would have opened a whole line of questioning that would have brought up classic impeachment evidence and undermined Luker's investigation. Moreover, if defense counsel had called Kittie Corley as a hostile witness based on the *Kyles* scenario discussed earlier, *see supra* paragraphs 234-235, counsel would have further discredited Corley on the basis of her multiple confessions to involvement in a violent drug-dealing ring, to handling the murder weapon, to lying about her whereabouts, to her willingness to serve as a false alibi and lie about her involvement, and to concealing the murder of C.J. Hatfield. Defense counsel might have likewise argued in closing that Corley had motive to mislead the police and prosecution (namely, to avoid criminal charges in the Hatfield murder and avoid greater criminal liability in the murder of Dewey Walker) by falsely casting blame on David Wilson for Walker's death. In this respect, the backside of the Corley letter was material under *Brady*. *See Kyles v. Whitley*, 514 U.S. 419, 446 (1995) (holding that an analysis under Brady must consider the impact of impeachment evidence regardless of whether the witness testified at trial); *State v. Whitt*, 220 W. Va. 685, 688-89, 696 (2007) (holding, like *Kyles*, that the possibility of calling another suspect as an adverse witness raises the potential of material evidence under *Brady*).

264. The backside of the Corley letter would also have allowed defense counsel to attack the reliability of the investigation under *Kyles v. Whitley*, 514 U.S.

419 (1995). *See* Doc. 79 at p. 10. Counsel would have cross-examined Sgt. Luker as to why the State was focusing on David Wilson when another co-defendant, who had been involved in violent drug dealing and murder, confessed to beating Mr. Walker.

265. In addition, the evidence about the Hatfield murder is material evidence because it bolstered the credibility of Corley's confession (on the frontside of the Corley letter) to having beaten Mr. Walker with the bat. The veracity of the backside bolsters the veracity of the frontside of the Corley letter. At trial, District Attorney Douglas Valeska convinced the jury that it was Petitioner who did the brutal, fatal beating. But Valeska knew, and withheld, Corley's violent drug-dealing history and involvement in the Hatfield murder. The probability that a reasonable juror would have found Corley's involvement in the Hatfield murder to be both at odds with Valeska's trial theory and consistent with Petitioner's trial defense makes this evidence material because its net effect makes reasonably probable that its disclosure at trial would have produced a different result at the penalty phase. *See Kyles v. Whitley*, 514 U.S. 419 (1995) (finding that the State's disclosure obligation turns on the cumulative effect of all suppressed evidence favorable to defense).

266. There are several elements on the backside of the Corley letter that are material:

Kittie Corley Confesses to Buying and Providing Murder Weapon That Killed Hatfield

267. First, Kittie Corley confesses to buying and providing the murder weapon used in the fatal shooting of C.J. Hatfield in March 2004. Appendix C and D. Corley confesses to buying the gun for David Stuckey that was ultimately used by Bam Bam to kill Hatfield. Corley's connection to the murder weapon in the Hatfield case is consistent with her connection to the murder weapon in the Walker case. On the front side of the letter, Corley stated that she brought in the baseball bat ("We took a baseball bat in with us"), took control of the bat to beat Mr. Walker, and then disposed of it ("I threw baseball bat in trash dumpster"). See Appendix A and B. So in both homicide cases, Kittie Corley is tied to the murder weapon. And this is corroborated by her police interrogations in 2005, where she explains at length how she concealed the murder weapon in her safe lock box and by a third-party, Heather Lynn Brown, who told the police the very same thing. *See infra* paragraphs 288 and 300.

Kittie Corley Appears Callous and Indifferent to Human Life

268. Second, the backside of her Corley letter makes Kittie Corley appear to be callous and indifferent to human life. Corley does not care that an innocent person, David Stuckey, will face life imprisonment or the death penalty for a murder he did not commit. See Appendix C and D ("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.") She unequivocally declares that she will not testify to save David Stuckey from wrongful execution. See *id*. ("I can never testify & I will never testify.") This evidence is probative that, in the Walker case, Corley would not have cared that David Wilson was wrongfully convicted and sentenced to death.

Walker Murder Occurred in the Wake of Hatfield Murder

269. Third, the murder of Dewey Walker on April 7, 2004 occurred only three weeks after the murder of C.J. Hatfield on March 12, 2004. Kittie Corley says that after the Hatfield murder, Bam Bam threatened to kill both her if she or Stuckey "talk[ed,]" and that everyone was "afraid of Bam Bam." *See* Appendix C and D. It is highly plausible that her fear for her life, which she was still experiencing at the time of the Dewey Walker murder, made her especially excitable, hypervigilant, and predisposed to rash, violent action under stressful circumstances. That fear would also naturally make her want to leave no witnesses to her presence at the scene of a subsequent burglary because, if she were arrested—or bulletined for arrest—by criminal authorities, Bam Bam would have reason to act upon his threats. As such, the temporal proximity of the two murders increases the likelihood that Kittie Corley was the actual killer of Mr. Walker. Moreover, it supports Mr. Wilson's statement to the police that Kittie "used to do stuff like that or something like that." *See* Doc. 76-3 at PDF 128, Bates 530.

Backside of Corley Letter Indicates Veracity of Both Sides of Letter

270. Fourth, the backside of the Corley letter contains strong indicia that Kittie Corley is being truthful about her involvement in both murders. Corley was trying to find an attorney and had no reason to lie to the person she was hoping would represent her. She was writing an attorney-client privileged letter. She was being truthful to her prospective attorney. Her audience for this letter was not the police. Corley had nothing to gain from misconstruing the facts in the Hatfield case. She was not going to negotiate a better deal for her testimony; she specifically said that she would not testify against Bam Bam or for David Stuckey. This lends her version of the Hatfield murder credibility. It suggests that she is being truthful. And she would hardly want to jeopardize her credibility in the eyes of her possible legal representative by lying about the Walker murder on the other side of the letter. As Corley writes: "This story is true […] Story on other side is true also." Appendix A and B.

Failure to Charge Corley or Call Her as a Witness in the Hatfield Case Discredits Investigations

271. Fifth, the fact that Corley was not charged or called as a witness in the Hatfield murder casts doubt on the adequacy and competence of the investigations in both the Hatfield and Walker homicide cases. This would have opened the door for defense counsel at Mr. Wilson's trial to attack the State's shoddy investigation of the Walker murder and the Hatfield murder. By cross-examining Luker at trial,

Petitioner would have attacked the State's shoddy investigations, which is central to the materiality and prejudice prongs of the *Brady* claim. *See Kyles v. Whitley*, 514 U.S. 419, 446-447 (1995) (the defense could "have attacked the reliability of the investigation" and "laid the foundation for a vigorous argument that the police had been guilty of negligence"); *Bies v. Sheldon*, 775 F.3d 386 (6th Cir. 2014) (evidence concerning the police's shoddy investigation and failure to follow up on leads would have been admissible, and the failure to reveal this information was a Brady violation); *Bowen v. Maynard*, 799 F.2d 593, 613 (10th Cir. 1986) ("A common trial tactic of defense lawyers is to discredit the caliber of the investigation […] and we may consider such use in assessing a possible Brady violation").

Motive for Kittie Corley Not Testifying

272. Sixth, the fact that Corley is afraid to testify in the Hatfield case is material and may explain why she was not called as a witness by the prosecution in David Wilson's case. Through careful examinations of Corley or Luker, defense counsel could have convinced a reasonable juror that the State struck a deal with Corley to protect her on the Walker murder: In exchange for not being called to the stand at David Wilson's trial and not having to admit to the Corley letter, Corley would agree to provide additional confidential information regarding the Hatfield murder. Such a deal would have made a reasonable juror suspect Kittie Corley's greater involvement in the Walker murder.

273. For these multiple reasons, the backside of the Corley letter was material evidence under *Brady* that defense counsel would have used in his cross-examination of Sgt. Luker or adverse-witness examination of Kittie Corley to demonstrate Corley's greater culpability for the murder of Mr. Walker. It would have showed the jury that Kittie Corley was involved in other criminal behavior, whereas David Wilson had no prior criminal involvement. It also raised doubts as to whether the state adequately investigated Kittie Corley's involvement in the murder of Dewey Walker, whether the state investigators suffered from tunnel vision, whether there is an unexplained, possibly suspicious reason why the state focused on David Wilson and not Kittie Corley. A reasonable juror could have questioned why the State was seeking the death penalty for David Wilson but agreeing to plead Kittie Corley out for a term of 25 years.

3. The materiality of the downstream evidence regarding the Walker murder

274. By withholding the Corley letter, the State of Alabama shielded downstream evidence involving Kittie Corley's greater role in the murder of Mr. Walker that would have been discovered by defense counsel if the Corley letter had been produced to them, including the two-page "Dearest David letter" that was written by Kittie Corley (see Appendix I for the "Dearest David" letter; Appendix J for a Certified Court Reporter transcription of the letter).

275. The letter was seized by Sgt. Luker on September 30, 2004. *See* Doc. 76-24 at PDF 16, Bates 3857. It is undated, but was probably written around that time, a month or two after the Corley letter. It was used by the U.S.P.S. handwriting expert and has the expert's markings on it. In the letter, Kittie Corley apologizes for being responsible for the Walker murder and for Mr. Wilson's incarceration.

276. In the "Dearest David" letter, Corley:

- Confesses that Corley and the other co-defendants were badly intoxicated during the entire week during which the Walker murder occurred: "we were all High + drunk. And to my knolage you or I didn't stop drinking all week. But then were all were partying pretty hard." Appendix J, Transcription at p. 2, lines 7-10, underlining in original.
- Apologizes for the Walker murder: "I am sorry for all of this. I really am sorry we are all up in here." Appendix J, Transcription at p. 2, lines 19-21.
- Writes "I will not let them give you time on b-s," which suggests that Mr. Wilson did not commit the murder but Corley did. Appendix J, Transcription at p. 3, lines 2-3.
- Writes "You were Right about it all. I owe you big time," which suggests that Mr. Wilson had taken the fall for her actions in the murder of Mr. Walker, and in fact, might have attempted to stop her. Appendix J, Transcription at p. 3, lines 19-20.
- Writes "look bro I will help you as much as I can. This is all a big mess that should Never have gone this far," which is consistent with the fact that Mr. Wilson was less culpable. Appendix J, Transcription at p. 3, lines 12-15.
- Expresses fondness for David and suggests that they had an intimate relationship. Corley writes, referring to the piece of paper she is writing on, "Oh hope you like the paper. Amazing what you can do with Now & Later paper & clear deoterant. huh. You & your girl ok." Appendix J, Transcription at p. 2, lines 13-15.

277. Throughout the "Dearest David" letter, Corley writes as if she is responsible for the murder of Mr. Dewey Walker.

278. Corley's admission that she considers herself Mr. Wilson's girlfriend ("You & your girl ok") suggests that she believed they were on intimate terms. This supports this Court's suggestion, in its opinion dated June 21, 2023, that Mr. Wilson may have been trying to protect Corley. *See* Doc. 79 at p. 9-10, n.4; *see also* paragraph 164 *supra*. It confirms the Court's suggestion that Mr. Wilson may have taken responsibility for Corley's actions and did not mention her bludgeoning the victim with the bat when he was interrogated by the police on April 14, 2004, because of their intimate relationship. As this Court noted, there was independent evidence in the record to support this fact: "At a hearing more than a year before trial, . . . [o]ne of the appointed attorneys informed the trial court that she had 'suspicions about a codefendant and a possible relationship [Petitioner] has with that co-defendant that might be influencing his decision and influencing the reason why he doesn't want us to be his lawyer.'" Doc. 79 at p. 10, n.4, citing record at Doc. 76-6 at PDF 23, Bates 1028. This is consistent with Corley writing, in her "Dearest David" letter "You are the only on [sic] I can trust. I am sorry I didn't listen to you earlyer [sic]. You were Right about it all. I owe you big time." Appendix J, Transcription at p. 3, lines 17-20.

279. Corley is also writing as if she is trying to coordinate a defense with Mr. Wilson and is at greater risk. She seems to feel that Mr. Wilson is no longer cooperating with her and has not responded to her earlier two letters. Corley seems

to be trying to coax Petitioner into a joint defense: "I don't believe you did this. And I have an Alibi. So who did it. Steve wrote Jen Jen & said you had told them someone else was. There. But they have to prove you were there at all. like me. No proff o well right." Appendix J, Transcription at p. 3, line 25 through p. 4, line 5.

280. The constant theme throughout her "Dearest David" letter is that Corley believes she is more culpable. As she states, "I am sorry for all of this." Through careful examination of Corley and Luker, defense counsel would have brought all this to light for the jury.

4. The materiality of the downstream evidence regarding the Hatfield murder

281. By suppressing the Corley letter, the State of Alabama shielded downstream mitigating evidence involving Kittie Corley's role in the murder of C.J. Hatfield that would have been discovered by defense counsel if the Corley letter had been produced to Mr. Wilson, including two police interrogations of Kittie Corley regarding her role in the murder of C.J. Hatfield (Appendix E, F, G, and H) and a police interview worksheet of the Joan Vroblick interrogation (Appendix K and L). These pieces of evidence contribute to the materiality of the Corley letter. Several pieces of downstream evidence were disclosed to Petitioner by Respondent on December 7, 2023, and undersigned counsel has obtained additional downstream

evidence through independent investigations. Petitioner will review these materials in order.

Corley Police Interrogation of January 29, 2005

282. First, the interrogation of Kittie Corley by investigator Allen Hendrickson of the Henry County Sheriff's Office conducted on January 29, 2005, contributes to the materiality of the Corley letter by confirming and independently demonstrating Corley's involvement in another murder. *See* Appendix E for the audio recording conventionally filed with the Court; Appendix F for the Certified Court Reporter transcription.

283. During this lengthy 27-minute interrogation, Kittie Corley confesses to being deeply implicated in a violent drug-trafficking gang led by her fiancé "Bam Bam" and to substantial involvement in the murder of C.J. Hatfield. During the course of the interrogation, Corley confesses to:

- Having almost exclusive access to the .38 caliber revolver that was apparently used to murder C.J. Hatfield. Corley was one of three people with access to the murder weapon. (Her proximity to the murder weapon is consistent with her having possession of the baseball bat in the Walker case.) Corley was the owner of the safe that the gun was kept in, which was used for myriad illicit activities. Appendix F, Transcription at p. 28, lines 4-15.
- Seeing Hatfield and Stuckey (the drug runners) leave for Atlanta prior to the murder. Appendix F, Transcription at p. 8, lines 21-22.
- Knowing the people in Atlanta ("Flex") who made the drug transaction with Hatfield and Stuckey and knowing that the transaction was actually made. Appendix F, Transcription at p. 15, lines 6-7.

- Knowing which kind of gun Bam Bam, Mark Hammond, and Stuckey each carried. Appendix F, Transcription at p. 31, line 15 through p. 34, line 3.
- Knowing where the drug gang met to drop off drugs and how long a drug transaction usually took. In fact, Corley says that most of the gang's activities happened within fifteen minutes of her apartment, correcting the investigator's suggestion that most activities occurred within fifteen minutes of downtown Dothan. It is obvious that Corley was, quite literally, central to the drug operations. Appendix F, Transcription at p. 26, lines 12-19.
- Knowing approximately where the Hatfield murder occurred in the outskirts of Dothan. Appendix F, Transcription at p. 6, line 20 through p. 7, line 13.
- Being deeply involved personally with the two leading suspects in Hatfield's murder and with all of their drug dealings: "Bam Bam" (Scott Mathis), who she identifies as her "fiancé" (*see* Appendix F, Transcription at p. 4, lines 1-2); and Mark Hammond, for whom she served as an alibi and with whom she had sexual relations in the past (*see* Appendix F, Transcription at p. 4, lines 11-12 and at p. 8, lines 6-7 "Corley: I screwed him [Hammond] once"; and "Hendrickson: Where had you and Mark been? Corley: I was supposed to be his alibi that night.").
- Being accustomed to murder: "It was nothing for somebody to talk about killing folks, you know, back then, especially with the business that we were doing." Appendix F, Transcription at p. 24, line 18 through p. 25, line 2.
- Having severe mental disorders: "I have [dis]sociative disorder, and I'm a paranoid schizophrenic." Appendix F, Transcription at p. 20, lines 12-13. This not only is material evidence for Mr. Wilson standing alone, but it also further bolsters the veracity of the frontside of the Corley letter, in which she acknowledges mental illness and claims insanity. *See* Appendix A and B.
- Being suicidal: "I was hanging from a rope from a tree trying to kill myself." Appendix F, Transcription at p. 35, lines 8-9.
- Being callous and not caring about someone being shot dead: "I said, 'What'd you do, kill somebody?' And I was laughing about it." Appendix F, Transcription at p. 24, lines 14-16.

- Being familiar with finding guns for illicit purposes. *See* Appendix F, Transcription at p. 33, lines 1-3 ("The .38s were hard enough for us to find, let alone unregistered.").

284. The detail of these confessions strongly corroborates the backside of the Corley letter.

285. In Petitioner's case, Kittie Corley is the only other individual who had access to Mr. Walker around the time of his murder. Corley's evident comfort with violence, drug dealing, guns and knives, and murder is profoundly material to Mr. Wilson's case.

286. Defense counsel would have brought these points up in skillful examination of Corley and Luker.

Corley Police Interrogation of March 24, 2005

287. The police interrogation of Kittie Corley by investigators Allen Hendrickson of the Henry County Sheriff's Office and Tommy Merritt of the Alabama Bureau of Investigations conducted on March 24, 2005, also contributes to the materiality of the Corley letter. *See* Appendix G for the audio recording filed conventionally; Appendix H for the Certified Court Reporter transcription of the interrogation.

288. During this second, lengthy, 33-minutes long interrogation, Kittie Corley again confesses to deep involvement in the violent drug ring and to

substantial involvement in the murder of C.J. Hatfield and its aftermath. During the course of the interrogation, Corley:

- Confesses to having had possession of the murder weapon in the Hatfield case. Appendix H, Transcription at p. 10, lines 11-20.
- Identifies the exact murder weapon (the "blue-plated type," "dark color not silver" .38 caliber revolver), which is shown to her. Appendix H, Transcription at p. 13, lines 14-15. Corley says that she kept it in a lock box that she had exclusive access to along with Bam Bam and Hammond.
- States that she got the lock box because "I was also holding some narcotics for other people." Appendix H, Transcription at p. 14, lines 8-9.
- Admits that, among her drug-dealing conspirators, "between all the boys, we pass knives and guns off all the time." Appendix H, Transcription at p. 11, lines 20-21.
- Confesses to planning to sell the drugs that Hatfield and Stuckey were supposed to have brought back from Atlanta. Appendix H, Transcription at p. 17, lines 4-6.
- Says that she was involved in the planning and execution of the drug run to Atlanta. Appendix H, Transcription at p. 17, lines 13-23.
- Says that Hammond told her that he killed Hatfield and said "that he needed it to be dealt with and that he shot him and that we didn't have to worry about it anymore." Appendix H, Transcription at p. 20, lines 17-20.
- Admits knowing that Mark Hammond's truck was involved in the murder of Hatfield and being able to identify the truck. Appendix H, Transcription at p. 4, line 13 through p. 5, line 17.
- Says that she saw Bam Bam hide evidence involved in the murder of Hatfield and that she was able to roughly identify the evidence. Appendix H, Transcription at p. 6, line 1 through p. 9, line 15.
- Confesses to being involved in illicit drug activities since she was less than eleven years old. Appendix H, Transcription at p. 12, line 12 through p. 13, line 2.
- Admits that she saw the murder weapon for the last time a week before Hatfield was murdered. Appendix H, Transcription at p. 11, lines 3-4.

- Admits knowing the habits and law-evading tactics of the drug ring. Appendix H, Transcription at p. 21, lines 10-16.
- Admits knowing who was with Hammond when Hammond shot Hatfield. Appendix H, Transcription at p. 21, lines 17-22.
- Admits knowing that Hammond gave Sarah Drescher the jewelry that Hatfield was wearing and knowing the type of jewelry it was. Appendix H, Transcription at p. 26, line 7 through p. 28, line 19.
- Admits knowing that Hammond and Stuckey urinated next to Hatfield's body. Appendix H, Transcription at p. 29, line 20 through p. 30, line 1.
- Admits being in constant contact with members of the drug ring on the outside and even while incarcerated. Appendix H, Transcription at p. 23, line 12 through p. 25, line 20.

289. Once again these elaborate details corroborate the back side of the Corley letter. It is remarkable how much consistency there is between the Corley letter and Corley's two police interrogations about the Hatfield murder. Most of the important themes on the backside of the Corley letter are corroborated by the January and March 2005 police interrogations. This consistency is evident from a side-by-side comparison of the Corley letter, the January 29, 2005 police interrogation, and the March 24, 2005, interrogation, which can be visualized in the following table:

Table of Correspondences Between Letter and Interrogations

Back of Corley Letter (Appendix C, Certified Court Reporter Transcription at Appendix D)	**Interrogation of 1/29/05** (Appendix E, Certified Court Reporter Transcription at Appendix F)	**Interrogation of 3/24/05** (Appendix G, Certified Court Reporter Transcription at Appendix H)

Corley is connected to the gun that was used as the murder weapon. "CJ got 3 bullets in him from a gun I bought." (Appendix D, Transcription at p. 2, lines 2-3)	**Corley was one of three people with the key to the safety box where the gun was kept.** "Corley: I'm one of the few people that has keys to my box. [...] There was me, Bam Bam, and Mark had a key. [...] Because that's more or less where they would keep everything. Hendrickson: Okay. Did you go by Drew's and pick up your box? Corley: Yes, I did. When— Hendrickson: What was in your box when you picked it up? Corley: I didn't open it. I didn't want to know. When Bam Bam came over he said, 'I need the box.' I said, "Okay.' He opened it up. There was a gun. He said. 'I'm going to give it to Mark. He needs it.' I said, "Okay.' He gave it to Mark; Mark gave it back to me. I put it in the box." (Appendix F, Transcription at p. 28, line 7 through p. 29, line 10)	**Corley kept Bam Bam's gun in her safe.** "Hendrickson: Where and when did you see that .38 Rossi? Corley: When it was put in a box that I had for safe keeping." (Appendix H, Transcription at p. 10, line 11-14) **Corley had the gun at the time of her arrest.** "Hendrickson: Do you know where that weapon was at when, you – I think that — is this gonna be the weapon that you spoke to me about that was in a safe when you got arrested? (Inaudible response.) Hendrickson: Okay. Where was it at when you got arrested? Corley: It was supposed to be in the apartment that I was staying at before I got locked up." (Appendix H, Transcription at p. 11, lines 5-15)
Bam Bam and Hammond were the kingpins of the drug gang. "When call came in from David [Stuckey] about what C.J. wanted to do, (take the money and say they were robbed) I rode up with Bam Bam & Tank [Hammond]."	**Hatfield and Stuckey went to Atlanta to pick up drugs for Bam Bam and Hammond.** "Hendrickson: They were going to pick up some drugs for Bam Bam? Corley: And Mark and a couple of other people that I know of. [...] Hendrickson: Hold on just a second. So C.J., Stuckey went to pick up for who? C.J. and Stuckey to pick up – Corley: Bam Bam. Hendrickson: Uh-huh...	**Bam Bam and Mark Hammond set up the trip to Atlanta for Hatfield and Stuckey.** "Hendrickson: Do you know who set this trip up for C.J. and Stuckey to go to Atlanta? Corley: The boys, as always. Hendrickson: The boys. When you say 'the boys' – Corley: Bam Bam, Mark, the boys." (Appendix H, Transcription at p. 19, lines 10-18)

(Appendix D, Transcription at p. 2, lines 4-7)	Corley: Mark." (Appendix F, Transcription at p. 15, line 19 through p. 16, line 9)	
Corley is Bam Bam's girlfriend and closest intimate partner. "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." (Appendix D, Transcription at p. 3, lines 6-9)	**Corley is Bam Bam's fiancée** "Hendrickson: Did you— I take it you knew— you dated Bam Bam for a while? Corley: Yes, sir. I'm his fiancé. Hendrickson: You're his fiancé? Corley: It's a twisted thing. I know. Hendrickson: You know what? Corley: I know who he's with now. I'm still with engaged to him. I have his engagement and wedding band in my pocket. (Appendix F, Transcription at p. 4, line 22 through p. 5, line 12)	**Corley would keep important items for Bam Bam in her safe.** "Corley: I can't tell you. I hardly went in the box, except for when I had to go get things for Bam Bam or other people that come back." (Appendix H, Transcription at p. 16, lines 14-17) **Bam Bam was the one who told her to keep the murder weapon in her safe.** "Merritt: Why was this gun in your box? Corley: Why was it in my box? Because I was told to hold it. Merritt: By who? Corley: By Bam Bam." (Appendix H, Transcription at p. 14, lines 16-21)
Corley was afraid to speak with law enforcement because she is afraid the drug gang would hurt her if they found out. "I can never testify & I will never testify even if I get the death penelty." (Appendix D, Transcription at p. 2, lines 20-22)	**Corley is afraid to speak to law enforcement for fear of retribution.** "Hendrickson: Did anybody ever try to find you and talk to you as far as law enforcement, to your knowledge? Corley: Not to my knowledge. But if they find out, I'm dead anyway. Hendrickson: They find out what? Corley: They find out I talked to you, I'm a dead woman."	**Corley is nervous to talk about Big Country, another one of her associates in the drug gang.** "Corley: Big Country? There's several different ones here. Man, I am going to be in so much trouble. Big Country was a guy that used to work at Grands, was a nickname that they gave him, and he was a bouncer." (Appendix H, Transcription at p. 34, line 20 through p. 35, line 2)

	(Appendix F, Transcription at p. 38, line 19 through p. 39, line 6)	
Hatfield and Stuckey were runners for the drug gang. "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." (Appendix D, Transcription at p. 2, lines 24-24 through p. 3, line 2)	**Hatfield and Stuckey made a drug run to Atlanta for the drug gang.** "Hendrickson: Are you aware of any trip that was allegedly made to Atlanta? Corley: Yes, sir. Hendrickson: Was that trip made, to your knowledge? Corley: Yes, sir. Hendrickson: How do you know it was made? Corley: Because I seen them leave. Hendrickson: Who? Corley: Stuckey and C.J. got in the truck." (Appendix F, Transcription at p. 8, line 12 through p. 9, line 2) **Hatfield and Stuckey made drug runs regularly** "Corley: It wasn't the first time C.J. and Stuckey had to make a run." (Appendix F, Transcription at p. 17, lines 17-19)	**Hatfield and Stuckey made a drug run to Atlanta for the drug gang.** "Hendrickson: We're going to go into a little more of the last interview now. Was you aware of a trip that Stuckey and C.J. made to Atlanta prior to his death? Corley: Yes, sir. Hendrickson: What do you know about the trip? Corley: It was supposed to be a drug run. They was supposed to go to Atlanta to buy some drugs so that they could bring it back and we could sell it." (Appendix H, Transcription at p. 16, line 19 through p. 17, line 6)
Bam Bam and Hammond ("Tank") are primarily responsible for and are the main masterminds behind the murder of Hatfield.	**Bam Bam received a phone call about Hatfield wanting to steal money and responded by seeking out Mark Hammond to kill Hatfield.** "Corley: When they came back, there was a phone call that Bam Bam	**Mark Hammond's truck was used for the Hatfield murder.** "Hendrickson: And why was your – why did you think Mark Hammond's truck needed to be looked at about this murder? Corley: Because there was a great possibility that it had been used to

"I rode up with Bam Bam & Tank. […] 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." (Appendix D, Transcription at p. 2, lines 6-13)	had on his cell phone that was a pre-paid phone. Hendrickson: Okay. Corley: And he looked at me. He said, 'We have a problem.' 'What are you talking about?' 'Well, we have a problem. We were in Grand.' I said, 'Well what is it?' He said, 'somebody wants to skip me out of my money. They either don't want to give me my money or give me my product.' And Bam Bam never played with his money. I said, 'Okay.' He said, 'I'm getting Mark.' I said, 'Okay.'" (Appendix F, Transcription at p. 9, line 12 through p. 10, line 7) **Bam Bam told Corley he had dealt with Hatfield.** "Hendrickson: Did Bam Bam ever tell you anything about what happened when they met up this time? Corley: He just said it was dealt with. He said anything but– Hendrickson: Did they say – did he ever say how he dealt with it? Corley: It was a present. He got a gift, some .38 gun, .38 Special to be specific. Hendrickson: Who did? Corley: Bam Bam. [...] Hendrickson: He said he dealt with it with his gift? Corley: He dealt with it with a gift, and I never thought anything about it." (Appendix F, Transcription at p. 22, line 21 through p. 23, line 22)	either take to and fro evidence that might still be in there." (Appendix H, Transcription at p. 4, lines 5-12) **Mark Hammond and Bam Bam got rid of evidence, including Hatfield's clothes, together.** "Hendrickson: Can you describe those clothes that Bam Bam put in a garbage bag and if you know who they belonged to? Corley: I know it was a pair of bluejeans and a dark colored shirt. I can't ID it specifically, but it was supposed to have belong to Mr. Hatfield. Hendrickson: It was supposed to have belonged to Hatfield? Corley: And they also had their clothes as well. Hendrickson: Do you know what their clothes were? When you're referring to "their," who was their? Corley: Mark and Bam Bam." (Appendix H, Transcription at p. 6, lines 5-21) **Bam Bam told Corley to hold on to the murder weapon.** "Merritt: Why was this gun in your box? Corley: Why was it in my box? Because I was told to hold it. Merritt: By who? Corley: By Bam Bam."

	Bam Bam got rid of evidence from the murder of Hatfield. "Corley: And Bam Bam wasn't —he was normal. He would – he wasn't upset. He wasn't freaking. He was just okay. But all the clothes that they had, Bam Bam put in a garbage bag. [...] He bagged everything up, and he put it in his Bronco. I asked again. You know, 'Trash.' I said, 'Well, why don't you just' — 'Well, no we'll take care of it. You know, I've got to take the trash out anyway.' Bam Bam hardly ever took out trash. But I couldn't question him [...] I don't know if he threw them away or what, but he threw away his favorite pair of pants." (Appendix F, Transcription at p. 35, line 11 through p. 36, line 20)	(Appendix H, Transcription at p. 14, lines 16-21) **Mark Hammond said that he had taken care of Hatfield.** "Hendrickson: What did Mark Hammond tell you that he'd done in regards to shooting C.J. Hatfield? Corley: Said that he needed it to be dealt with and that he had shot him and that we didn't have to worry about it anymore." (Appendix H, Transcription at p. 20, lines 14-20)
Hatfield wanted to steal Bam Bam's money and say that he and Stuckey had been robbed. "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." (Appendix D, Transcription at p. 2, lines 4-7)	**Hatfield wanted to get away with stealing the money from the drug drop in Atlanta.** "Corley: He told me that Stuckey and C.J. was going up there. C.J. told Stuckey that they would make a lot more money if they just told us they got robbed, and all they would have to do is beat each other up, and we'd believe them. Well, C.J. kept on pushing and pushing. He was just like that sometimes. You know, he was fun and crazy, but when he had an idea stuck in his head, he was going for it. When I asked Bam again, I said, 'Well, did – what did he do, you know? Tell me what's going on.' He told me that C.J. thought he could get away with it. And Stuckey called him on his cell phone and told him what was up so	

	that they'd know when they got there so if something was missing, we couldn't blame it on Stuckey." (Appendix F, Transcription at p. 13, line 11 through p. 14, line 7)	
Stuckey did not kill Hatfield. "C J Hatfield was murdered that's true, but David Stuckey did not do it." (Appendix D, Transcription at p. 2, lines 1-2)		**Mark Hammon said that he killed Hatfield.** "Hendrickson: Did Mark Hammond ever tell you that he shot C.J. Hatfield? Corley: Yes" (Appendix H, Transcription at p. 20, lines 10-13)
Bam Bam is a violent and dangerous drug-dealing criminal. "Bam Bam told me not to talk or he will kill my child and me." (Appendix D, Transcription at p. 2, lines 13-14) "If Bam Bam does not kill me, one of his friends will." (Appendix D, Transcription at p. 2, lines 22-23) "David is afraid of Bam Bam as is everyone else." (Appendix D, Transcription at p. 3, lines 3-4)	**Corley was afraid to question Bam Bam, her fiancé.** "Corley: It was my old man. I was always taught [...] You don't question your old man, especially when you do dealings like this. You question, and you wind up dead." (Appendix F, Transcription at p. 38, lines 12-17)	

Corley knows all about the drug trafficking business and is an integral part of it The entire back side of the Corley letter reflects her intimate knowledge of and involvement in the drug trafficking business. (See Appendix D)	**Corley knew well how long a drug transaction usually takes.** "Corley: Atlanta. They had to make the deal. They had to make the transition, which usually takes about two to three hours to make contact, make the transition, make sure everything's good and then come back. So we weren't expecting them until later." (Appendix F, Transcription at p. 11, lines 9-15) **Corley knew all of the details of the Atlanta transaction** Hendrickson: [...] Does anybody know if they actually went to Atlanta? Corley: From what I understand, yes. He contacted the guy up there, and he made the delivery. They made the drop off. Hendrickson: Who was the – so they wasn't robbed in Atlanta? Corley: No, sir. Hendrickson: Okay. So somebody in Atlanta did deliver them their narcotics? Corley: Yes, sir. Hendrickson: Who delivered the narcotics in Atlanta? Corley: That I know of? Hendrickson: Uh-huh. Corley: It's – we call him Flex. I don't know names. I have no idea. Hendrickson: They went to Atlanta. Somebody by the name of Flex did make the drop.	**Corley is a central player in the drug business** "Hendrickson: Did that trip happen, to your knowledge? Corley: To my – to my knowledge, yes sir. Hendrickson: Okay. How do you know it happened? Corley: Because, at the time, when they was getting ready to leave, everybody was around talking about it making sure that the plans were right. I mean, the trip had been planned. The funds had been given out. We were to be called on their way back. We was to be called when they got there, you know, how much they scored exactly. You know, everything was supposed to weigh out with what we all were supposed to know." (Appendix H, Transcription at p. 17, lines 7-23) **Corley has been involved in many drug runs** "Hendrickson: Evening. And typically when they left in the evening, how long did it take them to go up and come back? Corley: It's supposed to be a six-hour trip, but it could take him – it normally took them about 12, 10 to 12, to get down there, get everything that was…–" (Appendix H, Transcription at p. 20, lines 1-9) **Corley believed that the gang was like a brotherhood and identified with it.**

	Corley: He wasn't my contact; he was Bam's. (Appendix F, Transcription at p. 14, line 11 through p. 14, line 7) **Corley knew about the gang's meeting places.** "Hendrickson: They always met right around – Corley: Within a 15-minutes area. They would – Hendrickson: Of downtown Dothan? Corley: Basically from my apartment, yeah." (Appendix F, Transcription at p. 26, lines 12-19).	"Corley: It was kind of like a brotherhood. One of us needs help, you call another person. Now I've never heard of any one of us coming out and helping each other like this. Because this is just ludicrous. But if they needed help and they knew that they couldn't do it on their own, we've all swore oaths to each other if we all needed help, that's what we would do." (Appendix H, Transcription at p. 40, lines 7-16)

290. These consistencies between the Corley letter and the two police interrogations are strong evidence of the truth of the Corley letter, front and back.

291. Through skillful examination, defense counsel would have shown Corley's evident comfort with violence, drug dealing, guns and knives, and murder, which would have been profoundly material to Mr. Wilson's case.

The Police Interview Worksheet re. Joan Vroblick

292. These notes from a police interrogation of Joan Dixia Vroblick dated August 3, 2004, also would have contributed to the materiality of the Corley letter. The document, a "police interview worksheet," is attached as Appendix K; a Certified Court Reporter transcription of the document is attached as Appendix L.

293. Joan Dixia Vroblick, referred to elsewhere, by law enforcement, as Joan Ann Vroblick (see Doc. 76-24 at PDF 16, Bates 3857), was the jail cellmate of Kittie Corley while Corley was awaiting trial for the murder of Mr. Dewey Walker.

294. The interrogation of Vroblick would have occurred one week prior to Corley writing the Corley letter. The interrogation was conducted by Troy Silva and Nick Check, of the Henry County Sheriff's Department.[7]

295. The interview worksheet indicates that Kittie Corley told Vroblick about the Hatfield murder. Vroblick reports to the police that "Kathleen" Corley, whom she also refers to as "Kitty," told her:

- "Bam Bam killed C.J." Appendix K at p. 3; Appendix L, Transcription at p. 7, line 7.
- Something about "C.J., Stucky" (who were the drug runners who went to Atlanta). *Id*., line 8.
- Something about "Bankhead Highway, Atlanta." *Id.*, line 10.
- Pertinent information about an extensive list of drug dealers, including "Ghost, Iceman, Ice, Tank and Czar," as well as "Jessy," C.J., and Stuckey. *Id*., lines 9-12.
- Additional information about "DOC" and "MGR Trucking." *Id.*, lines 10 and 12.

296. This extensive information and the detailed and correct list of aliases confirm, first, that Kittie Corley was at the heart of a violent drug ring headed by

[7] Note that the *Slate* article on the Hatfield murder (Appendix Z) states that "The Hatfield case was handled at its outset by an old hand from the Alabama State Bureau of Investigation named Tommy Merritt and Troy Silva, a young detective from the Henry County Sheriff's Office who had never before investigated a murder." Appendix Z at p. 6.

"Bam Bam" (her fiancée); and second, that Corley trusted Vroblick and told her everything about the Hatfield murder.

297. Defense counsel would have presented this evidence through skillful cross-examination of Sgt. Luker.

Police Interrogation of Heather Lynn Brown

298. Present counsel has obtained a police interrogation of a third party, Heather Lynn Brown, a suspect in the Hatfield murder. The police interrogation is dated January 29, 2005, the same day as the Corley interrogation. *See* Appendix M.

299. In her interrogation, Brown tells the police that Kittie Corley had possession of the gun that was used as the murder weapon in the Hatfield murder and that she maintained it in her strongbox in her apartment. This confirms both the backside of the Corley letter and Corley's police interrogations from 2005.

300. Heather Lynn Brown, who was James Bailey's girlfriend, maintained in the police interrogation that Mark Hammond shot C.J. Hatfield, and made him beg for his life before shooting him. Appendix M, Transcription at p. 8. Brown then discusses the murder weapon:

> Brown: […] one of the guns Stuckey gave to Bam. Bam had given it back to Mark. And Bam then told his ex-girlfriend who goes by Kitty, it's her nickname not her stage name or anything, get the gun back from Mark it's registered. […]
>
> Hendrickson: Who put it in the lock box?

Brown: Kitty.

Hendrickson: Lock box where?

Brown: In her apartment. She had like a little safe lock box.

[…]

Hendrickson: Whatever happened to the used cartridge shells?

Brown: Mark. I don't know. Mark had those but when Kitty got the gun from Mark. He got it back from.

Hendrickson: Now who's Kitty.

Brown: Kitty is Bam Bam's ex-girlfriend.

Appendix M, Transcription at pp. 8-10.

301. This police interrogation of Heather Brown provides third-party confirmation of Corley's statements in the Corley letter and the two police interrogations implicating her in possession of the murder weapon.

302. Defense counsel would have called Heather Brown at trial as a witness, possibly adverse, and examined her about her knowledge of Corley's possession of the murder weapon. This would have corroborated defense counsel's cross-examintion of Sgt. Luker regarding Corley's possession of the murder weapon in the Hatfield case and her claims about possession and disposal of the murder weapon, the baseball bat, in the Walker case.

Police Interrogation of Mark Hammond

303. Present counsel has also obtained a police interrogation of another co-defendant, Mark Hammond, in the Hatfield case, dated February 26, 2005. *See* Appendix N.

304. In his interrogation, Hammond confirms that Kittie Corley was Scott "Bam Bam" Mathis's girlfriend. Appendix N, Transcription at p. 4-5 ("I know another girl named Kitty that Bam Bam dated").

305. Defense counsel would have used this evidence to call Hammond as third-party confirmation of what Corley wrote on the backside of the Corley letter and told the police in her two police interrogations.

306. During the interrogation, the investigator, Allen Hendrickson, states that Kittie Corley has "Bam Bam's name tattooed" on her body. *See* Appendix N, Transcription at p. 5; Appendix MM (confirming Corley bears the tattoo "2 HEART SYMBOLS WITH SCOTT").

307. The fact that Corley tattoed Bam Bam's name on her body with heart symbols is independent corroboration of her relationship with Bam Bam, which she writes about in the Corley letter and tells the police in her two interrogations.

308. Defense counsel would have called Hammond or Hendrickson as witnesses to independently corroborate Corley's relationship with Bam Bam and the

veracity of what she confessed to on the backside of the Corley letter, as a way to bolster what she said on the frontside of the Corley letter.

"Work Product | James William Bailey"

309. Another piece of material downstream evidence is a summary of law enforcement's conclusions about the various suspects in the Hatfield murder. The document is titled "Work Product | James William Bailey" at the top and is dated 2005. *See* Appendix O. That document includes the following about Kittie Corley:

- "Catherine Corley said she had a strongbox that Scott Mathis had her store a handgun in. The box was in Hammond's possession some of the time. She said that she (sic) took care of CJ with his gift and she knew that gift to be a 38 revolver that an unknown person gave him. Corley said that Hammond wanted her to say that he was with her at her place at the time the murder took place." Appendix O at p. 2.
- "Parmer stated that he knows that CJ was shot multiple times with what he believed to be different guns. He stated that the shots sounded differently. Parmer stated that Stuckey was there on his truck. Mathis was there on his Bronco. Parmer stated that a friend named Corley took him there and dropped him off. He stated that CJ was transported from the place where he was shot to the place where he was found in a toolbox on the back of Hammond's truck. Parmer stated that a necklace and ring were removed from CJ's body and the jewelry was given to Sara." Appendix O at p. 3.
- "Catherine Corley said she had a strongbox that Scott Mathis had her store a handgun in. The box was in Mathis some of the time and in Hammond's possession some of the time. She said that Mathis said he took care of CJ with his gift, and she knew that gift to be a 38 revolver that an unknown person gave him. Corley said she saw Mathis put shorts and a button down shirt which he said belonged to Mark Hammond, along with clothing she knew belonged to Mathis, in a trash bag for disposal on the same day that they also asked for a water hose to wash out the truck. This happened at the place where she was staying in Dothan. It was the same day that he said

> he took care of CJ with his gift. This is believed to be Friday March 12, 2004." Appendix O at p. 5.

310. This downstream evidence further corroborates the Corley letter and contributes to its materiality. Defense counsel would have presented its substance through skillful examination of Sgt. Luker or Kittie Corley.

"Final Summary" dated April 4, 2005

311. Another piece of downstream evidence is a police summary of the evidence and investigation (two partial versions of which are attached to the previous document under the date of March 31, 2005 and April 4, 2005). *See* Appendix P (Document titled "Final Summary" and dated April 4, 2005). That document includes the following regarding Kittie Corley:

> "Catherine Corley, former girlfriend of Mathis, was interviewed at the Houston County Jail. Corley said that Hammond told her that he had shot Hatfield. She said that Hammond told her that Stuckey and Hammond were together before Hatfield was shot and that Hatfield was with Stuckey in Stuckey's truck. Hammond and Stuckey each told Corley that they urinated at the scene were (sic) Hatfield was found." Appendix P at p. 6.

Here too, this downstream evidence provides corroboration of the substance of the Corley letter and contributes to its materiality. Defense counsel would have revealed its substance to Mr. Wilson's jury through skillful examination of Luker or Corley.

Henry County Sheriff's Department Property/Evidence Sheet

312. Another piece of downstream evidence is a Henry County Sheriff's Department Property/Evidence Sheet from approximately March 21, 2005, that refers to a "Kathy Corely (sic) Statement," alongside statements of John Parmer, James Bailey, Mark Hammond, and other suspects. *See* Appendix R (Police Evidence Sheet).

313. This property/evidence sheet corroborates the facts surrounding the Corley letter and her involvement in the Hatfield murder. It too would have been presented to the jury through skillful examination of Luker or Corley.

Excerpts from James Stuckey Clerk's File

314. Incidentally, as an exhibit to its "Response to Order and Motion for Extension" (Doc. 84), Respondent filed an excerpt from James Stuckey's court clerk's file. *See* Appendix U; also Doc. 84-1, Exhibit A to Doc 84. The document is a "Report of Investigation" ("PSI") by the Alabama Board of Pardons and Paroles dated March 31, 2010.

315. Even though the document postdates Mr. Wilson's trial, the excerpt corroborates the information that Corley provided to the police, both in the interrogations and in the Corley letter, namely that she was a handler of the Hatfield murder weapon. Therefore, this Court should consider it in its determination of the materiality of the Corley letter.

316. In the interrogation of Kittie Corley on March 24, 2005, Corley notes that Andrew White had possession of the safe box containing the gun. *See* Appendix H, Transcription at p. 16, lines 7-9 ("Corley: Well, it went from Drew to Mark, back to Drew, then Bam Bam, and I got it back."). This is consistent with the PSI report which indicates that Andrew White was the person who turned over the handgun to the police: "Late Monday night, Henry County Authorities were contacted by Andrew White, who released to authorities a Taurus handgun believed to have been used to shoot Hatfield. It was determined that White received the weapon from Hammond and Mathis on Sunday March 14, 2004 and that Mathis had received instruction from Stuckey to dispose of the weapon." Appendix U at p. 4. The PSI adds that the police obtained an "empty Taurus handgun box with a serial number that was traceable to Stuckey." Appendix U at p. 4.

317. This is all consistent, too, with Corley identifying the .38 gun, which was allegedly the murder weapon, in her interrogation by Hendrickon and Merritt on March 24, 2005. That gun is identified as a Rossi .38, but Rossi and Taurus effectively merged in the 1990s. The PSI corroborates Corley's admissions about the murder weapon being in her possession.

318. As a result, the PSI supports the materiality of the Corley letter and downstream evidence. Any slight discrepancies do not lessen the impact that defense counsel would have had on the jury, through skillful examination of Corley and

Luker, that Kittie Corley has openly confessed, seemingly without remorse, to possessing, handling, and providing the murder weapon in the Hatfield case.

Documentary video footage

319. If defense counsel had obtained the Corley letter, counsel would also have independently investigated the Hatfield murder and discovered additional excupatory evidence.

320. As noted *supra* paragraphs 43 and 128, the murder of C.J. Hatfield has drawn significant media attention and investigative journalism. *See*, *e.g.,* Appendix Z. Following Respondent's production of evidence relevant to the Hatfield murder, documentary filmmakers reached out to undersigned counsel and shared documents with counsel, including a transcript of a video recording of an interview by a documentary filmmaker with one of the suspects in the Hatfield murder who, when asked about Catherine Corley, responds on camera: "Catherine Corley, they called her Kitty. Yeah, that's a loco psycho chick that actually killed someone herself." *See* Appendix S (redacted transcript of video footage by documentary filmmaker). It is likely that this refers to the killing of Dewey Walker (although it is possible that this may refer to another murder).

321. Had Mr. Wilson's defense counsel known about Corley's involvement in the Hatfield murder, this type of statement by a co-defendant in the Hatfield case would have corroborated the Corley letter and other downstream evidence.

322. This evidence would have been used as classic mitigating evidence that shifts culpability away from Mr. Wilson, creates residual doubt about Mr. Wilson's role in the death of Mr. Walker, and places responsibility for the intentional murder on Kittie Corley. It is also direct aggravation-rebuttal evidence, undermining Mr. Valeska's repeated, vivid harangues about the supposed merciless beating of Mr. Walker by David Wilson as the basis for the application of the HAC aggravator.

323. For all of the foregoing reasons, the Corley letter and handwriting expert report were material evidence and their suppression violated *Brady v. Maryland*, 373 U.S 83 (1963).

F. Mr. Wilson's Case Is On All Four Corners with the *Brady* Case

324. *Brady v. Maryland* has become such an iconic ruling in the body of federal constitutional law that we sometimes forget its specific facts. But its specific facts are on all fours with Mr. Wilson's case. *Brady* speaks specifically to Mr. Wilson's situation and clearly controls it.

325. In *Brady*, 25-year-old John Leo Brady and 24-year-old Charles Donald Boblit were charged with murdering Mr. William Brooks. Both Brady and Boblit were convicted of first-degree murder (committed during the course of a robbery) and sentenced to death. At trial, Brady took the stand and admitted to his participation in the robbery, but claimed that Boblit had done the actual killing. Prior to trial, Brady's attorney had requested that the prosecution allow him to examine

Boblit's extrajudicial statements. Several of those statements were shown to him, but one dated July 9, 1958—in which Boblit admitted to having killed Brooks himself—was withheld by the prosecution. That statement did not come to Brady's notice until after he had been tried, convicted, and sentenced to death, and after his conviction had been affirmed on appeal. Brady motioned for a new trial on the basis of this newly discovered evidence, and the Maryland Court of Appeals remanded Brady's case for retrial on the question of punishment.

326. On appeal, the United States Supreme Court found that the suppression of Boblit's confession violated the Due Process Clause of the Fourteenth Amendment. Citing *Mooney v. Holohan*, 294 U.S. 103 (1935), the Court held 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." 373 U.S. at 87. The Court explained that this holding was grounded in fundamental notions of procedural fairness:

> Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.… 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.' 373 U.S. at 87-88 (internal citations omitted).

The Court went onto say that while Boblit's confession would not have exculpated Brady under Maryland law, it was nevertheless material to his degree of culpability. As such, it was prejudicial error for the prosecution to withhold that statement, and Brady was entitled to a new trial on punishment.

327. As Judge Watkins wrote in his Memorandum Opinion and Order, "At his trial, Brady testified and admitted his involvement with his codefendant in the murder. 373 U.S. at 84. Indeed, his counsel 'conceded that Brady was guilty of murder in the first degree, asking only that the jury return that verdict "without capital punishment."' *Id*. The Supreme Court held that suppression of the codefendant's statement in which he 'admitted the actual homicide' violated Brady's due process rights because it was favorable to Brady and possibly was material at least to his punishment. *Id.* at 86." Doc. 67, p. 19; *see also* Doc. 79, p. 13-14.

328. The Supreme Court's ruling in *Brady*—and its language—applies with equal force in Mr. Wilson's case:

> Petitioner and a companion, Boblit, were found guilty of murder in the first degree and were sentenced to death, their convictions being affirmed by the Court of Appeals of Maryland. 220 Md. 454, 154 A.2d 434. Their trials were separate, petitioner being tried first. At his trial Brady took the stand and admitted his participation in the crime, but he claimed that Boblit did the actual killing. And, in his summation to the jury, Brady's counsel conceded that Brady was guilty of murder in the first degree, asking only that the jury return that verdict 'without capital punishment.' Prior to the trial

> petitioner's counsel had requested the prosecution to allow him to examine Boblit's extrajudicial statements. Several of those statements were shown to him; but one dated July 9, 1958, in which Boblit admitted the actual homicide, was withheld by the prosecution and did not come to petitioner's notice until after he had been tried, convicted, and sentenced, and after his conviction had been affirmed.
>
> Petitioner moved the trial court for a new trial based on the newly discovered evidence that had been suppressed by the prosecution. Petitioner's appeal from a denial of that motion was dismissed by the Court of Appeals without prejudice to relief under the Maryland Post Conviction Procedure Act. 222 Md. 442, 160 A.2d 912. The petition for post-conviction relief was dismissed by the trial court; and on appeal the Court of Appeals held that suppression of the evidence by the prosecution denied petitioner due process of law and remanded the case for a retrial of the question of punishment. . . .
>
> We agree with the Court of Appeals that suppression of this confession was a violation of the Due Process Clause of the Fourteenth Amendment. . . .

Brady, 373 U.S. at 84-86.

329. As in Brady, Mr. Wilson's case involves an unplanned murder committed during the course of a robbery. Moreover, like Brady, Mr. Wilson has consistently asserted throughout that he did not kill Mr. Walker—and evidence existed at the time of trial that his co-defendant killed Mr. Walker. The withholding of exculpatory evidence by the prosecution during Mr. Wilson's trial casts doubt on the propriety of his sentence, and on the integrity of our criminal justice system. Mr. Wilson's death sentence is the product of a proceeding "that [did] not comport with standards of justice." *Brady*, 373 U.S. at 88. As the *Brady* Court explained, "[s]ociety wins not only when the guilty are convicted but when criminal trials are

fair." *Id.* at 87. The Kittie Corley letter and the downstream evidence cast clear doubt on the validity and fairness of Mr. Wilson's sentence of death.

G. The Corley letter would have led to admissible evidence

330. 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.").

331. In any event, in Mr. Wilson's case, it would have led to admissible evidence, including: impeachment evidence presented in cross-examination of Sgt. Luker, the lead investigator; mitigation evidence at the penalty phase and sentencing; rebuttal evidence regarding the HAC aggravator; evidence of a shabby investigation; and 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. Secretary, Department of Corrections*, 572 F.3d 1327, 1346-48 (11th Cir. 2009).

332. This evidence would have been admissible as a matter of Due Process under clearly established federal law under the AEDPA 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).

333. The Supreme Court's decision in *Green* is perfectly applicable to Mr. Wilson's case—on all four corners. 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.

H. The ACCA's decision is an unreasonable application of *Brady* and rests on unreasonable findings of fact.

334. The ACCA, in affirming the dismissal of this claim, found it to be procedurally barred, because the court concluded that trial 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. This ruling represents an unreasonable application of clearly established federal law (28 U.S.C. § 2254(d)(1)) for multiple reasons.

335. It flouts established law because a finding of procedural default in the *Brady* context, where the suppressed evidence was not turned over to the defense, even if they were made aware of it, improperly shifts the burden from a prosecutor's duty to disclose to a defense's duty to demand. In this case, there was a binding court order for the production of exculpatory evidence and trial counsel for Mr. Wilson made at least three *Brady* requests. 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).

336. The United States Supreme Court has held that the defense's failure to request exculpatory material does not excuse the prosecutor's duty to disclose. *Banks*, 540 U.S. at 696; *Strickler*, 527 U.S. at 280; *United States v. Agurs*, 427 U.S. 97, 107 (1976). Moreover, the prosecution does not comply with its duty to disclose simply by informing defense counsel that exculpatory evidence exists. In Mr. Wilson's case, the Corley letter was in the possession of the State of Alabama, and the State of Alabama never turned the letter over to defense counsel. No other source for the letter was available to Mr. Wilson, nor would the possibility of obtaining the letter through other means of investigation change the prosecution's duty to disclose under *Brady*. Therefore, the letter was suppressed within the meaning of *Brady*. *See supra* paragraphs 167-203; Doc. 67, p. 18 n.6.

337. The ACCA holding also constitutes a grossly unreasonable application of clearly established federal law because the *Brady* claim could not have been raised by appellate counsel, who were restricted to the record on appeal. The police report mentioning the Corley letter was not part of the record on appeal, and there is no evidence to show that appellate counsel had it or knew of its existence.

338. The ACCA's decision also rests on a number of unreasonable findings of fact (28 U.S.C. § 2254(d)(2)):

339. First, it rests on an unreasonable finding of fact that defense counsel knew of the Corley letter, when in fact there has been no evidence or hearing on that question to date.

340. Second, it rests on an unreasonable finding of fact that if defense counsel had asked for the Corley letter, the State of Alabama would have produced the letter, when in fact 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* motions over 19 years.

341. Third, it rests on an unreasonable finding of fact that had defense counsel demanded the Corley letter, the State of Alabama would have produced the expert report. *Wilson II*, No. CR-16-0675, at *9. There is no evidence to support this conclusion. The expert report was not mentioned in discovery materials or anywhere else.

342. Moreover, the ACCA's decision is not controlling because the question of procedural default is a federal question for this Court and there is "cause and prejudice" to excuse any potential procedural bar in Mr. Wilson's case.

343. It is well established that "cause and prejudice" will excuse a procedural default. *See Murray v. Carrier*, 477 U.S. 478 (1986).

344. It is equally well established that the prosecutorial suppression of evidence that constitutes a *Brady* violation also constitutes "cause." *See, e.g.*,

Amadeo v. Zant, 486 U.S. 214 (1988); *Banks v. Dretke*, 540 U.S. 668 (2004); *see* Hertz & Liebman, *Federal Habeas Corpus Practice and Procedure* (7th ed., 12/22/22 update, Foreword, pages xi – xiv). As Judge Watkins ruled earlier, "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, Dept. of Corr.*, 28 F.4th 1089, 1129 (11th Cir. 2022). 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.

345. In addition to the State's suppression constituting cause, it is well established that defense counsel's failure to raise a constitutional issue "is one 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), would satisfy the cause requirement. As an alternative to his *Brady* claim, Mr. Wilson also raises a

claim of ineffective assistance of counsel for failure to investigate and use the Corley letter. *See infra* 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).

346. The "cause and prejudice" standard for purposes of federal habeas review is a matter of federal law that could not be resolved by the state courts. Thus, even if the ACCA was correct that trial and appellate counsel failed to raise a *Brady* claim, the *Brady* claim would still have to be considered on the merits under a "cause and prejudice" analysis.

347. In sum, the ACCA's resolution of this claim does not rest on an adequate or independent state-law ground.

348. 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. *See* Appendix SS (Anthony G.

Amsterdam & James S. Liebman, Loper Bright *and the Great Writ*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4991093 (forthcoming in *Columbia Human Rights Law Review*, February 2025)).

349. The Supreme Court of the United States has never passed upon the constitutionality of that deference requirement. Consequently, this Court is free to invalidate it. Contemporaneously with the filing of this amended petition, Petitioner is filing a notice of constitutional question required by Fed. Rule Civil Pro. 5.1 and is serving the Attorney General of the United States with that notice.

350. This Court may avoid the necessity for adjudicating the constitutionality of § 2254(d)'s deference requirement by construing § 2254(d) in the manner prescribed by Justice Stevens' opinion in *Williams*, 529 U.S. at 386: "Section 2254(d) requires us to give state courts' opinions a respectful reading, and to listen carefully to their conclusions, but when the state court addresses a legal question, it is the law 'as determined by the Supreme Court of the United States' that prevails." This approach is advised by the canon of constitutional avoidance. *See*, *e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) ("'[I]t is a cardinal principle' of statutory interpretation . . . that when an Act of Congress raises 'a serious doubt' as to its constitutionality, 'this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'"); *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001) ("[I]f an otherwise acceptable construction of a statute

would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' . . . we are obligated to construe the statute to avoid such problems."); *and see, e.g., United States v. Hansen*, 599 U.S. 762, 781 (2023); *McKesson v. Doe*, 592 U.S. 1, 6 (2020) (per curiam); *Skilling v. United States*, 561 U.S. 358, 403-08 (2010).

351. Mr. Wilson will brief the issues raised by paragraphs 348 through 350 and supported by Appendix SS, together with other legal issues, after the Court has set a schedule for briefing the procedural issues framed by this amended petition, Respondent's answer, and Mr. Wilson's reply.

352. Since the ACCA's ruling is in error, this Court should review Mr. Wilson's *Brady* claim using the appropriate analysis. It should find that the Corley letter was suppressed and that—together with the downstream evidence—it was 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. Mr. Wilson requests discovery and a hearing on this issue.

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 AND SENTENCING.

353. The State of Alabama has consistently maintained that lead trial counsel for Petitioner David Wilson, Scott Hedeen, knew of the existence of the Corley letter from its mention in the police report and is at fault for not raising a *Brady* violation regarding the Corley letter at the original trial and on direct appeal.

354. Petitioner contests the state's argument for multiple reasons, *see* Claim I *supra*, including the fact that Mr. Hedeen filed a *Brady* motion pre-trial requesting any statements by Kittie Corley and thereby fully satisfied the requirements of *Brady*.

355. However, should the Court agree with the State of Alabama that a reasonably competent counsel had the obligation to seek discovery of the Corley letter or to raise a *Brady* claim regarding the Corley letter prior to trial or at trial, then Mr. Hedeen's failure to do so would *ipso facto* amount to constitutionally ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984).

356. United States District Judge Keith Watkins explained in his Memorandum Opinion and Order, that "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), as did the United States Supreme Court. *Wilson v. Alabama*, 139 S.Ct. 1620 (April 29, 2019)." Doc. 67, p. 9.

357. The holding by the ACCA that "evidence that an accomplice was involved is not mitigating" is contrary to or an unreasonable application of clearly established federal law, under the United States Supreme Court's decision in *Lockett v. Ohio*, 438 U.S. 586, 597, 604 (1978).

358. For the foregoing reason, and the cumulative effect of the other errors committed by trial counsel, Mr. Wilson was deprived of the effective assistance of counsel at the penalty phase and sentencing, in violation of the Sixth and Fourteenth Amendments, and Mr. Wilson is entitled to a new penalty-phase proceeding and sentencing. Mr. Wilson requests discovery and a hearing on this issue.

A. Background regarding trial counsel

359. Scott Hedeen and Ginger Emfinger (now known as Virginia Hicks, henceforth referred to as Ms. Emfinger) were appointed as counsel for Mr. Wilson on November 15, 2006. Doc. 76-1 at PDF 23, Bates 23.

360. During the one-year period between their appointment and the start of trial on December 3, 2007, Mr. Hedeen had open-heart surgery and cataract surgery (Doc. 76-6 at PDF 37, 41-42, Bates 1042, 1046-1047), he suffered from diabetes (Doc. 7607 at PDF 124, Bates 1329), he went through a divorce, and the very week of Mr. Wilson's trial, he was ordered to move out of his home. Doc. 76-24 at PDF 41, Bates 3882, ¶ 4 (divorce judgment of Scott and Jennifer Hedeen); *see also* Doc. 76-24 at PDF 45, Bates 38826 (time and date calculation). Mr. Hedeen did not have the health, time, energy, or emotional capacity necessary to effectively represent Mr. Wilson.

361. Although he was appointed on November 15, 2006, Mr. Hedeen did not visit his client, Mr. Wilson, until eleven months later, one day before the suppression hearing. *See* Doc. 76-24 at PDF 53, Bates 3894 (Attorney Fee Declaration for Scott Hedeen from the clerk's file for Houston County Case No. CC-04-1120) (showing initial visit with client on October 8, 2007).

362. Just a few months after being appointed, and before he had ever even met Mr. Wilson, on March 24, 2007, Mr. Hedeen went to the emergency room with heart problems. Doc. 76-6 at PDF 41, Bates 1046. He was diagnosed with congenital heart failure (Doc. 76-2 at PDF 150, Bates 350), and not long after, he had open-heart surgery. *Id.*

363. On March 26, 2007, two days before the surgery, Ms. Emfinger filed a motion for a continuance based on this scheduled operation. *Id.* For the next three months, Mr. Hedeen performed no work on Mr. Wilson's case except occasional phone calls with co-counsel. Doc. 76-24 at PDF 51, Bates 3892 (Att'y Fee Dec. for Scott Hedeen).

364. At a status conference on June 26, 2007, held expressly to address his health issues (Doc. 76-6 at PDF 35, 37, Bates 1040, 1042), Mr. Hedeen explained that he was incrementally regaining some of his stamina and was now able to walk. Doc. 76-6 at PDF 39, Bates 1044. He informed the trial court that his schedule was necessarily restricted, and the court questioned whether he would be able to handle a full capital jury trial. Mr. Hedeen assured the court that he would be able to do so.

365. Nonetheless, Mr. Hedeen's condition was having a negative effect on his representation. At the suppression hearing on October 9, 2007, the trial court took up a recently filed defense motion to rehear motions that the court had previously denied. Doc. 76-2 at PDF 360-362, Bates 160-162; Doc. 76-6 at PDF 118, Bates 1123. The trial court asked Mr. Hedeen if any new cases had arisen since the court denied the previous motions on March 5, 2007. Doc. 76-1 at PDF 24-30, Bates 24-30; Doc. 76-6 at PDF 118, Bates 1123. Mr. Hedeen explained that the previous motions were filed "before I went in for heart surgery. So I'm not aware of any new cases. There may be, but I am not aware of any." Doc. 76-6 at PDF 118,

Bates 1123. The trial court denied the motion to rehear the previously denied motions. Doc. 76-6 at PDF 119, Bates 1124.

366. At the June 2007 status conference, Mr. Hedeen also informed the trial court that he could not read due to his deteriorating vision:

> [I have] cataracts in both eyes, and I am going 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. This was less than six months before Mr. Wilson's trial in December. Doc. 76-6 at PDF 143, Bates 1148.

367. Mr. Hedeen had the cataract surgery in July. Doc. 76-6 at PDF 58-59, Bates 1063. Another two-month hiatus in work on Mr. Wilson's case followed. Doc. 76-24 at PDF 52, Bates 3893 (Att'y Fee Dec. for Scott Hedeen). Thus, for five months out of the year during which Mr. Hedeen represented Mr. Wilson, from March to June and July to August 2007, he was not able to perform any work on the case. Even if Mr. Hedeen had fully recovered his eyesight and his stamina by the time of the trial, his health issues clearly compromised his ability to effectively prepare for a trial.

368. In addition to these emergencies, Mr. Hedeen informed the court immediately following *voir dire* that he was prompted to check his glucose levels by a comment from one of the prospective jurors about "his diabetic condition." Doc.

76-7 at PDF 124, Bates 1329. The juror opined that he might not be able to sit through a trial due to his own diabetes. Doc. 76-6 at PDF 168, Bates 1173. But Mr. Hedeen, with much greater responsibility weighing on him, brushed off the possibility that his own ailments might hamper his defense of Mr. Wilson (Doc. 76-7 at PDF 124, Bates 1329), as long as he had orange juice or peanut butter to fortify him. Doc. 76-6 at PDF 169, Bates 1174.

369. At the same time that Mr. Hedeen was struggling with his multiple health problems, he was also dealing with a divorce. An order issued on December 3, 2007, the first day of Mr. Wilson's trial (Doc. 76-6 at PDF 143, Bates 1148), required him to vacate his residence by the middle of the week. *See* Doc. 76-24 at PDF 41, Bates 3882, ¶ 4 (divorce judgment of Scott and Jennifer Hedeen); *see also* Doc. 76-24 at PDF 45, Bates 3886 (time and date calculation, showing 90 days from Sept. 6, 2007, would be Dec. 5, 2007).

370. It is clear that Mr. Hedeen's serious health issues and personal difficulties prevented him from effectively preparing for Mr. Wilson's capital trial.

371. Ginger Emfinger did not or was not able to compensate for Mr. Hedeen's deficiencies. Her time records are almost entirely devoted to research and motion drafting. *See* Doc. 76-24 at PDF 63-69, Bates 3904-3910 (Att'y Fee Dec. for Ginger Emfinger from the clerk's file for Houston County Case No. CC-04-1120). She interviewed Mr. Wilson possibly twice before trial and his father once. Doc. 76-

24 at PDF 64, 66, Bates 3905, 3907. She spoke only once during the entire trial, and that was to inform the court that she agreed with Mr. Hedeen's decision to waive closing argument at the guilt phase. Doc. 76-9 at PDF 173, Bates 1780. This waiver forms the basis for one of Mr. Wilson's ineffectiveness claims, *see infra* paragraphs 649-672.

372. The deficiencies in trial counsel's investigations were not offset by the efforts of the previously appointed attorneys. Matthew Lamere's time records show that by February 21, 2006, nearly two years after his appointment to the case, he had not even read the discovery. Doc. 76-24 at PDF 76, Bates 3917 (Att'y Fee Dec. for Valerie Judah from the clerk's file for Houston County Case No. CC-04-1120 (entry for Feb. 21, 2006, showing Valerie Judah emailed discovery to Lamere, but with critical pages missing)); *see also* Doc. 76-24 at PDF 81-90, Bates 3922-3931 (Att'y Fee Dec. for Matthew Lamere from the clerk's file for Houston County Case No. CC-04-1120) (with no entries for reviewing discovery)).

373. Valerie Judah's time records show little more. Though she reviewed the discovery in October 2004 (Doc. 76-24 at PDF 77, Bates 3918), that review did not prompt much in the way of investigation. At that time, she apparently did not notice that the first sixteen pages of Mr. Wilson's statement to police were missing (or, at least, she did not do anything about it), because she did not note the omission until February 2006, when she emailed the discovery to Mr. Lamere, who, she said, would

get the missing pages. Doc. 76-24 at PDF 75-76, Bates 3916-3917 (entries for Feb. 21 and 28, 2006). As to investigation, one notation in her records mentions a possible fifth suspect, a person connected to co-defendant Kittie Corley (Doc. 76-24 at PDF 78, Bates 3919) (entry for September 14, 2004), but this lead was not followed up. Otherwise, the investigation operated at cross-purposes: the investigator, Lan McGriff, did nothing, because he was waiting for direction from counsel (Doc. 76-24 at PDF 76, Bates 3917) (entry for October 26, 2005), while counsel believed the investigator was proceeding on his own. *Id.* (entry for Feb. 17, 2006); *compare State v. Petric*, 333 So.3d 1063, 1086 (Ala. Crim. App. 2020) ("'[A]lthough lawyers are not prohibited from employing the services of non-lawyer assistants and delegating functions to them, the lawyer is required to supervise the delegated work and retains complete responsibility therefor.' . . . '[A]n attorney must supervise work done by lay personnel and a lawyer stands ultimately responsible for work done by his non-lawyer employees.'"). Ms. Judah became so exasperated with the lack of progress that she consulted with another investigator, Bobby Sorrells, to step in because he was "familiar with the case." *Id.* But his knowledge of the case came from working as a member of co-defendant Matthew Marsh's defense team (*id.*) (entry for Aug. 24, 2005), meaning he would have had a serious conflict of interest. In the end, the conflict did not materialize, because Sorrells, like McGriff, Lamere, and Judah, did nothing.

374. Trial counsel's failures to investigate and prepare for trial and sentencing are evident throughout the record of the proceedings in this case. For the penalty phase, trial counsel collected Mr. Wilson's school records, but did not present them to the jury in any coherent way. Instead, they simply dumped them on the jury to let the jurors look at them if they wanted to. *See infra.* They called two witnesses to testify for Mr. Wilson, his mother and a neighbor, but did not prepare them, so that critical information was not elicited, and the witnesses were completely unprepared for the prosecution's attack on their testimony. *See infra.* They presented nothing to explain the handicaps under which Mr. Wilson has lived his life, including undiagnosed Asperger's Syndrome. *See infra* paragraphs 415-455.

375. Trial counsel for Mr. Wilson did not act as advocates, much less as the zealous advocates the Constitution requires. Their deficiencies were so many and so serious that Mr. Wilson was effectively deprived of his right to counsel at the penalty and sentencing phases.

B. The right to the effective assistance of counsel.

376. The Sixth and Fourteenth Amendments guarantee all criminal defendants the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984); *see also Williams v. Taylor*, 529 U.S. 362 (2000) (hereafter, "*Terry Williams*"). To establish his entitlement to relief on a claim that counsel rendered ineffective assistance, a prisoner must demonstrate that (1) his attorney's

representation "fell below an objective standard of reasonableness," and that (2) he was prejudiced as a result. *Strickland*, 466 U.S. at 687-688; *see also*, *e.g.*, *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (citing *Strickland*) ("An ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense.").

377. "'To establish deficient performance, a petitioner must demonstrate that counsel's representation 'fell below an objective standard of reasonableness.'" *Wiggins*, 539 U.S. at 521 (quoting *Strickland*, 466 U.S. at 687). Under this standard, a reviewing court must undertake "an objective review of [counsel's] performance, measured for 'reasonableness under prevailing professional norms,' . . . which includes a context-dependent consideration of the challenged conduct as seen 'from counsel's perspective at the time.'" *Wiggins*, 539 U.S. at 523 (quoting *Strickland*, 466 U.S. at 688). Where counsel's challenged conduct is purportedly attributable to "tactical judgment," that judgment and the "investigations supporting" it must themselves be objectively reasonable. *Wiggins*, 539 U.S. at 521.

378. "[T]o 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). This standard requires a showing by less than

a preponderance of the evidence: "[A] defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Strickland*, 466 U.S. at 694. "The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Id.* at 694. Thus, a petitioner's burden of proof respecting prejudice is a lesser showing than "more probable than not." Rather, a petitioner must show "a probability sufficient to undermine confidence in the outcome" of the proceeding. *Id.* "[A]n analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993).

379. In assessing whether a reasonable probability can be shown, the aggregate harm flowing from all of counsel's individual errors must be considered cumulatively, rather than merely determining whether each individual error, standing alone, was prejudicial. *Strickland*, 466 U.S. at 694 ("[B]ut for counsel's unprofessional errors, the result of the proceeding would have been different.") (emphasis added); *id.* at 695 ("In making this [prejudice] determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury.") (emphasis added); *Terry Williams*, 529 U.S. at 397 (prejudice must be determined based on the "totality" of the evidence); *Daniel v. Comm'r*, 822 F.3d

1248, 1277-78 (11th Cir. 2016); *Evans v. Sec'y, Fla. Dep't of Corrs.*, 699 F.3d 1249, 1269 (11th Cir. 2012) ("the prejudice inquiry should be a cumulative one as to the effect of all of the failures of counsel that meet the performance deficiency requirement") (citing *Strickland*, 466 U.S. at 692, and *id.* at 694) (emphasis added).

380. In a capital case, defense counsel have a heightened duty of effective representation, under the Eighth Amendment, because of the severity of the penalty. *See*, *e.g.*, *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (Marshall, J., plurality op.) ("In capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability").

381. Because the impact of counsel's deficiencies must be considered cumulatively, Mr. Wilson's challenges to various aspects of trial counsel's performance, though presented individually, are all set forth herein as subdivisions of Claims II and IV. Additional relevant legal principles governing the particular ineffective assistance of counsel allegations are stated throughout, as applicable.

382. Because of the individual instances and cumulative effect of the deficient performance of trial and appellate counsel, as described below, Mr. Wilson was denied his right to the effective assistance of counsel and to his rights to due process, to a fair trial, to a reliable verdict on guilt and punishment, and to be free from cruel and unusual punishment as enumerated below in violation of the Fifth,

Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.[8] There is a reasonable probability that, but for counsel's deficient performance (each instance of which is detailed below), the outcome of Mr. Wilson's sentencing would have been different. *Strickland*, 466 U.S. at 694. Mr. Wilson was denied a full, fair and adequate hearing on all of the underlying issues described below due to counsel's failure to present evidence, to argue the applicable law, and other deficiencies in counsel's representation.

C. Trial counsel failed to provide effective assistance of counsel because they failed to properly investigate the State's case.

383. At Mr. Wilson's trial, his trial counsel failed to investigate the state's case. They failed to develop a coherent alternative to finding Mr. Wilson guilty as the sole perpetrator of the murder of Dewey Walker. They failed to reduce his culpability for purposes of sentencing. Counsel were unprepared to present any such defense because they had failed to conduct a reasonable investigation into the circumstances of the crime, the character and record of Mr. Wilson's co-defendants, or the character of Mr. Wilson himself. All the jury had for its consideration were the supposed 114 blows inflicted on Mr. Walker and Mr. Wilson's confession. The jury were barely informed of the existence of the co-defendants and, so, were given

[8] This enumeration of rights applies to every individual instance of ineffectiveness and to all instances collectively.

no information about the possibility of their culpability. Nor were they informed at trial of anything in Mr. Wilson's personal circumstances that might have supported a fact-finding that he acted with anything other than full understanding of what he was doing and the likely consequences of his actions.

384. Because of trial counsel's failure to investigate and present a defense, Mr. Wilson was deprived not only of the effective assistance of counsel, but of a fair sentencing trial, that is, a verdict worthy of confidence. *See*, *e.g.*, *Wiggins*, 539 U.S. at 534 ("'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'") (quoting *Strickland*, 466 U.S. at 694). As the following will show, had counsel acted as the advocates the Constitution requires, they would have demonstrated to the jury that Mr. Wilson was not the person who beat Mr. Walker to death with the baseball bat—a demonstration that would have generated a residual doubt at the penalty phase—and had less culpability than his co-defendant, Kittie Corley.

385. For the foregoing reasons, Mr. Wilson is entitled to relief and a new penalty phase and sentencing. Mr. Wilson requests discovery and a hearing on this issue.

1. The duty to investigate.

386. "The right to the effective assistance of counsel is … the right of the accused to require the prosecution's case to survive the crucible of meaningful

adversarial testing." *United States v. Cronic*, 466 U.S. 648, 656 (1984). Because counsel here failed to act within professional norms—which require a defense attorney at a minimum to conduct an adequate and independent investigation into the State's case—they were completely unprepared to subject the State's case to testing in that constitutionally required crucible.

387. Counsel's duty to thoroughly investigate at both stages of trial is well-established. *See*, *e.g.*, *Strickland*, 466 U.S. at 690 ("counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary"); *Rompilla v. Beard*, 545 U.S. 374, 387 (2005) ("It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities."); *Wiggins*, 539 U.S. at 524 (finding counsel ineffective for "abandoning their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources."); *Terry Williams*, 529 U.S. at 396 (counsel have an obligation "to conduct a thorough investigation of the defendant's background."). *See also* Guideline 10.7, American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (2003) (hereinafter cited as "ABA Guideline [No.]") ("Counsel

at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty.").

388. "In judging the defense's investigation, as in applying *Strickland* generally, hindsight is discounted by pegging adequacy to 'counsel's perspective at the time' investigative decisions are made, and by giving a 'heavy measure of deference to counsel's judgments.'" *Rompilla*, 545 U.S. at 381 (citations omitted). But "'strategic choices made after less than complete investigation are reasonable' only to the extent that 'reasonable professional judgments support the limitations on investigation.'" *Wiggins*, 539 U.S. at 533 (citations omitted). When a court reviews "the reasonableness of an attorney's investigation … [it] must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Id.* at 527. If "failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment," counsel's conduct flunks *Strickland*'s performance standard. *Wiggins*, at 526. The U.S. Supreme Court has determined that pertinent ABA standards are "guides to determining what is reasonable."[9] *Rompilla*, 545 U.S. at 387. *See also Wiggins*, 539 U.S. at 524 (recognizing the ABA Guidelines as "well-defined norms"); *Strickland*, 466 U.S. at 688 (describing the ABA standards as "[p]revailing

[9] The Alabama Circuit Judges Association has also adopted the ABA Guidelines as relevant to the determination of what is expected of counsel and the court in conducting a capital case. *See* Doc. 76-24 at PDF 133, Bates 3974 (Resolution, effective January 21, 2005).

norms of practice"). These accepted norms and Supreme Court precedent support the proposition that "[m]inimum standards that have been promulgated concerning representation of defendants in criminal cases generally, and the level of adherence to such standards required for noncapital cases, should not be adopted as sufficient for death penalty cases." Guideline 11.2.A, American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989) (hereinafter cited as "ABA Guideline [No.] (1989)").[10] *See also Johnson v. Mississippi*, 486 U.S. 578, 584 (1988) (noting a "special 'need for reliability in the determination that death is the appropriate punishment' in any capital case"); *Gardner v. Florida*, 430 U.S. 349, 363-64 (1977); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

389. The 2003 edition of the ABA Guidelines instruct that "[i]nvestigation and planning for both phases must begin immediately upon counsel's entry into the case . . . " Commentary to ABA Guideline 1.1 ("Representation at Trial"). Investigation must be thorough:

> defense counsel must independently investigate the circumstances of the crime, and all evidence – whether testimonial, forensic, or otherwise – purporting to inculpate the client. To assume the accuracy of whatever information the client may initially offer or the prosecutor may choose or be compelled to disclose is to render ineffective assistance of counsel. The defense lawyer's obligation

[10] The same principle is expressed in the 2003 Guidelines, though less succinctly, at Commentary to ABA Guideline 1.1.

> includes not only finding, interviewing, and scrutinizing the backgrounds of potential prosecution witnesses, but also searching for any other potential witnesses who might challenge the prosecution's version of events, and subjecting all forensic evidence to rigorous independent scrutiny.

Id. Conducting an adequate investigation is key to defending one accused of a crime, from the initial stage of filing pretrial motions to the final stage of presenting closing argument at trial. The ABA Guidelines clearly state, "Without investigation, counsel's evaluation and advice amount to little more than a guess." Commentary to ABA Guideline 11.4.1 (1989). In this case, counsel's performance did not even rise to a guess, because they developed no defense strategy at all.

390. Moreover, "'[t]he duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty.'" *Rompilla*, 545 U.S. at 387 (quoting 1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.)). *See also* ABA Guideline 10.7(A)(1) ("The investigation regarding guilt should be conducted regardless of any admission or statement by the client concerning the facts of the alleged crime, or overwhelming evidence of guilt, or any statement by the client that evidence bearing upon guilt is not to be collected or presented."). Thus, there can be no "strategic" reason to fail to investigate.

391. Investigation consists of more than reading discovery provided by the State, though that is an initial duty. Following from that discovery, and from

interviews with their client, defense counsel should develop an investigative plan. Commentary to ABA Guideline 1.1 ("Representation at Trial") ("[i]nvestigation and planning for both phases must begin *immediately* upon counsel's entry into the case ...") (emphasis added). *See also Wiggins*, 539 U.S. at 523 (counsel were ineffective for failing to follow up on information about client's background provided by the client to a probation officer and reported in a pre-sentence investigation report). Such a plan would consist of lists of witnesses to be interviewed and relevant records to collect. Commentary to ABA Guideline 10.7 ("elements of an appropriate investigation").

392. In any case involving co-defendants, reasonable investigation would require following leads as to their greater culpability and collecting any available records for them, such as criminal history and history of mental health treatment. In addition to demanding such information through discovery, Rule 16.1(b), Ala. R. Crim. P. (discovery by the defense of co-defendant or accomplice statements), counsel should search such obvious sources as the casefile for each co-defendant in the same case.

393. Mr. Wilson's trial counsel did none of these things. They conducted only minimal investigation, which discovered nothing about Mr. Wilson's co-defendants and very little about Mr. Wilson. Thus, their performance fell short of

all minimally accepted norms. Because of trial counsel's substandard performance, the jury heard a one-sided version of events – the State's case.

2. More specifically, trial counsel were ineffective for failing to investigate the confession of co-defendant Kittie Corley to the murder of Dewey Walker

a. Substandard performance.

394. The State of Alabama maintains that Mr. Wilson's trial counsel were provided with the police report giving an account of the police investigation of co-defendant Kittie Corley. Doc. 76-24 at PDF 16-17, Bates 3857-3858. That report described the following: on September 2, 2004, District Attorney Valeska and Sgt. Luker, the lead investigator in the death of Mr. Walker, met with an attorney representing an inmate at the Houston County Jail named Joan Ann Vroblick. Doc. 76-24 at PDF 15, 3857. The attorney turned over to Valeska a letter given to her by her client written by Kittie Corley. *Id.* In the letter, Corley confessed that she had "hit Mr. Walker with a baseball bat until he fell." *Id.* On September 30, Sgt. Luker searched Corley's jail cell and collected various samples of handwriting which she acknowledged as her own. He compared the handwriting on these samples with that of the Corley letter and concluded that all were written by the same person. Doc. 76-24 at PDF 16-17, Bates 3857-3858.

395. Three of Mr. Wilson's attorneys, Valerie Judah, Scott Hedeen, and Ginger Emfinger, billed for review of discovery in their attorney fee declarations.

See Doc. 76-24 at PDF 49, 65, 77, Bates 3890, 3906, 3918 (extracted from the casefiles for *State v. Wilson*, Houston County Case Nos. CC-04-1120 and -1121, received from the Clerk of Houston County). Yet none of them obtained a copy of this letter.

396. Certainly, an inculpatory statement from a co-defendant is critical information. *See*, *e.g.*, *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."); *Chambers v. Mississippi*, 410 U.S. 284, 298-302 (1973) (holding exclusion of third party's inculpatory statement on hearsay grounds violated due process rights of defendant). And it is evidence to which they were entitled under both Rule 16.1(b), Ala. R. Crim. P., and *Brady*.

397. There can be no strategic reason to excuse not obtaining or looking at the letter. A reasonably competent attorney would have investigated all of a client's co-defendants even without any "red flag" (*Rompilla*, 545 U.S. at 382) such as the Corley letter. Corley's casefiles for the same offense provided a readily accessible, self-evident place to start. Yet counsel in this case did not look into them. The only matter of concern evidenced by defense counsel about Mr. Wilson's co-defendants was whether Michael Jackson was being offered a deal in exchange for testifying against the others. *See* Doc. 76-24 at PDF 23, Bates 3864 (letter from Scott Hedeen to Mr. Valeska dated November 13, 2007).

b. Prejudice

398. Had counsel followed through on the police report (assuming they obtained and read it), they would have discovered that the State turned the confessional letter and the handwriting samples over to the USPS for examination by a handwriting expert. *See* Doc. 76-24 at PDF 35-38, Bates 3876-3879 (Motion to Order Defendant to Provide Fingerprint and Palm Print, filed in *State v. Catherine Nicole Corley*, Houston Cnty. Case No. CC-05-1726).

399. The USPS expert opined that the letter and the samples taken from Corley's cell—which Corley had identified as her own writing—were probably written by the same person. Doc. 76-24 at PDF 37, Bates 3878 (attached letter dated January 12, 2007).

400. The State used the letter against Corley. The State put forward this evidence, the letter and the expert report, as credible before the circuit court in the case against Corley to obtain additional finger- and palm-prints. *See* Doc. 76-24 at PDF 35-38, Bates 3876-3879 (Motion to Order Defendant to Provide Fingerprint and Palm Print, filed in *State v. Catherine Nicole Corley*, Houston County Case No. CC-05-1726).

401. The Corley letter and the handwriting expert report authenticating it as written by her are crucial to the defense of Mr. Wilson on the charge of intentional murder. Mr. Wilson admitted only to striking Mr. Walker once with the baseball bat

and trying to subdue him; he denied killing Mr. Walker. Doc. 76-3 at PDF 122-124, Bates 524-526. An admission by a co-defendant that she inflicted multiple blows on Mr. Walker and that she was far more deeply involved in every aspect of the burglary/robbery-murder and its cover-up, would have called into question any intention on Mr. Wilson's part to kill the victim. There is a reasonable probability that the jury, presented with this information, would have determined that Corley's confession raises residual doubts on the issue of intent and capital murder, and that the jury would have returned a verdict of life imprisonment without parole. *See* Ala. Code 1975, §§ 13A-5-40(b) and 13A-6-2(a)(1) (defining murder as requiring a specific intent to cause death).

402. The significance of the Corley letter, confessing to hitting Mr. Walker with a bat until he fell, and of the expert report, confirming the identity of the writer as Corley, to Mr. Wilson's sentence of death cannot be denied. At Mr. Wilson's trial, the prosecutor repeatedly emphasized the number of injuries as indicative of an intent to kill and of the heinousness of the act. Doc. 76-9 at PDF 152-153, Bates 1759-1760; *see also* Doc. 76-9 at PDF 155-156, 158, 169, Bates 1762-1763, 1765, 1776.

403. The Corley letter and its contents would have produced admissible evidence at Mr. Wilson's trial under *Chambers v. Mississippi*, 410 U.S. 284 (1973), and *Holmes v. South Carolina*, 547 U.S. 319 (2006): namely, that the police

investigators had received evidence that a co-defendant, or more specifically Kittie Corley, had perpetrated the beating and been involved in another murder only a few weeks beforehand. 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. Had evidence derived from Corley's letter and the expert report been submitted to the jury, there is a reasonable probability that Mr. Wilson would have been sentenced to life without parole because Corley's admission to striking Mr. Walker multiple times, under the State's own theory, calls into question Mr. Wilson's intent to kill.

404. The confession of co-defendant Catherine Corley would have been relevant to the jury's determination of the appropriate punishment for Mr. Wilson, even if the jurors had convicted him of capital murder after hearing it. Relative culpability is a legitimate and important consideration in sentencing. *See*, *e.g.*, Ala. Code 1975, § 13A-5-51(4) ("The defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor.") *See also Lockett v. Ohio*, summarized in paragraph 147 *supra*. Had counsel investigated this matter and discovered the facts as set out above, the jury would have had a very

different picture of Mr. Wilson to consider. "[B]ut for counsel's unprofessional errors" there is a reasonable probability that "the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

405. During the testimony of Mr. Wilson's two mitigation witnesses, the DA attacked the idea that Mr. Wilson was a follower by insisting that he acted alone. He browbeat neighbor Bonnie Anders into silence:

> And he said, well, something like that. I was going to go over there and knock him out. And when I got there, I changed it all up, because I didn't want to, you know, just knock him out.
>
> If those words were said and those were David Wilson's words and he was smart enough to change his plan, and he didn't want to just knock him out, in other words, and the victim was beat to death, would you look at the jury and tell the[m], *would you still call him a follower if he is the only one there and he was the only one that did that part*? You wouldn't, would you, ma'am, if that was true? If that was true? If you can't answer, I understand.

Doc. 76-10 at PDF 107, Bates 1916 (emphasis added). Had the Corley letter been in evidence, this line of questioning would have been impossible or rebutted.

406. At the penalty phase, the State emphasized the tortuousness of Mr. Walker's death in its argument for the death penalty. ADA Maxwell re-emphasized the State's theory that all injuries were inflicted by Mr. Wilson as proof of the HAC aggravator:

> You heard Dr. Enstice describe to you the number of injuries that the victim in this case suffered through, 114, I believe, is what she said, different injuries ...

> I don't think that any of you, when you see the pictures and after you have heard the testimony from the doctor, will believe that this was not especially heinous, atrocious and cruel.

Doc. 76-10 at PDF 110-111, Bates 1919-1920. And again, at the sentencing hearing before the judge, the number of injuries was given as a justification for a sentence of death. Doc. 76-10 at PDF 176-177, 184-185, Bates 1085-1986, 1993-1994.

407. Had the Corley letter and the handwriting expert report been submitted to the jury, there is a reasonable probability that Mr. Wilson would not have been sentenced to death, because Corley's admission to striking Mr. Walker multiple times, under the State's own theory, calls into question Mr. Wilson's cruelty towards the victim. There is a reasonable probability that the vote for death, already at the minimum of ten (Doc. 76-2 at PDF 172, Bates 372), would have been different, because the jury would have had to consider the likelihood that Mr. Wilson was not Mr. Walker's actual killer.

408. The sentencing court was not provided with this information either. And since the sentencing court is required to consider the jury's sentencing recommendation and accord weight proportionally to the jurors' votes, *Ex parte Tomlin*, 909 So. 2d at 286-87 (number of jurors voting for a sentence must be considered by the court), had additional jurors, or the entire jury voted for life, as is possible with such relevant evidence as this, the court's weighing would also have been different.

409. Counsel's failure to discover and present Corley's confession seriously prejudiced Mr. Wilson because it left him with no defense and thereby deprived him of a fair penalty trial. "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*, 514 U.S. at 434.[11] 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.") Thus, counsel's failure to investigate, discover, and present this evidence violated Mr. Wilson's rights to the 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. Therefore, Mr. Wilson's death sentence is due to be vacated.

410. For the foregoing reasons, Mr. Wilson is entitled to relief and a new penalty and sentencing. Mr. Wilson requests discovery and a hearing on this issue.

[11] *See also id.* at 434-38 (noting analysis of *Strickland* prejudice adopted from *Brady* materiality); *Martin v. Cain*, 246 F.3d 471, 477 (5th Cir. 2001) ("*Brady*'s 'materiality' standard 'is identical to' the prejudice standard Martin had to satisfy to prevail on his ineffective assistance claim").

3. The ACCA's decision is contrary to or an unreasonable application of Strickland*, requiring reasonable investigation, and* Lockett*, on the consideration of mitigating evidence.*

411. The Alabama Court of Criminal Appeals upheld the trial court's ruling that Mr. Wilson's ineffective assistance of counsel claim regarding the failure to investigate the Corley letter at the penalty phase was procedurally barred because "Evidence that an accomplice was involved is not mitigating." Doc. 67, p. 9.

412. The ACCA's holding is contrary to or an unreasonable application of clearly established federal law, under the United States Supreme Court's decision in *Lockett v. Ohio*, 438 U.S. 586, 597, 604 (1978); *see also supra* paragraphs 348-350. As noted *supra* paragraph 147, federal and state courts routinely consider lesser culpability as a mitigating circumstance and are required to under binding Supreme Court law.

D. Counsel were ineffective at the penalty and sentencing phases of Mr. Wilson's capital trial in numerous other ways.

413. Defense counsel failed to communicate with a host of individuals who would have provided crucial evidence in support of a sentence of life imprisonment without parole for David Wilson. Had counsel adequately communicated with David, engaged his family, spoken with friends, neighbors, counselors, doctors, teachers, and acquaintances, and acquired understanding of his school records, they

would have been able to craft a comprehensive and compelling mitigation case and Mr. Wilson would not have been sentenced to death.

1. Had counsel properly investigated and prepared for sentencing, they would have discovered 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.

414. Trial counsel's failure to prepare for David Wilson's sentencing was prejudicial. Had counsel performed a reasonable investigation, they would have learned that numerous witnesses, as well as considerable documentary evidence, were available that would have yielded a compelling life story, explaining how David's troubled upbringing and psychological challenges led to his involvement in this offense. Had such a presentation been made, there is a reasonable probability, especially given the non-unanimous 10-2 jury recommendation, that David Wilson would have been sentenced to life imprisonment without parole. This unacquired evidence, which would have precluded a sentence of death, includes the following:

Asperger's Syndrome

415. Despite the overwhelming evidence of mental disability and developmental abnormalities in David Wilson's school records, trial counsel did not have him fully evaluated by a neuropsychologist. Instead, they consulted Dr. Michael D'Errico for the limited purpose of confirming that Mr. Wilson suffers from

ADHD and learning disability. Inexplicably, even after Dr. D'Errico confirmed these diagnoses, counsel did not call him to testify to explain even this limited diagnosis to the jury. Instead, they gave the jury 400 pages of school records to look at if the jurors wanted to. Doc. 76-10 at PDF 33, Bates 1842. Trial counsel extinguished the significant mitigation value that the jury could have derived from Mr. Wilson's school records by telling the judge: "But if we are going to introduce any of the records, we should just introduce all of the records and let the jury take a look at it. I mean, that's fine with me." *Id.*

416. Rule 32 counsel retained Dr. Robert D. Shaffer, Ph.D., a forensic and neuropsychologist, to conduct a full evaluation of David. In addition to interviewing and administering psychological examinations to David himself, Dr. Shaffer interviewed David's relatives about his social, behavioral, and psychological history, and he consulted Mr. Wilson's school and psychological records. A licensed clinical psychologist since 1984, Dr. Shaffer would have been readily available to testify at Mr. Wilson's capital trial in 2007. *See* Appendix NN (Psychological Report from Dr. Robert Shaffer and Curriculum Vitae of Dr. Robert Shaffer).

417. Had Dr. Shaffer been consulted and called to testify by David's trial counsel, he would have testified that David suffers from "severe" symptoms of Asperger's Syndrome, a constituent of autism spectrum disorder ("ASD"), and that this disorder contributed to his involvement in the alleged crime. *See* Appendix NN.

418. Dr. Shaffer's testimony would have been especially valuable given that Mr. Wilson was accused of a crime that closely reflected the two categories of ASD symptoms most notably connected with criminal behavior. "Criminal activity associated with hfASD [high functioning autism spectrum disorder] psycho-pathology can be divided into two broad domains: (1) deficits in Theory of Mind (ToM) abilities and/or (2) abnormal, repetitive narrow interests." Barbara G. Haskins and J. Arturo Silva, *Asperger's Disorder and Criminal Behavior: Forensic-Psychiatric Considerations* 34 J. Am. Acad. Psych. L. 374-84, 378 (2006). At the time of Mr. Wilson's trial in 2007, Asperger's Syndrome was a well-established medical diagnosis. Austrian pediatrician Hans Asperger defined the type of autism that would be termed Asperger's Syndrome in 1944,[12] over sixty years before Mr. Wilson was charged in this case. Autism has been included in the Diagnostic and Statistical Manual of Mental Disorders, the definitive diagnostic reference text for mental disorders, since 1980, starting in the third edition of the manual (DSM-III). Asperger's Syndrome had been in the DSM-IV since at least 1994, thirteen years before David Wilson was tried.

419. Through his testimony, Dr. Shaffer would have described how David Wilson's Asperger's Syndrome required him to struggle to understand and interact

[12] "Hans Asperger," The Autism History Project at the University of Oregon, accessed September 27, 2024, https://blogs.uoregon.edu/autismhistoryproject/people/hans-asperger/.

with other people, and how it isolated him from his peers. *See* Appendix NN, Psychological Report from Dr. Robert Shaffer, at 3, 6. Dr. Shaffer would have testified that despite his social inadequacies, David nevertheless craved the acceptance of his peers. *Id.* at 6-7, 14. He was therefore easily manipulable and prone to do improper things to imitate or please them. *See* Appendix NN. Experts have found, for example, that adolescents with Asperger's Syndrome often imitate socially successful individuals in an effort to fit in, and a consequence of such behavior is "observing and imitating popular but notorious models, for example the school 'bad guys'. This group may accept the adolescent with Asperger's syndrome, who wears the group's 'uniform', speaks their language and knows their gestures and moral code; but this in turn may alienate the adolescent from more appropriate models." [13] Persons with Asperger's Syndrome also have to struggle to understand when their peers might have been using them or deceiving them, which makes them further manipulable by their peers.[14] Dr. Shaffer would have made clear to the jury that David was a perfect vehicle for his co-defendants to use for their own criminal ends. This evidence would have been especially probative and compelling when

[13] Tony Atwood, *The Complete Guide to Asperger's Syndrome* (2007), 28.

[14] David M. Williams, et al., "Can you spot a liar? Deception, mindreading, and the case of autism spectrum disorder," Autism Research (2018) ("Detection of deception is of fundamental importance for everyday social life. People with diminished understanding of other minds, such as those with autism spectrum disorder (ASD), might be at risk of manipulation because of lie detection difficulties. We found that lie detection ability was related to how many ASD traits neurotypical people manifested and also was significantly diminished among adults with a full diagnosis of ASD.")

presented in conjunction with testimony from David Wilson's teacher, Donna Arieux, who observed that Mr. Wilson never bullied his peers and that instead he cared for others. *See, infra*.

420. Dr. Shaffer would have testified how Asperger's Syndrome affected David Wilson's behavior, rendering him more susceptible to engaging in innapropriate or illegal actions, and stunted his ability to fully understand the consequences of his actions. Appendix NN, at 14.

421. Dr. Shaffer would have explained to the jury how David's obsession with electronics, such as the electronics in Chris Walker's van, was a symptom of his Asperger's Syndrome and motivated part of the alleged offense. Dr. Shaffer would have contextualized David Wilson's obsession with the electronics available in the van rather than leaving the jury to consider David's actions in a vacuum. Dr. Shaffer would have explained that an obsession with electronics is a "typical ASD trait," and that Mr. Wilson's "obsession of electronics or other gadgetry" had been exhibited throughout David's life, as he "has always been observed to tinker with sound [devices] and other electronics, breaking them down into pieces and sometimes failing to be able to restore them to operation." Appendix NN, at 14. Dr. Shaffer would have explained that beginning when David was a child, he would ceaselessly take apart and ruin electronics he was interested in, and he was not able to manage his obsessions even when faced with consequences. *Id.* In discussing

David's childhood, David's mother had informed Dr. Shaffer that David was "fascinated by taking apart things around the house and studying the parts of mechanical objects." Appendix NN, at 4-5.

422. Dr. Shaffer would have also explained that Asperger's Syndrome muted David's ability to understand other people's emotions and pain, and made David unable to appreciate the human stakes of his actions like most people. Appendix NN, at 14. Dr. Shaffer's explanation would have made clear that Mr. Wilson's actions, such as returning to burglarize a property where an injured or dead man was located, were not the product of cold-blooded cruelty or lack of empathy, but rather symptoms of David Wilson's Asperger's Syndrome.

423. Dr. Shaffer would also have contextualized David Wilson's behavior during trial. This would have been especially important in a capital case, where the jury has increased discretion at the sentencing stage to act based upon their personal impressions of the defendant's display of remorse (or lack thereof) and moral character. Individuals with Asperger's Syndrome often express a flat affect that gives them the appearance of remorselessness.[15] David Wilson's teachers and caregivers have expressed that David often had a vacant expression consistent with

15 Elizabeth Weiss, et al. "Less differentiated facial responses to naturalistic films of another person's emotional expressions in adolescents and adults with High-Functioning Autism Spectrum Disorder," 89 *Progress in Neuro-Psychopharmacology and Biological Psych*., 341, 341-346 (2019).

Asperger's Syndrome. *See, infra* paragraph 445. Dr. Shaffer would have explained that David Wilson's lack of facial expression was not indicative of any lack of remorse. Mr. Wilson was likely prejudiced by his appearance before the jury without such context, especially with regard to the "heinous, atrocious, and cruel" aggravating factor alleged by the prosecution.

424. Dr. Shaffer would have testified that Mr. Wilson was placed in Special Education when he was eleven years old after five educators designated him as within the "Emotional Conflict" and "Specific Learning Disability" categories of learning disabilities. Appendix NN, at 3. A year earlier, a school psychologist in Santa Rosa County, Florida, had observed that David was "anxious and nonsensical" in the classroom, that "social and emotional control and good academic adjustment appear to be significant problems" for David, and that his score on the Learning Disability Evaluation Scale indicated "learning problems for age in all areas." Appendix NN, at 3; *see also* Doc. 76-3 at PDF 158, Bates 560.

425. Dr. Shaffer would have testified that David Wilson spent his elementary school years isolated from his peers. He was relegated to a special-needs classroom and not permitted to engage in extra-curricular activities. Appendix NN, at 3. When he did have the chance to engage with his peers, on discrete occasions such as peer counseling, he was mocked. *Id.* at 3.

426. Dr. Shaffer would have discovered and testified that as a child, David Wilson was prescribed a cocktail of drugs to subdue his ADHD symptoms in school, including the antidepressants Prozac and Ritalin. Appendix NN, at 4; *see also* Doc. 76-11 at PDF 20, Bates 2019.

427. Dr. Shaffer would have discovered and testified that David Wilson has exhibited abnormal behavior consistent with a diagnosis of Asperger's Syndrome since he was an infant. David's mother Linda Wilson "observed that he resisted being held by her and didn't like sitting in her lap. At an age when her other children played with toys, instead of cuddling or holding soft baby toys that he was given, David's attachment to those toys only seemed to be as an object to chew. This was also the case with building blocks and a toy tool set, which he only 'tried to eat.' She also recalled that he would line up his toys in an orderly, regimented fashion, unlike her other sons. If anyone moved a toy he had lined up, he would be upset that something was out of position." Appendix NN, at 4-5.

428. Dr. Shaffer would have discovered and testified that David Wilson struggled with interpersonal interactions as a child, and he craved attention and acceptance without knowing how to seek or receive attention appropriately. Appendix NN, at 5. Linda Wilson would have told Dr. Shaffer that " 'If you paid attention to the other kids, he'd act silly to get your attention' by giggling, banging, or hollering. He would complain about needing attention, saying, 'I wish I was an

only child,' and would create distractions to get their attention but not seem to appreciate that his behavior was inappropriate." *Id.* Linda Wilson would have also told Dr. Shaffer that "David expressed sadness and frustration that 'nobody cares about me.'" *Id.* Mr. Wilson's uncle, Angelo Gabbrielli, would have confirmed Ms. Wilson's observations to Dr. Shaffer, saying that David "would act silly or 'tell stupid jokes' to get the others to laugh. He would do intrusive and inappropriate plays for attention, … [and] appeared to feel hurt because he didn't feel himself to be a part of the group. He said that David would overexaggerate expressions of feelings for others, and the peers would just clam up." *Id*. at 6.

429. Dr. Shaffer would have discovered and testified that David Wilson was easy to manipulate and would emulate others or follow their directives in his desperate efforts to fit in. Dr. Shaffer would have learned that "Mr. Gabbrielli considered that his nephew was 'desperate for a friend.' 'If you liked frogs, he liked frogs. If you liked surfing in a mudhole, he liked surfing in a mudhole.' He was a 'follower' who would mimic others but over-do it. He would 'do stupid things to maintain friendship.' 'If you said stick your tongue on an electric fence, he'd do it.'" Appendix NN, at 6-7. Dr. Shaffer would have testified that David had "Difficulty understanding when peers were taking advantage or manipulating him, and exhibited excessive behaviors when trying to conform to peer expectations and manipulations" (Appendix NN, at 12), and that "[h]e would do anything asked of him by people he

considered friends or potential friends, and he would often over-do it, exhibiting excessive behavior to prove himself in front of his peers" (Appendix NN, at 14). In short, Dr. Shaffer would have made clear in his testimony that Mr. Wilson was a perfect candidate for his co-defendants to use and frame for their own criminal ends. And as Mr. Gabbrielli predicted, if an individual Mr. Wilson considered a friend asked him to steal, he would. Appendix NN, at 7.

430. Dr. Shaffer would have administered Observational Questionnaires to Mr. Wilson's family members. Appendix NN, at 7-8. Through his testing, Dr. Shaffer would have discovered that David's father's "ratings of David on scales descriptive of his Social Interaction, Restricted Patterns of Behavior, Cognitive Patterns, and Pragmatic Skills each displayed scores in the range of concern for Asperger's symptoms. The resulting global Asperger's Quotient was 73, a score indicating more severe symptoms than 97 out of 100 respondents from a standardization sample. Linda Wilson was most familiar with David when he was a small child and again when he was in high school. She also identified areas of concern related on the scales measuring Cognitive Patterns, and Pragmatic Skills. Her Asperger's Disorder Quotient of 80 indicates more severe symptoms than 91 out of 100 individuals from the sample." Appendix NN, at 9.

431. Through his testing, Dr. Shaffer would have also discovered that "Mr. Wilson endorsed a number of symptoms associated with brain abnormality. These

included visual, auditory, olfactory and haptic sensory illusions; episodes of visual fixation and staring, nocturnal sweats and other sleep disturbance. Mr. Wilson experiences frequent headaches, numbness and tingling in extremities." Appendix NN, at 9.

432. Dr. Shaffer would have administered the Social Responsiveness Survey ("SRS"), a 65-item objective questionnaire assessing symptoms associated with autism, to David's father (Roland Wilson), mother (Linda Wilson), and uncle (Angelo Gabbrielli), and discovered that David Wilson scores "in the middle of the Severe rating," which is associated with "severe and enduring interference with everyday social interactions," and "strongly associated with clinical diagnosis of autism spectrum disorder." Appendix NN, at 9. This high score clearly demonstrates that David Wilson's understanding of his surroundings and his resulting behaviors were significantly different from other people's, as "[t]his rare frequency of symptoms of Autism is unlikely to be found in 1000 ratings from the general population." *Id.*

433. Through his assessments, Dr. Shaffer would have discovered critical evidence concerning Mr. Wilson's role in the crime and the reliability of the investigation against him. In a case concerning competing co-defendant narratives of the crime, Dr. Shaffer would have discovered that David was "unable to recognize

when something is unfair or when he was being taken advantage of by someone." Appendix NN, at 10.

434. Furthermore, Dr. Shaffer would have discovered through the SRS-2 tests that Mr. Wilson exhibited "typical Autism traits and symptoms such as awkward, inappropriate, odd, weird or social behaviors, especially with communication and recognition of meaning and emotional tones of other people" (Appendix NN, at 9-10), struggled with "social isolation" as a child (*id.* at 10), "focusses too much on parts of things and misses the big picture" (*id.*), "misunderstand[s] emotional tones and non-verbal signals" (*id.*), and has to struggle to "perceiv[e] the emotional states of other people" (*id.*). Mr. Wilson also exhibited "a lack of engagement in meaningful adult communication" and "rigid and inflexible behavior problems" (*id.*).

435. Dr. Shaffer would have found that consistent with an Asperger's Syndrome diagnosis, David Wilson was "emotionally distant and reacts to other people as if they are objects," "avoids people who try to make a connection with him and fails to understand what others are thinking or feeling," "is unable to communicate his own feelings," and "is uncoordinated, lacks self-confidence and is too dependent on others." Appendix NN, at 10-11.

436. Dr. Shaffer would have diagnosed David Wilson with Asperger's Syndrome as he exhibited all of the symptoms that make up the "minimum criteria"

for an Asperger's Syndrome Diagnosis.[16] "Persistent deficits in social communication and social interaction across multiple contexts," "[r]estricted, repetitive patterns of behavior, interests, or activities," and "[r]estricted, repetitive patterns of behavior, interests, or activities" were all "evident beginning during Mr. Wilson's infancy and through to the present day." Appendix NN, at 11-12. And thus Dr. Shaffer would have testified that Mr. Wilson's "pattern of isolated cognitive strengths but severe social deficits is consistent with both Asperger's Disorder and the current diagnostic classification of Autism Spectrum Disorder" (*id.* at 12), and "open-ended interviews about David Wilson's behavior throughout life resulted in an unmistakable indication of Asperger's and Autism Spectrum Disorder" (*id* at 13).

437. Dr. Shaffer would have testified that in addition to Mr. Wilson's severe Asperger's Syndrome, David suffered from "a head injury with brief loss of consciousness" when he was 11 or 12 years old that further exacerbated his decision-making abilities. Appendix NN, at 4. Mr. Wilson had cognitive deficits prior to his head injury, but Dr. Shaffer has found that "[t]he head injury he sustained in a bicycle accident likely added further neurological impairment to Mr. Wilson's life-long developmental disorder." *Id.* at 11. And furthermore, Dr. Shaffer would have testified that "[t]his type of closed head injury resulting in unconsciousness is known

[16] "Current diagnostic practices specify that individuals meeting the former description of Aspergers Disorder are subsumed under the diagnosis of Autism Spectrum Disorder (ASD)." Appendix NN, at 13.

to add inflammation to the brain. Results often include impairment of impulse control and the appreciation of consequences of actions." *Id*. at 14.

438. Dr. Shaffer would have informed the jury how Mr. Wilson's Asperger's Syndrome and severe brain injury would have affected his culpability at trial. He would have testified that "The developmental and post-injury neurological state of Mr. Wilson also affects theory of mind. That is the ability for a person to recognize how a different person might view the same situation and appreciation of how the emotional experience another person would have would differ from his own." Appendix NN, at 14. David Wilson's inability to recognize the viewpoints and emotions of other people is directly relevant to the question whether he deserved a death sentence, because it would have negated a juror's possible impression that he was callous or indifferent to the suffering of Mr. Walker when he may have appeared to a juror so focused on the eleectronics.

439. Dr. Shaffer would have explained to the jury how Mr. Wilson's Asperger's Syndrome and his brain injury each would have compromised the connections in crucial parts of his brain, specifically, the "circuits between fully functional frontal lobe, anterior cingulate and limbic system structures." Appendix NN, at 14. Dr. Shaffer would have presented that, because David Wilson's brain functions were compromised, he was and is "less able to halt an ongoing sequence of actions, and weigh the likely consequences. The result appears to be heedless

behavior with willful disregard for how the outcome would be experienced by others or by oneself in similar circumstance." *Id.*

440. Dr. Shaffer would have explained to the jury how David Wilson's "severe deficit in *theory of mind* caused [him] to lack appreciation for the moral and legal wrongness of his actions,"[17] and that David "displayed a desperate need to believe that he fit in with other people." Appendix NN, at 14. Dr. Shaffer would have explained that David's inability to appreciate the morality of his actions and his outsized need to fit in made him an easy target for his peers, such as Matt Marsh, who "multiple times prior to the incident… persuaded David to steal things that Matt wanted." *Id.*

441. Dr. Shaffer would have informed the jury that David Wilson's return to the van was consistent with his Asperger's Syndrome symptom of obsessing over and taking apart electronic gadgets, and that David would have had to struggle "to grasp the big picture in a human sense — potential for harm and loss of life" given his "brain compromise and severe Autism Spectrum Disorder." *Id* at 14-15.

442. According to the Diagnostic and Statistical Manual of Mental Disorders, produced by the American Psychiatric Association,

> [t]he essential features of autism spectrum disorder are persistent impairment in reciprocal social communication and social

[17] Theory of mind is "the ability for a person to recognize how a different person might view the same situation and appreciation of how the emotional experience another person would have would differ from his own." Appendix NN, at 14.

> interaction (Criterion A), and restricted, repetitive patterns of behavior, interest, or activities (Criterion B). These symptoms are present from early childhood and limit or impair everyday functioning (Criteria C and D).

DSM-V § 299.00 (Autism Spectrum Disorder), p. 53 (5th ed. 2013). "In young children with autism spectrum disorder, lack of social and communication abilities may hamper learning, especially learning through social interaction or in settings with peers." *Id.* at 57. "Adolescents and adults with autism spectrum disorder are prone to anxiety and depression." *Id.* at 55. "Self-injury (*e.g.*, head banging, biting the wrist) may occur ...." *Id.* at 55. Nonverbal communicative deficits "are manifested by absent, reduced, or atypical use of eye contact (relative to cultural norms), gestures, facial expressions, body orientation, or speech intonation." *Id.* at 54. "Many individuals [also] have language deficits," including "severe deficits" in verbal social communication. *Id.* at 53, 52. These symptoms are evident in David Wilson's school records and from collateral witnesses. *See, e.g.*, Doc. 76-4 at PDF 195, 200, Bates 798, 803 (David was labeled "emotionally handicapped" in 4th grade); Doc. 76-4 at PDF 21, Bates 624 ("David requires consistent behavior management strategies throughout the day. David is unable to adjust to different teachers each period."); Doc. 76-5 at PDF 100, Bates 904 (when David was 14, he was assigned to a separate classroom and other accommodations because he struggled with "frustration and stress" in school, "self esteem and worth," "lack of

emotional control causing harm to self and others"); Doc. 76-4 at PDF 91, Bates 694 (in David's 10th grade Psychological Report, he showed either significant or very significant evidence of: Excessive Self-Blame, Excessive Anxiety, Excessive Withdrawal, Poor Ego Strength, Poor Academics, Poor Attention, Poor Impulse Control, Poor Sense of Identity, Excessive Suffering, Poor Anger Control, Excessive Sense of Persecution, Excessive Aggressiveness, Excessive Resistance.) An expert conducting a full evaluation would have recognized and identified these features, as has Dr. Shaffer. "Diagnoses [of autism spectrum disorder] are most valid and reliable when based on multiple sources of information, including clinician's observations, caregiver history, and, when possible, self-report." *Id.* at 53.

443. Trial counsel were ineffective in failing to regularly meet with David Wilson, investigate his social and educational background, and retain a qualified mental health expert, so as to identify and confirm David's diagnosis of Asperger's Syndrome.

444. David Wilson's lead attorney, Scott Hedeen, met with him only three times before trial—the first meeting coming two months before the trial started—for a total of less than five hours. *See* Doc. 76-24 at PDF 55, 60, Bates 3896, 3901 (Hedeen's fee dec.). Ginger Emfinger met with him only twice prior to the start of his capital trial. *See* Doc. 76-24 at PDF 64, 66, Bates 3905, 3907 (Emfinger's fee dec.). Had trial counsel met with David more regularly, and interviewed him about

his behavioral and social history, they would have learned that David exhibited several "red flags" for autism spectrum disorder, including poor social and communicative skills, a consistently flat affect, and a history of depression and self-harming behavior. *See supra.*

445. Trial counsel also failed to interview caregivers and teachers about David's social and behavioral history, which would likewise have disclosed David's numerous symptoms. From the time David was very young, adults and peers recognized that his behavior and socialization were abnormal. Had trial counsel interviewed and called David's fourth grade teacher, Jill Hudson Byerley, she would have testified that David had no social skills, did not know how to interact with other children, and maintained a vacant expression, as if he was not present. Doc. 76-30 at PDF 61-62, Bates 5108-5109; Doc. 76-23 at PDF 14, Bates 3654. David had no sense of humor; if someone told a joke, he could not understand why it was funny. Doc. 76-30 at PDF 61-62, Bates 5108-5109. Ms. Byerley would also have testified that it was difficult to carry on a conversation with David. *Id.* She recalls that David tried to play with other children, but did not understand how to interact with them. Ms. Byerley would have testified that David was a lonesome boy, who did not know how to be a friend. *Id.*

446. David's school records likewise confirm his profound communicative deficits. For instance, when David was in Ms. Byerley's fourth grade class, he was

administered the Florida Writing Assessment. David scored a 1.0 out of a possible 6, the lowest responsive score a student could receive. Doc. 76-5 at PDF 55, Bates 859. The assessment report described David's performance as follows:

> A paper scored 1 is an unorganized response that minimally addresses the requirements of the topic (explaining for expository and telling a story for narrative). Words and sentences do not express ideas clearly. The sentences may be incomplete and may contain many spelling and punctuation errors.

Id. For David to have received a score of 1.0, two examiners separately determined that David's performance was exceptionally deficient. *Id.*

447. David's relatives, including Linda Wilson, Roland Wilson, Edward Wilson, and Angelo Gabrielli, would have testified that David's behavior was also unusual. Doc. 76-23 at PDF 15, Bates 3655. Roland would have testified that David was easily frustrated when he could not meet the expectations of others, prompting fits which necessitated Roland to sometimes hold him tightly until David calmed down; and David had difficulty following directions and understanding jokes or humor. *Id.*

448. Angelo Gabbrielli would have corroborated David's social difficulties. He recalls that David responded to praise and attempts at humor with blank, unaffected stares. Doc. 76-23 at PDF 15, Bates 3655. Angelo would also have confirmed that David found communication difficult and struggled academically. *Id.* In addition, David's mother, Linda Wilson, would have testified that David banged

his head against a vehicle in frustration and punched himself in the face, prompting her to seek psychiatric help for him at a local hospital. *Id.* at PDF 15-16, Bates 3655-3656.

449. Had they been interviewed about David's behavioral history, David's relatives and teachers would also have reported that David demonstrated restricted and repetitive patterns of interest. Doc. 76-23 at PDF 16, Bates 3656. His older brother, Edward Wilson, would have testified that David was particularly focused on mechanical objects, taking them apart and putting them back together, to the exclusion of other activities and forms of play. *Id.* David's teacher, Ms. Arieux, recalls that the only thing David seemed to care about was working on cars and trucks. *Id.*

450. David's medical history also confirms the symptoms of his Asperger's Syndrome. Doc. 76-23 at PDF 16, Bates 3656. David has been prescribed psychoactive medications to treat depression and ADHD since elementary school. *Id.* As expressed above, depression is a common feature of autism spectrum disorder. ADHD is also a recognized comorbid diagnosis. *See* DSM-V, p. 58 ("Abnormalities of attention (overly focused or easily distracted) are common in individuals with autism spectrum disorder, as is hyperactivity. ... When criteria for both ADHD and autism spectrum disorder are met, both diagnoses should be given.").

451. Courts have recognized that evidence of mental disability is classic mitigation evidence that should be presented to the sentencing jury and/or judge in a capital case. *See, e.g.*, *Wiggins*, 539 U.S. at 535 (explaining that the defendant's "diminished mental capacities, further augment his mitigation case"); *Rompilla*, 545 U.S. at 390-93 (2005); *Porter v. McCollum*, 558 U.S. 30, 40 (2009) (per curiam); *Brownlee v. Haley*, 306 F.3d 1043, 1070 (11th Cir. 2002) (vacating a death sentence because trial counsel failed to present any mitigating evidence to jury, including "powerful mitigating evidence of ... [defendants] psychiatric disorders"); *Maples v. Commissioner, Alabama Department of Corrections*, 729 Fed. Appx. 817, 824-28 (11th Cir. 2018); *Harris v. State*, 947 So. 2d 1079, 1127-28 (Ala. Crim. App. 2004) (finding counsel ineffective for failing to investigate and present evidence of a client's troubled past, below average IQ, and post-traumatic stress disorder) (overruled on other grounds, *Ex parte Jenkins*, 972 So. 2d 159 (Ala. 2005)).

452. Moreover, the features of autism spectrum disorder make an Asperger's Syndrome diagnosis especially compelling in assessing a capital defendant's moral culpability. Autism sufferers "remain socially naive and vulnerable" throughout their lives. DSM-V, p. 56.

> [C]ertain clinical features of autism can predispose an autistic individual to criminal offending. ... Criminal acts might also stem from obsessions or special interests. The factor, for example, that often links criminal offending and Asperger's Syndrome is "the

> pursuit of circumscribed interests, such as theft of electronics for the purpose of disassembling them."[18]

453. Fixation on the van with audio equipment in this case is exactly the kind of "pursuit of circumscribed interests"—here David's interest in electronic equipment and trucks and specifically in disassembling them—referenced in the DSM-V.

454. Investigating and presenting evidence of David Wilson's lifelong struggle with Asperger's Syndrome through an expert such as Dr. Shaffer would have afforded the jury important context for understanding David's offense, which was predicated on theft of electronic equipment. Yet trial counsel unreasonably failed to present this available mitigating evidence during the penalty phase of his capital trial.

455. Trial counsel's failure to investigate and present evidence of David Wilson's struggle with Asperger's Syndrome prejudiced Mr. Wilson at trial.

Susceptibility to influence

456. Due to their deficits in social communication, Asperger's Syndrome sufferers are characteristically gullible, naive, and vulnerable to manipulation by people they trust. *See* DSM-V, p. 56. Though their social awkwardness typically

[18] Christine N. Cea, *Autism and the Criminal Defendant*, 88 St. John's L. Rev. 495, 501 (2014) (quoting Susan London, *Asperger's Diagnosis Is Tenuous after a Crime*, Clinical Psychiatry News, Apr. 1, 2009, at 34).

renders it difficult for them to make friends, they do not lack the desire for friendship. "Frequently, there is a desire to establish friendships without a complete or realistic idea of what friendship entails (*e.g.*, one-sided friendships or friendships based solely on shared special interests)." *Id.* at 54. An expert such as Dr. Shaffer would have been able to explain this feature to the jury and its impact on David Wilson.

457. Had trial counsel investigated David Wilson's social and behavioral history, they would have learned that, as a result of Asperger's Syndrome, compounded by severe isolation in childhood, David yearned for friendship but was unable to discern a true friend from a false one. Doc. 76-23 at PDF 18, Bates 3658. He was therefore susceptible to influence by more able peers who were not necessarily well-intentioned. *Id.*

458. At age 19, David graduated from high school with a vocational diploma (Doc. 76-10 at PDF 75, Bates 1884) and began working at his uncle's roofing business. Prior to graduation, David began associating with Matthew Marsh and Michael Ray Jackson, who had been in David's special education classes.

459. Donna Arieux, a special needs teacher and speech therapist, taught David, Matthew, and Michael in the same special education classes. Doc. 76-23 at PDF 18, Bates 3658. Ms. Arieux had the boys as students all year for several years in a row. *Id.* If anything happened in her class, David made sure that Ms. Arieux

would not get hurt. Jill Stewart, another special education teacher, would have likewise testified that David was quiet and did not present a discipline problem. *Id.*

460. Ms. Arieux's memories of Matthew Marsh are quite different. Doc. 76-23 at PDF 19, Bates 3659. Ms. Arieux recalls that Matthew stole from her three times. *Id.* Before one of the thefts, Matthew had offered to help Ms. Arieux bring materials into school from her car. *Id.* She had left a camera on her passenger seat; when she returned, it was gone. *Id.* After she pleaded in class for the return of the camera, Matthew later produced it, saying he found it in her glove compartment. *Id.*

461. Ms. Arieux's recollections of Michael Jackson are also troubling. Doc. 76-23 at PDF 19, Bates 3659. She would have testified that Michael was a liar, she could not believe anything he said. *Id.* Michael also drew demons and other scary drawings, including on his arms, which he would show Ms. Arieux. *Id.* She remembers telling him that he should not draw on his arms. *Id.* Ms. Jill Stewart, another special education teacher at David's high school, also recalls that Michael was self-destructive. Michael once mutilated an apple in class, which Ms. Stewart found disturbing. *Id.* Angelo Gabrielli, David's uncle, believes Matthew and Michael valued having David around because he would do anything Matthew told him to do. Doc. 76-23 at PDF 19, Bates 3659. David's friend, Katie Atwell, would have testified that Matthew and Michael influenced David to drink and smoke, which he had never been interested in before meeting them, and also to skip work.

Id. David ended up losing his job at his uncle's roofing company when Matthew and Michael convinced him to skip work to hang out with them. *Id.*

462. Brandie Moore, a friend of David's cousin, Jacqueline Gabbrielli, since high school recalls that Michael Ray Jackson was a bad kid who was constantly in trouble. Doc. 76-23 at PDF 19, Bates 3659. Yet David continued to associate with Michael and Matthew because he desperately wanted to be liked and accepted. *Id.* at PDF 19-20, Bates 3659-3760.

463. David's family, including Linda Wilson, Angelo Gabbrielli, Edward Wilson, and Jacqueline Gabbrielli, as well as Katie Atwell, would have testified that it was with Marsh and Jackson that David found himself in trouble with the law for the first time in his life. Doc. 76-23 at PDF 20, Bates 3660. Matthew Marsh and Chris Walker, the son of the victim, burned Matthew's vehicle, a Blazer. *See* Doc. 76-24 at PDF 14, Bates 3855 (Dothan police account of interview with Mark Dandridge); Doc. 76-24 at PDF 115, Bates 3956 (Ala. Board of Pardons and Paroles Report of Investigation of Albert Christopher Walker in Barbour County Case No. CC-2005-142/143); and Doc. 76-24 at PDF 119, Bates 3960 (letter from Marsh's parents to Judge Jackson from Houston Cnty. Case No. CC-04-1098). According to David, this was an attempt to collect insurance money suggested by Chris. Doc. 76-23 at PDF 20, Bates 3660. The entire group was questioned by the police. David was questioned informally and never charged. *Id.* David's friends and family, including

his mother and his uncle Angelo, advised him to stop hanging out with Matthew Marsh and his friends. *Id.* They would have testified that, because he was so desperate to be liked by others and because he was easily influenced by others, he continued to spend time with his new friends. *Id.*

464. As Angelo Gabbrielli recalls, during the year prior to Dewey Walker's death, Matthew Marsh had a run-in with Mr. Walker. Mr. Walker's son, Chris, had put new rims on Matthew's car. Doc. 76-23 at PDF 20, Bates 3660. When Mr. Walker found out that Matthew did not intend to pay Chris for the rims, Mr. Walker refused to let Matthew pick up his car. *Id.* Mr. Walker held the car until Matthew paid for the rims. *Id.* It was then that Matthew began plotting to rob Mr. Walker and get the money back that he felt was rightfully his. *See also* Doc. 76-24 at PDF 107, Bates 3948 (Dothan police account of interview with Doug Jacobs, neighbor of the Marshes, reporting that Matthew Marsh's Geo Metro had sported new rims one day during the week Mr. Walker was missing).

465. Trial counsel should have consulted a qualified mental health expert, who would have diagnosed David Wilson's Asperger's Syndrome and explained David's mental and social limitations to the jury. *See Ake v. Oklahoma*, 470 U.S. 68, 82 (1985) (explaining that, with his own expert, "the defendant is fairly able to present at least enough information to the jury, in a meaningful manner, as to permit it to make a sensible determination."); *McWilliams v. Dunn,* 582 U.S. 183, 197

(2017) (quoting *Ake*, 470 U.S. at 81:"'By organizing a defendant's mental history, examination results and behavior, and other information, interpreting it in light of their expertise, and then laying out their investigative and analytic process to the jury, the *psychiatrists for each party* enable the jury to make its most accurate determination of the truth on the issue before them' (emphasis added)."). Had trial counsel then investigated David's social history, they would have learned that the features of David's Asperger's Syndrome autism spectrum disorder rendered him susceptible to influence by more able peers, and that he was in fact being influenced immediately prior to and at the time of the crime. The sentencing jury should have been provided this evidence of David's susceptibility to influence, as it is central to David's moral culpability for the offense.

Generational poverty

466. David Wilson's family members, including his mother, Linda Wilson, and her brother, Angelo Gabbrielli, would have testified that Linda and her siblings grew up extremely poor in Milton, Florida. Doc. 76-22 at PDF 193, Bates 3632. As Angelo remembers, they lived in a shack with a rotted roof, and when it would rain outside, it would rain inside the shack as well. *Id.* at PDF 193-194, Bates 3632-3633. The family subsisted on a mixture of cornmeal and powdered milk. *Id.* at PDF 194, Bates 3633. Angelo recalls that throughout their childhood, Linda and her siblings were severely abused on a daily basis by, at first, their alcoholic father and, following

their parents' divorce, their older brother, Robert Gabbrielli. *Id.* The judge and jury were never provided this information.

467. Linda survived her childhood and met and married Roland Wilson in 1980. Doc. 76-22 at PDF 194, Bates 3633. Had she been asked about her marriage, Linda would have testified that they moved into a two-bedroom trailer on Roland's parents' property in Milton, Florida. *Id.* Beginning in November of 1982, Linda gave birth to three boys over the next two and a half years. *Id.* Edward was born on November 5, 1982; David was born on March 7, 1984; and Steven was born on May 6, 1985. *Id.* When Edward was three months old, Roland lost his job at a local chemical plant and struggled to find work. *Id.* After more than a year of unemployment, Roland finally found a job at Whiting Field naval base after Steven was born. *Id.*

468. Linda recalls that as the caregiver for three boys in diapers, she felt overwhelmed, and she and Roland fought frequently. Doc. 76-22 at PDF 194, Bates 3633. Linda remembers feeling so overwhelmed and upset with Roland's neglectfulness that one night she left the trailer without telling anyone. *Id.* Roland had come home from work and passed out. *Id.* Linda put the boys to bed and then drove off. *Id.* She drove around until five in the morning, a clear sign that her despair was deepening. *Id.*

469. "Generational poverty occurs in families where at least two generations have been born into poverty."[19] Poverty "negatively affects children by virtue of the stress that it places on their parents. Thus, child neglect and abuse are sometimes the result of a parent's inability to cope with the stressors that their low socioeconomic status introduces into their lives."[20] "When poverty is experienced on a long-term basis—especially when it is intergenerational—chronic abuse may result."[21]

470. The Supreme Court has recognized that such entrenched poverty, coupled with resultant parental neglect, is a powerful mitigator. *See*, *e.g.*, *Wiggins*, 539 U.S. at 516-17 ("[P]etitioner's mother, a chronic alcoholic, frequently left Wiggins and his siblings home alone for days, forcing them to beg for food and to eat paint chips and garbage."). Such evidence of "troubled history" is "relevant to assessing a defendant's moral culpability." *Id.* at 535. *See also Hitchcock v. Dugger*, 481 U.S. 393, 397 (1987). Had trial counsel conducted a reasonable investigation and presented this compelling evidence of generational poverty to the jury, there is a reasonable likelihood that David Wilson's sentence would have been different.

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[19] Eric Jensen, *Teaching with Poverty in Mind* (Nov. 2009), *available at* http://www.ascd.org/publications/books/109074/chapters/Understanding-the-Nature-of-Poverty.aspx.

[20] Craig Haney, *Evolving Standards of Decency: Advancing the Nature and Logic of Capital Mitigation*, 36 Hofstra L. Rev. 835, 866 (Spr. 2008).

[21] *Id.* at 868.

Familial mental illness and abandonment

471. David Wilson grew up in a troubled, unpredictable, and chaotic home environment. When he was a young toddler, his mother Linda attempted suicide twice and would likely have been successful on her first attempt had David's father Roland not intervened in time. Doc. 76-22 at PDF 196-197, Bates 3635-3636. Following the divorce of David's parents shortly after Linda's suicide attempts, David was abandoned by his mother during his early childhood, isolated and emotionally abused by his grandparents and stepmother, and severely physically abused by his uncle. Doc. 76-22 at PDF 197-198, Bates 3636-3637. Trial counsel Scott Hedeen and Ginger Emfinger neither investigated nor presented any of the neglect and abuse that David suffered during his upbringing or any of the familial mental illness that led to it.

472. David's family members, including Linda Wilson, Roland Wilson, Edward Wilson, Morgan Wilson, Jane Wilson, and Pamela Tankersley, would have testified that when David's younger brother, Steven, was diagnosed with cystic fibrosis, Linda and Roland were told that he might not live to five years old, and that he would require careful and intensive care. Doc. 76-22 at PDF 195-196, Bates 3634-3635. Cystic fibrosis is a life-threatening, genetic disease that causes persistent lung infections and progressively limits the ability to breathe.[22] This added stress brought

[22] *See* Cystic Fibrosis Foundation, https://www.cff.org/What-is-CF/About-Cystic-Fibrosis/.

Linda and Roland's already troubled relationship to the breaking point. Doc. 76-22 at PDF 196, Bates 3635. Numerous witnesses, including Roland Wilson, Linda Wilson, Edward Wilson, and Pamela Tanekersly, would have testified that, in caring for Steven, David's parents and grandparents neglected David's childhood needs.

473. Angelo, Linda, and Roland would have testified that Linda tried to kill herself multiple times during her marriage to Roland. Doc. 76-22 at PDF 196, Bates 3635. Roland told Linda that his life would be better without her, and in response, Linda threatened to commit suicide. *Id.* One day, when David was just a toddler, she took the children up to their grandparents' house and walked home with the intention of killing herself. *Id.* She ingested a handful of pills before realizing that Steven, who had recently learned to walk, had followed her home. *Id.* She tried to bring Steven back to his grandparents' house but passed out on the way while carrying Steven. *Id.*

474. Roland was unloading his Winnebago when he observed Linda walking towards him with Steven in her arms. Doc. 76-22 at PDF 196, Bates 3635. Roland would have testified that Steven was slipping from Linda's grasp as she began to lose consciousness. *Id.* Roland carried Linda inside his parents' house, then ran to his trailer to find out what Linda had taken. *Id.* He found an empty bottle of antidepressants. *Id.*

475. Roland rushed back to his parents' home to retrieve Linda. Doc. 76-22 at PDF 196, Bates 3635. He took her to the emergency room, where her stomach was pumped. *Id.* Linda was held at the Baptist Hospital for approximately two months following this suicide attempt. *Id.*

476. Roland would have testified that not long after Linda's first suicide attempt, he later received an urgent phone call from friends who were concerned about Linda's welfare. Doc. 76-22 at PDF 196, Bates 3635. Linda had written a suicide note and left it for Roland at a restaurant. Doc. 76-22 at PDF 196-197, Bates 3635-3636. After his friends read her letter to him, Roland alerted the police. Doc. 76-22 at PDF 197, Bates 3636. Linda was found alone, sitting on a bench in Carpenter Park. *Id.* For her own safety, Linda was apprehended, then again committed to the Baptist Hospital. *Id.*

477. Roland recalls that Linda's behavior became increasingly irrational. Doc. 76-22 at PDF 197, Bates 3636. He would have testified that Linda once fled their trailer with the children in tow while he was taking a shower. *Id.* Roland, who worked between shifts and was not home much, became concerned that Linda was dangerous. *Id.* He feared that he would come home and find Linda and the children dead. *Id.*

478. Linda Wilson would have testified that her own mother, Kathleen Gabbrielli, suffered from mental illness, and was neglectful and abusive. Doc. 76-

22 at PDF 197, Bates 3636. Her mother divorced her alcoholic, abusive father when Linda was in the second grade. *Id.* Following the divorce, Linda was routinely molested by her eldest brother, Robert, which her mother was aware of but did nothing to prevent. *Id.* When Linda was in grade school, her mother had a nervous breakdown while working at the Vanity Fair factory. *Id.* She later began threatening suicide, saying, "I'll run my car off a bridge or into a tree." *Id.*

479. When David was three years old, Roland filed for divorce. Doc. 76-26 at PDF 23-24, Bates 4266-4267 (divorce complaint). Due to Linda's struggles with depression, the court granted primary custody to Roland. *See* Doc. 76-26 at PDF 23-24, Bates 4266-4267 (divorce complaint); and Doc. 76-26 at PDF 26-28, Bates 4269-4271 (divorce judgment). When David was five years old, Linda moved to Dothan, Alabama, further separating him from his mother. Doc. 76-22 at PDF 197, Bates 3636.

480. Linda would have testified that she rarely saw David during this time. Doc. 76-22 at PDF 197, Bates 3636. She could not afford a car and thus had to rely on others to drive her or lend her their cars in order to get from Dothan to Milton. *Id.* at PDF 197-198, Bates 3636-3637. When she was able to drive down to spend time with the children, Roland often took the children somewhere without telling her. *Id.* at PDF 198, Bates 3637. As she recalls, this happened over a dozen times during the boys' elementary school years. *Id.*

481. Roland would have testified that Linda's infrequent visits with her children were often cut short. Doc. 76-22 at PDF 198, Bates 3637. Taking care of three young boys singlehandedly was difficult, and Linda typically returned the children earlier than promised, sometimes in the middle of the night. *Id.* She even returned the children the same afternoon she picked them up because she could not handle them. *Id.*

482. Roland would also have testified that David and his siblings were traumatized by their mother's absence and abandonment. Doc. 76-22 at PDF 198, Bates 3637. When Linda failed to follow through on her promises to come get the boys, they would become upset with Roland. *Id.* The children regarded the cheap toys Linda sometimes gave them as very precious. *Id.* When the toys inevitably broke, and Roland was unable to fix them, the children were devastated. *Id.*

483. Researchers have found that "[p]arental abandonment is a unique form of loss, sometimes creating devastating feelings of pain and grief."[23] More specifically, "parental abandonment represents a 'profound blow to a child's self-esteem and [creates a] sense of degradation ... due to having been given up, put aside, left, or lost.'"[24]

[23] Haney, *supra* note 2, at 870.

[24] *Id.* (quoting Judith Marks Mishne, *Trauma of Parent Loss Through Divorce, Death, and Illness*, 1 Child & Adolescent Soc. Work J. 74 (1984)).

484. The Supreme Court has recognized the unique trauma of parental abandonment as particularly mitigating. *See*, *e.g.*, *Rompilla*, 545 U.S. at 393 ("[W]hen Rompilla was 16[,] his mother 'was missing from home frequently for a period of one or several weeks at a time.'") (citation omitted); *Wiggins*, 539 U.S. at 525 ("Petitioner's mother was a chronic alcoholic; Wiggins was shuttled from foster home to foster home and displayed some emotional difficulties while there[.]"); *see also Abdul-Kabir v. Quarterman*, 550 U.S. 233, 239-240 (2007); *Johnson v. Secretary, DOC*, 643 F.3d 907, 924 (11th Cir. 2011).

485. Yet, trial counsel unreasonably failed to investigate David's abandonment by his mother and to present evidence of it during the penalty phase of his capital trial. Instead, during Linda's sentencing testimony, trial counsel glossed over her absence from David's life, asking vague, leading questions to which Linda answered affirmatively: "[W]hen he was living with his father, did you visit David?" and "Did you still talk with David on the phone?" Doc. 76-10 at PDF 65, Bates 1874. Trial counsel failed to ask more probing questions of Linda or call additional witnesses, including Roland Wilson, to disclose the harmful effects of Linda's abandonment on David and his siblings.

486. This wandering line of questioning not only failed to demonstrate the harmful effects that Linda's abandonment had on David, but falsely vindicated Linda's parenting. Her testimony would have implied that she tried to connect with

her children; it concealed the crucial facts that, despite her benign intentions, her sporadic attempts at motherhood only deepened the loss that her children felt.

487. Trial counsel's failure to present evidence of Linda's debilitating and life-threatening mental illness was also unreasonable. At the beginning of Linda's testimony during David's sentencing, defense attorney Mr. Hedeen explained to Linda that he would ask her "very limited, specific questions" and asked that she "respond in the limited specific way." Doc. 76-10 at PDF 60, Bates 1869. Mr. Hedeen then asked a few leading questions about her first suicide attempt, without ever using the term "suicide." Mr. Hedeen never inquired about Linda's other suicide attempts, her history of mental illness and psychiatric hospitalizations, or how her depression affected her relationships with her children and family. By tiptoeing around Linda's mental illness, Mr. Hedeen's questioning would have likely confused the jury and left them uncertain about how Linda's struggles affected her sons. Defense counsel likewise failed to interview and call other available witnesses, such as David's father, Roland Wilson, and older brother, Edward Wilson, to testify about Linda's mental health problems.

488. Research has shown that a family history of mental illness is a critical factor in the assessment of moral culpability. "Mental illnesses are multifactorial

illnesses (caused by the interaction of various genetic and environmental factors),"[25] and "[b]ecause genetic factors are involved, when one family member is affected, other close relatives may be at increased risk."[26] As a mental health expert explained to the New York Times, "'[s]hort of a brain scan that shows mental defect, a family history of mental illness is the most persuasive evidence that someone had significant mental problems at the time of the crime.'"[27] Trial counsel's failure to investigate and present Linda's mental health struggles hid a critical contributor to any assessment of David's culpability.

489. In *Rompilla*, the Supreme Court determined that trial counsel were ineffective in failing to investigate and present available evidence of a family history of alcoholism. 545 U.S. at 391-92 ("Rompilla's parents were both severe alcoholics who drank constantly. His mother drank during her pregnancy with Rompilla, and he and his brothers eventually developed serious drinking problems."). *See also Terry Williams*, 529 U.S. at 395 n. 19; *Cooper v. Sec'y, Dep't of Corr.*, 646 F.3d at 1343; *Johnson v. Secretary, DOC*, 643 F.3d at 1343. Trial counsel were likewise ineffective in failing to present David's family history of mental illness.

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[25] *Family History of Mental Illness*, Emory University School of Medicine, Department of Human Genetics, *available at* http://genetics.emory.edu/documents/resources/Emory_Human_Genetics_Family_History_Mental_Illness.PDF.

[26] *Id.*

[27] Marc Lacey, *Lawyers for Defendant in Giffords Shooting Seem to Be Searching for Illness*, N.Y. Times, Aug. 17, 2011, at A13.

490. Had David's trial counsel presented the true nature of Linda's mental illness and its effect on her family, rather than portraying her suicidal ideation as a singular, aberrant episode, this "might well have influenced the jury's appraisal of his moral culpability." *Terry Williams*, 529 U.S. at 398.

Neglect and Abuse

491. David's family members, including Roland Wilson, Jane Wilson (David's stepmother), Dale Wilson, and Pamela Tankersley (David's aunt), would have testified that Roland began working nights at the naval base and sleeping during the day. Doc. 76-22 at PDF 201, Bates 3640. David and his brothers were left in the care of their paternal grandparents, I.D. and Ruby Wilson, who were retired and in their 70s. *Id.* Steven required constant care because of respiratory problems and other complications of his cystic fibrosis, so he received the bulk of the attention and energy that his elderly grandparents had to give. *Id.*

492. Family members, including Pamela Tankersley, Linda Wilson, and Edward Wilson, would have testified that, during these formative years, David was neglected by his father and his grandparents and that he rarely saw his mother. Doc. 76-22 at PDF 201, Bates 3640. They would also have testified that David's grandparents were elderly and ill-equipped to handle three young boys. *Id.* I.D. and Ruby did their best to take care of Steven, ensuring that he received the care that he needed to survive, but ignored or mistreated David. *Id.* His aunt, Pamela Tankersley,

remembers David's grandmother screaming at him and telling him that he was stupid and would never amount to anything. *Id.* through Doc. 76-23 at PDF 2, Bates 3642. Edward Wilson recalls that Ruby was more easily frustrated with David than either of his brothers. Doc. 76-23 at PDF 2, Bates 3642.

493. David's relatives, including Linda Wilson, Roland Wilson, Edward Wilson, Jane Wilson, Angelo Gabbrielli, and Pamela Tankersley, would have testified that Roland remarried when David was seven years old. Doc. 76-23 at PDF 2, Bates 3642. Roland's new wife, Jane Wilson, had two young children of her own. *Id.* Roland recalls the children telling him after his divorce from Jane that they felt Jane favored her own children over them. *Id.* She would cook for her children but not for Edward, David, or Steven. *Id.* She also isolated David from the rest of the family. *Id.* David could now choose between being screamed at by his grandmother or told to go to his room by his stepmother. *Id.* Linda remembers David being relegated to his room so often that he would miss meals and be forced to sneak out in the middle of the night to eat. *Id.* Edward Wilson recalls that David was not allowed to have friends over, go to other kids' houses, or venture down the road to the store; however, Jane allowed her biological children to have friends over, took them places separately, and bought gifts for them while ignoring David and his siblings. *Id.* Jane also yelled at Roland's children and took away their toys and games. *Id.*

494. Family members, including Linda Wilson, Edward Wilson, Angelo Gabbrielli, and John Gabbrielli, would have testified that David was often left behind when Roland and Jane would go on vacation or to sporting events with the other children. Doc. 76-23 at PDF 2, Bates 3642. Sometimes when Linda would come to visit her children, they would all be off somewhere else. *Id.* But just as often, the other children would be on vacation or at an event and David would be left at home. Doc. 76-23 at PDF 3, Bates 3643.

495. Pamela Tankersley, David's aunt by marriage, lived in her husband's parents' home, next door to Roland's trailer, when David was eight years old. Doc. 76-23 at PDF 3, Bates 3643. She would have testified that she was concerned for David because she could see that he was not wanted in his own home. *Id.* While he could be a difficult child, he was clearly just trying to garner some attention and some love. *Id.* Whenever Pamela sat with David and talked with him, he would be very excited. *Id.* He would run to get his bike so he could show her the new tricks he was learning. *Id.* But when Ruby would start screaming at David, flailing her arms and telling him that he was stupid, Pamela had to leave the house because it was so upsetting to her. *Id.*

496. Desperate to escape his isolation, David moved to Dothan in sixth grade to live with his mother. Doc. 76-23 at PDF 3, Bates 3643. Family members, including Linda Wilson, Angelo Gabbrielli, and John Gabbrielli would have testified

that David received only slightly more attention in Dothan than he had in Milton. *Id.* Linda could have testified that she spent time with him when she could, but she worked very long hours. *Id.* When David got out of school each day, he had to wait at his grandmother's house until Linda got off work. *Id.* David's maternal uncle, John Gabbrielli, recalls that David's maternal grandmother, Kathleen Gabbrielli, gave preferential treatment to Angelo's children because they had lived around her their entire lives. Doc. 76-23 at PDF 7, Bates 3647. John also remembers that Kathleen would yell at David and tell him that he was a bad kid. *Id.* Once again, when he was living with the maternal side of his family, David was isolated and subjected to differential treatment, just as he had been when living with the paternal side of his family.

497. Linda's brother, Angelo Gabbrielli, became a surrogate father to him. Doc. 76-23 at PDF 3, Bates 3643. While Angelo allowed David to leave his room and took him on fishing trips, he also physically abused David. *Id.* Angelo and Linda would have testified that he often beat David, usually with a belt, but sometimes with other things. *Id.* David recalls that on one occasion, his uncle became angry and poured a large pot of hot water on him. *Id.* On another occasion, Angelo took a switch and beat David until he had welts all over his legs. *Id.* David realized that it was impossible to please his uncle, so in the middle of seventh grade, he moved back to Milton to get away from Angelo's physical abuse. *Id.*

498. Child abuse and neglect often occur alongside other risk factors, such as poverty and mental illness, which also existed in David's family. "[P]arents who are overwhelmed by the stress of poverty are more likely to provide what researchers and clinicians term 'psychologically unavailable caregiving,'" which David experienced from all of his caregivers.[28] "These environments are chaotic, disruptive, and conflict-ridden because the adults in charge are managing their own needs and problems and have fewer psychological resources to devote to the needs of their children,"[29] especially when one of the children, such as Steven, required specialized and around-the-clock care. This research was well-established at the time of David's trial as "[m]ental health workers have known for decades that the resulting neglect can take a significant toll on the physical, intellectual, social, behavioral, and emotional development of children and compromise their long-term psychological adjustment."[30]

499. Authorities have recognized that abuse and neglect are damaging to the psychological development of children.[31] As the Supreme Court has made clear, competent defense counsel must present mitigating evidence of child abuse and

[28] Haney, *supra* note 2, at 867.

[29] *Id.*

[30] *Id.* at 865.

[31] *See* Psychological Issues Related to Child Abuse and Neglect, American Psychological Association, available at http://www.apa.org/pi/families/resources/policy/neglect.aspx.

neglect in capital sentencing. *See Wiggins*, 539 U.S. at 534-35 ("The mitigating evidence counsel failed to discover and present in this case is powerful. … Wiggins experienced severe privation and abuse in the first six years of his life while in the custody of his alcoholic, absentee mother."). *See also Porter v. McCollum*, 558 U.S. at 33; *Penry v. Lynaugh*, 492 U.S. 302, 308-09 (1989); *Cooper v. Sec'y, Dep't of Corr.*, 646 F.3d 1328, 1342-43 (11th Cir. 2011); *Johnson v. Secretary, DOC*, 643 F.3d 907, 923-24 (11th Cir. 2011).

500. Nevertheless, David's trial counsel never mentioned neglect during the penalty phase. And the sole mention of abuse was Linda's explanation that David returned to Milton because "[w]hen he would come home from school with an off-task mark, my brother [Angelo] would want to take the belt and tear his butt up with it." Doc. 76-10 at PDF 69, Bates 1878. This unchallenged remark placed the blame for David's beatings on himself.

501. Completely absent from the discussion was Steven's battle with cystic fibrosis, to which he finally succumbed in the months preceding David's trial. Trial counsel merely asked Linda, "[U]nfortunately, you now have two sons. Correct?" Doc. 76-10 at PDF 62, Bates 1871. Counsel then followed up by asking when this son died. *Id.* Trial counsel completely ignored the fact that Steven, David's baby brother, suffered from a lifelong, genetic illness that overwhelmed his elderly

grandparents so that they were unable to devote time or attention to David after Linda had abandoned her children.

502. Likewise, Jane Wilson's mistreatment and neglect of David was never mentioned during the penalty phase. Indeed, trial counsel never even interviewed Edward Wilson, David's surviving brother, who was present in the home when David was confined to his bedroom without adequate food, and who would have gladly testified in mitigation.

503. Trial counsel's failure to adduce and present available evidence of child abuse and neglect is sufficient to undermine confidence in the outcome of David's sentencing. *Strickland*, 466 U.S. at 694. As in *Wiggins*, had counsel presented this evidence, there is a reasonable probability of a different result. 539 U.S. at 535.

Mental health and learning difficulties

504. Roland Wilson would have testified that when David was in kindergarten, his teacher, Ms. Hardy, recommended that he be evaluated for exceptional student education. Doc. 76-23 at PDF 6, Bates 3646. In elementary school, David was diagnosed with Attention Deficit/Hyperactivity Disorder ("ADHD") and prescribed Ritalin. Doc. 76-3 at PDF 194, Bates 596; Doc. 76-5 at PDF 45, Bates 849.

505. In fourth grade, David was declared eligible for exceptional education. Doc. 76-3 at PDF 168, Bates 570. School records confirm that by the time David

was 10 years old he was taking both Ritalin and Pamelor, an antidepressant prescribed to treat mood disorders. Doc. 76-3 at PDF 194, Bates 596. Soon after, when David was in sixth grade, a psychologist observed that he seemed unhappy, alone, and isolated. Doc. 76-3 at PDF 161, Bates 563.

506. In addition to compounding his depression, David's years of isolation and neglect stunted his emotional growth and ability to interact with his peers. This was likely exacerbated by and symptomatic of Mr. Wilson's Asperger's Syndrome. *See, supra.*

507. During his upbringing, David exhibited repeated instances of self-blame and self-harm. Had counsel asked her, David's mother Linda would have testified that one evening, as she was picking up David from his grandmother's house, David came out to the car and seemed very upset. Doc. 76-23 at PDF 7, Bates 3647. He started to bang his head against the car and punch himself in the face with a closed fist. *Id.* Linda remembers David doing this once before, also at his grandmother's house, and she became worried for him. *Id.* at PDF 7-8, Bates 3647-3648. Before David returned to Milton, Linda took him to Charter Wood Hospital to seek help for his psychological problems. *Id.* at PDF 8, Bates 3648.

508. Family members, including Roland Wilson, Jane Wilson, Pamela Tankersley, Edward Wilson, and Angelo Gabbrielli, would have testified, and David's school records confirm, that David struggled with excessive self-blame, had

difficulty interacting socially with other students, and had poor ego strength and a poor sense of identity. Doc. 76-4 at PDF 91, Bates 694. David was also placed in an Emotionally Handicapped Program while in high school. Doc. 76-4 at PDF 90, Bates 693. Because he had struggled academically, David was required to repeat the tenth grade. Doc. 76-5 at PDF 170-171, Bates 974-975. His father was in favor of pulling him out of high school to enroll him in a trade school. Linda and Angelo disagreed on this approach, so David was brought back to Dothan to finish high school. Doc. 76023 at PDF 8, Bates 3648.

509. David's family members and teachers, including Linda Wilson, Angelo Gabbrielli, Jacqueline Gabbrielli, Nicholas Gabbrielli, Donna Arieux, Katie Atwell, and Jeffrey Tate, would have testified that David seemed to finally find a place where he felt wanted and loved. Doc. 76-23 at PDF 8, Bates 3648. Now that he was older and required less supervision from adults, his mother and other caretakers found him more manageable, and in turn, David's living environment was less chaotic. While his uncle Angelo was still strict with him, he was much less physically abusive during David's time in high school than he was when David was in middle school. *Id.* David's brother Steven began to hang out with their cousin Jacqueline and her friends, and David began to tag along. *Id.* While he was shy and quiet at first, he gradually began to open up. *Id.*

510. The stability at home translated into improvement at school. In Dothan, at Northview High School, David earned two As, one B, four Cs, and a D. Doc. 76-5 at PDF 83, Bates 887.

511. While David showed improvement in a more supportive environment, his ongoing psychological issues were recognized and documented. Cynthia McKinnon, a special needs teacher, would have testified that at Northview High School David was classified as having emotional disturbance (ED). Doc. 76-4 at PDF 169, Bates 772 (David categorized as "Emotionally Disturbed" in an IEP assessment). The high school's decisions were based on "records accepted from Santa Rosa County Schools," from which David transferred. Doc. 76-4 at PDF 174, Bates 777. Santa Rosa County Schools had found that David suffered from "frustration and stress," problems with "self-esteem and worth," and that he was disruptive in class and was easily distracted. Doc. 76-4 at PDF 184, Bates 787. Ms. McKinnon would have testified that a student is classified as ED after being tested by a psychometrist. Ms. McKinnon reports that students classified as ED suffer from a range of psychological problems, including bi-polar disorder, schizophrenia, or other mental illnesses.

512. Donna Arieux, another special needs teacher, would have testified that she taught David in her emotional conflict class. Doc. 76-23 at PDF 9, Bates 3629. She recalls that David was always on time and did his work quietly. *Id.* She never

had to write him up in her entire time as his teacher. *Id.* It helped that David's mother was very supportive of David and would leave her job 45 minutes outside of Dothan to come to the school for parent-teacher conferences. *Id.*

513. David and Ms. Arieux became close, and David would talk to her about his passion for working on and building trucks. Doc. 76-23 at PDF 9, Bates 3629. While he started off as a bit of a loner at Northview High School, he slowly started to make friends. *Id.* David continued to struggle with his academics, but found activities he enjoyed during a work-training program at Dothan Technology Center. *Id.* He loved working with his hands and building or repairing things. *Id.* at PDF 10, Bates 3650.

514. David's attendance improved and he began receiving positive feedback at school. Brenda Johnson, David's work-training instructor, submitted a memo to Ms. Arieux commending David's improvement:

> I must say I am very proud of David, and I am enjoying having him in my class. I believe David has really matured since the first time I met him, and I believe he will be quite successful in whatever he chooses to do after graduation.

Doc. 76-4 at PDF 34, Bates 637. Another teacher, Jim Thompson, also wrote a positive recommendations for him. Doc. 76-4 at PDF 35, Bates 638.

515. Ms. Arieux would have testified that she wished she had a lot of students like David Wilson. Doc. 76-23 at PDF 10, Bates 3650. She never saw him

pick on or bully another student. *Id.* He was quiet but she felt he cared for other people. *Id.* While he was passionate about working on trucks, he was not a leader among the people in her class or his friends. *Id.* When she heard that David was charged with capital murder, she was both shocked and extremely upset. *Id.* If she had to rate the people she knew on a scale of one to ten, with one being the most likely to commit this crime, she would have given David a ten, the least likely to commit this crime. *Id.*

516. The Supreme Court has made clear that a capital defendant's mental health and learning difficulties constitute powerful mitigating evidence that competent counsel must present. For instance, in *Wiggins*, the Supreme Court criticized trial counsel's failure to present evidence of the petitioner's "diminished mental capacities …." 539 U.S. at 535. In *Terry Williams*, trial counsel were found ineffective for failing to discover and present, among other facts, evidence that the petitioner "had suffered repeated head injuries, and might have mental impairments organic in origin." 529 U.S. at 370.

517. As alleged above, had trial counsel performed an adequate investigation, they would have discovered the following about David Wilson: he began exhibiting signs of intellectual limitation as early as kindergarten; he was diagnosed with ADHD and treated for depression while in elementary school; he was prescribed Ritalin, a central nervous system stimulant, and Pamelor, an

antidepressant, while in elementary school; his adaptive functioning was stunted from an early age and he found it very difficult to socialize with his peers; he performed poorly academically in his early grades and had difficulty communicating; as a child, he engaged in deliberate self-harm and was treated for psychological distress.

518. As the Supreme Court expressed in *Wiggins*, this is "the kind of troubled history we have declared relevant to assessing a defendant's moral culpability." 539 U.S. at 535. Yet, trial counsel unreasonably failed to investigate and present it.

519. The Supreme Court has also recognized that evidence of improvement, or positive contribution to society, despite a defendant's limitations, is compelling mitigation in support of a lesser sentence than death. Thus in *Terry Williams*, where the petitioner was intellectually limited, counsel were found ineffective for failing to seek "prison records recording Williams' commendations for helping to crack a prison drug ring and for returning a guard's missing wallet, or the testimony of prison officials who described Williams as among the inmates least likely to act in a violent, dangerous or provocative way." 529 U.S. at 396.

520. Trial counsel failed to investigate David's educational background and interview his teachers, including Ms. Arieux, who would have testified that David was a pleasure to have as a student, despite his academic struggles, and that David

was not a dangerous person. David's relatives, including Linda Wilson and Angelo Gabrielli, would also have testified that his emotional problems improved in the more nurturing environment he found in Dothan.

521. Trial counsel failed to investigate and present evidence of David's history of intellectual and psychological problems, as well as his potential for improvement and rehabilitation. "[T]aken as a whole," this evidence "might well have influenced the jury's appraisal of [his] culpability ...." *Rompilla*, 545 U.S. at 393.

Trial counsel's ineffectiveness in the use of witnesses

522. Despite the abundance of available mitigating evidence described above, trial counsel relied on Linda Wilson as the only family member to testify on David's behalf. Given the enormous weight placed on her shoulders, it is disconcerting that trial counsel did nothing to prepare her for testifying, before she was put on the stand to act as the major witness for her son's life.

523. As Linda was absent for most of David's formative years, she was also unable to testify about many mitigating details, including David's psychological diagnoses and isolated childhood. For instance, Linda was unable to testify about David's prescriptions and did not even know David's doctor:

> Q. And when he went back down to Milton, was he placed on any drugs at that point in time?

A. Yes, sir.

Q. Do you know which ones? You may not know.

A. No, sir.

Q. During the time either he was with you in the seventh and part of the eighth grade or when he went back down to his father's for the two-and-a-half-year period, was he seeing a psychologist or a psychiatrist?

A. Yes, sir.

Q. Do you happen to know the names?

A. No, sir.

Doc. 76-10 at PDF 73, Bates 1882. Other family members, including David's father, Roland Wilson, could easily have provided the information that Linda could not. Wholly lacking in specificity and patently demonstrating lack of first-hand knowledge, Linda's testimony had none of the credibility that Roland's testimony would have had.

524. Indeed, all of the family members and teachers noted above would have testified at Mr. Wilson's penalty phase and sentencing hearing if asked to do so. But Roland Wilson, David's father, and Angelo Gabbrielli, David's uncle, were not called to testify, though they were eager to help. And the other available mitigation witnesses were not even contacted by trial counsel.

525. Effective counsel would have uncovered the above referenced mitigation and called these witnesses to testify. Competent counsel would also have recognized that expert assistance was critical at the penalty phase of this capital trial,

particularly as mental health issues are central to David Wilson's mitigation. To investigate David's psychological problems, as well as his behavioral and family history, effective counsel would have sought the assistance of a mitigation specialist, psychiatrist, and/or clinical psychologist. *See* ABA Guideline 4.1(A)(1) (defense team shall "consist of no fewer than two attorneys ... , an investigator, and a mitigation specialist" and a mental health professional); *McWilliams v. Dunn*, 582 U.S. 183, 186 (2017) ("Our decision in *Ake v. Oklahoma* . . . clearly established that, when certain threshold criteria are met, the State must provide an indigent defendant with access to a mental health expert who is sufficiently available to the defense and independent from the prosecution to effectively 'assist in evaluation, preparation, and presentation of the defense.'"

526. David's trial counsel failed to present a single expert. Had they done so, an expert such as Dr. Shaffer would have analyzed the plethora of information about the neglect and abuse David suffered in childhood, his family history of trauma and mental illness, and David's personal history of mental health problems, intellectual difficulties, and social inadequacies. *See* Appendix NN. An expert such as Dr. Shaffer would have presented his analysis to the jury in a manageable and accessible manner. *Id.* Instead, David's trial counsel gave the jury 400 pages of school records, unexplained. Counsel also acknowledged, through questioning of

Mr. Wilson's mother, that he had not reviewed those school records with her. Doc. 76-10 at PDF 94, Bates 1903.

527. Counsel had a constitutional obligation to hire experts who understood the nature of David's problems and how they culminated in his involvement in the crime. *See McMullen v. Dalton*, 83 F.4th 634 (7th Cir. 2023) (if no reasonable strategic considerations justified defense counsel's failure to follow up on red flags in a court-ordered PSI by (1) investigating the 24-year-old defendant's background and mental health, (2) having the defendant evaluated by a mental-health professional, and (3) presenting life-history and mental-health evidence in mitigation at the defendant's sentencing for possession of cocaine and marijuana, counsel's ineffective assistance entitled the defendant to resentencing); *Wilson v. Sirmons*, 536 F.3d 1064, 1085 (10th Cir.2008) (finding defense counsel ineffective where he hired a mental health expert "only three weeks prior to trial and met with him only two days before he testified," so that the expert "did not have time to conduct additional testing to confirm a diagnosis of schizophrenia, nor could the defense team gather collateral evidence that might provide insight into Mr. Wilson's psychology"); *cf. Hinton v. Alabama*, 571 U.S. 263, 273 (2014) (per curiam) ("Criminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence.").

528. These experts, armed with adequate information, would have explained how the difficult circumstances of David's life and his Asperger's Syndrome coalesced to make him particularly susceptible to bad influences. They would have explained how young people in general are more susceptible to peer pressure (*see Roper v. Simmons,* 543 U.S. 551, 569 (2005); *Graham v. Florida,* 560 U.S. 48, 68 (2010)), which is especially true for someone with David's emotional and psychological limitations.

529. Trial counsel's failure to consult and present expert testimony cannot be explained as strategic. Counsel apparently recognized the importance of experts to Mr. Wilson's case, filing a motion for funds for out-of-state witnesses in anticipation of needing someone from Milton, Florida, to explain the hundreds of pages of school records to the jury at the penalty phase. Doc. 76-6 at PDF 121-122, Bates 1126-1127. At the very least, an educational records expert would have assisted counsel in putting the records in order, removing duplicate documents from the records, explaining the terminology used for students in emotionally handicapped classes, and describing to the jury the challenges faced by emotionally handicapped students. *See McWilliams v. Dunn*, 582 U.S. at 199; Amsterdam & Hertz, *Trial Manual 9 for the Defense of Criminal Cases* (2024), page 409, § 16.2.2.

530. State post-conviction counsel consulted Dr. Theresa Harden, who has a Ph.D. in special education and curriculum and administration. Doc. 76-30 at PDF

57-59, Bates 5104-5106; Doc. 76-23 at PDF 24, Bates 3664. When David Wilson was an elementary school student in Milton, Dr. Harden was employed by Santa Rosa County Schools as the Exceptional Student Education resource consultant. Doc. 76-30 at PDF 57-59, Bates 5104-5106. Upon her review of David's school records, Dr. Harden reports that David's deficits in processing information and social interaction clearly correspond with an Asperger's Syndrome diagnosis. *Id.* Though Dr. Harden was available and would have been willing to testify at the time of David's capital trial, she was never contacted by his trial counsel. *Id.*

531. Mitigation evidence is relevant "because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring). Defense counsel must present a contextual narrative that explains how a particular defendant's "disadvantaged background" or "emotional and mental problems" mitigate his offense. *Id. See also Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982) (noting that capital punishment must be "sensible to the uniqueness of the individual."). In this case, trial counsel provided no context for David's offense, predictably resulting in a death recommendation and sentence.

532. Had counsel performed effectively at the penalty phase, they would have presented extensive testimony as described above from family members, friends, teachers, and experts, all of whom would have offered critical mitigating information about David, the neglect and abuse he suffered, and his psychological and learning impairments.

533. Instead, trial counsel presented the unprepared testimony of David's mother and a neighbor, which was attacked by the prosecution as incoherent. Doc. 76-10 at PDF 125, Bates 1934. Though trial counsel seems to have recognized the importance of David's school records, they left it to the jury to sift through them for evidence of mental health problems, if they chose to spend the time to review them. Without expert assistance, the jury could only guess how David's hinted-at problems may have affected his participation in the crime.

534. Had the mitigating evidence described above been presented fully, there is a reasonable probability that David Wilson would not have been sentenced to death, especially as two jurors already voted for life.[32] Doc. 76-2 at PDF 172, Bates 372. The fact that the court made the ultimate determination of sentence does

[32] *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."

not change the harm done to Mr. Wilson by counsel's ineffectiveness before the jury. The sentencing court is required to consider the jury's sentencing verdict and accord weight proportionally to the jurors' votes. *Ex parte Tomlin*, 909 So. 2d at 286-87 (number of jurors voting for a sentence must be considered by the court).

535. Counsel's failure to investigate and present this mitigating evidence fell below professional standards. 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.

536. Mr. Wilson requests discovery and a hearing on this issue.

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

537. In the penalty phase, no less than in the guilt phase, a prosecutor's sole responsibility is to seek justice; therefore, he is prohibited from inflaming the jury, making improper suggestions or assertions of personal knowledge, or engaging in conduct prohibited by law. *See*, *e.g.*, *Berger*, 295 U.S. at 88; *Thomas v. State*, 90 So. 878, 880 (Ala. 1921).

538. But during the penalty phase of Mr. Wilson's trial, the prosecutor engaged in numerous acts of misconduct to distract the jury from the crucial task of evaluating the facts and, instead, to have it decide the issues based on its emotional reactions. *See* Claims VII and VIII below.

539. These premeditated tactics violated long-settled principles of state and federal law that prohibit prosecutors from making arguments "calculated to inflame the passions or prejudices of the jury." *Viereck v. United States*, 318 U.S. 236, 247 (1943); *see also King v. State*, 518 So. 2d 191, 192-195 (Ala. Crim. App. 1987). However, because defense counsel failed to object to the prosecutor's improper actions, the jury was permitted to consider unlawful evidence and impermissible arguments in assessing Mr. Wilson's culpability. Had counsel objected, there is a reasonable probability that the objections would have been sustained and the jury would not have recommended that Mr. Wilson be sentenced to death.

a. Defense counsel failed to object effectively to the presentation of the improper and highly prejudicial aggravator of escape.

540. On February 18, 2005, more than ten months after his arrest on capital charges, Mr. Wilson was charged with escape in the second degree. *State v. Wilson*, Houston Cnty. Case No. CC-05-1138 (filed June 14, 2005). Valerie Judah, appointed counsel on the capital charges, was also appointed to represent Mr. Wilson on the

additional charge. *Id.* On May 17, 2006, Mr. Wilson pled guilty to escape in the second degree. *Id.*

541. Immediately prior to the penalty phase, defense counsel made a motion *in limine* to exclude the escape conviction on the grounds that the defense would not argue the statutory mitigator of no significant prior criminal history. Doc. 76-10 at PDF 20-23, Bates 1829-1832. In response, the prosecutor notified the trial court and defense counsel that he planned to argue that Mr. Wilson was under a sentence of imprisonment at the time of the offense as an aggravating circumstance. Doc. 76-10 at PDF 23-24, Bates 1832-1833. The prosecutor asserted that this aggravating circumstance applied if Mr. Wilson had a conviction at the time of his sentencing, even if the crime occurred after the charged murder. Doc. 76-10 at PDF 24-25, Bates 1833-1834. Defense counsel conceded this point and shifted to arguing that the court should exclude "the details." Doc. 76-10 at PDF 25-26, Bates 1834-1835.

542. At the start of opening arguments at the penalty phase, the prosecution informed the jury of the aggravating circumstances that it would present:

> First of all, in the Code of Alabama – excuse the legalese, but it is very important. The capital offense was committed by a person, David Wilson, who was under a sentence of imprisonment. I expect the evidence to be, after David Wilson was arrested and charged with the capital murder and burglary, that while he was pending trial, that he did, to wit, escape or attempt to escape from the penal facility, the Houston County Jail, and he was convicted of that offense in May of 2006 and received a sentence for five years pending trial. That's one

> aggravating circumstance we expect to prove to you from the witness stand, in other words, in relationship to the document itself.

Doc. 76-10 at PDF 37-38, Bates 1846-1847. Defense counsel did not object.

543. But both the prosecutor and defense counsel were mistaken as to the applicability of the prior conviction aggravator.

544. After the opening arguments, the trial court checked the aggravating circumstances statute and the case cited by the State and realized that Mr. Wilson's escape conviction did not qualify under either the first or second aggravating circumstance. Doc. 76-10 at PDF 49-51, Bates 1858-1860.

545. The trial court informed the prosecution and defense, "So I think we have got a problem with that first one. And I think that will be a reversible problem." Doc. 76-10 at PDF 51, Bates 1860.

546. Even after being informed of the error and that, in the trial court's opinion, the error rose to the level of reversible error, defense counsel failed to object or call for a mistrial. Doc. 76-10 at PDF 51, Bates 1860. The trial court then informed the jury that Mr. Wilson's escape conviction should not be considered as an aggravating circumstance. Doc. 76-10 at PDF 54-55, Bates 1863-1864.

547. In order for the "under a sentence of imprisonment" aggravator to apply, the defendant must be convicted of the other offense prior to the commission of the capital offense. Ala. Code 1975, § 13A-5-49(1). The case law cited by the

prosecution and agreed to by the defense applies to a different aggravator, which allows for the introduction of any other convictions for capital offenses or violent felonies. Ala. Code 1975, § 13A-5-49(1)(2); *see also Ex parte McWilliams*, 640 So. 2d 1015, 1023 (Ala. 1993). Mr. Wilson's conviction for escape in the second degree does not fit under this aggravator because it is not a felony involving the use or threat of violence. Ala. Code 1975, § 13A-10-32 ("A person commits the crime of escape in the second degree if he escapes or attempts to escape from a penal facility.").

548. Defense counsel deficiently and prejudicially failed to object to the prosecutor's improper and highly prejudicial opening statement at the penalty phase. *Hinton v. Alabama*, 134 S. Ct. 1081, 1089 (2014) ("An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*."); *Kimmelman v. Morrison,* 477 U.S. 365, 385 (1986) ("The justifications Morrison's attorney offered for his omission betray a startling ignorance of the law – or a weak attempt to shift blame for inadequate preparation."); *Lawhorn v. Allen*, 519 F.3d 1272, 1295-96 (11th Cir. 2008) (it is ineffective to make a critical decision based on inaccurate understanding of the law); *Grueninger v. Director, Virginia Dep't of Corr.,* 813 F.3d 517, 529-30 (4th Cir. 2016) ("[A]ny determination by . . . [defense counsel] that he could not defend a suppression motion because he and the prosecutor 'agreed that [Grueninger] did not evoke [sic]

his Miranda rights,' . . . appears to rest less on informed legal judgment than on a legal misapprehension – which of course will not excuse deficient performance."). Alabama law limits aggravation to ten circumstances. *See* Ala. Code 1975, § 13A-5-49 (1975). These are the only aggravating circumstances that a prosecutor is permitted to argue or that a jury is permitted to rely upon in reaching a sentencing determination. *Ex parte Stewart*, 659 So. 2d 122, 127-28 (Ala. 1993) (reversing a sentence where jury was allowed to consider aggravation beyond statutory aggravating factors); *Ex parte Williams*, 556 So. 2d 744, 745 (Ala. 1987) (reversing a sentence because the jury considered an improper aggravator). Despite this clearly established law, the prosecutor argued that the jury should sentence Mr. Wilson to death because he was convicted of trying to escape while awaiting trial on capital murder charges. Although Alabama law explicitly prohibits this argument, defense counsel did not object.

549. Defense counsel's failure to object and to prevent the prosecution from informing the jury about Mr. Wilson's escape conviction was both deficient performance and highly prejudicial. The prosecutor's improper introduction of the escape conviction severely undercut the attractiveness to the jury of the life without parole option. The U.S. Supreme Court has consistently recognized the importance of informing juries that life without parole means imprisonment until death. *Kelly v. South Carolina*, 534 U.S. 246, 249 (2002) (finding that when the prosecution injects

future dangerousness, defendant is entitled to an instruction that "life imprisonment means imprisonment until the death of the offender"); *accord, Simmons v. South Carolina*, 512 U.S. 154 (1994); *Shafer v. South Carolina,* 532 U.S. 36 (2001). Because fear of a defendant is such a powerful aggravator, due process requires that the jury be reminded that life without parole means that the defendant will never get out of prison. In Mr. Wilson's case, the prosecutor informed the jury of just the opposite—that life without parole did not mean life without parole because Mr. Wilson had tried to escape in the past.

550. Even though the court instructed the jury not to consider the escape, such evidence is so prejudicial that it cannot be erased from the minds of jurors, once placed there. In considering the harm from allowing a jury to consider improper use of character evidence generally, the ASC has opined: "The basis for the rule [404(b)] lies in the belief that the prejudicial effect of prior crimes will far outweigh any probative value that might be gained from them. *Most agree that such evidence of prior crimes has almost an irreversible impact upon the minds of the jurors*." *Ex parte Billups*, 86 So. 3d 1079, 1084 (Ala. 2010) (quotation marks and citations omitted) (emphasis added). With respect to escape in particular, the U.S. Supreme Court has explained that "evidence of violent behavior in prison can raise a strong implication of 'generalized ... future dangerousness.'" *Kelly*, 534 U.S. at 253 (quoting *Simmons v. South Carolina*, 512 U.S. 154, 171 (1994)). As with improper

admission of a non-testifying co-defendant's statement incriminating the defendant, evidence of an escape conviction "'cannot be wiped from the brains of the jurors.'" *Bruton v. United States*, 391 U.S. 123, 129 (1968) (quoting *Delli Paoli v. United States*, 352 U.S. 232, 247 (Frankfurter, J., dissenting) and discussing adoption of the dissent rationale in subsequent precedent). In *Bruton*, the Court further quoted approvingly the *Delli Paoli* dissenters' opinion that, where critical inculpatory evidence has been admitted improperly, "'[t]he 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.'" 391 U.S. at 129 (quoting *Delli Paoli*, 352 U.S. at 248).[33] In some ways, an escape conviction would have an even more ineradicable impact on the jury than would a co-defendant's statement, since the latter is usually self-serving and subject to impeachment, while a conviction is an accomplished fact. Certainly, the obvious purpose of introducing an escape conviction, in particular, is to suggest that life without parole would not be effective protection of society from the defendant, as Mr. Valeska, in fact, intended to argue and later did argue: "I will say, in other words, his escape conviction was after he was arrested for the capital murder case, i.e, he is

[33] At the time of Mr. Wilson's trial, Mr. Valeska had held that position for thirty years. *See* http://www.thedaoffice.com/MeetTheDa.cfm. His "mistake" of law cannot be inadvertent. He raised the issue again during the sentencing hearing before the judge, to which defense counsel did object. Doc. 76-10 at PDF 183, Bates 1992. The court sustained the objection "out of an abundance of caution." *Id.*

not a good risk for life without parole, because he has tried to escape already."[34] Doc. 76-10 at PDF 29, Bates 1838.

551. The fact that the court presumably did not consider the escape does not change the harm done to Mr. Wilson by counsel's ineffectiveness before the jury. The sentencing court is required to consider the jury's sentencing recommendation and accord weight proportionally to the jurors' votes. *Ex parte Tomlin*, 909 So. 2d at 286-87 (number of jurors voting for a sentence must be considered by the court). "[W]hen the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale." *Stringer v. Black*, 503 U.S. 222, 232 (1992).

552. Had defense counsel argued the law correctly in objecting to the introduction of Mr. Wilson's escape conviction, the trial court would have been obligated to prohibit the prosecution from presenting the escape conviction to the jury. Had the jury never been informed of Mr. Wilson's escape attempt, there is a reasonable probability that additional jurors would have recommended life without parole and thus that Mr. Wilson would not have been sentenced to death. Without a vote of ten for death, the court would not have had that sentence as an option. Counsel's failure to object on appropriate grounds and prevent this inflammatory

[34] Defense counsel did object to this argument, and it was not made before the jury.

information from being presented to the jury violated Mr. Wilson's rights to the 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. Therefore, Mr. Wilson's death sentence is due to be vacated.

b. Counsel failed to object to the prosecutor's repeated questioning and arguments based on facts not in evidence.

553. Throughout David Wilson's trial, the prosecutor, Mr. Valeska, argued from facts not in evidence. He argued that Mr. Wilson said things he did not say and that Mr. Wilson did things no one testified to. While defense counsel objected occasionally to this tactic, they did not attack the practice effectively by arguing the real harm from these imaginings of the DA.

554. Perhaps the most egregious example of this kind of misconduct was Mr. Valeska's argument that Mr. Wilson changed "the plan" from one of knocking Mr. Walker out to beating him to death. In his opening statement at the guilt phase, Mr. Hedeen mentioned the abrupt ending of the partial tape of David's April 14, 2004 interrogation (*see supra* paragraph 59 and *infra* paragraphs 632 and 654) and indicated that Mr. Wilson meant that he decided against even hitting Mr. Walker. Doc. 76-7 at PDF 55, Bates 1360. During questioning of Sgt. Luker, he also attacked the failure to record Mr. Wilson's statement in its entirety and to make supplemental

notes of what transpired while the tape was not running. Doc. 76-8 at PDF 144-154, Bates 1550-1560. But when it came time to explain to the jury why this was important, after Mr. Valeska put forward his unsupported extrapolation in his closing at the penalty phase, Mr. Hedeen did not counter it.

555. The incompleteness of Mr. Wilson's statement was made an issue by Mr. Valeska's repeated argument in closing at the penalty phase that what Mr. Wilson meant when he said, right before the tape ended, that he "changed it all up" (Doc. 76-3 at PDF 133, Bates 535) was that he decided not just to strike Mr. Walker to knock him out, but to kill him (Doc. 76-10 at PDF 127, 129, 136, Bates 1936, 1938, 1945). Mr. Valeska attacked the testimony of Mr. Wilson's mother, Linda Wilson, by asking her whether, if her son "changed it all up," he could still be a follower:

> Q. ... I want to tell you what he said on the tape and ask you if it's in evidence. The question was by the detective: That's exactly what happened, isn't it?
>
> Something like that. But when I – we was going to like just go over there and knock him out. When I got there – this is the last page of the statement – I changed it all up, because I didn't want, you know, just to knock him out.
>
> Now, you heard your son give those words on the tape when you sat there and listened. Correct?
>
> A. Yes, sir.

> Q. So, in other words, you would agree and tell the jury that he changed the plan and made the decision himself and decides to do more than just knock out the victim; is that correct?
>
> A. I don't know.
>
> Q. Look at the jury and tell them, ma'am, in your opinion, someone that changes a plan and decides to do more, is he just a follower or is he a leader?
>
> A. A follower.

Doc. 76-10 at PDF 91-92, Bates 1900-1901. Mrs. Wilson was not given the option of a different interpretation to respond to. And defense counsel did not object.

556. Mr. Valeska used the same tactic with Bonnie Anders, Mr. Wilson's neighbor, by asking her whether she would change her view that Mr. Wilson was more a follower than a leader if she knew what Valeska represented Mr. Wilson had said in his statement:

> And he said, well, something like that. I was going to go over there and knock him out. And when I got there, I changed it all up, because I didn't want to, you know, just knock him out.
>
> If those words were said and those were David Wilson's words and he was smart enough to change his plan, and he didn't want to just knock him out, in other words, and the victim was beat to death, would you look at the jury and tell the[m], would you still call him a follower if he is the only one there and he was the only one that did that part? You wouldn't, would you, ma'am, if that was true? If that was true? If you can't answer, I understand.

Doc. 76-10 at PDF 107, Bates 1916. Ms. Anders also had no response. And defense counsel did not object.

557. However, a more reasonable (because more logically consistent) interpretation of the trailing conclusion of Mr. Wilson's statement would have been that he "changed it all up" because he did not like the prospect of beating Mr. Walker and intended to avoid encountering him. What Mr. Wilson said, in context, was:

> Mike Etress: Let's go back to the very beginning for a second.
>
> David Wilson: OK.
>
> ME: When you were at Matt's house whose [*sic*] came up with the plan to steal the van?
>
> DW: Matt's mainly cause he's wanting the speakers out of it.
>
> ME: Who had conversation about (?) ...
>
> DW: Me and Matt, first of all it was me and Matt talking about it cause me and him was the only ones there and Kitty found out about it so then she started talking about it and then Michael found out about it.
>
> ME: Was she going to help?
>
> DW: She was going to help a little bit on it.
>
> ME: What about Michael?
>
> DW: Michael said he didn't want to help.
>
> ME: He said he didn't want to help?
>
> DW: He didn't want to help he just wanted a couple of speakers.
>
> ME: He just wanted the speakers. Was there any conversation made about harming Mr. Walker?
>
> DW: There was but we were being sarcastic about it.
>
> ME: But there was conversation that . . .

> DW: There was.
>
> Tony Luker: Who all was there talking about it?
>
> DW: Me, Matt and Kitty.
>
> ME: Now what was the sarcastic conversation that you were having?
>
> DW: Well, we were like all kind of got the little idea just knocking him out like make him you know black out or whatever and taking the keys and going with the van.
>
> ME: But that's exactly what happened isn't [it]?
>
> DW: Something like that but then I, we was going to like just go over there and knock him out. When I got there, I changed it all up cause I didn't want to you know just knock him out.
>
> ME: So y'all, so you ...
>
> Side A of tape stops.

Doc. 76-3 at PDF 133, Bates 535. In the earlier portion of the interrogation, Mr. Wilson described striking Mr. Walker in the head as accidental, not intentional:

> Well he heard me he said hey, he picked up a knife. I swung the bat tried to hit him in the arm, the back shoulder, the right shoulder, so it can knock off the knife. I accidentally hit him in the back of the head. That was not my intentions though but it happened and I got scared about it. He fell down and he got back up.

Doc. 76-3 at PDF 122, Bates 524. He also stated that, once the brief encounter he described concluded, he did not want to go back into the kitchen where Mr. Walker lay when co-defendant Corley arrived and insisted on seeing the body – "I, I told her like I stayed right there [in the back bedroom] it's like I ain't gone go that far cause I know what I, happened and all and I'm freaking out about it." Doc. 76-3 at PDF

127, Bates 529. None of this corresponds with changing the plan to a murderous one. Nothing but Mr. Valeska's improper supposition about what might have been said, i.e., no fact in evidence, and no fair inference from any fact in evidence, supported his argument about a change in plan to murder.

558. In fact, if, after the tape stopped, Mr. Wilson continued in the vein suggested by Mr. Valeska and admitted he "changed it all up" to kill Mr. Walker, that would have been a difference between what Mr. Wilson said during the recorded portion and the unrecorded portion. But Sgt. Luker testified that what was said in the missing portion was the same as what had previously been discussed "100 percent." Doc. 76-8 at PDF 155, Bates 1561; *see also* Doc. 76-8 at PDF 129-130, 152, Bates 1535-1536, 1558. The State relied on this assertion to get the tape admitted and to demonstrate that there was purportedly no harm from the omission of the conclusion. Doc. 76-8 at PDF 127-130, 162, Bates 1533-1536, 1568.

559. Defense counsel did not point out these inconsistencies. There could be no strategic reason for not objecting to argument from facts not in evidence, especially where counsel had laid at least a partial groundwork to show that the facts actually in evidence, the taped statement, supported the opposite of what Mr. Valeska argued. Mr. Hedeen certainly objected to other "fantasies" of the prosecutor. Doc. 76-9 at PDF 154, Bates 1761 (during the guilt phase). Had counsel objected, a substantial portion of the State's argument for the HAC aggravator would have been

undercut, creating a reasonable probability that more jurors would have voted for life.

560. Mr. Valeska's interpretation persuaded the judge, who noted in his sentencing order that "[Mr. Wilson] decided to do something more than that [i.e., hit Mr. Walker with the bat and knock him out] in his own words ...." Doc. 76-2 at PDF 185, Bates 385. So it is reasonable to conclude that the jurors were swayed as well. Yet counsel did nothing to counter this false argument.

561. Mr. Valeska reinforced his "changing the plan" argument by arguing that "the blood in different parts of the house" (Doc. 76-10 at PDF 129, Bates 1938), "all the blood in the different locations of the house" (Doc. 76-10 at PDF 129-130, Bates 1938-1939), meant that Mr. Walker was subjected to a long, drawn-out, cruel death motivated by "a torturous, pitiless, intentional act of inflicting a high degree of pain upon a man that he changed the plan for . . . ." Doc. 76-10 at PDF 129, Bates 1938. But this argument that Mr. Walker was dragged around the house was based on a fabrication of Mr. Valeska's. The evidence log from the crime scene does not show "blood in different parts of the house." The crime scene evidence log shows that any blood droplets that may have been found in the house were all located in a circumscribed area open to the kitchen, where Mr. Walker was found. There was absolutely no record of blood being collected from the bedrooms or the den. *See* Doc. 76-24 at PDF 138-141, Bates 3979-3982. Mr. Valeska's argument was made

as a direct contradiction of Mr. Wilson's statement indicating that he struck Mr. Walker once: "It didn't happen like that. You know it didn't, because all the blood in the different locations of the house and all the injuries received." Doc. 76-10 at PDF 129-130, Bates 1938-1939. Defense counsel did not object to the false basis of this argument.

562. To underscore the "pitilessness," Mr. Valeska asserted that Mr. Wilson was particularly "cold and callous" because "he took and drank Dewey Walker's milk." Doc. 76-10 at PDF 130-131, Bates 1939-1940. This referred back to a false assertion in the State's opening at the guilt phase that "[h]e admits that he went back over there with Catherine Corley and drank Dewey Walker's milk that Dewey had brought home from the grocery store. Drank his milk and stood over him while Dewey was lying there, while Corley ate a candy bar in this 64-year-old man's home, the one place he thought he would be safe and secure." Doc. 76-7 at PDF 148, Bates 1353. There is nothing in Mr. Wilson's statement and nothing anywhere in the record about drinking milk in Mr. Walker's house. Again, defense counsel made no objection.

563. Mr. Valeska also inserted a reference to another, wholly irrelevant crime, to which Mr. Wilson had no connection whatsoever. Mr. Valeska attempted to compare the murder of Dewey Walker to the murder of Marilyn Mitchell[35]: "Mr.

[35] *See Hammonds v. State*, 777 So. 2d 750 (Ala. Crim. App. 1999).

Hedeen, he says, compared to other capital murder cases – I am going to tell you right now, I am not going to bring in the autopsy of Marilyn Mitchell and put it in front of you, what happened to her, when he talks about –" (Doc. 76-10 at PDF 131-132, Bates 1940-1941) Mr. Hedeen did object to this interjection, but without clarifying that Mr. Wilson had nothing to do with that case.

564. In *Berger*, the Supreme Court granted a new trial where it found that the prosecutor

> was guilty of misstating the facts in his cross-examination of witnesses; of putting into the mouths of such witnesses things which they had not said; of suggesting by his questions that statements had been made to him personally out of court, in respect of which no proof was offered; of pretending to understand that a witness had said something which he had not said and persistently cross-examining the witness upon that basis; of assuming prejudicial facts not in evidence; of bullying and arguing with witnesses; and, in general, of conducting himself in a thoroughly indecorous and improper manner.

295 U.S. at 84. This description matches the performance of Mr. Valeska in this case. Yet counsel put up little resistance.

565. During the defense closing argument in the penalty phase, trial counsel reiterated that what the attorneys say is not evidence. Doc. 76-10 at PDF 112-113, 121-123, Bates 1921-1922, 1930-1932. He argued against the HAC aggravator that the jury should consider that Mr. Walker might have been rendered unconscious after the initial blow to his head. Doc. 76-10 at PDF 113-120, Bates 1922-1929. He also explained that mitigation is meant to individualize the defendant, but without

making an excuse, and argued Mr. Wilson's age should be considered. Doc. 76-10 at PDF 120-121, 123-125, Bates 1929-1930, 1932-1934.

566. But even while pointing out that what the attorneys say is not evidence, counsel did not specifically ask the jury to apply that to Mr. Valeska's misinterpretation of Mr. Wilson's statement or his misreport of what Mr. Wilson said. Counsel did not call the jury's attention to Mr. Valeska's implausible interpretations and numerous misstatements discussed above[36] and argue—as he should have—that subtracting them from the "evidence" would result in a very different picture of how heinous, atrocious and cruel this offense actually was. The failure to object to, and argue the baselessness of, facts not in evidence constitutes deficient performance, which prejudiced Mr. Wilson because it permitted the State to exacerbate the aggravators, while diminishing Mr. Wilson's mitigating evidence, thus unbalancing the weighing process. *Cf. Stringer*, 503 U.S. at 232 ("[W]hen the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale."). Had defense counsel effectively demonstrated that what Mr. Wilson admitted to – a limited assault on Mr. Walker – was true, instead

[36] Mr. Valeska gave his closing after Mr. Hedeen; however, the themes of that closing were the same as what the State had been arguing throughout. For example, Mr. Valeska questioned both defense mitigation witnesses about the supposed change in plan. Therefore, defense counsel was on notice of the likely purport of the State's rebuttal.

of the brutal ordeal the State fabricated, there is a reasonable probability that more jurors would have voted for life.

567. Counsel's deficient performance in failing to object to these improperly argued "facts" prejudiced Mr. Wilson and denied him 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. For this reason, this Court must find trial counsel ineffective and vacate Mr. Wilson's death sentence.

568. For the foregoing reasons, Mr. Wilson is entitled to relief and a new penalty phase and sentencing. Mr. Wilson requests discovery and a hearing on this issue.

3. Defense counsel failed to present any evidence at the sentencing hearing before the judge.

569. The judicial sentencing hearing took only a few minutes. Doc. 76-10 at PDF 175-187, Bates 1984-1996. At the outset of the hearing, the trial court inquired as to whether defense counsel planned to present anything:

> Court: Other than argument, does the defense have anything further?
>
> Defense: I have some things to point out. I don't know if that's argument or if that's discussion or whatever it is.

Doc. 76-10 at PDF 175, Bates 1984. The prosecutor then argued that the victim's injuries supported a finding that the murder was especially heinous, atrocious, and cruel. Doc. 76-10 at PDF 176-177, 178-179, Bates 1985-1986, 1987-1988. The prosecutor asked the court to follow the recommendation of the ten jurors who recommended death and sentence David Wilson to death. Doc. 76-10 at PDF 178, Bates 1987.

570. Defense counsel argued briefly for a sentence of life without parole. Doc. 76-10 at PDF 179-182, Bates 1988-1991. He pointed out that a psychological report from when David was 16 years old found that "he had significant self-blame, which they said caused an exaggerated need to accept responsibility." Doc. 76-10 at PDF 182, Bates 1991. Defense counsel never mentioned this to the jury at the penalty phase, and never argued to the jury that school records like Mr. Wilson's were mitigating evidence. The prosecutor gave a rebuttal argument during which he argued that David tried to escape, a wholly improper aggravator; that the victim was struck more than 100 times; and that a checklist from David's school records shows that he was self-serving. Doc. 76-10 at PDF 183-186, Bates 1992-1995. As soon as the prosecutor completed his rebuttal argument, the trial court asked if there was anything further from the defense. Doc. 76-10 at PDF 186, Bates 1995. When defense counsel said that there was not, the trial court immediately sentenced David Wilson to be executed by lethal injection. *Id.*

571. Counsel knew before the sentencing hearing that the jury vote was 10-2 and should have known that the court is expected to factor in the number of jury votes for a penalty in determining the appropriate sentence. Yet counsel did not do any of the things that could have been done to prepare for and present a mitigation case to the judge. Counsel's deficient performance at sentencing prejudiced Mr. Wilson and denied him his rights to effective assistance of counsel, to due process, to a fair trial, and to be free from cruel and unusual punishment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution.

572. Therefore, Mr. Wilson's sentence is due to be vacated. Mr. Wilson requests discovery and a hearing on this issue.

4. Counsel failed to protect Mr. Wilson's right to a fair jury determination.

573. The right to trial by jury includes the right to a jury free of bias. U.S. Constitution, Amendment VI ("In all criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury ...."). This right extends to the penalty phase of a capital trial. "The test of vitiating influence upon a jury authorizing a new trial is not whether it *did* influence the jury to act without the evidence, but whether it *might have* unlawfully influenced the jury in the verdict returned, as to its nature, character, or degree, or the amount and extent of the

punishment fixed by the jury within the statute." *Oliver*, 166 So. at 617 (citations omitted) (emphasis added).

574. Mr. Wilson's family attended the trial. During a break, his mother, Linda Wilson, observed the prosecutor carrying documents into the jury room during their guilt phase jury deliberations. When defense counsel was informed of this highly improper conduct, they did not bring it to the attention of the trial court. The Alabama Supreme Court is stringent about prohibiting all such communication. *See Brickley v. State*, 243 So.2d 502, 505 (Ala. 1970); *Oliver v. State*, 166 So.2d 615, 617 (Ala. 1936); *Ex parte Pilley*, 789 So.2d 888, 893 (Ala. 2000). Reasonably effective counsel would have informed the court, demanded a hearing on the matter, and requested a mistrial. The failure to raise the issue and the resulting prejudice also affected the determination of punishment. Had counsel performed effectively, there is a reasonable probability that Mr. Wilson would not have been sentenced to death.

575. In denying this claim, the ACCA sidestepped the issue by finding that Mr. Wilson should have pled precisely when counsel were notified, *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 analysis, find counsel performed deficiently and that their deficient performance prejudiced Mr. Wilson.

576. Counsel's deficient performance in failing to bring this misconduct and potential juror bias to the attention of the trial court prejudiced Mr. Wilson and denied him 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. Therefore, Mr. Wilson's sentence is due to be vacated.

577. Overall, the effect of counsel's deficient performance throughout the penalty phase must be assessed cumulatively. *Strickland*, 466 U.S. at 695. All of the above individual instances of counsel error left the jury with an incomplete, distorted picture of Mr. Wilson. This caricature prejudiced Mr. Wilson and denied him 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. Therefore, Mr. Wilson's sentence is due to be vacated. Mr. Wilson is entitled to relief and a new penalty phase and sentencing. Mr. Wilson requests discovery and a hearing on this issue.

E. The ACCA's decision is an unreasonable application of *Strickland*, *Wiggins*, and *Rompilla* and rests on unreasonable findings of fact.

578. Mr. Wilson's Rule 32 counsel pled that trial counsel failed to conduct a reasonable mitigation investigation and so presented a less than complete picture of Mr. Wilson's character and background to his sentencing jury. Doc. 76-22 at PDF 193, Bates 3632 to Doc. 76-23 at PDF 26, Bates 3666.

579. In rejecting this claim, 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). The ACCA unreasonably held that Corley's confession would have made no difference to the penalty jury because relative culpability does not matter to the finding of the "especially heinous, atrocious, and cruel" aggravator. This is at odds with the entire purpose of the penalty phase, namely to assess the individual defendant's moral culpability (s*ee Abdul-Kabir v. Quarterman*, 550 U.S. 233, 263-64 (2007)), and is an unreasonable deviation from *Lockett v. Ohio*, as indicated in paragraph 147 *supra*.

580. The ACCA failed to accept the facts pled by Rule 32 counsel for Mr. Wilson as true so as to require a hearing, read the allegations respecting the diagnosis of Asperger's Syndrome unreasonably, and ignored the affidavit from a school professional explaining that Mr. Wilson's school records contain much information supporting that diagnosis. In this regard, 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 all this mitigation from the story 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) and the cases collected in *Sears.*

581. The ACCA began its review of this claim with a lengthy quotation from *McWhorter v. State*, 142 So. 3d 1195, 1245-47 (Ala. Crim. App. 2011), of numerous statements of the method of review by lower courts, many of which 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 court 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, many, like *Campbell*. And the court failed to apply this principle from *Wiggins* in Mr. Wilson's case. What the Supreme Court meant by this statement was 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 Wiggins, they had information collected in a pre-sentence investigation report, and they had records of Wiggins' various foster-care placements. 539 U.S. at 523. But the Supreme Court found the investigation unreasonable because it did not examine Wiggins' life history in any detail, although counsel had clues that much was available to be discovered. *Id.* at 524.

582. The ACCA has repeatedly ignored the Supreme Court's instructions by misapplying the above instruction and 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*, *Wilson II*, No. CR-16-0675, slip op. at 48, to deny Mr. Wilson relief.

583. As one example of an unreasonable treatment of the facts, in deviation from *Wiggins*, the court 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 swept aside serious allegations of child abuse, because the victim of that abuse, David Wilson, cannot produce a log recording dates and times of day when he was abused, together with notations as to whether this was a day of bruising only, or a day of welts and broken skin. A witness at trial would not have to testify to what the ACCA demands in order for his or her account of abuse to be considered by a jury, nor has the U.S. Supreme Court demanded such an impossibly high degree of specificity.

584. 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. And the court's further dismissal of such evidence as a "double-edged sword," *Wilson II*, No. CR-16-0675, slip op. at 50, is an unreasonable deviation from *Sears*, 561 U.S. at 951 ("the fact that along with this new mitigation evidence there was also some adverse evidence is unsurprising, . . . given that counsel's initial mitigation investigation was constitutionally inadequate. Competent counsel should have been able to turn some of the adverse evidence into a positive . . . This evidence might not have made Sears any more likable to the jury, but it might well have helped the jury understand Sears, and his horrendous acts – especially in light of his purportedly stable upbringing."). This is all simply a way of refusing to consider evidence as mitigating, which the U.S. Supreme Court has said neither a jury nor a court may do, *see*, *e.g.*, *Woodson*, 428 U.S. at 303-5 (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.").

585. 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 at and of 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 Court 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. 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 called for a full evaluation by a professional, such as Dr. Shaffer, who would explain to a jury what Mr. Wilson's mental problems are and how they affect 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. Trial counsel would have come to the same conclusion had they reasonably sought an expert familiar with school records to review the voluminous documents they collected but failed to explain to the jury. Had they consulted with a professional such as Dr. Harden, they would also have been put 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. The ACCA found that trial counsel did not perform unreasonably by failing to discover the Asperger's 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. At the time David Wilson was in school, Asperger's was not widely known to non-psychologists, but by the time of his trial, it was. This is another example where developments in science must be taken into account. 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 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.

586. The ACCA also found that Rule 32 counsel did not plead the applicability of the Asperger's 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 evidences an unreasonable fact finding. Mr. Wilson was diagnosed with Asperger's *because* he meets the criteria set out in the DSM-V. 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 gave details of exactly what they would have testified to. Doc. 76-23 at PDF 14-16, Bates 3654-3656. How counsel could have been more specific is incomprehensible.

587. The ACCA also 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 "mild" is a relative term. "Mild" intellectual disability, for example, 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). Autism is a severe impairment of an individual's ability to interact socially. DSM-V at 50. All levels of severity "requir[e] support" to function. *Id.* at 52 (table describing three levels of severity). The court's ruling was also an unreasonable deviation from what the U.S. Supreme Court has required:

> 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 . . . .

Tennard v. Dretke, 542 U.S. 274, 286-87 (2004).

588. Mr. Wilson's autism spectrum diagnosis is an important mitigating factor which the jury heard nothing about. They did not hear about it because counsel failed to investigate Mr. Wilson's mental health status competently. That failure, along with the other deficiencies Mr. Wilson pled, prejudiced him. The prejudice is proved by the fact that the limited mitigation counsel did present persuaded two jurors to vote for life. Doc. 76-2 at PDF 172, Bates 372. A single additional vote

would have prevented a death verdict. That is all Mr. Wilson has to show to succeed on this claim:

> [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. *Strickland*, 466 U.S. at 695 . . . . ('The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncracies of the particular decisionmaker, such as unusual propensities toward harshness or leniency.').

Bertolotti v. Dugger, 883 F.2d 1503, 1519 n.12 (11th Cir. 1989).

589. Because the ACCA failed to follow the appropriate analysis laid out in *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 where a full account of his personal characteristics and life history can be presented to a jury.

590. Additionally, state post-conviction counsel pled that Corley's confession constituted mitigating evidence which counsel failed to pursue and present. Doc. 76-23 at PDF 26-29, Bates 3666-3669. The ACCA's discussion of Corley's participation in the crime and the issue of relative culpability as a mitigating factor was flatly erroneous as to the law. The ACCA assumed 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. However, the ACCA confused two separate issues respecting this aggravator. While the State, in order to prove that a murder was especially heinous, atrocious, and cruel, may not have to prove also what a defendant with co-defendants personally did, that defendant cannot be precluded from presenting mitigating evidence to show that his own participation in the crime was not what 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).

591. 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, 550 U.S. at 263-64. 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, therefore, does not follow that "the defendant's actual participation in the murder," *id.*, or non-participation, counts for nothing.

592. In denying this claim, the ACCA also persisted in not accepting Mr. Wilson's well pled facts as true. Had counsel submitted the Corley letter to the jury and established that she was responsible for Mr. Walker's death, there is a reasonable probability that the jury would have found Mr. Wilson did not deserve the death penalty. The court did not explain how this would not be mitigating, but merely asserted that Mr. Wilson cannot show prejudice. *Wilson II*, No. CR-16-0675, slip op. at 51.

593. Corley's confession, like the mitigating factors in the previous subpart of this claim, would have provided a reason for the jury to vote for a sentence less than death. Counsel for Mr. Wilson pled sufficient facts to prove deficient performance and prejudice as discussed above. Because the ACCA failed to follow the appropriate analysis laid out in *Lockett*, *Abdul-Kabir*, and numerous other U.S. Supreme Court cases respecting mitigation, Mr. Wilson is entitled to *vacatur* of his sentence and a new penalty phase where a jury can consider the question of his relative culpability.

594. The ACCA's treatment of prosecutorial misconduct during the penalty phase 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.

Without admitting the deficiency in counsel's performance in conceding that an attempted escape conviction qualified as an aggravating circumstance, the ACCA found that the State's presentation of that conviction to the jury had no effect, 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 that Mr. Wilson's statement right before the tape ran out that he "changed it all up" meant that he decided not to assault Mr. Walker only, but to kill him, *id.* at 55-56, even though the testifying detective insisted that nothing was said off the tape that 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 blow.

595. 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*, 134 S. Ct. at 1089, 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*, 534 U.S. at 253. 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*, 391 U.S. at 129 (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.

596. 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 supra* paragraph 925, 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.

597. 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. *See also Ex parte Tomlin*, 540 So. 2d 668, 672 (Ala. 1988) (explaining that a prosecutor's misconduct must be considered cumulatively). This is deficient performance which prejudiced Mr. Wilson by providing a false basis for a sentence of death.

598. 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's sentence must be vacated and he must be granted a new penalty phase before a jury untainted by a prosecutor's misconduct. *See also supra*, paragraphs at 348-350.

F. Trial counsel's obstruction of Mr. Wilson's right to testify on his own behalf prejudiced Mr. Wilson at the penalty phase.

599. In addition to the matter set out *infra* in Claim IV (guilt-phase ineffective assistance of counsel), denying Mr. Wilson his right to testify impacted the penalty phase as well.

600. As noted, at the penalty phase, the DA latched onto the sudden cut-off of the tape of Mr. Wilson's statement to police and extrapolated a wholly unsupported meaning for the concluding statement that he "changed it all up." Doc. 76-10 at PDF 127, 129, 136, Bates 1936, 1938, 1945. Mr. Valeska attacked the testimony of Mr. Wilson's mother, Linda Wilson, by asking her whether, if her son "changed it all up," he could still be a follower. Doc. 76-10 at PDF 91-92, Bates 1900-1901. He used the same tactic to silence Bonnie Anders, the other mitigation witness. Doc. 76-10 at PDF 107, Bates 1916.

601. The ACCA, in ruling on counsel's deficiency in failing to challenge the DA's speculation, held 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 one fact actually in evidence respecting its meaning was Sgt. Luker's testimony that the untaped portions of Mr. Wilson's statement did not differ from the taped portion. Doc. 76-8 at PDF 145, 152, Bates 1551, 1558. Mr. Wilson's testimony would have confirmed this point.

602. Counsel's refusal to allow Mr. Wilson to testify on his own behalf violated his rights to the 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, at the penalty phase, under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution. Therefore, Mr. Wilson's convictions and sentence are due to be vacated. Mr. Wilson requests discovery and a hearing on this issue. For the foregoing reasons, Mr. Wilson is entitled to a new penalty phase and sentencing.

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.

603. As demonstrated in Claim I *supra*, the Corley letter, handwriting expert report, and derivative ("downstream") fruit-of-the-hidden-tree evidence were favorable, suppressed, and material to Mr. Wilson's defense at his penalty phase and sentencing, and their suppression, cumulatively, deprived Mr. Wilson of his right to due process under the Fourteenth Amendment of the United States Constitution.

604. The Corley letter, handwriting expert report, and downstream fruit-of-the-hidden-tree evidence were also favorable, suppressed, and material to Mr. Wilson's defense at the guilt phase of his trial, and their suppression, cumulatively,

deprived Mr. Wilson of his right to due process under the Fourteenth Amendment of the United States Constitution. Mr. Wilson is entitled to a new guilt phase trial.

A. The evidence was material at the guilt phase

605. Armed with the Corley letter, handwriting expert report, and downstream fruit-of-the-hidden-tree evidence, defense counsel would have cross-examined Sgt. Luker or called Kittie Corley as an adverse witness to elicit evidence at trial negating both the *mens rea* and *actus reus* requirements for capital murder.

1. Mens Rea

606. Under Alabama law, the two capital murder charges that David Wilson was convicted of require proof of intentional murder. *See* Ala. Code 1975, § 13A-5-40(a)(4) (murder during a burglary); Ala. Code 1975, § 13A-5-40(a)(2) (murder during a robbery); Ala. Code 1975, § 13A-5-40(b).[37] *See Brown v. State*, 72 So. 3d 712 (Ala. Crim. App. 2010) ("Alabama appellate courts have repeatedly held that, to be convicted of a capital offense and sentenced to death, a defendant must have had a particularized intent to kill and the jury must have been charged on the

[37] The Alabama legislature in Ala. Code 1975, § 13A-5-40(b) explicitly isolates capital murder to only murder as defined under Ala. Code 1975, § 13A-6-2(a)(1) (requiring "intent to cause the death of another person"), and excludes murder as defined in Ala. Code 1975, § 13A-6-2(a)(2) (requiring only reckless conduct "under circumstances manifesting extreme indifference to human life") and 13A-6-2(a)(3) (felony murder).

requirement of specific intent to kill.") (quoting *Ziegler v. State*, 886 So.2d 127, 140 (Ala. Crim. App. 2000)).

607. The trial court judge instructed the jury in Mr. Wilson's case on the elements of capital murder in a manner consistent with the intentional murder requirements of the Alabama Code, namely that "the law states that an intentional murder committed during a burglary in the first degree is capital murder. […] A person commits an intentional murder if he causes the death of another person, and in performing the act or acts which caused the death of that person, that he intends to kill that person." Doc. 76-9 at PDF 183-184, Bates 1790-1791; *id.* at PDF 184-185 ("[T]o convict, the State must prove beyond a reasonable doubt each of the following elements. […] Number two, that David Wilson caused the death of Dewey Walker by hitting him with a baseball bat and/or strangling him with the mouse cord or the extension cord. Number three, that in committing the acts which caused the death of Dewey Walker, that Mr. Wilson intended to kill Mr. Walker. A person acts intentionally when it is his purpose to cause the death of another person. The intent to kill must be real and specific."). The trial court gave an analogous instruction regarding the capital murder charge during the course of a robbery. Doc. 76-9 at PDF 189-192, Bates 1796-1799.

608. Armed with the Corley letter, defense counsel would have crossed-examined Sgt. Luker or examined Kittie Corley as an adverse witness to elicit

evidence that Corley was the one who intentionally beat Mr. Walker to death with the baseball bat, was more deeply implicated in the robbery and burglary, had a motive to kill Mr. Walker, and was involved in other murderous gang activity. This evidence would have convinced a reasonable juror that David Wilson was not the one with the intent to kill Mr. Walker.

609. In his police statement dated April 14, 2004, Mr. Wilson admitted to the police that he accidentally hit Mr. Walker in the head once, as he tried to knock a knife out of Mr. Walker's hand, and thereafter subdued him with an extension cord. The evidence at trial established that Mr. Walker was not killed by asphyxiation, but rather by multiple blows to his head and body. *See supra* paragraph 224. The frontside of the Corley letter now shows that Kittie Corley was the one who intentionally killed Mr. Walker with the baseball bat.

610. Everything in this case turned on who delivered the multiple blows to Mr. Walker's head and body. Petitioner has always denied that he did so; however, there was no available evidence to clearly corroborate Mr. Wilson's claim. But there is now—straight from the hand of his co-defendant. The Corley letter—in which she confesses that she "hit Mr. Walker with a baseball bat until he fell"—is linchpin evidence in Mr. Wilson's case. Through skillful examination of witnesses, defense counsel would have presented the substance of the Corley letter, handwriting expert report, and downstream evidence to the jury.

611. Mr. Wilson described Kittie Corley as acting strangely "excited" or "thrilled." Doc. 76-3 at PDF 127-128, Bates 529-530. Mr. Wilson told the police that "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 [know] what was up with her." Doc. 76-3 at PDF 127, Bates 529. Mr. Wilson then 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*." Doc. 76-3 at PDF 128, Bates 530 (emphasis added).

612. Mr. Wilson's statement that Corley told him she "use to do stuff like that" corroborates the Corley letter and the downstream evidence that Corley was involved in the other murder of C.J. Hatfield. Together, the evidence would have been damning. Defense counsel would have argued to the jury that the only evidence of intent involved Corley's intent to beat Mr. Walker with a bat and that she had a motive because, as she wrote, "It was Dewey's time to go." *See supra* paragraphs 256 *et seq*.

2. Actus Reus

613. Under a similar logic, the Corley letter and downstream evidence undermine the *actus reus* element of causation. Defense counsel would have argued to the jury that Kittie Corley, and not Petitioner, beat Dewey Walker to death with

the bat and so "caused the death" of Mr. Walker. The Corley letter also provided evidence that Corley had a motive and the experience of being involved in murder.

3. Accomplice liability

614. Under Alabama law, a person can be held responsible for the actions of another person if they are an accomplice. To be held to be an accomplice, in Alabama, the law requires that a person have the *mens rea* of intent, namely, have "the intent to promote or assist the commission of the offense." Ala. Code 1975 § 13A-2-23; *Ex parte Raines*, 429 So.2d 1111, 1112 (Ala. 1982) (holding that proof of a "particularized intent to kill" is required even for a capital felony murder conviction of a non-triggerman accomplice in an intentional killing). In Alabama, an individual cannot be convicted of capital murder for "being an accomplice merely in the underlying felony." *Id.* at 1112; *Brown v. State*, 72 So.3d 712, 716-716 (Ala. Crim. App. 2010). In other words, for Mr. Wilson to be held to be an accomplice to the capital murder carried out by Kittie Corley, the jury would have had to find that he had the intent to assist the commission of an intentional murder.

615. As mentioned above, defense counsel would have used the Corley letter and downstream evidence to convince a reasonable juror that Mr. Wilson did not act intentionally and did not have an intent to assist in the commission of an intentional murder.

616. As Judge Coody ruled in this case, the question of materiality for purposes of a *Brady* analysis is contextual and must take into account the prosecution's theory of the case. Doc. 79, p. 18 n.7. Here, District Attorney Doug Valeska proceeded on the theory that Mr. Walker was killed by the bat blows and not the strangulation. For this reason, the Corley letter and downstream evidence is material to the guilt phase. As Judge Coody wrote:

> The prosecution's charging decision and the theory it brings to trial can be important context in a *Brady* analysis. The Ninth Circuit Court of Appeals stressed this point in *Comstock v. Humphries*, 786 F.3d 701, 712-13 (9th Cir. 2015) (citations and quotations omitted):
>
> > We evaluate the materiality of *Brady* evidence based on the crimes charged, not based on the crimes that might have been charged. This makes sense. *Brady* requires prosecutors to disclose evidence that is material to the defendant's guilt or punishment. Guilt or punishment cannot, of course, be premised on uncharged crimes, and evidence that directly undermines the prosecution's theory of the charged crime is plainly material under *Brady*. Just as a habeas petitioner alleging actual innocence need not establish that he was innocent of an uncharged crime, a petitioner alleging a *Brady* violation need not establish that the suppressed evidence would have exculpated him from an uncharged offense.

Doc. 79, p. 18 n.7.

617. The test of materiality articulated by the Supreme Court in *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) is whether, in the absence of the exculpatory evidence, the defendant "received a fair trial, understood as a trial resulting in a verdict worthy of confidence."

618. Under this standard, Mr. Wilson is entitled to a new guilt phase trial. Mr. Wilson requests discovery and a hearing on this issue.

B. The ACCA's decision is an unreasonable application of *Brady* and rests on unreasonable findings of fact.

619. The ACCA, in affirming the dismissal of this claim, found it to be procedurally barred, because the court concluded that trial 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. This ruling is in error for the reasons discussed *supra*, Claim I, subsection H, paragraphs 334 *et seq*.

620. The holding of the ACCA is an unreasonable application of clearly established federal law, see 28 U.S.C. § 2254(d)(1). *See supra*, Claim I, subsection H, paragraphs 334 *et seq*.

621. The ACCA's decision rests on a number of unreasonable findings of fact, *see* 28 U.S.C. § 2254(d)(2). *See supra*, Claim I, subsection H, paragraphs 334 *et seq*.

622. 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, subsection H, paragraphs 334 *et seq*.

623. Alternatively, this Court should not accord deference to the ACCA's decision on this or any other issue governed by federal law. *See supra*, paragraphs 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

624. Respondent maintains that trial counsel for Mr. Wilson, Scott Hedeen, knew of the existence of the Corley letter from the police report and is at fault for not raising the *Brady* violation regarding the guilt phase prior to trial or on direct appeal. Doc. 56 at p. 8 (Answer to Petition).

625. Petitioner contests Respondent's position, *see* Claims I and III *supra*, arguing *inter alia* that Mr. Hedeen filed a *Brady* motion requesting any statements by Kittie Corley and thereby fully satisfied the requirements of *Brady*.

626. However, should the Court agree with Respondent that a reasonably competent counsel had the obligation to raise a *Brady* violation regarding the Corley letter prior to trial, then Mr. Hedeen's failure to do so and to investigate the Corley letter would *ipso facto* amount to constitutionally ineffective assistance of counsel at the guilt phase under *Strickland v. Washington*, 466 U.S. 668 (1984).

627. Defense counsel's failure to investigate co-defendant Corley and her confessions prejudiced Mr. Wilson because it left him with no defense and thereby

deprived him of a fair trial. *Kyles*, 514 U.S. at 434. 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.")

628. The analysis under *Strickland* is a cumulative analysis. Trial counsel's failures to investigate and prepare for trial regarding the Corley letter are amplified by other evidence of failures throughout the record of the guilt phase proceedings in this case. Trial counsel filed a multiplicity of motions, but these were canned motions and they did nothing to adapt them to the circumstances of Mr. Wilson's case. *See infra*. They failed to support the motions they did file at hearings by making inadequate argument to the trial court. At the guilt phase, they gave only the briefest of opening statements and no closing argument to orient the jury as to any theory of defense. *See infra*. They failed to object to prosecutorial misconduct; they failed to ensure an unbiased jury; and they were responsible for a host of other omissions. *See infra*.

629. Thus, trial counsel's failure to investigate, discover, and present the Corley letter, handwriting expert report, and downstream evidence, compounded by their other failures, especially their decision to waive a closing argument at the guilt phase, violated Mr. Wilson's rights to the 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. Therefore, Mr. Wilson's convictions and sentence are due to be vacated, and Mr. Wilson is entitled to relief and a new guilt phase trial. Mr. Wilson requests discovery and a hearing on this issue.

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.

630. At the guilt phase of Mr. Wilson's trial, defense counsel failed to investigate, discover, and present evidence concerning the Corley letter, handwriting expert report, and downstream evidence, and as a result, presented no theory of defense.

631. Opening and closing arguments are where capital defense counsel lay out a theory of the case and give the jury some reason to find their client either not guilty or guilty of a lesser-included offense.

632. But in their opening statement in this case, defense counsel simply cautioned the jury that what the lawyers said was not evidence and asked the jurors to listen closely to the testimony. Doc. 76-7 at PDF 151-158, Bates 1356-1363. They briefly pointed out issues respecting gaps in the evidence (Doc. 76-7 at PDF 155-156, Bates 1360-1361 (tape cut short); Doc. 76-7 at PDF 157, Bates 1362 (most

items of evidence collected not sent for testing)), but gave no indication why the evidence or lack of evidence would not prove Mr. Wilson guilty.

633. After conclusion of the State's evidence, defense counsel put on nothing to contradict it. Doc. 76-9 at PDF 139, Bates 1746 (prosecution rests) and Doc. 76-9 at PDF 140, Bates 1747 (defense rests).

634. Then, after the prosecutor gave a thorough closing argument, defense counsel *waived* their closing argument. Doc. 76-9 at PDF 176, Bates 1783.

635. The failure to investigate resulted in trial counsel's failure to provide Mr. Wilson with a defense during the guilt phase, which would include, at a minimum, adequate and thorough pretrial motions (instead of canned motions cut-and-pasted from a manual without individualization to the case), proper objections throughout trial (instead of objections on unstated grounds or no objection at all), a well-reasoned opening statement and closing argument (instead of an empty opening gesture and no closing), effective cross-examination of State's witnesses, and defense witnesses to refute the State's theory of the case (instead of nothing at all).

636. Trial counsel's failures regarding the Corley letter and downstream evidence, compounded by their other failures, *see supra*, deprived Mr. Wilson of the effective assistance of counsel at the guilt phase. For the foregoing reasons, Mr. Wilson is entitled to relief and a new trial. Mr. Wilson requests discovery and a hearing on this issue.

1. The ACCA's decision is an unreasonable application of Strickland*, requiring reasonable investigation, and of* Chambers *and* Holmes*, prohibiting exclusion of reliable evidence of third-party guilt. The basis for the ACCA's decision also rests on unreasonable findings of fact.*

637. 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.

638. The ACCA's ruling regarding the admissibility of the Corley letter is clearly wrong. The ACCA's decision is an unreasonable application of clearly established federal law, see 28 U.S.C. § 2254(d)(1), and rests on a number of unreasonable findings of fact, *see* 28 U.S.C. § 2254(d)(2). *See also supra* paragraphs 348 through 350.

639. First, the ACCA 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 which is required to 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.')

640. Second, the ACCA's decision rests on an unreasonable finding of fact insofar as defense counsel did, as a matter of fact, plead sufficient facts regarding the 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).

641. Third, the ACCA's ruling on the Corley letter is not an adequate and independent state ground for three distinct (and each of them independently sufficient) reasons: (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* and *Chambers*, as evidenced in the paragraph above. The ACCA failed to address a federal claim presented to it. 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*, 545 U.S. at 390. (b) Rule 32 counsel was *correct* in stating that, as a matter of federal constitutional law under *Holmes* and *Chambers* (and *Olden* as well), the Corley letter *was* admissible evidence. As Rule 32 counsel explicitly pleaded, the due-process/confrontation-right rulings in cases like *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006), and *Chambers v. Mississippi,* 410 U.S. 284, 302 (1973)—and in *Olden v. Kentucky*, 488 U.S. 227 (1988)—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 in those Supreme Court decisions. 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.

642. Fourth, 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, Doug 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.

643. The ACCA's unreasonableness is corroborated by the fact that the court's ruling contradicts its own statement of facts on direct appeal: "The results of the autopsy *conflicted with* Wilson's account of a single, accidental blow to Walker's head." *Wilson I*, 142 So. 3d at 750 (emphasis added). Corley's confession would provide an alternative explanation for the 100+ additional injuries to which Dr. Enstice testified. *See id.* And Mr. Wilson's pleading adequately set out that alternative explanation for what occurred. Corley admitted in her confessional letter that she "hit Mr. Walker with a baseball bat until he fell." Doc. 76-24 at PDF 16, Bates 3857. Since Mr. Wilson was denied an evidentiary hearing, the state post-conviction court was obligated to accept his pled facts as true. *Ex parte Boatwright*, 471 So. 2d 1257, 1259 (Ala. 1985).

644. In the end, 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 had 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 ACCA, 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 in *Chambers* and the South Carolina courts 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.

645. What the *Chambers* Court required of evidence of third-party guilt was 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 supra* paragraph 274 *et seq.*). Thus, there would be no valid, constitutionally sound reason to exclude the letter.

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

647. 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 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; *see also supra* at paragraphs 348 through 350.

648. For the foregoing reasons, Mr. Wilson is entitled to relief and a new guilt phase trial. 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, including counsel's failing to deliver a closing argument presenting a coherent defense.

649. 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 supra* paragraphs 633-636.

650. At trial, defense counsel claimed that the decision to waive closing argument was designed to prevent the prosecution from giving a rebuttal closing argument. Doc. 76-9 at PDF 171, Bates 1778. At times, a prosecutor will give a short and drab initial closing argument and save most of his or her major points for the rebuttal closing, where the prosecutor is given the last word. However, this is not what the prosecutor did in this case. In this case, the prosecutor gave a full and dramatic closing argument that presented the State's theory and detailed each piece of evidence. Doc. 76-9 at PDF 147-170, Bates 1754-1777.

651. In its initial closing argument, the prosecutor laid out the State's theory of the case (Doc. 76-9 at PDF 147-148, Bates 1754-1755), detailed the evidence supporting the State's theory (Doc. 76-9 at PDF 149-152, Bates 1756-1759), argued in detail the brutality of the murder and the pain suffered by the victim (Doc. 76-9 at PDF 153-163, Bates 1760-1770), explained how the State had proven the capital murder charges beyond a reasonable doubt (Doc. 76-9 at PDF 164-167, Bates 1771-1774), attacked Mr. Wilson's character (Doc. 76-9 at PDF 167, Bates 1774), explained a discrepancy in the time stamp on the transcript of Mr. Wilson's statement to police (Doc. 76-9 at PDF 168-169, Bates 1775-1776), and finished the argument by describing how, after "coolly and calmly" attacking the victim over a

prolonged period of time and obtaining the coveted van, Mr. Wilson's concern was with acquiring the victim's television for himself (Doc. 76-9 at PDF 170, Bates 1777). This is not a case where the prosecution saved arguments for rebuttal. *See*, *e.g.*, *Floyd v. State*, 571 So. 2d 1221, 1227 (Ala. Crim. App. 1989), *rev'd on other grounds*, *Ex parte Floyd*, 571 So. 2d 1234 (Ala. 1990), ("[T]he prosecutor's initial closing argument had been quite brief and had consisted of little more than a reading of the indictment."); *Lawhorn v. State*, 756 So. 2d 971, 987 (Ala. Crim. App. 1999) ("[W]e [have] held that it was not ineffective assistance of counsel when defense counsel made a strategic decision to waive closing arguments in order to deprive the prosecution of its main opportunity to argue to the jury.")

652. Even without having conducted a reasonable investigation or any of the other tasks described throughout this petition, counsel could have argued that Mr. Wilson could be found guilty only of a lesser offense because of the absence of evidence. *See*, *e.g.* Doc. 76-9 at PDF 181, Bates 1788 (jury instruction: "Now, the doubt which would justify an acquittal must be a doubt for which you have a reason and which reason arises either from all of the evidence or from part of the evidence *or any lack of evidence* and which remains with you after a careful consideration of all of the evidence.") (emphasis added).

653. Even though Mr. Wilson's statement had not been suppressed, trial counsel could have argued its unreliability, given both the circumstances of his arrest

and its incompleteness. *See Crane v. Kentucky*, 476 U.S. 683 (1986). The circumstances of the arrest would have established its coerciveness, as discussed *infra* Sections IV(D) and (E). Defense counsel elicited testimony from Sgt. Luker about some of these circumstances (Doc. 76-8 at PDF 136-144, Bates 1542-1550) but never explained to the jury their significance.

654. The incompleteness of Mr. Wilson's police statement was raised as an issue in defense counsel's opening, but they did not follow up on its significance at the end of trial. In the opening, Mr. Hedeen highlighted the cut-off:

> And you will hear my client is speaking, and it's being believed – the last words that he speaks before the tape ends is, well, I was going to go over and hit him, but then I changed my mind, because I just didn't want to hit him. And then, boom, the tape ends. And you will hear Sergeant Luker testify that there was approximately – approximately 10 minutes of conversation that took place after the tape ended.

Doc. 76-7 at PDF 155, Bates 1360. But after the testimony of Dr. Enstice respecting multiple injuries and Valeska's closing harangue that what Mr. Wilson did to Mr. Walker could not have been accidental (*see*, *e.g.* Doc. 76-9 at PDF 152, 169, Bates 1759, 1776), the jury could not reasonably be expected to remember what Mr. Hedeen had said during the opening or to question whether the incompleteness of the tape made any difference.

655. Trial counsel could have asked the jury to consider that it was Matthew Marsh who instigated the crimes and who benefitted the most. Doc. 76-3 at PDF

116-117, 124, 133, Bates 518-519, 526, 535. The gloves purportedly used during the crime were found in his vehicle (Doc. 76-8 at PDF 43, Bates 1449), and the purported murder weapon, a baseball bat, in Michael Jackson's (Doc. 76-8 at PDF 42, Bates 1448). The State put on no evidence to show that it was not Marsh or Jackson who bore the greatest responsibility for the crime. But defense counsel did not highlight this omission.

656. Trial counsel could have emphasized that the crime could not have happened the way Doug Valeska imagined. The blood droplets about which Sgt. Luker testified could not support the assertion that Mr. Wilson dragged Mr. Walker around the house beating him to make him tell where his coin collection was stashed (*see* Doc. 76-9 at PDF 155, 159, Bates 1762, 1766), because there would have been more than droplets. The injury from the initial blow and fall may have resulted in bleeding, as is shown by the pool of blood at the foot of a projecting corner of the kitchen wall (*see* Doc. 76-3 at PDF 51, Bates 453) (State's Exhibit 15), consistent with Mr. Wilson's account (Doc. 76-3 at PDF 122, Bates 524). The evidence also showed the droplets only in the kitchen and hallway and the contiguous area of the living/dining room, *see* Doc. 76-3 at PDF 51, Bates 453 (State's Exhibit 15); *see also* Doc. 76-8 at PDF 8-9, Bates 1414-1415 (testimony of Sgt. Luker), not in the bedrooms where the walls were damaged (Doc. 76-8 at PDF 13, Bates 1419) (holes in the walls of Mr. Walker's bedroom); (Doc. 76-8 at PDF 60-61, Bates 1466-1467)

(holes in the walls of a den next to Mr. Walker's bedroom).[38] The damage to the walls did not include any blood left behind by a bloodied bat, as would have to have been the case if Mr. Valeska were right.

657. Had Mr. Wilson engaged in the mayhem Mr. Valeska imagined, his clothes would reasonably have been expected to have shown traces of blood, as Sgt. Luker postulated in his search warrant affidavit. Doc. 76-3 at PDF 136, Bates 538 (State's Exhibit 45). But Mr. Wilson's clothing was admitted into evidence, with no showing that there was anything that even appeared to be blood on it. Doc. 76-8 at PDF 110-112, Bates 1516-1518. The State also did not bother to send the clothing off for any testing. Doc. 76-8 at PDF 111, Bates 1517. And what of the co-defendants and their clothing? Sgt. Luker was not even asked if their clothing had been collected as well.

658. With all of the exaggeration in Mr. Valeska's account of the evidence, trial counsel could have argued that the inflation was meant to cover a big gap in the State's case—namely, what the co-defendants did. Counsel could have asked the jury to contrast what Mr. Wilson admitted to—he did admit to harming Mr.

[38] Sgt. Luker, in response to a question about testing evidence, testified expansively that "[t]he other blood droplets down the – the hallway way away from the body into the living room, the bedrooms, no, those – those droplets were never sent off." Doc. 76-8 at PDF 201, Bates 1607. However, during discussion of the crime scene on direct (Doc. 76-8 at PDF 51-52, Bates 1457-1458), no evidence was discussed or admitted of any blood in the bedrooms. State's Exhibit 15, which showed the cones marking the droplets, and the circles Sgt. Luker drew on that exhibit all show spots in the kitchen and hall area. *See* Doc. 76-24 at PDF 136, Bates 3977 (color copy of State's Exhibit 15).

Walker—with what Dr. Enstice testified to. How could the jury be sure that all of what she described was done by Mr. Wilson? The State's arguments asked the jury to believe what Mr. Wilson said was true insofar as he admitted some guilt, but to disbelieve him when he did not say he committed the murder *in toto*. Had counsel raised these questions, there is a reasonable probability that the jury would have convicted Mr. Wilson on a lesser charge, such as felony murder. *See*, *e.g.*, Doc. 76-10 at PDF 5-6, Bates 1814-1815 (jury instructions).

659. Failure to present any theory of defense in a closing argument, where one was available and no strategy justified the decision not to argue it, constitutes deficient performance. *Ex parte Whited*, 180 So.3d 69, 86 (Ala. 2015). Here trial counsel sat on their hands throughout the entirety of the trial and made next to no effort to defend Mr. Wilson. Yet there were inconsistencies and omissions in the State's case which defense counsel could easily have pointed out. Counsel's silence prejudiced Mr. Wilson because there were real questions which the State failed to address concerning the extent of Mr. Wilson's involvement—as compared with the involvement of his co-defendants—in the burglary, robbery and murder of Mr. Walker. Had counsel questioned the State's failure to investigate the co-defendants and their participation in the crime, there was a reasonable probability that the jury might have felt reasonable doubt that Mr. Wilson was the sole perpetrator and about his supposed intent to kill.

660. Trial counsel's deficient performance prejudiced Mr. Wilson and denied him 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. Therefore, Mr. Wilson's convictions are due to be vacated.

661. For the foregoing reasons, Mr. Wilson is entitled to relief and a new trial. Mr. Wilson requests discovery and a hearing on this issue.

1. The ACCA's decision is an unreasonable application of Strickland *and rests on unreasonable findings of fact.*

662. The ACCA denied Mr. Wilson's claim of defense counsel's ineffectiveness in waiving closing argument by finding that the decision to waive was "strategic," that Mr. Wilson failed to plead what lesser included offense the jury might have convicted him of with counsel's persuasion, that greater culpability on the part of a co-defendant would not lessen Mr. Wilson's culpability, that "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. Each of these conclusions is belied by the facts pled by Mr. Wilson and by the law.

663. Rule 32 counsel for Mr. Wilson pled that trial counsel were ineffective in waiving closing because they had nothing to lose and everything to gain by setting

out some defense to the State's lengthy and detailed initial closing. Doc. 76-22 at PDF 177-183, Bates 3616-3622. Trial counsel gave a few hints to the jury about possible holes in the State's case in opening (the abrupt ending of Mr. Wilson's taped statement, for example) and in questioning the State's witnesses (such as questions surrounding Mr. Wilson's arrest), but waived their right to weave any such hints together or to point out other deficiencies (such as the role of the co-defendants in the crime). The end they hoped to achieve was to foreclose a rebuttal argument from the State. Doc. 76-9 at PDF 173-174, Bates 1780-1781.

664. But, unlike in other cases where a decision to waive closing was found not to be deficient performance, *see supra* paragraph 651, the State in this case had not held its fire for a grand finale, *see* Doc. 76-9 at PDF 147-170, Bates 1754-1777. Mr. Wilson specifically pled points the defense could have made, but the ACCA rejected each for unreasonable reasons of law and fact. *See also supra*, paragraphs 348 through 350.

665. First, the ACCA's decision is an unreasonable application of *Strickland* because "strategic" choices of counsel, to be insulated from a finding of ineffectiveness, must be "reasonable":

> [A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. . . . In making that determination, the court should keep in mind that

> counsel's function . . . is to make the adversarial testing process work in the particular case.

466 U.S. at 690. An attorney's claim that he did X in order to accomplish Y does not resolve the matter. Rather, the court must consider whether doing X could reasonably be expected to result in Y.

666. The ACCA did not conduct such an analysis. Here, the State had not saved its main arguments to the jury for rebuttal, but had explained its case in full in its initial address, so waiving closing did not accomplish any reasonable goal. The ACCA simply found that, because counsel articulated a "reason," they could not be deficient in performance. *Wilson II*, No. CR-16-0675, slip op. at 34. It is not reasonable to present no defense at any point in a capital trial or to waive closing to avoid something that has already happened. This is not the law of *Strickland*.

667. The ACCA countered Mr. Wilson's pleading that counsel could have argued for conviction on a lesser charge by faulting Mr. Wilson for not specifically identifying what lesser charge that would be. *Id.* This is unreasonable. It is well-known 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, 993 (Ala. 2004). Mr. Wilson, in fact, specified felony murder as a lesser included offense in pleading another claim. ACCA Appellant's Br. at 84. And the trial court instructed the jury on felony murder. Doc. 76-10 at PDF 5-6, Bates 1814-1815.

668. The ACCA also opined that arguing greater culpability on the part of a co-defendant would not lessen Mr. Wilson's culpability. *Wilson II*, No. CR-16-0675, slip op. at 34. This is unreasonable as well. If Mr. Wilson's statement was accepted as true in full—a matter for the jury to decide—then his responsibility for Mr. Walker's death is more in line with the defendant's in *Enmund v. Florida*, 458 U.S. 782 (1982), than with *Sneed v. State*, 1 So. 3d 104, 125-26 (Ala. Crim. App. 2007), the case cited by the ACCA, in which the defendant was *on videotape* standing by the shooter when the killing occurred. Notably, in *Sneed* itself the ACCA quoted the principle which it refused to apply here: "'Whether 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.'" *Id.* at 125 (quoting *Gamble v. State*, 791 So. 2d 409, 445 (Ala. Crim. App. 2000)). But counsel's waiver of closing argument effectively ceded that jury question to the State's unopposed interpretation. This is deficient performance, which prejudiced Mr. Wilson.

669. The ACCA's assertion that trial counsel could have achieved nothing by arguing coercion in eliciting a statement from Mr. Wilson, because "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, simply evidences that the

ACCA continued unreasonably to distinguish Mr. Wilson's case from *Kaupp v. Texas*, 538 U.S. 626 (2003). *See* Sections IV(D) and (E) *infra.*

670. Finally, the ACCA rejected Mr. Wilson's argument that trial counsel could have countered the prosecution's interpretation of his interrupted comment that he "changed it all up" (Doc. 76-3 at PDF 133, Bates 535) by assuming what the State had to prove: that the evidence was overwhelmingly persuasive of Mr. Wilson's guilt, *see Wilson II*, No. CR-16-0675, slip op. at 34-35. State post-conviction counsel pled that trial 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 trial counsel's deficiency by finding that this admission of assault somehow proves further actions leading to murder, even though not admitted in the recording. This is counterfactual. Either all of Mr. Wilson's admissions off-tape were the same as those on-tape or they were not. The State cannot have it both ways, and counsel were ineffective for failing to argue the contradiction. The ACCA's finding otherwise was unreasonable.

671. A fair assessment of all the arguments trial counsel could have mustered and the difference it may have made to the jury's verdict must lead to the conclusion that counsel were ineffective for waiving closing and that the waiver prejudiced Mr. Wilson by leaving him with no defense.

672. 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. *See also supra* paragraphs 348 through 350. Mr. Wilson requests discovery and a hearing on this issue.

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.

673. In their opening statement, trial counsel highlighted the incompleteness of Mr. Wilson's statement:

> And you will hear my client is speaking, and it's being believed – the last words that he speaks before the tape ends is, well, I was going to go over and hit him, but then I changed my mind, because I just didn't want to hit him. And then, boom, the tape ends. And you will hear Sergeant Luker testify that there was approximately – approximately 10 minutes of conversation that took place after the tape ended.

Doc. 76-7 at PDF 155, Bates 1360.

674. Mr. Wilson 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.

675. It is clearly established that the accused has a 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 further 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). Following Supreme Court precedent, the Eleventh Circuit has held that, because "the right to testify is one of the rights essential to due process of law in a fair adversary process," trial counsel may not prevent his client from asserting that right. *United States v. Teague*, 953 F.2d 1525, 1530-35 (11th Cir. 1992) (citing *Rock*, 483 U.S. at 51).

676. Trial counsel is an advocate, but he is not the master of his client's defense; he is his client's assistant. *Teague*, 953 F.2d at 1533 (citing *Mulligan v. Kemp*, 771 F.2d 1436, 1441 (11th Cir. 1985)). The day in court is the defendant's and the defendant's alone; the decision to take the stand on his own behalf is similarly his alone. *Id.* Trial counsel's perception of the wisdom of that decision is of no consequence. *Id.* The American Bar Association's Standards for Criminal Justice recognize this fact, providing:

> (a) Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel are:
>
> (i) what plea to enter;
>
> (ii) whether to waive jury trial; and
>
> (iii) whether to testify in his or her own behalf.

Standards for Criminal Justice Standard 4-5.2(a) (2d ed. 1980). The commentary continues, "because of the fundamental nature of these three decisions, so crucial to the accused's fate, the accused must make the decisions." *Id.* Similarly, the ABA's Model Rules of Professional Conduct., Rule 1.2(a) provides:

> (a) A lawyer shall abide by a client's decisions concerning the objectives of representation … In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and *whether the client will testify*.

(Emphasis added); *see also McCoy,* 584 U.S. at 422, and *Jones* 463 U.S. at 751.

677. Alabama similarly recognizes the constitutional and professional requirement that counsel shall not prevent his client from testifying. *Reeves v. State*, 974 So. 2d 314, 325 (Ala. Crim. App. 2007) ("We agree with the reasoning and holding of *Teague*. A defendant has a fundamental right to testify on his own behalf, that right is personal to the defendant, and defense counsel may not waive that right."[39]); *see also McCoy,* 584 U.S. at 422, and *Jones* 463 U.S. at 751.

678. Despite these clear directives, trial counsel usurped Mr. Wilson's right and made the decision for him. Refusing to allow their client to testify was a violation of the professional norms of criminal representation and a violation of Mr. Wilson's constitutional right to testify in his own behalf. *Teague*, 953 F.2d at 1533; *Reeves*, 974 So. 2d at 325. This refusal constituted deficient performance. *Teague*, 953 F.2d at 1534 (citing *Strickland v. Washington*, 466 U.S. 668 (1984)).

679. Mr. Wilson was seriously prejudiced by counsel's refusal to allow him to testify. "The testimony of a criminal defendant at his own trial is unique and inherently significant." *Nichols v. Butler*, 953 F.2d 1550, 1553 (11th Cir. 1992). "The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself." *Id.* (citing *Green v.*

[39] In *Reeves*, the defendant never made the trial court aware of his desire to testify. *Reeves*, 974 So. 2d at 318. This was irrelevant to the ACCA's decision.

United States, 365 U.S. 301, 304 (1961)). The U.S. Supreme Court itself has recognized that "the most important witness for the defense in many criminal cases is the defendant himself." *Rock*, 483 U.S. at 52.

680. Alabama law recognizes this as well. In *Reeves*, the defendant was charged with burglary. The victim alone testified that the defendant entered her residence. Consequently, the court held that the defendant's potential testimony that he did not enter the home was central to the case. *Id.* at 325. Trial counsel's refusal to permit his client to testify prejudiced the defendant, as the jury was never permitted to weigh the respective testimonies and decide the issue of fact as to whether defendant had entered the residence. *Id.*

681. Here, Mr. Wilson was the only person at his trial—and one of the only two people, Corley being the other—with knowledge of what transpired in Mr. Walker's residence during the course of events which led to charges of capital murder. In this most serious situation, a clear account of those events was critical to a fair trial. Yet, trial counsel, who had failed to obtain the confessional letter of Corley, also prevented Mr. Wilson from providing that essential testimony.

682. Trial counsel's refusal to allow Mr. Wilson to testify on his own behalf violated his rights to the 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.

Therefore, Mr. Wilson's convictions are due to be vacated. Mr. Wilson requests discovery and a hearing on this issue.

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

683. Despite collecting substantial physical evidence from the scene of the crime, the State conducted no forensic testing. *See*, *e.g.*, Doc. 76-8 at PDF 81, Bates 1487. Consequently, the only piece of evidence admitted at trial implicating Mr. Wilson in Mr. Walker's murder was Mr. Wilson's own police statement. The question of the admissibility of Mr. Wilson's police statement could not have been more critical to the defense.

1. Mr. Wilson was arrested illegally in his home.

684. Half a dozen police officers went to the home of a teenaged boy around 3 a.m. to arrest him on suspicion of murder. They did not have a warrant. All they had was the confession of a co-defendant implicating the boy. The boy's parent let them in, and the boy was rousted out of bed. The police told the boy "we need to go and talk." He answered "OK," and went with them. After a short interrogation, the boy confessed. The state courts found that the boy's OK meant he went with the police voluntarily such that his statement and other evidence were not due to be suppressed. But the U.S. Supreme Court disagreed. These are the facts of *Kaupp v.*

Texas, 538 U.S. 626 (2003), and they are indistinguishable from the facts of David Wilson's case.

685. At 3:45 a.m. on April 14, 2004, at least five police officers went to the home of David Wilson to arrest him. Doc. 76-6 at PDF 59, Bates 1064. They did not have a warrant. Sgt. Luker knocked, and Mr. Wilson's mother answered. Doc. 76-6 at PDF 60, Bates 1065. The police entered; at least one of them was in uniform. Doc. 76-6 at PDF 60-61, Bates 1065-1066. Mrs. Wilson went to wake her son, who was asleep. *Id.*

686. At the suppression hearing, Sgt. Luker testified first that he arrested Mr. Wilson at his home. Doc. 76-6 at PDF 57, 59-60, Bates 1062, 1064-1065. Later he stated that he did not tell Mr. Wilson that he was under arrest, but that "we needed to talk with him, that he needed to come – if he would come with us to talk with us about an incident." Doc. 76-6 at PDF 62, Bates 1067. Sgt. Luker also stated that if Mr. Wilson had declined, he would have been arrested (*id.*), and confirmed that "he was not free to stay in his house" (Doc. 76-6 at PDF 80, Bates 1085). Mr. Wilson was not informed that he could choose not to comply with the police officers' demands. Sgt. Luker also testified, contradictorily, that Mr. Wilson went with the officers "voluntarily." Doc. 76-6 at PDF 62, Bates 1067.

687. Mr. Wilson was transported to the police station in a police vehicle. Doc. 76-6 at PDF 62, 81, Bates 1067, 1086. He was handcuffed beforehand, possibly while still in his home. Doc. 76-6 at PDF 64, 81, Bates 1069, 1086.

688. Mr. Wilson arrived at the police station at 3:59 a.m. (Doc. 76-6 at PDF 63, Bates 1068), less than 15 minutes after being awakened. He was in handcuffs when brought into the interrogation room. Doc. 76-6 at PDF 64, Bates 1069. Sgt. Luker read Mr. Wilson his rights at 4:12 a.m. Doc. 76-6 at PDF 68, Bates 1073. Mr. Wilson signed a waiver at 4:13. *Id.* These recorded times show that no "curative event" occurred between the time of the first encounter and the time when Mr. Wilson signed the waiver. The interrogation began immediately after, and about an hour later, at 5:02 a.m., Mr. Wilson's statement was being taped. Doc. 76-6 at PDF 87-89, Bates 1092-1094. Sgt. Luker testified that the discussion during the untaped hour was the same as what is recorded on the tape. Doc. 76-6 at PDF 88, 93-94, 96, Bates 1093, 1098-1099,1101. So, again, no curative event intervened.

689. An "OK" in response to police demands to "go and talk" does not render the removal voluntary. *Kaupp*, 538 U.S. at 630. In *Kaupp*, the Court considered the time that the police went to the Kaupp home (3 a.m.), the number of police officers present in the home (3), the youth of the suspect (17), and the command of the police that "we need to go and talk," with no indication that the suspect could refuse, proof that Kaupp was arrested in his home. *Id.* at 630-31. The

State's argument, that the suspect's "OK" in response to the request that he accompany police to headquarters rendered the encounter voluntary, was rejected by the Court:

> Kaupp's "'Okay'" in response to Pinkins's statement is no showing of consent under the circumstances. Pinkins offered Kaupp no choice, and a group of police officers rousing an adolescent out of bed in the middle of the night with the words "'we need to go and talk'" presents no option but "to go." There is no reason to think Kaupp's answer was anything more than "a mere submission to a claim of lawful authority."

Id. at 631 (citation omitted). Resistance is not required to establish lack of consent: "failure to struggle with a cohort of deputy sheriffs is not a waiver of Fourth Amendment protection, which does not require the perversity of resisting arrest or assaulting a police officer." *Id.* at 632.

690. The facts in this case are similar to those in *Kaupp* as set out above. A reasonable person in Mr. Wilson's position would not have felt free, nor been free, to decline to go. Because Mr. Wilson was taken involuntarily from his home to the police station and never given the option to leave, he was arrested within the meaning of the Fourth Amendment.

691. The Fourth Amendment guarantees "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. "[S]earches and seizures inside a home without a warrant are presumptively unreasonable." *Payton v. New York*, 445 U.S. 573, 586

(1980). An individual is under arrest when "'taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.'" *Kaupp*, 538 U.S. at 627 (citations omitted). *See also Hayes v. Florida*, 470 U.S. 811, 815 (1985) ("None of our later cases have undercut the holding in *Davis v. Mississippi*, 394 U.S. 721 (1969), that transportation to and investigative detention at the station house without probable cause or judicial authorization together violate the Fourth Amendment. Indeed, some 10 years later, in *Dunaway v. New York*, 442 U.S. 200, 207-16 (1979), we refused to extend *Terry v. Ohio* . . . to authorize investigative interrogations at police stations on less than probable cause, even though proper warnings under *Miranda* . . . had been given.").

692. An arrest in a home without a warrant is permissible only where there is both probable cause and exigent circumstances. *Payton*, 445 U.S. at 590. Where these requisites for an arrest are not affirmatively shown, any statement made by the arrestee will be admissible only if it was voluntarily made and was far enough removed from the illegal circumstances of the arrest to dissipate the taint of the illegality. *Brown v. Illinois*, 422 U.S. 590, 591-2 (1975) (citing *Wong Sun v. United States*, 371 U.S. 471, 486 (1963)). Any evidence seized as a result of an illegal arrest is likewise inadmissible as "fruit of the poisonous tree" if it is "come at by the exploitation of that illegality." *Wong Sun*, 371 U.S. at 484-88. The burden of proof

for these showings rests upon the State. *Brown*, 422 U.S. at 604. Because the arrest was without a warrant, it was illegal, and all statements and evidence obtained as a result were due to be suppressed.

2. The police did not have probable cause.

693. Because Mr. Wilson was arrested illegally in his home, his statement made at the police station and the evidence seized with a search warrant based on it would only be admissible against him if the police had probable cause to arrest. *Brown v. Illinois,* 422 U.S. 590 (1975); *Dunaway*, *supra*; *Taylor v. Alabama*, 457 U.S. 687 (1982); *Lanier v. South Carolina*, 474 U.S. 25 (1985) (per curiam); *Kaupp*, *supra*. "The quantum of information which constitutes probable cause . . . [is] evidence which would 'warrant a man of reasonable caution in the belief' that a felony has been committed . . . ." *Wong Sun,* 371 U.S. at 479.

694. The purpose of requiring proof of probable cause at a suppression hearing is to "provide[] the detached scrutiny of a neutral magistrate." *United States v. Leon*, 468 U.S. 897, 913-14 (1984). Thus, information provided to a reviewing court must give specifics both about the credibility of the informant and the reliability of the informant's information sufficient to support "an independent evaluation of the matter." *Franks v. Delaware*, 438 U.S. 154, 165 (1978). It cannot merely assert reliability without giving details. *Aguilar v. Texas*, 378 U.S. 108, 109 (1964) ; *accord*, *Illinois v. Gates*, 462 U.S. 213, 239 (1983) (dictum) ("[a]n officer's

statement that'[a]ffiants have received reliable information from a credible person and do believe' that heroin is stored in a home, is . . . inadequate"); *Luke v. Gulley*, 50 F.4th 90, 96 (11th Cir. 2022) (finding that an arrest and prosecution pursuant to an arrest warrant violated the Fourth Amendment: "Detective Gulley does not dispute that his affidavit lacked sufficient information to provide the magistrate judge probable cause to issue the warrant to arrest Luke for Lewis's murder. The detective's affidavit is skeletal, consisting of a conclusory allegation that Luke killed Lewis by 'sho[oting] at the truck Lewis was driving' 'based on the [detective]'s Investigation, and eye witness verbal statements.'").

695. The only evidence submitted at the suppression hearing was Sgt. Luker's testimony, the *Miranda* waiver, Mr. Wilson's taped statement, and the search warrant with its affidavit. Doc. 76-6 at PDF 54-55, Bates 1059-1060. The exhibits provide no support for probable cause to arrest, as they were obtained after Mr. Wilson was arrested. Thus, the State's proof rested on Sgt. Luker's testimony alone.

696. But that testimony did not link Mr. Wilson to the crime, independently of Mr. Wilson's own police statement. The only evidence that could have linked him would have been his co-defendants' police statements (had they also met other requirements to establish probable cause, *see below*). But Sgt. Luker's testimony did not specify what they said or even whether their statements implicated Mr. Wilson.

See Doc. 76-6 at PDF 75-76, 96-97, 113-114, Bates 1080-1081, 1101-1102, 1118-1119. The search warrant affidavit referenced only Corley's statement (Doc. 76-3 at PDF 20, Bates 422), taken after Mr. Wilson was arrested,[40] and could not supply probable cause. The totality of evidence consisted at most of conclusory statements that certain other suspects of unknown veracity or reliability had themselves admitted to a crime, with an inference that they implicated Mr. Wilson.

697. Under *Illinois v. Gates,* the question whether information received from a third party supplies the requisite probable cause for a search or arrest is determined by the "totality of the circumstances," including, *inter alia*, the "informant's 'veracity,' 'reliability,' and 'basis of knowledge.'" 462 U.S. at 230-39.

698. Even if Sgt. Luker's testimony is considered sufficient to show that Mr. Wilson's co-defendants' statements, *i.e.*, the statements of Marsh and Jackson, were taken before Mr. Wilson was arrested and that those statements inculpated Mr. Wilson, those facts alone would not establish probable cause. The court was given at most the "bare bones" assertion that the co-defendants had made statements inculpating Mr. Wilson. Such assertions do not meet the level of specificity which the Supreme Court has required to support probable cause. *See Illinois v. Gates*, 462 U.S. 213, 239 (1983) ("[a]n officer's statement that '[a]ffiants have received reliable

[40] The affidavit relied in part on statements purportedly made by Kittie Corley. She was arrested at 4:15 a.m. on April 14, 2004, after Mr. Wilson. Doc. 76-24 at PDF 13, Bates 3854. Her statement was not taken until 5:20 a.m. Doc. 76-24 at PDF 25, Bates 3866.

information from a credible person and do believe' that heroin is stored in a home, is . . . inadequate", citing *Aguilar v. Texas,* 378 U.S. 108 (1964)). No testimony was elicited from Sgt. Luker respecting any knowledge the police might have had about Marsh's or Jackson's honesty or any record either of them might have had for supplying reliable information to the police in the past. Nor was any evidence submitted to the court to show that any independent police investigation had confirmed anything Marsh and Jackson said about Mr. Wilson's involvement in the murder of Mr. Walker.

699. The Supreme Court does not exempt co-defendants from this rule or accord any special reliability to their statements. In fact, that Court has held that the statement of a co-defendant, even if self-inculpatory, "as the confession of an accomplice, [is] presumptively *unreliable.*" *Lee v. Illinois*, 476 U.S. 530, 539 (1986) (emphasis added). Indeed, "a co-defendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence." *Id.* at 541 (citation omitted). *See also Bruton v. United States*, 391 U.S. 123, 135-36 (1968) ("[T]heir credibility is inevitably suspect … given the recognized motivation to shift blame onto others."); *Lilly v. Virginia*, 527 U.S. 116, 128 (1999) ("[T]he mere fact that one accomplice's confession qualifie[s] as a statement against his penal interest d[oes] not justify its use as evidence against another person."). So, far from finding co-

defendants' statements inherently reliable, the Supreme Court instead presumes their unreliability.

700. Tellingly, in *Kaupp*, where the only information known to police inculpating Kaupp was contained in the statement of his co-defendant, Texas conceded that no probable cause existed and the Supreme Court agreed. 538 U.S. at 631. Likewise, in *Wong Sun*, the Court found that the police did not have probable cause to arrest Wong, 371 U.S. at 491, even though he had been implicated as a dealer in heroin by two co-defendants making self-inculpatory statements, *id.* at 475.

701. Accordingly, co-defendants' statements must either meet the test for veracity and reliability applicable to any informant, or be corroborated by independent police investigation, per *Gates*. Here, the State never established either of these prerequisites for probable cause.

702. A court assessing probable cause must be given sufficient facts respecting the informant and the information supplied to make an independent judgment: "[a magistrate's] action cannot be a mere ratification of the bare conclusions of others." *Gates*, 462 U.S. at 239. The evidence presented at the suppression hearing in this case did not meet the specificity required, because it gave no detail about the co-defendants or the content of their statements.

3. The Miranda waiver was not a "cure."

703. In *Kaupp*, the Court found that warning the defendant of his *Miranda* rights, absent any other factors indicating voluntary consent, was insufficient to overcome the illegality of the arrest. 538 U.S. at 633. No significant passage of time intervened between Kaupp's removal from his home and his confession, and during that time Kaupp remained in the presence of police officers. *Id.* The Court held that, because the State could "not even allege[] 'any meaningful intervening event' between the illegal arrest and Kaupp's confession," it would have to be suppressed. *Id.*; *see also Brown*, 422 U.S. at 604.

704. In this case, likewise, no cure occurred. Although Mr. Wilson signed a *Miranda* waiver, there were no "meaningful intervening event[s]" that could cure the illegality of his arrest. Rather, once Mr. Wilson was arrested, he was immediately brought to the police station, in handcuffs and in a police vehicle; the interrogation began almost immediately thereafter. Mr. Wilson was given no option to leave. The *Miranda* form was signed less than half an hour after his initial contact with police, when he was awakened from sleep. Most of the intervening time was spent transporting Mr. Wilson to the CID office. At no point was Mr. Wilson outside the presence of police officers from the time of initial contact until his interrogation began. The interrogation continued without a break until Mr. Wilson's statement was complete.

705. A unanimous Court in *Kaupp* agreed that an arrest under circumstances similar to those here is coercive:

> It cannot seriously be suggested that when the detectives began to question Kaupp, a reasonable person in his situation would have thought he was sitting in the interview room as a matter of choice, free to change his mind and go home to bed.

538 U.S. at 632. There is no indication that police feared that Mr. Wilson would abscond or destroy evidence before a warrant could be obtained. In fact, police went to his home to arrest him, where they found him in bed (Doc. 76-6 at PDF 61, Bates 1066), as in *Kaupp*, 538 U.S. at 628. Police failure to record the initial segment of the interrogation further adds to the flagrancy of the misconduct because it erased the best evidence of Mr. Wilson's condition at the time he first confessed. The purpose of arresting Mr. Wilson was, as in *Brown*, investigatory. Descending on Mr. Wilson's home in force at such an early hour had no purpose besides disorienting him to increase the likelihood of a confession: "the manner in which Brown's arrest was effected gives the appearance of having been calculated to cause surprise, fright, and confusion." *Brown*, 422 U.S. at 605.

706. In Mr. Wilson's case, as in *Brown*, police did not have a warrant, did not have probable cause, and arrested Mr. Wilson in the "hope that something might turn up." 422 U.S. at 605. Mr. Wilson's signing of the *Miranda* waiver no more cured the illegality of his arrest than did Brown's or Kaupp's.

4. The search of Mr. Wilson's home was illegal.

707. Following Mr. Wilson's statement, Sgt. Luker obtained a search warrant for his residence. Doc. 76-6 at PDF 98, Bates 1103. The search warrant affidavit gives as its basis Mr. Wilson's statement and Sgt. Luker's own observations respecting clothing in Mr. Wilson's bedroom at the time of the arrest. Doc. 76-3 at PDF 19, Bates 421. The affidavit also cites a statement by Corley as the basis to search for audio equipment. *Id.* The evidence seized included audio equipment and Mr. Wilson's clothing. Doc. 76-3 at PDF 22, Bates 424.

708. As discussed above, Mr. Wilson's arrest was illegal, and information gleaned from it was inadmissible. *See Wong Sun*, 371 U.S. at 484-88. When an affidavit for a search warrant includes information that is the product of an earlier violation of the Fourth Amendment and does not contain sufficient independent evidence to make out probable cause without reference to the tainted information, the warrant and any search made under its authority are invalid. *Florida v. Jardines*, 569 U.S. 1 (2013). Because the State failed to show that the police had probable cause to arrest Mr. Wilson without a warrant, Sgt. Luker's observations during the illegal arrest and Mr. Wilson's statement could not form the basis for a later search warrant.

709. Moreover, the affidavit's description of Corley's statement is demonstrably false. Corley's statement said nothing about where Mr. Wilson might hide the audio equipment, much less that she had actually seen any at his residence:

> JD: Did they say what they did with any of the speakers or the amplifiers? Who got all of that?
>
> CC: I know the plan was David was gonna get half of everything because he said I put my life on the line, I should get half at least. Ah, Matt wanted a couple of speakers, a couple of tweeters, a couple of amps, just enough to put in the car and Michael was gonna get two fifteen and an amp and like two tweeters.

Doc. 76-24 at PDF 32, Bates 3873. The search warrant affidavit differs materially:

> According to Catherine Nicole Corley a codefendant Wilson was to get half of the audio equipment from the van because he had taken all of the chances in burglary, theft and murder. Corley stated that she was told by Wilson that he was going to hide the audio equipment in and under the mobile home in which he lived.

Doc. 76-3 at PDF 20, Bates 422. Nothing in Corley's statement indicates where Mr. Wilson might have hidden any items stolen from Mr. Walker. Doc. 76-24 at PDF 25-33, Bates 3866-3874. Sgt. Luker was not present during the interrogation of Corley (*see* Doc. 76-24 at PDF 25, Bates 3866), so his affidavit cannot be based upon his personal recollection of an untaped portion of her interrogation. Therefore, Corley could not provide the basis for conducting the search of Mr. Wilson's home.

The critical "fact" in the affidavit—the location of the items to be seized[41]—is an embellishment of Corley's statement by Sgt. Luker. Under *Franks v. Delaware,* 438 U.S. 154 (1978), "[t]he law is clearly established . . . that the Constitution prohibits a police officer from knowingly making false statements in an . . . affidavit about . . . probable cause . . . if such false statements were necessary to the probable cause.'" *Goldring v. Henry*, 2021 WL 5274721, at *4 (11th Cir. November 12, 2021).

710. The validity of a search warrant necessarily rests on the affidavit submitted to obtain the warrant. *Leon*, 468 U.S. at 914. As with issuance of an arrest warrant, issuance of a search warrant requires "that the magistrate purport to perform his neutral and detached function and not serve merely as a rubber stamp for the police." *Id.* at 914. "Suppression … remains an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth." *Id.* at 923.

[41] *See*, *e.g.*, *Leon*, 468 U.S. at 923 ("a warrant may be so facially deficient – i.e., in failing to particularize the place to be searched or the things to be seized – that the executing officers cannot reasonably presume it to be valid"); *United States v. Ward*, 967 F.3d 550, 554 (6th Cir. 2020) ("To elude the 'bare bones' label, the affidavit must state more than 'suspicions, or conclusions, without providing some underlying factual circumstances regarding veracity, reliability, and basis of knowledge' and make '*some* connection' between the illegal activity and the place to be searched.").

711. Because the affidavit Sgt. Luker submitted to obtain a search warrant rested upon information illegally obtained and demonstrably false, the warrant itself was invalid. The search was thus illegal and its fruits were due to be suppressed.

5. Counsel were ineffective in challenging admission of the statement and evidence.

712. Trial counsel filed two motions to suppress based on the involuntariness of Mr. Wilson's statement and the inadequacy of the search warrant. Doc. 76-24 at PDF 92-95 and 123-126, Bates 3933-3936 and 3964-3967. The motion to suppress Mr. Wilson's statement never mentioned that the police had no warrant when they went to David Wilson's home. Doc. 76-24 at PDF 92-95, Bates 3933-3936; *see also* Doc. 7601 at PDF 73-76, Bates 73-76. It included a number of arguments—that the police must have probable cause to arrest, that a waiver of rights must be voluntary, that the police may not interrogate a suspect outside the presence of counsel once the right to counsel has attached[42]—but did not explain how any of these issues impacted the facts of the case. The only facts alleged were in a heading: "Mr. Wilson's Second Statement to Detective Dawson Must Be Suppressed" (Doc. 76-24 at PDF 92, Bates 3933); but those facts were not from David Wilson's case. Mr. Wilson made only one statement, and no Detective Dawson worked on his case.

[42] This third argument was not at issue in Mr. Wilson's case.

Kaupp v. Texas was cited, but only for the principle that a consensual encounter can become coercive. *Id.* There was no discussion of how *Kaupp* applied to the circumstances here.

713. This motion was, in fact, a cut-and-paste job from a sample motion in the *Alabama Capital Defense Trial Manual* published by the Equal Justice Initiative ("EJI").[43] *See* Doc. 76-24 at PDF 97, Bates 3938. The motion filed in Mr. Wilson's case is composed of the opening paragraph of the sample motion together with numbered paragraphs 1, 14, 16, 24-25, 30, 32, 33 (omitting a factual sub-paragraph), 34, 36-37, the concluding paragraph, and the requested relief. Also copied are headings I and II(C), including the fictitious Detective Dawson. EJI's sample motion includes paragraphs detailing the facts from a fictitious case to illustrate how the law applies to specific circumstances. The motion filed in Mr. Wilson's case does not substitute any facts from his case to fill in these gaps.

714. At the suppression hearing, the prosecutor elicited an abundance of testimony concerning the circumstances of the arrest and interrogation. But defense counsel presented no explanation or argument to the court to show how all of this added up to an illegal arrest, as above. Counsel failed to explain that Mr. Wilson's statement was tainted with the coerciveness of the arrest itself, with no intervening curative event. At the conclusion of the hearing, counsel made no argument about

[43] Equal Justice Initiative, *Alabama Capital Defense Trial Manual* 715-23 (4th ed. 2005).

how the facts in evidence supported their motion. Doc. 76-6 at PDF 117, Bates 1122. *Kaupp* was never mentioned.

715. Counsel's motion to suppress the evidence from the search (Doc. 76-24 at PDF 123-126, Bates 3964-3967) failed to assert a valid basis for attacking the warrant: that the facts stated in the supporting affidavit were derived from Mr. Wilson's illegal arrest and its fruits—Mr. Wilson's statement and Sgt. Luker's observations—and that Sgt. Luker's version of Corley's statement was demonstrably false. Counsel did not raise these points at the suppression hearing either. At the conclusion of the hearing, counsel did not make any argument at all. Doc. 76-6 at PDF 117, Bates 1122.

716. This failure to support the motions defense counsel filed constitutes deficient performance which cannot be explained as "strategy." No reasonable attorney would file a motion to suppress and fail to support it with readily available evidence or fail to make any argument at all. *See Kimmelman v. Morrison*, 477 U.S. 365 (1986).

717. The deficient performance of trial counsel prejudiced Mr. Wilson. Had counsel supported their motions with applicable caselaw, facts, and argument, admission of any statement or physical objects derived from the illegal arrest and search would have been prohibited as "fruit of the poisonous tree." The evidence admitted at Mr. Wilson's trial was limited. None of the co-defendants testified.

Nothing in any testimony concerning the crime scene connected Mr. Wilson to it. Doc. 76-7 at PDF 181, Bates 1386 to Doc. 76-8 at PDF 201, Bates 1607. And none of the collected evidence was tested. Doc. 76-8 at PDF 39, 78-79, 71-72, 110-111, Bates 1445, 1484-1485, 1477-1478, 1516-1517. A pathologist testified about the injuries to Mr. Walker and the cause of his death (Doc. 76-9 at PDF 3-20, 30-78, 101-138, Bates 1610-1627, 1637-1685, 1708-1745), but her testimony also did not link Mr. Wilson to the crime. The only evidence presented to the jury that incriminated Mr. Wilson was his own statement. The State, in fact, elicited from Sgt. Luker that no testing was done precisely "because Mr. Wilson had confessed." Doc. 76-8 at PDF 81, Bates 1487.

718. The inadequacies of trial counsel allowed the State to rely on Mr. Wilson's illegally obtained statement and the evidence seized under the search warrant based on that statement. Without the statement, and its fruits, the case against Mr. Wilson would have collapsed, because nothing else the State presented to the jury connected Mr. Wilson to the murder. Thus, there is more than "a reasonable probability that … the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. But for counsel's failures, Mr. Wilson's rights enumerated above would have been secured, and the result of his trial would have been different. Mr. Wilson is entitled to a new trial.

719. But for trial counsel's failures, Mr. Wilson's rights to effective assistance of counsel, to be free from unreasonable search and seizure, to remain silent, to due process, to a fair trial, to a reliable jury verdict, and to be free from cruel and unusual punishment under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments of the U.S. Constitution would have been secured, and the result of his trial would have been different. Therefore, Mr. Wilson's convictions are due to be vacated. Mr. Wilson requests discovery and a hearing on this issue.

6. The ACCA's decision is an unreasonable application of Strickland*'s required assessment of the "totality of the evidence," and of* Kaupp*,* Wong Sun*, and an extensive body of U.S. Supreme Court precedent respecting probable cause to arrest. The basis for the ACCA's decision also rests on unreasonable findings of fact.*

720. 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*, paragraphs 348 through 350.

721. The ACCA sidestepped acknowledging the fact that Mr. Wilson was illegally arrested under *Payton* (see *supra* paragraph 684 *et seq.*)[44] 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*,[45] *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 Mr. Wilson,[46] ignoring violations of law by police and by prosecutorial misconduct,

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[44] 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.

[45] 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.*

[46] 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.

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*.

722. Having erroneously found no deficiency in trial counsel's performance, the ACCA did not assess prejudice. But, because the underlying Fourth Amendment challenge had 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 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.

723. 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. Mr. Wilson requests discovery and a hearing on this issue.

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

724. Mr. Wilson's statement to police was made as the result of an illegal arrest. *See supra* Claim IV (D). But even if this Court were to determine that probable cause existed to justify holding Mr. Wilson at the police station despite that illegality, the intimidating and coercive conduct of police colored the environment in which Mr. Wilson made his inculpatory statement. This conduct combined with characteristics of Mr. Wilson himself, including his Asperger's Syndrome, rendered his statement involuntary. Those same characteristics also made Mr. Wilson's statement unknowing and unintelligent. Trial counsel were ineffective for failing to challenge adequately the voluntariness of Mr. Wilson's statement to police, because these facts were known or could have been known by defense counsel, but were either not presented or not argued to the court.

1. Facts relevant to a showing that David Wilson's statement to the police was not voluntary, intelligent, and knowing.

725. The circumstances under which Mr. Wilson was arrested are set out above. To recapitulate briefly, at least five police officers entered the Wilson residence shortly before 4 a.m. and roused Mr. Wilson from sleep. Doc. 76-6 at PDF 59-61, Bates 1064-1066. Mr. Wilson was permitted to dress while police officers hovered close enough to observe clothing lying on the floor in his bedroom (Doc. 76-3 at PDF 20, Bates 422) (affidavit in support of application for search warrant). He was not given the option to decline going with the police officers, but was told "we need to talk." Doc. 76-6 at PDF 62, Bates 1067. Either before leaving his home or immediately outside, Mr. Wilson was handcuffed. He was placed in a police vehicle and transported to police headquarters. Doc. 76-6 at PDF 62, 64, 81, Bates 1067, 1069, 1086. There he was placed in a "conference room" and immediately read his rights and asked to sign a waiver. Doc. 76-6 at PDF 64, 68, Bates 1069, 1073. The only people in the room were Mr. Wilson and his two interrogators, who had participated in his arrest. Doc. 76-6 at PDF 65, Bates 1070. The time elapsed from first contact to the initiation of interrogation was less than half an hour, that is, less than half an hour from the moment Mr. Wilson was unexpectedly awakened. Doc. 76-6 at PDF 68, 79, Bates 1073, 1084.

726. The initiation of the interrogation was deliberately not recorded. Doc. 76-6 at PDF 89-90, Bates 1094-1095. There is no record of any break between signing the waiver, the initial unrecorded statement, and the taping of the statement. Because the conclusion of the statement went unrecorded (Doc. 76-6 at PDF 71, Bates 1076), the exact length of the interrogation is unknown, but, given that the taping began at 5:02 a.m., approximately an hour after signing of the waiver (Doc. 76-6 at PDF 89, Bates 1094), it is likely that it lasted at least two hours.

727. At the time of his arrest, Mr. Wilson had just turned twenty (Doc. 76-1 at PDF 48, Bates 48) (Youthful Offender ("YO") Presentence Investigation Report ("PSR"), showing date of birth as March 7, 1984) and was functioning in the low average range of intellectual abilities (Doc. 76-11 at PDF 22, Bates 2021) (report of court-appointed psychologist Dr. Doug McKeown). Early in life, Mr. Wilson had been diagnosed with Attention Deficit Hyperactivity Disorder (*id.*) and had been placed in special education classes (Doc. 76-11 at PDF 20, Bates 2019) throughout his school career as Emotionally Conflicted, *see*, *e.g.* Doc. 76-5 at PDF 73, 113, 123, Bates 877, 917, 927. Mr. Wilson had no prior criminal history (Doc. 76-1 at PDF 52, Bates 52) (YO PSR), so he had no experience in the criminal justice system.

728. All of this information was available to defense counsel by the time of the suppression hearing in October 2007. A probation officer had completed an investigation for the application for Youthful Offender status, showing no prior

criminal history (Doc. 76-1 at PDF 48-54, Bates 48-54) (YO PSR, completion date of August 26, 2004) and a court-ordered evaluation had been completed (Doc. 76-11 at PDF 19, 25, Bates 2018-2024) (Forensic Evaluation Report by Dr. Doug McKeown, dated May 1, 2007).

729. Trial counsel filed a motion to suppress based on the involuntariness of Mr. Wilson's statement. Doc. 76-1 at 73-76, Bates 73-76; *see also* Doc. 76-24 at PDF 92-95, Bates 3933-3936. That motion correctly stated the law in detail; however, the motion itself did not include any facts in support (*id.*), nor did counsel argue any facts at the suppression hearing (Doc. 76-6 at PDF 117, Bates 1122). As explained above, the motion was cut and pasted from the EJI manual, again with no insertion of facts from Mr. Wilson's case. At the suppression hearing, the only evidence submitted by the State to demonstrate voluntariness was the *Miranda* waiver (Doc. 76-3 at PDF 28-29, Bates 430-431) and Sgt. Luker's testimony that Mr. Wilson waived his rights voluntarily (Doc. 76-6 at PDF 68-69, Bates 1073-1074) and did not appear to be negatively influenced by the recency of his awakening (Doc. 76-6 at PDF 79-80, Bates 1084-1085). Trial counsel put on no witnesses of their own and made no argument at all to show why their client's statement was neither voluntary nor knowing and intelligent. Doc. 76-6 at PDF 117-118, Bates 1122-1123.

2. The legal standard.

730. "No person … shall be compelled in any criminal case to be a witness against himself …." U.S. Const. amend. V. "[A]ny criminal trial use against a defendant of his involuntary statement is a denial of due process of law, even though there is ample evidence aside from the confession to support the conviction." *Mincey v. Arizona*, 437 U.S. 385, 398 (1978) (quotation marks and citations omitted) (emphasis in original). To be admissible against him, a defendant's statement must be "the product of . . . [a] meaningful act of volition." *Blackburn v. Alabama*, 361 U.S. 199, 211 (1960). The question is "whether the behavior of the State's law enforcement officials was such as to overbear . . . [the defendant's] will to resist and bring about confessions not freely self-determined" (*Rogers v. Richmond,* 365 U.S. 534, 544 (1961)), or whether the confession was "the product of an essentially free and unconstrained choice by its maker" (*Culombe v. Connecticut,* 367 U.S. 568, 602 (1961) (plurality opinion), approved in *Schneckloth v. Bustamonte,* 412 U.S. 218, 225-26 (1973)). A court must "indulge every reasonable presumption *against waiver* of fundamental constitutional rights . . . ." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (internal quotation marks and citation omitted) (emphasis added), including the right against compelled self-incrimination, see *Bram v. United States*, 168 U.S. 532, 543-48 (1897). Therefore, it is the State's burden at a suppression hearing to prove that a confession is voluntary, *i.e.*, not the result of coercion, as well as

knowing and intelligent, *i.e.*, that the defendant understood his Fifth Amendment right to remain silent and the consequences of waiving that right. *Lego v. Twomey*, 404 U.S. 477, 489 (1972).

731. The voluntariness of a suspect's custodial statement depends upon "the totality of the circumstances." *Haynes v. Washington*, 373 U.S. 503, 514 (1963). "The due process test takes into consideration the totality of all the surrounding circumstances – both the characteristics of the accused and the details of the interrogation." *Dickerson v. United States*, 530 U.S. 428, 434 (2000) (internal quotation marks and citation omitted) (considered dictum; *accord*, *Reck v. Pate,* 367 U.S. 433, 440 (1961); *Gallegos v. Colorado*, 370 U.S. 49, 55 (1962). Thus, where interrogation follows immediately upon arrest, those preceding circumstances are a factor in a "totality" analysis:

> An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion [currently taught to police] cannot be otherwise than under compulsion to speak.

Miranda, 384 U.S. at 461.

732. The administration of *Miranda* warnings does not suffice to demonstrate that an ensuing confession is voluntary. *Mincey v. Arizona*, 437 U.S. 385, 396 (1978); *Sims v. Georgia*, 389 U.S. 404. 407 (1967) (per curiam); *Beecher v. Alabama*, 389 U.S. 35, 37 n.4 (1967) (per curiam). Voluntariness and *Miranda*

waiver are distinct, though not wholly unrelated issues. *See Miller v. Fenton*, 474 U.S. 104, 110 (1985) ('even after holding that the Fifth Amendment privilege against compulsory self-incrimination applies in the context of custodial interrogations [in *Miranda*], . . . the Court has continued to measure confessions against the requirements of due process").

733. The Supreme Court has held that custodial interrogation is inherently coercive:

> In *Miranda*, we noted that the advent of modern custodial police interrogation brought with it an increased concern about confessions obtained by coercion. 384 U.S., at 445-458 … Because custodial police interrogation, by its very nature, isolates and pressures the individual, we stated that "[e]ven without employing brutality, the 'third degree' or [other] specific stratagems, … custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals." *Id.*, at 455 … We concluded that the coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements, and thus heightens the risk that an individual will not be "accorded his privilege under the Fifth Amendment … not to be compelled to incriminate himself." *Id.*, at 439 ….

Dickerson, 530 U.S. at 434-435 (footnote omitted) (textual ellipses in original). Coercion does not have to be physical to be effective:

> Again we stress that the modern practice of in-custody interrogation is psychologically rather than physically oriented. As we have stated before, "Since *Chambers v. State of Florida*, 309 U.S. 227, 60 S. Ct. 472, 84 L. Ed. 716, this Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition." *Blackburn v. State of Alabama*, 361 U.S. 199, 206, 80 S. Ct. 274, 279, 4 L. Ed.2d

> 242 (1960). Interrogation still takes place in privacy. Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms.

Miranda, 384 U.S. at 448. Isolation of the individual interrogated contributes to the coerciveness of the custodial environment:

> It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity. The current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles – that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.

Id. at 457-58 (footnote omitted).

734. Even if a suspect's statement is "voluntary," it may not be knowingly and intelligently made. Because the U.S. Constitution requires that a suspect have "a full appreciation" of the rights that he is waiving and the consequences of their waiver (*Haley v. Ohio*, 332 U.S. 596, 601 (1948)), "a suspect's limited intellectual ability factors significantly into the determination of whether there is a valid waiver," *Smith v. Zant*, 887 F.2d 1407, 1430 (11th Cir.1989); *accord*, *Reck*, 367 U.S. at 441 ("Reck was a nineteen-year-old youth of subnormal intelligence. He had no prior criminal record or experience with the police."). In *Arizona v. Fulminante*, the

Supreme Court found the defendant's "low average to average intelligence" and his dropping out of school were "facts . . . support[ing] a finding of coercion." 499 U.S. 279, 286 n.2 (1991). Similarly, in *Spano v. New York*, the Court found the defendant's young age (25), emotional instability, and lack of prior exposure to the interrogation process relevant to a finding that his confession was taken in violation of the Fifth Amendment. 360 U.S. 315, 321-22 (1959).

735. Just as "the flagrancy of the official misconduct, *Brown*, 422 U.S. at 604, is a relevant factor in determining whether a confession taken after an illegal arrest is admissible, so, too, is the purpose of methods employed by law enforcement to obtain a confession relevant to the voluntariness *vel non* of a confession. *See, e.g., Brown v. Mississippi*, 297 U.S. 278, 286 (1936) ("methods more revolting to the sense of justice"); *Brooks v. Florida*, 389 U.S. 413, 15 (1967) (per curiam) ("a shocking display of barbarism"); *and see Miller v. Fenton,* 474 U.S. 104, 109-10 (1985) ("This Court has long held that certain interrogation techniques either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment. . . . Although these decisions framed the legal inquiry in a variety of different ways, usually through the 'convenient shorthand' of asking whether the confession was 'involuntary,' . . . the Court's analysis has consistently been animated by the view that 'ours is an accusatorial and

not an inquisitorial system,' . . . and that, accordingly, tactics for eliciting inculpatory statements must fall within the broad constitutional boundaries imposed by the Fourteenth Amendment's guarantee of fundamental fairness."); *Missouri v. Seibert*, 542 U.S. 600, 611 and 617 (2004) (plurality opinion) (holding the "question-first" practice violated *Miranda* because its "object . . . is to render *Miranda* warnings ineffective …."). The thrust of *Miranda* was to "address[] 'interrogation practices ... likely ... to disable [an individual] from making a free and rational choice' about speaking." *Id.* at 611 (quoting *Miranda*, 384 U.S. at 464-65). Where "the police [are] not merely trying to solve a crime," but are "concerned primarily with securing a statement from [a] defendant on which they c[an] convict him . . . the confession obtained must be examined with the most careful scrutiny . . . ." *Spano*, 360 U.S. at 323-24.

3. Mr. Wilson's statement was not voluntary nor was his waiver of rights knowing and intelligent.

736. The circumstances of Mr. Wilson's arrest were not routine. The arrest took place in the early hours of the morning when most people are asleep, as was David Wilson. Mr. Wilson was awakened and handcuffed and placed in a police vehicle for a trip to police headquarters. There he was isolated in an interrogation room at the Criminal Investigation Division and, within minutes, confronted with a *Miranda* waiver form by two of the police officers who had just arrested him. Mr.

Wilson, just turned twenty and with no prior record, was unfamiliar with criminal procedures. Exactly what happened at this juncture is uncertain, since the police deliberately chose not to record the initial portion of the encounter.

737. Each of the facts described above is relevant to a totality-of-the-circumstances analysis of the voluntariness of David Wilson's actions.

738. Just as the crux of whether a person is under arrest or not turns on freedom to leave, *Kaupp*, 538 U.S. at 632, so does whether a person voluntarily answers police questioning turn on whether a waiver was "the voluntary product of a free and unconstrained will, as required by the Fourteenth Amendment." *Haynes*, 373 U.S. at 514. As the Supreme Court found in *Kaupp*, the earliness of the hour of an in-home warrantless arrest and a large number of police officers participating are factors indicative of coerciveness, 538 U.S. at 631, the opposite of a free and unconstrained will. *See also Spano*, 360 U.S. at 322 (finding the fact that interrogation was not conducted "during normal business hours" is relevant to involuntariness). Transportation handcuffed in a police vehicle and immediate commencement of questioning continues that coercion:

> It cannot seriously be suggested that when the detectives began to question Kaupp, a reasonable person in his situation would have thought he was sitting in the interview room *as a matter of choice*, free to change his mind and go home to bed.

Kaupp, 538 U.S. at 632 (emphasis added). As the Court explained in *Miranda*, "[a]n 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." 384 U.S. at 461. The dissenters in *Harris* described a scenario similar to what actually occurred in Mr. Wilson's case—as well as in *Kaupp*—and its natural consequences:

> A person who is forcibly separated from his family and home in the dark of night after uniformed officers have broken down his door, handcuffed him, and forced him at gunpoint to accompany them to a police station does not suddenly breathe a sigh of relief at the moment he is dragged across his doorstep. Rather, the suspect is likely to be so frightened and rattled that he will say something incriminating. These effects, of course, extend far beyond the moment the physical occupation of the home ends.

495 U.S. at 28 (Marshall, Brennan, Blackmun, and Stevens, JJ., dissenting). The Court agreed with that assessment in *Brown*, where it found the "manner in which Brown's arrest was effected gives the appearance of having been calculated to cause surprise, fright, and confusion." 422 U.S. at 605. A person who is frightened or confused is in no state to exercise "a free and rational will," *Miller*, 474 U.S. at 450, "bewilderment being an unpromising frame of mind for knowledgeable decision," *Seibert*, 542 U.S. at 613.

739. The fact that Mr. Wilson was asleep when police officers arrived to arrest him adds to his then-present inability to make a rational choice whether to answer or not. Common experience teaches that human beings are not alert when first awakened. We use words such as "groggy" to describe this condition: "weak

and unable to think clearly or walk correctly, usually because of illness or being tired." Cambridge Dictionaries Online, *s.v.* "groggy," available at http://dictionary.cambridge.org/us/dictionary/english/groggy. *See also* example of usage from Merriam-Webster Dictionary, *s.v.* "groggy" ("I'm still a little groggy from my nap."), available at http://www.merriam-webster.com/dictionary/groggy. This condition of disorientation would have been at its maximum at the time Mr. Wilson's interrogation began, but the police chose not to record that portion. Doc. 76-6 at PDF 89-90, Bates 1094-1095. Nonetheless, Sgt. Luker testified that it appeared that Mr. Wilson had been asleep. Doc. 76-6 at PDF 78, Bates 1083. Therefore the trial court was obligated to assume that Mr. Wilson would have been feeling the normal effects of having just recently awakened at the time he was read his *Miranda* rights. The burden was on the State to prove that Mr. Wilson was not suffering the effects of a surprise awakening.

740. Additionally, the reading of the *Miranda* warnings and completion of the waiver form was accomplished in one minute. Doc. 76-6 at PDF 68, Bates 1073 (reading of rights began at 4:12 a.m. and signature obtained by 4:13). Such a brief lapse of time would allow for no more than a "mere recitation of the litany." *Seibert*, 542 U.S. at 611.

741. Mr. Wilson's age, just turned twenty, is also relevant. Young persons are more susceptible to overbearing authority, as the Supreme Court recognized in

Kaupp and *Dunaway*. One of the key factors the Supreme Court considered in determining that Kaupp would not have felt free to leave was his young age. *Kaupp*, 538 U.S. at 631. The Court also, while acknowledging that the circumstances of Dunaway's arrest were somewhat less coercive than those of Brown's, considered Dunaway's age, as a teenager, a relevant factor. *Dunaway*, 442 U.S. at 215 n. 17. *See also Spano*, 360 U.S. at 321 (considering defendant's age of 25 significant to a finding of involuntariness); *Reck*, 367 U.S. at 441. Alabama law also recognizes young age as relevant to decision-making. Youths do not reach the age of majority until they turn nineteen, Ala. Code 1975, § 26-1-1, only a year younger than Mr. Wilson was at the time of the crime. The law mandates that persons just past the age of majority who are charged with a felony be considered for Youthful Offender status, Ala. Code 1975, § 15-19-1, on a theory of lesser culpability. For this reason, age is also specified as a statutory mitigating factor in capital cases. Ala. Code 1975, § 13A-5-51(7). Mr. Wilson's low average intellectual abilities and special education status make him more comparable to those younger than his peers. *See Spano*, 360 U.S. at 322 (considering defendant's diagnosis of emotional instability and leaving high school after half a year relevant factors in finding involuntariness). *See also Reck*, 367 U.S. at 441, and *Fulminante*, 499 U.S. at 286 n.2 (holding similar factors weighed in favor of a finding of involuntariness).

742. Inexperience in the criminal justice system also renders a suspect more vulnerable to coercion. The *Miranda* Court added the admonition respecting the right to counsel precisely because the inexperienced are poor judges of their own best interests:

> A once-stated warning [of the right to remain silent], delivered by those who will conduct the interrogation, cannot itself suffice to that end among those who most require knowledge of their rights. A mere warning given by the interrogators is not alone sufficient to accomplish that end. Prosecutors themselves claim that the admonishment of the right to remain silent without more "will benefit only the recidivist and the professional." Brief for the National District Attorneys Association as *amicus curiae*, p. 14.

384 U.S. at 469-70 (emphasis added). For this reason, the Court in *Spano* considered the defendant's lack of any exposure to "official interrogation" relevant to a finding of involuntariness. 360 U.S. at 321. *See also Reck*, 367 U.S. at 441. As noted in the YO PSR, Mr. Wilson had no prior criminal history (Doc. 76-1 at PDF 52, Bates 52) and, so, was in the very position here described as most vulnerable.

743. As a final factor weighing in favor of finding a statement involuntary, the Supreme Court has considered the purpose of the authorities' methods of interrogation. Where the obvious intent is to extract a confession as a shortcut to conviction, "the confession obtained must be examined with the most careful scrutiny." *Spano*, 360 U.S. at 324. Here the police heightened the secrecy and deliberately created a "gap in our knowledge" by not taping the administration of

the *Miranda* warnings and the initiation of the interrogation. Doc. 76-6 at PDF 89-90, Bates 1094-1095. The burden was on the State to produce evidence sufficient to show that the custodial secrecy of the interrogation of Mr. Wilson was not a veil over unconstitutional coercion.

744. Here, the only evidence presented concerning the circumstances of Mr. Wilson's interrogation was the testimony of the police officer who chose to arrest Mr. Wilson without a warrant, who executed the arrest at a time early in the morning when Mr. Wilson would be most vulnerable because unexpectedly awakened, who chose not to record the administration of the *Miranda* warnings and the initial interrogation, and who falsified information in his affidavit in support of a search warrant. All of this evidences a distinct and patent purpose to obtain a confession as a shortcut to conviction. And, in fact, at trial, Sgt. Luker excused the failure to conduct any independent investigation "because Mr. Wilson had confessed." Doc. 76-8 at PDF 81, Bates 1487. While the subjective intent of Sgt. Luker is not at issue, his credibility as a witness is. The word of Sgt. Luker that Mr. Wilson voluntarily waived his rights is highly suspect and inadequate to overcome the strong presumption to the contrary.

745. All of the factors discussed above show that Mr. Wilson was in no frame of mind to "volunteer" a statement to police, with knowledge and understanding of what rights he was forgoing, notwithstanding Sgt. Luker's self-

serving assertions to the contrary. "The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." *Spano*, 360 U.S. at 320-21.

746. For these reasons, Mr. Wilson could not have voluntarily or knowingly and intelligently given consent to waive his rights under *Miranda*.

4. The introduction of an incomplete and unreliable version of Mr. Wilson's statement conflicts with federal law governing voluntariness.

747. Although Mr. Wilson's interrogation by the police lasted an hour and a half (Doc. 76-6 at PDF 72, Bates 1077), Sgt. Luker testified that Mr. Wilson's statement was only forty-five minutes long. Doc. 76-6 at PDF 72, Bates 1077. The tape recording of the statement runs for only thirty to thirty-five minutes. Doc. 76-6 at PDF 70, Bates 1075. The taped statement submitted to the jury, therefore, represented roughly a third of what actually transpired between Mr. Wilson and the police.

748. Before investigators began recording, they questioned Mr. Wilson for nearly fifty minutes. Doc. 76-8 at PDF 144, Bates 1550. Sgt. Luker took no notes of this conversation, though he was well aware that this was a capital murder

investigation. Doc. 76-8 at PDF 145, Bates 1551. Sgt. Luker testified that he did not take notes because the department normally videotapes these interrogations. Doc. 76-8 at PDF 145, Bates 1551. The day of Mr. Wilson's interrogation, however, Sgt. Luker knew that the interview room where he questioned Mr. Wilson did not have a working videorecorder. Doc. 76-8 at PDF 146, Bates 1552. Sgt. Luker's failure to take any notes of Mr. Wilson's questioning, combined with his intentional selection of an interview room without a videorecorder, ensured that the only evidence of what occurred during these missing fifty minutes was Sgt. Luker's bland assertion at trial that what was recorded was the same as what was not recorded. Doc. 76-8 at PDF 145, Bates 1551.

749. Exacerbating the choice not to record the beginning of the interrogation and not to videorecord at all, the tape in the audiorecorder ran out about ten to fifteen minutes before the end of the interrogation. Doc. 76-8 at PDF 128, Bates 1534. Again, the only evidence of what occurred in those ten to fifteen minutes was Sgt. Luker's testimony that Mr. Wilson's statements during this period were the same as what was captured on tape. Doc. 76-8 at PDF 130, Bates 1536. There were no supplemental reports memorializing this lost period of time. Doc. 76-8 at PDF 154, Bates 1560.

750. The coercive circumstances of Mr. Wilson's arrest are set out in detail *supra.* In their light, the reliability of the recording, begun nearly an hour later, is

highly suspect. Introducing only part of a statement, as the trial court permitted in this case, prevents the jury from achieving a "fair and impartial understanding" of the statement. *United States v. Marin*, 669 F.2d 73, 84-85 (2d Cir. 1982). Such a practice also serves to distort the confession's meaning and significance. *United States v. Walker*, 652 F.2d 708, 713 (7th Cir. 1981).

751. These concerns have led to the longstanding practice in Alabama of requiring confessions to be admitted in their entirety. *See*, *e.g.*, *Eiland v. State*, 52 Ala. 322, 335 (1875) ("Confessions or declarations, whether offered in evidence in a civil or criminal case, must be received as a whole."); *Ex parte Drinkard*, 777 So.2d 295, 300 (Ala. 2000) (holding that defendant had the right to have his entire statement entered into evidence if the prosecution submitted only a portion).

752. And this is no mere quirk of Alabama law. In *Jackson v. Denno*, 378 U.S. 368 (1964), the Supreme Court of the United States squarely held that "a defendant objecting to the admission of a confession is entitled to a fair hearing in which both the underlying factual issues and the voluntariness of his confession are actually and reliably determined." *Id*. at 380. For this reason, *Jackson* invalidated the former New York procedure for adjudicating the voluntariness of a confession.[47]

[47] "Under the New York rule, the trial judge must make a preliminary determination regarding a confession offered by the prosecution and exclude it if in no circumstances could the confession be deemed voluntary. But if the evidence presents a fair question as to its voluntariness, as where certain facts bearing on the issue are in dispute or where reasonable men could differ over the inferences to be drawn from undisputed facts, the judge 'must receive the confession and leave to

753. The admission of Mr. Wilson's partial statement, which constituted a mere third of Mr. Wilson's interrogation by the police, represents an unreasonable application of *Jackson*'s edict that the procedure for adjudicating a defendant's claim of involuntariness must produce an ascertainable and reliable result. It too violated Mr. Wilson's right to due process, a fair trial and reliable sentencing guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

5. Counsel were ineffective for failing to challenge the voluntariness of Mr. Wilson's statement and the knowingness and intelligence of his waiver of rights on readily apparent, legally supportable grounds.

754. Trial counsel filed a motion to suppress based on the involuntariness of Mr. Wilson's statement (Doc. 76-1 at 73-76, Bates 73-76); however, the motion

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the jury, under proper instructions, the ultimate determination of its voluntary character and also its truthfulness.'" *Id*. at 377 (footnotes omitted). "This procedure has a significant impact upon the defendant's Fourteenth Amendment rights. In jurisdictions following the orthodox rule, under which the judge himself solely and finally determines the voluntariness of the confession, . . . the judge's conclusions are clearly evident from the record since he either admits the confession into evidence if it is voluntary or rejects it if involuntary. Moreover, his findings upon disputed issues of fact are expressly stated or may be ascertainable from the record. In contrast, the New York jury returns only a general verdict upon the ultimate question of guilt or innocence. It is impossible to discover whether the jury found the confession voluntary and relied upon it, or involuntary and supposedly ignored it. Nor is there any indication of how the jury resolved disputes in the evidence concerning the critical facts underlying the coercion issue. Indeed, there is nothing to show that these matters were resolved at all, one way or the other. *Id*. at 379-80 (footnotes omitted). "The admixture of reliability and voluntariness in the considerations of the jury would itself entitle a defendant to further proceedings in any case in which the essential facts are disputed, for we cannot determine how the jury resolved these issues and will not assume that they were reliably and properly resolved against the accused. And it is only a reliable determination on the voluntariness issue which satisfies the constitutional rights of the defendant and which would permit the jury to consider the confession in adjudicating guilt or innocence." *Id*. at 387.

itself did not include any facts in support. As discussed above, the motion was cut and pasted from the EJI manual without adaptation to the circumstances of Mr. Wilson's case.

755. At the suppression hearing, the only evidence submitted by the State to meet its burden was the *Miranda* waiver itself and Sgt. Luker's inconsistent testimony that Mr. Wilson appeared to have been asleep when he first came out of his bedroom (Doc. 76-6 at PDF 78, Bates 1083), but did not appear to be negatively influenced by the recency of his awakening a very short time later at the police station (Doc. 76-6 at PDF 80, Bates 1085). Trial counsel asked questions about whether Mr. Wilson had been asleep (Doc. 76-6 at PDF 78-80, Bates 1083-1085), but failed to argue to the court that Sgt. Luker's answers were contradictory or to challenge him as a credible witness. Luker was important as the prosecution's sole witness regarding Mr. Wilson's ability to understand what he was waiving, and Luker's dubious credibility, given that it was Luker's own actions which were called into question by the suppression motion, and that he made the decision not to preserve the most telling piece of evidence on the subject of the voluntariness of Mr. Wilson's taped confession – the initial, untaped questioning before the formal confession (Doc. 76-6 at PDF 89-90, Bates 1094-1095) were key to the suppression motion. Yet defense counsel had nothing to say about them. Counsel did not underscore the coercive nature of the arrest and its carryover to the interrogation, as

considered in *Kaupp*, or the invalidity of the second, on-tape waiver as a product of on-going coercion as in *Westover v. United States*, Case No. 761, 384 U.S. 436, 495-96 (1966) (decided with *Miranda*), and *Seibert*.

756. Nor did counsel present any evidence or argue any facts relevant to an assessment of Mr. Wilson's personal circumstances impacting his ability to make a valid waiver. They put on no witnesses of their own and made no argument at all to show why their client's statement was neither voluntary, nor knowing and intelligent. Although trial counsel knew from the report of court-appointed psychologist Dr. McKeown that Mr. Wilson was functioning in the low average range of intellectual abilities (Doc. 76-11 at PDF 21, Bates 2020), they did not introduce this fact as evidence impacting the question of knowing and intelligent waiver. Mr. Wilson's special circumstances as indicated by his school career in special education and the report of Dr. McKeown placed him in at least as precarious a position as the defendant in *Fulminante*. Counsel did not argue that Mr. Wilson's age and lack of prior criminal history were relevant to the voluntariness analysis, even though these factors were clearly established as relevant by the several United States Supreme Court precedents discussed above. Instead, the conclusion of the State's evidence was followed immediately by the court's ruling and then discussion of other pending motions. Doc. 76-6 at PDF 117, Bates 1122.

757. Trial counsel's failure to competently support the suppression motion they filed constitutes deficient performance which cannot be explained as "strategy." No reasonable attorney would file a motion to suppress and fail to support it with readily available evidence and argument. No reasonable attorney would allege facts from a fictitious case or fail to make any argument at all. *See Wiggins*, 539 U.S. at 523 (quoting *Strickland*, 466 U.S. at 688) ("[counsel's] performance [must be] measured for 'reasonableness under prevailing professional norms' …"); *Morrison*, 477 U.S. at 379 (holding *Strickland* applicable to claims based on failure to assert right to exclusion of illegally seized evidence and ineffectiveness claims cognizable in habeas).

758. Trial counsel's failure to litigate this issue prejudiced Mr. Wilson by failing to protect his right to due process and by permitting the admission of unreliable evidence:

> It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession . . . and even though there is ample evidence aside from the confession to support the conviction.

Jackson v. Denno, 378 U.S. 368, 376 (1964) (citation omitted). By failing to inform the court of the full circumstances leading to the statement, trial counsel also failed to protect Mr. Wilson's constitutional right to present a complete defense. *See Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (holding that excluding testimony about the

circumstances of a confession deprives a defendant of his constitutional right to present a complete defense). As a result of these errors, trial counsel failed to provide effective assistance to Mr. Wilson.

759. This ineffectiveness further prejudiced Mr. Wilson because it permitted the admission of his statement to police, which placed him at the crime scene and admitted to inflicting an injury to Mr. Walker. As demonstrated above, there is a reasonable probability that the outcome of Mr. Wilson's trial would have been different had his statement been suppressed because it was the only evidence connecting him to the murder of Mr. Walker.

760. Trial counsel's failure to challenge the admissibility of Mr. Wilson's statement, because it was not voluntary, knowing, or intelligent, fell below professional standards. Counsel's deficient performance prejudiced Mr. Wilson and denied him his rights to effective assistance of counsel, to remain silent, 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. Therefore, Mr. Wilson's convictions and sentence are due to be vacated.

6. 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.*

761. 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,[48] and because all of the facts pled by Mr. Wilson were in the record then (though not pled by appellate counsel) and, so, considered by the court. *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.

762. 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,[49] with a

[48] 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.

[49] "[T]here can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in *all* settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves." *Miranda*, 384 U.S. at 467 (emphasis added).

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 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 all 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.

763. 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,[50] *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. *Westover*, 384 U.S. at 495-96; *Seibert*, 542 U.S. at 611 and 617. This the ACCA never did.

764. 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 that statement. It is also dubious that the State offers no reasonable explanation for

[50] 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).

this omission, especially where investigators could have easily documented their entire interactions with Mr. Wilson.

765. 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, had 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.

766. 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. *See also supra*,

paragraphs 348 through 350. Mr. Wilson requests discovery and a hearing on this issue.

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*.

767. Mr. Wilson was tried before an all-white jury as described *infra* in Claim VI. The State used five of its 16 peremptory strikes to remove all remaining African-Americans after removals for cause. Counsel failed to object. That counsel's performance was deficient is evident from the fact that the State conceded on appeal that a *prima facie* showing had been made. *Wilson I*, 142 So. 3d at 747-48. Thus, no reasonable attorney would have failed to object.

768. Counsel's performance prejudiced Mr. Wilson, because his claim for equal protection under *Batson* was reviewed for plain error only. *Id.* at 751.

769. Additionally, had counsel raised the challenge contemporaneously, the State would have been required to produce the LETS records it relied on to strike Jurors Dawsey and Williams. Those records would have shown that each of these jurors had only traffic violations. *See* Appendices JJ and KK. Counsel could have demanded also that all of the "criminal history" records the State used to strike jurors be produced. The LETS records for seated white jurors could have been investigated at that time, with the resulting discovery that five seated white jurors had traffic

records. This would have provided further evidence of the State's discriminatory intent.

770. Trial counsel's deficient performance prejudiced Mr. Wilson, because it deprived him of his rights to counsel, 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. Therefore, Mr. Wilson's convictions are due to be vacated.

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

771. A prosecutor's sole responsibility is to seek justice; therefore, he is prohibited from inflaming the jury, making improper suggestions or assertions of personal knowledge, or engaging in conduct prohibited by law. *See*, *e.g.*, *Berger v. United States*, 295 U.S. 78, 88 (1935). But during the guilt phase of Mr. Wilson's trial, the prosecutor engaged in numerous acts of misconduct to distract the jury from the crucial task of evaluating the facts and, instead, have it decide the issues based on its emotional reactions. These premeditated tactics violated long-settled principles of state and federal law that prohibit prosecutors from making arguments "calculated to inflame the passions or prejudices of the jury." *Viereck v. United States*, 318 U.S. 236, 247 (1943). However, because trial counsel failed to object to

the prosecutor's improper actions, the jury was permitted to consider unlawful evidence and impermissible arguments in assessing Mr. Wilson's culpability. 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.

1. Trial counsel failed to object to the false testimony of Sgt. Luker elicited by the prosecutor.[51]

772. The testimony of Sgt. Luker respecting purported blood droplets included several falsehoods. Sgt. Luker testified on direct that

> Looking at the blood, you know, you can tell if it's a drop – straight down, you have got high velocity, low velocity, blood splatter [*sic*], you know, the pools – the pools of blood where the body was where it seeped out of the body forming a pool. But, then, there were several other blood droplets or drops around throughout the house.

Doc. 76-8 at PDF 7, Bates 1413 (emphasis added). On redirect, Sgt. Luker testified that he determined Mr. Walker was attacked in multiple areas of the home because of the shape and location of the purported blood droplets. Doc. 76-8 at PDF 199-200, Bates 1605-1606. On recross, Sgt. Luker asserted that "[t]he other blood

[51] In Rule 32, counsel for Mr. Wilson pled two subparts of counsel's failure to challenge prosecutorial misconduct related to Sgt. Luker's testimony about "blood" droplets throughout the house: (1) that counsel failed to challenge Sgt. Luker's lack of credentials as an expert and so could not positively identify any spots he saw away from the body as blood, and (2) that counsel failed to challenge the falseness of the testimony itself, i.e., that the spots were, in fact, blood, given that the purported droplets Sgt. Luker observed were not collected or tested. Doc. 76-22 at PDF 159-168, Bates 3598-3607. In this amended habeas petition, Mr. Wilson pleads only the second subpart.

droplets down the – the hallway way away from the body into the living room, the bedrooms, no, those – those droplets were never sent off." Doc. 76-8 at PDF 201, Bates 1607.

773. But the "other blood droplets" in "the bedrooms" were not sent off for testing because they did not exist. The evidence log from the crime scene lists fourteen swabs of "red stain." *See* Doc. 76-24 at PDF 138-141, Bates 3979-3982 (evidence log for 127 Shield Court). The "location" column of the log shows that all of these were taken from the kitchen or areas immediately contiguous to it. *Id. See also* State's Trial Exhibit 38 (crime scene videotape showing the layout of the house).

774. Sgt. Luker's testimony was offered to rebut the defense's suggestion (Doc. 76-8 at PDF 200-201, Bates 1606-1607), supported by Mr. Wilson's statement to police (Doc. 76-3 at PDF 122-123, Bates 524-525), that Mr. Wilson struck Mr. Walker in the kitchen while trying to knock a knife out of his hand and that Mr. Walker struck his head when he fell in the kitchen. The implication of Sgt. Luker's testimony was that Mr. Wilson was lying when he asserted that his entire interaction with Mr. Walker occurred in the kitchen.

775. The prosecution used Sgt. Luker's testimony to argue that Mr. Wilson possessed the specific intent to kill (Doc. 76-9 at PDF 148-150, 153-154, Bates 1755-1757, 1760-1761), and that the crime was especially torturous (Doc. 76-9 at

PDF 148-149, 153-154, 155, 156-157, 158, Bates 1755-1756, 1760-1761, 1762, 1763-1764, 1765). Mr. Valeska created a scenario from Sgt. Luker's testimony that was not supported by any other evidence. Valeska extrapolated from the droplets of blood "throughout the house," combined with holes in the walls of various other rooms and the discovery by the police of a coin collection in a wall safe (not discovered by the perpetrators of the crime), that Mr. Wilson dragged Mr. Walker around the house, beating him repeatedly to extract from him the location of his valuable collection (Doc. 76-9 at PDF 148-150, 155, 156-157, Bates 1755-1757, 1762, 1763-1764), even though it was never shown that there were any reddish droplets, much less blood, near the holes in the wall.

776. Mr. Valeska, far from correcting this false testimony, encouraged it and deliberately elicited it. Defense counsel did not object or demonstrate its falsity by, for example, introducing the evidence log into evidence.

777. "[I]t is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment . . . The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (citations omitted). Summarizing its earlier holdings in *Napue* and *Mooney v. Holohan*, 294 U.S. 103 (1935), the U.S. Supreme Court held in *Miller v. Pate*, 386 U.S. 1, 7 (1967), that the "Fourteenth Amendment

cannot tolerate a state criminal conviction obtained by the knowing use of false evidence." The same is true of misleading testimony. *Alcorta v. Texas*, 355 U.S. 28, 31 (1957) (holding that a habeas petitioner was denied due process when a prosecution witness gave the jury a "false impression" of his relationship with the petitioner's wife).

778. Had counsel exposed the falsity of this "droplets . . . throughout the house" testimony, that exposure would, in turn, have eradicated any basis for the State to put forward its theory that Mr. Walker was subjected to protracted dragging and beating. Instead, the evidence concerning the encounter between Mr. Wilson and Mr. Walker would have been limited to Mr. Wilson's own statement, i.e., that it took place entirely in the kitchen, with an accidental blow to Mr. Walker's head, followed by his fall and striking his head against the corner of a projecting wall, where a pool of blood does, in fact, appear in State's Exhibit 15. Doc. 76-3 at PDF 51, Bates 453; *see also* Doc. 76-24 at PDF 136, Bates 3877 (color reproduction).

779. There is no reasonable defense strategy that would have supported a decision not to counter false evidence. Trial counsel simply failed to do so. The choice here was not strategic. Counsel, in fact, objected during Mr. Valeska's closing that the arguments about Mr. Wilson "splatter[ing Mr. Walker] all the way to eternity and back" were not based on facts in evidence. Doc. 76-9 at PDF 153, Bates 1860. The court overruled the objection on the grounds that the arguments were based on

inferences from the evidence. *Id.* Had trial counsel timely objected to the "evidence" itself, the objection during closing would have to have been sustained. That failure prejudiced Mr. Wilson because it allowed for exaggeration of the harm inflicted on a supposedly conscious Mr. Walker in a pitiless quest for his hidden treasure. Had Sgt. Luker's testimony on this issue been exposed as false, counsel would have been in a better position to argue against a finding of intent to kill. Such a negative finding would, in turn, have supported conviction of something less than capital murder and imposition of a sentence less than death.

780. Trial counsel's deficient performance prejudiced Mr. Wilson and denied him 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. Therefore, Mr. Wilson's convictions are due to be vacated. Mr. Wilson requests discovery and a hearing on this issue.

> *2. The ACCA's decision is an unreasonable application of* Strickland*, requiring assessment of the "totality of the evidence";* Cronic*, defining defense counsel's duty as subjecting the State's case to "the crucible of meaningful adversarial testing"; and of* Napue *and* Miller*, 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.*

781. 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 by presenting false or misleading evidence. *See also supra*, paragraphs 348 through 350.

782. 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.

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

783. Appellate counsel failed to adequately argue on appeal the issues raised in this amended federal habeas corpus petition regarding the guilt phase of Mr. Wilson's trial, including the illegality of Mr. Wilson's arrest and 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.

784. Appellate counsel also failed to adequately argue on appeal the issues raised in this petition regarding the penalty phase and sentencing of Mr. Wilson. Appellate counsel's failure to properly raise the issues regarding the guilt, penalty,

and sentencing phases of Mr. Wilson's trial prejudiced him and resulted in an unreliable conviction and sentence of death in violation of *Strickland*, 466 U.S. at 685.

1. The constitutional right to counsel is the right to the effective assistance of counsel and that right applies on the first appeal as of right.

785. Although the U.S. Constitution does not mandate that States grant criminal defendants a first appeal as of right, *McKane v. Durston*, 153 U.S. 684 (1894), where a State "has created appellate courts as 'an integral part of the system . . . for finally adjudicating the guilt or innocence of a defendant' . . . the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution," *Evitts v. Lucey*, 469 U.S. 387, 393 (1985) (quoting *Griffin v. Illinois*, 351 U.S. 12, 18 (1956)). Principles of due process and equal protection require States to provide indigent criminal defendants with counsel to represent them in their first appeal as of right. *Douglas v. California*, 372 U.S. 353 (1963).

786. The right to assistance of counsel necessarily means the right to effective assistance of counsel, *Strickland*, 466 U.S. at 685; *Cronic*, 466 U.S. at 654; *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980); *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) ("It has long been recognized that the right to counsel is the right to

the effective assistance of counsel"), including effective assistance of appellate counsel, *Evitts*, 469 U.S. at 396; *Ex parte Dunn*, 514 So. 2d 1300, 1303 (Ala. 1987) ("it is clear that the *Strickland* standards, though expressly applying only to trial counsel, are also properly applied in the appellate context"). The "guarantee of counsel 'cannot be satisfied by mere formal appointment.'" *Evitts*, 469 U.S. at 395 (quoting *Avery v. Alabama*, 308 U.S. 444, 446 (1940)). Appellate counsel must "play the role of an active advocate" in perfecting the criminal defendant's appeal. *Evitts*, 469 U.S. at 394. "Nominal representation on an appeal as of right ... does not suffice to render the proceedings constitutionally adequate; a party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all." *Id.* at 396.

2. Appellate counsel failed to provide effective assistance of counsel by failing to adequately argue the illegality of Mr. Wilson's arrest and, consequently, the inadmissibility of his statement and other evidence procured as a result of that illegal arrest.

787. Direct appeal counsel for Mr. Wilson were ineffective for failing to properly raise the illegality of Mr. Wilson's arrest. The discussion of the facts omitted important details, and no mention was made of *Kaupp v. Texas*, 538 U.S. 626 (2003), to demonstrate lack of consent and absence of probable cause.

788. In their initial brief, appellate counsel gave a one paragraph description of the facts surrounding Mr. Wilson's arrest in their "Statement of the Facts" and a

second short paragraph under the specific issue of arrest. Doc. 76-13 at PDF 20, 50, Bates 2110, 2140 (Appellant's ACCA Br., pp. 3 and 33). Appellate counsel did not argue lack of probable cause. The brief mentions the time of day the arrest was executed, the number of police officers present, and the lack of a warrant or exigent circumstances. The factual discussion does not make clear that the five police officers whom Sgt. Luker named as responding to the scene all entered Mr. Wilson's home or that Sgt. Luker, at least, was close enough to make observations about clothing in Mr. Wilson's bedroom, as demonstrated by his affidavit in support of a search warrant. Sgt. Luker's assertion that Mr. Wilson went voluntarily is not counterbalanced against his contradictory testimony that Mr. Wilson was arrested inside his home and was not free to ignore the police and go about his business. It is also not mentioned that Mr. Wilson was handcuffed before being transported to the police station. The legal argument is aimed entirely at the lack of a warrant and lack of consent. Doc. 76-13 at PDF 50, 52, Bates 2140, 2142 (Appellant's ACCA Br., pp. 33-35). Cases in support are merely cited and not discussed in any detail. *Id.*

789. In its brief, the State argued only that Mr. Wilson went to the police station voluntarily. Doc. 76-14 at PDF 47-48, Bates 2256-2257 (Appellee's ACCA Br., pp. 31-32). In response to this assertion, appellate counsel pled more facts and argued the inapplicability of the case cited by the State, *Smith v. State*, 797 So. 2d 503, 528-29 (Ala. Crim. App. 2000), because the circumstances surrounding Smith's

arrest differed in critical details from Mr. Wilson's. Doc. 76-14 at PDF 136-140, Bates 2345-2349 (Appellant's ACCA Reply, pp. 14-18). But again, there is no mention of *Kaupp*, nor of the absence of probable cause.

790. Finally, even after the ACCA relied on *New York v. Harris*, 495 U.S. 14 (1990), to hold that, whether Mr. Wilson was arrested in his home or not, the police had probable cause to arrest, which excused the illegality, *Wilson I*, 142 So. 3d at 765-68, appellate counsel did not respond to the finding of probable cause. Doc. 76-18 at PDF 53, 57, Bates 2671-2675 (Appellant's ACCA Appl. for Reh'g, pp. 37-41). Instead, counsel continued to assert that the facts supported a finding of arrest, but again with no citation to *Kaupp*.

791. Because appellate counsel never cited *Kaupp*, they could not demonstrate that the circumstances of this case are virtually identical. In *Kaupp,* the U.S. Supreme Court held that a suspect's "OK," when told to come with the police, does not prove consent when the circumstances indicate coercion. 538 U.S. at 630. Such coercion includes rousing the suspect from sleep in the early morning, numerous police officers present inside the suspect's home, and transport handcuffed in a police vehicle. *Id.* at 630-31. Appellate counsel should have been aware of *Kaupp*, which had been decided a year before the crime in this case and four years before the suppression hearing. *Kaupp* was cited in the EJI manual's

model motion to suppress, *see* Doc. 76-24 at PDF 99, Bates 3940 (Amended Rule 32 Petition, Exhibit 16, ¶ 14) and appellate counsel were attorneys at EJI.

792. Appellate counsel's failure to argue lack of probable cause for Mr. Wilson's arrest was damaging. The only evidence possibly implicating Mr. Wilson at the time of his arrest were the statements of two co-defendants, not three, as counsel's initial brief states. *See* Doc. 76-23 at PDF 103, Bates 3743 (Amended Rule 32 Petition, Exhibit 2, p. 3). But, as set out above, the U.S. Supreme Court has never exempted co-defendants' statements from the "totality of the circumstances" test of *Gates*. A co-defendant had given a statement in *Kaupp*, but that was not held to establish probable cause. None of the appellant's briefs contain any discussion of the lack of proof of the reliability of these co-defendants' statements.

793. Similarly, appellate counsel failed to distinguish *Vincent v. State*, 349 So. 2d 1145 (Ala. 1977), the case relied on by the ACCA to find that probable cause existed here, because, as the *Vincent* court said, the uncorroborated testimony of a co-defendant could serve as the basis for a finding of probable cause, *id.* at 1146. Appellate counsel failed to show that the circumstances of *Vincent* did not support such a holding in Mr. Wilson's case. In *Vincent*, a finding of probable cause was made by a judge in a juvenile transfer hearing, *id.* at 1145 – that is, by a neutral magistrate, as required by *Leon*, 468 U.S. at 914 – not the police. The probable cause finding made by the judge in *Vincent* was based not on a co-defendant's statement

to police, but on a co-defendant's sworn testimony before the judge, 349 So. 2d at 1145, which would have been subject to cross-examination. The co-defendant's oath and the cross-examination served the same function of determining credibility as do the *Gates* factors of police familiarity with an informant or independent police investigation. *See*, *e.g.*, *White*, 496 U.S. at 328-29 and 332. Here, unlike in *Vincent*, nothing established the credibility of Mr. Wilson's putative co-defendants. Yet, appellate counsel failed to point out this critical difference in their application for rehearing.

794. These failures constitute deficient performance. No reasonable attorney would raise an issue on appeal and strategically choose not to cite a recent holding of the U.S. Supreme Court directly on point. No reasonable attorney would deliberately choose not to address a critical issue, such as probable cause was here, where cases relied on by the appellate court could be easily distinguished. There can be no strategic justification for such omissions.

795. This deficient performance of counsel prejudiced Mr. Wilson. Had appellate counsel laid out the facts in full and had they argued the law effectively, in particular by showing the applicability of *Kaupp* both to lack of consent and to lack of probable cause and the inapplicability of *Vincent*, along with Supreme Court precedent addressing the presumed unreliability of co-defendants' statements (see *supra*), there is a reasonable probability that the outcome of Mr. Wilson's appeal

would have been different. That is, the ACCA, which also never discussed *Kaupp* and relied on the inapposite *Vincent* case to find the existence of probable cause, would instead have been compelled to find that Mr. Wilson was arrested illegally and that no probable cause justified his arrest. That court would have had to rule also that Mr. Wilson's statement and the other evidence collected on the basis of his statement and observations made during his illegal arrest were due to be suppressed. As a result, Mr. Wilson would have been granted a new trial at which that evidence could not be used against him.

796. But for counsel's failures, Mr. Wilson's rights to effective assistance of counsel, to be free from unreasonable search and seizure, to remain silent, to due process, to a fair trial, to a reliable jury verdict, and to be free from cruel and unusual punishment under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments of the U.S. Constitution would have been secured, and the result of his appeal would have been different. For this reason, this Court must find appellate counsel ineffective and grant Mr. Wilson a new appeal.

3. Appellate counsel were ineffective for failing to argue adequately the involuntariness of Mr. Wilson's custodial statement and, consequently, the inadmissibility of his statement and other evidence procured as a result of it.

797. Direct appeal counsel for Mr. Wilson were ineffective for failing to argue adequately the involuntariness of Mr. Wilson's custodial statement. As

described above, substantial evidence appeared in the record to show that Mr. Wilson's confession was not voluntary or knowing and intelligent, as required by clearly established federal law (see *supra*). Yet, appellate counsel, like trial counsel, failed to call relevant facts to the court's attention and failed to argue applicable law.

798. In their initial brief, appellate counsel argued that the admission of Mr. Wilson's statement at trial violated his right to due process because of its incompleteness. Doc. 76-13 at PDF 45, 49, Bates 2135, 2139 (Appellant's ACCA Br., pp. 28-32). Counsel argued that the incompleteness made it impossible for the State to have met its burden of demonstrating voluntariness (without explaining why, other than that part of the interaction between Mr. Wilson and the police was unrecorded) and that the introduction of the statement violated due process because the incompleteness rendered the statement unreliable (without any discussion of what was missing). *Id.* The State pointed out the absence of specifics in the argument, *see* Doc. 76-14 at PDF 45-47, Bates 2254-2256 (Appellee's ACCA Br., pp. 29-31), but counsel made no response on this issue at all in their reply.

799. While incompleteness might have been a legitimate challenge if counsel had adequately explained the harm that resulted from it, without that explanation the claim failed. As to involuntariness, the ACCA found relevant that Mr. Wilson was read his *Miranda* rights beforehand, *see Wilson I*, 142 So. 3d at 762-64, and that the incompleteness went to the weight to be accorded the statement,

rather than its admissibility, *id.* at 763. As to unreliability, the court considered that Sgt. Luker testified that the unrecorded portions were the same as those recorded, *id.* at 764-65, and, after listening to the tape itself, the court declared that nothing appeared unreliable about it, *id.* at 764.

800. Counsel's application for rehearing made no new arguments. Doc. 76-18 at PDF 48, 53, Bates 2666-2671 (Appellant's ACCA Appl. for Reh'g, pp. 32-37). The only attempt to demonstrate that the ACCA's holding was in error was an assertion that the court could not determine whether an incomplete statement was involuntary or unreliable simply by listening to the incomplete statement itself. *Id.* at 35. But even here, counsel did not explain, as Mr. Wilson does now, that his condition at the time he signed the waiver is key and that that condition would not be the same an hour later when the recording began.

801. Appellate counsel unreasonably failed to challenge Mr. Wilson's statement as involuntary, unknowing, and unintelligent based upon evidence in the record which was readily available to support such findings. As discussed above, Mr. Wilson's statement was not voluntary, because it was elicited under coercive circumstances flowing from his immediately preceding arrest—including such factors as the unusual time of day (or rather, time of night) when police officers could expect to find Mr. Wilson asleep and did in fact find him sleeping; the invasion of Mr. Wilson's home by a large number of police officers; his transportation to the

police station in a police vehicle and in handcuffs; the immediate commencement of the interrogation following upon the arrest; and the isolation created by the removal to an interrogation room at police headquarters. These factors should have been readily apparent to appellate counsel because they appear in the transcript of the suppression hearing, which was included in the record on appeal. *See* Doc. 76-7 at PDF 52, Bates 1057. Additionally, Mr. Wilson was not capable of making a knowing and intelligent waiver of his right against self-incrimination, because of factors such as his age, emotional instability, special education status, ADHD, and unfamiliarity with the criminal justice system. These factors also were readily evident in the record, for example, in the YO PSR (Doc. 76-1 at PDF 48-54, Bates 48-54), in Dr. McKeown's evaluation of Mr. Wilson (Doc. 76-11 at PDF 19-25, Bates 2018-2024), and in Mr. Wilson's school records (Doc. 76-3 at PDF 155, Bates 557 to Doc. 76-6 at PDF 16, Bates 1021), but they were not briefed by appellate counsel.

802. Making the arguments Mr. Wilson now makes would not have conflicted with arguing the involuntariness of Mr. Wilson's statement based on its purported incompleteness. But forgoing the above arguments in favor of the incompleteness challenge cannot be justified as strategic. No reasonable attorney would forgo a valid legal challenge to a client's statement, supported by copious evidence and harm which could be readily shown.

803. Counsel's deficient performance prejudiced Mr. Wilson. Had appellate counsel laid out the facts in full and had they argued the law effectively, in particular by showing that the circumstances of Mr. Wilson's arrest were critical to assessing the involuntariness of his statement and that the personal characteristics of Mr. Wilson himself were key in determining whether his waiver of his right against self-incrimination was knowing and intelligent, there is a reasonable probability that the outcome of Mr. Wilson's appeal would have been different. That is, the ACCA would have had to consider facts that countered Sgt. Luker's unsupported assertions about Mr. Wilson's signing of the *Miranda* waiver and his understanding of the rights enumerated there. At the suppression hearing, a strong presumption against waiver applied, *Johnson*, 304 U.S. at 464 (holding that courts must "indulge every reasonable presumption against waiver of fundamental constitutional rights ...") (internal quotation marks and citation omitted), and Sgt. Luker's conclusory testimony would have been insufficient to overcome that presumption. The ACCA would have been compelled to find that Mr. Wilson's statement was not voluntary, knowing, or intelligent. That court would have had to rule that Mr. Wilson's statement and the evidence obtained on the basis of his statement were due to be suppressed, as argued above. As a result, Mr. Wilson would have been granted a new trial at which that evidence could not be used against him.

804. But for appellate counsel's failures, Mr. Wilson's rights to the effective assistance of counsel, to be free from unreasonable search and seizure, to remain silent, to due process, to a fair trial, to a reliable jury verdict, and to be free from cruel and unusual punishment under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments of the U.S. Constitution would have been secured, and the result of his appeal would have been different. For this reason, this Court must find appellate counsel ineffective and grant Mr. Wilson a new appeal.

4. The ACCA's decision is an unreasonable application of Strickland *and rests on unreasonable findings of fact.*

805. The ACCA's denial Mr. Wilson's claim of ineffective assistance of appellate counsel is an unreasonable application of *Strickland* and U.S. Supreme Court decisions respecting the underlying issues. *See also supra* paragraphs 348 through 350.

806. 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 *supra* in paragraphs 720 *et seq.*

807. 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*, 469 U.S. at 396. *See also Ex parte Dunn*, 514 So. 2d 1300, 1303 (Ala. 1987).

808. 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.

809. 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. Mr. Wilson requests discovery and a hearing on this issue.

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.

810. The State of Alabama did not present to the jury at the guilt phase sufficient evidence to support a finding beyond a reasonable doubt (*see Jackson v. Virginia*, 443 U.S. 307 (1979); *In re Winship*, 397 U.S. 358, 364 (1970)) that Petitioner David Wilson had the intent to kill Mr. Dewey Walker, or that he was the person who inflicted the 114 fatal blows to Mr. Walker. The prosecution asked the jury to take on faith that Mr. Wilson inflicted the blunt force trauma that ultimately killed Mr. Walker. All the while, unbeknownst to Mr. Wilson, the State of Alabama had in its possession a letter in which the co-defendant, Kittie Corley, took responsibility for the bat blows that killed Mr. Walker.

811. Much of the evidence that the State did present to the jury at the guilt phase was inadmissible as a matter of clearly established federal law. *See* Claim IV, sections D and E *supra*.

812. As a result of 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, *see supra* and *infra*—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, fruit-of-the-hidden-tree evidence, which establish that Kittie Corley was the one who beat Mr. Walker to death with a baseball bat and had a motive. *See supra* Claim I and III. Thus, while there is evidence that Corley had a motive, had the intent, 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 the victim, Mr. Dewey Walker, or have the intent to kill the victim, and as a result he is also innocent of the death penalty.

813. The Eleventh Circuit has found that it is "not settled whether a freestanding actual innocence claim is viable in a capital case on federal habeas corpus review" after the Supreme Court's decision in *Herrera v. Collins*, 50 U.S. 390 (1990). *In re Dailey*, 949 F.3d 553, 557 (11th Cir. 2020) (quoting *Johnson v. Warden, Ga. Diagnostic & Classification Prison*, 805 F.3d 1317, 1324 (11th Cir. 2015)). The Circuit, therefore, does not preclude petitioners from raising freestanding, substantive actual innocence claims.

814. As the Eleventh Circuit indicated in *In re Dailey*, there is some confusion concerning the Supreme Court's stance on substantive, freestanding actual innocence claims that *are untethered from underlying constitutional errors*, claims that would therefore render the federal habeas court an initial trier of fact rather than a reviewing habeas court. *Herrera v. Collins*, 506 U.S. at 401-402 (noting that the standard announced in *Jackson v. Virginia*, 443 U.S. 307 (1979), "'does not permit a court to make its own subjective determination of guilt or innocence'" but does permit an inquiry into whether there has been "an independent constitutional violation *i.e.*, a conviction based on evidence that fails to meet the *Winship* standard.")

815. The confusion stems from the *Herrera* Court's holding that actual innocence claims untethered to underlying constitutional violations are not independent substantive grounds for relief, and the Court's simultaneous "assum[ption], for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim." *Herrera v. Collins*, 506 U.S. at 417.

816. This assumption and its ambiguities continue to apply in Eleventh Circuit decisions concerning "actual innocence" claims that are untethered from

underlying constitutional violations. *Felker v. Turpin*, 83 F.3d 1303, 1312 (11th Cir. 1996) ("Justice O'Connor joined by Justice Kennedy, both of whose votes were necessary to the majority in *Herrera v. Collins,* 506 U.S. 390 (1993), explained that that decision left open the difficult question of whether federal habeas courts may entertain convincing claims of actual innocence."); *In re Dailey*, 949 F.3d at 557; *In re Davis*, 565 F.3d 810, 817 (11th Cir. 2009).

817. However, Mr. Wilson's actual innocence claim does not fall into this murky, indeterminate category of substantive actual innocence claims *untethered from constitutional violations*, or in the words of the Supreme Court, "absent an independent constitutional violation occurring in the underlying state criminal proceeding." *Herrera v. Collins*, 506 U.S. at 400.

818. Thus, Mr. Wilson's actual innocence claim is *not* subject to the impossibly high standard *Herrera* imposes.

819. Petitioner David Wilson's claim of actual innocence is unshakably anchored in his *Brady*, ineffective assistance of counsel, and prosecutorial misconduct claims. It is 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, and thus it warrants relief from this federal habeas court. In reviewing this claim, the Court should adopt the "probably resulted" standard set forth in *Murray v. Carrier*, 477 U.S. 478 (1986), and reaffirmed in

Schlup v. Delo, 513 U.S. 298 (1995), that guides a court's review in cases where actual innocence supports the application of a fundamental miscarriage of justice exception to a procedurally defaulted claim.[52]

820. The United States Supreme Court distinguishes actual innocence claims that *are rooted* in underlying constitutional violations from freestanding actual innocence claims that *are not rooted* in such constitutional violations based on the "principle that federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact." *Herrera v. Collins*, 506 U.S. at 400. Mr. Wilson's actual innocence claim falls into the first category of actual innocence claims that *are rooted in underlying constitutional violations* and therefore warrant habeas relief.

821. This substantive legal claim of actual innocence has not been raised before through no fault of Petitioner David Wilson. Mr. Wilson has been diligent in seeking that this claim be reviewed by the state and federal courts. First, as explained *supra* in Claim III, the legal claim of actual innocence is tied to the discovery of the Corley letter and to the facts presented in the *Brady* claim. Mr. Wilson could not have adequately pled this claim prior to obtaining the Corley letter and learning its contents. Second, Mr. Wilson has diligently and consistently written to his attorneys

[52] In *Murray v. Carrier*, the Supreme Court held that in order to establish a miscarriage of justice, a petitioner must show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." 477 U.S. 478, 496 (1986).

at various stages of his postconviction proceedings to raise this substantive actual innocence claim.

822. 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* Appendix OO (Notarized letter by David Wilson to counsel dated Nov. 11, 2015, redacted).[53] Mr. Wilson's amended Rule 32 petition was filed on December 11, 2015. Doc. 76-22 at PDF 25, Bates 3464.

823. Mr. Wilson again specifically asked his state post-conviction counsel to raise this legal claim of actual innocence as part of another round of amendments to the amended Rule 32 petition in state court. *See* Appendix PP (Notarized letter by David Wilson to counsel dated July 5, 2017, redacted); Appendix QQ (Letter by David Wilson to counsel dated August 4, 2017, redacted).

824. Mr. Wilson then specifically asked his original federal habeas corpus attorney to raise this legal claim of actual innocence in his federal habeas corpus petition and, right after he received a copy of the filed habeas petition, asked his federal habeas corpus attorney why it had not been included in the federal habeas

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

corpus petition. *See* Appendix RR (Letter by David Wilson to counsel dated June 1, 2019).

825. On June 13, 2019, Mr. Wilson filed a *pro se* request with this Court asking for the appointment of new counsel to raise this legal claim of actual innocence. Doc. 15. Undersigned counsel was appointed as Mr. Wilson's new counsel and is raising the claim in this amended petition.

826. Because Mr. Wilson is not at fault for not raising the claim of actual innocence in his Rule 32 proceedings, the claim is properly before this Court. Should the Court nevertheless require a showing of cause and prejudice, it is well-established Supreme Court precedent that an "external impediment" to raising a claim constitutes cause. *Amadeo v. Zant*, 486 U.S. 214 (1988); *Murray v. Carrier*, 477 U.S. 478, 492 (1986) ("cause for a procedural default on appeal ordinarily requires a showing of some external impediment preventing counsel from constructing or raising the claim."). The prosecutor's suppression of the Corley letter for nineteen years constitutes such an "external impediment." As for prejudice, it is difficult to overstate the prejudice suffered by a petitioner who is at risk of execution due to a wrongful conviction. Another ground for "cause" is the ineffective assistance of counsel that plagued Mr. Wilson's trial and direct appeal, *see supra* Claims II and IV, as well as Rule 32 proceedings. *Martinez v. Ryan*, 566 U.S. 1 (2012).

827. Should the Court require an alternative reason to excuse procedural default, Mr. Wilson's actual innocence claim provides that gateway. 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.") Thus, in addition to showing cause and prejudice,[54] Mr. Wilson's claim that he is actually innocent of capital murder, tethered to underlying constitutional errors, excuses procedural default.[55]

828. Petitioner has maintained his innocence of capital murder since the time of his arrest in his home. Trial counsel prevented Mr. Wilson from taking the stand when Mr. Wilson was willing to testify to his innocence of capital murder. The State

[54] A showing of cause and prejudice and a showing of a fundamental miscarriage of justice due to actual innocence are not mutually exclusive. The Court acknowledges that petitioners such as Mr. Wilson who have demonstrated a fundamental miscarriage of justice are usually able to meet the cause-and-prejudice standard. *Murray v. Carrier*, 477 U.S. at 495-496.

[55] 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.

of Alabama withheld material evidence that his co-defendant Kittie Corley was the actual killer, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). This material evidence would have established Mr. Wilson's actual innocence claim, which is inextricably tethered to the underlying violations of Mr. Wilson's Fifth, Sixth, Eighth, and Fourteenth Amendment rights. For this reason, Mr. Wilson is entitled to a new trial on a lesser included offense. Mr. Wilson requests discovery and an evidentiary hearing on this claim.

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.

829. In a county where African-Americans are 25% of the population,[56] the prosecution struck every African-American from the venire, resulting in an all-white jury in a death penalty case involving a white victim. The prosecution eliminated black veniremembers based on purported "criminal histories," primarily traffic violations, after telling jurors they were not interested in "speeding tickets," and by

[56] U.S. Census Bureau, Profile of General Demographic Characteristics, Census 2000, for Houston County, Alabama, available at https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=CF; and Profile of General Population and Housing Characteristics, Census 2010, available at https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=CF.

disparately targeting African-American potential jurors during voir dire with questions about the death penalty that were not posed to similarly-situated white jurors. Peremptorily removing most black veniremembers from capital trial juries has been and is common practice for the Houston County District Attorney's office.[57]

A. The record of jury selection raised a strong inference of racial discrimination on the part of the prosecution.

830. Fifty-four venirepersons were called for Mr. Wilson's trial. Doc. 76-6 at PDF 163, Bates 1168. After seven strikes for cause and two hardship excuses (Doc. 76-7 at PDF 122, Bates 1327), five of the 45 remaining jurors were African-

[57] Appellate courts have reversed convictions obtained by the Houston County District Attorney's Office at least seven times in recent years. In a case tried two years before Mr. Wilson's, the same prosecutor who testified regarding the jury strikes in this case, Gary Maxwell, removed all eleven black veniremembers, though one served as an alternate. *Ex parte Floyd*, 227 So. 3d 1, 1-2 (2016). The state court excused the prosecutor's contradictory answers during the Batson hearing as a result of the passage of time, since the *Batson* hearing was held on remand. *Id.* at 12. But the passage of time cannot explain certain glaring inconsistencies here. Mr. Maxwell testified from his contemporaneous notes and did not express any lack of memory about the general meaning of his notations, only about the specifics, for example, of demeanor. As to any faded memory about criminal convictions, however, the State could have submitted the records it said it would, but never did (see *supra*). See also a list of reversals cited by Mr. Wilson in his *Batson* hearing. Doc. 76-15 at PDF 123, Bates 2486. In 2011, the Equal Justice Initiative found that 82% of African American prospective jurors in capital cases were struck by Valeska's office between 2006 and 2010. *See* Equal Justice Initiative, "African Americans Illegally Barred From Serving on Juries Sue Alabama Prosecutor Over Racial Discrimination," October 24, 2011, https://eji.org/news/african-americans-barred-from-juries-sue-alabama-prosecutor-doug-valeska-for-racial-discrimination/ ("from 2006 to 2010, state prosecutors in Dothan used peremptory strikes to exclude 82% of qualified Black jurors in death-penalty cases.").

American[58] (Doc. 76-15 at PDF 73, Bates 2436); (Doc. 76-12 at PDF 16-22, Bates 2077-2083). Thus, the venire was already deficient in African-American representation at 12%.[59] Three of the strikes for cause had removed black jurors.[60] *See* Doc. 76-7 at PDF 122, Bates 132) (strikes); Doc. 76-12 at PDF 16-22, Bates 2077-2083 (venire list).[61] The State then had 16 peremptory strikes available. Doc. 76-15 at PDF 33, Bates 2396. Five peremptory strikes were used to remove *all* of the remaining black prospective jurors. *Id.*[62] The prosecution thus removed every African-American from the venire. Mr. Wilson faced an all-white jury,[63] which subsequently convicted him and sentenced him to death.

831. There were no juror questionnaires, so reasons to remove jurors had to come from the voir dire. The prosecutor's voir dire consisted largely of uninterrupted narrative and general questions posed to the panel as a whole, most of which elicited

[58] Three African-Americans were struck for cause: (1) Rufus Baker, (2) Daphne Kirkland, and (3) Joyce Whiting. The remaining five were: (1) James Collins, (2) Jehl Dawsey, (3) Barbara Hamilton, (4) Bonzell Lewis, and (5) Darran Williams.

[59] As discussed *supra*, African-Americans comprise 25% of the Houston County population. A venire consisting of only 12% African-Americans demonstrates an absolute disparity of 13% in this case. The Supreme Court has refused to adopt an explicit percent standard for fair cross section disparities, but a gap that is greater than the percentage of the underrepresented minority group in the actual venire would seem to be a sufficient disparity.

[60] Baker, Kirkland, and Whiting. All three indicated an inability to impose a death sentence. Doc. 76-6 at PDF 184, Bates 1189, at PDF 172-173, Bates 1177-1178 respectively.

[61] *See* Appendix FF (Chart of jurors removed for cause or hardship).

[62] *See* Appendix GG (Chart of jurors peremptorily struck by the State).

[63] *See* Appendix HH (Chart of jurors empaneled).

no response. *See*, *e.g.*, Doc. 76-7 at PDF 10-60, Bates 1215-1265. The only segment of the voir dire where the prosecution asked questions of specific veniremembers was when it queried potential jurors on their ability to return a death sentence. The prosecution's conduct of this portion of the voir dire displayed glaring racial disparity.

832. The prosecution addressed or questioned 7 of 8, or 88%, of the African-Americans in the venire[64] concerning their views on the death penalty and the 8th African-American juror had indicated before the voir dire that she had cause to be dismissed.[65] Doc. 76-7 at PDF 37-47, Bates 1242-1252; and Doc. 76-12 at PDF 16-22, Bates 2077-2083.[66] By contrast, the prosecution questioned only 5 of 46, or roughly 11%, of Caucasian veniremembers about their views on the death penalty. *Id*. Consequently, though African Americans comprised only 15% of the venire, they were nearly 54% of the venirepersons that the prosecution directly engaged about the death penalty. The jurors specifically questioned by the prosecution included

[64] Jurors had not yet been removed for cause.

[65] Only two of these, Mr. Baker and Rev. Whiting, had indicated opposition to the death penalty. The State did not question Daphne Kirkland, who had also expressed reservations. She had already indicated that she had other reasons preventing her from serving on the jury. Doc. 76-7 at PDF 4, Bates 1209.

[66] *See* Appendix II (Chart of jurors questioned by Mr. Valeska about their views on the death penalty).

some who had not responded to the court's questions,[67] so the prosecution's questioning of these jurors was not premised on previously expressed opposition.

833. Following the exchange about opinions of the death penalty, the prosecutor asked veniremembers about criminal history. He phrased his inquiry this way:

> So I don't want to know, once again, you know, if you had a speeding ticket. But I do want to know about any other offenses that you were arrested or charged or had to go to court on, *excluding speeding*. Okay? Anything else, come and tell us privately. Okay?

Doc. 76-7 at PDF 52, Bates 1257 (emphasis added). The only juror who responded to this question was struck from the jury.[68] *See* Doc. 76-7 at PDF 106-107, Bates PDF 1311-1312, and at PDF 119-120, Bates 1324-1325.

B. Testimony at the *Batson* hearing strengthened the evidence of discrimination.

834. On initial review on direct appeal, the State conceded a *Batson* hearing was warranted and the ACCA remanded for that purpose.[69] *Wilson I*, 142 So. 3d at

[67] The three jurors who expressed opposition were all removed for cause. Doc. 76-6 at PDF 184-185, Bates 1189-1190; Doc 76-7 at PDF 122, Bates 1327.

[68] He was not struck because of the conviction, which he said was a minor traffic violation, but because he maintained he could not return a verdict even as to guilt. Another juror responded to the court's inquiry about felony convictions. *See* Doc. 76-6 at PDF 179, Bates 1184. He also did not serve.

[69] It must be emphasized that, although the ACCA gave as a reason for remand that "the circuit court is in a better position to evaluate the parties' arguments and to rule on the propriety of the State's reasons for striking African-Americans because it was present during the jury-selection

747-48. At the hearing, the prosecutor asserted that he used peremptory strikes to remove one African-American veniremember for an equivocal response regarding the death penalty (Doc. 76-15 at PDF 62, Bates 2425) and two others because of their criminal histories (Doc. 76-15 at PDF 56-58, Bates 2419-2421). For one of the latter two, he also cited his age, 26 (Doc. 76-15 at PDF 58, Bates 2421). Yet the prosecutor had not asked any of the white veniremembers who eventually served on the jury about the death penalty or about their criminal histories. In fact, the prosecutor did not direct a single question to any of the white veniremembers who eventually served on the jury. In addition, five of the white veniremembers who eventually served on the jury actually had criminal histories. Although the prosecutor testified throughout the *Batson* remand hearing from notes purportedly made during jury selection (*see*, *e.g.* Doc. 76-15 at PDF 48-49, Bates 2411-2412; at PDF 55-56, Bates 2418-2419; at PDF 62, Bates 2425; at PDF 77, Bates 2440; at PDF 79, Bates 2442; at PDF 128, Bates 2491; at PDF 133, Bates 2496), those notes were never entered into evidence.

proceedings," *Wilson I*, 142 So. 3d at 747, the judge who presided over the *Batson* hearing was not the trial judge.

1. "Criminal history."

835. The prosecutor claimed that he struck two qualified African-American prospective jurors, Darran Williams[70] and Jehl Dawsey, because they had criminal histories. Doc. 76-15 at PDF 56, 58, Bates 2419, 2421. The alleged basis for these strikes was information obtained from the "Law Enforcement Tracking System" ("LETS").[71] Doc. 76-15 at PDF 56, Bates 2419. According to the prosecutor, LETS "covers people who are – have been charged with – anywhere from a speeding offense all the way up in the state of Alabama." *Id.* The prosecutor did not specify whether the charges against Mr. Williams and Mr. Dawsey consisted only of speeding or of something more; he simply reiterated when asked that each man "had a LETS record," Doc. 76-15 at PDF 57-58, Bates 2420-2421, and for Mr. Williams, he added that there were "14 speedings." Doc. 76-15 at PDF 57, Bates 2420. The State did not introduce the LETS records at the *Batson* hearing or afterward, despite promising to do so (Doc. 76-15 at PDF 141, Bates 2504), so there is no evidence that either Mr. Williams or Mr. Dawsey had any criminal history other than speeding.

[70] Mr. Williams' name is spelled "Darren" in the *Batson* hearing transcript, but the jury list shows that the correct spelling is "Darran." *See* Doc. 76-3 at PDF 152, Bates 554 (venire list).

[71] According to the University of Alabama's Center for Advanced Public Safety, which designed the "LETS" system, the unabbreviated name is "Law Enforcement Tactical System." *See LETSGo*, University of Alabama Center for Advanced Public Safety (2019), https://www.caps.ua.edu/software/letsgo/. According to the team that created it, LETS is a search engine "designed to provide law enforcement and criminal justice agencies information about individuals and vehicles by searching various databases." Over 1,000 state law enforcement agencies use the system today. *Id.*

Nor is there any evidence that either Mr. Williams or Mr. Dawsey were even convicted, since LETS "covers people who are – have been charged …." Doc. 76-15 at PDF 56, Bates 2419. In fact, there is no evidence that the prosecutor had the records for the right Darran Williams, in particular, since a number of other individuals with alternate spellings appear in Alabama's criminal justice system. *See* Appendix JJ. According to Mr. Williams' Alacourt[72] record, he had six speeding charges at the time of Mr. Wilson's trial, *see* Appendix KK, but only one of those was in the previous five years, *id.*[73] Mr. Dawsey's record does, in fact, only include traffic violations. *See* Appendix LL.

836. The prosecutor's claim of ignorance about what the LETS record contained was less than candid. It is a matter of public record that a LETS record

[72] Alacourt is an information service that contains all of the records in "The State of Alabama's Unified Judicial System[, which] maintains the State Judicial Information System which contains trial court data for each of Alabama's 67 counties." *See* https://v2.alacourt.com/AlacourtInfo/frmWhatWeDo.aspx (accessed Nov. 7, 2024). It includes "All currently active cases […] maintained in the system." *Id.* According to Alacourt, the service includes: Civil Cases - Circuit and District Courts; Criminal Cases - Circuit and District Courts; Domestic Relations & Child Support; Traffic Cases; Outstanding Alias Warrants; Trial Court Dockets; [and] Attorney Case Information." *Id.* It is a matter of public record that public terminals with Alacourt access were available in the Houston County Circuit Clerk's Office at the time.

[73] The DA argued that Mr. Williams's Alacourt records should not be considered, because they were not admitted during Mr. Maxwell's testimony. Doc. 76-15 at PDF 116-117 Bates 2479-2480. Mr. Wilson's counsel indicated that they had only one copy with them (Doc. 76-15 at PDF 126, Bates 2489), and the documents were submitted to the court later and included in the record on appeal (Doc. 76-16 at PDF 19-23, Bates 2528-2532). The State then objected in writing to the inclusion of these documents in the record. Doc. 76-16 at PDF 16-17, Bates 2525-2526.

does, and did in 2007, contain the specific charges against the listed individual and also shows the present status or disposition of each charge.

837. Neither Dawsey nor Williams was asked about their records during voir dire. In fact, the entire venire was told *not* to report any speeding tickets. Doc. 76-7 at PDF 52, Bates 1257. The fact that neither Mr. Williams nor Mr. Dawsey responded to the prosecutor's question about convictions other than speeding strongly suggests that any criminal history they had fell in the "speeding tickets" category. Thus, this "reason" is highly suspect for pretextuality. The State cannot legitimately assert a reason about which the prosecutor asked no questions and which he explicitly indicated was irrelevant.[74] And, in fact, Mr. Williams and Mr. Dawsey were the *only* jurors struck because of a LETS record. As Mr. Wilson demonstrated at the hearing, multiple white veniremembers sat on the jury who did in fact have traffic records that should have shown up in LETS.

838. The critical fact that the prosecutor allowed five white veniremembers with similar criminal histories—Cauley Kirkland, Robert Lewis, Richard Morris, Daniel Sinas and Sidney Timbie—to serve on the jury further demonstrates the pretextual nature of this reason. Mr. Wilson submitted Alacourt records to the court

[74] *Miller-El v. Dretke*, 545 U.S. 231, 246 (2005) ("*Miller-El II*") ("'The State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination.'") (quoting *Ex parte Travis*, 776 So. 2d 874, 881 (Ala. 2000)).

to prove this point. *See* Doc. 76-15 at PDF 84-85, Bates 2447-2448; Doc. 76-16 at PDF 10-14, Bates 2519-2523.

839. The prosecutor's response to this evidence was to assert a number of defenses, including that smaller municipalities do not always report to LETS. Doc. 76-15 at PDF 133-134, Bates 2496-2497. But this raises three further issues. First, according to the record submitted, Cauley Kirkland and Daniel Sinas's traffic violations were reported by State Troopers in Dothan and thus should be present in LETS. Doc. 76-16 at PDF 19, Bates 2528 (agency listed under "charge" section). Additionally, according to an Alacourt search, the majority of Mr. Morris' traffic violations occurred in Dothan or elsewhere in Houston County. As the eleventh-largest county in the state by population, Houston County far from qualifies as a "smaller municipality." And, as the municipality of the trial court itself, one can assume that records originating therein would be considered by the state. So the prosecution's assertion that its records show that "none of the jurors had ever been charged with any offenses 'speeding or otherwise'" (Doc. 76-15 at PDF 80, Bates 2443) seems highly improbable.

840. Second, if the prosecutors knew that LETS was not inclusive, and really cared about eliminating all individuals with criminal histories, including speeding

tickets,[75] they would have checked Alacourt or other sources and they would also have *asked the venire* about the prospective jurors' criminal convictions and traffic tickets. If LETS truly is not as comprehensive as Alacourt – and there is every indication that it is – then it should strike the court as curious that the prosecution chose to use an incomplete database that was not publicly available or available to defense counsel instead of using the comprehensive and publicly available Alacourt database. Missing one white juror might truly be an oversight, but four certainly colors this reason as pretextual.[76] Mr. Williams and Mr. Dawsey were similarly situated to the five white jurors who had traffic records but were not struck. This kind of pretextual reasoning for the strike of a similarly situated juror is the very core of a *Batson* violation.

841. Third, and most simply, the prosecution never submitted the LETS reports into the evidentiary record or turned them over to the defense despite promising to do so. The prosecutor stated at the remand hearing that the State should be allowed to introduce LETS reports into the record because Mr. Wilson was allowed to enter Alacourt data. Doc. 76-16 at PDF 126, Bates 2489. The promised

[75] *See* Doc. 76-16 at PDF 57, Bates 2420 ("[W]hen we get through, you will see that anybody who had a conviction was struck, white or black. It didn't make any difference.").

[76] "Happenstance is unlikely to produce this disparity." *Miller-El v. Cockrell*, 537 U.S. 322, 342 (2003) ("*Miller-El I*").

LETS records never materialized. This omission should raise a specter of pretext over the State's purported reasoning for striking jurors with "criminal records."

842. The prosecution refused to recognize Mr. Morris's traffic violation on the record, stating that none of the final jurors had ever been charged with any offenses "speeding or otherwise." Doc. 76-16 at PDF 80, Bates 2443. The prosecutor then sought to justify his retention of Mr. Morris, despite his multiple speeding tickets, for two reasons. First, because "either he acknowledged or some of our law enforcement people acknowledged that he is close to people in law enforcement." Doc. 76-16 at PDF 128, Bates 2491. In reality, all that the prosecution knew was this:

PROSPECTIVE JUROR:	I know Jason Devane.
MR. VALESKA:	And what's your name?
PROSPECTIVE JUROR:	Derek – Richard Morris.

Doc. 76-7 at PDF 64-65, Bates 1269-1270. From this, the State could have no idea how Mr. Morris knew law enforcement or whether knowing law enforcement left Mr. Morris with positive or negative feelings about the State. But the State attempted to further bolster its reasons by adding that "Mr. Morris was an assistant principal in our school system . . . . And I know that assistant principals are usually fairly conservative people." Doc. 76-15 at PDF 129-128, Bates 2491-2492. But, yet again, the State did not ask Mr. Morris any questions to establish that he was, in fact, "fairly

conservative." Assumptions about jurors based solely on their occupation do not supply legitimacy to a party's strikes.[77] The proliferation of unsubstantiated reasons is itself suspect.

843. The State propounded similar off-the-cuff reasons for each of the five white jurors with traffic records who served. All of these explanations are *post hoc* rationalizations because the State claimed ignorance of their traffic records.[78] Therefore, the State did not keep them on the jury in spite of their records for the reasons stated at the *Batson* hearing. Before Mr. Wilson raised this challenge, the State assured the court that eliminating any juror with a criminal record was a priority. Doc. 76-15 at PDF 57, Bates 2420. The question here is whether the

[77] "[T]he following are illustrative of the types of evidence that can be used to show sham or pretext: . . . an assumption that teachers as a class are too liberal, without any specific questions having been directed to the panel or the individual juror showing the potentially liberal nature of the challenged juror." *Ex parte Branch*, 526 So. 2d 609, 624 (Ala. 1987) *accord*, *e.g.*, *Chivers v. State*, 796 S.W.2d 539, 542 (Tex. App. 1990); *People v. Bennett*, 206 A.D.2d 382, 384, 614 N.Y.S.2d 430, 432 (N.Y. App. Div., 2d Dep't 1994). The reverse must also be true, that a juror cannot be presumed to be pro-prosecution based on his occupation, especially where that assumption is proffered in a comparative juror context.

The *ad hoc* character of the State's justifications based on occupation is demonstrated by the contradictions about level of education Mr. Maxwell has argued. At one point, Mr. Maxwell justified a strike because the juror was an engineer, and he had learned at a conference that "they always overanalyze everything." Doc. 76-15 at PDF 71, Bates 2434. Yet, in the *Floyd* case, Mr. Maxwell testified: "[D]ue to the complexity of a capital murder case, … [w]e prefer jurors who have jobs or education that requires concentration and attention to detail and also analysis." 227 So. 3d at 3. While reasons for striking specific jurors might fade over a few years' time, an attorney's whole theory of jury selection would not.

[78] As discussed *infra*, a simple search of the publicly available Alacourt database would have immediately revealed the traffic records of the white jurors who ultimately served. If LETS is truly an incomplete database as the prosecution asserted, then they have little rationale for not asking further questions or consulting an alternative database.

prosecutor's assertion of ignorance of the white jurors' records is credible, not whether some other post hoc reason can be postulated for distinguishing them from the struck black jurors.

844. Because the prosecutor treated African-American and white jurors differently, the assertion that criminal history was a basis for the prosecutor's peremptory strikes is not adequate to overcome the presumption of discrimination created by the *prima facie* case. *See Miller-El v. Dretke,* 545 U.S. 231, 248 (2005) ("*Miller-El II*") (disparate treatment "severely undercut[s]" the legitimacy of the prosecutor's reason).

845. The prosecutor never articulated a reason specific to Mr. Wilson's case why traffic violations should disqualify a potential juror. *See Batson*, 476 U.S. at 98 ("The prosecutor therefore must articulate a neutral explanation related to the particular case to be tried."). Here, it is all too evident that the State came equipped with LETs records to disqualify African-American jurors only. Telling jurors not to inform the parties about traffic violations, "overlooking" four white jurors with traffic violations, and striking only African-Americans with traffic violations adds up to highly suspicious action. In this case, LETS records became the new literacy test or "crime of moral turpitude" – a smokescreen for impermissible discrimination.

2. "Young age."

846. At the *Batson* hearing, the prosecutor testified that he had another reason for removing Mr. Dawsey, namely his "young age" of 26. Doc. 76-15 at PDF 58, Bates 2421. He stated that Mr. Dawsey's age was a more important factor than his LETS record. *Id.* He had already explained at the beginning of his testimony that the State wanted older jurors, because, in his experience, "younger people are less likely to invoke the death penalty than older people." Doc. 76-15 at PDF 51, Bates 2414. This "experience" might be a justification for specifically asking younger people about their position on the death penalty,[79] but a class-based assumption such as this is improper, without further grounds for the strike. *Ex parte Branch*, 526 So. 2d at 624. And, immediately after giving this reason for striking younger jurors, the prosecutor disproved his point by talking about James Collins (Doc. 76-15 at PDF 51-52, Bates 2414-2415), a black 54-year-old (Doc 76-15 at PDF 62, Bates 2425), struck for his purported "hesitancy." *Id.* The trial record makes clear that it was consistently race, and not age, that the prosecution associated with a hesitancy about the death penalty.

847. But Mr. Dawsey's age is indubitably pretextual, because the prosecutor did ask him whether he could impose a death sentence, and he unequivocally

[79] The jurors specifically queried about the death penalty are listed in App. I. Of these, only four of 13 were under 40.

answered that he could. Doc. 76-7 at PDF 39-40, Bates 1244-1245. Mr. Dawsey, who indicated no difficulty with the death penalty, was the State's eighth strike (Doc. 76-15 at PDF 58, Bates 2421), while Mr. Collins, who said it would be "tough" (Doc. 76-7 at PDF 39, Bates 1244), was the twelfth (Doc. 76-15 at PDF 62, Bates 2425). In fact, three of the four jurors struck for cause because of opposition to the death penalty were "older" jurors, i.e., by the State's definition, over 40: Baker (45), Sharon Smith (61), and Whiting (55). *See* Doc. 76-12 at PDF 16-22, Bates 2077-2083 (venire list). The State's age-based reason was unsubstantiated.

848. During the *Batson* hearing, the State proclaimed that any juror under 44 had been struck by the State on this reluctance-to-impose-a-death-sentence theory. Doc. 76-15 at PDF 73, Bates 2436. But the State did not in fact strike Mr. Morris, the white assistant principal with a traffic record, who, at 34, was well under the state's self-proclaimed mid-40s cut-off. The State never asked Mr. Morris about his position on the death penalty.

849. Striking Mr. Dawsey because his young age suggested he would oppose the death penalty was directly contradicted by his definite answer, under oath, that he could impose such a sentence. Leaving on a similarly-situated white juror, about whose opinion the State knew nothing, shows that this "reason" was also a pretext.

3. Disparate questioning of white and African-American venirepersons.

850. At the *Batson* hearing, the prosecutor stated that his reason for removing Juror James Collins was that "he was the one that said it would be tough to render a death penalty recommendation." Doc. 76-15 at PDF 62, Bates 2425. This was the only reason given for this strike. After stating this reason, the prosecutor went into a long disquisition about why he would remove a juror who made this kind of response. Doc. 76-15 at PDF 62-69, Bates 2425-2432. He never gave any indication why Mr. Collins, out of a venire that included many similarly situated jurors in terms of age and occupation, was selected for direct questioning about the death penalty in the first place. The questioning of Mr. Collins was part of a larger pattern of the prosecution singling out black veniremembers with extensive and at time misleading questioning about their opposition to the death penalty.

851. During voir dire, the prosecutor targeted African-American veniremembers with questions designed to bait them into giving disqualifying responses. This questioning followed the court's qualification of the jury, which included death qualification. *See* Doc. 76-6 at PDF 181-186, Bates 1186-1191. The jurors specifically questioned by the prosecution, including Mr. Collins, had not responded to the court's questions,[80] so the prosecution's questioning was not

[80] The three jurors who expressed opposition were all removed for cause. Doc. 76-6 at PDF 184-185, Bates 1189-1190; Doc. 76-7 at PDF 122, Bates 1327.

premised on previously expressed opposition. As explained above, the jurors selected for any questioning at this point were disproportionately African-American, and the manner of questioning was significantly different for them.

852. In response to a long, baiting question in which the prosecutor himself suggested, "it's a tough question" (Doc. 76-7 at PDF 39, Bates 1244), Mr. Collins agreed "it would be tough" to impose a sentence of death:

> [MR. VALESKA:] But once again, I am just asking generally, and I know it's a tough question: Mr. Collins, can you do it? And if you say, no, I really don't think I can, Valeska, or I am only going to give you life without parole no matter what, that's okay. There's nothing wrong with that, Mr. Collins. But, you know, I just need to ask.
>
> PROSPECTIVE JUROR: It would be tough.
>
> MR. VALESKA: It would be tough. Thank you for your honesty. Okay.

Doc. 76-7 at PDF 40, Bates 1245. Mr. Collins did not say he could not or would not impose a death sentence; he merely agreed with the prosecutor that it would not be an easy decision, a perfectly legitimate stance. And the prosecutor did not follow up, but moved on directly to yet another African-American juror. *Id.* This failure to clarify equivocal responses on issues of claimed significance to the prosecutor undermines the legitimacy of a proffered reason. *See Miller-El II*, 545 U.S. at 244 ("[W]e expect the prosecutor would have cleared up any misunderstanding by asking further questions before getting to the point of exercising a strike.").

853. The legitimacy of the reason given for striking Mr. Collins is further undermined by the fact that the prosecutor questioned 88% of the African-Americans and only 13.5% of the white veniremembers. Additionally, Daphne Kirkland, the only African-American veniremember not questioned by the prosecution, had already indicated that she was unable to serve due to the demands of her work. Doc. 76-7 at PDF 4, Bates 1209. The prosecutor's questions for Kirkland disproportionately encouraged her to elaborate the grounds that justified striking her for cause.[81] Such targeted questioning is highly probative of the role of race in jury selection. *Miller-El II*, 545 U.S. at 256 ("Only 6% of white venire panelists, but 53% of those who were black, heard a different description of the death penalty before being asked their feelings about it.").

854. The prosecutor disproportionately targeted African-Americans with questions of a different kind than those he posed to the few white veniremembers he questioned. He gave an emotional twist to his questioning of Mr. Collins by assuring

[81] When Ms. Kirkland indicated that her employment might be an issue for her jury service, the prosecutor asked her, "In other words, if you don't work, you don't eat; is that right?" and continued to ask, "Do you have family, too, that you are supporting?" Doc. 76-7 at PDF 4, Bates 1209. A white juror, Ms. Green, who went to the stand right before Ms. Kirkland for a similar employment reason was asked the following question by the prosecutor: "Just one question. If this trial only takes Monday, Tuesday and Wednesday, in other words, approximate, and doesn't go the whole week, that would definitely help, wouldn't it?" Doc. 76-7 at PDF 3, Bates 1208. Though the two jurors, Ms. Kirkland and Ms. Green, came to the stand for nearly an identical reason, the prosecutor asked substantively different questions.

him, "If you are just sitting there and saying ... 'I can't do it.' It's all right." Doc. 76-7 at PDF 38, Bates 1243 (internal quotations added). He then promised that Mr. Collins would not be judged for his position on the death penalty. Doc. 76-7 at PDF 38, Bates 1243. When black venireman Bonzell Lewis said he "probably could" impose death, the prosecutor veered off into religious opposition to the death penalty, even though Mr. Lewis had not expressed religious qualms. Doc. 76-7 at PDF 42-44, Bates 1247-1249.

855. White veniremembers were not given similar assurances designed to elicit hesitation concerning the death penalty. Doc. 76-7 at PDF 10-60, Bates 1215-1265. Instead, they were addressed in technical terms about aggravating versus mitigating circumstances. For example, the prosecutor asked white juror Ryan Bond if he could be "satisfied beyond a reasonable doubt that an aggravating circumstance exists and it outweighs any mitigating." Doc. 76-7 at PDF 37-38, Bates 1242-1243 (Ryan Bond). In questioning white juror James Ferguson, the State again asked if he was capable of finding that the "aggravating outweighs the mitigating," and specifically pointed out that the sentencing phase would not even happen if the jury did not first find Mr. Wilson guilty. Doc. 76-7 at PDF 40, Bates 1245. This type of questioning is markedly different from how any black veniremember was questioned about the death penalty.

856. Because the only reason given for striking Mr. Collins was his qualified response to a leading question, a kind of question not posed to white veniremembers, and because the prosecutor did not attempt to clarify Mr. Collins' response or question any of the white veniremembers who eventually served on the jury, the prosecutor's proffered reason for striking Mr. Collins is inadequate to rebut the strong *prima facie* showing in this case.

C. The legal standard and its application.

857. "[T]he Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a defendant." *Batson*, 476 U.S. at 89. In *Batson*, the U.S. Supreme Court established a three-step process for assessing claims of racial discrimination. *Miller-El I*, 537 U.S. at 328-29 (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 Corrections*, 677 F.3d 1333, 1338-39 (11th Cir. 2012) ("Madison argues that the Court of Criminal Appeals unreasonably applied clearly established federal law because the court used the wrong standard for establishing a prima facie case when it required Madison to establish 'purposeful racial discrimination' rather than to provide sufficient support for an inference of

discrimination. We agree that requiring Madison to 'establish[ ] purposeful discrimination' is the wrong standard to apply for the first step of *Batson*, which only requires Madison to produce sufficient 'facts and any other relevant circumstances' that 'raise an inference . . . of purposeful discrimination.'").

858. In this case, a *prima facie* showing was made by appellate counsel against the prosecution based on the fact that all available African-American jurors were struck by the State, resulting in an all-white jury.[82] *Compare* Doc. 76-7 at PDF 125, Bates 1330 (listing names of jurors empaneled) *with* Doc. 76-12 at PDF 16-22, Bates 2077-2083 (venire list); Doc. 76-15 at PDF 74, Bates 2437 (testimony of ADA Maxwell). *See also* Appendix HH (chart of empaneled jurors). The State conceded before the ACCA that the required showing had been made. *Wilson I*, 142 So. 3d at 747-48. So only steps two and three remain at issue here. *See Foster*, 578 U.S. at 500.

859. 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.

[82] Neither the circuit court in its ruling on Mr. Wilson's Batson claim nor the ACCA acknowledge that an all-white jury heard this case. *See* Doc. 76-15 at PDF 32-41, Bates 2395-2404 and especially *id.* at PDF 33, Bates2396; *Wilson I*, 142 So. 3d at 746-48, 751-59.

860. At the hearing held on remand from the ACCA, one of the two trial prosecutors, Gary Maxwell, stated reasons for each of the 16 strikes made by the State. Doc. 76-15 at PDF 5473, Bates 2417-2436.

861. 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 (finding a strike based on a prospective juror's concern over school obligations pretextual where the trial court had ascertained that those obligations could be satisfied at a later time and the juror "did not express any further concern about serving on the jury); *Miller-El II*, 545 U.S. at 246 (finding a strike based on a prior conviction of a prospective juror's brother pretextual where that reason was advanced by the prosecutor only after he had urged another untenable reason which he did not defend and where the juror's "testimony indicated he was not close to his brother, . . . and the prosecution asked nothing further about the influence his brother's history might have had on . . . [the juror], as it probably would have done if the family history had actually mattered."). The court must then conduct a "sensitive inquiry," *Batson*, 476 U.S. at 93, considering "the totality of relevant facts," *id.* at 94. The "relevant facts" include the strength of the *prima facie* showing. *Miller-El I*, 537 U.S. at 340 (in analyzing whether, "despite the neutral explanation of the prosecution, the peremptory strikes in the final analysis were race based[, i]t goes without saying that this includes the facts and circumstances that were adduced

in support of the *prima facie* case."). *See also Adkins v.Warden, Holman CF*¸710 F.3d 1241, 1255 (11th Cir. 2013). Other factors may include disparity in the treatment of similarly-situated white and minority jurors, *see Miller-El II*, 545 U.S. at 241 ("More powerful than these bare statistics, however, are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve.") and *Adkins*, 710 F.3d at 1255; disparate questioning of white and minority jurors, *see Miller-El II,* 545 U.S. at 255-63; a failure to question on the topic of purported concern, *see Miller-El II*, 545 U.S. at 246 ("'The State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination.'") (quoting *Ex parte Travis*, 776 So. 2d at 881); and a history of discrimination, *Miller-El II*, 545 U.S. at 266. These factors must be considered in light of the complete trial record, as well. *Batson*, 476 U.S. at 94; *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008) ("[I]n reviewing a ruling claimed to be Batson error, all of the circumstances that bear upon the issue of racial animosity must be consulted") (citations omitted); *Foster*, 578 U.S. at 501 ("We have 'made it clear that in considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted.'").

862. The question for the court is the credibility of the prosecutor, *Batson*, 476 U.S. at 98 n.21, and "the plausibility of th[e State's proffered] reason[s] in light of all evidence with a bearing on it," *Miller-El II*, 545 U.S. at 251-52. "This final step involves evaluating 'the persuasiveness of the justification' proffered by the prosecutor." *Rice v. Collins*, 546 U.S. 333, 338 (2006) (quoting *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (*per curiam*)). "In the typical challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge *should be believed." Hernandez v. New York*, 500 U.S. 352, 365 (1991) (emphasis added). "If any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much more than *Swain*." *Miller-El II*, 545 U.S. at 240.

863. A court reviewing a *Batson* claim cannot fill in the gaps for a prosecutor who has stated his reasons for his strikes on the record. "The reasons stated by the prosecutor provide the only reasons on which the prosecutor's credibility is to be judged." *Parker v. Allen*, 565 F.3d 1258, 1271 (11th Cir. 2009) (citing *United States v. Houston*, 456 F.3d 1328, 1335 (11th Cir. 2006)). "[A] prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives." *Miller-El II*, 545 U.S. at 252. Where a prosecutor's "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." *Id.*

Each of a prosecutor's reasons is not to be assessed in a vacuum, divorced from all others:

> [T]he State's failure to articulate a legitimate reason for its challenge of veniremember number 26 exposes its rationale for subsequent strikes to greater scrutiny. . . . Thus, even explanations that would ordinarily pass muster become suspect where one or more of the explanations are particularly fanciful or whimsical. . . .
>
> The explanation offered for striking each black juror must be evaluated in light of the explanations offered for the prosecutor's other peremptory strikes, and as well, in light of the strength of the prima facie case. The persuasiveness of a proffered explanation may be magnified or diminished by the persuasiveness of companion explanations, and by the strength of the prima facie case.

Ex parte Bird, 594 So. 2d 676, 683 (Ala. 1991) (citations omitted). *See also Snyder*, 552 U.S. at 478 ("[I]f there were persisting doubts as to the outcome, a court would be required to consider the strike of Ms. Scott for the bearing it might have upon the strike of Mr. Brooks.").

864. A racially motivated strike against a single juror violates *Batson*. *See Batson*, 476 U.S. at 95 ("A single invidiously discriminatory governmental act is not immunized by the absence of such discrimination in the making of other comparable decisions.") (internal quotation marks omitted). *See also Snyder*, 552 U.S. at 477 ("Because we find that the trial court committed clear error in overruling petitioner's *Batson* objection with respect to Mr. Brooks, we have no need to consider petitioner's claim regarding Ms. Scott.") (citations omitted).

865. Here, at the circuit court hearing on remand from the ACCA, Mr. Wilson's counsel first established that Mr. Maxwell was the prosecutor in the recent *Floyd* case, where all black jurors were also struck. Doc. 76-15 at PDF 80, Bates 2443. Counsel reminded the court that in Mr. Wilson's case the prosecution also struck all available African-American jurors. Doc. 76-15 at PDF 87-88, 94-95, Bates 2450-2451, 2457-2458. Counsel called the court's attention to the disparity in treatment based on purported criminal histories by demonstrating that five white jurors who served had traffic violations similar to those of the struck black jurors, Mr. Dawsey and Mr. Williams. Doc. 76-15 at PDF 84-85, Bates 2447-2448. The white jurors' Alacourt records were made part of the record of the hearing. *See* Doc. 76-16 at PDF 14-20, Bates 2523-2429. Mr. Wilson's counsel also demonstrated the State's erroneous supposition that younger jurors are more likely to oppose the death penalty. Doc. 76-15 PDF 82-23, Bates 2445-2446.

866. On the strike of Mr. Collins for opposition to the death penalty, Mr. Wilson's counsel cited the fact that the State disproportionally targeted black prospective jurors by questioning seven out of eight of them, the eighth being a venirewoman who had already indicated cause to be struck. Doc. 76-15 at PDF 86-87, Bates 2449-2450. Counsel noted that Mr. Collins did not respond to the court's questions during death qualification, indicating he was not opposed. Doc. 76-15 at PDF 88, Bates 2451. Counsel described how Mr. Collins was targeted with a lengthy

leading question which encouraged him to express doubts. Doc. 76-15 at PDF 89, Bates 2452. When Mr. Collins agreed imposing a death sentence "would be tough", the DA did not question him further to assess the degree of difficulty, even though the DA did follow up after the somewhat equivocal head-nodding of white juror Ryan Bond. Doc. 76-15 at PDF 90-91, Bates 2453-2454.

867. Overall, Mr. Wilson's counsel also noted the State's failure to question or follow up on subjects of purported concern. Doc. 76-15 at PDF 88-90, Bates 2451-2453. Counsel cited the Houston County DA's numerous reversals for Batson violations (*see*, *e.g. id.* at Doc. 76-15 at PDF 95-96, 99-103 , Bates 2458-2459, 2462-2466), to which the DA vociferously objected. *See*, *e.g.* Doc. 76-15 at PDF 95, 96-98, 103-104, Bates 2458, 2459-2461, 2466-2467.

868. The prosecution's action at trial in removing all black jurors and the reasons put forward by the State at the *Batson* hearing must be considered as a whole, along with the points argued by Mr. Wilson and the evidence in the trial record. A powerful indicator of discrimination is the 100% removal of African-American jurors. *Johnson*, 545 U.S. at 169-70 (recognizing that evidence that the State struck all black persons on the venire is a basis for an inference of discrimination); *McGahee v. Ala. Dep't of Corr.*, 560 F.3d 1252, 1265 (11th Cir. 2009) (the state court's failure to consider the State's removal of all African-American prospective

jurors through for-cause and peremptory strikes was an unreasonable application of *Batson*). The State's reasons must be assessed against this backdrop.

869. As set out above, the State sought to justify the strikes of Mr. Dawsey and Mr. Williams on the basis of their purported LETS records. Doc. 76-15 at PDF 56-58, Bates 2419-2421. Multiple factors demonstrate the pretexuality of this reason. First, the records themselves were not introduced into the record, despite Mr. Wilson's challenge to their content (Doc. 76-15 at PDF 81-82, Bates 2444-2445) and the State's unfulfilled promise to produce them: "And what we have from LETS, we will provide to them." Doc. 76-15 at PDF 141, Bates 2504. The State challenged Mr. Wilson's submission of the Alacourt records unless it was permitted to enter the LETS records, and the court agreed both parties could submit their documentation. Doc. 76-15 at PDF 126, Bates 2489. Instead, after the hearing, the State filed an objection to Mr. Wilson's Alacourt records. Doc. 76-16 at PDF 16-17, Bates 2525-2526.

870. Since Mr. Maxwell's testimony stated that LETS includes "anywhere from a speeding offense all the way up" (Doc. 76-15 at PDF 56, Bates 2419), the court cannot assume that the jurors in question necessarily had records containing anything more severe than a speeding ticket.[83] The State did not assert that they had

[83] And this is, in fact, correct. *See* Appendices KK and LL.

anything more serious in their "criminal history."[84] The State did assert that Mr. Williams had "14 speedings" (Doc. 76-15 at PDF 56-57, Bates 2419-2420), but, again, since the LETS record was not introduced, it cannot be assumed that all of these were actually part of this juror's record, given that the court reporter even misspelled his name. *Compare* Doc. 76-15 at PDF 56, 87, Bates 2419, 2450 *with* Doc. 76-12 at PDF 22, Bates 2083.[85] It is also relevant that neither Mr. Willliams nor Mr. Dawsey responded to the question respecting convictions, "excluding speeding." Doc. 76-7 at PDF 52, Bates 1257.

871. Second, and most telling, the State at trial specifically instructed jurors *not* to report "speeding tickets." *Id.* It is well-established that reliance on a reason about which no questions are asked is strong evidence that the reason is pretextual. *Miller-El II*, 545 U.S. at 246. But here the State not only asked no questions, it affirmatively told jurors it was not interested in speeding tickets.

872. Third, and compounding the second point, the State claimed to have no knowledge of the traffic records of, not one, but *five* white jurors. Doc. 76-15 at PDF 84-85, 131-133, Bates 2447-2448, 2494-2496. Even if Mr. Maxwell can be believed

[84] The State was able to identify the actual charge, DUI, for four jurors. Doc. 76-15 at PDF 54-56, 60, Bates 2417-2419, 2423.

[85] *Compare also* Appendix KK, showing Darran Williams' actual record, *with* Appendix JJ, showing several other "Darren" Williamses. The circuit court's order denying the *Batson* claim varies from the correct "Darran" to "Darron" and "Darren." Doc. 76-15 at PDF 33, 36, 37, Bates 2396, 2399, 2400.

about the faults of LETS, had the State questioned jurors about their traffic record, it is more likely than not that the white jurors would have come forward with this information. It is highly suspicious that the State did not ask for this information in open court, where it could not control the response and, therefore, the record. If it is truly the State's belief that LETS provides a more complete and accurate picture of criminal records than Alacourt, then the State has no excuse for not identifying the prior traffic records of five impaneled white jurors.

873. Fourth, Mr. Maxwell's explanation about the shortcomings of LETS rings hollow. The State purported to be very concerned about removing any and every juror with a "criminal" history. Doc. 76-15 at PDF 57, Bates 2420 ("[W]hen we get through, you will see that anybody who had a conviction was struck, white or black. It didn't make any difference."). But if LETS was known to be deficient in its coverage, the State had other resources available, such as Alacourt. The State's assertion that Alacourt was unavailable to them (Doc. 76-16 at PDF 16, Bates 2525) is simply not true. Furthermore, of the records submitted by Mr. Wilson, that of Mr. Kirkland shows that his ticket was issued by the State Troopers in Dothan (Doc. 76-16 at PDF 19, Bates 2528), not a smaller municipality as postulated by Mr. Maxwell (Doc. 76-15 at PDF 133-134, Bates 2496-2497).

874. Any one of the above points renders "criminal history" as a reason to strike Jurors Dawsey and Williams pretextual, but all of them together indubitably do.

875. Since the State had no second reason for striking Mr. Williams, and since the one reason given is demonstrably pretextual, the State discriminated on the basis of race in striking Mr. Williams. This strike alone requires the vacation of Mr. Wilson's convictions and sentence.

876. But if there were any question remaining, there is more. As noted earlier, *see supra* paragraph 841, the State put forward a second reason for striking Mr. Dawsey, his age. Doc. 76-15 at PDF 58, Bates 2421. According to Mr. Maxwell, this reason was even more important than Mr. Dawsey's "record." *Id.* At the beginning of his testimony, Mr. Maxwell explained generally that the State, in its experience, had found younger jurors more likely to be opposed to the death penalty than older jurors. Doc. 76-15 at PDF 51, Bates 2414. This was the reason for adopting "young age" as a reason to strike. Doc. 76-15 at PDF 75-76, Bates 2438-2439. The problem for the State is twofold: first, it has long been widely understood that general assumptions about a class are impermissible without questioning to determine whether the assumption actually applies to a specific juror. *See*, *e.g.*, *Miller-El II*, 545 U.S. at 246; *Ex parte Branch*, 526 So. 2d at 624; *Chivers v. State*, 796 S.W.2d 539, 542 (Tex. App. 1990); *State v. Broussard*, 2016-230 (La.App. 3

Cir. 9/28/16), 201 So.3d 400, 407 (La. App. 2016). Second, the State did question Mr. Dawsey about his views on the death penalty, as one of the seven black jurors so targeted, and he expressed no reservations about his ability to vote for the death penalty. Doc. 76-7 at PDF 39-40, 1244-1245. Therefore, in his case, the assumption was soundly *dis*proved.

877. If this were not enough, the State's assumption was further disproved by the fact that of the four jurors removed for cause because of their opposition to the death penalty, only one was under 40. *See* Appendix FF (Chart of jurors removed for cause or hardship). And Mr. Collins, who was removed specifically for his purported hesitancy, was 54. Doc. 76-15 at PDF 62, Bates 2425; Doc. 76-12 at PDF 17, Bates 2078. Thus, there is no legitimacy to this second reason for striking Mr. Dawsey.

878. Finally, the State's reason for striking Mr. Collins, that he expressed hesitation about his ability to impose a death sentence (Doc. 76-15 at PDF 62, Bates 2425) is likewise less than credible. Mr. Collins did not respond when the court questioned the venire about opposition to the death penalty. He obviously did not put himself in that category. The State questioned the venire further on this issue, which it is permitted to do, but the fact that only some jurors were asked, and that those jurors were predominantly African-American, is highly suspect. As explained above, seven of the eight remaining black jurors were questioned, but only five of

the remaining 37 white jurors were. *See* Appendix II (Chart of jurors questioned by DA Valeska about their views on the death penalty). The choice of jurors to question is itself racially skewed.

879. But the long, leading preamble to the question asked of Mr. Collins, suggesting that the choice would be "tough" and that Mr. Collins would not be judged negatively if he admitted he "just can't do it" (Doc. 76-7 at PDF 38-39, Bates 1243-1244), differed significantly from the abrupt, technical questioning of white jurors such as Ryan Bond and James Ferguson. Doc. 76-7 at PDF 37, 40, Bates 1242, 1245. All of this suggests that the prosecutor was on a fishing expedition for reasons to strike black jurors that would provide cover for his real reason—their race. Once he elicited the answer he wanted—"it would be tough"—despite its provisional character, he inquired no further. *See Miller-El II*, 545 U.S. at 232 (finding failure to question further juror's views on death penalty versus rehabilitation indicated pretext). Thus, Mr. Collins never said he could not or would not vote for death, if appropriate. Such discriminatory tactics, however veiled, violate *Batson*.

880. District courts in this Circuit have repeatedly found that a state court's failure to take proper account of a record of misleading and inconsistent voir dire questioning regarding opposition to the death penalty constitutes an unreasonable application of clearly established *Batson* law under AEDPA. *See Hall v. Thomas*, 977 F. Supp. 2d 1129, 1131 (S.D.Al., Sept. 30, 2013) (finding that an Alabama state

court's failure to recognize that a prosecutor's proffered reason for striking an African-American prospective juror—opposition to the death penalty—was categorically at odds with the juror's responses on a jury questionnaire, and that this failure constituted an unreasonable application of *Batson*'s third-step jurisprudence); *Stephens v. Haley*, 823 F. Supp. 2d 1254, 1257 (S.D. Al., Oct. 6, 2011) (finding that an Alabama state court's refusal to consider a prosecutor's failure to ask follow-up questions regarding opposition to the death penalty constituted a "violation of clearly established federal law" under *Batson* and AEDPA). The facts in Mr. Wilson's case clearly demonstrate a proffering of pretextual reasons for racially discriminatory strikes related to opposition to the death penalty and an unreasonable deviation from *Batson.*

881. In addition to the questionable character of the prosecution's reasons for striking individual jurors, the state courts were obligated to consider the reasonableness, or plausibility, of Mr. Maxwell's whole theory of jury selection, which he put on the record. In particular, Mr. Maxwell explained that he begins with a "gut feeling" as the foundation of his strikes. Doc. 76-15 at PDF 59, Bates 2422. However, Alabama courts have explicitly prohibited jury selection based on "gut reaction" or "gut feelings." *See*, *e.g.*, *Ex parte Yelder*, 630 So. 2d 107, 109 (Ala. 1992); *Ex parte Bird*, 594 So. 2d at 684.

882. While each of the above points demonstrates the pretextual character of the State's reasons, all of them together, along with the 100% removal of African-American jurors, create a solid case of racial discrimination. With or without the prior history of the Houston County District Attorney's Office's documented proclivity to discriminate, Mr. Wilson established that it definitely did so in his case.

883. 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. Therefore, Mr. Wilson's convictions are due to be vacated. Mr. Wilson requests discovery and a hearing on this issue.

D. The ACCA's decision is an unreasonable application of *Batson* case law and rests on unreasonable findings of fact.

884. The ACCA'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 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 altogether the highly

relevant factor that all available black jurors were struck by the State, leaving an all-white jury, and reversed the burden of proof, placing it on Mr. Wilson to disprove LETS records he did not have access to. The ACCA's analysis in no way comported with consideration of "the totality of relevant facts" required by *Batson*. 476 U.S. at 94. *See also supra*, paragraphs 348 through 350.

885. The prosecution's alleged reasons for the strikes at issue failed to rebut the powerful inference of discrimination raised by the record. But, first and foremost, in denying Mr. Wilson's *Batson* claim, the ACCA on remand erroneously failed to consider the prosecutor's total exclusion. *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*).

886. The prosecution's total exclusion of black veniremembers 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 at 680 (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 at 624 (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.

887. The unreasonableness of the ACCA's analysis continued in its discussion of the propounded reasons themselves. 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 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.

888. The ACCA further misapplied comparative juror analysis in addressing the fact that at least five white jurors served despite their traffic violations. 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, as set out above, 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.

889. 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 it 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 puzzling that they chose to rely on LETS to do so, which they claim is an incomplete database. 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.

890. 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*, 560 F. 3d at 1256.

891. The ACCA then justified the State's actions in striking Jurors Dawsey and Williams because a number of white jurors with criminal records were struck.[86] *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

[86] 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.

situated, and the black juror is struck, but the white juror is not, the question is whether some distinction besides race justifies the strike.[87] The ACCA never addressed the comparison of Jurors Dawsey and Williams to the white jurors with traffic tickets who served. Therefore, there is no state court opinion to defer to on that point. *See Romine v. Head*, 253 F.3d 1349, 1365 (11th Cir. 2001) ("[W]e have grave doubt that the Georgia Supreme Court applied federal law at all, let alone the governing law set down in Supreme Court decisions. Failure to apply that governing law (or the same rule in state law) is tantamount to applying a rule that contradicts governing law, for these purposes. And under *Williams* that means the federal habeas court 'will be unconstrained by § 2254(d)(1) because the state-court decision falls within that provision's "contrary to" clause.' . . . In other words, when there is grave doubt 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.")

892. 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

[87] The tendency to suppose that the choice here is either-or must be avoided. If the State did not strike the black juror, it does not follow that it would have had to strike the white juror. The State could have chosen to strike yet another juror for a completely different reason.

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.

893. Mr. Wilson has proved that at least two African-American veniremen were struck for pretextual reasons. 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.

894. The ACCA also erred in its consideration of the strike of Mr. Collins for purported hesitation respecting the death penalty. *Wilson I*, 142 So. 3d at 754-55. First, 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. 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.

895. The ACCA also 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, as previously described. *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. No suggestions of difficulty in the decision or understanding if he could not. 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. 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*, 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 mere fact that seven of eight black jurors were addressed at all, but only five white jurors, must be factored into the questioning specifically addressed to Mr. Collins. But the ACCA did not.

896. The ACCA's decision unreasonably applies *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.

897. 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.

898. Finally, 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 had worked in the DA's office for more than 30 years, including 24 to 25 years as chief assistant under the DA 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.

899. Because the ACCA found reasons to deny relief on every individual aspect of Mr. Wilson's *Batson* claim, 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.

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.

900. Mr. Wilson's trial counsel filed a motion to prohibit the State from introducing victim impact testimony at the guilt phase, which the trial judge properly granted. Doc. 76-2 at PDF 99, Bates 299. The defense also made two motions *in limine* on similar issues: the first, to prohibit testimony concerning irrelevant victim characteristics, relying on *Gissendaner v. State*, 949 So. 2d 956, 965 (Ala. Crim. App. 2006). Doc. 76-6 at PDF 158, Bates 1163. The trial judge denied this motion. Doc. 76-6 at PDF 158, Bates 1163. The second motion *in limine* requested that the prosecutor be prohibited from referring to potential punishments until the sentencing phase. Doc. 76-6 at PDF 154-155, Bates 1159-1160. This was also denied. Doc. 76-6 at PDF 155, Bates 1160. Even though the court granted the first motion, Mr. Valeska repeatedly injected irrelevant and inflammatory testimony regarding the personal characteristics of Mr. Walker, the pain from the injuries inflicted on him, and other sentencing phase issues into the guilt phase without correction by the trial court.

901. The prosecution began by eliciting irrelevant, prejudicial, and inflammatory evidence regarding personal characteristics of the victim. The victim's supervisor, Jimmy Walker, testified that Dewey Walker had been sick before his death and that his condition had caused weight loss and made him very frail. Doc. 76-7 at PDF 161-162, Bates 1366-1367. The trial judge also allowed Jimmy Walker's testimony that Dewey Walker's wife had died and that he had discussed retiring soon. Doc. 76-7 at PDF 162, Bates 1367. To close out his direct examination, Jimmy Walker was allowed to assert that Dewey Walker had a "decent salary" and that he would have qualified for retirement had he lived long enough. Doc. 76-7 at PDF 176, Bates 1381. None of these facts were relevant to guilt.

902. Next, the trial court allowed Mr. Valeska to make improper arguments about the testimony of Dr. Enstice, the forensic pathologist who performed the autopsy on Mr. Walker. Dr. Enstice testified to her belief that Mr. Walker felt pain and torture during the attack:

> "Those are very painful. ... [H]e did incur pain from the fractures." Doc. 76-9 at PDF 44, Bates 1651.
>
> "[H]e did feel pain, yes." Doc. 76-9 at PDF 47-48, Bates 1654-1655.
>
> "In my opinion, very painful." Doc. 76-9 at PDF 49, Bates 1656.
>
> "I have seen that in a number of autopsy cases ... where people were in obvious pain." Doc. 76-9 at PDF 55, Bates 1662.

> "Oh, yes. Yes." (Agreeing to Mr. Valeska's characterization that Mr. Walker suffered "a lot of pain and suffering and torture for a 64-year-old man.") Doc. 76-9 at PDF 134, Bates 1741.

See also Doc. 76-9 at PDF 45, 59, Bates 1652, 1666. After discussing chain of custody, Dr. Enstice went into the amount of pain Mr. Walker allegedly suffered at great length:

> Q. Now, can you tell us, in your opinion, of those 114, as a forensic pathologist, with Mr. Walker at his age, would he have felt pain?
>
> A. Oh, yes.
>
> Q. How much pain? On a scale of zero to none, 10 being extreme, in your opinion, how much pain?
>
> A. With rib fractures and a sternal fracture, those are painful. Those are very painful. Skull fractures to the base of the skull and a depressed skull fracture in the top of his skull, given the nature of what I saw at the autopsy, pain – yes, he – he did incur pain from the fractures.
>
> Q. In your opinion, was that protracted or extended a long period of time that he felt those injuries? In other words, would five minutes and it have been over – or based on the internal examination of what you found, would he have felt pain and suffered longer than that?
>
> A. Yes. In my opinion, based on what I found in regard to his breathing in blood, which there was a pattern of breathing in blood in all lobes of both lungs, which is indicative of Mr. Walker being alive for a period of time, hours, if you will – he is breathing in blood, so we know he is alive.
>
> Q. Now, can you tell the ladies and gentlemen of the jury, when you looked externally on his body externally, before you did an internal exam of the skull, anything in the ears that you saw?

Doc. 76-9 at PDF 144-145, Bates 1751-1752. And it continues.

903. Based on this testimony, Mr. Valeska impermissibly shaped his guilt phase closing as a sentencing plea for why Mr. Walker's death was heinous, atrocious, and cruel under Alabama law. Often employing inflammatory language, the DA repeatedly emphasized that Mr. Walker suffered during his death. For example, he argued, "Dewey Walker was alive during this hell – this reign of terror brought down by David Wilson." Doc. 76-9 at PDF 148-149, Bates 1755-1756. He embroidered throughout on the theme that Mr. Walker's death was torturous: "How come you continue to hit, strike, beat, choke, attack, physically whip, torture, inflict a high degree of pain for sheer enjoyment on a defenseless man?" Doc. 76-9 at PDF 158, Bates 1765. This was followed shortly by, "He tortured him. What's it like? What's it like – the last breath you have in the world ...." Doc. 76-9 at PDF 160, Bates 1767. This last argument is a universally forbidden Golden Rule argument. *See*, *e.g.*, *Hodge v. Hurley*, 426 F.3d 368, 384 (6th Cir. 2005); *People v. Vance*, 188 Cal. App. 4th 1182, 1188, 116 Cal. Rptr. 3d 98, 102 (2010).

904. The prosecutor continued to focus on the pain Mr. Walker must have felt (Doc. 76-9 at PDF 163, Bates 1770) and emphasized the length of time Mr. Walker endured this pain, *see*, *e.g.* Doc. 76-9 at PDF 159, Bates 1766 ("[The pathologist] said in her professional opinion ... [a]t least two hours he was alive. Was he conscious? ... In the least two hours – and it could have been what? Even longer? 8, 10, 12, a day, even more?"). Pain, torture, and prolonged suffering are key

elements of the especially heinous, atrocious, and cruel aggravator, which is properly considered at the penalty phase of a capital trial, *see* Ala. Code § 13A-5-49(8), but not the guilt phase.

905. Amidst these inflammatory, improper, irrelevant, and prejudicial comments, the prosecutor told the jury, "Come on, Valeska, this is a death penalty case." Doc. 76-9 at PDF 164, Bates 1771. Defense counsel contemporaneously objected to this improper sentencing reference (Doc. 76-9 at PDF 165, Bates 1772), but the trial court overruled the objection (Doc. 76-9 at PDF 166, Bates 1773).

906. The U.S. Supreme Court rejected 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 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).

> 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.

> [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 commented 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 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). It has no application 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).

907. The improper admission of these sentencing phase issues, including victim characteristics, victim impact evidence, and the death penalty itself, at the guilt phase undermine the validity of Mr. Wilson's convictions and death sentence under clearly established federal law. *See id.* The injection of sentencing-phase considerations into the guilt phase deprived Mr. Wilson of due process, a fair trial, and a reliable sentence, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution. Therefore, Mr. Wilson's convictions and sentence are due to be vacated.

908. The ACCA postulated several reasons to excuse these errors, each of them unreasonable. As 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 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 125, 126 (Ala. 1993) (emphasis in original).

909. The ACCA acknowledged 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. However, in relying on *Ex parte Rieber*, 663 So. 2d 999 (Ala. 1995), to find that "any error was harmless," *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.

910. On the second issue, 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.

911. 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).

912. 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 in this Claim. As the United States 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. Mr. 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 off his wholly unjustifiable "inference" from the truncated recording of Mr. Wilson's statement. None of the District Attorney's misconduct in this case was prompted by any defense action.

913. 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)). In evaluating this question, this Court must

consider not only the flagrantly unconstitutional actions here, but also the other grounds enumerated in this petition both as to trial court error and prosecutorial misconduct.

914. Since the ACCA's ruling on the injection of sentencing considerations into the guilt phase is unreasonable (*see also supra* paragraphs 348-350), 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. Mr. Wilson requests discovery and a hearing on this issue.

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.

915. Mr. Valeska's guilt phase closing arguments distracted the jury from the crucial task of evaluating the facts and, instead, urged the jury to decide the issues based on its emotional reactions. Valeska sought to arouse in the jurors feelings of hostility toward Mr. Wilson and sympathy for the victim. These premeditated tactics violated long-settled principles of federal law that prohibit prosecutors from making arguments "calculated to inflame the passions or prejudices of the jury." *Berger*, 295 U.S. at 85-89; *Viereck v. United States*, 318 U.S. 236, 247 (1943).

1. The DA sought to arouse in jurors a personal hostility toward and fear of Mr. Wilson.

916. Throughout his arguments at the guilt phase, Mr. Valeska sought to arouse the jurors' personal hostility towards and fear of Mr. Wilson and to distract them from appreciating the fact that the only evidence of Mr. Wilson's involvement in the crime, his own statement, contradicted the State's theory of guilt.

917. During both opening and closing, Mr. Valeska highlighted bad acts and character evidence which should have been excluded. For example, during his opening statement, the DA asserted that Mr. Wilson went back to the victim's house with Corley, who enjoyed seeing the body. Doc. 76-7 at PDF 145-146, Bates 1350-1351. He also remarked that Mr. Wilson joked with his accomplices about not having the keys to Mr. Walker's van. Doc. 76-9 at PDF 167, Bates 1774. Neither of these details had anything to do with the elements of the offense. But the DA went even further. In his opening, asserting what the evidence would show

> He [Mr. Wilson] admits that he went back over there with Catherine Corley and drank Dewey Walker's milk that Dewey had brought home from the grocery store. Drank his milk and stood over him while Dewey was lying there, while Corley ate a candy bar in this 64-year-old man's home, the one place he thought he would be safe and secure.

Doc. 76-7 at PDF 148, Bates 1353. And he repeated this allegation in his closing: "They drank his milk – stood over his body and drank his milk." Doc. 76-9 at PDF 153, Bates 1760.

918. There is nothing in Mr. Wilson's statement or anywhere in the trial record to support this. In fact, Mr. Wilson emphatically denied accompanying Corley into the kitchen at all. Doc. 76-3 at PDF 127, Bates 529. The DA made plain that these arguments were intended as a direct line of attack on Mr. Wilson's character when he asked, "What's that tell you about that man that sits over there?" Doc. 76-9 at PDF 167, Bates 1774. In doing so, the DA invited the jury to make its guilt phase determination based on Mr. Wilson's purported propensity to commit bad acts or his general bad character. The U.S. Supreme Court in *Williams* noted that the rules of evidence were designed to prevent jurors in a criminal trial "from being influenced to convict for that offense by evidence that the defendant had habitually engaged in other misconduct." 337 U.S. at 247. Absent a legitimate ground for the jury's consideration of such evidence, the comments here are precisely the type of inference that the rules of evidence prohibit. *See*, *e.g.*, *id.* ("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*") (emphasis added).

919. In addition, the prosecutor repeatedly resorted to outright character assaults against Mr. Wilson. At various points, the DA referred to Mr. Wilson as a "coward," (Doc. 76-9 at PDF 153, Bates 1760), "death and destruction," (Doc. 76-9 at PDF 158, Bates 1765) and a "cold, calculated, depraved, evil, wicked person"

(Doc. 76-9 at PDF 159, Bates 1766). Such name-calling was absolutely irrelevant to the question of guilt or innocence. 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").

920. Finally, after describing some of Mr. Walker's injuries, the DA directly addressed Mr. Wilson about his statement that he accidentally hit the victim. Doc. 76-9 at PDF 152, Bates 1759. The prosecutor drove home his point by brandishing a bat in front of the jury: "Go back there and look at the clock and see how quickly you can do this 114 times (indicated)." Doc. 76-9 at PDF 153, Bates 1760. This characterization is unsupported by the record. The State's pathologist testified that Mr. Walker had 114 "bruises or contusions and scratches or abrasions," not that Mr. Walker was hit 114 separate times. Doc. 76-9 at PDF 43, Bates 1650. When the prosecutor asked Dr. Enstice if these injuries were sustained separately, she stated, "some could have occurred at the same time." Doc. 76-9 at PDF 44, Bates 1651. By arguing facts not in evidence, the prosecutor denied Mr. Wilson the opportunity to rebut these assertions, in violation of his due process right to a fair trial. *See Skipper v. South Carolina*, 476 U.S. 1, 7 n.1 (1986) ("[I]t is . . . [an] elemental due process requirement that a defendant not be sentenced to death 'on the basis of information which he had no opportunity to deny or explain.'").

921. All of these arguments were improper and prejudicial because they exaggerated what the evidence showed about the extent of Mr. Wilson's responsibility for the death of Mr. Walker or they sought to distract the jurors from the facts critical to a determination of Mr. Wilson's innocence or guilt. In *Viereck*, the Court condemned a blatant attempt to convict based on passions rather than facts:

> [W]e direct attention to conduct of the prosecuting attorney which we think prejudiced petitioner's right to a fair trial, and which . . . might well have placed the judgment of conviction in jeopardy. In his closing remarks to the jury he indulged in an appeal wholly irrelevant to any facts or issues in the case, the purpose and effect of which could only have been to arouse passion and prejudice.

318 U.S. at 247. The DA in this case likewise stepped outside the bounds of "any facts or issues in the case" in making these arguments.

922. The DA's improper arguments 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. Therefore, Mr. Wilson's convictions and sentence are due to be vacated.

923. The ACCA, rather than condemning these improprieties, excused them as within bounds because supported by the evidence. *Wilson I*, 142 So. 3d at 780-83. But drinking milk and eating candy over the prostrate body of Mr. Walker was a fabrication, as were the 114 blows. The ACCA ignored these inventions and failed to address the inflammatory character of the remarks. By upholding the DA's

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.

924. Since the ACCA's ruling was unreasonable, this Court should review Mr. Wilson's claim using the appropriate analysis, find the DA's remarks impermissibly inflammatory, improper and prejudicial to 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.

2. The prosecutor impermissibly appealed to the jurors' sympathies for the victim as a reason to convict.

925. On numerous occasions, the prosecutor blatantly appealed to the jurors' sympathy for the victim as a reason why Mr. Wilson should be convicted of capital murder. The transcript is littered with these references, such as, "his poor little old chest was still pumping up and down with that heart going, and he was still breathing." Doc. 76-9 at PDF 151, Bates 1758. Mr. Valeska even created a theatrical scenario in which he adopted the imagined point of view of the deceased victim:

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

> Quit hitting me. Leave me alone. I am elderly. What do you want from me?

Doc. 76-9 at PDF 153-154, Bates 1760-1761. Defense counsel immediately objected to this unsubstantiated dramatization, but the trial court overruled the objection. Doc. 76-9 at PDF 154, Bates 1761.

926. This comment not only asked the jury to imagine what the victim would tell them about the pain he suffered, but also urged the jury to consider the prosecutor's speculation of how the victim might testify as evidence of guilt. Such personal opinions of the prosecutor, when divorced from the evidence introduced at trial, are never proper because they invade the province of the jury to determine the facts. *See United States v. Young*, 470 U.S. 1, 7-8 (1985) ("Prosecutors sometimes breach their duty to refrain from overzealous conduct by . . . offering unsolicited personal views on the evidence.")

927. The prosecution asked the jury several more times to imagine what the attack must have been like for Mr. Walker. Doc. 76-9 at PDF 160, Bates 1767 ("He tortured him. What's it like?"); (Doc. 76-9 at PDF 161, Bates 1768) ("What's it like?"); (Doc. 76-9 at PDF 162, Bates 1769) ("What was it like for Mr. Walker? In other words, all this force applied to him."); (Doc. 76-9 at PDF 170, Bates 1777) ("Can you imagine what it was like for about six minutes for Mr. Walker who was being choked. . . ."). Having the jurors "imagine" what Mr. Walker's attack felt like was irrelevant to the guilt phase. The prosecutor's comments, therefore, could only

have distracted the jurors from the objective inquiry they were required to conduct. The natural tendency of such appeals to sympathy is to heighten the jurors' antipathy for the accused and persuade them to judge the case by their passions alone.

928. These remarks, like those detailed in the first section, served no purpose but to inflame the jurors. They likewise were contrary to the prohibitions set out in the cases cited above. The prosecutor's remarks 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. Therefore, Mr. Wilson's convictions and sentence are due to be vacated.

929. 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.

930. Since the ACCA's ruling was unreasonable, this Court should review Mr. Wilson's claim using the appropriate analysis, find that the DA's remarks were impermissibly inflammatory, improper and prejudicial to 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.

C. The prosecutor made improper comments on silence during closing argument, in violation of *Griffin v. California*.

931. During his guilt phase closing, Mr. Valeska directly questioned Mr. Wilson in front of the jury, stating, "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?" Doc. 76-9 at PDF 152, Bates 1759. Mr. Wilson could not respond at that point. The DA capitalized on Mr. Wilson's situation by answering the question for him, saying, "It's the brain. The brain tells the body. . . . Accidentally. Accidentally." Doc. 76-9 at PDF 152, Bates 1759. The prosecutor's direct confrontation of Mr. Wilson, at a time when Mr. Wilson was powerless to respond, was an improper comment on silence. Courts routinely reverse convictions where the prosecution engages in such kinds of improper comments on silence. *See*, *e.g.*, *Griffin*, 380 U.S. at 615; *Whitt v. State*, 370 So. 2d 736, 737 (Ala. 1979) (reversing where prosecutor stated during closing that "the only person alive today that knows what happened out there that night is sitting right there."); *Wherry*,

402 So. 2d at 1133 (recognizing that a comment that "even inadvertently makes reference to the fact that the defendant can testify" is reversible error); *Blackmon v. State*, 462 So. 2d 1057, 1060 (Ala. Crim. App. 1985) (noting that this "principle is observed with the strictest of scrutiny") (emphasis added); *Tomlin v. State*, 591 So. 2d 550, 556 (Ala. Crim. App. 1991) (concluding prosecutor's comment during closing that "we couldn't make him take the stand again" was "direct comment on the appellant's failure to testify."); *Windsor v. State*, 593 So. 2d 87, 91 (Ala. Crim. App. 1991) (reversible error where prosecutor's gestures and comments created a "possibility" jury interpreted them as reference to defendant's failure to testify).

932. The District Attorney here, Doug Valeska, has a history of overstepping on this issue. *See Hammonds v. Comm'r, Alabama Dep't of Corr.*, 712 F. App'x 841, 851 (11th Cir. 2017) ("We are very disturbed by Valeska's behavior. Not only did Valeska intentionally refer to Hammonds's decision not to testify, but he did so in flagrant violation of the court's pre-trial order – an order that should not have even been necessary in the first place, since it is a basic tenet of constitutional law that the government may not use against the defendant his decision not to testify. And the instruction really should not have been necessary in Hammonds's case, since Valeska had been reprimanded in prior cases for engaging in precisely the same unconstitutional and unethical behavior."). *See also Hammonds v. Allen*, 849 F. Supp. 2d 1262, 1303 (M.D. Ala. 2012) (citing prior reprimands: "*Hammond v. State*,

776 So. 2d 884 (Ala. Crim. App. 1998) (finding reversible error during sentencing when Valeska commented on result of defendant's previous trial for same offense)"); *Jackson v. State*, 414 So. 2d 1014 (Ala. Crim. App. 1982) (noting Valeska's improper closing argument about defendant's failure to testify); *McNair v. State*, 653 So. 2d 320 (Ala. Crim. App. 1992) (disapproving of Valeska's inappropriate remarks about the victim and the defendant).

933. The prosecutor's remarks violated 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. Therefore, Mr. Wilson's convictions and sentence are due to be vacated.

934. 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.

935. 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.

936. 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.

D. The prosecutor made repeated references to the non-testifying co-defendants' confessions, in violation of Mr. Wilson's confrontation rights, and trial court failed to take curative action.

937. The prosecutor and the prosecution witnesses repeatedly referenced the confessions of Mr. Wilson's co-defendants and alluded to their contents. *See*, *e.g.* Doc. 76-8 at PDF 25-26, 39, 161, Bates 1431-1432, 1445, 1567. First, the DA elicited testimony from Sgt. Luker that co-defendant Matthew Marsh told police where to find the stolen van – the alleged proceeds of the robbery. Doc. 76-8 at PF 25-26, Bates 1431-1432. The DA then elicited that Sgt. Luker had also spoken with co-defendants Kittie Corley and Michael Jackson before recovering the van, suggesting to the jury they had given statements similar to Marsh's statement. Doc. 76-8 at PDF 26-27, Bates 1432-1433. Sgt. Luker told the jury about these confessions a third time, when the prosecutor asked him why he had not ordered DNA testing in the case: "We had Mr. Wilson's confession, as well as the other co-

defendants saying the same thing." Doc. 76-8 at PDF 39, Bates 1445. Finally, the DA asked Sgt. Luker to read from the written statement of co-defendant Michael Jackson, ostensibly to tell the jury what time the statement was taken (Doc. 76-8 at PDF 161, Bates 1567) – an issue that had no relevance to the case. When defense counsel objected on relevance grounds, the judge failed to sustain the objection, and the jury heard once again that one of Mr. Wilson's co-defendants had given a written confession. Doc. 76-8 at PDF 161, Bates 1567.

938. Although the trial court sustained defense counsel's objection to Sgt. Luker's testimony about the co-defendants' confessions as a reason not to conduct DNA testing, it failed to issue a curative instruction.

939. In *Bruton*, the U.S. Supreme Court found that a defendant's confrontation right was violated where a co-defendant's confession was admitted at trial, because the co-defendant exercised his right to remain silent and could not be cross-examined. 391 U.S. at 137. *See also Kirby v. United States*, 174 U.S. 47, 55 (1899) (the right to confrontation was violated where convictions of non-testifying co-defendants were admitted to prove essential element of charge).

940. The introduction of these references to the co-defendants' confessions violated Mr. Wilson's right to a fair trial, to confront the witnesses offered against him, and to a reliable sentencing as guaranteed by the Fifth, Sixth, Eighth, and

Fourteenth Amendments to the U.S. Constitution. Therefore, Mr. Wilson's convictions and sentence are due to be vacated.

941. 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 clear attempts to bolster the State's case and hardly "harmless."

942. 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.

E. The prosecutor made improper comments by fabricating evidence that did not exist.

943. As noted *supra* paragraphs 553-564, the prosecutor, Mr. Valeska, argued from facts that were not in evidence that Mr. Wilson said things he did not say and that Mr. Wilson did things no one testified to.

944. The prosecutor capitalized on the incompleteness of the tape of the police interrogation of Mr. Wilson to argue that when Mr. Wilson said, in the last part of the recorded statement, that he "changed it all up," that meant he changed "the plan" to one of murder, rather than assault (Doc. 76-10 at PDF 127, 129, 136, Bates 1936, 1938, 1945), even though Mr. Wilson never said he intended to kill Mr. Walker in any recorded part of the interrogation.

945. As noted *supra*, Mr. Valeska persuaded the trial judge, who noted in his sentencing order that "[Mr. Wilson] decided to do something more than that [i.e., hit Mr. Walker with the bat and knock him out] in his own words ...." Doc. 76-2 at PDF 185, Bates 385. These prosecutorial arguments as well violated well established federal law. *Berger v. United States*, 295 U.S. 78, 88 (1935).

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 AND SENTENCING.

A. The prosecutor repeatedly overstepped the bounds of propriety and permissibility by arguing an inapplicable aggravator and from facts not in evidence.

946. Numerous instances of prosecutorial misconduct during the penalty phase are set out above. In brief, the prosecutor improperly introduced Mr. Wilson's prior conviction for escape while awaiting trial as an aggravating circumstance. He relied on the same "blood spatter" evidence argued in the guilt phase to magnify the injury to Mr. Walker. And he asserted that Mr. Wilson was particularly "cold and callous" because "he took and drank Dewey Walker's milk" (Doc. 76-10 at PDF 130-131, Bates 1939-1940), a "fact" for which there was no evidence whatsoever. In addition, the prosecutor asked the jury to remember the photographs of the victim's wife and children, even though the people in the photographs were never identified at trial. Doc. 76-10 at PDF 141, Bates 1950. Later in his closing argument, the prosecutor told the jury that the injuries suffered by the victim were "up there at the top" of what the forensic pathologist had experienced (Doc. 76-10 at PDF 111, Bates 1920), even though the forensic pathologist did not testify in this manner.

947. Thus, the prosecutor repeatedly puffed up his case with what defense counsel rightly described in the guilt phase as "fantasy." Doc. 76-9 at PDF 154, Bates 1761. The prosecutor's comments were not proper inferences from the

evidence. No evidence to support them was introduced at the trial. Prosecutors are forbidden to argue facts not in evidence, as this practice denies the defendant an opportunity to rebut or explain such assertions, *Skipper*, 476 U.S. at 7 n.1. These repeated assertions about evidence that was never introduced or proven to the jury impermissibly infringed Mr. Wilson's constitutional right to confront the evidence against him. *See Douglas v. Alabama*, 380 U.S. 415, 419 (1965) ("Although the Solicitor's reading of Loyd's alleged statement, and Loyd's refusals to answer, were not technically testimony, the Solicitor's reading may well have been the equivalent in the jury's mind of testimony that Loyd in fact made the statement. . . .").

948. The prosecutor's baseless, false, and misleading statements to the jury 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. Therefore, Mr. Wilson's sentence is due to be vacated.

949. 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 the photographs, 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.

950. 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 and sentencing 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.

B. The prosecutor improperly urged the jury to "do what's right," rather than follow the law.

951. Near the end of his closing in the penalty phase, the prosecutor admonished the jury that it was their duty to sentence Mr. Wilson to death, urging them to "have the courage and the strength" (Doc. 76-10 at PDF 141, Bates 1950), and to "do what's right" (Doc. 76-10 at PDF 142, Bates 1951). These comments went beyond telling the jury it was their duty to follow the law, even if that led to a death sentence; they suggested that voting for a death sentence was the courageous and virtuous thing to do.

952. In *United States v. Young*, the U.S. Supreme Court held that a prosecutor who exhorted the jury to "do its job" was in error. 470 U.S. 1, 18 (1985). The ACCA has held similarly in cases other than this one. *See*, *e.g.*, *McNair v. State*, 653 So. 2d at 339-41; *Arthur v. State*, 575 So. 2d 1165, 1185 (Ala. Crim. App. 199) (ruling improper the prosecutor's comment that jury should "do its job" regardless of facts or law). In a case where the DA repeatedly struck foul blows, *cf. Berger*, 295 U.S. at 88, this final exhortation encouraged the jury to follow suit and sentence Mr. Wilson to death whether appropriately or not under the law.

953. The prosecutor's exhortation to the jury severely undermined the reliability of Mr. Wilson's sentencing determination, and also denied his 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.

954. 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 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.

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 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.

955. The trial court never informed the jurors that, unlike aggravating circumstances, they could consider a mitigating circumstance even if they did not all agree on its existence. Doc. 76-10 at PDF 149-154, Bates 1958-1963. Because of this omission, there is an unacceptable risk that the jurors concluded they had to unanimously agree on applicable mitigating circumstances. The jury's

misconception impermissibly enhanced Mr. Wilson's burden during the sentencing phase.

956. U.S. Supreme Court precedent requires that jurors clearly understand that they need not be unanimous as to the existence of mitigating circumstances in order to consider them. *McKoy v. North Carolina*, 494 U.S. 433, 439 (1990); *Mills v. Maryland*, 486 U.S. 367, 384 (1987).

957. The trial court's erroneous instruction 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 United States Constitution. Therefore, Mr. Wilson's sentence is due to be vacated.

958. 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*, this one creates "at least a substantial risk that the jury was misinformed," 486 U.S. at 381.

959. 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 because misleading the jury violated his rights to due process and a fair sentencing.

B. The trial court improperly diminished the jury's role in sentencing.

960. Attempting to provide preliminary instructions in the sentencing phase, the trial court told the jury, "And in the sentencing phase, the procedure is generally the same as in the guilt phase, except the sentencing phase is not near as involved." Doc. 76-10 at PDF 36, Bates 1845. This was error, as it mischaracterized the jury's role in the sentencing process. The U.S. Supreme Court held in *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985), 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."

961. The trial court's lessening of the seriousness of the jury's sentencing decision 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. Therefore, Mr. Wilson's sentence is due to be vacated.

962. 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 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).

963. 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 because of the trial court's violation of his rights to due process and a fair trial.

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.

964. During the penalty phase of Mr. Wilson's trial, counsel introduced over 400 pages of school records. Doc. 76-3 at PDF 156, Bates 558 to Doc. 76-6 at PDF 16, Bates 1021. Although counsel failed to put these records in context or explain them to the jury, the sentencing court was obligated to consider them. But, in its sentencing order, the trial court mentioned non-statutory mitigating circumstances in only one paragraph:

> The Court does find some evidence that defendant's mother attempted suicide when he was of an early age, that his parents divorced, that he lived with one parent then the other over the years, that he took medication as a child, and that he helped in Red Cross Disaster Relief work with a neighbor.

Doc. 76-2 at PDF 187, Bates 387. This all-too-brief summary overlooks a wealth of mitigating factors.

965. The trial court did not consider Mr. Wilson's long struggle with emotional and psychological issues from a very early age. Mr. Wilson began seeing a psychiatrist in kindergarten for these issues (Doc. 76-10 at PDF 79, Bates 1888), which led to struggles in school and placement in a self-contained class for emotionally handicapped students (Doc. 76-4 at PDF 182, 195, Bates 785, 798). A psychologist diagnosed Mr. Wilson at the age of nine with poor social and emotional control and an underdeveloped contact with reality. Doc. 76-3 at PDF 158, Bates

560. At age 11, Mr. Wilson was found to be battling anxiety and depression. Doc. 76-4 at PF 13, Bates 616. Throughout his childhood, psychiatrists placed Mr. Wilson on medication (Doc. 76-3 at PDF 194, Bates 596; Doc. 76-4 at PDF 27, 53, 123, 156, Bates 630, 656, 726, 738), but at those times when he lived with his mother, she would force him to stop taking it (Doc. 76-4 at PDF 27, Bates 630). This evidence is unquestionably mitigating because it illustrates the challenges Mr. Wilson faced from a very young age and the limited control he had over his life prior to the crime. *See Brewer v. Quarterman*, 550 U.S. 286, 289-90, 296 (2007) (evidence of mental illness, including depression, is mitigating); *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) ("[E]vidence of the defendant's background and character is relevant because of the belief, long held by society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse."); *Eddings*, 455 U.S. at 116 (1981) (background and mental and emotional development is "a relevant mitigating factor of great weight").

966. The trial court also did not consider Mr. Wilson's extensively documented need to struggle in order to barely get by in school, due in part to his significant learning disabilities (Doc. 76-4 at PDF 13, 135, Bates 616, 738). In the seventh grade, Mr. Wilson tested in the second and third grade range for reading, writing, and math. Doc. 76-4 at PDF 15, Bates 618. For several years, Mr. Wilson

did not participate in statewide testing because he was "unable to adhere to standardized testing procedures." Doc. 76-4 at PDF 20, 132, Bates 623, 735. By the time Mr. Wilson turned 18 years old, just two years before the crime, Mr. Wilson tested in the fourth and sixth grade range for reading, spelling, and math. Doc. 76-4 at PDF 7, Bates 610. This evidence is mitigating because it demonstrates the limited opportunities available to Mr. Wilson and directly rebuts the prosecutor's assertion that Mr. Wilson was smart and sophisticated, and thus must have played a leading role in the crime. Doc. 76-10 at PDF 84, 91-92, 125, 126, 139, Bates 1893, 1900-1901, 1934, 1935, 1948.

967. In addition, while the trial court mentioned that Mr. Wilson "lived with one parent and then the other over the years" (Doc. 76-2 at PDF 187, Bates 387), the court did not fully consider the transient nature of Mr. Wilson's life at a critical point in his development. The evidence available to the trial court reflects that, between the ages of 10 and 12, Mr. Wilson attended five different schools in two different states. Doc. 76-4 at PDF 139, 140, 182, 197, Bates 742, 743, 785, 800. At one point, Mr. Wilson's father made him quit school and get a job. Doc. 76-1 at PF 31, Bates 31. Mr. Wilson bounced from his father's home in Florida to his mother's home in Alabama. Doc. 76-10 at PDF 67, 73-74, 76, Bates 1876, 1882-1883, 1885. He would live with his father, who would have Mr. Wilson take medication (Doc. 76-9 at PDF 123, 155, 181, Bates 1730, 1762, 1788; Doc. 76-10 at PDF 51, 84, Bates 1860, 1893),

and then be sent to live with his mother, who would force him to stop taking the medication (Doc. 76-4 at PDF 27, Bates 630; Doc. 76-10 at PDF 72, Bates 1881). These aspects of Mr. Wilson's difficult childhood constitute mitigating evidence that had to be considered by the trial court in determining the appropriate sentence. *See*, *e.g.*, *Eddings*, 455 U.S. at 116 (background and mental and emotional development is "a relevant mitigating factor of great weight").

968. Section 13A-5-47(d), Ala. Code 1975, requires that "the trial court shall enter specific written findings concerning the existence or nonexistence" of any non-statutory mitigating circumstance offered by the defense. *See also Ex parte Taylor*, 808 So. 2d 1215, 1219 (Ala. 2001) ("[T]he trial judge must make specific written findings regarding the existence or nonexistence of . . . each mitigating circumstance offered by the parties. . . ."). Here, the trial court's one-paragraph finding regarding mitigation, *see supra*, clearly does not comply with the Code requirement of making specific findings regarding the existence or nonexistence of nonstatutory mitigating factors. Accordingly, the decision of the ACCA involved an unreasonable determination of the facts within the meaning of § 2254(d)(2).

969. Not only does the Eighth Amendment require that the defendant be permitted to present any relevant mitigating evidence, but "*Lockett* requires the sentencer to listen" to that evidence. *Eddings*, 455 U.S. at 115 n.10. *See also Abdul-Kabir*, 550 U.S. at 251 n.12 ("[T]he mere ability to present evidence is not

sufficient."). Indeed, "the sentencer must also be able to consider and *give effect to* that evidence in imposing sentence." *Penry*, 492 U.S. at 319 (emphasis added) (citations omitted). *See also Hitchcock,* 481 U.S. at 398-99 (reversing a death sentence where the sentencing judge refused to consider non-statutory mitigating circumstances). The sentencer gives effect to mitigating evidence only by "weigh[ing] such evidence in its calculus of deciding whether a defendant is truly deserving of death." *Brewer*, 550 U.S. at 296. The sentencer may not "refuse to consider, as a matter of law, any relevant mitigating evidence." *Eddings*, 455 U.S. at 114.

970. Alabama law correspondingly requires trial courts to consider all relevant mitigating evidence and provides that once a defendant interjects a statutory or non-statutory mitigating circumstance, the sentencer must find it exists unless the State disproves its factual existence by a preponderance of the evidence. Ala. Code 1975, § 13A-5-52. *See also Ex parte Trawick*, 698 So. 2d 162, 176 (Ala. 1997) ("[A] defendant has only the burden of interjecting the issue of mitigating circumstances, and the burden then shifts to the State to disprove the existence of the mitigating circumstances, by a preponderance of the evidence.").

971. "To find that mitigating circumstances do not exist where such mitigating circumstances clearly exist returns us to the state of affairs which were found by the Supreme Court in *Furman v. Georgia* to be prohibited by the

Constitution" by inviting arbitrary imposition of the death penalty. *Magwood v. Smith*, 791 F.2d 1438, 1448 (11th Cir. 1986) (quoting *Magwood v. Smith*, 608 F. Supp. 218, 228 (M.D. Ala. 1985)) (granting habeas relief where the Alabama courts failed to find mitigation despite overwhelming evidence). *See also Parker v. Dugger*, 498 U.S. 308, 318-23, (1991) (granting habeas corpus relief where a state appellate court failed to consider "uncontroverted" mitigating evidence when addressing the override of a jury's life verdict); *Hadley v. State*, 575 So. 2d 145, 157–58 (Ala. Crim. App. 1990) (overturning failure to find mitigating circumstances where evidence was uncontradicted).

972. Failing to enumerate an uncontroverted mitigating circumstance is, under Alabama's weighing system, tantamount to a refusal to consider it, which the Eighth Amendment does not permit. "The sentencer ... may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration." *Eddings*, 455 U.S. at 114-15. Because "the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances, . . . the proceedings . . . did not comport with the requirements of *Skipper v. South Carolina*, 476 U.S. 1 (1986), *Eddings*[], and *Lockett*[]." *Hitchcock*, 481 U.S. at 398-99.

973. The trial court's refusal to find and consider undisputed mitigating evidence in sentencing Mr. Wilson violated 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. Therefore, Mr. Wilson's sentence is due to be vacated.

974. In reviewing the propriety of Mr. Wilson's sentence, the ACCA merely repeated the same five mitigators identified in the sentencing order. *Wilson I*, 142 So. 3d at 818. Thus, it also failed to engage with Mr. Wilson's school records. *See Parker*, 498 U.S. at 322.

975. 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.

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 AND SENTENCING.

976. Prior to trial, Mr. Wilson filed motions to prohibit characterization of the jury's role as advisory (Doc. 76-1 at PDF 178, Bates 178), to prohibit the court

from considering any aggravating circumstance not reliably found by the sentencing jury (Doc. 76-1 at PDF 149, Bates 149), to bar imposition of the death penalty in the absence of a unanimous jury vote (Doc. 76-1 at PDF 151, Bates 151), and to bar the death penalty under *Ring v. Arizona*, 536 U.S. 584 (2002), because the then-controlling Alabama sentencing procedure did not require a jury to make the factual findings that rendered a defendant eligible for the death penalty (Doc. 76-1 at PDF 169, Bates 169). The trial court denied all of these motions.

977. Under Alabama law at the time of Mr. Wilson's trial, the sentencing judge had to make an independent evaluation of the presence of aggravating circumstances and of whether one or more aggravators outweighed the mitigating evidence. Alabama Acts of 1981, No. 81-178.

978. At the jury penalty phase of Mr. Wilson's capital trial, only ten of the twelve jurors voted to recommend a sentence of death. Doc. 76-2 at PDF 172, Bates 372.

979. In a case involving a 10-to-2 jury verdict for death, *Ring v. Arizona*, 536 U.S. 584 (2002), in conjunction with *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), invalidates critical aspects of the process used to sentence Mr. Wilson to death.

980. First, under *Ring*, following *Apprendi v. New Jersey*, 530 U.S. 466 (2000), aggravating circumstances that are prerequisite to death-eligibility must be considered elements of the offense.

981. Second, following *Ramos*, every element of an offense must be found by a jury beyond a reasonable doubt.

982. Third, although *Edwards v. Vannoy*, 593 U.S. 255 (2021), held *Ramos* nonretroactive in the ordinary noncapital context, *Edwards* does not control the application of *Ramos* to capital sentencing in light of the "significant constitutional difference between the death penalty and lesser punishments" recognized by the Supreme Court. *Beck v. Alabama*, 447 U.S. 625, 637 (1980). And when death sentencing is at issue, *Ramos* serves as a substantive rule under *Montgomery v. Louisiana*, 577 U.S. 190 (2016), (holding *Miller v. Alabama*, 567 U.S. 460 (2012), retroactive because a new rule adding to the procedural requirements for imposing a particular sentence to a certain class of people is a substantive rule). Here, *Ramos* adds a procedural requirement (a unanimous jury verdict is required to find any fact making a defendant death-eligible), so *Ramos* in this application is a substantive rule that applies retroactively despite *Edwards*.

983. 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 fact making him death-eligible.

984. Nor can the jury's unanimous verdict at the guilt stage satisfy the Sixth Amendment requirement of *Ring*, *Ramos* and *Montgomery.* This is so because the jury at the guilt phase had no reason to believe that a verdict convicting Mr. Wilson of murder committed during a robbery and a burglary would automatically make him eligible for a death sentence. To the contrary, the Court instructed the jury prior to the commencement of guilt-phase opening statements that the "case will be tried in two phases. The first phase is the guilt phase. And evidence will be presented concerning the elements of the crime. And if the defendant is found guilty, then you would proceed to what's called the sentencing phase. And that's where you would hear evidence either for or against particular penalties in the case." Doc. 76-7 at 128-129, Bates 1333-1334. The jury was thus explicitly instructed that they would not consider the penalty until the sentencing phase. Likewise, during *voir dire*, the Court informed the entire jury pool that "in this case, the jury will be considering — if they find the defendant guilty of capital murder in this case, *the jury in a second phase of the trial* will consider the penalty." Doc. 76-6 at PDF 182, Bates 1187. The Court repeats this instruction shortly thereafter and further explaints that "At the sentencing phase, the jury would be weighing aggravating and mitigating circumstances." Doc. 76-6 at PDF 192, Bates 1197. The jury was thus explicitly made to associate aggravating and mitigating circumstances with the sentencing phase only.

985. Thus the jurors were misled regarding the sentencing consequences of their guilty verdicts and did not return those verdicts conscious of the grave responsibility which *Caldwell v. Mississippi* demands.[88]

986. When a State makes life or death the consequence of a jury's decision, due process entitles the defendant to inform the jury accurately about the predicates for that decision. *Simmons*, 512 U.S. at 168-69; *Shafer*, 532 U.S. at 51. In particular, it is impermissible to mislead the jury about the consequences of its verdict. *Caldwell*, 472 U.S. at 328-29.

987. The ACCA denied this claim solely on the authority of *Ex parte Waldrop*, 859 So. 2d 1181 (Ala. 2002). *See Wilson I*, 142 So. 3d at 802-3. The *Waldrop* decision did not engage with the issues superimposed upon *Ring* by the U.S. Supreme Court's rulings in *Ramos*, *Montgomery* and *Caldwell*. In failing to consider the substance of Petitioner's arguments, the ACCA unreasonably misapplied clearly established federal law.

988. 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 and sentencing because of the violation of his rights to jury trial and due process.

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[88] It is noteworthy that when defense counsel attempted to inform the jury in his sentencing phase opening that the jury's guilty verdict did put Mr. Wilson at risk of execution, the prosecutor objected and the trial court sustained the objection. Doc. 76-10 at PDF 45, 46, Bates 1864-1865.

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, AND SENTENCING.

989. Ultimately, all of Mr. Wilson's claims arise under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. The purpose of Due Process further supports a cumulative assessment of any and all errors the Court determines occurred in prior proceedings in this case. Due Process is required in criminal cases to ensure that defendants are convicted only as a result of a fair trial: "In construing th[e Fourteenth] Amendment, we have held that it imposes minimum standards of fairness on the States, and requires state criminal trials to provide defendants with protections 'implicit in the concept of ordered liberty.'" *Danforth v. Minnesota*, 552 U.S. 264, 269-70 (2008) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)). The fairness of a trial cannot be determined by sectioning portions of the proceedings off and analyzing each separately.

990. That such a holistic analysis must be applied can be deduced also from the "totality of the circumstances" or "prejudice" standard applicable to virtually every claim Mr. Wilson has alleged. Claims alleging a *Brady* violation "turn [ ] on the cumulative effect of all suppressed evidence favorable to the defense, not on the evidence considered item by item," *Kyles*, 514 U.S. at 420; claims of ineffective assistance of counsel similarly must be adjudicated by considering the record as a whole, *see Terrry Williams*, 529 U.S. at 397-98 ("the State Supreme Court's

prejudice determination was unreasonable insofar as it failed to evaluate the totality of the available mitigation evidence – both that adduced at trial, and the evidence adduced in the habeas proceeding in reweighing it against the evidence in aggravation"), and require a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *Strickland*, 466 U.S. at 694; and claims alleging error in jury instructions "must be considered in the context of the instructions as a whole and the trial record," *Estelle v. McGuire*, 502 U.S. 62, 72 (1991). For claims of prosecutorial misconduct not involving the violation of a specific constitutional right, "[t]he relevant question is whether the prosecutors' comments [or actions] 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden*, 477 U.S. 168, 181 (1986) (quoting *Donnelly*, 416 U.S. at 643)). This standard necessarily requires a consideration of the prosecutorial conduct in conjunction with the impairment of any and all specific constitutional rights affected by it. As the Tenth Circuit has explained in applying cumulative analysis to "legally diverse claims," "[t]hese substantive prejudice components essentially duplicate the function of harmless error review." *Cargle v. Mullin*, 317 F.3d 1196, 1207 (10th Cir. 2003). Indeed, the concept of "harmless error," which is generally applicable to all claims (excepting "structural" errors) makes sense, and is itself fair, only where the harm of all error is considered together.

991. In Mr. Wilson's case, the various kinds of errors alleged above are closely intertwined. As previously explained, the thrust of the defense was that Mr. Walker was rendered unconscious early in the assault and, therefore, could not have suffered as the State insisted. This, on its own, was hardly convincing as a defense. But the *Brady* violation is obviously implicated here because it directly impeded Mr. Wilson's ability to persuade the jury that he did not act alone and did not strike the killing blows. The prosecutor's misconduct in conjuring up a false tale about "all the blood in the different locations of the house" and twisting Mr. Wilson's statement out of context added to the *Brady* error to create a completely false picture of what happened at the Walker residence. The multiplicity of violations of Mr. Wilson's basic federal rights left the jury with no avenue to convict him of anything less than a capital offense. Trial counsel's errors also impacted this picture: failing to investigate Mr. Wilson's co-defendants and to challenge Sgt. Luker's account of blood trailed throughout the house left the State's distortion of the crime scenario uncorrected. Counsel further failed to demonstrate that Mr. Wilson's statement could not be fairly interpreted as having the meaning Mr. Valeska attributed to it. Their incompetent suppression argument had a similar effect because it resulted in the admission of Mr. Wilson's incomplete statement, opening the door for Mr. Valeska's misleading gloss on it.

992. The harm from all of these errors combined to completely undercut the fairness of the proceedings and render the result of Mr. Wilson's trial and sentencing fatally unreliable.

993. Harm from the guilt phase must be considered for its impact on the penalty phase as well. *Smith v. Wainwright*, 741 F.2d 1248, 1255 (11th Cir. 1984) (remanding for a hearing because defense counsel's failure to impeach prosecution witnesses during the guilt phase "may not only have affected the outcome of the guilt/innocence phase, it may have changed the outcome of the penalty trial"). Especially where the defense has failed in its "opportunity to meet the case of the prosecution" in the guilt phase, *Strickland,* 466 U.S. at 685, a defendant enters the penalty phase at a substantial disadvantage. *See*, *e.g.*, *Lockhart v. McCree*, 476 U.S. 162, 181 (1986) ("it seems obvious to us that in most, if not all, capital cases much of the evidence adduced at the guilt phase of the trial will also have a bearing on the penalty phase").

994. In the penalty phase, counsel again relied on a version of events that would have rendered Mr. Wilson less culpable than the prosecution argued. They posited that Mr. Walker was rendered unconscious by the first blow, but they failed to show that much of the State's evidence was fiction. Once again, with respect to the circumstances of the offense, defense counsel failed to challenge the picture of brutality the State created out of false evidence and by the twisting of Mr. Wilson's

words. Their presentation of mitigation was very restricted and they failed to prepare the witnesses they did call to respond to the prosecutor's attacks. They failed to use mental health history they had at their fingertips and they failed to find additional evidence easily discoverable with minimal effort. They failed to interview witnesses or prepare the witnesses selected to add telling details to the portrait Mr. Wilson's school records could have limned if they had been presented in a coherent way. The prosecutor took advantage of this featureless presentation to characterize Mr. Wilson as a "bad seed," with no possibility of redemption, and to argue that a man who was capable of such extreme violence must be given the maximum punishment. The sentencing court followed the State's lead, accepting as true that Mr. Wilson deliberately "changed it all up" to kill Mr. Walker, instead of simply stealing his van.

995. Given this inextricable mix of errors, failures, and breaches of Mr. Wilson's rights, fundamental fairness demands that this Court consider the accumulated harm done to him by all of the violations of the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments that are the subject of the claims alleged above. Because the cumulative prejudice of these violations adversely and seriously affected the fairness and integrity of the judicial proceedings and "undermined confidence in the [guilt and penalty] verdict[s]," *Kyles*, 514 U.S. at 434-35, Mr. Wilson's convictions and sentence must be vacated.

996. The cumulative effect of all trial-level error violated Mr. Wilson's rights to due process, to equal protection, to jury trial, to effective assistance of counsel, to be free from unreasonable search and seizure, to a fair trial, to an impartial jury, to an individualized sentencing, to reliability in capital sentencing, and to be free from cruel and unusual punishment, and every other right above enumerated, under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

997. 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. This is 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). *See also supra*, paragraphs 348-350.

998. Similarly, instances of prosecutorial misconduct and trial court error were each treated individually with no consideration of the accumulated harm.

999. 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 confessional letter of co-defendant Corley, 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 limited than the State argued at his trial. No assessment of this accumulated error has ever been undertaken.

1000. 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.

CONCLUSION

For all of the reasons set out above in detail, Mr. Wilson was not convicted and sentenced as the result of a fair proceeding. Substantial rights were violated by the prosecution, by the court, and by Mr. Wilson's own counsel. There can be no confidence in the outcome of such proceedings. Therefore, this Court, after discovery and a full evidentiary hearing of all the claims raised herein or in any supplements or amendments to this petition, should set aside Mr. Wilson's convictions and sentence and grant him a new trial.

PRAYER FOR RELIEF

For the above reasons, David Wilson respectfully asks this Honorable Court to grant him the following relief:

(A) Afford him an opportunity to reply to any responsive pleading;

(B) Grant him discovery under Rule 6 of the Rules Governing Section 2254 Cases and a sufficient period of time to conduct discovery, and further grant him authority to obtain subpoenas to further document and prove the facts set forth in this petition;

(C) Grant him an evidentiary hearing at which proof may be offered supporting the allegations set forth in this petition;

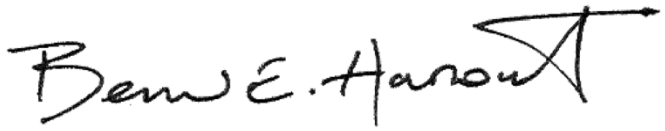
(D) Permit him, after additional factual development, an opportunity to brief and argue the issues presented in this petition;

(E) Issue a writ of habeas corpus granting him 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

(F) Grant such further and other relief as may be appropriate.

Dated this 12th day of November 2024.

Respectfully submitted,



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LIST OF APPENDICES TO FIRST AMENDED PETITION

Appendix A: Frontside of the Corley Letter Confession to Walker Murder

Appendix B: Certified Court Reporter Transcription of the Front Side of the Corley Letter

Appendix C: Back Side of the Corley Letter Confession to Involvement in Hatfield Murder

Appendix D: Certified Court Reporter Transcription of the Back Side of the Corley Letter

Appendix E: Audio of Jan. 29, 2005, Interrogation of Kittie Corley, filed conventionally with the Court via flash drive

Appendix F: Certified Court Reporter Transcription of Interrogation of Kittie Corley on January 29, 2005

Appendix G: Audio of March 24, 2005, Interrogation of Kittie Corley, filed conventionally with the Court via flash drive

Appendix H: Certified Court Reporter Transcription of Interrogation of Kittie Corley on March 24, 2005

Appendix I: Kittie Corley's "Dearest David" Letter from 2004

Appendix J: Certified Court Reporter Transcription of "Dearest David" Letter

Appendix K: Police Interview Worksheet of Vroblick Interrogation dated August 3, 2004

Appendix L: Certified Court Reporter Transcription of Police Interview Worksheet of Vroblick Interrogation

Appendix M: Police Transcript of Police Interrogation of Heather Lynn Brown dated January 29, 2005

Appendix N: Police Transcript of Police Interrogation of Mark Hammond dated February 26, 2005

Appendix O: Law Enforcement "Work Product | James William Bailey" Summary of Investigation into Murder of C.J. Hatfield (2005)

Appendix P: Law Enforcement "Final Summary" of Investigation into Murder of C.J. Hatfield (April 4, 2005)

Appendix Q: Official police transcription of Kittie Corley's police interrogation dated January 29, 2005

Appendix R: Henry County Sheriff's Department Property/Evidence Sheet from approximately March 21, 2005

Appendix S: Redacted transcript of a video recording of an interview by a documentary filmmaker with one of the suspects in the Hatfield murder who refers to Kittie Corley as "a loco psycho chick that actually killed someone herself"

Appendix T: State of Alabama Expert Report on Handwriting Match re. the Corley Letter

Appendix U: Excerpt from James Stuckey Clerk's File

Appendix V: Transcript of *voir dire* at James Bailey trial, Case No. CC-05-380, November 18, 2008, p. 15

Appendix W: Alabama SJIS Case Detail, Catherine Nicole Corley

Appendix X: Alabama SJIS Case Detail, Matthew Marsh

Appendix Y: Alabama SJIS Case Detail, Michael Jackson

Appendix Z: *Slate* article on C.J. Hatfield Murder

Appendix AA: Table of Contents to Brief of Appellant, No. CR-07-0684 (filed July 10, 2008), pp. ii-vii.

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.

Appendix CC: List of Issues Raised to the Alabama Supreme Court on Direct Appeal.

Appendix DD: Table of Contents to Brief of the Appellant, No. CR-16-0675 (filed August 15, 2017), pp. ii-iv.

Appendix EE: Table of Contents to Petition for Writ of Certiorari, No. 1170747 (filed May 17, 2018), pp. i-ii.

Appendix FF: Chart of jurors removed for cause or hardship (under seal)

Appendix GG: Chart of jurors peremptorily struck by the State (under seal)

Appendix HH: Chart of jurors empaneled (under seal)

Appendix II: Chart of jurors questioned by DA Valeska about their views on the death penalty (under seal)

Appendix JJ: Alacourt results for Darren Williams (under seal)

Appendix KK: Alacourt results for Darran Williams (under seal)

Appendix LL: Alacourt results for Jehl Dawsey (under seal)

Appendix MM: Alabama Department of Corrections, "Incarceration Details," Catherine Nicole Corley, AIS# 00256533.

Appendix NN: Psychological Report from Dr. Robert Shaffer and Curriculum Vitae of Dr. Robert Shaffer.

Appendix OO: Notarized letter by David Wilson to counsel dated Nov. 11, 2015 (redacted)

Appendix PP: Notarized letter by David Wilson to counsel dated July 5, 2017 (redacted)

Appendix QQ: Letter by David Wilson to counsel dated August 4, 2017 (redacted)

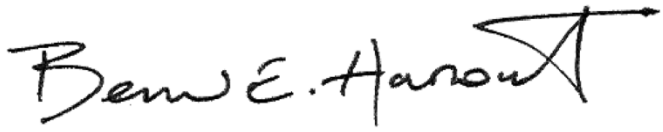
Appendix RR: Letter by David Wilson to counsel dated June 1, 2019 (redacted)

Appendix SS: Anthony Amsterdam and James Steven Liebman, *Loper Bright* and the Great Writ (October 17, 2024). Columbia Human Rights Law Review, February 2025, forthcoming.

CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2024, the foregoing amended petition has been electronically filed with the Clerk of the Court as an attachment to Petitioner's Motion for Leave to File an Amended Petition, and therefore a copy has been electronically served upon counsel for Respondent:

Office of the Attorney General
Attn: Capital Litigation Division
501 Washington Avenue
Montgomery, AL 36130



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