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

DAVID WILSON,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 1:19-CV-284-WKW-CSC
	)	
JOHN Q. HAMM, Commissioner,	)	DEATH PENALTY CASE
	)	
Respondent.	)	

PRELIMINARY REPLY TO RESPONDENT'S ANSWER

Petitioner David Wilson, through undersigned counsel, respectfully submits this Preliminary Reply to Respondent's Answer pursuant to this Court's Order dated August 9, 2022, and Rule 5 of the Federal Rules Governing § 2254 Cases in the United States District Courts.

1. This federal habeas corpus case presents unique procedural, representational, and timing questions.

2. Procedurally, this federal habeas corpus case is unique because there is no state post-conviction record to speak of. Mr. Wilson filed a lengthy, elaborate, 242-page Rule 32 petition in state court (Fed. Rec. Vol. 22, PDF p. 25; R32C p. 224), but the state trial court dismissed his petition with prejudice for failure to plead his claims with sufficient detail under Ala. R. Crim. P. 32.7(d) ("the petition is not sufficiently specific" or "fails to state a claim"). *State of Alabama v.*

David Phillip Wilson, Case No. CC-2004-001121.60, Circuit Court of Houston County, February 24, 2017 (Fed. Rec. Vol. 28, PDF p. 125; R32C p. 1524). As a result, there has been no factual development of the underlying legal claims at the state Rule 32 post-conviction stage. There was no evidentiary hearing in Rule 32. There was no opportunity to engage in discovery or provide any evidence on the claims of ineffective assistance of counsel or the violation of *Brady v. Maryland*, 373 U.S. 83 (1963). There was no factual development at all in Rule 32.

3. Representationally, this federal habeas corpus case is special because undersigned counsel began representing Mr. Wilson several months after prior counsel filed a 310-page federal habeas corpus petition. *David Wilson v. John Q. Hamm*, Case No. 1:19-cv-284, Doc. 1, Petition for Writ of Habeas Corpus By a Prisoner in State Custody Under Sentence of Death, filed April 24, 2019. Undersigned counsel began representing Mr. Wilson on the understanding that he would be able to gain access to the inculpatory confession of the co-defendant, Catherine "Kitty" Corley, which was never turned over to Mr. Wilson, or at least have an opportunity to move for disclosure of the confession, and engage in investigation on the ineffective assistance of counsel claims, before amending prior counsel's federal habeas corpus petition.

4. Timing-wise, this federal habeas corpus case also presents a unique situation. Respondent has filed its record with the Court. *See David Wilson v. John Q. Hamm*, Case No. 1:19-cv-284, Doc. 59, Respondent's Notice of Manual Filing of Federal Record, dated October 7, 2022. Because there is now a federal record, Petitioner has filed a renewed motion for the Kitty Corley letter pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963) and the state of Alabama's *ongoing* legal and ethical duty to disclose to Mr. Wilson clearly exculpatory material in their possession—a duty that extends into these federal habeas corpus proceedings. *See David Wilson v. John Q. Hamm*, Case No. 1:19-cv-284, Doc. 60, Petitioner's Renewed Motion for Disclosure of Ongoing *Brady*

Material, dated November 7, 2022. This Court had previously reserved ruling on Mr. Wilson's *Brady* motion for disclosure of the Kitty Corley letter until Respondent filed the federal habeas corpus record in this case; since Respondent has now filed a preliminary record, the matter is ripe for judgment and must urgently be addressed. Moreover, there are a few corrections and supplements to be made to the record that Respondent has filed, and Petitioner has just filed a motion to revise and supplement the record. *See David Wilson v. John Q. Hamm*, Case No. 1:19-cv-284, Doc. 61, Petitioner's Motion for Respondent to Correct, Supplement, and Refile the Federal Habeas Corpus Record and Checklist, filed November 7, 2022. As a matter of timing, even though the record is now adequate to address the *Brady* disclosure motion, it would be better for Respondent to revise and resubmit the corrected and supplemented record before undersigned counsel files many more pleadings, since there will likely be Eleventh Circuit and United States Supreme Court review, and it would be better to cite a revised and supplemented record.

5. Undersigned counsel would therefore respectfully suggest the following order of process:

    a. The Court addresses Petitioner's renewed motion for disclosure of ongoing *Brady* material and enters an order of disclosure;

    b. Respondent revises and supplements the record so that in all future pleadings the parties can reference a corrected and complete record;

    c. Petitioner files for a litigation budget, engages in discovery, and files any necessary discovery motions on claims such as the *Brady* claim or ineffective assistance of counsel, among others;

    d. Petitioner amends the federal habeas corpus petition;

    e. Respondent answers the amended habeas petition;

    f. Petitioner replies to Respondent's response to the amended petition;

    g. Petitioner files his motion for an evidentiary hearing.

6. Barring that, Petitioner preliminarily replies to Respondent's answer in the following manner:

    a. Regarding Claim I (the prosecution's failure to turn over the inculpatory letter written by the codefendant, Catherine "Kitty" Corley, and the expert report regarding that letter, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963)), there are factual issues that need to be developed before addressing the merits of the claim. Mr. Wilson is entitled first to see the letter and the expert report under the state of Alabama's ongoing and continuing legal and ethical duty to turn over material exculpatory evidence to the defense. Mr. Wilson has filed a renewed motion to that effect. *See David Wilson v. John Q. Hamm*, Case No. 1:19-cv-284, Doc. 60, Petitioner's Renewed Motion for Disclosure of Ongoing *Brady* Material, filed November 7, 2022. Once Mr. Wilson has obtained the *Brady* disclosure material, counsel will amend his federal habeas corpus petition accordingly, and this Court will have a full record to reach the merits of the *Brady* violation.

    Even assuming, for the sake of argument, that Respondent is correct that the claim is procedurally barred because it was not raised at trial or on direct appeal, *see* Doc. 56, Respondent's Answer to David Wilson's Petition for Writ of Habeas Corpus, at 8, there is cause and prejudice to excuse any procedural bar in this case based on the ineffective assistance of trial and appellate counsel. *See Strickland v Washington*, 466 U.S. 668 (1984). It is well established that cause and prejudice will excuse a procedural default. *See Murray v. Carrier*, 477 U.S. 478 (1986). It is equally well established that 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). The cause-and-prejudice standard for purposes of federal habeas review is a matter of federal law that cannot be resolved by the state courts below. Thus, even if Respondent is correct that trial counsel knew of but failed to raise a *Brady* claim—a point which is not established on the present record and needs to be factually determined—the *Brady* claim would still have to be considered by the Court under an ineffective assistance of counsel cause-and-prejudice analysis.

Mr. Wilson's *Brady* claim and ineffective assistance of counsel claim pertaining to the Kitty Corley letter effectively amount to a Due Process violation that must be heard on the merits by this Court. Whether the Court considers Mr. Wilson's claim as a Due Process violation based on *Brady* or a Due Process violation based on ineffective assistance of counsel, his claim (pertaining to the nondisclosure of the Kitty Corley letter) must be addressed on the legal merits *after* Mr. Wilson has obtained the letter and report, and has had an opportunity at a hearing to enter such *Brady* evidence into the record to demonstrate its materiality.

Mr. Wilson's Due Process claim pertaining to the Kitty Corley letter—both in its *Brady* and IAC dimensions—has never been developed factually in state court through no fault of Mr. Wilson. As such, it must be developed in federal court. Once Mr. Wilson has obtained the letter and report, undersigned counsel will amend the habeas corpus petition and introduce this evidence to the Court at a hearing.

b. Regarding Claim II (the prosecutor used his peremptory strikes in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986)), the legal claim is entirely preserved for

review on the merits by this Court. The factual record is complete. It was fully developed at a *Batson* hearing following Mr. Wilson's capital trial and conviction. At this point, undersigned counsel does not believe that the factual record needs to be expanded.

In the proceedings below, the prosecutor stated that he struck two African American venire members, J.D. and D.W., based on their prior criminal record as reflected in law enforcement records ("LETS records")—which the prosecutor did not show, disclose, or reveal to defense counsel. At the *Batson* hearing, the prosecutor promised to turn those records over to defense counsel and introduce them into the record, but he never did. The prosecutor likewise promised to supplement the record with those LETS records, but failed to do so.

In denying Mr. Wilson's *Batson* challenge, the state court effectively reversed the burden of proof by requiring Mr. Wilson to prove that those LETS records did not provide a race-neutral reason for the strikes. Imposing this burden on Mr. Wilson was unreasonable, since he did not have access to the LETS records. The state court's reversal of the burden of proof was contrary to and involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States in *Batson v. Kentucky*, 476 U.S. 79 (1986). Moreover, the decision was based on an unreasonable determination of the facts in light of the evidence presented in state court proceedings, under 28 U.S.C. § 2254(d). For these reasons, and without waiving any others, this Court must address the merits of Mr. Wilson's *Batson* claim.

c. Regarding Claim III (ineffective assistance of counsel at the guilt and penalty phases), none of the factual predicate regarding the ineffective assistance of trial and appellate counsel was developed in state court because Mr. Wilson's lengthy, elaborate, 242-page Rule 32 state post-conviction petition was dismissed with prejudice for failure to plead in sufficient detail. As a result, there was no opportunity for factual development in state court.

Mr. Wilson's Rule 32 petition pled egregiously incompetent and prejudicial errors committed by defense counsel, including: (a) not giving a closing argument at the guilt phase of the trial; (b) not investigating the material exculpatory Kitty Corley evidence; (c) failing to raise a *Batson* objection; (d) failing to object to prosecutorial misconduct; (e) not conducting a full mitigation investigation and presentation; and (f) not documenting Mr. Wilson's mental condition of Asperger's Syndrome which interacted negatively with his behavior, among other things.

The state courts dismissed Mr. Wilson's claims of ineffective assistance of counsel because he supposedly "failed to plead sufficient facts" and thus did not meet the requirements of specificity under Rule 32.7(d) of the Alabama Rules of Criminal Procedure. *See* Fed. Rec. Vol. 33, PDF p. 18, 22, 25, 28, 29, 31, 32, 36, 37, 51, 52, 55, 56, 57, 58, 59, 62, and 66 [Alabama Court of Criminal Appeals ("ACCA") Memorandum opinion of March 9, 2018, at 17, 21, 24, 27, 28, 30, 31, 35, 36, 50, 51, 54, 55, 56, 57, 58, 61, and 65].

The state court's ruling was based on an unreasonable determination of the facts under 28 U.S.C. § 2254(d). For example, the state court dismissed the claim of ineffective assistance of counsel surrounding the Kitty Corley letter for failure to

plead sufficiently that the letter "would have been admissible." *See* Fed. Rec. Vol. 33, PDF p. 22 [ACCA Memorandum opinion of March 9, 2018, at 21] ("Wilson failed to plead sufficient facts to … show that the letter would have been admissible"). Those factual findings by the state court, however, are clearly erroneous and are belied by the language in Mr. Wilson's Rule 32 petition, where counsel 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.

Fed. Rec. Vol. 22, PDF p.152; R32C. 351; Amended Petition for Relief from Judgment Pursuant to Rule 32, at 120.

The ACCA's decision was therefore based on an unreasonable determination of the facts in light of the pleading presented in the state court proceedings and would result in a decision contrary to and involving an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States.

In any event, because there has been no opportunity for factual development in state court on the claims of ineffective assistance of counsel—foundational claims in both state and federal habeas corpus—Mr. Wilson is entitled to develop the facts and present them at a hearing before this Court, and will comprehensively brief his right to an evidentiary hearing in forthcoming papers. It would be a miscarriage of

justice to allow Mr. Wilson to proceed to execution without ever having had the opportunity to develop the factual predicates of his well-pleaded ineffective assistance of counsel claims.

d. Regarding Claim IV (prosecutorial misconduct at the guilt phase), the legal argument is fully preserved for review on the merits by this Court because it was resolved on the merits by the ACCA on direct appeal. *See* Fed. Rec. Vol. 18, PDF p. 145 et seq. The ACCA's merits ruling, however, was contrary to, and involved an unreasonable application of, federal law as determined by the Supreme Court of the United States.

Mr. Wilson contends that numerous instances of prosecutorial misconduct infected the guilt phase of his trial, in violation of his constitutional rights. As detailed in Mr. Wilson's petition, the trial court permitted or failed to cure the following errors: (a) the prosecution's introduction of an incomplete and unreliable version of Mr. Wilson's statements, in violation of federal law governing voluntariness; (b) the prosecution's introduction of irrelevant testimony during the guilt phase concerning the personal characteristics of Mr. Walker, the pain that he suffered, and other sentencing phase matters; (c) the prosecution's efforts to arouse the jurors' personal fear of and hostility towards Mr. Wilson and their sympathy for the victim; (d) the prosecution's improper commentary on Mr. Wilson's constitutionally protected silence during closing arguments, contrary to *Griffin v. California*, 380 U.S. 609 (1965); and (e) the prosecutor's repeated references to the non-testifying co-defendants' confessions, in violation of Mr. Wilson's confrontational rights. *See* Doc. 1, Petitioner's Habeas Corpus Petition, at 265-83.

Respondent argues that these claims are non-meritorious. Regarding subclaim (a), Respondent acknowledges that the burden is on the prosecution to establish that a defendant: (i) was read their *Miranda* rights, (ii) voluntarily waived those rights, and (iii) voluntarily gave their statement; however, Respondent argues that it is not required to produce a full recording of the defendant's statement to establish that it has met its burden of proof. *See* Doc. 56, Respondents' Answer, at 114. Respondent argues that Sgt. Luker's testimony and the recorded portion of Mr. Wilson's statement sufficed to establish the prerequisites for admission of Mr. Wilson's statement. The ACCA's opinion is consistent with that argument. However, Mr. Wilson's statement itself cannot be used as evidence to show that the prosecution has met its burden of establishing the prerequisites for the admission of Mr. Wilson's statement; moreover, Sgt. Luker's conflict of interest should have precluded the ACCA from finding that his testimony alone could establish that the state had met its burden of proof. The ACCA's decision was therefore contrary to, and involved an unreasonable application of, federal law. That said, without waiving any legal arguments at this point, counsel for Petitioner will likely remove this subclaim from Mr. Wilson's Amended Petition when he has an opportunity to amend his federal habeas corpus petition.

Regarding subclaim (b), Respondent answers that the ACCA did not err by allowing the prosecution's introduction of irrelevant testimony concerning sentencing phase matters. The ACCA acknowledged that "victim impact statements typically 'describe [only] the effect of the crime on the victim and his family' and, although relevant to the penalty-phase, are inadmissible in the guilt phase." 142

So.3d at 774 (quoting *Payne*, 501 U.S. at 821). However, such statements "are admissible during the guilt phase of a criminal trial... if the statements are relevant to a *material issue* of the guilt phase." *Ex parte Crymes*, 630 So.2d 125, 126 (Ala.1993). Contrary to the ACCA's determination, Mr. Walker's personal characteristics and the pain he suffered were *not* "material issue[s] of the guilt phase." Such testimony had no bearing on whether Mr. Wilson was guilty of the elements of the offense. The ACCA's decision was contrary to, and involved an unreasonable application of, federal law as determined by the Supreme Court of the United States.

Regarding subclaim (c), Respondent answers that the ACCA did not err by allowing the prosecution's efforts to arouse the jurors' personal fear of and hostility towards Mr. Wilson and their sympathy for the victim. Yet, 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." *See Viereck v. United States*, 318 U.S. 236, 247 (1943) (reversing based on inflammatory argument where prosecutor compared jurors to U.S. soldiers and trial to World War II). The ACCA's determination was therefore contrary to, and involved an unreasonable application, of federal law as determined by the Supreme Court of the United States.

Regarding subclaim (d), Respondent answers that the ACCA did not commit clear error in dismissing Mr. Wilson's allegation regarding the prosecution's improper commentary on his constitutionally protected silence. Yet, the prosecution's tactic of asking Mr. Wilson an incriminating question after he had chosen to take the

Fifth, and then responding for him, forced Mr. Wilson to make an impossible choice: to either explain his conduct or have his silence exploited to achieve a conviction. The prosecutor's remarks violated Mr. Wilson's right not to testify and his rights to due process, a fair trial, and a reliable sentencing determination under the Fifth, Sixth, Eighth, and Fourteenth Amendments. The ACCA's decision was contrary to, and involved an unreasonable application of, federal law under *Griffin v. California*, 380 U.S. 609 (1965).

Finally, regarding subclaim (e), Respondent answered that the ACCA did not commit clear error in condoning the prosecutor's repeated references to the non-testifying co-defendants' statements. Such references, however, violated Mr. Wilson's right to a fair trial, to confront the witnesses against him, and to reliable sentencing as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments. *See Bruton v. United States*, 391 U.S. 123, 137 (1968) (holding that a defendant's confrontation right was violated where a co-defendant's confession was admitted at trial, although the co-defendant exercised his right to remain silent and could not be cross-examined); *see also Kirby v. United States*, 174 U.S. 47, 55 (1899) (holding that the defendant's confrontation right was violated where convictions of non-testifying co-defendants were admitted to prove an essential element of the charge). The ACCA's decision was therefore contrary to, and involved an unreasonable application of, federal law as determined by the Supreme Court of the United States.

e. Regarding Claim V (prosecutorial misconduct at the penalty phase), the legal claims are preserved for review on the merits by this Court because the claim was

resolved on the merits by the ACCA on direct appeal. The ACCA's decision was contrary to, and involved an unreasonable application of, federal law as determined by the Supreme Court of the United States.

Mr. Wilson alleges that prosecutorial misconduct infected the penalty phase in violation of his constitutional rights. As noted in Mr. Wilson's petition, the trial court permitted or failed to correct the following improper actions: (a) the prosecution's presentation of facts not in evidence, as well as a highly inflammatory, non-statutory aggravator; and (b) the prosecution's entreaty to the jury "to do what's right," rather than follow the law. *See* Doc 1., Petitioner's Habeas Corpus Petition, at 283-287.

Regarding subclaim (a), while Respondent acknowledges that the prosecution should not have been allowed to present facts not in evidence, it argued that these facts did not have an "unfair prejudicial impact on the jury's deliberations." Doc. 56, Respondent's Answer, at 142 (internal citations omitted). However, the prosecution's repeated references to evidence that was never introduced or proven to the jury impermissibly infringed upon Mr. Wilson's constitutional right to confront the evidence against him. *See United States v. Owen*s, 484 U.S. 554, 557 (1988) (Confrontation Clause firmly establishes counsel must have an adequate opportunity to cross-examine adverse witnesses). The prosecutor's 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. The ACCA's decision was therefore contrary to, and involved an

unreasonable application of, federal law as determined by the Supreme Court of the United States.

Regarding subclaim (b), Respondent argues that, when read in context, the prosecutor's entreaty to the jury "to do what's right" amounted to an appeal that the jurors apply the facts to the law and sentence Wilson to death. *See* Doc. 56, Respondent's Answer, at 149. It therefore argues that the ACCA's decision to dismiss this claim was proper. However, the U.S. Supreme Court clearly held in *United States v. Young*, that a prosecutor who exhorted the jury to "do its job" had committed prejudicial error. 470 U.S. 1, 18 (1985). The prosecutor's statement at Mr. Wilson's trial is nearly identical. Thus, the ACCA's decision was contrary to, and involved an unreasonable application of, federal law as determined by the Supreme Court of the United States.

f. Regarding Claim VI (error in penalty phase jury instructions), the legal claims are preserved for review on the merits by this Court, and the factual record is complete. They were addressed by the ACCA on the merits on direct appeal. The ACCA's decision was contrary to, and involved an unreasonable application of, federal law. Specifically, Mr. Wilson argues that the circuit court erred by: (a) leading the jury to believe it could not consider a mitigating factor unless the entire jury agreed upon its existence; and (b) diminishing the jury's role in the penalty phase. *See* Doc. 1, Habeas Corpus Petition, at 287-291. Taken individually and collectively, the trial court's instructional errors deprived Mr. Wilson of his right to due process and a

reliable sentencing determination guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments.

Nevertheless, Respondent answers that the ACCA's decision to uphold these trial court instructions was proper. *See* Doc. 56, Respondent's Answer, at 151-157. However, the court's decision conflicts with U.S. Supreme Court precedent, which states that: (a) jurors must be clearly instructed that they need not be unanimous as to the existence of mitigating circumstances in order to consider those circumstances (*see McKoy v. North Carolina*, 494 U.S. 433, 439 (1990); *Mills v. Maryland*, 486 U.S. 367, 384 (1987); *Calhoun v. State*, 932 So. 2d 923, 972 (Ala. Crim. App. 2005)); and (b) "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that that the responsibility for determining the appropriateness of the defendant's death rests elsewhere" (*Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985)). The ACCA's decision with respect to this claim was therefore contrary to, and involved an unreasonable application of, federal law as determined by the Supreme Court of the United States.

g. Regarding Claim VII (failure to make findings regarding mitigating factors), Respondent answers that Petitioner has raised this claim for the first time in the federal habeas corpus petition and has never raised it on direct appeal or on Rule 32 in state court. *See* Doc. 56, Respondent's Answer, at 157. Respondent appears to be correct. Because of the procedural obstacle, and without waiving any legal argument or reply at this point, Petitioner likely will remove this claim from Mr.

Wilson's Amended Petition when he has an opportunity to amend his federal habeas corpus petition.

h. Regarding Claim VIII (violation of *Ring v. Arizona*), the legal claims are preserved for review on the merits by this Court, and the factual record is complete. Mr. Wilson argues that his death sentence was obtained through a process not compliant with *Ring v. Arizona,* 536 U.S. 584 (2002) and *Hurst v. Florida*, 136 S. Ct. 616 (2016), thereby violating his right to trial by jury. *See* Doc. 1, Petitioner's Habeas Corpus Petition, at 296-300.

In *Ring*, the U.S. Supreme Court held that "[c]apital defendants… are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximal punishment" 536 U.S. at 589. Thus, a death sentence may only be imposed where a jury finds unanimously and beyond a reasonable doubt that (1) a statutory aggravating circumstance exists beyond a reasonable doubt, and (2) the statutory aggravating circumstance outweighs the mitigating circumstance. *See* Ala. Code § 13A-5-46(e)(2) (1975); *Ex parte Woodard*, 631 So. 2d 1065, 1071 (Ala. 1993). Mr. Wilson's death sentence cannot be affirmed pursuant to *Ring* because a jury never made either of the factual findings necessary to support imposition of the death penalty.

Contrary to Respondent's assertions, there is no basis for concluding that the aggravating circumstances in this case were factually found by a unanimous jury to exist beyond a reasonable doubt. The trial court prevented such a finding by denying defense counsel's request for a special verdict on the three aggravating

circumstances sought by the state. *See* Fed. Rec. Vol. 10, PDF p. 162-163; TR. 816-817. *See, e.q., Ex parte McGriff*, 908 So. 2d 1024, 1039 (Ala. 2004) (suggesting that at retrial, trial court should utilize specialized verdict form to expressly record jurors' votes on the issue of existence of aggravating circumstance). Moreover, Mr. Wilson's 10 to 2 verdict (*see* Fed. Rec. Vol. 2, PDF p. 172; CRT. 356) indicates that the jurors did not unanimously agree on the existence of the "heinous, atrocious, or cruel" aggravating circumstance or unanimously find that the aggravating circumstances outweighed the mitigating circumstances. *See* Fed. Rec. Vol. 2, PDF p. 172. Nevertheless, the ACCA dismissed Mr. Wilson's claim, holding that the jury "specifically found beyond a reasonable doubt that the capital offense was committed while Wilson was committing the offenses of burglary and robbery." *Wilson v. State*, 142 So.3d 732, 802 (2010). *See* Fed. Rec. Vol. 18, PDF p. 187. This decision was contrary to, and involved an unreasonable application of, federal law as determined by the Supreme Court in *Ring*.

To Mr. Wilson's broader argument that *Ring* invalidated Alabama's capital sentencing scheme, the ACCA responded that under *Ex parte Waldrop*:

> Only one aggravating circumstance must exist in order to impose a sentence of death. Ala. Code 1975, § 13A–5–45(f).… The jury, and not the trial judge, determined the existence of the 'aggravating circumstance necessary for imposition of the death penalty.' *Ring* 536 U.S. at 609, … Therefore, the findings reflected in the jury's verdict alone exposed Waldrop to a range of punishment that had as its maximum the death penalty. This is all *Ring* and *Apprendi* [v. New Jersey, 530 U.S. 466 (2000),] require. 859 So.2d 1181, 1188 (Ala. 2022).

See Fed. Rec. Vol. 18, PDF p. 187-188. Yet, *Waldrop* impermissibly eased the state's burden of proving that the death penalty is appropriate by ensuring that the jury was unaware that its guilt/innocence phase finding authorized the trial judge to impose the death penalty without additional due process.

Moreover, the Alabama Supreme Court's construction of Alabama law under *Waldrop* arbitrarily renders defendants convicted of some capital offenses automatically subjected to the death penalty at the end of the guilt/innocence phase, while defendants convicted of other capital offenses cannot be sentenced to death without further jury fact findings at the penalty phase. This construction violates the requirements of the Sixth, Eighth, and Fourteenth Amendments. The *Waldrop* decision likewise undermines the reliability of the capital sentencing process and improperly skews sentencing toward the imposition of the death penalty. *See Adams v. Texas*, 448 U.S. 38, 46-47 (1980). Since the ACCA relied on *Waldrop* – which itself is contrary to and involves an unreasonable application of, federal law as determined by the Supreme Court of the United States. Mr. Wilson is entitled to relief on this claim.

Finally, the ACCA's dismissal of Mr. Wilson's claim that *Ring* invalidated the Alabama capital sentencing scheme is clearly contrary to federal law under *Hurst v. Florida*, 136 S. Ct. 616 (2016). In *Hurst*, the Supreme Court held that Florida's capital-sentencing scheme was unconstitutional under the Sixth Amendment. Alabama's capital sentencing scheme is nearly indistinguishable from that of Florida: neither Florida nor Alabama requires the jury to make the critical findings necessary to impose the death penalty, but rather leave such findings to

the trial judge; both Florida and Alabama utilize an advisory jury verdict; and neither Florida nor Alabama juries make specific factual findings with regard to the existence of mitigating or aggravating circumstances. Respondent answers that the constitutionality of Alabama's capital sentencing scheme was sustained by the Alabama Supreme Court against a *Hurst* challenge in *Ex parte Bohannon*, 222 So. 3d 525, 532-33 (Ala. 2016). But this decision itself is contrary to and involves an unreasonable application of *Hurst v. Florida*.

i. Regarding Claim IX (due process violation because trial court did not hold hearing to justify use of shackles on Mr. Wilson and ineffective assistance of counsel), Petitioner will require further factual development to establish the presence of a due process violation, at which time Petitioner would then amend Mr. Wilson's habeas corpus petition.

j. Regarding Claim X (due process violation because of cumulative trial-level errors), the legal claims are preserved for review on the merits by this Court. The cumulative effect of all trial-level error violated Mr. Wilson's rights under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments.

The purpose of Due Process is to ensure that defendants are convicted in a fair trial: "In construing th[e Fourteenth] Amendment, we have held that it imposes minimum standards of fairness on the States…" *Danforth v. Minnesota*, 552 U.S. 264, 269-70 (2008). The fairness of a trial cannot be determined by sectioning portions of the proceedings off and analyzing each separately. Courts recognize as much when they apply harmless error review.

Nevertheless, the ACCA dismissed Mr. Wilson's cumulative error claim—focusing narrowly on his allegations of ineffective assistance of counsel:

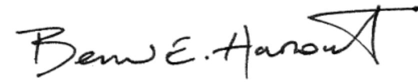
> [T]here is no cumulative effect of trial counsel's ineffectiveness to consider. Because the substantive *Brady* claim raised by Wilson was procedurally barred, there is nothing to add to this analysis. *Id*. The circuit court did not err in dismissing this claim. *See* Fed. Rec. Vol. 33, PDF p. 59 [March 9, 2018 opinion, p. 58].

The ACCA thereby treated Mr. Wilson's cumulative error claim the same way that it treated his IAC claim. For the reasons stated above, that decision was erroneous. Moreover, the court's failure to apply a cumulative effects test was contrary to and involved an unreasonable application of, federal law as determined by the Supreme Court of the United States.

FOR THESE REASONS, Mr. Wilson respectfully requests that the Court first enter an order granting *Brady* disclosure of the Kitty Corley letter; second grant Mr. Wilson's request for a few corrections and supplements to the record; and third enter a scheduling order that allows for a reasonable process of discovery and resolution of discovery motions, with an eye toward the eventual amendment of the federal habeas corpus petition by Mr. Wilson and briefing on the right to a federal hearing.

Date: November 7, 2022

Respectfully submitted,



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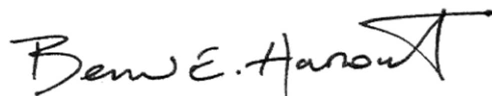
CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2022, the foregoing has been electronically filed with the Clerk of the Court 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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