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

DAVID WILSON, **Petitioner,**	)	
v.	)	**No.** 1:19-CV-284-WKW-CSC
JEFFERSON S. DUNN, Commissioner, Alabama Department of Corrections, Respondent.	)	**CAPITAL CASE**

PETITION FOR WRIT OF HABEAS CORPUS
BY A PRISONER IN STATE CUSTODY UNDER SENTENCE OF DEATH

Petitioner, DAVID WILSON, now incarcerated on death row at W.C. Holman Correctional Facility in Atmore, Escambia County, Alabama, petitions this court for relief from his unconstitutionally obtained convictions and sentence of death. Mr. Wilson is actually innocent of capital murder, because he did not kill the victim or have the intent to kill the victim, nor was he present when the victim was killed, and, so, also "innocent of the death penalty." *Sawyer v. Whitley*, 505 U.S. 333, 343, 345 (1992). His convictions and death sentence were obtained through the State's suppression of critical evidence – the confession of a co-defendant – and through the prosecution's false arguments about the meaning of his illegally obtained statement to police, which police failed to record in full. Mr. Wilson could have and wanted to testify respecting the meaning of the final recorded words, but counsel prevented him from doing so. In support of this petition, Mr. Wilson states the following:

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JURISDICTION AND VENUE

This court has jurisdiction to hear Mr. Wilson's habeas corpus petition pursuant to 28 U.S.C § 2254(a).

Venue is proper in the Middle District of Alabama because Houston County, Alabama, where Mr. Wilson was convicted and sentenced, is within this district. 28 U.S.C. § 2241(d).

INTRODUCTION AND STATEMENT OF FACTS

On April 13, 2004, Dewey Walker was found dead in his home in Dothan, Houston County, Alabama. (Tr. R.[1] 239, 245.) A van with valuable audio equipment

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[1] The following abbreviations for the state court records will be used:

(Tr. C. #) refers to the clerk's record on direct appeal;

(Tr. R. #) refers to the trial transcript;

(Tr. R-Sent. #) refers to the sentencing transcript;

(Tr. R-Suppress #) refers to the transcript of the hearing on the motion to suppress;

(Tr. R-Mot. #) refers to the transcript of an unspecified motion hearing held on October 12, 2006, in Vol. 6 of the direct appeal record;

(Tr. R-Status #) refers to the transcript of an unspecified motion hearing held on June 26, 2007, in Vol. 6 of the direct appeal record;

(Tr. Supp. C-1 #) refers to the first supplement to the record on appeal;

(Tr. Supp. C-2 #) refers to the second supplement to the record on appeal;

(Tr. C-Remand #) refers to the clerk's record on remand;

(Tr. Supp. C-Remand #) refers to the supplement to the clerk's record on remand;

(Tr. R-Remand #) refers to the transcript of the hearing under *Batson v. Kentucky*, 476 U.S. 79 (1986), on remand;

(C. #) refers to the clerk's record on appeal from dismissal of Mr. Wilson's state post-conviction petition; and

(R. #) refers to the transcript of the hearing on the State's Motion to Dismiss Mr. Wilson's state post-conviction petition.

was missing. (Tr. R. 222, 228-29.) Police questioned Matthew Marsh as a suspect that night (C. 707); his name came up as an associate of Mr. Walker's son (C. 706-7) and he was known to drive a blue GEO Metro (*id.*), the model of car a neighbor had seen at Mr. Walker's house during the past week (C. 706).

Marsh admitted having Mr. Walker's van and some of the audio equipment, but denied involvement in the killing. (C. 707.) He implicated three others: Michael Jackson, David Wilson, and Catherine Nicole Corley. (*Id.*) The police arrested Marsh and Jackson before Mr. Wilson and Corley after. (C. 611-12) (police reports recording times of arrest).

Police arrested David Wilson the following morning at about 4 a.m. in his home without a warrant. (Tr. R. 375; Tr. R-Suppress 7.) At least five officers entered his home. (Tr. R-Suppress 9.) He was rousted out of bed and told "we needed to talk ... he needed to come ...." (*Id.* at 12.) He was brought to the police station in a police vehicle and in handcuffs within minutes of being awakened (*Id.* 12, 14, 31) and interrogated by Sergeant Luker and Corporal Etress (Tr. R. 400; Tr. R-Suppress 15). A bare minute was spent administering the *Miranda* warnings. (Tr. R-Suppress 18.) Police did not record the first hour. (Tr. C. 412, 498). They then interrogated Mr. Wilson on tape for half an hour, but the recording stopped ten to fifteen minutes before the interrogation ended. (Tr. R-Suppress 20-22.)

In the recorded portion of his statement, Mr. Wilson said that Marsh instigated the crime by begging him to go to Mr. Walker's house to steal things. (Tr. C. 500.) Mr. Wilson stated that while he was in the house, Mr. Walker unexpectedly came home.

(Tr. C. 504.) Mr. Walker heard Mr. Wilson in the house and grabbed a knife. (Tr. C. 505.) Mr. Wilson swung at Mr. Walker's arm with a bat attempting to dislodge the knife, but missed and hit him in the back of the head. (*Id.*) Mr. Walker struck a corner of the wall as he fell. (Tr. C. 505-6.) Mr. Walker stood up, still with the knife in hand. (Tr. C. 506.) Mr. Wilson choked Mr. Walker to get him to drop the knife. (Tr. C. 506-7.) Mr. Wilson then retreated and returned to Marsh's house. (Tr. C. 509.) One of Mr. Wilson's co-defendants, Corley, wanted to return to Mr. Walker's house shortly after the struggle. (Tr. C. 510.) She went to look at Mr. Walker in the kitchen, but Mr. Wilson refused to accompany her. (Tr. C. 510-11.)

Sgt. Luker obtained a search warrant based on Mr. Wilson's statement, his own observations during the warrantless arrest, and information purportedly from Corley. (Tr. C. 402-3.) The statement attributed to Corley in the search warrant affidavit signed by Sgt. Luker (Tr. C. 403) does not appear at all in her recorded statement (C. 624-32). Sgt. Luker did not participate in Corley's interrogation (C. 624) and, so, had no personal knowledge to draw from. The search recovered some of the audio equipment. (Tr. C. 405.)

Mr. Wilson was indicted for two counts of capital murder: murder during a burglary, Ala. Code 1975, § 13A-5-40(a)(4) (Tr. C. 20), and murder during a robbery, Ala. Code 1975, § 13A-5-40(a)(2) (Tr. C. 22).

Some months after the arrests, the District Attorney ("DA") obtained a letter from Corley in which she confessed that she "hit Mr. Walker with a baseball bat until he fell." (C. 615.) Sgt. Luker seized other handwriting samples from Corley's cell (*id.*),

and the DA submitted these to a handwriting expert with the United States Postal Service ("USPS") (C. 634-37). The expert opined the letter and materials from Corley's cell were probably written by the same person. (C. 636.) This investigation was recorded in a police report disclosed to defense counsel. (C. 615.) However, the letter itself and expert reports were not turned over to the defense.[2] No mention of the expert's review and opinion was made in any documents produced to the defense. Neither did defense counsel investigate Corley's culpability by pursuing disclosure of the letter from the DA or by searching her casefile in the clerk's office.

Counsel filed two suppression motions lifted from a trial handbook without supplying any facts from Mr. Wilson's case. *Compare* (C. 691-94) *with* (C. 696-704) and (C. 722-25) *with* (C. 727-30). A suppression hearing was held two months before trial. (Tr. R-Suppress 2) (date of suppression hearing, Oct. 9, 2007) and (Tr. R. 2) (date of trial, Dec. 3, 2007). Sgt. Luker testified at length to the facts surrounding the arrest of David Wilson, but gave virtually no evidence concerning probable cause, such as police familiarity with Mr. Wilson's co-defendants or any details of their statements. *See* (Tr. R-Suppress 6-65). Defense counsel presented no evidence respecting characteristics of Mr. Wilson, even though they had a Youthful Offender Report, showing he had just turned 20 at the time of the crime and had no prior criminal history (Tr. C. 34-40), and a report from Dr. Doug McKeown, a psychologist who evaluated Mr. Wilson for competency and state of mind, containing social history

[2] Mr. Wilson moved for discovery in Rule 32 proceedings, including disclosure of the letter (C. 1415 and 1422), but it was never granted, since the court dismissed his petition in its entirety.

information (Tr. Supp. C-1 16-22). At the conclusion of the evidence, they made no argument at all (*id.* 67), and the court immediately denied the motions (*id.*).

The venire for Mr. Wilson's trial included only eight African-Americans out of a total of 54 venirepersons.[3] *See* (Tr. Supp. C-2 13-19) (venire list); (Tr. R. 22) (clerk giving number of veniremembers present). Of those eight, three were removed for cause. (Tr. R. 179.) The State had 16 peremptory strikes and used five of them to remove all the remaining black jurors. (Tr. Supp. C. 32.) Mr. Wilson was, thus, tried before an all-white jury for the murder of a white man. No challenge was raised at trial under *Batson v. Kentucky*, 476 U.S. 79 (1986).

At trial, the State's theory was that Mr. Wilson went to Mr. Walker's house alone and that, when Mr. Walker returned home, Mr. Wilson hit him with a bat and choked him. (Tr. R. 191-96.) The evidence supporting this theory was Mr. Wilson's statement to police, in which he admitted striking one blow (Tr. C. 505), and the audio equipment seized from his residence (Tr. R. 206-07). However, a pathologist described a multitude of injuries sustained by Mr. Walker. (Tr. R. 497.) None of the co-defendants testified. Corley's letter was not mentioned.

In addition to his testimony concerning Mr. Wilson's arrest, the taking of his statement, and the search, Sgt. Luker testified repeatedly respecting spots of "blood" he observed throughout the house (Tr. R. 262-65, 292-95, 455-57), even though no

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[3] In its order denying *Batson* relief, the circuit court mistakenly stated that the venire consisted of 75 persons. (Tr. C-Remand 32.) This is the number of names in the venire list in the record (Tr. Supp. C-2 13-19), but all those called did not appear. Hence, Mr. Hedeen's query respecting number required by law for a capital venire. (Tr. R. 22.)

samples were taken of these spots, *see* (C. 737-40) (evidence log for 127 Shield Court), and, so, no testing was done on them (Tr. R. 456-57). Based on this testimony, the DA argued that Mr. Wilson subjected Mr. Walker to a torturous beating, dragging him around the house in a fruitless effort to find his coin collection. (Tr. R. 602-4, 607-10.)

Defense counsel did virtually nothing during trial. They gave a brief opening setting out no theory of defense. (Tr. R. 208-15.) They asked potentially relevant questions, but failed to follow up. They either made no objection or made objections on unsupported grounds against the unqualified testimony of Sgt. Luker and otherwise failed to counter the proliferation of "facts" not in evidence. They called no witnesses (Tr. R. 593-94) and gave no closing (Tr. R. 625-28). The jury returned verdicts of guilty on both counts. (Tr. R. 672.)

At the penalty phase, the State 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. (Tr. R. 691-92.) Defense counsel conceded that this aggravator was applicable. (Tr. R. 680.) 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. (Tr. R. 705.)

Defense counsel called two unprepared witnesses, Mr. Wilson's mother and a neighbor (Tr. R. 713-62), and dumped 400 pages of school records on the jury without explanation (Tr. R. 748-49). Ms. Wilson testified respecting her own mental health problems, her divorce from Mr. Wilson's father, the shuttling back and forth of Mr.

Wilson between his parents, his problems in school, and some details of physical and verbal abuse of Mr. Wilson by his uncle. (Tr. R. 713-50.) However, the DA attacked her testimony by pointing out that Mr. Wilson had not lived with her for a significant amount of time during his childhood and by asking questions about his school records that she could not answer. *See, e.g.* (Tr. R. 749-50). The neighbor's testimony was also attacked as having a limited basis. See, e.g. (Tr. R. 756-57).

The same defective evidence introduced in the guilt phase, the "blood around the house" which supported the dragging-and-beating scenario, was raised in both sides' closing arguments. Defense counsel, having failed to attack Sgt. Luker's qualifications to identify blood, instead relied on a theory that Mr. Walker was unconscious and, so, unaware of the dragging and beating. (Tr. R. 771-74.) The State then also highlighted the "blood" evidence in its closing. *See, e.g.* (Tr. R. 783-84).

Despite these deficiencies, two jurors voted for life. (Tr. C. 356.) Nonetheless, the judge imposed a death sentence. (Tr. R-Sent. 15.)

Because counsel failed to investigate Mr. Wilson's background with any thoroughness, they failed to identify potential witnesses who could have provided more detail about his early life. 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 could have informed the jury about Linda'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. (C. 394-97, 405-07.) 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 (C. 392-96); David's developmental delays and special education placements (C. 405-07); the psychiatric medications David was prescribed from an early age, including Ritalin and Pamelor (C. 405, 410); the untimely death of David's younger brother, Steven, from cystic fibrosis (C. 403-04); the impact of Steven's illness on David's family (C. 404); and the neglect, abuse, and abandonment David suffered in childhood (C. 400-05).

Teachers from Mr. Wilson's elementary schools, such as Dr. Theresa Harden and Jill Byerley had relevant information about his social and academic difficulties, *see* (C. 1856-58 and 1860-61), which his mother could not provide, because Mr. Wilson was living with his father at that time. Dr. Harden could further have explained what the school records disclose about Mr. Wilson's mental health issues, in particular, his Asperger's Syndrome. (C. 1857.) And a mental health expert, such as neuropsychologist Dr. Robert Shaffer, could have explained the symptoms and effects of Asperger's in Mr. Wilson's development and behavior, including his interaction with peers, such as his co-defendants. *See* (C. 411-16).

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.

Appellate counsel raised a challenge under *Batson v. Kentucky*, 476 U.S. 79 (1986), because Mr. Wilson was tried before an all-white jury. The Alabama Court of Criminal Appeals ("CCA") remanded for a hearing on that issue. *Wilson v. State*, 142 So. 3d 732, 747-48 (Ala. Crim. App. 2010) ("*Wilson I*"[4]). Mr. Wilson challenged the removal of three jurors in particular, Jehl Dawsey, Darran Williams, and James Collins. *Id.* at 752. At the *Batson* hearing, one of the prosecutors who struck the jury, Gary Maxwell, testified respecting the State's reasons for each of its strikes.[5] Mr. Maxwell testified that he removed Mr. Dawsey because of his "LETS" record[6] and his young age (Tr. R-Remand 17); that he removed Mr. Williams because of his LETS record (*id.* at 15-16); and that he removed Mr. Collins because of his reservations about his ability to vote for death (*id.* at 21). The State did not submit the LETS records into evidence, despite promising at the conclusion of the hearing to do so. (*Id.* at 99-100.) Mr. Wilson demonstrated that the State did not remove four white jurors with traffic records. (*Id.* at 43-44.) After the hearing, the circuit court denied the claim, accepting the State's reasons as non-pretextual. (Tr. C-Remand 40.)

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[4] Mr. Wilson will cite the CCA's opinions on direct appeal as "*Wilson I*" collectively.

[5] The proceedings were highly unusual in that the District Attorney himself, Doug Valeska, who was lead counsel at Mr. Wilson's trial and who conducted the voir dire, represented the State at this hearing and called as a witness his Chief Assistant, Gary Maxwell. *Compare* (Tr. R. 3) (listing counsel for the State at trial) *with* (Tr. R-Remand 2-3). (In capital cases, the Attorney General's office represents the State in all appeals.) This quirk led to the DA virtually testifying for his own witness with repeated interjections about his own and his office's practices. *See, e.g.* (Tr. R-Remand 6-7, 16-17, 24, 27-30, 36-38).

[6] Mr. Maxwell testified that "LETS" stands for "Law Enforcement Tracking System." (Tr. R-Remand 15.)

On issues other than *Batson*, Mr. Wilson fared little better with his appellate counsel than with his trial counsel. Appellate counsel raised issues related to Mr. Wilson's arrest and the admissibility of his statement, *see* (C. 532-34) and (C. 527-31), but again failed to argue a lack of probable cause for the arrest or the involuntariness of the statement arising from the conditions of the arrest and characteristics of Mr. Wilson. On return to remand from the *Batson* hearing, the CCA denied all relief, 142 So. 3d at 758-59, and the Alabama Supreme Court ("ASC") denied certiorari, *Ex parte Wilson*, No. 1111254 (Ala. Sept. 20, 2013).

PROCEDURAL HISTORY

David Wilson was arrested on April 14, 2004. (Tr. C. 1.) Matthew Lamere and Valerie Judah were appointed to represent him. (*Id.*)

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), and Murder during a Robbery, *id.*, § 13A-5-40(a)(2).[7] (Tr. C. 20, 22.)

Mr. Wilson was arraigned on October 12, 2004, and pled not guilty to both charges. (Tr. Supp.1 R-Arr.[8] 8-9.) He was denied youthful offender status on the same day. (*Id.* at 6.)

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[7] Houston Cnty. Case Nos. CC-04-1120 and -1121.

[8] The state court record contains two supplements to the record on appeal. The first of these, cited here, has two hearing transcripts separately paginated. Hence, the first transcript is designated as "R-Arr.," i.e., the transcript of the hearing which included arraignment and the youthful offender application. The second transcript will be designated as "R-Withdraw," i.e., the transcript of the hearing on counsel's motions to withdraw.

While in the Houston County Jail awaiting trial, Mr. Wilson was charged with attempted escape. Houston Cnty. Case No. CC-2005-1138 (indictment June 9, 2005). Judah advised Mr. Wilson to plead to the escape charge, *id.* (guilty plea entered May 17, 2006), but, as a result, Mr. Wilson was delivered to the Alabama Department of Corrections and sent to serve his escape sentence at Donaldson Correctional Facility in Bessemer, Alabama (Tr. R-Mot. 10), and other DOC facilities (C. 674) (Mount Meigs). Counsel did not visit Mr. Wilson at these facilities. (C. 672) (Judah att'y fee dec. showing mileage for five visits to client, each billed at six miles); (C. 684) (Lamere att'y fee dec. showing one visit to client in 2004).

On August 21, 2006, Judah moved to withdraw. (Tr. C. 51.) A hearing was held on November 14, 2006, during which Lamere also moved to withdraw. (Tr. Supp.1 R-Withdraw 2, 4.) Mr. Wilson was returned to Dothan for this hearing. (*Id.* at 4); (Tr. C. 54). The court granted their request (*id.* at 6) and appointed Scott Hedeen and Ginger Emfinger to replace them (Tr. C. 55).

Counsel filed motions to suppress Mr. Wilson's statement to the police and the evidence seized during the search of his home. (Tr. C. 59-66.) A hearing was held on both motions on October 9, 2007. (Tr. R-Suppress 2.) After extensive testimony from Sgt. Luker of the Dothan Police Department, counsel made no further argument and the court denied the motions. (*Id.* at 65-67.)

Trial began on December 3, 2007. (Tr. R. 2.) Neither Mr. Wilson nor any of his co-defendants testified. (Tr. R. 4-5) (index listing trial witnesses). The jury convicted Mr. Wilson of both counts of capital murder on December 5, 2007. (Tr. C. 354-55.)

Following a 15-minute break (Tr. R. 673-74), a penalty phase hearing was held during which defense counsel presented only two lay witnesses (Tr. R. 689-796). The jury returned a 10-2 verdict in favor of death. (Tr. C. 356.)

On January 8, 2008, the court held a sentencing hearing and sentenced Mr. Wilson to death. (Tr. R-Sent. 15.)

Timely appeal was taken.[9] The issues raised to the CCA are set out in Appendix A (Table of Contents to Br. of the Appellant, No. CR-07-0684 (filed July 10, 2008), pp. ii-vii).

On November 5, 2010, the CCA remanded to the trial court to determine if the prosecution violated *Batson v. Kentucky*, 476 U.S. 79 (1986). *Wilson I*, 142 So. 3d at 747-48. After a hearing, the circuit court denied the claim. (Tr. C-Remand 40.)

Mr. Wilson rebriefed the *Batson* issue on return to remand. The issues raised in the remand brief are set out in Appendix B (Table of Contents to Br. of the Appellant on Return to Remand, No. CR-07-0684 (filed May 11, 2011), pp. i-ii). On March 23, 2012, the CCA affirmed Mr. Wilson's conviction and sentence. *Wilson*, 142 So. 3d at 748 (op. on return to remand), and on June 22, 2012, denied rehearing, *id.*

Mr. Wilson petitioned for certiorari from the Alabama Supreme Court ("ASC").[10] The issues raised to the ASC are set out in Appendix C.[11] That court denied certiorari on September 20, 2013. *Ex parte Wilson*, No. 1111254 (Ala. Sept. 20, 2013).

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[9] Ala. Crim. App. Case No. CR-07-0684.

[10] Ala. No. 1111254.

[11] No index is included in the petition for writ of certiorari.

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).

Mr. Wilson filed a Petition pursuant to Rule 32 of the Alabama Rules of Criminal Procedure on September 19, 2014.[12] (C. 16-88.) He filed an Amended Petition on December 11, 2015 (C. 224-1027), and a supplement on September 7, 2016 (C. 1429-61). The State filed an Amended Answer and Motion to Dismiss on February 24, 2016 (C. 1051-1124), and a response to the supplement on October 6, 2016 (C. 1485-91). The court held a hearing on the State's Motion on November 8, 2016 (R. 1[13]), and dismissed the petition in its entirety without granting discovery or holding an evidentiary hearing on February 24, 2017 (C. 1524-1646, 1647-1769[14]). Mr. Wilson filed a Motion to Reconsider on March 24, 2017 (C. 1772-1861), which was denied by operation of law on March 26, 2017. *But see* (C. 1873, 1874) (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).

Mr. Wilson timely appealed on April 6, 2017.[15] The issues raised on appeal are set out in Appendix D (Table of Contents to Br. of the Appellant, No. CR-16-0675 (filed August 15, 2017), pp. ii-iv). The CCA affirmed the dismissal of the petition on

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

[13] The Rule 32 record contains transcripts of two motion hearings, each separately paginated.

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

[15] Ala. Crim. App. Case No. CR-16-0675.

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.

Mr. Wilson petitioned for certiorari from the ASC.[16] The issues raised to the ASC are set out in Appendix E (Table of Contents to Pet. for Writ of Cert., No. 1170747 (filed May 17, 2018), pp. i-ii). That court denied certiorari on August 24, 2018. *Ex parte David Phillip Wilson*, No. 1170747 (Ala. Aug. 24, 2018).

Mr. Wilson filed a petition for writ of certiorari with the U.S. Supreme Court on January 18, 2019.[17] This petition remains pending.

GROUNDS SUPPORTING THE PETITION FOR RELIEF

I. The Prosecution Withheld Exculpatory Evidence Contrary to *Brady v. Maryland*, Violating David Wilson's Rights to Due Process and a Fair Trial under the Fifth and Fourteenth Amendments.

The confession of someone other than the defendant is undeniably critical information favorable to the defense. As the Supreme Court held in *Brady v. Maryland*, where just such a confession went undisclosed, the withholding of such evidence "casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice ...." 373 U.S. 83, 88 (1963). The prosecutor in this case withheld such favorable, material evidence from Mr. Wilson.

A. The State withheld material exculpatory evidence showing that co-defendant Catherine Corley confessed to killing Dewey Walker.

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[16] Ala. Case No. 1170747. With 242 days remaining on his SOL, Mr. Wilson's petition was due on or before April 23, 2019.

[17] S. Ct. Case No. 18-7527.

In his statement to police, Mr. Wilson admitted striking Dewey Walker in the head by accident, while aiming to disarm him of a knife, and choking him with an extension cord until he "passed out." (Tr. C. 505-7.) Mr. Wilson also said that Mr. Walker struck his head on a jutting corner of the wall when he fell. (Tr. C. 505-6.) Mr. Wilson did not confess to any other assault on Mr. Walker. A tape of Mr. Wilson's statement was played at his trial (Tr. R. 419-21) and admitted into evidence, *see* (Tr. R. 418-19) and (Tr. R. 6). A transcript of the statement was also admitted. (Tr. R. 433-34) and (Tr. C. 497-517).

The State's pathologist testified that numerous other injuries were inflicted on Mr. Walker (Tr. R. 497) and that he was still alive when they were inflicted (Tr. R. 499, 503-4, 512). The prosecution argued that Mr. Wilson alone inflicted all of the injuries. (Tr. R. 606-7, 609-10, 612, 623.)

But the DA had in his possession a letter written by Mr. Wilson's co-defendant, Catherine Nicole Corley, in which she confessed that she had "hit Mr. Walker with a baseball bat until he fell." (C. 615.) The State did not turn this letter over to the defense, nor has it ever done so.

In her statement to the police, Corley admitted entering the home after Mr. Wilson's initial confrontation and gave a detailed description of its interior, but denied entering the kitchen where Mr. Walker lay. (C. 626-29.) There is a material difference between the Corley statement, which was turned over to the defense, and the Corley letter, which was not.

After the letter was turned over to the prosecution, Sgt. Luker, the lead investigator, collected samples of Corley's handwriting from her jail cell. (C. 615-16.) The letter and the handwriting samples were turned over to the USPS for examination by a handwriting expert. (C. 634-37.) The expert opined that the letter and samples taken from Corley's cell were probably written by the same person. (*Id.*) The State did not notify Mr. Wilson's counsel of this examination or turn over the reports and supporting documents, nor has it ever done so.

A defendant is entitled to favorable evidence in a criminal proceeding. *Brady*, 373 U.S. 83 (1963). To establish a *Brady* claim, "[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State ... and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999).

Evidence is suppressed, within the meaning of *Brady*, when it is withheld from the defense. *Brady*, 373 U.S. at 84, 86-87. The prosecutor's duty to disclose exists independent of the defense and applies even absent any specific request by the accused. *Strickler*, 527 U.S. at 280. A prosecutor is not absolved of his obligations under *Brady* by defense counsel's inaction. *Banks v. Dretke*, 540 U.S. 668, 696 (2004).

"[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). But a defendant's burden in proving prejudice

> 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.

Id. at 434. Furthermore, "suppressed evidence [must be] considered collectively, not item-by-item." *Id.* at 436. 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 conviction must be reversed. *Id.* at 421-22.

Corley's letter, and the expert reports authenticating it, were material because they would have been crucial to Mr. Wilson's defense on the charge of intentional murder. Mr. Wilson admitted only to once striking and choking (Tr. C. 505), but not killing, Mr. Walker. The only evidence at trial about his co-defendants' participation in the crime was Mr. Wilson's own statement. Mr. Wilson said that, after his encounter with Mr. Walker, Corley came to the home and entered at the back. (Tr. C. 510.) Mr. Wilson refused to accompany her any further into the house. (Tr. C. 510-11.) She, on her own, went, as she said, to view the body. (*Id.*) So there was a period of time when Corley was in the home, but Mr. Wilson was not a witness to what she did.

In her letter, Corley admitted she "hit Mr. Walker with a baseball bat until he fell." (C. 615.) Her numerous blows, when Mr. Wilson was not present, create reasonable doubt about any intent to kill on Mr. Wilson's part. Thus, there is a reasonable probability that Mr. Wilson would not have been convicted of capital

murder. *See* Ala. Code 1975, §§ 13A-5-40(b) and 13A-6-2(a)(1) (requiring a specific intent to cause death).

Such a confession would also have been relevant to punishment, even if Mr. Wilson were convicted of capital murder. Lesser culpability is mitigating. Ala. Code 1975, § 13A-5-51(4); *Lockett v. Ohio*, 438 U.S. 586, 608 (1978). There is a reasonable probability that the vote for death, already at the minimum of ten (Tr. C. 356), would have been fewer, because of the likelihood that Mr. Wilson was not Mr. Walker's actual killer.

The State could not legitimately have attacked the authenticity of the letter or credibility of the expert, given its own use of them against Corley. The State put forward the letter and the expert reports as credible before the court to obtain additional fingerprints from Corley. (C. 634-37.)

The materiality of Corley's letter to Mr. Wilson's conviction and sentence cannot be denied. At trial, the DA emphasized the number of injuries as indicative of intent to kill. (Tr. R. 606-7, 609-10, 612, 623.) This point was reiterated at the penalty phase, in which the State sought application of the "heinous, atrocious, and cruel" aggravator and disproof of the mitigating factor that Mr. Wilson was not a leader. (Tr. R. 761, 764-65.) And at sentencing, the number of injuries was again cited to support a sentence of death. (Sent. R. 5-6, 13-14.)

The prosecution's withholding of the above-described evidence violated *Brady* and seriously prejudiced Mr. Wilson because it left him with no defense and thereby deprived him of a fair trial both as to guilt and as to punishment. "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. Where a co-defendant's confession is suppressed, 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, the prosecution's withholding of this evidence violated Mr. Wilson's rights to due process, to a fair trial, to a reliable jury verdict as to both guilt and penalty, 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 convictions and sentence are due to be reversed.

B. The CCA's decision is contrary to or an unreasonable application of *Brady* and rests on unreasonable findings of fact.

The CCA, in affirming the dismissal of this claim, found it to be procedurally barred, because the court concluded that trial counsel were aware of the suppressed evidence and could have raised the issue at trial or on appeal.[18] *Wilson II*, No. CR-16-0675, at *9. This ruling is in error for at least two reasons.

[18] The claim could not have been raised by appellate counsel, who were restricted to the record on appeal. The police report describing the Corley letter was not part of this record, and there is no evidence to show that appellate counsel had it or knew of its existence. Post-conviction counsel has averred that the report was discovered in trial counsel's discovery file, obtained directly from trial counsel. *See* Pet. for Writ of Cert., *Ex parte Wilson*, No. 1170747 (Ala. filed May 17, 2018), at 22.

This holding is contrary to or an unreasonable application of clearly established federal law, *see* 28 U.S.C. § 2254(d)(1), because a finding of procedural default in the *Brady* context, where the suppressed evidence was never 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 duty to demand. The U.S. 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). The prosecution does not comply with its duty to disclose simply by informing defense counsel that exculpatory evidence exists. Here, the letter was in the possession of the DA, and the DA never turned the letter over to defense counsel. No other source for the letter was available to Mr. Wilson. Therefore, the letter was suppressed within the meaning of *Brady*.

The CCA's decision also rests on an unreasonable finding of fact, *see* 28 U.S.C. § 2254(d)(2), in that it concluded that, had defense counsel demanded the letter, they would have received the expert report. *Wilson II*, No. CR-16-0675, at *9. There is no evidence to support this conclusion. Unlike the confessional letter, the expert report was not mentioned in discovery materials or anywhere else. It was first discovered by state post-conviction counsel in Catherine Corley's casefile at the Houston County Circuit Clerk's office. Thus, there is no support for a conclusion that the report was not suppressed.

The CCA engaged in no further analysis of this issue and, so, omitted any discussion of materiality. Since the CCA's ruling on suppression is in error, this Court

should review Mr. Wilson's *Brady* claim using the appropriate analysis, find that the co-defendant's confessional letter and the expert report were suppressed and material and that the suppression 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.

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

II. 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*.

In a county where African-Americans are 25% of the population,[19] the prosecution struck every African-American from the venire, resulting in an all-white jury. The prosecution eliminated black veniremembers based on purported "criminal histories," i.e., traffic violations, after telling jurors they were not interested in "speeding tickets," and by 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.[20]

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[19] U.S. Census Bureau, Profile of General Demographic Characteristics, Census 2000, for Houston Cnty., Ala., 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

[20] 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

A. The record of jury selection raised a strong inference of racial discrimination on the part of the prosecution.

Fifty-four venirepersons were called for Mr. Wilson's trial. (Tr. R. 22.) After seven strikes for cause and two hardship excuses (Tr. R. 179), five of the 45 remaining jurors were African-American[21] (Tr. R-Remand 32); (Tr. Supp. C-2 13-19). Thus, the venire was already deficient in African-American representation at 12%. Three of the strikes for cause removed black jurors.[22] *See* (Tr. R. 179) (strikes); (Tr. Supp. C-2 13-19) (venire list).[23] The State then had 16 peremptory strikes available. (Tr. C-Remand 32.) Five peremptory strikes were used to remove <u>all</u> of the remaining black prospective jurors. (*Id.*)[24] The prosecution, thus, removed every African-American from the venire. Mr. Wilson faced an all-white jury,[25] which subsequently convicted him and sentenced him to death.

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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 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 also a list of reversals cited by Mr. Wilson in his *Batson* hearing. (Tr. R.-Remand 82.)

[21] 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.

[22] Baker, Kirkland, and Whiting. All three indicated an inability to impose a death sentence. (Tr. R. 43, 31-32 respectively.)

[23] *See* App. F (chart of jurors removed for cause or hardship).

[24] *See* App. G (chart of jurors peremptorily struck by the State).

[25] *See* App. H (chart of jurors empaneled).

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 no response. *See, e.g.*, (Tr. R. 67-117). 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. The prosecution addressed or questioned 7 of 8, or 88%, of the African-Americans in the venire[26] concerning their views on the death penalty.[27] (Tr. R. 94-104) and (Tr. Supp. C-2 13-19).[28] By contrast, the prosecution questioned only 5 of 46, or roughly 11%, of Caucasian veniremembers. (*Id.*) Consequently, though African Americans comprised only 15% of the venire, they were nearly 54% of those that the prosecution directly engaged about the death penalty. This questioning followed the court's qualification of the jury, which included death qualification. *See* (Tr. R. 40-45, 51-55). The jurors specifically questioned by the prosecution included some who had not responded to the court's questions,[29] so the prosecution's questioning of these jurors was not premised on previously expressed opposition.

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[26] Jurors had not yet been removed for cause.

[27] 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.

[28] *See* App. I (chart of jurors questioned by DA Valeska about their views on the death penalty).

[29] The three jurors who expressed opposition were all removed for cause. (Tr. R. 43-44, 179.)

Following this exchange, the prosecutor asked 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?

(Tr. R. 109) (emphasis added). The only juror who responded to this question was struck from the jury.[30] *See* (Tr. R. 163-64 and 176-77.)

B. Testimony at the *Batson* hearing strengthened the evidence of discrimination.

On initial review on direct appeal, the State conceded a *Batson* hearing was warranted and the CCA remanded for that purpose.[31] *Wilson I*, 142 So. 3d at 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 (Tr. R.-Remand 21) and two others because of their criminal histories (Tr. R.-Remand 15-17). For one of the latter two, he also cited his age, 26. (Tr. R.-Remand 17.) 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

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[30] 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* (Tr. R. 38). He also did not serve.

[31] It must be emphasized that, although the CCA 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 proceedings," *Wilson I*, 142 So. 3d at 747, the judge who presided over the *Batson* hearing was not the trial judge.

eventually served on the jury. In addition, four of the white veniremembers who eventually served on the jury actually had criminal histories.[32] Although the prosecutor testified throughout from notes purportedly made during jury selection, *see, e.g.* (Tr. R.-Remand 7-8, 14-15, 21, 36, 38, 87, 92), those notes were never entered into evidence.

1. "Criminal history."

The prosecutor claimed that he struck two qualified African-American prospective jurors, Darran Williams[33] and Jehl Dawsey, because they had criminal histories. (Tr. R.-Remand 15, 17.) The alleged basis for these strikes was information obtained from the "Law Enforcement Tracking System" ("LETS").[34] (*Id.* at 15.) 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 what either Mr. Williams or Mr. Dawsey had been charged

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[32] Under current Alabama law, citizens are disqualified to sit as jurors by reason of criminal conviction only if they have "not lost the right to vote by conviction for any offense involving moral turpitude." Ala. Code 1975, § 12-16-60(a)(4). It is worthy of note that Alabama's laws respecting loss of voting rights for conviction for a "crime of moral turpitude" were held unconstitutional by the U.S. Supreme Court in *Hunter v. Underwood*, 471 U.S. 222 (1985). The discriminatory intent and impact of Art. VIII, § 182, of the Alabama Constitution of 1901, which added this phrase to a short-list of serious felonies, was clear from the records of the constitutional convention and from the numbers of African-American citizens disqualified from voting under its terms. *Id.* at 226-27. Until the recent enactment of the Definition of Moral Turpitude Act, that phrase was not clearly defined, but the same language is used in both the Code and the patently discriminatory Constitution.

[33] Mr. Williams' name is spelled "Darren" in the *Batson* hearing transcript, but the jury list shows that the correct spelling is "Darran." *See* (Tr. C. 535) (venire list).

[34] On information and belief, the correct name is "Law Enforcement Tactical System."

with, other than speeding, but simply reiterated when asked that each "had a LETS record." (*Id.* at 16 and 17.) For Mr. Williams, the prosecutor alleged that he had "14 speedings." (*Id.* at 16.) The State did not introduce the LETS records at the *Batson* hearing or afterward, despite promising to do so (*id.* at 100),[35] so there is no evidence that either Mr. Williams or Mr. Dawsey had any criminal history other than speeding. Nor is there any evidence that either Mr. Williams or Mr. Dawsey were even convicted, since LETS "covers people who are – have been charged ...." (*Id.* at 15.) 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* App. J. According to Mr. Williams' Alacourt record, he had six speeding charges at the time of Mr. Wilson's trial, *see* App. K, but only one of those was in the previous five years, *id.* Mr. Dawsey's record does, in fact, only include traffic violations. *See* App. L.

The prosecutor's claim of ignorance about what the LETS record contained was less than candid. On information and belief,[36] a LETS record does, and did in 2007, contain the specific charges against the listed individual and also show the present status or disposition of each charge.

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[35] The DA even argued that Mr. Wilson's Alacourt records should not be considered, because they were not admitted during Mr. Maxwell's testimony. (Tr. R.-Remand 75-76.) Mr. Wilson's counsel indicated that they had only one copy with them (*id.* at 85), and the documents were submitted to the court later and included in the record on appeal (Tr. C.-Remand 18-22). The State then objected in writing to the inclusion of these documents in the record. (Tr. Supp. C-Remand 15-16.)

[36] Based on undersigned counsel's review of discovery in a 2005 criminal case and discussion with a former Montgomery Police officer.

Neither of these jurors was asked about their records during voir dire. In fact, the entire venire was told **not** to report any speeding tickets. (Tr. R. 109.) The fact that neither Mr. Williams nor Mr. Dawsey responded to the DA's question about convictions other than speeding strongly suggests that any criminal history they had fell under the "speeding tickets" category. Thus, this "reason" is highly suspect. The State cannot legitimately assert a reason about which they asked no questions.[37] And, in fact, Mr. Williams and Mr. Dawsey were the **only** jurors struck because of a LETS record. Yet, it would be inconceivable that, of 45 jurors who remained in the venire after strikes for cause, that no white juror ever had even a speeding ticket or that any tickets they had did not appear in LETS. And, as Mr. Wilson demonstrated at the hearing, what is inconceivable is here contrary to fact.

In this particular case, the pretextual nature of this reason is heightened by the fact that the prosecutor allowed four white veniremembers[38] with similar criminal histories to serve on the jury. Mr. Wilson submitted Alacourt[39] records to the court to prove this point. *See* (Tr. R.-Remand 43-44; Tr. Supp. C-Remand 9-13.). The prosecutor's response to this evidence was to assert a number of defenses, including that smaller municipalities do not always report to LETS. (Tr. R.-Remand

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[37] *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)).

[38] The four were: (1) Cauley Kirkland, (2) Robert Lewis, (3) Richard Morris, and (4) Sidney Timbie.

[39] Alacourt describes itself as "The Alabama Trial Court system at your desk." https://v2.alacourt.com/, accessed April 11, 2018. Alacourt was available in 2007.

92-93.) But this raises two further issues. First, just from the record submitted on Cauley Kirkland, his traffic violation was reported by the State Troopers in Dothan. (Tr. Supp. C.-Remand 18) (agency listed under "charge" section). But, second, if the prosecution knew that LETS was not inclusive, and really cared about eliminating all individuals with criminal histories, including speeding tickets,[40] they would have checked other sources[41] and *asked the venire* about them. Missing one white juror might truly be an oversight, but four certainly colors this reason as pretextual.[42]

Mr. Williams and Mr. Dawsey were similarly situated to the four white jurors with traffic records but not eliminated. The prosecutor 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." (Tr. R.-Remand 87.) 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.

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[40] *See* (Tr. R.-Remand 16) ("[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.").

[41] On information and belief, public terminals with Alacourt access are available in the Houston County Circuit Clerk's Office. Although Alacourt is a subscription service, *see* http://efile.alacourt.gov/, the Twentieth Judicial Circuit, which includes Houston County, obviously has a subscription.

[42] "Happenstance is unlikely to produce this disparity." *Miller-El v. Cockrell*, 537 U.S. 322, 342 (2003) ("*Miller-El I*").

(Tr. R. 121-22.) 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." (Tr. R.-Remand 87-88.) 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.[43] The proliferation of unsubstantiated reasons is itself suspect.

The State propounded similar off-the-cuff reasons for each of the four white jurors with traffic records who served. But all of these explanations are, in fact, *post hoc* rationalizations, because the State claimed ignorance of their traffic records. Therefore, the State did not keep them on the jury in spite of their records for the

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[43] "[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). 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." (Tr. R.-Remand 30.) 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.

reasons stated at the *Batson* hearing. Before this challenge was raised by Mr. Wilson, the State assured the court that eliminating any juror with a criminal record was a priority: "[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." (Tr. R.-Remand 16.) The question here is whether the prosecutor's assertion of ignorance of the white jurors' records is credible, not whether some other latter-day reason can be postulated for distinguishing them from the struck black jurors.

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 II*, 545 U.S. at 248 (disparate treatment "severely undercut[s]" the legitimacy of the prosecutor's reason).

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."

At the *Batson* hearing, the prosecutor testified that he had another reason for removing Mr. Dawsey, his "young age" of 26. (Tr. R.-Remand 17.) He stated that Mr. Dawsey's age was a more important factor than his LETS record. (*Id.*) But 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." (*Id.* at 10.) This "experience" might be a justification for specifically asking younger people about their position on the death penalty,[44] but a class-based assumption such as this is improper, without more.[45] And, immediately after giving this reason for striking younger jurors, the prosecutor disproved his point by talking about James Collins (Tr. R.-Remand 10-11), a black 54-year-old (*id.* at 21), struck for his purported hesitancy.

But Mr. Dawsey's age is indubitably pretextual, because the DA did ask him whether he could impose a death sentence, and he unequivocally answered that he could. (Tr. R. 96-97.) Mr. Dawsey, who indicated no difficulty with the death penalty, was the State's eighth strike (Tr. R.-Remand 17), while Mr. Collins, who said it would be "tough" (Tr. R. 96), was the twelfth (Tr. R.-Remand 21). 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

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[44] The jurors specifically queried about the death penalty are listed in App. I. Of these, only four of 13 were under 40.

[45] *Ex parte Branch*, 526 So. 2d at 624.

(55). *See* (Tr. Supp. C-2 13-19) (venire list). The State's age-based reason was unsubstantiated.

During the *Batson* hearing, the State proclaimed that any juror under 44 had been struck by the State on this opposition theory. (Tr. R.-Remand 32.) But the State left on Mr. Morris, the white assistant principal with a traffic record, who, at 34, was well under the touted mid-40 cut-off. The State never asked Mr. Morris about his position on the death penalty.

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. Opposition to the death penalty.

At the *Batson* hearing, the prosecutor stated 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." (Tr. R.-Remand 21.) 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. (*Id.* at 21-28.) He never gave any indication why Mr. Collins was selected for direct questioning about the death penalty in the first place.

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* (Tr. R. 40-45, 51-55). The jurors specifically questioned by the prosecution, including Mr. Collins, had not responded to the court's questions,[46] so the prosecution's questioning was not 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.

In response to a long, baiting question in which the prosecutor himself suggested, "it's a tough question" (Tr. R. 96), 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.

(Tr. R. 97). 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 supposedly 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

[46] The three jurors who expressed opposition were all removed for cause. (Tr. R. 43-44, 179.)

prosecutor would have cleared up any misunderstanding by asking further questions before getting to the point of exercising a strike.").

The legitimacy of the reason propounded to strike 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. 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.").

Once the prosecutor disproportionately targeted African-Americans, he then asked them a different kind of question than those posed to the few white veniremembers he questioned. He gave an emotional twist to his questioning of Mr. Collins by assuring him, "If you are just sitting there and saying ... 'I can't do it.' It's all right." (Tr. R. 95) (internal quotations added). He then promised that Mr. Collins would not be judged for his position on the death penalty. (Tr. R. 95.) When black venireman Bonzell Lewis said he "probably could" impose death, the DA veered off into religious opposition to the death penalty, even though Mr. Lewis had not expressed religious qualms. (Tr. R. 99-101.)

White veniremembers were not given similar assurances designed to elicit hesitation concerning the death penalty. (Tr. R. 67-117.) Instead, they were addressed in technical terms about aggravating versus mitigating circumstances. *See, e.g.* (Tr. R. 94-95) (Ryan Bond); (Tr. R. 97) (James Ferguson).

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.

"[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-part test 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, i.e., "a defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." *Johnson v. California*, 545 U.S. 162, 170 (2005).

In this case, a *prima facie* showing was made by the defense against the prosecution based on the fact that all available African-American jurors were struck by the State, resulting in an all-white jury.[47] *Compare* (Tr. R. 182) (listing names of

[47] Neither the circuit court in its ruling on Mr. Wilson's Batson claim nor the CCA acknowledge that an all-white jury heard this case. *See* (Tr. C-Remand 31-40 and especially *id.* at 32); *Wilson I*, 142 So. 3d at 746-48, 751-59.

jurors empaneled) *with* (Tr. Supp. C-2 13-19) (venire list); (Tr. R-Remand 33) (testimony of ADA Maxwell). *See also* Appendix H (chart of empaneled jurors). The State conceded that the required showing had been made before the CCA. *Wilson I*, 142 So. 3d at 747-48.

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.

A hearing was held on remand from the CCA here. One of the two trial prosecutors, Gary Maxwell, stated one or more reasons for each of the 16 strikes made by the State. (Tr. R-Remand 13-32.)

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 strike based on juror's concern over school obligations pretextual where court had ascertained that alternatives to complete them were available and the juror was informed of these alternatives); *Miller-El II*, 545 U.S. at 246 (finding prior conviction of juror's brother as reason for strike pretextual where no questions asked to establish closeness of juror's relationship). 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.") Other factors may include disparity in the treatment of similarly-situated white and minority jurors, *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."); a failure to question on the topic of purported concern, *id.* 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).

Alabama courts applying *Batson* have held that evidence in the record is before the court and proper for review whether the parties argue from it or not. *Freeman v. State*, 651 So. 2d 576, 597 (Ala. Crim App. 1994) (stating, in deciding a *Batson* claim, "we reject the state's argument that we cannot review all of the evidence before the trial court and all of the conclusions to be plainly drawn from that evidence unless explicitly pointed out to the trial court"). Additionally, the U.S. Supreme Court has distinguished "between evidence that must be presented to the state courts to be considered by federal courts in habeas proceedings and theories about that evidence."

Miller-El II, 545 U.S. at 241 n.2 ("There can be no question that the transcript of voir dire, recording the evidence on which Miller-El bases his arguments and on which we base our result, was before the state courts.").

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] reason 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.

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 are 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 at 683 (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.").

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).

Here, Mr. Wilson first established that Mr. Maxwell was the prosecutor in the recent *Floyd* case, where all black jurors were also struck. (Tr. R-Remand 39.) He reminded the court that in Mr. Wilson's case the prosecution also struck all available

African-American jurors. (*Id.* at 46-47, 53-54.) He called the court's attention to the disparity in treatment based on purported criminal histories by demonstrating that four white jurors who served had traffic violations similar to those of the struck black jurors, Mr. Dawsey and Mr. Williams. (*Id.* at 43-44.) The white jurors' Alacourt records were made part of the record of the hearing. *See* (Tr. Supp. C-Remand 13-19). Mr. Wilson also demonstrated the State's erroneous supposition that younger jurors are more likely to oppose the death penalty. (*Id.* at 41-42.)

On the strike of Mr. Collins for opposition to the death penalty, Mr. Wilson cited the fact that the State disproportionally targeted black jurors by questioning seven out of eight of them. (*Id.* at 45-46.) He noted that Mr. Collins did not respond to the court's questions during death qualification, indicating he was not opposed. (*Id.* at 47.) He described how Mr. Collins was targeted with a lengthy leading question which encouraged him to express doubts. (*Id.* at 48.) When Mr. Collins agreed imposing a death sentence, the DA did not question him further to assess the degree of difficulty, even though he did follow up with the somewhat equivocal head nodding of white juror Ryan Bond. (*Id.* at 49-50.)

Overall, Mr. Wilson also noted the State's failure to question or follow up on subjects of purported concern. (*Id.* at 47, 48-49.) He cited the Houston County DA's numerous reversals for Batson violations, *see, e.g.* (*id.* at 54, 55, 58-62), to which the DA vociferously objected, *see, e.g.* (*id.* at 54, 55-57, 62-63).

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 State struck all black persons on venire was basis for inference of discrimination found in *Batson*); *McGahee v. Ala. Dep't of Corr.*, 560 F.3d 1252, 1265 (11th Cir. 2009) (court's failure to consider State's total removal of African-Americans with for-cause and peremptory strikes was unreasonable application of *Batson*). The State's reasons must be assessed against this backdrop.

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. (Tr. R-Remand 15-17.) That this reason is pretextual is demonstrated by multiple factors. First, the records themselves were not introduced into the record, despite Mr. Wilson's challenge to their content (*id.* at 40-41) and the State's unfulfilled promise to produce them: "And what we have from LETS, we will provide to them" (*id.* at 100). 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. (*Id.* at 85.) Instead, after the hearing, the State filed an objection to Mr. Wilson's Alacourt records. (Tr. Supp. C-Remand 15-16.)

Since Mr. Maxwell's testimony was that LETS includes "anywhere from a speeding offense all the way up" (*id.* at 15), the most that could be assumed about these jurors is that they had speeding tickets.[48] The State did not assert that they

[48] And this is, in fact, correct. *See* App. K and L.

had anything more serious in their "criminal history."[49] The State did assert that Mr. Williams had "14 speedings" (*id.* at 15-16), 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,[50] *cf.* (Tr. R-Remand 15, 46) *with* (Tr. Supp. C-2 19). Also to be considered is that neither Mr. Willliams nor Mr. Dawsey responded to the question respecting convictions, "excluding speeding." (Tr. R. 109.)

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 renders that reason 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.

Third, and compounding the second point, the State claimed to have no knowledge of the traffic records of, not one, but FOUR white jurors. (Tr. R-Remand 43-44, 90-92.) Even if Mr. Maxwell can be believed 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.

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[49] The State was able to identify the actual charge, DUI, for four jurors. (Tr. R-Remand 13-15, 19.)

[50] *Cf. also* App. K, showing Darran Williams' actual record, *with* App. J, showing several other "Darren" Williamses. The circuit court's order denying the *Batson* claim varies from the correct "Darran" to "Darron" and "Darren." (Tr. C-Remand 32, 35, 36.)

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. (Tr. R-Remand 16) ("[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 (Tr. Supp. C-Remand 15) 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 (Tr. Supp. C-Remand 18), not a smaller municipality as postulated by Mr. Maxwell (Tr. R-Remand 92-93).

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.

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. The removal of a single juror for discriminatory reasons requires reversal of Mr. Wilson's convictions and sentence. *Batson*, 476 U.S. at 95.

But even if there were any question remaining, there is more. The State put forward a second reason for striking Mr. Dawsey, his age. (Tr. R-Remand 17.) Per Mr. Maxwell, this reason was even more important than Mr. Dawsey's "record." (*Id.*) But, 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. (*Id.* at 10.) This was the reason for adopting "young age" as

a reason to strike. (*Id.* at 34-35.) The problem for the State is twofold: first, general assumptions about a class are impermissible without questioning to demonstrate that the assumption actually applies to a specific juror. *Miller-El II*, 545 U.S. at 246; *Ex parte Branch*, 526 So. 2d at 624. Second, the State did question Mr. Dawsey about his views on the death penalty, as one of the seven black jurors so targeted, but he expressed no reservations about his ability to vote for that penalty. (Tr. R. 96-97.) Therefore, in his case, the assumption was soundly *dis*proved.

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* App. F. And Mr. Collins, who was removed specifically for his purported hesitancy, was 54. (Tr. R-Remand 21); (Tr. Supp. C-2 14). Thus, there is no legitimacy to this second reason for striking Mr. Dawsey.

Finally, the State's reason for striking Mr. Collins, that he expressed hesitation about his ability to impose a death sentence (Tr. R-Remand 21) 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* App. I. The choice of jurors to question is itself racially skewed.

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" (Tr. R. 95-96), differed significantly from the abrupt, technical questioning of white jurors such as Ryan Bond and James Ferguson. (Tr. R. 94, 97.) All of this suggests that the DA 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. *Cf. 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, are contrary to law.

In addition to the questionable character of the propounded 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. (Tr. R-Remand 18.) 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.

In conducting its "sensitive inquiry," a court must consider "all relevant facts." Thus, 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.

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 and sentence are due to be reversed.

D. The CCA's decision is contrary to or an unreasonable application of *Batson* and rests on unreasonable findings of fact.

The CCA's decision on return to remand denying relief, *Wilson I*, 142 So. 3d at 751-59, conflicts with 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, and ignored altogether the highly relevant factor that all available black jurors were struck by the State, leaving an all-white jury. The CCA's analysis in no-wise comported with consideration of "the totality of relevant facts" required by *Batson*. 476 U.S. at 94.

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 CCA on remand erroneously failed to

mention, let alone consider, the fact that the prosecution removed every available African-American during jury selection. *Cf. McGahee*, 560 F.3d at 1265 (court's failure to consider State's total removal of African-Americans with for-cause and peremptory strikes was unreasonable application of *Batson*). The prosecution's total exclusion of black 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, it "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 CCA's failure to consider the State's reasons within the context of this highly relevant fact renders its opinion unreasonable.

The unreasonableness of the CCA's analysis continued in its discussion of the propounded reasons themselves. First, 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. Because the State gave no reason for this factor, it must be considered pretextual. But the CCA instead faulted Mr. Wilson for failing to cross-examine Mr. Maxwell about the specifics, *Wilson I*, 142 So. 3d at 758, even though on direct he had already said he did not have the specifics in his notes (Tr. R-Remand 15) ("A. Number six strike was number 73, which is Darren DeLawrence Williams, age 34. 14 speeding convictions, and he had a LETS record. ... Q. Do we have anything else besides the speeding? A. I've got my – I have got in my notes that he had a LETS record."). Furthermore, the State promised that it would submit the LETS records (*id.* at 100), but in fact never did so. Mr. Wilson raised this lack of specificity in his argument following Mr. Maxwell's first round of testimony (*id.* at 41, 43, 50); therefore, it was before the *Batson* court for consideration. Mr. Maxwell was recalled following this argument (*id.* at 86-99), but the State did not produce any further evidence about these jurors' purported records. It should also be noted that the State was able to give specifics about those jurors who had DUIs (*id.* at 13-15, 19, 89) and one with a controlled substance offense (*id.* at 14), making it all the more suspicious that it could give no specifics about Jurors Dawsey and Williams.

All that is definitely known is that the State told the entire venire it wanted to know about criminal history "excluding speeding." (Tr. R. 109.) Neither Mr. Williams nor Mr. Dawsey responded to this question. Therefore, it must be assumed, without evidence to the contrary, that they did not have criminal histories other than speeding tickets. And, in fact, the State's only specific allegation was that Mr. Williams had some speeding tickets. (Tr. R-Remand 16.) Underscoring the pretextual character of this reason is the fact that the State did not question either juror about his "criminal" history. *Cf. Miller-El II*, 545 U.S. at 246 (discounting juror's brother's criminal history as a valid reason to strike, when no questions were asked about the matter).

The CCA further misapplied comparative juror analysis in addressing the fact that at least four white jurors served despite their traffic violations. The CCA 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 CCA 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. (Tr. R. 109.) 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. (Tr. R-Remand 16.) Fourth, when confronted with the criminal records of four 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. (*Id.* at 92.) 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. The State cannot propound a reason and fail to question on that reason without the reason being considered pretextual. *Miller-El II*, 545 U.S. at 246.

The CCA then justified the State's actions in striking Jurors Dawsey and Williams because a number of white jurors with criminal records were struck.[51] *Wilson I*, 142 So. 3d at 758. That is a backwards application of comparative juror analysis. The question is whether any similarly-situated white jurors *served*, not whether similarly-situated white jurors were struck: "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination ...." *Miller-El II*, 545 U.S. at 241. The matter at issue is racial discrimination. If two jurors, one black and one white, are similarly situated, and the black juror is struck, but the white juror is not, the question is whether some distinction besides race justifies the strike.[52] The CCA never addressed the

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[51] The white jurors who were struck had more serious charges than speeding tickets. One had a controlled substance offense. (Tr. R-Remand 14.) All but one of the remainder had DUIs, one having seven of these. (*Id.* at 13-15, 19, 89.)

[52] 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.

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.

The CCA also declined to address Juror Dawsey's age as a reason to strike, since it found the "criminal history" reason permissible. *Wilson I*, 142 So. 3d at 758 n.9. It cursorily applied the same improper comparative analysis as for criminal history, "noting" again that both black and white jurors were struck for this reason. *Id.* It failed to engage at all with the facts discussed above, that age was given as a reason because the State believed younger jurors less likely to vote for a death sentence (Tr. R-Remand 10), but Mr. Dawsey affirmatively answered that he could impose such a sentence (Tr. R. 96). This reason, like criminal history, was pretextual.

Striking a single black juror because of race is grounds for reversal. Here, Mr. Wilson has proved that two were so struck. The CCA's findings otherwise are contrary to or an unreasonable application of *Batson* premised on unreasonable findings of fact.

The CCA 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 CCA 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 DA asked: "Ryan Bond – where is Mr. Bond?" (Tr. R. 94.) Obviously, the DA had not noticed any "nonverbal response" in calling on this juror, since he did not even know where he was. And if the DA were concerned about "nonverbal responses," surely he would have addressed those jurors first, before calling on someone he could not have seen respond.

The CCA 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* (Tr. R. 95-96.) 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?

(Tr. R. 94.) No suggestions of difficulty in the decision or understanding if he could not. Only after Mr. Bond responded by nodding his head, did the DA 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?

(*Id.* at 94-95.) In fact, the DA 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, nor 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 CCA did not.

The CCA's decision is contrary to or 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.

Striking a single black juror because of race is grounds for reversal. Here, Mr. Wilson has proved that Mr. Collins was so struck. The CCA's findings otherwise are contrary to or an unreasonable application of *Batson* premised on unreasonable findings of fact.

Finally, the CCA discounted the Houston County DA's history *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, DA'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 questioning DA. (Tr. R-Remand 6.) 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.

Because the CCA found reasons to deny relief on every individual aspect of Mr. Wilson's *Batson* claim, it also never considered the "totality of relevant facts," as *Batson* requires. 476 U.S. at 94. Since the CCA's ruling on *Batson* is in error, this Court should review Mr. Wilson's 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 Ground.

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

III. Trial Counsel Rendered Ineffective Assistance Inconsistent with Constitutional Requirements as Provided under *Strickland v. Washington*.

A. Introduction.

Scott Hedeen and Ginger Emfinger[53] were appointed as counsel for Mr. Wilson on November 15, 2006. (Tr. C. 9.) During the one year between their appointment and the start of trial on December 3, 2007, Mr. Hedeen had open-heart surgery and cataract surgery. (Tr. R-Status 4, 8-9.) He also suffered from diabetes. (Tr. R. 181.) Additionally, he went through a divorce and was ordered to move from his home the very week of Mr. Wilson's trial. (C. 640, ¶ 4) (divorce judgment of Scott and Jennifer Hedeen). *See also* (C. 644) (time and date calculation). He did not have the time or the energy necessary to effectively represent Mr. Wilson.

On March 24, 2007, just a few months after being appointed to Mr. Wilson's case, and before he had ever even met Mr. Wilson, *see* (C. 652) (Att'y Fee Dec. for Scott Hedeen from the clerk's file for Houston Cnty. Case No. CC-04-1120) (showing initial visit with client on October 8, 2007), Mr. Hedeen went to the emergency room with heart problems (Tr. R-Status 8). He was diagnosed with congenital heart failure (Tr. C. 334), and not long after, he had open-heart surgery (*id.*). On March 26, 2007, two days before the surgery, Ms. Emfinger filed a motion for a continuance based on that event. (*Id.*) For the next three months, Mr. Hedeen performed no work on Mr. Wilson's case except occasional phone calls with co-counsel. (C. 650) (Att'y Fee Dec. for Scott Hedeen).

At a status conference on June 26, 2007, held expressly to address his health issues (Tr. R-Status 2 and 4), Mr. Hedeen explained that he was incrementally regaining some of his stamina and was now able to walk (*id.* at 6). He informed the

[53] Ms. Emfinger is now Ms. Hicks.

trial court that his schedule was necessarily restricted, and the court questioned whether he would be able to handle a full capital jury trial. (*Id.* at 5.) Mr. Hedeen assured the court that he would be able to do so. (*Id.*)

Nonetheless, Mr. Hedeen's condition was having a negative effect. 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. (Tr. C. 344-46; Tr. R-Suppress 68.) The trial court asked Mr. Hedeen if any new cases had arisen since the court denied the previous motions on March 5, 2007. (Tr. C. 10-16; Tr. R-Suppress 68.) 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." (Tr. R. 68.) The trial court denied the motion to rehear the previously denied motions. (Tr. R. 69.)

At the June 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.

(Tr. R-Status 4.) This was less than six months before Mr. Wilson's trial in December. (Tr. R. 2.)

At the same status conference, the prosecution proposed that the defense review the evidence the State had collected during its investigation. (Tr. R-Status 10.) Because all of the evidence was at the courthouse, the trial court encouraged defense counsel to complete this crucial step in the discovery process. (*Id.*) Defense counsel

responded that this would be difficult because of his cataracts, but that he would try. (*Id.*) Mr. Hedeen's cataracts also prevented him from reviewing in a timely manner the photographs that the State planned to admit into evidence. (Tr. R-Suppress 67.)

Mr. Hedeen had the cataract surgery in July. (Tr. R-Status 8-9.) Another two-month hiatus in work on Mr. Wilson's case followed. (C. 651) (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.

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." (Tr. R. 181.) The juror opined that he might not be able to sit through a trial due to his own diabetes. (Tr. R. 27.) 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 (Tr. R. 181), as long as he had orange juice or peanut butter to fortify him (Tr. R. 28).

At the same time 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 (Tr. R. 2), required him to vacate his residence by the middle of the week, *see* (C. 640, ¶ 4) (divorce judgment of Scott and Jennifer

Hedeen). *See also* (C. 644) (time and date calculation, showing 90 days from Sept. 6, 2007, would be Dec. 5, 2007).

It is clear that Mr. Hedeen's serious health issues and personal difficulties prevented him from effectively preparing for Mr. Wilson's capital trial. He did not even visit his client until October 8, 2007 (C. 652) (Att'y Fee Dec. for Scott Hedeen), one day before the suppression hearing, but eleven months after being appointed.

Ginger Emfinger did not or was not able to substitute for Mr. Hedeen's deficiencies. Her time records are almost entirely devoted to research and motion drafting. *See* (C. 662-68) (Att'y Fee Dec. for Ginger Emfinger from the clerk's file for Houston Cnty. Case No. CC-04-1120). She interviewed Mr. Wilson possibly twice before trial and his father once. (*Id.* at 663, 665.) 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 innocence/guilt phase (Tr. R. 627-28), a waiver which forms the basis for one of Mr. Wilson's ineffectiveness claims, *see* Ground III(C)(6).

The deficiencies in trial counsel's investigation[54] were not supplied by pre-trial counsel's efforts. Matthew Lamere's time records show that by Feb. 21, 2006, nearly two years after his appointment to the case, he had not even read the discovery. (C. 675) (Att'y Fee Dec. for Valerie Judah from the clerk's file for Houston Cnty/ Case No. CC-04-1120) (entry for Feb. 21, 2006, showing Judah emailed discovery to Lamere, but with critical pages missing). *See also* (C. 680-89) (Att'y Fee Dec. for Matthew

[54] These deficiencies will be addressed below under Ground III(C)(2).

Lamere from the clerk's file for Houston Cnty. Case No. CC-04-1120) (with no entries for reviewing discovery). Valerie Judah's time records show little more. Though she reviewed the discovery in October 2004 (C. 676), 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 was missing (or, at least, 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. (*Id.* at 674-75) (entries for Feb. 21 and 28, 2006). As to investigation, one notation in her records mentions a possible fifth suspect, an older person connected to co-defendant Catherine Corley, (*id.* at 677) (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, (*id.* at 675) (entry for October 26, 2005), while counsel believed the investigator was proceeding on his own, *id.* (entry for Feb. 17, 2006). 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.

Counsel's failures to investigate and prepare for trial are evident throughout the record of the proceedings in this case. Counsel filed a multiplicity of motions, but

these were canned motions which they did nothing to adapt to the circumstances of Mr. Wilson's case. *See* Sections C(1) and (3) *below*. They failed to support the motions they did file at hearings by making any argument to the court. *See id.* At the innocence/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* Sections C(6) *below*. They failed to object to prosecutorial misconduct, *see* Section C(5); ensure an unbiased jury, *see* Section C(8); and a host of other omissions.

At the penalty phase, counsel did little better. Although they collected Mr. Wilson's school records, they did not present them to the jury in any coherent way, but simply dumped them on the jury to let them look at them if they wanted to. *See* Section D(1)(a). They called two witnesses to testify for Mr. Wilson, 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 id.* They presented nothing to explain handicaps under which Mr. Wilson has lived his life, including undiagnosed Asperger's Syndrome. *See id.*

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, in effect, deprived of his right to counsel.

B. The constitutional right to counsel is the right to the effective assistance of counsel.

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 thereof. *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.").

"'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 "conduct 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.

"[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." The prejudice analysis does not depend on whether the outcome of the proceeding would have been different alone: "[T]he [outcome determinative] standard is not quite appropriate." *Id.* at 694. 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).

In assessing whether this 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).[55]

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").

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 Ground III. Additional relevant legal principles governing the particular ineffective assistance of counsel allegations are stated throughout, as applicable.

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, to be free from cruel and unusual punishment, and other individual rights as enumerated below in violation of

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[55] *See also Kyles*, 514 U.S. at 434-38 (1995) (noting analysis of *Strickland* prejudice adopted from *Brady* materiality, which applies a cumulative test); *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").

the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.[56] There is a reasonable probability that, but for counsel's deficient performance (each instance of which is detailed below), the outcome of rulings on motions, the determination of guilt, the judicial sentencing, and the outcome of his direct appeal, 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. Counsel were ineffective at the innocence/guilt phase.

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

a. Mr. Wilson was arrested illegally in his home.

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.

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

But the U.S. Supreme Court disagreed. These are the facts of *Kaupp v. Texas*, 538 U.S. 626 (2003), but they are indistinguishable from the facts of David Wilson's case.

At 3:45 a.m. on April 14, 2004, at least five police officers went to the home of David Wilson to arrest him. (Tr. R-Suppress 9.) They did not have a warrant. Sgt. Luker knocked, and Mr. Wilson's mother answered. (*Id.* at 10.) The police entered; at least one of them was in uniform. (*Id.* at 10-11.) Mrs. Wilson went to wake her son, who was asleep. (*Id.*)

At the suppression hearing, Sgt. Luker testified first that he arrested Mr. Wilson at his home. (*Id.* at 7, 9-10.) 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." (*Id.* at 12.) Sgt. Luker also stated that if Mr. Wilson had declined, he would have been arrested (*id.*), and answered "yes" when asked if "he was not free to stay in his house?" (*id.* at 30). Mr. Wilson was not informed that he could choose not to comply with the officers' demands. Sgt. Luker also testified, contradictorily, that Mr. Wilson went with the officers "voluntarily." (*Id.* at 12.)

Mr. Wilson was transported to the police station in a police vehicle. (*Id.* at 12, 31.) He was handcuffed beforehand, possibly while still in his home. (*Id.* at 14, 31.)

Mr. Wilson arrived at the police station at 3:59 a.m. (*Id.* at 13), less than 15 minutes after being awakened. He was in handcuffs when brought into the interrogation room. (*Id.* at 14.) Sgt. Luker read Mr. Wilson his rights at 4:12 a.m. (*Id.* at 18.) 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. (*Id.* at 37-39.) Sgt. Luker testified that the discussion during the untaped hour was the same as what is recorded on the tape. (*Id.* at 38, 43-44, 46). So, again, no curative event intervened.

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). 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 an arrest is not shown to be legal, any statement made by the arrestee will be admissible only if the statement itself was voluntarily made and was far enough removed from the illegal circumstances of the arrest to dissipate the taint from 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.

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.

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. Because that arrest was without a warrant, it was illegal, and all statements and evidence obtained as a result were due to be suppressed.

b. The police did not have probable cause.

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. *New York v. Harris*, 495 U.S. 17, 18-19 (1990). A court reviewing an arrest made without a warrant must consider whether "the totality of the circumstances" establishes probable cause. *Maryland v. Pringle*, 540 U.S. 366, 371-72 (2003) (applying *Illinois v. Gates*, 462 U.S. 213 (1983), to probable cause to arrest); *Alabama v. White*, 496 U.S. 325, 328-329 (1990).

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).

The only evidence submitted at the suppression hearing was Sgt. Luker's testimony, the *Miranda*[57] waiver, Mr. Wilson's taped statement, and the search warrant with its affidavit. (Tr. R-Suppress 4-5.) The exhibits provide no support for

[57] *Miranda v. Arizona*, 384 U.S. 436 (1966).

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.

But that testimony did not link Mr. Wilson to the crime, independently of Mr. Wilson's own statement. The only evidence that could have linked him would have been his co-defendants' 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* (*id.* at 25-26, 46-47, 63-64). The search warrant affidavit referenced only Corley's statement (Tr. C. 403), taken after Mr. Wilson was arrested,[58] 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.

Probable cause "is dependent upon both the content of information possessed by police and its degree of reliability." *White*, 496 U.S. at 330. Where police rely on statements of informants, the veracity of the informant must be either known to the police, *id.* at 328-29, or confirmed by independent police investigation, *id.* at 332.

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

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[58] The affidavit relied in part on statements purportedly made by Corley. She was arrested at 4:15 a.m. on April 14, 2004, after Mr. Wilson. (C. 612.) Her statement was not taken until 5:20 a.m. (C. 624.)

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. 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.

The Supreme Court does not except 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.

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.

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.

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.

c. The *Miranda* waiver was not a "cure."

Since Wilson was illegally arrested without a warrant or probable cause, "well-established precedent requires suppression of the confession unless it was 'an act of free will [sufficient] to purge the primary taint of the unlawful invasion.'" *Kaupp*, 538 U.S. at 632-33 (citation omitted; alteration in the original). Factors to be considered "include observance of *Miranda*, '[t]he temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct.'" *Id.* (citation omitted).

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, unless that deficiency could be supplied. *Id. See also Brown*, 422 U.S. at 604.

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.

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 (Tr. R-Suppress 11), 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.

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.

d. The search of Mr. Wilson's home was illegal.

Following Mr. Wilson's statement, Sgt. Luker obtained a search warrant for his residence. (Tr. R-Suppress 48.) 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. (Tr. C. 402-3.) 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. (Tr. C. 405.)

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. The magistrate issuing the search warrant had a duty to inquire into the basis for the arrest. As the State failed to put forward any proof 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 search.

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 speaker 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.

(C. 631.) 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.

(Tr. C. 403.) Nothing in Corley's statement indicates where Mr. Wilson might have hidden any items stolen from Mr. Walker. (C. 624-32.) Sgt. Luker was not present during the interrogation of Corley, *see* (C. 624), so his affidavit cannot be based on 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, is an embellishment of Corley's statement by Sgt. Luker.

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.

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.

e. Counsel were ineffective in challenging admission of the statement and evidence.

Trial counsel filed two motions to suppress based on the involuntariness of Mr. Wilson's statement and the inadequacy of the search warrant. (C. 691-94 and 722-25.) The motion to suppress Mr. Wilson's statement never mentioned that the police had no warrant when they went to David Wilson's home. (C. 691-94.) *See also* (Tr. C. 59-62). 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[59] – 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" (C. 691) – and were not facts from David Wilson's case. Mr. Wilson made only one statement, and no Detective Dawson worked on his 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.

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").[60] *See* (C. 696-704). 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.

At the suppression hearing, the prosecutor elicited an abundance of testimony concerning the circumstances of the arrest and interrogation. But defense counsel

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[59] This third argument was not at issue in Mr. Wilson's case.

[60] Equal Justice Initiative, *Alabama Capital Defense Trial Manual* 715-23 (4th ed. 2005).

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 how the facts in evidence supported their motion. (Tr. R-Suppress 67.) *Kaupp* was never mentioned.

Counsel's motion to suppress evidence from the search (C. 722-25) failed to assert a valid basis for attacking the seizure: that the facts stated in the affidavit submitted to obtain the warrant were derived from the illegal arrest and its fruits – Mr. Wilson's statement and Sgt. Luker's observations. The motion also did not point out the inconsistency between Corley's statement and Sgt. Luker's version of it. 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. (Tr. R-Suppress 67.)

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).

The deficient performance of 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. (Tr. R. 238-457.) And none of the collected evidence was tested. (Tr. R. 295, 334-35, 327-28, 366-67.) A pathologist testified about the injuries to Mr. Walker and the cause of his death (Tr. R. 458-75, 484-532, 555-92), 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." (Tr. R. 337.)

The inadequacies of 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.

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 trial would have

been different. Therefore, Mr. Wilson's convictions and sentence are due to be reversed.

f. The CCA's decision is contrary to or an unreasonable application of *Strickland*, requiring 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 CCA's decision also rests on unreasonable findings of fact.

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, counsel's deficient performance prejudiced Mr. Wilson.

The CCA sidestepped acknowledging the fact that Mr. Wilson was illegally arrested[61] 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*,[62] *see* (C.

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[61] The CCA 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. The court declined even to correct this error. *Wilson II*, No. CR-16-0675, slip op. at 11-13.

[62] The CCA failed to address the illegitimacy of these "distinctions," which included such irrelevancies as that Kaupp was 17, while Mr. Wilson was 20 (C. 1538); and that

> 1538-39), 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 Mr. Wilson[63] and ignoring the violations of law by police and prosecutorial misconduct and the deficiencies of counsel's performance in challenging those violations throughout. An ineffectiveness claim must be evaluated within the "totality of the evidence," *Strickland*, 466 U.S. at 695, and every error of fact and law which the CCA failed to even acknowledge rendered its assessment of that totality contrary to or an unreasonable application of *Strickland*.

The U.S. Supreme Court has drawn an equation between probable cause to search and probable cause to arrest, *Pringle*, 540 U.S. at 371-72 (adopting the probable cause to search analysis from *Gates*, 462 U.S. 213 (1983), for an arrest claim); therefore, the requirements to establish probable cause to arrest are the same as those needed to establish probable cause to search. Repeatedly, the U.S. Supreme Court has defined probable cause as requiring "reasonably trustworthy information": "Probable cause exists where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient

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Kaupp was taken to the police station in his underwear, while Mr. Wilson was allowed to dress (*id.*).

[63] At the pleading stage, 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 CCA had any reasonable basis to dispute.

in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." *Pringle*, 540 U.S. at 372 n.2 (quoting *Brinegar v. United States*, 338 U.S. 160, 175–176 (1949)). Probable cause "is dependent upon both the content of information possessed by police and its degree of reliability." *Alabama v. White*, 496 U.S. 325, 330 (1990). The only information known to the police when they arrested Mr. Wilson was contained in the statements of co-defendants Marsh and Jackson.[64] (C. 611, 707) (police reports recounting arrest of Marsh and Jackson before Mr. Wilson). The CCA did not discuss any basis known to the police for *trusting* the statements of these co-defendants.

The U.S. Supreme Court has never excepted co-defendants from the requirement that information known to the police must be trustworthy to supply probable cause. Instead, the Supreme Court has explicitly said that a co-defendant's statement does not supply probable cause where the police have no familiarity with the co-defendant and, so, no basis upon which to make a credibility determination. *Wong Sun*, 371 U.S. at 491 ("We have no occasion to disagree with the finding of the Court of Appeals that [Wong Sun's] arrest, also, was without probable cause or reasonable grounds.").

In *Kaupp*, again, the only information known to police implicating Kaupp was a co-defendant's statement. 538 U.S. at 627-28. The State of Texas recognized the

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[64] The CCA refused even to acknowledge that Corley's statement was not taken until *after* Mr. Wilson's arrest, *Wilson II*, No. CR-16-0675, slip op. at 15 n.3, despite a police reports documenting this fact, *see* (C. 611) (arrest of Mr. Wilson at 3:45 a.m.); (C. 612) (arrest of Corley at 4:12 a.m.). This constitutes an unreasonable finding of fact.

deficiency and conceded that no probable cause existed. *Id.* at 630-31. The Supreme Court accepted that concession and premised its ruling on it. *Id.* at 632.

Furthermore, in case after case, the Supreme Court has found co-defendants' statements inherently untrustworthy, *see, e.g.*, *Lilly*, 527 U.S. at 132-34; *Lee*, 476 U.S. at 539, and those findings are highly relevant to the analysis here, even where they do not directly address probable cause to arrest. The CCA's unqualified conclusion that co-defendants' statements standing alone supply probable cause flies in the face of this weighty precedent. The CCA's decision in this case conflicts even with its own precedent in *Carter v. State*, where it held that a co-defendant's statement alone did not supply probable cause to arrest.[65] 435 So. 2d 137, 139 (Ala. Crim. App. 1982). *See also Ball v. State*, 409 So. 2d 868, 874-75 (Ala. Crim. App. 1979).

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[65] The CCA relied on three Alabama cases purportedly holding that an unsupported co-defendant's statement supplies probable cause, *Wilson II*, No. CR-16-0675, slip op. at 16, but two cannot sustain that proposition and the third involved the decision of a juvenile court, *Vincent v. State*, 349 So. 2d 1145, 1145 (Ala. 1977), which falls under a different standard of review, *see, e.g.*, *United States v. Leon*, 468 U.S. 897, 913-14 (1984)

McWhorter v. State, 781 So. 2d 257 (Ala. Crim. App. 1999), does not discuss the issue of trustworthiness; therefore, there is no explanation for how the CCA justified its conclusion that probable cause existed. The CCA also cited to no authority for holding that a co-defendant's statement supplies probable cause. However, the police in that case did obtain information from an uninvolved informant who had some of the proceeds of the robbery hidden at his or her home. *Id.* at 265-66. In *R.J. v. State*, 627 So. 2d 1163, 1165 (Ala. Crim. App. 1993), the Court concluded that a co-defendant describing a crime in which he admitted participating made his information "reliable" and thereby supplied probable cause. But this is contrary to all of the U.S. Supreme Court caselaw discussed by Mr. Wilson in his briefs, as well as the case *R.J.* relies on, *Ball v. State*, 409 So. 2d 868, 874-75 (Ala. Crim. App. 1979), for the supposed principle that a co-defendant's statement, standing alone and uncorroborated, can establish probable cause. The information about the crime may provide probable cause to arrest the confessor, but the police would still have no idea, based on the confession alone,

If Kaupp's co-defendant's statement was insufficient to supply probable cause and if Wong Sun's co-defendants' statements were insufficient to supply probable cause and if Carter's co-defendant's statement was insufficient to supply probable cause, as they all were, there is no justification for finding that Mr. Wilson's co-defendants' statements somehow, but inexplicably, do. The CCA simply failed to conduct the necessary analysis of trustworthiness. The court's holding is thus contrary to or an unreasonable application of U.S. Supreme Court precedent and its own and due to be vacated.

Having erroneously found no deficiency in counsel's performance, the CCA did not assess prejudice. But, because the underlying Fourth Amendment challenge had merit, 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 reversal of his conviction and a new trial where his statement and the seized evidence will be excluded.

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of the confessor's trustworthiness or the reliability of his statements about another person's actions.

Because the CCA's ruling on this portion of Mr. Wilson's *Strickland* claim is contrary to *Strickland* itself and to U.S. Supreme Court precedent governing illegal arrest and probable cause or an unreasonable application thereof, as well as its own precedent on the latter, resting 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 Fourth, Fifth, Sixth, and Fourteenth Amendments affected by counsel's ineffectiveness.

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

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

At the innocence/guilt phase of Mr. Wilson's trial, his counsel presented no theory of defense. 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. But in opening statement in this case, defense counsel simply cautioned the jury that what the lawyers said was not evidence and to listen closely to the testimony. (Tr. R. 208-15.) They did point out issues respecting gaps in the evidence (Tr. R. 212-13) (tape cut short); (Tr. R. 214) (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. After conclusion of the State's evidence, the defense put on nothing to contradict it. (Tr. R. 593) (prosecution rests) and (Tr. R. 594) (defense rests). Then, after the prosecutor gave a thorough closing argument, defense counsel waived their closing. (Tr. R. 630.)

Counsel here did not provide the jury with any coherent alternative to finding Mr. Wilson guilty as the sole perpetrator of the murder of Dewey Walker. 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 no information about the possibility of their culpability. Nor were they informed at the innocence/guilt phase 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.

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 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 Mr. Walker's actual killer.

a. The duty to investigate.

"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 that constitutionally required crucible.

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.") (quoting 1 ABA Standards for Criminal Justice 4–4.1 (2d ed. 1982 Supp.)); *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.").

"In assessing counsel's investigation, [a court] must conduct an objective review of their 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 (citing *Strickland*, 466 U.S. at 688-89). "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). *See also Wiggins*, 539 U.S. at 533 (finding that "'strategic choices made after less than complete investigation are reasonable' only to the extent that 'reasonable professional judgments support the limitations on investigation'") (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. However, it will be unreasonable when counsel's "failure to investigate thoroughly stemmed from inattention, not strategic judgment." *Id.* at 512.

The U.S. Supreme Court has determined that ABA standards are "guides to determining what is reasonable."[66] *Rompilla*, 545 U.S. at 387. *See also Wiggins*, 539 U.S. at 524 (recognizing the ABA Guidelines as "well-defined norms"); *Strickland*,

[66] 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* (C. 732) (Resolution, effective January 21, 2005).

466 U.S. at 688 (describing the ABA standards as "[p]revailing 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)").[67] *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).

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:

> With respect to the guilt/innocence phase, 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 includes not only finding, interviewing, and scrutinizing the backgrounds of potential prosecution witnesses, but also searching for any other potential witnesses who might challenge

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

> 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.

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.

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 ineffective for failing to

follow up on information about client's background provided by 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"). 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), one obvious place to search is the casefile for each co-defendant in the same case.

In this case, trial counsel conducted only minimal investigation, which discovered nothing about Mr. Wilson's co-defendants and very little about Mr. Wilson. The failure to investigate resulted in trial counsel's failure to provide Mr. Wilson with a defense during the innocence/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 (instead of misguided attempts to challenge an expert unassisted), and defense witnesses to refute the State's theory of the case (instead of nothing at all). Here, the performance of Mr.

Wilson's trial counsel fell below all minimally accepted norms because they did none of these things. As such, Mr. Wilson's counsel performed deficiently.

Because of trial counsel's substandard performance, the jury heard a one-sided version of events – the State's case. "[B]ut for counsel's unprofessional errors," as detailed below, there is a reasonable probability that "the result of the proceeding would have been different." *Strickland*, 466 U.S. 694.

b. Trial counsel were ineffective for failing to investigate the confession of co-defendant Catherine Nicole Corley to the murder of Dewey Walker.[68]

Defense counsel were provided with discovery by the State. Included in that discovery were police incident reports and statements of all of Mr. Wilson's co-defendants, along with statements from other witnesses interviewed by the police. *See, e.g.*, (C. 611-16, 624-32, 706-707). At the end of the police reports is an account

[68] This instance of ineffectiveness is pled both as one example of counsel's inaction and its prejudicial consequences and in the alternative to Ground I, the violation of the dictates of *Brady*, should the Court find the evidence was not suppressed within the meaning of *Brady*. Defense counsel have a duty of zealous advocacy independent of the prosecutor's duty to disclose. *Brady* does not impose a diligence requirement on defense counsel, *see Banks*, 540 U.S. at 696 ("A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process. Ordinarily, we presume that public officials have properly discharged their official duties. ... Prosecutors' dishonest conduct or unwarranted concealment should attract no judicial approbation.") (quotation marks and citations omitted); it does not give a free pass to the State where counsel are ineffective. Nonetheless, counsel also have a duty to investigate reasonably and can be held accountable for failing to discover what might have been discovered through reasonable investigation, *Rompilla*, 545 U.S. at 390-93, even if the State also had an obligation to disclose, *see 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").

of a police investigation of co-defendant Catherine Nicole Corley. (C. 615-16.) That final report described the following: on September 2, 2004, DA 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. (*Id.* at 615.) The attorney turned over to DA Valeska a letter given to her by her client purporting to be written by a co-defendant of Mr. Wilson, Catherine Nicole 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. (*Id.* at 615-16.)

Three of Mr. Wilson's attorneys, Valerie Judah, Scott Hedeen, and Ginger Emfinger, billed for review of discovery in their Attorney Fee Declarations. *See* (C. 648, 664, 676) (extracted from the casefiles for *State v. Wilson*, Houston Cnty. Case Nos. CC-04-1120 and -1121, received from the Clerk of Houston County). Yet none of them requested a copy of this letter. 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 which they were entitled to both under Rule 16.1(b), Ala. R. Crim. P., and under *Brady*. There can be no strategic reason to excuse not even looking at the letter.

A reasonably competent attorney would have investigated all of a client's co-defendants even without any smoking gun such as Corley's letter. One obvious place to begin such an investigation would be in their casefiles *for the same offense*. Yet counsel in this case did not do so. 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* (C. 622) (letter from Scott Hedeen to DA Valeska dated November 13, 2007).

Had counsel kept abreast of developments in the co-defendants' cases, 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* (C. 634-37) (Motion to Order Defendant to Provide Fingerprint and Palm Print, filed in *State v. Catherine Nicole Corley*, Houston Cnty. Case No. CC-05-1726). 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. (*Id.* at 636) (attached letter dated January 12, 2007).

The confessional letter of Corley and the expert reports authenticating it as written by her were 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 choking (Tr. C. 505-7), but not killing, him. The only evidence admitted at trial respecting the participation of Mr. Wilson's co-defendants in the crime was Mr. Wilson's own statement. Mr. Wilson said that, after his encounter with Mr. Walker, co-defendant Corley came to Mr. Walker's residence and entered through the back

bedroom, as he had done. (Tr. C. 510.) At that time, Mr. Wilson refused to accompany Corley any further into the house. (Tr. C. 510-11.) Nonetheless, Corley, on her own, went, as she said, to view the body. (*Id.*) Thus, there was a period of time when Corley was in the home, but Mr. Wilson was not a witness to what she did. In her letter, Corley admitted she "hit Mr. Walker with a baseball bat until he fell." (Tr. C. 615.) Admission by a co-defendant of striking multiple blows after Mr. Wilson, when he was not present, 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 raised doubts on the issue of intent, and Mr. Wilson would not have been convicted of capital murder. *See* Ala. Code 1975, §§ 13A-5-40(b) and 13A-6-2(a)(1) (defining murder as requiring a specific intent to cause death).

The State could not legitimately have attacked the authenticity of the letter or the credibility of the USPS expert, when Sgt. Luker himself noted the similarity between the handwriting in the letter and the written materials he confiscated from Corley's cell. (C. 616) (police report). The State evidently believed in the veracity of Corley's confession to the point of seeking expert confirmation of Sgt. Luker's opinion and using the letter against Corley. Even more importantly, the State put forward this evidence, the letter and the expert reports, as credible before the circuit court in the case against Corley to obtain additional finger- and palm-prints. *See* (C. 634-37) (Motion to Order Defendant to Provide Fingerprint and Palm Print, filed in *State v. Catherine Nicole Corley*, Houston Cnty. Case No. CC-05-1726).

The significance of Corley's letter, confessing to hitting Mr. Walker with a bat until he fell, and the expert reports, confirming the identity of the writer as Corley, to Mr. Wilson's conviction cannot be denied. At Mr. Wilson's trial, the prosecutor repeatedly emphasized the number of injuries as indicative of an intent to kill. In innocence/guilt-phase closing argument, DA Valeska attacked Mr. Wilson's statement that he did not mean to hit Mr. Walker in the head, arguing that the number of injuries refuted this 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 (indicated).

(Tr. R. 606-7.) DA Valeska repeated this theme throughout. *See, e.g.*, (Tr. R. 609-10, 612, 623).

The confessional letter, or its contents, would have been admissible at Mr. Wilson's trial under *Chambers v. Mississippi*, 410 U.S. 284 (1973), and *Holmes v. South Carolina*, 547 U.S. 319 (2006). 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 Corley's letter and the expert reports been submitted to the jury, there is a reasonable probability that Mr. Wilson would have been convicted of something less than capital murder 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.

Counsel's failure to investigate the co-defendants seriously prejudiced Mr. Wilson because it left him with no defense and thereby deprived him of a fair 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. 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 convictions and sentence are due to be reversed.

c. The CCA's decision is contrary to or 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 CCA's decision also rests on unreasonable findings of fact.

The U.S. Supreme Court has clearly held that a state cannot erect mechanistic procedural rules to exclude evidence that another person committed the crime. *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Holmes v. South Carolina*, 547 U.S. 319 (2006). Nonetheless, the CCA, relying on a three-prong test set out in *Ex parte Griffin*, 790 So. 2d 351 (Ala. 2000), held that Mr. Wilson insufficiently pled this claim, *Wilson II*, No. CR-16-0675, slip op. at 21, because the facts pled would not "exclude [him] as a perpetrator of the offense," *Ex parte Griffin*, 790 So. 2d at 354. The three-prong test itself, applied mechanistically, as the CCA did, falls into the same trap as the Mississippi rule in *Chambers* and the South Carolina rule in *Holmes*. The confession creates a jury question, which Mr. Wilson did not get to test, because of the deficient performance of his trial counsel.

In short, the CCA 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. (Tr. C. 20, 22.) The Corley confession 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.*, *Sattazahn v.*

Pennsylvania, 537 U.S. 101, 108 (2003) ("[*Arizona v.*] *Rumsey*[, 467 U.S. 203 (1984)] thus reaffirmed that the relevant inquiry for double-jeopardy purposes was not whether the defendant received a life sentence the first time around, but rather whether a first life sentence was an 'acquittal' based on findings sufficient to establish legal entitlement to the life sentence – i.e., findings that the government failed to prove one or more aggravating circumstances beyond a reasonable doubt.").

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). *See also Ex parte Raines*, 429 So. 2d 1111, 1112 (Ala. 1982) ("[T]he accomplice liability doctrine may be used to convict a non-triggerman accomplice if, but only if, the defendant was an accomplice in the intentional killing as opposed to being an accomplice merely in the underlying felony."). At trial, the DA emphasized the number of injuries as proof of intent to kill. (Tr. R. 606-7, 609-10, 612, 623.) 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 CCA gave no explanation for how Corley's confession would not be adequate to support such a defense.

The court's finding that Mr. Wilson's pleading here was inadequate because it would not prove his innocence in the death of Mr. Walker 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. In his statement to police, Mr. Wilson admitted striking and choking Mr. Walker, but then leaving the room.[69] (Tr. C. 505-7.) Corley arrived on the scene after this encounter. (Tr. C. 510.) She went alone to the kitchen where Mr. Walker lay. (*Id.*) What happened at that time would be what she admitted to in her confessional letter, that she "hit Mr. Walker with a baseball bat until he fell." (C. 615.) Since Mr. Wilson was denied an evidentiary hearing, the court was obligated to accept his pled facts as true. *Ex parte Boatwright*, 471 So. 2d 1257, 1259 (Ala. 1985).

Corley's attack on Mr. Walker occurred after the single blow struck by Mr. Wilson. Since she said she struck Mr. Walker "until he fell," he could not have been dead when she first entered the kitchen. That would lead to a logical conclusion that she, not Mr. Wilson, struck the killing blows. The facts that Mr. Wilson did not strike the killing blows and that he was not present in the kitchen when the killing blows were struck creates reasonable doubt about his guilt of the killing and any intent to kill. That is all Mr. Wilson had to plead to establish the admissibility of the Corley letter under *Chambers* and *Holmes* and even under *Ex parte Griffin*. The latter case cannot be read to establish a more stringent burden to pass through the gate of admissibility than *Chambers* and *Holmes* allow without falling into the same unconstitutional category as the state court rulings in those cases, which the Supreme Court reversed.

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[69] The facts supporting this issue are set out in Ground I and here incorporated.

What the *Chambers* Court required of such evidence of third-party guilt was indicia of reliability, 410 U.S. at 300, and trustworthiness, *id.* at 302. The handwriting expert's report identifying the letter as written by Corley confirmed its authenticity. (C. 636.) Given the authenticity of the letter, there is no difference between this confession and the oral confessions improperly excluded in *Chambers*. Thus, there would be no valid, constitutionally sound reason to exclude the letter.

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, especially with no alternative defense, would fail to obtain and employ such exculpatory evidence. *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. Mr. Wilson is entitled to reversal of his convictions and a new trial where a full defense to the charge of capital murder can be presented to the jury.

Because the CCA's ruling on this portion of Mr. Wilson's *Strickland* claim is contrary to *Strickland* itself and to U.S. Supreme Court precedent governing admissibility of third-party confessions of guilt or an unreasonable application thereof, resting on unreasonable factfinding, 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.

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

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

Mr. Wilson's statement to police was made as the result of an illegal arrest. See the discussion in Section C(1) above. 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 rendered his statement involuntary. Those same characteristics also made Mr. Wilson's statement unknowing and unintelligent. 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.

a. Facts relevant to a showing that David Wilson's statement to the police was not voluntary, intelligent, and knowing.

The circumstances under which Mr. Wilson was arrested are set out above in Ground III(C)(1)(a) and here incorporated by reference. To recapitulate briefly, at least five police officers entered the Wilson residence shortly before 4 a.m. and roused Mr. Wilson from sleep. (Tr. R-Suppress 9-11.) Mr. Wilson was permitted to dress while officers hovered close enough to observe clothing lying on the floor in his bedroom (Tr. C. 403) (affidavit in support of application for search warrant). He was not given the option to decline going with the officers, but was told "we need to talk."

(Tr. R-Suppress 12.) Either before leaving his home or immediately outside, Mr. Wilson was handcuffed and placed in a police vehicle, in which he was transported to police headquarters. (*Id.* at 12, 14, 31.) There he was placed in a "conference room" and immediately read his rights and asked to sign a waiver. (Tr. R-Suppress 14, 18.) The only people in the room were Mr. Wilson and his two interrogators, who had participated in his arrest. (Tr. R-Suppress 15.) 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. (Tr. R-Suppress 18, 29.)

The initiation of the interrogation was deliberately not recorded. (Tr. R-Suppress 39-40.) 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 (*id.* at 21), 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 (*id.* at 39), it is likely that it lasted at least two hours.

At the time of his arrest, Mr. Wilson had just turned twenty (Tr. C. 34) (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 (Tr. Supp. C-1 19) (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 (*id.* at 17) throughout his school career as Emotionally Conflicted, *see, e.g.* (Tr. C. 854, 894,

904). Mr. Wilson had no prior criminal history (Tr. C. 38) (YO PSR), so he had no experience in the criminal justice system.

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 (Tr. C. 34-40) (YO PSR, completion date of August 26, 2004) and a court-ordered evaluation had been completed (Tr. Supp. C-1 16-22) (Forensic Evaluation Report by Dr. Doug McKeown, dated May 1, 2007).

Trial counsel filed a motion to suppress based on the involuntariness of Mr. Wilson's statement. (Tr. C. 59-62.) *See also* (C. 691-94). 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 (Tr. R-Suppress 67). As explained above in Section C(1)(e), here incorporated by reference, 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 (Tr. C. 411-12) and Sgt. Luker's testimony that Mr. Wilson waived his rights voluntarily (Tr. R-Suppress 18-19) and did not appear to be negatively influenced by the recency of his awakening (*id.* at 29-30). 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. (*Id.* at 67-68.)

b. The legal standard.

"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 voluntary and his waiver of his rights not to incriminate himself and to the advice of counsel must be knowing and intelligent. *Moran v. Burbine*, 475 U.S. 412, 421 (1986). 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). 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 rights and the consequences of waiving them. *Lego v. Twomey*, 404 U.S. 477, 489 (1972).

A court considering a waiver of *Miranda* rights conducts a two-pronged inquiry under the totality of the circumstances standard. *Burbine*, 475 U.S. at 421. First, a court considers the voluntariness of the statement, and whether the waiver was "the product of a free and deliberate choice rather than intimidation, coercion or deception." *Id.* Second, a court considers the separate question of whether the waiver was "knowingly and intelligently" made. *Id.*

The voluntariness of a suspect's custodial statement depends upon "the totality of the circumstances," including "police coercion, ... the length of the interrogation, ... its location, ... its continuity, ... the defendant's maturity, ... education, ... physical condition, ... and mental health," in addition to *Miranda* warnings. *Withrow v. Williams*, 507 U.S. 680, 693-94 (1993) (citations omitted). "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). 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.

Administration of *Miranda* warnings alone does not prove voluntariness: "*Miranda* warnings, alone and per se, cannot always ... break, for Fourth Amendment purposes, the causal connection between the illegality and the confession." *Brown*, 422 U.S. at 603 (emphasis in original). Although the Fourth Amendment "attenuation" analysis of *Brown*, *Dunaway v. New York*, 442 U.S. 200, 212 (1979), and *Wong Sun* is applicable only "where, as a threshold matter, courts determine that 'the challenged evidence is in some sense the product of illegal governmental activity,'" *Harris*, 495 U.S. at 19 (citation omitted), even where police have probable cause to excuse arrest without a warrant, any statements subsequently taken outside

the home "would ... be inadmissible ... if they were the product of coercion," *id.* So the analysis to be conducted where probable cause existed is at least similar to the attenuation analysis, which requires a showing that the "confession was 'an act of free will ....'" *Kaupp*, 538 U.S. at 632 (citing *Wong Sun*, 371 U.S. at 486). However "legal" the arrest, if the circumstances were unduly coercive, that fact is a relevant consideration in a voluntariness analysis.

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). Since the presumption is against waiver of rights, *Johnson*, 304 U.S. at 464, the State must prove, at a suppression hearing, that the inherent coerciveness of the custodial interrogation was overcome not only by reading a suspect his rights, but by "adequately and effectively appris[ing him] of his rights ...." *Miranda*, 384 U.S. at 467 (emphasis added).

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 know what rights he is waiving, as well as the consequences of his decision, *Burbine*, 475 U.S. at 421, "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). In *Arizona v. Fulminante*, the Supreme Court found the defendant's "low average to average intelligence" and his dropping out of school "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).

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 whether the confession was obtained in violation of the Fifth Amendment. *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. This is especially true where the methods used to extract a confession are tailored to contravene *Miranda*, even where the *Miranda* warnings are given: "it would be absurd to think that mere recitation of the litany suffices to satisfy *Miranda* in every conceivable circumstance." *Seibert*, 542 U.S. at 611.

Thus, *Miranda* warnings must be "given under circumstances allowing for a real choice between talking and remaining silent." *Id.* at 609. Otherwise, the resulting confession cannot be truly voluntary, knowing, and intelligent.

c. Mr. Wilson's statement was not voluntary nor was his waiver of rights knowing and intelligent.

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 by the entry of five police officers into his trailer home and told to dress. The police told him they "needed to talk." They did not give him the option of declining to go with them. Instead, he was handcuffed and placed in a police vehicle for a quick 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 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.

Each of the facts described above is relevant to a totality of the circumstances analysis of the voluntariness of David Wilson's actions.

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 product of a free and deliberate choice," *Burbine*, 475 U.S. at 421. 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 free choice. *See also Spano*, 360 U.S. at 322 (finding fact that interrogation

was not conducted "during normal business hours" relevant to involuntariness). Transport 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 Kaupp – and here – 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 cannot make the "free and rational choice" required for a voluntary statement, *Miranda*, 384 U.S. at 464-65, "bewilderment being an unpromising frame

of mind for knowledgeable decision," *Seibert*, 542 U.S. at 613. Mr. Wilson was subjected to treatment very similar to that condemned in *Kaupp*.

The fact that Mr. Wilson was asleep when 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. The word "groggy" derives from "grog," a mixture of rum and water. OED Online, *s.v.* "groggy," available at http://www.oed.com/view/Entry/81696?redirectedFrom=groggy#eid. Courts readily accept that a person under the influence of an intoxicant cannot make the free choice required under the Fifth Amendment. *See, e.g.*, *Wilson I*, 142 So. 3d at 764 (finding absence of evidence of intoxication supported voluntariness). 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. (Tr. R-Suppress 39-40.) Nonetheless, Sgt. Luker testified that it appeared that Mr. Wilson had been asleep. (Tr. R-Suppress 28.) Therefore, given the presumption against waiver, 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.

Additionally, the reading of the *Miranda* warnings and completion of the waiver form was accomplished in one minute. (Tr. R-Suppress 18) (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. Administration of *Miranda* warnings under all of the above described conditions cannot be "effective."

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). 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 Fulminante*, 499 U.S. at 286 n.2 (holding similar factors weighed in favor of a finding of involuntariness).

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. As noted in the YO PSR, Mr. Wilson had no prior criminal history (Tr. C. 38) and, so, was in the very position here described as most vulnerable.

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. In *Miranda*, the Court considered "incommunicado" interrogation tactics "strong evidence that the accused did not validly waive his rights," "[w]hatever the testimony of the authorities ...." 384 U.S. at 476. "In these circumstances the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so. It is inconsistent with any notion of a voluntary relinquishment of the privilege." *Id.* The Court found the "privacy" of this method highly suspect: "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." *Id.* at 448. 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. (Tr. R-Suppress 39-40.) 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.

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." (Tr. R. 337.) 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.

All of these factors – the timing of the initial encounter early in the morning with Mr. Wilson being roused from his bed, the show of force by the presence of at least five officers in his home, the quick transport to the police station in handcuffs and in a police vehicle, the proximity of the interrogation to his arrival, the location in isolation in a "conference" room at the police station, the deliberate decision not to tape the beginning of the questioning, the continuity of the questioning (with off-the-record preliminaries and conclusion), as well as Mr. Wilson's youth, somewhat limited intellectual capabilities, emotional instability, and inexperience with the criminal justice system – show that Mr. Wilson was in no frame of mind to "volunteer" a statement to police, with knowledge and understanding of what rights he was forgoing, notwithstanding Sgt. Luker's self-serving assertions to the contrary. "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.

For these reasons, Mr. Wilson could not have voluntarily or knowingly and intelligently given consent to waive his rights under *Miranda*.

d. 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.

Trial counsel filed a motion to suppress based on the involuntariness of Mr. Wilson's statement (Tr. C. 59-62); however, the motion itself did not include any facts in support. As discussed above in Section C(1)(e), here incorporated by reference, the motion was cut and pasted from the EJI manual without adaptation to the circumstances of Mr. Wilson's case.

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 (Tr. R-Suppress 28), but did not appear to be negatively influenced by the recency of his awakening a very short time later at the police station (Tr. R-Suppress 30). Counsel asked questions about whether Mr. Wilson had been asleep (Tr. R-Suppress 28-30), but failed to argue to the court that Sgt. Luker's answers were contradictory or to challenge him as a credible witness, especially as the sole witness, on Mr. Wilson's ability to understand what he was waiving, given that it was Luker's own actions which were called into question by the suppression motion, and that he, Sgt. Luker, himself made the decision not to preserve a critical piece of the most telling evidence on that subject – the initial, untaped questioning before the formal

confession (Tr. R-Suppress 39-40). 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*.

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 (Tr. Supp. C-1 18), 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*. They 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 considered relevant in *Spano*. Instead, the conclusion of the State's evidence was followed immediately by the court's ruling and then discussion of other pending motions. (Tr. R-Suppress 67-68.)

Trial counsel performed deficiently because they should have argued that, based on the circumstances of the arrest and Mr. Wilson's age, cognitive limitations,

emotional instability, and unfamiliarity with the criminal justice system, his statements could not have been the product of a free and rational choice. As with the "OK" which the U.S. Supreme Court found inadequate to prove the voluntariness of Kaupp's accompanying police from his home, 538 U.S. at 631, Mr. Wilson's willingness to speak with police about the crime is so colored by the coerciveness of his immediately preceding encounter with the police at his home and the "incommunicado" character of his custodial interrogation as to be no true consent. Furthermore, the requirement of a "knowing and intelligent" waiver of *Miranda* rights "implies a rational choice based upon some appreciation of the consequences of the decision. ... Here [the defendants] surely had no appreciation of the options before them or of the consequences of their choice [to sign waivers]." *Brown v. Crosby*, 249 F. Supp. 2d 1285, 1292 (S.D. Fla. 2003) (citing *Cooper v. Griffin*, 455 F.2d 1142, 1145 (5th Cir. 1972)) (alterations in the original). Mr. Wilson was unfamiliar with the criminal justice system and had never been exposed to interrogation, as in *Spano*, 360 U.S. at 321. Yet, Sgt. Luker raced through the *Miranda* form and had a signature from Mr. Wilson within the space of a minute. (Tr. R-Suppress 18) (reading of rights began at 4:12 a.m. and signature obtained by 4:13). Such a brief lapse of time would hardly allow an individual with more experience than Mr. Wilson to freely consider his options.

This failure to support the motion 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 and

argument. No reasonable attorney would instead 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).

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.

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 at least some of the injuries to Mr. Walker. As demonstrated

above in Section C(1)(e), here incorporated by reference, 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.

Counsel's failure to challenge the admissibility of Mr. Wilson's statement, because 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 reversed.

e. The CCA's decision is contrary to or 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 CCA's decision also rests on unreasonable findings of fact.

The CCA affirmed the dismissal of this ground because it claimed to have conducted its review on direct appeal, of a voluntariness claim based on the totality of the circumstances, though premised on different grounds,[70] and because, it held,

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

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 CCA mischaracterized in its prior review and failed to correct here: its erroneous conclusion that Mr. Wilson went with police voluntarily.

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,[71] with a show of force in circumstances which serve to disorient – the early hour, the rush to the police station, the immediate interrogation in a secluded place – there must be serious doubt about the voluntariness of his co-operation with the police, *Miranda*, 384 U.S. at 461 ("An individual swept from familiar surroundings into police custody; surrounded by antagonistic forces, and subjected to [police] techniques of persuasion ... cannot be otherwise than under compulsion to speak."); *Brown*, 422 U.S. at 605 ("The manner in which Brown's arrest was effected gives the appearance of having been calculated to cause surprise, fright, and confusion."). The Supreme 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 CCA demonstrably did not

[71] "[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).

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.

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 above* Section C(1)(a). Mr. Wilson's condition at that time, even if it could be evaluated entirely on the basis of whether he sounded intoxicated or not,[72] *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 also said 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 CCA never did.

Furthermore, the CCA never addressed the factors making Mr. Wilson's statement neither knowing nor intelligent.

Because the CCA adopted its holding from direct appeal, finding no constitutional violation, it did not assess counsel's performance. But the underlying

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[72] 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* C. 527-31 (Appellant's Br. on direct appeal).

Fifth Amendment challenge, as pled here and in state court, had merit, and counsel performed deficiently in failing to raise it fully. 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 in Section C(1)(e), 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 reversal of his conviction and a new trial where his statement and the seized evidence will be excluded.

Because the CCA's ruling on this portion of Mr. Wilson's *Strickland* claim is contrary to *Strickland* itself and to U.S. Supreme Court precedent governing voluntariness, knowingness, and intelligence of confessions or an unreasonable application thereof, resting 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.

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

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

Mr. Wilson was tried before an all-white jury as described above in Ground II, here incorporated by reference. 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. Counsel's performance prejudiced Mr. Wilson, because his claim for equal protection under *Batson* was reviewed for plain error only. *Id.* at 751. Further prejudice accrued for all of the reasons set out above in Ground II. 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* App. J and K. Counsel could have demanded also that all of the "criminal history" records the State used to strike jurors be produced. An absence of any criminal records, including LETS records, for seated white jurors could have been investigated at that time, with the resulting discovery that four seated white jurors had traffic records. This would have provided further evidence of the State's discriminatory intent. 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 and sentence are due to be reversed.

This Court should review the ineffectiveness of trial counsel for failing to raise an objection under *Batson* using the appropriate analysis, find that the prosecution struck African-American jurors based only on their race, find counsel ineffective for

failing to challenge this discrimination, and grant Mr. Wilson a new trial because of counsel's ineffectiveness which violated Mr. Wilson's rights to counsel, equal protection, due process, and a fair trial.

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

5. Counsel failed to object to numerous instances of prosecutorial misconduct, thereby allowing Mr. Wilson's rights to be repeatedly violated.

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 innocence/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 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 Mr. Wilson would not have been convicted of capital murder.

a. Counsel failed to object to testimony from an unqualified State witness as a purported serologist and blood spatter expert.

During the innocence/guilt phase, Sgt. Tony Luker repeatedly testified about blood spatter and blood droplets, analyzing what he observed at the scene. (Tr. R. 262-65, 292-95, 455-57.) The testimony of Sgt. Luker went beyond reporting his observations to draw conclusions about what certain reddish spots he observed in areas of the house away from Mr. Walker's body were, i.e., blood, and what the shape and location of these purported blood droplets meant about the course of the attack on Mr. Walker. Sgt. Luker was never qualified as a serologist or a blood spatter expert, and defense counsel did not challenge the introduction of his opinions.

In *Clemmons v. State*, the ASC laid out the ground rules for expert testimony:

> To authorize a witness to give an opinion as an expert, it must appear that, by study, practice, experience, or observation as to the particular subject, he has acquired a knowledge beyond that of ordinary witnesses; otherwise, he would not be an expert and his knowledge, skill, or experience is not considered sufficient to inform the court or to guide the jury in reaching a correct conclusion upon the subject of inquiry.

52 So. 467, 471 (Ala. 1910). In that case, the court found:

> The witness was not shown to be qualified to give his opinion as an expert on this subject. The mere fact that he had seen blood flow from two dead bodies, on prior occasions, did not render him competent as an expert on this subject [rate of coagulation].

Id. The court, therefore, reversed the conviction and remanded for a new trial. *Id.* at 473.

In this case, Sgt. Luker was not asked any questions respecting his "study, practice, experience, or observation as to the particular subject" or about any training

at all, but stated only that "[a]t the present time, I am a lieutenant with the police department assigned to the patrol division as a second shift squad commander." (Tr. R. 260.)

He first testified to his observations of blood droplets found in the hallway leading away from the kitchen and well away from Mr. Walker's body. (Tr. R. 262-65.) His testimony impermissibly assumed what needed to be proved as the foundation for everything else he said about blood droplets, i.e., that the droplets were, in fact, blood. *See, e.g., Graham v. State*, 374 So. 2d 929, 940-41 (Ala. Crim. App.), *writ quashed*, 374 So. 2d 942 (Ala. 1979) (granting new trial in part because presumptive test for blood not adequate).[73] But that foundation had not been laid – Sgt. Luker did not testify even to administering a presumptive test for blood – and Sgt. Luker, who was not a serologist, could not lay it. What Sgt. Luker identified as blood droplets down the hallway leading from the kitchen, *see, e.g.* (Tr. C. 434) (State's Trial Exhibit 15) and (C. 735) (color reproduction), was never subjected to testing of any kind, *see* (Tr. R. 456-57) (testimony of Sgt. Luker that "blood" evidence was not

[73] *See also, e.g., United States v. Williams*, No. CRIM. 06-00079-JMS, 2013 WL 4518215, at *8 (D. Haw. Aug. 26, 2013) ("First, a presumptive test for the presence of blood was conducted, i.e., a pheno[l]phthalein test, which is used by the FBI Laboratory to help narrow down the areas of interest which may then be tested by a confirmatory test and/or tested with PCR STR DNA analysis. ... If a sample tested positive under this presumptive test, a confirmatory test (the Takayama Hemochromogen test) is required before the sample is identified as blood.") (citations omitted).

tested). Therefore, it is not certain that the spots he photographed were indeed blood.[74]

With respect to blood spatter, this, for example, might be a permissible layman's observation, if it had been established that the droplets under discussion were blood: "Good common sense would tell you if it is going to run that way, you are going to have a trail of blood to that spot. If there was a vacant place in between the pools of blood, then it didn't run." (Tr. R. 264.) But Sgt. Luker did not limit his testimony to his layman's observations. He also referenced technical terms regarding the direction in which a drop hits a surface or its speed upon contact:

> 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.

(Tr. R. 263) (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 blood droplets. (Tr. R. 455-56.) For example, he opined that Mr. Walker must have been in other parts of the house than the kitchen after being struck because of the blood found in other areas. (Tr. R. 455-56.) But the conclusion expressed by Sgt. Luker is not a simple "common sense" deduction and does not necessarily follow from what he

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[74] Numerous other substances can be mistaken for blood. *See, e.g.*, *State of Maine v. Marques*, 747 A.2d 186, 189 (Maine 2000) ("The lab results indicated that the red mark was neither blood nor paint, but was 'consistent with a polymeric substance [subsequently identified as consistent with cosmetics].'"). The photographic exhibit showing "blood" spots down the hallway also shows other dirt and debris on the floor.

observed. An implement with blood on it might also have caused droplets to appear away from Mr. Walker's body. Or the "blood" might not have been blood at all. Sgt. Luker's veneer of expertise from his earlier testimony very probably misled the jury into crediting his opinion in this matter. DA Valeska certainly relied on this "expert" testimony in his closing argument – "Droplets going straight down" (Tr. R. 609) – as support for his imagined scenario of Mr. Walker being dragged around the house and beaten.

Sgt. Luker's testimony on redirect was offered to rebut the defense's suggestion (Tr. R. 456-57), supported by Mr. Wilson's statement to police (Tr. C. 505-06), 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.

The prosecution used Sgt. Luker's testimony to argue that Mr. Wilson possessed the specific intent to kill (Tr. R. 602-4, 607-8), and that the crime was especially torturous (Tr. R. 602-03, 607-8, 609, 610-11, 612). DA Valeska created a scenario from Sgt. Luker's testimony that was not supported by any other evidence. DA 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 (Tr. R. 602-4, 609, 610-11), even though it

was never shown that there were any reddish droplets, much less blood, near the holes in the wall. In fact, the evidence log from the crime scene shows that the only swabs of "red stain" were all taken from the kitchen or areas immediately contiguous to it. *See* (C. 737-40) (evidence log for 127 Shield Court). Counsel did not introduce the evidence log into evidence at either phase.

Had counsel challenged the admissibility of Sgt. Luker's opinions on serology and blood spatter, that testimony would have been excluded. That exclusion, in turn, would 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. (Tr. C. 434.) *See also* (C. 735) (color reproduction).

There is no reasonable defense strategy that would have supported a decision not to challenge Sgt. Luker as an expert. Counsel simply failed to do so. Counsel, in fact, objected during DA 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. (Tr. R. 607-8.) The court overruled the objection on the grounds that the arguments were based on inferences from the evidence. (*Id.*) Had 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 excluded, 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.

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 and sentence are due to be reversed.

b. Counsel failed to object to the false testimony of Sgt. Luker elicited by the prosecutor.[75]

The testimony of Sgt. Luker respecting purported blood droplets, as discussed in the preceding section, 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.

[75] Mr. Wilson pleads 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. (C. 358-67.)

(Tr. R. 263) (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. (Tr. R. 455-56.) On recross, Sgt. Luker asserted 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." (Tr. R. 457.)

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* (C. 737-40) (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).

Sgt. Luker's testimony was offered to rebut the defense's suggestion (Tr. R. 456-57), supported by Mr. Wilson's statement to police (Tr. C. 505-06), 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.

The prosecution used Sgt. Luker's testimony to argue that Mr. Wilson possessed the specific intent to kill (Tr. R. 602-4, 607-8), and that the crime was especially torturous (Tr. R. 602-03, 607-8, 609, 610-11, 612). DA Valeska created a scenario from Sgt. Luker's testimony that was not supported by any other evidence.

DA 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 (Tr. R. 602-4, 609, 610-11), even though it was never shown that there were any reddish droplets, much less blood, near the holes in the wall.

The DA, 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.

"[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).

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. (Tr. C. 434.) *See also* (C. 735) (color reproduction).

There is no reasonable defense strategy that would have supported a decision not to counter false evidence. Counsel simply failed to do so. The choice here was not strategic. Counsel, in fact, objected during DA 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. (Tr. R. 607-8.) The court overruled the objection on the grounds that the arguments were based on inferences from the evidence. (*Id.*) Had 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.

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 and sentence are due to be reversed.

c. Counsel failed to object to the repeated introduction at the innocence/guilt phase of evidence relating to the "especially heinous, atrocious, or cruel" aggravating circumstance.

Defense counsel deficiently and prejudicially failed to object to the introduction at the innocence/guilt phase of evidence relating to the "especially heinous, atrocious, or cruel" aggravating circumstance. While evidence that focuses on the heinous nature of a capital crime is relevant to the jury's penalty phase determination, *see* Ala. Code 1975, § 13A-5-49(8), it is irrelevant to determining culpability at the innocence/guilt phase, *see* Ala. R. Evid. 403. *See also Beck v. Alabama*, 447 U.S. 625, 642 (1980) (condemning the introduction of irrelevant evidence that diverts jurors' attention from deciding question of guilt); *Powell v. State*, 796 So. 2d 404, 419 (Ala. Crim. App. 1999), aff'd 796 So. 2d 434 (Ala. 2001) (holding trial courts abuse their discretion by allowing introduction of prejudicial evidence with no probative value).

During the innocence/guilt phase of trial, the prosecution repeatedly elicited testimony from forensic pathologist Kathleen Enstice about the amount of pain felt by the victim. (Tr. R. 498-99, 501-02, 503, 509, 511, 513, 518.) The prosecution also

had Dr. Enstice compare the victim's injuries to the injuries she had observed during other autopsies. (Tr. R. 530-31.) This testimony was completely irrelevant to determining Mr. Wilson's culpability.

Defense counsel failed to object to any of the irrelevant and highly prejudicial testimony about the victim's pain. Later during closing arguments at the penalty phase, defense counsel acknowledged that the forensic pathologist's testimony at the innocence/guilt phase "touches on matters that are before you right now, specifically the especially heinous and atrocious aggravating factor." (Tr. R. 768.)

Counsel's failure to object to this highly prejudicial testimony could not have resulted from a reasonable trial strategy because defense counsel did object when the prosecutor asked Dr. Enstice to compare the victim's injuries to the injuries she had seen during other autopsies. (Tr. R. 530.) This objection demonstrates that defense counsel's strategy was to keep the prosecutor from introducing evidence at the innocence/guilt phase that was only relevant to the penalty phase.

In response to the objection, the trial court said, "Ground – is it 8 or 13?" and overruled the objection. (Tr. R. 531.) Defense counsel deficiently and prejudicially failed to argue to the trial court that Section 13A-5-49(8), Alabama Code 1975, "[t]he capital offense was especially heinous, atrocious, or cruel compared to other capital offenses," is a statute only applicable at the penalty phase of a capital trial. Had defense counsel explained that evidence comparing the offense at issue to other capital offenses is irrelevant at the innocence/guilt phase, the trial court would have

been obligated to prevent the prosecution from eliciting testimony about the pain felt by the victim or comparing the victim's injuries to other autopsies.

During closing statements at the innocence/guilt phase, the prosecutor argued that Mr. Wilson tortured and inflicted a high degree of pain on the victim. (Tr. R. 612.) Defense counsel failed to object to this irrelevant and prejudicial argument, and this failure could not have resulted from a reasonable trial strategy because, moments later, defense counsel objected to the prosecution arguing, "He tortured him." (Tr. R. 614.) Defense counsel explained to the court that whether the victim was tortured was relevant to the especially heinous, atrocious, and cruel aggravator but not to the innocence/guilt determination. (Tr. R. 614-15.) There is no strategic reason why defense counsel would object here and not object to the earlier argument or the repeated elicitation of similar testimony relevant only to the penalty phase.

Later in the prosecutor's closing argument, defense counsel again demonstrated that the earlier failures to object to irrelevant testimony about pain were not part of a reasonable strategy. When the prosecutor again started to talk to the jury about how much pain and suffering the victim went through, defense counsel objected and the trial court sustained the objection. (Tr. R. 616.) This clearly indicates that defense counsel intended to prevent the prosecution from arguing the amount of pain felt by the victim at the innocence/guilt phase. Moments later, the prosecution again mentioned the pain felt by the victim during the offense. (Tr. R. 617.) Defense counsel did not object. (Tr. R. 617.)

Because counsel repeatedly failed to object to the introduction of this irrelevant and highly prejudicial evidence, the prosecutor was able to rely upon this distracting and sympathetic testimony in asking the jury at the innocence/guilt phase to conclude that Mr. Wilson was responsible for Mr. Walker's death. (Tr. R. 612, 614, 624.) Had the jury not been distracted by this emotional evidence, there is a reasonable probability that Mr. Wilson would not have been convicted of capital murder or sentenced to death.

Counsel's ineffectiveness in objecting to prosecutorial misconduct violated Mr. Wilson's 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 and sentence are due to be reversed.

d. The CCA's decision is contrary to or 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 CCA's decision also rests on unreasonable findings of fact.

In denying Mr. Wilson's claim of prosecutorial misconduct, the CCA 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

CCA's reliance on its prior decisions, thus, was contrary to or 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.

The CCA, on plain error review on direct appeal, addressed the issue of the State's failure to qualify Sgt. Luker as an expert and found that his testimony did not cross the boundary between lay and expert opinion. *Wilson I*, 142 So. 3d at 804-5. However, the court limited its review to Sgt. Luker's testimony on direct, *id.* at 804, and did not discuss his further opinions expressed on redirect. The court did not consider at all that Sgt. Luker's testimony was premised on an unproven assumption that the droplets he observed in the hallway were blood.[76] This was unreasonable factfinding.

The court's opinion also incorrectly defined blood spatter expert testimony as limited to "determin[ing] the position of the victim and the assailant at the time of a crime." *Id.* However, the case cited for this proposition actually states that "[b]lood-spatter analysis is *typically* used to determine the position of the victim and the assailant at the time of a crime." *Gavin v. State*, 891 So. 2d 907, 969 (Ala. Crim. App. 2003) (emphasis added). The fact that such evidence is typically used to determine

[76] Mr. Wilson pleads 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. (C. 358-67.)

position of assailant to victim does not mean that it is only used for such a purpose. The CCA refused to view Sgt. Luker's testimony as expressing an unqualified expert opinion because it did not comment on relative position. 142 So. 3d at 804. But Sgt. Luker's testimony did more than simply describe what he observed – random spots of a reddish substance and their position relative to the pool of blood around Mr. Walker's body; Sgt. Luker drew deductions, first, that the reddish drops down the hallway were blood and, second, from the locations of the reddish drops, he expressed an opinion that Mr. Walker was attacked in other rooms besides the kitchen: "I could not tell you how many times he could have been choked and passed out and moved" (Tr. R. 457) (not responding to the question asked), suggesting that the scattered drops did, in fact, show that Mr. Walker was "moved." *See also* (Tr. R. 455-56). The CCA was factually incorrect as to what blood spatter expertise can explain and also legally incorrect in stating that such an expert is limited to testifying to relative position of perpetrator and victim.

The CCA's rejection of Mr. Wilson's claim that counsel were ineffective in failing to challenge testimony by a police officer that spots he saw in the Walker house were blood, despite never having them tested, was also patently unscientific and contrary to its own prior precedent in *White v. State*, 448 So. 2d 970, 971 (Ala. Crim. App. 1984). It was not generally accepted at the time of Mr. Wilson's trial that a lay witness can identify a reddish substance as blood, where the spots observed were neither fresh nor near the body. This evidence was used to support a highly prejudicial, and otherwise unproven, scenario in which the DA argued that Mr.

Wilson dragged Mr. Walker around his house beating him. Because the CCA adopted an unscientific standard for identifying purported blood evidence, it did not fairly address the prejudice to Mr. Wilson. But even if a non-expert police officer can testify that he saw blood at a crime scene examined a week after the crime, where the "blood" was not near the body and was never collected or subjected to testing, a defense attorney would be deficient in his or her performance in failing to challenge the identification and any prosecution theory premised on it.

Mr. Wilson pled that his trial counsel were ineffective for failing to adequately challenge the quasi-expert testimony of the arresting officer, Sgt. Luker, respecting certain spots he observed in Mr. Walker's house away from the kitchen and identified as blood purely on the basis of appearance, without any testing. (C. 358-64.) He also pled, putting aside the witness' lack of expert qualifications, that the testimony was subject to challenge because no testing had been done and could not be done, because the evidence, whatever it was, had not been collected. (C. 364-67.) The CCA found that Sgt. Luker's testimony was not objectionable, because courts have held that lay witnesses may testify that a substance they observed was blood. *Wilson II*, No. CR-16-0675, slip op. at 27. That conclusion sidesteps the question of counsel's performance, which does not hinge entirely on outright exclusion of the testimony, but must also be reassessed in light of the opinion relied on, *Leonard v. State*, 551 So. 2d 1143 (Ala. Crim. App. 1989).

In *Leonard*, the testifying officer's statement that a substance was blood was objected to and corrected to "It is what appeared to me to be blood." 551 So. 2d at

1146. Subsequently, a serologist testified that the substance in question was, in fact, blood. *Id.* Thus, the initial error was doubly corrected. *Leonard* has never been cited by any court for the proposition the CCA relied on here as its holding.

The *Leonard* opinion cites *McClendon v. State*, 36 So. 2d 580 (Ala. App. 1948), for the proposition that a lay witness may identify a substance as blood. It is noteworthy that *Leonard* is the only case ever to cite *McClendon* as authority for any reason. Citing the 40-year-old *McClendon* case on a scientific issue as the basis of its opinion was suspect at the time *Leonard* issued, but the *McClendon* opinion itself relied on a number of earlier cases, all decided at least 20 years before it and where the circumstances are far different from those here.

For example, that court cited *Lightner v. State*, 71 So. 469 (Ala. 1916), 36 So. 2d at 581, in which the ASC opined:

> A witness need not be an "expert on blood" in order to testify that fresh marks and spots on the defendant's hands and clothing were made by blood. The appearance of fresh or recently extracted blood is within the common knowledge of mankind, and any intelligent witness is presumptively competent to identify it when he sees it.

71 So. at 469 (emphasis added). Furthermore, "numerous other witnesses testified without objection to the presence of blood on defendant's hands and clothing shortly after the killing, and defendant admitted it himself." *Id.* (emphases added). In Mr. Wilson's case, the "blood" was not fresh, since the examination of the crime scene occurred a week after the crime, *Wilson I*, 142 So. 3d at 748, and Mr. Wilson himself said nothing about striking Mr. Walker anywhere but in the kitchen. The "common

knowledge of mankind" does not cover the ability to distinguish whether dried reddish spots are or are not blood.

McClendon's citation to *Bray v. State*, 78 So. 463 (Ala. App. 1918), 36 So. 2d at 581, is no more applicable to Mr. Wilson's case. The court there concluded:

> All persons are more or less familiar with the appearance of stains caused by blood, and it has been repeatedly held that no particular skill or experience is required to qualify a witness who saw the stains to render his evidence with respect thereto admissible.

78 So. at 464. This statement provides the strongest reason why these cases cannot fairly serve to settle the issue in Mr. Wilson's case: their age and the progress of science. The other cases the *McClendon* court relied on were all also issued before 1925; thus, their validity as to science-based evidentiary issues at a trial in 2007 cannot be sustained. The basis of the above statement – that familiarity with the appearance of blood stains renders a lay person competent to identify any stain as blood or not – is no longer scientifically valid or even generally accepted. The *McClendon* opinion was issued in 1948, one year before introduction of the Ouchterlony double immunodiffusion test. *See, e.g.*, Lab. of Forensic Serv., Sacramento Cnty. Dist. Att'y, Sero: Ouchterlony Test for Species Determination, in Serology Manual, 1 (2009), available at http://www.sacda.org/files/1014/3577/0245/Sero_ouchterlony_for_species_ID.pdf. It is clearly evident that the identification of stains as blood was a far more complex matter at the beginning of the 21st century than at the beginning of the 20th.

Numerous courts now recognize that expert testimony is necessary to identify spots as blood in circumstances similar to those here.[77] *See, e.g.*, *United States v. Williams*, No. CRIM. 06-00079-JMS, 2013 WL 4518215, at *8 (D. Haw. Aug. 26, 2013) (describing presumptive versus confirmatory tests for the presence of blood and the necessity of the latter; *State of Missouri v. Daniels*, 179 S.W.3d 273, 285 (Mo. Ct. App. 2005) (same). The reason is that it is now known that spots that look like blood are not always, in fact, blood. *See, e.g.*, *State of Maine v. Marques*, 747 A.2d 186, 189 (Maine 2000) ("The lab results indicated that the red mark was neither blood nor paint, but was 'consistent with a polymeric substance [subsequently identified as consistent with cosmetics].'"). Given this fact, testimony that dark spots of unknown age or origin are blood, unsupported by any scientific testing, was false and, so, not available to the prosecution to prove its case. *See, e.g.*, *Napue*, 360 U.S. at 269 ("[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.") (citations omitted); *Miller*, 386 U.S. at 7 ("[T]he Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence."); *Alcorta*, 355 U.S. at 31 (holding that a habeas

[77] An eyewitness to an assault could legitimately testify that the victim bled and that spots on the victim's clothing are blood, since he or she observed the injury and the staining at the time they occurred. Mr. Wilson is not arguing that a lay witness could never testify that a stain is blood, only that spots of unknown origin cannot be identified as "blood" without adequate testing by a qualified expert.

petitioner was denied due process when a prosecution witness gave the jury a "false impression" of his relationship with the petitioner's wife).

But of equal significance, the CCA itself has previously disavowed the stance it took in this case. In *White v. State*, the CCA opined:

> The evidence introduced up to this point tended to show that the wrench had been used to beat the victim, resulting in severe head injuries. The State argues that whether or not a particular stain is blood is a matter of common knowledge and needs no proof. We disagree. If the life or liberty of some future defendant depends on whether some dark stain is blood, dye, paint, catsup, or any one of a thousand other things, the State should not be allowed to assume the fact into evidence. The authority cited by the State merely holds that once a stain has been determined to be blood, it is a matter of common knowledge as to whether the stain is "fresh."

448 So. 2d 970, 971 (Ala. Crim. App. 1984). This holding cannot be squared with the CCA's present opinion in Mr. Wilson's case. It was unreasonable for the CCA to adhere to a position respecting forensic evidence that it rejected over 30 years ago. Challenges to forensic evidence and to unqualified "experts" were common at the time of Mr. Wilson's trial, *see Daniels and Marques above*.

Trial counsel's failure to challenge Sgt. Luker's qualifications to identify dark spots he saw in Mr. Walker's house outside of the kitchen area where his body was found was deficient performance. No reasonable attorney would fail to contest such an unsupported conclusion, *Strickland*, 466 U.S. at 690, especially where the DA used the identification in his direct and redirect examination of Sgt. Luker to begin construction of a scenario for which there was no other evidence, i.e., that Mr. Wilson dragged Mr. Walker around his house beating him. That failure prejudiced Mr. Wilson, since the dragging theory was used to bolster a finding of intent to kill. (Tr.

R. 602-4, 607-8.) There is a reasonable probability that, without it, the jury would have had reasonable doubt that Mr. Wilson had such an intent. *Strickland*, 466 U.S. at 694. The prejudicial effect is underscored by the CCA's acceptance of the identification, on direct appeal, without proof other than Sgt. Luker's word. *Wilson I*, 142 So. 3d at 749 ("In addition to the blood found near Walker's body, Investigator Luker discovered blood droplets throughout the house."). Mr. Wilson is entitled to reversal of his conviction and a new trial where unqualified expert testimony is not used against him.

The second part of this subclaim is premised on the same point, that Sgt. Luker's testimony was false, or misleading, because, without testing, it was insufficient to prove that any spots he saw in other areas of the house were actually blood. Counsel asked whether any testing had been done (Tr. R. 456-57), but failed to follow through with a question challenging the ability of Sgt. Luker to make the identification he did without testing. The issue is not whether spots were observed, *contra Wilson II*, No. CR-16-0675, slip op. at 28, but whether *spots of blood* were observed. Mr. Wilson pled that counsel were ineffective for failing to show that the State had not proved and could not prove that there were any other spots of blood in the house; at a hearing he would have to submit evidence to prove that claim. The CCA improperly considered this claim in light of a burden of proof, not pleading. Even so, one item of proof pled by Mr. Wilson is that evidence technicians did not take swabs in the bedrooms. Without taking swabs, they could not conduct tests. The only evidence in contradiction was Sgt. Luker's own, unqualified testimony. But that

testimony was, at best, misleading, because it was based on insufficient data to conclude any drops he observed were blood. Thus, the State, at trial, upon objection and/or cross-examination, would have been unable to prove that what Sgt. Luker saw was blood, and his testimony on this point would have been properly excluded or rendered unreliable. The prejudice here is the same as explained above.

As to the evidence respecting the degree of pain Mr. Walker would have felt, the CCA sidestepped the real issue to dismiss the claim on a general rule that the pain suffered by the victim is admissible at the guilt phase. *Wilson II*, No. CR-16-0675, slip op. at 28-31. The point of this part of Mr. Wilson's claim, however, is that, had counsel objected to Sgt. Luker's identification of spots he observed as blood without subjecting them to forensic testing, the evidence supporting any theory that the victim suffered pain and mental anguish as a result of being dragged around the house and beaten would have evaporated, making any testimony from the pathologist, Dr. Enstice, relative to that scenario inadmissible. The CCA did not address this premise of Mr. Wilson's claim.

Thus, in denying this claim, the CCA failed to consider the "totality of the evidence" and misapplied prevailing standards for scientific evidence and counsel's duty to investigate and consult experts respecting such evidence. Counsel's performance must be assessed as of the time it occurred, *Rompilla*, 545 U.S. at 381, not as of a century earlier.

Because the CCA analyzed the subparts of Mr. Wilson's claim of ineffectiveness erroneously and contrary to *Strickland*, it also erred in concluding that there was no

cumulative prejudicial effect from counsel's failure to exclude the false testimony of Sgt. Luker and Dr. Enstice combined. *See Wilson II*, No. CR-16-0675, slip op. at 31. Had this evidence all been excluded, there is a reasonable probability that the result of Mr. Wilson's trial would have been different. *Strickland*, 466 U.S. at 694. Mr. Wilson is, thus, due a new trial free of the taint of all of this false testimony. This Court should review Mr. Wilson's IAC claim using the appropriate analysis, find that counsel failed to perform consistent with contemporary norms and that their failure prejudiced Mr. Wilson by allowing the introduction of false or misleading evidence, and grant Mr. Wilson a new trial because of the prosecution's violation of his rights to due process and a fair trial.

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

6. Defense counsel were ineffective in failing to deliver a closing argument presenting a coherent defense theory.

a. Counsel's performance was deficient and prejudiced Mr. Wilson.

After the prosecutor gave a thorough closing argument, defense counsel waived their closing. (Tr. R. 627-28, 630.) With David Wilson facing a conviction for capital murder and exposure to the death penalty, defense counsel gave the jury no reason why they should find him not guilty or guilty of a lesser-included offense. Compounding the unreasonableness of defense counsel's decision to waive closing argument was the fact that at no point, not in its opening statement, and certainly not through cross-examination of the State's witnesses, did counsel even hint at a theory of the case or highlight a reasonable doubt.

At trial, defense counsel claimed that the decision to waive closing argument was designed to prevent the prosecution from giving a rebuttal closing argument. (Tr. R. 625.) 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. (Tr. R. 601-24.)

In its initial closing argument, the prosecutor laid out the State's theory of the case (Tr. R. 601-02), detailed the evidence supporting the State's theory (Tr. R. 603-06), argued in detail the brutality of the murder and the pain suffered by the victim (Tr. R. 607-17), explained how the State had proven the capital murder charges beyond a reasonable doubt (Tr. R. 618-21), attacked Mr. Wilson's character (Tr. R. 621), explained a discrepancy in the time stamp on the transcript of Mr. Wilson's statement to police (Tr. R. 622-23), 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 (Tr. R. 624). This is not a case where the prosecution saved arguments for rebuttal.

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.* (Tr. R. 635) (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).

Even though Mr. Wilson's statement had not been suppressed, counsel could have argued its unreliability, given both the circumstances of his arrest and its incompleteness. The circumstances of the arrest would have established its coerciveness, as discussed above in Sections II(C)(1)(a) and (3)(a), here incorporated by reference. Defense counsel elicited testimony from Sgt. Luker about some of these circumstances (Tr. R. 392-400), but never explained to the jury their significance.

The incompleteness of the 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.

(Tr. R. 212.) But after the testimony of Dr. Enstice respecting multiple injuries and DA Valeska's closing harangue that what Mr. Wilson did to Mr. Walker could not have been accidental, *see, e.g.* (Tr. R. 606, 623), the jury could not reasonably be expected to remember what Mr. Hedeen had said or to question whether the incompleteness of the tape made any difference.

DA Valeska's attack on Mr. Wilson's description of his actions as accidental (*id.*) and harping on the baseball bat as evidence that he went armed with intent to

kill (Tr. R. 603, 607, 609) suggested that Mr. Wilson "changed it all up" to kill Mr. Walker. But none of what Mr. Wilson said in the recorded parts of his statement corresponds with changing the "plan" to a murderous one; that would have been a difference between what Mr. Wilson said during the recorded portion and the unrecorded portion, contrary to Sgt. Luker's testimony. DA 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 ...." (C. 369.) So it is reasonable to conclude that the jurors were swayed as well. Yet counsel did nothing to counter the State's false argument.

Furthermore, even if one took the view that the statement was uncoerced, Mr. Wilson admitted to striking Mr. Walker in the head and choking him with an extension cord. (Tr. C. 506-8.) He said nothing of repeated blows or bashing Mr. Walker's ribcage. He did mention his co-defendants and that one of them, at least, Catherine Corley, came into Mr. Walker's house the night he died. (Tr. C. 510-11.) Yet, the State put on no evidence to show that it was not Corley, instead of Mr. Wilson, who subjected Mr. Walker to more than a hundred injuries. Defense counsel could also have asked the jury to consider that it was Matthew Marsh who instigated the crimes and who benefitted the most. (Tr. C. 499-500, 507, 516.) Gloves purportedly used during the crime were found in his vehicle (Tr. R. 299), and the purported murder weapon, a baseball bat, in Michael Jackson's (Tr. R. 298). Yet 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.

Defense counsel could also have emphasized that the crime could not have happened the way DA Valeska imagined. The blood droplets about which Sgt. Luker testified, if they were blood, 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* (Tr. R. 609, 613), because there would have been more than droplets. The injury from the initial blow and fall resulted in significant bleeding, as is shown by the pool of blood at the foot of a projecting corner of the kitchen wall, *see* (Tr. C. 484) (State's Exhibit 15), consistent with Mr. Wilson's account (Tr. C. 505). The evidence also showed the droplets only in the kitchen and hallway and the contiguous area of the living/dining room, *see* (Tr. C. 484) (State's Exhibit 15); *see also* (Tr. R. 264-65) (testimony of Sgt. Luker), not in the bedrooms where the walls were damaged (Tr. R. 269) (holes in the walls of Mr. Walker's bedroom); (Tr. R. 316-17) (holes in the walls of a den next to Mr. Walker's bedroom).[78] 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 DA Valeska were right.

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[78] 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." (Tr. R. 457.) However, during discussion of the crime scene on direct (Tr. R. 307-8), 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* (C. 735) (color copy of State's Exhibit 15).

Had Mr. Wilson engaged in the mayhem DA Valeska imagined, his clothes could reasonably have been expected to have shown traces of blood, as Sgt. Luker postulated in his search warrant affidavit. (Tr. C. 519) (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. (Tr. R. 366-68.) The State also did not bother to send the clothing off for any testing. (Tr. R. 367.) But what of the co-defendants and their clothing? Sgt. Luker was not even asked if it had been collected as well.

With all of the exaggeration in DA Valeska's account of the evidence, defense counsel could have argued that the inflation was meant to cover a big gap in the State's case – i.e., what the co-defendants did. Counsel could have asked the jury to contrast what Mr. Wilson admitted to, and he did admit to harming Mr. 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.* (Tr. R. 659-60) (jury instructions).

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*, — So. 3d —, 2015 WL 480837, at *16 (Ala. Feb. 6, 2015). Here 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 counsel could easily have pointed out. Counsel's decision not to give a closing cannot be excused as "strategy," despite counsel's self-serving statement to that effect. It is not strategy to forgo a closing argument to prevent compelling rebuttal when all the damage has already been done in the first round. *Id.* (finding waiver of closing, considering "the length and highly emotional nature of the State's initial closing argument, ... an 'error[] so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment' ....") (quoting *Strickland*, 466 U.S. at 689) (alteration in the original). Counsel's silence prejudiced Mr. Wilson because there were real questions of relative culpability which the State failed to address. 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.

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 and sentence are due to be reversed.

b. The CCA's decision is contrary to or an unreasonable application of *Strickland* and rests on unreasonable findings of fact.

The CCA denied Mr. Wilson's claim of defense counsel's ineffectiveness in waiving closing 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, 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.

Mr. Wilson pled that 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. (C. 376-82.) Defense 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. (Tr. R. 627-28.) But, unlike in other cases where a decision to waive closing was found not to be deficient performance, *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."), the State in this case had not held its fire for a grand finale, *see* (Tr. R. 601-24). Mr. Wilson specifically pled points the defense could have made, but the CCA rejected each for reasons contrary to law or to the facts.

First, the CCA's decision is contrary to *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. The CCA 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 CCA 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*.

The CCA 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.* But this is unreasonable. It is well-known that a lesser included offense of murder during any 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. CCA Appellant's Br. at 84. And the trial court instructed the jury on felony murder. (Tr. R. 659-60.)

The CCA also evidenced a misunderstanding of relative culpability (demonstrated again in assessing counsel's performance at the penalty phase, below). The court opined that arguing greater culpability on the part of a co-defendant would not lessen Mr. Wilson's. *Wilson II*, No. CR-16-0675, slip op. at 34. But the court could come to this conclusion only by accepting the evidence presented by the State as complete and all of its interpretations of that evidence as true and ignoring what the State failed to show and what Mr. Wilson's statement actually says. This is a direct result of trial counsel's ineffectiveness. Mr. Wilson's statement was accepted as true insofar as he admitted to striking Mr. Walker and choking him. But that was all Mr. Wilson stated that he did, and he further told the police that he refused to accompany co-defendant Corley when she went to look at Mr. Walker. (Tr. C. 510-11.) The CCA ignored that counsel could have pointed out that fact, suggested that Corley could have killed Mr. Walker, and argued for a lesser offense from it. Even though the CCA on direct appeal acknowledged that Mr. Wilson's limited admission did not match the multiple injuries to Mr. Walker, *Wilson I*, 142 So. 3d at 750 ("The results of the

autopsy *conflicted with* Wilson's account of a single, accidental blow to Walker's head.") (emphasis added), the court cannot imagine that there might be some alternative conclusion other than that Mr. Wilson lied. If Mr. Wilson's statement was accepted as true in full, 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 CCA, in which the defendant was *on videotape* standing by the shooter when the killing occurred. In fact, in *Sneed* itself, the CCA 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.

The CCA's assertion that 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 that court continues unreasonably to distinguish this case from *Kaupp*.

Finally, the CCA rejected Mr. Wilson's argument that counsel could have countered the prosecution's interpretation of his interrupted comment that he "changed it all up" (Tr. C. 516) 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. Mr. Wilson pled 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, even though the detective who took the statement emphasized that what was not on the tape did not differ from what was on the tape (Tr. R. 383-86, 418-19) and, on the tape, Mr. Wilson admitted only to striking a single blow. The CCA excused 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 illogical. Either all of Mr. Wilson's admissions off-tape were the same as those on-tape or they weren't. The State cannot have it both ways, and counsel were ineffective for failing to show the contradiction. The CCA's factfinding otherwise was unreasonable.

A fair assessment of all the arguments Mr. Wilson suggested counsel could have made 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.

Because the CCA's ruling on this portion of Mr. Wilson's *Strickland* claim is contrary to or an unreasonable application of *Strickland* itself and to U.S. Supreme Court precedent respecting underlying issues and 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.

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

7. 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.

In his opening statement, defense 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.

(Tr. R. 212.) Sgt. Luker testified that nothing off the tape differed from what was on the tape. (Tr. R. 383-86, 418-19.) On the tape, David Wilson admitted to hitting Mr. Walker once accidentally and choking him to try to disarm him. (Tr. C. 505) But Dr. Enstice testified to a multitude of significantly more serious and ultimately fatal injuries. (Tr. R. 458-532, 555-93.) Because the defense did not have Corley's letter, the jury had no explanation for the discrepancy. *See Wilson I*, 142 So. 3d at 750 ("The results of the autopsy *conflicted with* Wilson's account of a single, accidental blow to Walker's head.") (emphasis added).

What Mr. Wilson did not get to say was that when Mr. Walker came home, he, Mr. Wilson, was trapped in an area where he could not retreat without encountering Mr. Walker. He did not want to hit Mr. Walker, but he could not exit without getting past him. The encounter was as detailed in the taped statement. When he returned to the house with Corley, she went to the kitchen on her own. Mr. Wilson was not

even in the house during part of the time when Corley was. Therefore, he was not a witness to and did not know what she did.

The mention of Corley's participation on the tape was brief and might have been passed over without Mr. Wilson's full explanation of the sequence of events. Mr. Wilson wanted to testify to explain what was missing from the tape, but 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.

It is clearly established that the accused has a right to testify on his 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); the Sixth Amendment right to call witnesses "material and favorable to [the accused's] defense," *id.* at 52 (citation omitted); and the Fifth Amendment right not to be compelled to testify, *id.* 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).

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).

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."[79])

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)).

Moreover, 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. 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.

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

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[79] 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 CCA's decision.

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.*

Here, Mr. Wilson was the only witness at his trial 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, counsel, who had failed to obtain the confessional letter of Corley, also prevented Mr. Wilson from providing that essential testimony.

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 and sentence are due to be reversed.

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

8. Counsel failed to protect Wilson's right to a fair and honest jury determination.

a. Counsel's performance was deficient and prejudiced Mr. Wilson.

Counsel were also ineffective for failing to object to the prosecutor interacting with jurors during their deliberations. The right to trial by jury includes the right to a jury free of bias. U.S. Const., am. VI ("In all criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury ...."). "The question of whether to seat a biased juror is not a discretionary or strategic decision. The seating of a biased juror who should have been dismissed for cause requires reversal

of the conviction." *Hughes v. United States*, 258 F.3d 453, 463 (6th Cir. 2001) (citing *United States v. Martinez–Salazar*, 528 U.S. 304, 316 (2000)). Counsel's failure to object to the prosecutor interacting with the jury during deliberations was seriously deficient: it created bias by allowing the prosecutor to forge an improper connection with the entire jury.

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 deliberations. When defense counsel was informed of this highly improper conduct, they did not bring it to the attention of the trial court. Reasonably effective counsel would have informed the court, demanded a hearing on the matter, and requested a mistrial.

The ASC has stated that "all courts are agreed that ... no improper communication be had between jurors and court officers while deliberating and trying to reach a verdict." *Brickley v. State*, 243 So. 2d 502, 505 (Ala. 1970). The matter is so serious that "*[a]ny* misconduct that might influence the jury, affect the verdict rendered or the punishment fixed, is a cause for a new trial." *Oliver v. State*, 166 So. 615, 617 (Ala. 1936) (citations omitted) (emphasis added). "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." *Id.* (citations omitted) (emphasis added).

Even in a case where the contact between the juror and a court officer involved only a telephone call between an assistant district attorney not trying the case and a seated juror with whom he attended church simply to confirm that connection, the ASC reversed the conviction: "Here, where the penalty is the maximum inflicted by law, death, we find such contact with a prospective juror by a member of the district attorney's office intolerable." *Ex parte Pilley*, 789 So. 2d 888, 893 (Ala. 2000). The contact in Mr. Wilson's case was more egregious because it involved direct contact between the DA trying the case and the entire jury. Had counsel called this matter to the attention of the court and asked for a mistrial, there can be no doubt that it would have been granted because the "standard [in such cases] casts a light burden on the defendant." *Id.* at 893.

There can be no strategic reason for failing to object to contact between the prosecutor and the jury, which by its very nature creates bias. "The question of whether to seat a biased juror is not a discretionary or strategic decision." *Hughes*, 258 F.3d at 463 (citing *Martinez–Salazar*, 528 U.S. at 316).

Defense counsel were aware that contact between counsel and jurors could impact the case. As part of his opening statement at the innocence/guilt phase, Mr. Hedeen specifically warned the jurors of the reason for his own potentially rude-seeming conduct in ignoring the jurors in the hallway:

> Judge Jackson said ... that you should avoid talking to attorneys, particularly the attorneys that are involved in this case. And I mean the three seated here and the two seated here.
>
> So I can't speak on behalf of Mr. Valeska, but if I see you walking down the hall and I don't say hey or I don't say anything to you, and I just look at you and then turn away, it is not because I am being rude.

> It's because I take that admonition from the judge real seriously, that we are not to talk to you while you are jurors in this case. We are not being rude. We are doing what we are supposed to do. So please don't take offense if I don't say anything to you or if Ms. Emfinger doesn't say anything to you. We are doing what we have to do as far as not talking to you.

(Tr. R. 210-11.)

It was deficient performance not to bring the DA's contact with the jurors to the attention of the court. That deficiency prejudiced Mr. Wilson because it permitted the prosecution to have undue influence over the jury and create bias in favor of the State. In *Ex parte Pilley*, the ASC reversed where an assistant DA, not trying the case, merely confirmed his acquaintance with a juror through church. The contact here was much more prejudicial. The seating of one biased juror is inherently prejudicial. Here, the whole jury was tainted. Had counsel performed effectively, there is a reasonable probability that the court would have granted a mistrial, and Mr. Wilson would not have been convicted of capital murder or sentenced to death.

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 and sentence are due to be reversed.

b. The CCA's decision is contrary to or an unreasonable application of *Strickland* and rests on unreasonable findings of fact

The CCA held that Mr. Wilson's claim that counsel were ineffective for failing to move for a mistrial after the DA was observed carrying materials into the jury

room while the jurors were in deliberation insufficiently pled by reading the claim unreasonably and for reasons contrary to the facts pled by Mr. Wilson, contrary to *Ex parte Boatwright*, 471 So. 2d at 1259. The court attributed a lack of specificity to the claim by imagining scenarios that required assumption of unproven facts contrary to those pled. The court did not directly address the impact of the contact described by Mr. Wilson.

Mr. Wilson pled that his mother observed the DA carrying documents into the jury room during their deliberations. (C. 386-89.) She notified counsel, but counsel did nothing to bring this impropriety to the attention of the court. (*Id.*)

The CCA 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 claim itself that the notice to counsel occurred before the jury completed their deliberations. There is no other reasonable way to read the claim. The court further found, tellingly, "*even taking Wilson's assertions as true*," that he failed to allege that any jurors noticed the intrusion. *Id.* (emphasis added). This also is unreasonable. The incident involved the DA taking evidence into the jury room where jurors were deliberating. *See* (C. 386) ("during their deliberations"). Unless the Houston County jury room is uncharacteristically spacious, a fact not in evidence, it was unreasonable to suppose, as the court did, that no one noticed the intrusion.

The CCA simply did not give a fair reading to the claim. If the State, at a hearing, were to show that the jury room is built in such a way as to allow entry

without notice or that Ms. Wilson failed to notify counsel until after a verdict had been returned, that might present a different matter. But the CCA did not have such evidence before it and was not authorized to deny the claim as pled by Mr. Wilson on facts not proved by the State. The court did not otherwise address counsel's deficient performance or the prejudice from this contact.

The CCA's ruling on this portion of Mr. Wilson's *Strickland* claim is contrary to *Strickland* itself, which requires consideration of the "totality of *the evidence*," 466 U.S. at 695, not mere speculation, and to *Ex parte Boatwright*, which requires an appellate court to accept the facts pled by a petitioner as true, 471 So. 2d at 1259, and rests on unreasonable findings of fact, i.e., facts not in evidence. Therefore, this Court should review Mr. Wilson's *Strickland* claim using the appropriate analysis, find counsel performed deficiently and that their deficient performance prejudiced Mr. Wilson, and grant Mr. Wilson a new trial because of counsel's failure to act as the counsel the Constitution demands, depriving Mr. Wilson of his rights to due process and a fair trial.

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

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

1. Counsel's performance was deficient and prejudiced Mr. Wilson.

Defense counsel deficiently and prejudicially did no better at the penalty phase and sentencing than they had done during the innocence/guilt phase. Their errors earlier in the trial respecting the facts of the crime carried over with prejudicial effect

into the penalty phase. They compounded those errors by failing 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.

a. 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.

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 that David would have been sentenced to life imprisonment without parole. This unacquired evidence, which would have precluded a sentence of death, includes the following:

Generational poverty

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. 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. The family subsisted on a mixture of cornmeal and powdered milk. 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. The judge and jury were never provided this information.

Linda survived her childhood and met and married Roland Wilson in 1980. 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. Beginning in November of 1982, Linda gave birth to three boys over the next two and a half years. Edward was born on November 5, 1982; David was born on March 7, 1984; and Steven was born on May 6, 1985. When Edward was three months old, Roland lost his job at a local chemical plant and struggled to find work. After more than a year of unemployment, Roland finally found a job at Whiting Field naval base after Steven was born.

Linda recalls that as the caregiver for three boys in diapers, she felt overwhelmed, and she and Roland fought frequently. Linda remembers feeling so overwhelmed and upset with Roland's neglectfulness that one night she left the

trailer without telling anyone. Roland had come home from work and passed out. Linda put the boys to bed and then drove off. She drove around until five in the morning, a clear sign that her despair was deepening.

"Generational poverty occurs in families where at least two generations have been born into poverty."[80] 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."[81] "When poverty is experienced on a long-term basis – especially when it is intergenerational – chronic abuse may result."[82]

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. 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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[80] 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.

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

[82] *Id.* at 868.

Familial mental illness and abandonment

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. This added stress brought an already troubled relationship to the breaking point.

Angelo, Linda, and Roland would have testified that Linda tried to kill herself multiple times during her marriage to Roland. Roland told Linda that his life would be better without her, and in response, Linda threatened to commit suicide. One day, she took the children up to their grandparents' house and walked home with the intention of killing herself. She ingested a handful of pills before realizing that Steven, who had recently learned to walk, had followed her home. She tried to bring Steven back to his grandparents' house but passed out on the way.

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

Roland rushed back to his parents' home to retrieve Linda. He took her to the emergency room, where her stomach was pumped. Linda was held at the Baptist Hospital for approximately two months following this suicide attempt.

Roland would have testified that he later received an urgent phone call from friends who were concerned about Linda's welfare. Linda had written a suicide note and left it for Roland at a restaurant. After his friends read her letter to him, Roland alerted the police. Linda was found alone, sitting on a bench in Carpenter Park. For her own safety, Linda was apprehended, then again committed to the Baptist Hospital.

Roland recalls that Linda's behavior became increasingly irrational. He would have testified that Linda once fled their trailer with the children in tow while he was taking a shower. Roland, who worked between shifts and was not home much, became concerned that Linda was dangerous. He feared that he would come home and find Linda and the children dead.

Linda Wilson would have testified that her own mother, Kathleen Gabbrielli, suffered from mental illness, and was neglectful and abusive. Her mother divorced her alcoholic, abusive father when Linda was in the second grade. Following the divorce, Linda was routinely molested by her eldest brother, Robert, which her mother was aware of but did nothing to prevent. When Linda was in grade school, her mother had a nervous breakdown while working at the Vanity Fair factory. She later began threatening suicide, saying, "I'll run my car off a bridge or into a tree."

When David was three years old, Roland filed for divorce. Due to Linda's struggles with depression, the court granted primary custody to Roland. *See* (C. 1022-23) (divorce complaint) and (C. 1025-27) (divorce judgment). When David was five years old, Linda moved to Dothan, Alabama, further separating him from his mother.

Linda would have testified that she rarely saw David during this time. 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. When she was able to drive down to spend time with the children, Roland often took the children somewhere without telling her. As she recalls, this happened over a dozen times during the boys' elementary school years.

Roland would have testified that Linda's infrequent visits with her children were often cut short. 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. She even returned the children the same afternoon she picked them up because she could not handle them.

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

"Parental abandonment is a unique form of loss, sometimes creating devastating feelings of pain and grief."[83] "As one leading researcher on the topic put it, parental abandonment represents a 'profound blow to a child's self-esteem and

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

[creates a] sense of degradation ... due to having been given up, put aside, left, or lost.'"[84]

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[.]").

Yet, trial counsel unreasonably failed to investigate and present evidence of David's abandonment by his mother 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?" (Tr. R. 719.) 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.

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

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

"respond in the limited specific way." (Tr. R. 714.) 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. 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.

While trial counsel gave little consideration to Linda's mental health struggles, 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)."[85] "Because genetic factors are involved, when one family member is affected, other close relatives may be at increased risk."[86] 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.'"[87]

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[85] *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.

[86] *Id.*

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

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."). Trial counsel were likewise ineffective in failing to present David's family history of mental illness.

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

David's family members, including Roland Wilson, Jane Wilson, Dale Wilson, and Pamela Tankersley, would have testified that Roland began working nights at the naval base and sleeping during the day. 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. 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.

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. They would also have testified that David's grandparents were elderly and ill-equipped to handle

three young boys. 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. His aunt, Pamela Tankersley, remembers David's grandmother screaming at him and telling him that he was stupid and would never amount to anything. Edward Wilson recalls that Ruby was more easily frustrated with David than either of his brothers.

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. Roland's new wife, Jane Wilson, had two young children of her own. Roland recalls the children telling him after his divorce from Jane that they felt Jane favored her own children over them. She would cook for her children but not for Edward, David, or Steven. She also isolated David from the rest of the family. David could now choose between being screamed at by his grandmother or told to go to his room by his stepmother. 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. 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. Jane also yelled at Roland's children and took away their toys and games.

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.

Sometimes when Linda would come to visit her children, they would all be off somewhere else. But just as often, the other children would be on vacation or at an event and David would be left at home.

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. She would have testified that she was concerned for David because she could see that he was not wanted in his own home. While he could be a difficult child, he was clearly just trying to garner some attention and some love. Whenever Pamela sat with David and talked with him, he was so excited. He would run to get his bike so he could show her the new tricks he was learning. 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.

Desperate to escape his isolation, David moved to Dothan in sixth grade to live with his mother. Linda's brother, Angelo Gabbrielli, became a surrogate father to him. While Angelo allowed David to leave his room and took him on fishing trips, he also physically abused David. Angelo and Linda would have testified that he often beat David, usually with a belt, but sometimes with other things. David recalls that on one occasion his uncle became angry and poured a large pot of hot water on him. On another occasion, Angelo took a switch and beat David until he had welts all over his legs. 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.

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.'"[88] "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."[89] "Mental 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."[90]

Compounding the stressors of poverty and mental illness, David's family also had to contend with his younger brother, Steven, suffering from a deadly illness. Cystic fibrosis is a life-threatening, genetic disease that causes persistent lung infections and progressively limits the ability to breathe.[91] 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 his childhood needs.

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

[89] *Id.*

[90] *Id.* at 865.

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

Authorities have recognized that abuse and neglect are damaging to the psychological development of children.[92] As the Supreme Court has made clear, competent defense counsel must present mitigating evidence of child abuse and 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.").

Nevertheless, David's trial counsel never mentioned neglect during his 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." (Tr. R. 723.) This unchallenged remark placed the blame for David's beatings on himself.

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?" (Tr. R. 716.) Counsel then followed up by asking when this son died. (*Id.*) That Steven, David's baby brother, suffered from a lifelong, genetic illness which so overwhelmed his elderly grandparents that they were unable to devote time or attention to David, whom Linda had abandoned, was ignored.

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

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

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

Roland Wilson would have testified that when David was in kindergarten, his teacher, Ms. Hardy, recommended that he be evaluated for exceptional student education. Ms. Hardy reported that David did not pay attention in class. David was also unable to participate in chorus and other enrichment activities because of his behavior. In elementary school, David was diagnosed with Attention Deficit/Hyperactivity Distorder ("ADHD") and prescribed Ritalin. (Tr. C. 577, 826.)

In fourth grade, David was declared eligible for exceptional education. (Tr. C. 551.) 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. (Tr. C. 577.) Soon after, when David was in sixth grade, a psychologist observed that he seemed unhappy, alone, and isolated. (Tr. C. 544)

In addition to compounding his depression, David's years of isolation and neglect stunted his emotional growth and ability to interact with his peers. David's

fourth grade teacher, Jill Hudson Byerly, who taught David at Berryhill Elementary School, recalls that David had no social skills and did not know how to interact with other children. If someone in class told a joke and the other children laughed, David did not understand why it was funny. David also had difficulty communicating with others, and maintained a vacant expression. Ms. Byerly would have testified that she does not recall David ever having any friends.

When David moved to Dothan in the sixth grade, the school system discovered that, in addition to depression, David had academic problems. His school records show that his written language skills were at a second grade level and his reading comprehension and math skills were at a third grade level.

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. Linda could have testified that she spent time with him when she could, but she worked very long hours. When David got out of school each day, he had to wait at his grandmother's house until Linda got off work. 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. Once again, David was isolated and subjected to differential treatment. John also remembers that Kathleen would yell at David and tell him that he was a bad kid.

Had counsel asked her, David's mother Linda would have testified that she remembers picking up David from his grandmother's house one evening. David came

out to the car and seemed very upset. He started to bang his head against the car and punch himself in the face with a closed fist. Linda remembers David doing this once before, also at his grandmother's house, and she became worried for him. Before David returned to Milton, Linda took him to Charter Wood Hospital to seek help for his psychological problems.

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. (Tr. C. 673.) David was also placed in an Emotionally Handicapped Program while in high school. (Tr. C. 672.) Because he struggled academically, David had to repeat the tenth grade, and his father decided to pull him out of high school and enroll him in a trade school. Linda and Angelo disagreed with this approach, so David was brought back to Dothan to finish high school.

David's family members, friends, 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. While his uncle Angelo was still strict with him, he was much less physically abusive. David's brother Steven began to hang out with their cousin Jacqueline and her friends, and David began to tag along. While he was shy and quiet at first, he gradually began to open up.

The stability at home translated into improvement at school. David's school records show that, in Milton, David had to repeat tenth grade. (Tr. C. 951-52.) His second time in tenth grade he failed eleven of his sixteen classes. (Tr. C. 952.) In Dothan, David earned two As, one B, four Cs, and a D. (Tr. C. 864)

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 David was classified as having emotional disturbance (ED) at Northview High School. David was also rated as having significant problems. Ms. McKinnon would have testified that a student is classified as ED after being tested by a psychometrist. Because David came to Northview from out of state, he would have been re-tested after enrolling in special education in Dothan. Ms. McKinnon reports that students classified as ED suffer from a range of psychological problems, including bi-polar disorder, schizophrenia, or other mental illnesses.

Donna Arieux, another special needs teacher, would have testified that she taught David in her emotional conflict class. She recalls that David was always on time, sat right in front of her desk, and did his work quietly. She never had to write him up in her entire time as his teacher. 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.

David and Ms. Arieux became close, and David would talk to her about his passion for working on and building trucks. While he started off as a bit of a loner at

Northview High School, he slowly started to make friends. David continued to struggle with his academics, but found activities he enjoyed during a work-training program at Dothan Technology Center. He loved working with his hands and building or repairing things.

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.

(Tr. C. 616.) Another teacher, Jim Thompson, also wrote a positive recommendations for him. (Tr. C. 617.)

Ms. Arieux would have testified that she wished she had a lot of students like David Wilson. She never saw him pick on or bully another student. He was quiet but she felt he cared for other people. While he was passionate about working on trucks, he was not a leader among the people in her class or his friends. When she heard that David was charged with capital murder, she was both shocked and extremely upset. 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 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.

As expressed 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.

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.

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.

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.

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.

Asperger's Syndrome

Despite the evidence of mental disability 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 they wanted to. (Tr. R. 687) ("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.").

Post-conviction 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. A licensed clinical psychologist since 1984, Dr. Shaffer would have been readily available to testify at David's capital trial in 2007.

Had Dr. Shaffer been consulted and called to testify by David's trial counsel, he would have testified that David suffers from Asperger's Syndrome, a constituent of autism spectrum disorder. 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 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. 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. 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, all of which would have been necessary to confirm David's diagnosis of Asperger's Syndrome.

Ginger Emfinger, one of David Wilson's attorneys, met with him only twice prior to the start of his capital trial. *See* (C. 663, 665) (Emfinger's fee dec.). His lead attorney, Scott Hedeen, met with him only three times, beginning two months before trial, for a total of less than five hours. *See* (C. 654, 659) (Hedeen'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.

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. David had no sense of humor; if someone told a joke, he could not understand why it was funny. Ms. Byerley would also have testified that it was difficult to carry on a conversation with David. 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.

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. (Tr. C. 836.) 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.*)

David's relatives, including Linda Wilson, Roland Wilson, Edward Wilson, and Angelo Gabrielli, would have testified that David's behavior was also unusual. Roland would have testified that David's expression was often vacant or "spaced out"; David had difficulty cooperating, especially in groups; 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.

Angelo Gabrielli would have corroborated David's odd behavior. He recalls that David responded to praise and attempts at humor with blank, unaffected stares. Angelo would also have confirmed that David found communication difficult and struggled academically. 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.

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. 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. David's teacher, Ms. Arieux, recalls that the only thing David seemed to care about was working on cars and trucks.

David's medical history also confirms the symptoms of his Asperger's Syndrome. David has been prescribed psychoactive medications to treat depression and ADHD since elementary school. As expressed above, depression is a common feature of autism spectrum disorder. ADHD is also a recognized comorbid diagnoses. *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.").

Courts have recognized that evidence of mental disability is classic mitigation evidence that should have been presented to the sentencing jury and judge. *See Harris v. State*, 947 So. 2d 1079, 1127-28 (Ala. Crim. App. 2004) (finding counsel ineffective for failing to investigate and present evidence of 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)); *Wiggins*, 539 U.S. at 535 (explaining that defendant's "diminished mental capacities, further augment his mitigation case"); *Brownlee v. Haley*, 306 F.3d 1043, 1070 (11th Cir. 2002) (vacating death sentence because trial counsel failed to present any mitigating evidence to jury, including "powerful mitigating evidence of ... [defendants] psychiatric disorders").

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."[93]

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[93] 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).

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

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 by theft of electronic equipment. Yet trial counsel unreasonably failed to present this available mitigating evidence during the penalty phase of his capital trial.

Susceptibility to influence

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 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.

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. He was therefore susceptible to influence by more able peers who were not necessarily well-intentioned.

At age 19, David graduated from high school with a vocational diploma (Tr. R. 729) 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, and Catherine Corley, a friend of theirs.

Donna Arieux, a special needs teacher and speech therapist, taught David, Matthew, and Michael in the same special education classes. Ms. Arieux had the boys as students all year for several years in a row. Had trial counsel interviewed and called Ms. Arieux as a witness, she would have testified that David was a kind student who always sat on the front row. 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.

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

Ms. Arieux's recollections of Michael Jackson are also troubling. She would have testified that Michael was a liar, and she could not believe anything he said. Michael also drew demons and other scary drawings, including on his arms, which he would show Ms. Arieux. She remembers telling him that he should not draw on his

arms. Ms. Stewart also recalls that Michael was self-destructive. Michael once mutilated an apple in class, which Ms. Stewart found disturbing.

Angelo Gabrielli, David's uncle, believes Matthew and Michael valued having David around because he would do anything Matthew told him to do. 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. 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.

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. Yet David continued to associate with Michael and Matthew because he desperately wanted to be liked and accepted.

David's family and friends, including Linda Wilson, Angelo Gabbrielli, Edward Wilson, Jacqueline Gabbrielli, and Katie Atwell, would have testified that it was with this group that David found himself in trouble with the law for the first time in his life. Matthew Marsh and Chris Walker, the son of the victim, burned Matthew's vehicle, a Blazer. *See* (C. 613) (Dothan police account of interview with Mark Dandridge); (C. 714) (Ala. Board of Pardons and Paroles Report of Investigation of Albert Christopher Walker in Barbour County Case No. CC-2005-142/143)); and (C. 718) (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. The entire group was questioned by the police. David was

questioned informally and never charged. David's friends and family, including his mother and his uncle Angelo, advised him to stop hanging out with Matthew Marsh and his friends. 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.

As Angelo 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. 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. Mr. Walker held the car until Matthew paid for the rims. It was then that Matthew began plotting to rob Mr. Walker and get the money back that he felt was rightfully his. *See also* (C. 706) (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).

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."). Had trial counsel then investigated David's social history, they would have learned that the features of David's 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.

Trial counsel's ineffectiveness

Despite the abundance of mitigating evidence described above, trial counsel exclusively 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.

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.

(Tr. R. 727.) Other family members, including David's father, Roland Wilson, could easily have provided the information that Linda could not.

Indeed, all of the family members, friends, 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.

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).

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. An expert such as Dr. Shaffer would have

presented his analysis to the jury in a manageable and accessible manner. Instead, David's trial counsel merely dumped more than 400 pages of school records, completely unexplained, on the jury. *See, e.g.* (Tr. R. 687) (in discussing the admissibility of the records without proving a chain of custody, defense counsel stated, "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."). Counsel also acknowledged, through questioning of Mr. Wilson's mother, that he had not reviewed them with her. (Tr. R. 748.)

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. 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, which is especially true for someone with David's emotional and psychological limitations.

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. (Tr. R-Suppress 71-72.) 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.

Post-conviction counsel consulted Dr. Theresa Harden, who has a Ph.D. in special education and curriculum and administration. 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. 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. 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.

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.

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.

Instead, trial counsel presented the unprepared testimony of David's mother and a neighbor, which was attacked by the prosecution as incoherent. 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.

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. (Tr. C. 356.) The fact that the court made the ultimate determination of sentence 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 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).

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 reversed.

b. Trial counsel were ineffective for failing to investigate the confession of co-defendant Catherine Nicole Corley to the murder of Dewey Walker as a mitigating circumstance.

The confession of co-defendant Catherine Corley would also have been relevant to the jury's determination of the appropriate punishment for Mr. Wilson, even if they had convicted him of capital murder after hearing it. Relative culpability is a legitimate 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*, 438 U.S. 586, 608 (1978) (plurality op. of four justices, with two additional justices concurring on this point) (finding Ohio death penalty statute which did not allow for consideration of relative culpability unconstitutional); *id.* at 613 (Blackmun, J., concurring in part and concurring in the judgment); *id.* at 619-20 (Marshall, J., concurring in the judgment). Had counsel investigated this matter and discovered the facts as set out above in Ground III(C)(2), here incorporated by reference, the jury would have had a very different picture of Mr. Wilson to consider.

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.

(Tr. R. 761) (emphasis added). Had the Corley letter been in evidence, this line of questioning would have been impossible.

As in the innocence/guilt phase, the State emphasized the torturousness 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.

(Tr. R. 764-65.) And again, at the sentencing hearing before the judge, the number of injuries was given as a justification for a sentence of death. (Tr. R-Sent. 5-6, 13-14.)

Had Corley's letter and the expert reports 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 (Tr. C.

356), would have been different, because the jury would have to have considered the likelihood that Mr. Wilson was not Mr. Walker's actual killer.

The sentencing court was not provided with this information either. But, since 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), 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.

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.[94] 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,

[94] *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").

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 reversed.

c. Counsel failed to object to numerous instances of prosecutorial misconduct, thereby allowing Mr. Wilson's rights to be repeatedly violated.

In the penalty phase, no less than in the innocence/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). 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, 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*, 318 U.S. at 247. *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.

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

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.*

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. (Tr. R. 674-77.) 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. (Tr. R. 677-78.) 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. (Tr. R. 678-79.) Defense counsel conceded this point and shifted to exclude "the details." (Tr. R. 679-80.)

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.

(Tr. R. 691-92.) Defense counsel did not object.

But both the prosecutor and defense counsel were mistaken as to the applicability of the prior conviction aggravator. 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. (Tr. R. 703-05.) 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." (Tr. R. 705.) 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. (Tr. R. 705.) The trial court then informed the jury that Mr. Wilson's escape conviction should not be considered as an aggravating circumstance. (Tr. R. 708-09.)

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 the second 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 also 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.").

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*."); *Lawhorn v. Allen*, 519 F.3d 1272, 1295-96 (11th Cir. 2008) (ineffective to make critical decision based on inaccurate understanding of law). 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 sentence where jury allowed to consider aggravation beyond statutory aggravating factors); *Ex parte Williams*, 556 So. 2d 744, 745 (Ala. 1987) (reversing sentence because jury considered 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. While Alabama law explicitly prohibits this argument, defense counsel did not object.

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 prosecution injects future dangerousness, defendant entitled to instruction that "life imprisonment means imprisonment until the death of the offender"). 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.

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*, 391 U.S. at 129 (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).[95] 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 DA Valeska, in fact, intended to argue: "I will say, in other words, his escape conviction was after he was arrested for the capital murder

[95] At the time of Mr. Wilson's trial, DA 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. (Tr. R-Sent. 12.) The court sustained the objection "out of an abundance of caution." (*Id.*)

case, i.e, he is not a good risk for life without parole, because he has tried to escape already."[96] (Tr. R. 683.)

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 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). "[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)

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 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

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

Amendments to the U.S. Constitution. Therefore, Mr. Wilson's death sentence is due to be reversed.

ii. Counsel failed to object to testimony from an unqualified State witness as a purported serologist and blood spatter expert.

The testimony of Sgt. Luker respecting "blood" droplets found throughout the house, introduced during the innocence/guilt phase, was also improperly relied on by the prosecution during the penalty phase to support the aggravating circumstance of especially heinous, atrocious and cruel. *See, e.g.* (R. 783-84) (arguments that the blood droplets showed that Mr. Walker was dragged around the house). For all of the reasons stated above in Section III(C)(5)(a), and here incorporated by reference, Sgt. Luker was unqualified to render an opinion on whether the "droplets" were blood or anything about what they meant. Therefore, counsel's failure to object to the admissibility of this evidence at the innocence/guilt phase also rendered their performance at the penalty phase ineffective.

The prosecution used Sgt. Luker's testimony to argue that the crime was especially torturous during the innocence/guilt phase (Tr. R. 602-03, 607-8, 609, 610-11, 612) and carried over to the HAC aggravator in the penalty phase (Tr. R. 783-84). DA Valeska created a scenario from Sgt. Luker's testimony that was not supported by any other evidence. DA Valeska extrapolated from the droplets of "blood" down the hall, 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 (Tr. R. 602-4, 609, 610-11), even though it was never shown that there were any reddish droplets, much less blood, near the holes in the wall. In fact, the evidence log from the crime scene shows that the only swabs of "red stains" were all taken from the kitchen or areas immediately contiguous to it. *See* (C. 737-40) (evidence log for 127 Shield Court). Counsel did not introduce the evidence log into evidence at either phase.

Had counsel challenged the admissibility of Sgt. Luker's opinions on serology and blood spatter, that testimony would have been excluded. That exclusion, in turn, would 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. (Tr. C. 434.) *See also* (C. 735) (color reproduction).

There is no reasonable defense strategy that would have supported a decision not to challenge Sgt. Luker as an expert. Counsel simply failed to do so. Counsel, in fact, objected during DA Valeska's closing in the innocence/guilt phase that the arguments about Mr. Wilson "splatter[ing Mr. Walker] all the way to eternity and back" were not based on facts in evidence. (Tr. R. 607-8.) The court overruled the objection on the grounds that the arguments were based on inferences from the evidence. (*Id.*) Had 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 excluded, counsel would have been in a better position to argue against the HAC aggravator. A negative finding on that issue would very probably, in turn, have persuaded additional jurors to vote for life.

The fact that the court made the ultimate determination of sentence 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 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).

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 death sentence is due to be reversed.

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

Throughout David Wilson's trial, the prosecutor, DA 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.

Perhaps the most egregious example of this kind of misconduct was DA 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 innocence/guilt phase, Mr. Hedeen mentioned the abrupt ending of the tape and indicated that Mr. Wilson meant that he decided against even hitting Mr. Walker. (Tr. R. 212.) 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. (Tr. R. 400-10.) But when it came time to explain to the jury why this was important, after DA Valeska put forward his unsupported extrapolation in his closing at the penalty phase, Mr. Hedeen did not counter it.

The incompleteness of Mr. Wilson's statement was made an issue by DA 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" (Tr. C. 516) was that he decided not just to strike Mr. Walker to knock him out, but to kill him (Tr. R. 781, 783, 790). DA 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.

(Tr. R. 745-46.) Mrs. Wilson was not given the option of a different interpretation to respond to. And defense counsel did not object.

DA 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.

(Tr. R. 761.) Ms. Anders also had no response. And defense counsel did not object.

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:

M[ike]E[tress]: Let's go back to the very beginning for a second.

D[avid]W[ilson]: 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 bout 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.

T[ony]L[uker]: 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.

(Tr. C. 516.) 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.

(Tr. C. 505.) 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." (Tr. C. 510-11.) None of this corresponds with changing the plan to a murderous one. Nothing but DA 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.

In fact, if, after the tape stopped, Mr. Wilson continued in the vein suggested by DA 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." (Tr. R. 411.) *See also* (Tr. R. 385-86, 408). 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. (Tr. R. 383-86, 418-19.)

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 DA Valeska argued. Mr. Hedeen certainly objected to other "fantasies" of the prosecutor. (Tr. R. 608) (during the innocence/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.

DA 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 ...." (Tr. C. 369.) So it is reasonable

to conclude that the jurors were swayed as well. Yet counsel did nothing to counter this false argument.

DA Valeska re-enforced his "changing the plan" argument by again arguing that "the blood in different parts of the house" (Tr. R. 783), "all the blood in the different locations of the house" (Tr. R. 783-84), 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 ...." (Tr. R. 783.) But this argument that Mr. Walker was dragged around the house was based on a fabrication of DA Valeska's, supported only by the false testimony of Sgt. Luker, as discussed above in Section III(C)(5)(a). The evidence log from the crime scene does not show "blood in different parts of the house." Even if the "blood droplets" were actually blood, the crime scene evidence log shows that they 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* (C. 737-40). This 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." (Tr. R. 783-84.) Defense counsel did not object to the false basis of this argument.

To underscore the "pitilessness," DA Valeska asserted that Mr. Wilson was particularly "cold and callous" because "he took and drank Dewey Walker's milk." (Tr. R. 784-85.) This referred back to the false assertion in the State's opening at the

innocence/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." (Tr. R. 205.) There is nothing in Mr. Wilson's statement about drinking milk in Mr. Walker's house. Again, defense counsel made no objection.

DA Valeska also inserted reference to another, wholly irrelevant crime, to which Mr. Wilson had no connection whatsoever. DA Valeska attempted to compare the murder of Dewey Walker to the murder of Marilyn Mitchell[97]: "Mr. 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 –" (Tr. R. 785-86.) Mr. Hedeen did object to this interjection, but without clarifying that Mr. Wilson had nothing to do with that case.

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.

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

295 U.S. at 84. This description matches the performance of DA Valeska in this case. Yet counsel put up little resistance.

During the defense closing argument in the penalty phase, counsel reiterated that what the attorneys say is not evidence. (Tr. R. 766-67, 775-77.) 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. (Tr. R. 767-74.) 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. (Tr. R. 774-75, 777-79.)

But, even while pointing out that what the attorneys say is not evidence, counsel did not specifically ask the jury to apply that to DA Valeska's misinterpretation of Mr. Wilson's statement or his misreport of what Mr. Wilson said. Counsel did not argue against the numerous errors discussed above[98] and the effect subtracting them from the "evidence" should have on the jury's view of how egregious this offense was. The failure to object to and argue against 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. *Compare Stringer*, 503 U.S. at 232

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[98] DA 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, DA Valeska questioned both defense mitigation witnesses about the supposed change in plan. *See also* Ground III(C)(5)(c), respecting the presentation of evidence in support of the HAC aggravator during the innocence/guilt phase; and Ground III(C)(5)(a), respecting the false blood-throughout-the-house "evidence." Therefore, defense counsel was on notice of the likely purport of the State's rebuttal.

("[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 of the brutal ordeal the State fabricated, there is a reasonable probability that more jurors would have voted for life.

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 reverse Mr. Wilson's sentence.

d. Defense counsel failed to present any evidence at the sentencing hearing before the judge.

The judicial sentencing hearing took only a few minutes. (Tr. R-Sent. 4-16.) 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.

(Tr. R-Sent. 4.) The prosecutor then argued that the victim's injuries supported a finding that the murder was especially heinous, atrocious, and cruel. (Tr. R-Sent. 5-

6, 7-8.) The prosecutor asked the court to follow the recommendation of the ten jurors who recommended death and sentence David Wilson to death. (Tr. R-Sent. 7.)

Defense counsel argued briefly for a sentence of life without parole. (Tr. R-Sent. 8-11.) 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." (Tr. R-Sent. 11.) 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. (Tr. R-Sent. 12-15.) As soon as the prosecutor completed his rebuttal argument, the trial court asked if there was anything further from the defense. (Tr. R-Sent. 15.) When defense counsel said that there was not, the trial court immediately sentenced David Wilson to be executed by lethal injection. (*Id.*)

Counsel knew before the sentencing hearing what the jury vote was 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. *Ex parte Tomlin*, 909 So. 2d at 286-87. Yet counsel did not do any of the things that could have been done to prepare for and present a mitigation case to the jury, as set out in Section 1(a) above, and here incorporated by reference, in order to persuade the judge that a sentence of life was more appropriate for Mr. Wilson. Had counsel made a fuller presentation to the court,

as described in Section 1(a), there is a reasonable probability that Mr. Wilson would have been sentenced to life without parole. 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 sentence is due to be reversed.

e. Counsel failed to protect Mr. Wilson's right to a fair and honest jury determination.

The right to trial by jury includes the right to a jury free of bias. U.S. Const., am. 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).

All of the facts describing trial counsel's error respecting jury bias contained in Ground III(C)(8) are here realleged. The same prejudice accrued in the determination of punishment. The seating of a biased juror is inherently prejudicial; here the entire jury was tainted with bias by improper contact with the prosecutor, which trial counsel failed to object to. Had counsel performed effectively, there is a reasonable probability that Mr. Wilson would not have been convicted of capital murder or sentenced to death.

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 sentence is due to be reversed.

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 picture of Mr. Wilson. This incomplete and even distorted picture 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 reversed.

2. The CCA's decision is contrary to or an unreasonable application of *Strickland*, *Wiggins*, and *Rompilla* and rests on unreasonable findings of fact.

The CCA's assessment of counsel's performance at the penalty phase was equally flawed with its innocence/guilt phase rulings, again applying erroneous standards of pleading and prejudice. The CCA 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 Court also failed to accept the facts pled by Mr. Wilson as true, contrary to *Ex parte Boatwright*, 471 So. 2d at 1259, reading the

allegations respecting the diagnosis of Asperger's Syndrome unreasonably and ignoring the affidavit from a school professional explaining that Mr. Wilson's school records contain much information supporting that diagnosis. The CCA was further legally in error when it 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 simply contrary to the entire purpose of the penalty phase, to assess the individual defendant's moral culpability. *See Abdul-Kabir v. Quarterman*, 550 U.S. 233, 263-64 (2007). The absence of all this mitigation from the story presented to the jury was prejudicial, especially where two jurors voted for life even without it.

Mr. Wilson 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. (C. 392-425.) The CCA's treatment of this claim is unreasonable and contrary to U.S. Supreme Court precedent with respect to the standards it applies, with respect to its fact-finding, and with respect to its legal conclusions. *Cf.*, *e.g.*, *Wiggins v. Smith*, 539 U.S. 510 (2003).

The CCA 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 contrary to 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 directly contrary to the Supreme Court's holding in *Wiggins*. While the CCA 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*, predating *Wiggins*. 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 have gathered does not answer whether the investigation conducted was reasonable or not. 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. 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.

The CCA 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 reversals 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 CCA conducted the same kind of faulty analysis here, finding that counsel did enough, without assessing what further information counsel should have known to pursue. 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.

As one example of unreasonable treatment of the facts, contrary to *Wiggins*, the court found Mr. Wilson's allegations that his uncle, Angelo Gabbrielli, repeatedly beat him with a belt and other implements 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.) 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.) Likewise, Wilson pleaded only a few instances of verbal abuse.

Wilson II, No. CR-16-0675, slip op. at 49. The CCA 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 CCA 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.

The facts Mr. Wilson 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 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.").

The CCA'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 complete misunderstanding of the term "diagnosis." The Court found that 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* (C. 405). These facts alone called for a full evaluation by a professional, such as Dr. Shaffer, who could 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 described in detail what that diagnosis would have been and what it means. *See* (C. 411-16). Counsel would have come by 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. (C. 423-24 and 1857.) The CCA found 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.

(C. 1857.) 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. 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.

The CCA also found that Mr. Wilson did not plead the applicability of the Asperger's diagnosis with sufficient specificity, because he "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 a misunderstanding of the process of diagnosis. Mr. Wilson was diagnosed with

Asperger's *because* he meets the criteria set out in the DSM-V. Thus, the quote of symptoms from the DSM, *see* (C. 412), shows what Mr. Wilson's symptoms are. But the CCA was also factually in error. Following the quotation of symptoms, Mr. Wilson named numerous witnesses who observed features such as those described in the DSM and gave details of exactly what they would have testified to. (C. 413-15.) How Mr. Wilson could have been more specific is incomprehensible.

The CCA 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). An individual such as Mr. Wilson suffers from the least severe limitations on the spectrum, but that does not render them no limitation at all. The court's ruling was also directly contrary to 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).

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. (Tr. C. 356.) 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).

Because the CCA failed to follow the appropriate analysis laid out in *Wiggins*, *Eddings*, and numerous other U.S. Supreme Court cases, Mr. Wilson is entitled to reversal 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.

Additionally, Mr. Wilson pled that Corley's confession constituted mitigating evidence which counsel failed to pursue and present. (C. 425-28.) The CCA'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 CCA 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 CCA 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 Ohio death penalty statute which did not allow for consideration of relative culpability unconstitutional).

The whole purpose of the penalty phase of a capital trial is to determine the moral culpability of the defendant in deciding whether he or she 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 CCA 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.

In denying this claim, the CCA also persisted in not accepting Mr. Wilson's pled facts as true. Had counsel submitted Corley's confession to the jury and established that Mr. Wilson refused to accompany her into the kitchen, as he said in his statement, and, so, was not present at the time she inflicted the fatal injuries and did not provide any assistance or support, 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.

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. Mr. Wilson pled sufficient facts to prove deficient performance and prejudice as discussed above. Because the CCA 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 reversal of his sentence and a new penalty phase where a jury can consider the question of his relative culpability.

The CCA's treatment of prosecutorial misconduct during the penalty phase to which counsel failed to object failed to consider the points raised as counsel error, rather than 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 CCA 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 CCA 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 CCA itself acknowledged on direct appeal that, on the tape, Mr. Wilson admitted only to striking one blow.

Mr. Wilson pled first that 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, *Hinton*, 134 S. Ct. at 1089 ("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*."), though the CCA glossed over that prong. As to prejudice, the CCA did not address the finding by numerous courts, including the U.S. Supreme Court, that such an error cannot be wiped away. 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. (Tr. R. 683.) 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). The CCA also ignored that the prosecutor was experienced (C. 433 n.86), such that 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). Counsel did not argue any of this. And the CCA did not explain how or why Mr. Wilson's case falls outside the parameters of these decisions.

Mr. Wilson also pled that the DA's arguments at the penalty phase based on the "blood" evidence never proven to be blood, in support of the "especially heinous, atrocious, and cruel" aggravator, were compounded by repetition and by the carryover of defense counsel's concession to this identification at the innocence/guilt phase. The court adopted its analysis of this issue in the innocence/guilt phase, *Wilson II*, No.

CR-16-0675, slip op. at 54-55, and for the same reasons Mr. Wilson has argued above under Ground III(C)(5), that analysis is erroneous.

Mr. Wilson 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 CCA 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 (Tr. R. 401 and 408). The tape was admitted on the basis of Sgt. Luker's representation that this was so. (Tr. R. 418-19.) The CCA 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 CCA 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, as previously discussed, 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, *Napue*, 360 U.S. at 269, it necessarily follows that counsel were ineffective for failing to challenge this argument.

Because 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.

Because the CCA's ruling on this portion of Mr. Wilson's *Strickland* claim is contrary to *Strickland* itself, as well as other U.S. Supreme Court precedent governing the underlying issues of prosecutorial misconduct, Mr. Wilson is entitled to reversal of his sentence and a new penalty phase before a jury untainted by a prosecutor's misconduct.

The penalty phase of Mr. Wilson's trial followed immediately after the innocence/guilt phase. Since the taint from the impermissible *ex parte* contact between the DA and the jury did not dissipate, counsel's ineffectiveness affected this phase as well. *See* (C. 448-49).

For the same reasons given above respecting counsel's ineffectiveness during the innocence/guilt phase, Ground III(C)(8), the CCA's ruling on this claim, *see Wilson*

II, No. CR-16-0675, slip op. at 57, is in error. Therefore, Mr. Wilson is entitled to reversal of his sentence and a new penalty phase before a jury untainted by impermissible contact with the prosecutor.

3. Trial counsel's obstruction of Mr. Wilson's right to testify on his own behalf prejudiced Mr. Wilson at the penalty phase as well.

In addition to the matter set out in Ground III(C)(7) above, denying Mr. Wilson his right to testify impacted the penalty phase as well. In this 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." The prosecutor argued that this meant Mr. Wilson changed his mind from assault to murder. (Tr. R. 781, 783, 790). DA 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. (Tr. R. 745-46.) He used the same tactic to silence Bonnie Anders. (Tr. R. 761.)

The CCA 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 (Tr. R. 401 and 408). Mr. Wilson's testimony would have confirmed this point.

The CCA 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. Again, Mr. Wilson's own testimony would have explained that the intended change was to less violence, rather than more. This makes more sense than the DA's account. As the CCA 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.

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 and sentence are due to be reversed.

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

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

Mr. Wilson was represented on appeal by attorneys from the Equal Justice Initiative, Bryan Stevenson, Brandon J. Buskey, and Alicia D'Addario. At the time of their representation of Mr. Wilson in 2008, Ms. D'Addario had been admitted to the Bar for only two years, having been admitted in 2006. Mr. Buskey had even less experience, having been admitted in 2007. Appellate counsel failed to adequately argue meritorious issues on appeal, 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.

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.

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).

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.

Direct appeal counsel for Mr. Wilson were ineffective for failing to raise Ground III(C)(1), *supra*, incorporated here by reference, in its entirety. The illegality of Mr. Wilson's arrest was raised on appeal, but 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.

In their initial brief, 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. Appellant's CCA Br., pp. 3 and 33. 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. *Id.* at pp. 33-35. Cases in support are merely cited and not discussed in any detail. *Id.*

In its brief, the State argued only that Mr. Wilson went to the police station voluntarily. Appellee's CCA 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. Appellant's CCA Reply, pp. 14- 18. But again, there is no mention of *Kaupp*, nor of the absence of probable cause.

Finally, even after the CCA 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, Appellant's CCA 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*.

Because 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, and which was cited in the EJI manual's model motion to suppress, *see* Exhibit 16, ¶ 15, when appellate counsel were employed by EJI.

Appellate counsel also omitted any discussion of probable cause. The only evidence possibly implicating Mr. Wilson at the time of his arrest were the statements of two co-defendants, not three, as the initial brief states. *See* Exhibit 2, p. 3. But, as set out above in Section III(C)(1)(b), 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.

Similarly, appellate counsel failed to distinguish *Vincent v. State*, 349 So. 2d 1145 (Ala. 1977), the case relied on by the CCA 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.

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.

This deficient performance of counsel prejudiced Mr. Wilson. Had appellate counsel laid out the facts in full as in III(C)(1) 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, there is a reasonable probability that the outcome of Mr. Wilson's appeal would have been different. That is, the CCA, 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 to have ruled 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.

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 trial.

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.

Direct appeal counsel for Mr. Wilson were ineffective for failing to raise Ground III(C)(3), *supra*, incorporated here by reference, in its entirety. As described above under that Ground, substantial evidence appeared in the record to show that Mr. Wilson's confession was not voluntary or knowing and intelligent, as required under *Burbine*. 475 U.S. at 421. Yet, appellate counsel, like trial counsel, failed to call relevant facts to the court's attention and failed to argue applicable law.

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. Appellant's CCA 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 Appellee's CCA Br., pp. 29-31, but counsel made no response on this issue at all in their reply.

While incompleteness might have been a legitimate challenge if counsel had shown harm from it, without that showing the claim failed. As to involuntariness, the CCA 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.

Counsel's application for rehearing made no new arguments. Appellant's CCA Appl. for Reh'g, pp. 32-37. The only attempt to demonstrate that the CCA'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.

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 in Ground III(C)(3), 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 when officers could expect, and did in fact find, Mr. Wilson to be asleep; the invasion of Mr. Wilson's home by a large number of police officers; his transport 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* Volume VI. 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 (Tr. C. 34-40), in Dr. McKeown's evaluation of Mr. Wilson (Tr. Supp. C-1 16-22), and in Mr. Wilson's school records (Tr. C. 538-996).

Making the arguments Mr. Wilson now makes in Ground III(C)(3) 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 from which could be readily shown, for a challenge the harm from which could not be shown (or was not shown by Mr. Wilson's appellate counsel).

Counsel's deficient performance prejudiced Mr. Wilson. Had appellate counsel laid out the facts in full as in Ground III(C)(3), 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 personal characteristics of Mr. Wilson himself were key in determining that his waiver of his right against self-incrimination was not knowing and intelligent, there is a reasonable probability that the outcome of Mr. Wilson's appeal would have been different. That is, the CCA would have to have considered facts that countered Sgt. Luker's unsupported assertions about Mr. Wilson's signing of te *Miranda* waiver and his understanding of the rights enumerated there. Since, 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), Sgt. Luker's conclusory testimony would have been insufficient to overcome that presumption. The CCA would have been compelled to find that Mr. Wilson's statement was not

voluntary, knowing, or intelligent. That court would have to have ruled also that Mr. Wilson's statement and the other evidence collected on the basis of his statement were due to be suppressed, as argued fully above under Ground III(C)(3). As a result, Mr. Wilson would have been granted a new trial at which that evidence could not be used against him.

But for 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 trial.

4. The CCA's decision is contrary to or an unreasonable application of *Strickland* and rests on unreasonable findings of fact.

The CCA denied Mr. Wilson's claim of ineffective assistance of appellate counsel under *Strickland* for reasons contrary to that decision and U.S. Supreme Court decisions respecting the underlying issues. In particular, the CCA erred in assessing Mr. Wilson's claims by relying on its findings of no plain error respecting related underlying issues on direct appeal, contrary to the lesser burden of proof required by *Strickland* and the ASC's instructions in *Ex parte Taylor*, 10 So. 3d at 1078.

Mr. Wilson pled that direct appeal counsel were ineffective in their arguments supporting the issues of the illegality of his arrest and the involuntariness of his statement. (C. 461-72.) The issues raised by counsel on appeal differed from claims related to the same constitutional rights raised in Mr. Wilson's Rule 32 petition. Yet, the CCA found no error or showing of prejudice, because of its plain error review. *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) and 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 equivalent to the rulings on the issues in Grounds III(C)(1) and (3) and are erroneous for the same reasons.

These rulings effectively eradicate the right to effective appellate counsel in a capital case. Such a conclusion is directly contrary to decisions of the U.S. Supreme Court requiring counsel, and effective counsel, in every criminal appeal as of right. *Douglas v. California*, 372 U.S. 353 (1963); *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). *See also Ex parte Dunn*, 514 So. 2d 1300, 1303 (Ala. 1987). "[A] party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all." *Evitts*, 469 U.S. at 396. The CCA's holdings imply that counsel or

no counsel makes no difference in the outcome of issues on appeal from a capital conviction, because the court itself sees all and considers all.[99]

As to the substantive matter of Mr. Wilson's claims, the CCA 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 court's errors on the trial counsel claims.

Because the CCA applied a standard of review contrary to U.S. Supreme Court precedent, this Court should grant the writ and order a new trial 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.

IV. Prosecutorial Misconduct Infected the Innocence/Guilt Phase Proceedings in Violation of Mr. Wilson's Constitutional Rights. The Trial Court Permitted or Failed to Cure These Improper Actions.

A. The introduction of an incomplete and unreliable version of Mr. Wilson's statement conflicts with federal law governing voluntariness.

Despite collecting substantial physical evidence from the scene of the crime, the State conducted no forensic testing. *See, e.g.*, (Tr. R. 337). Consequently, the only piece of evidence admitted at trial implicating Mr. Wilson in Mr. Walker's murder

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[99] On the contrary, in analyzing the voluntariness of Mr. Wilson's statement, the court discussed none of Mr. Wilson's personal characteristics, but noted only that he did not seem to be intoxicated an hour after his arrest, judging from a tape recording. *Wilson I*, 142 So. 3d at 763-64.

was Mr. Wilson's own statement. Defense counsel moved to suppress Mr. Wilson's statement. (Tr. C. 59-62.) The trial court denied the motion. (Tr. R-Suppress 67.)

Although Mr. Wilson's interrogation by the police lasted an hour and a half, (Tr. R-Suppress 22), Sgt. Luker testified that Mr. Wilson's statement was only forty-five minutes (*id.* at 22), and the tape recording of the statement was only thirty to thirty-five minutes (*id.* at 20). The taped statement submitted to the jury, therefore, represented roughly a third of what actually transpired between Mr. Wilson and the police.

Before investigators began recording, they questioned Mr. Wilson for nearly fifty minutes. (Tr. R. 400.) Sgt. Luker took no notes of this conversation, though he was well aware that this was a capital murder investigation. (Tr. R. 401.) Sgt. Luker testified that he did not take notes because the department normally videotapes these interrogations. (Tr. R. 401.) 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. (Tr. R. 402.) 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. (Tr. R. 401.)

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. (Tr. R. 384.) 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. (Tr. R. 386.) There were no supplemental reports memorializing this lost period of time either. (Tr. R. 410.)

The trial court relied on Sgt. Luker's assertion that what transpired during the missing portions of the interrogation before and after the recorded part did not differ from what was on the tape to find the tape admissible. *See, e.g.* (Tr. R-Suppress 38) ("[T]he tape is exactly in the same lines of what he told us during that other time."). But the prosecutor capitalized on the incompleteness of the tape to argue that the last part of the recorded statement, that Mr. Wilson "changed it all up," meant he changed "the plan" to one of murder, rather than assault (Tr. R. 781, 783, 790), even though Mr. Wilson never said he intended to kill Mr. Walker in any recorded part of the interrogation.

Statements taken pursuant to custodial interrogation are presumed involuntary. *See Dickerson v. United States*, 530 U.S. 428, 435 (2000) (discussing *Miranda*). The State bears the burden of demonstrating that a defendant's custodial confession is, in fact, voluntary. *Seibert*, 542 U.S. at 609 n.1. The State cannot meet its burden where, as here, its investigators recorded barely one third of their interrogation without presenting either a reliable, contemporaneous report of what occurred during the unrecorded interaction or a plausible explanation of why they failed to memorialize such a critical phase of the investigation.

The reliability of statements is a central due process concern. *See Bram v. United States*, 168 U.S. 532, 547-48 (1897).[100] For this reason, the U.S. Supreme Court has found due process violations and excluded confessions where the circumstances of the confession created a significant risk that the statements were unreliable. *See, e.g., Brown v. Mississippi*, 297 U.S. 278 (1936); *Lyons v. Oklahoma*, 322 U.S. 596 (1944). The coercive circumstances of Mr. Wilson's arrest were set out in detail during Sgt. Luker's testimony at the suppression hearing. Therefore, 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*

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[100] "Looking at the doctrine as thus established, it would seem plainly to be deducible that as the principle from which, under the law of nature, it was held that one accused could not be compelled to testify against himself, was in its essence comprehensive enough to exclude all manifestations of compulsion, whether arising from torture or from moral causes, the rule formulating the principle with logical accuracy came to be so stated as to embrace all cases of compulsion which were covered by the doctrine. As the facts by which compulsion might manifest itself, whether physical or moral, would be necessarily ever different, the measure by which the involuntary nature of the confession was to be ascertained was stated in the rule, not by the changing causes, but by their resultant effect upon the mind, -- that is, hope or fear, -- so that, however diverse might be the facts, the test of whether the confession was voluntary would be uniform, -- that is, would be ascertained by the condition of mind which the causes ordinarily operated to create. The well-settled nature of the rule in England at the time of the adoption of the constitution and of the fifth amendment, and the intimate knowledge had by the framers of the principles of civil liberty which had become a part of the common law, aptly explain the conciseness of the language of that amendment. And the accuracy with which the doctrine as to confessions as now formulated embodies the rule existing at common law, and imbedded in the fifth amendment, was noticed by this court in *Wilson v. U. S.*, [162 U. S. 621, 16 Sup. Ct. 895] *supra*, where, after referring to the criteria of hope and fear, speaking through Mr. Chief Justice Fuller, it was said: 'In short, the true test of admissibility is that the confession is made freely, voluntarily, and without compulsion or inducement of any sort.' 162 U. S. 623, 16 Sup. Ct. 899."

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).

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).

The admission of the statement, which constituted a mere third of Mr. Wilson's interrogation by the police, contravened precedent from the U.S. Supreme Court and 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. Therefore, Mr. Wilson's convictions and sentence are due to be reversed.

The CCA based its finding that the State met its burden to demonstrate voluntariness upon Sgt. Luker's testimony at the suppression hearing and the fact that the court "listened to the recorded portion of Wilson's statement." *Wilson I*, 142 So. 3d at 761-64. Sgt. Luker was the arresting officer, who, contrary to law, arrested Mr. Wilson in his home without a warrant, as set out above in Ground III(C)(1). The CCA did not take this point into consideration, nor did it acknowledge the early morning hour of the arrest, the appearance of police in force, the immediate transport in a police vehicle to police headquarters, or any of the other coercive circumstances

of the arrest. It remarked only on the administration of the *Miranda* warnings and Mr. Wilson's signature on the *Miranda* waiver. *Wilson I*, 142 So. 3d at 763-64. Furthermore, it was 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. (Tr. R. 411.) 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 this omission, especially where investigators could have easily documented their entire interactions with Mr. Wilson.

Since the CCA's ruling on the reliability of Mr. Wilson's incomplete statement is in error, this Court should review Mr. Wilson's involuntariness claim using the appropriate analysis, find his incomplete statement unreliable, and grant him a new trial because of the trial court's violation of his rights to due process and a fair trial.

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

B. The trial court failed to prevent or cure the introduction of irrelevant testimony respecting the personal characteristics of Mr. Walker, the pain from the injuries inflicted, and other sentencing phase matters during the innocence/guilt phase.

Mr. Wilson's counsel filed a motion to prohibit the State from introducing victim impact testimony at the guilt/innocence phase, which the trial judge properly granted. (Tr. C. 283.) 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). (Tr. R. 17.) The trial judge denied this motion. (Tr. R. 17.) The second motion in limine requested that the prosecutor be estopped from referring to potential punishments until the sentencing phase. (Tr. R. 13-14.) This was also denied. (Tr. R. 14.) Even though the court granted the first motion, the DA, nonetheless, repeatedly injected this and other sentencing phase issues into the innocence/guilt phase without correction by the trial court.

The State 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. (Tr. R. 218-19.) The trial judge also allowed Jimmy Walker's testimony that Dewey Walker's wife had died and that he had discussed retiring soon. (Tr. R. 219.) 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. (Tr. R. 233.) None of these facts were relevant to guilt, because they were not necessary to establish any element of the crime.

Next, the trial court repeatedly allowed Dr. Enstice, the forensic pathologist who performed the autopsy on Mr. Walker, to testify to her belief that he felt pain and torture during the attack:

> "Those are very painful. ... [H]e did incur pain from the fractures." (Tr. R. 498)

"[H]e did feel pain, yes." (Tr. R. 501-02.)

"In my opinion, very painful." (Tr. R. 503.)

"I have seen that in a number of autopsy cases ... where people were in obvious pain." (Tr. R. 509.)

"Oh, yes. Yes." (Agreeing to the DA's characterization that Mr. Walker suffered "a lot of pain and suffering and torture for a 64-year-old man." (Tr. R. 588.)

See also (Tr. R. 499, 513). 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?

(Tr. R. 598-99.) And it continues.

Based on this testimony, the DA then impermissibly shaped his innocence/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." (Tr. R. 602-03.) He embroidered on this theme throughout 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?" (Tr. R. 612.) This was followed shortly by, "He tortured him. What's it like? What's it like – the last breath you have in the world ...." (R. 614.)

The prosecutor continued to focus on the pain Mr. Walker must have felt (Tr. R. 617) and emphasized the length of time Mr. Walker endured this pain, *see, e.g.* (Tr. R. 613) ("[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 innocence/guilt phase.

Amidst these inflammatory, improper, irrelevant, and prejudicial comments, the prosecutor told the jury, "Come on, Valeska, this is a death penalty case." (Tr. R. 618.) Defense counsel contemporaneously objected to this improper sentencing reference (Tr. R. 619), but the trial court overruled (Tr. R. 620).

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 or not:

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

Williams v. New York, 337 U.S. 241, 246–47 (1949) (emphasis added).

The improper admission of these sentencing phase issues, including victim characteristics, victim impact evidence, and the death penalty itself, at the innocence/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/innocence 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 reversed.

The CCA postulated several reasons to excuse these errors, each of them unreasonable. As to Mr. Walker's personal characteristics, the CCA 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 ASC 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). *See also Williams*, 337 U.S. at 247 ("Rules of evidence have been fashioned for criminal trials which *narrowly confine the trial contest to evidence that is strictly relevant to the particular offense charged.*") (emphasis added).

The CCA 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 CCA ignored the substantial differences between this case and *Rieber*. In *Rieber*, the victim-related testimony at the innocence/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.

On the second issue, the CCA'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 are irrelevant 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 can be, and 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* (Tr. C. 22). 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. (Tr. R. 270-71.) Therefore, this evidence was doubly irrelevant.

As the ASC 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).

Respecting the statement, "Come on, Valeska, this is a death penalty case" (Tr. R. 618), the CCA found it "was isolated" and thus did not entitle Mr. Wilson to relief. *Wilson I*, 142 So. 3d at 775. In so holding, the CCA 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 innocence/guilt phase, as described in this Ground. As the U.S. Supreme Court has explained, prosecutorial misconduct of the sort here must be assessed "in context." *Darden v. Wainwright*, 477 U.S. 168, 179 (1986). That Court excused prosecutorial argument which it condemned as "offensive" and "improper," *id.* at 180, for a number of reasons, the most significant being that it "did not manipulate or misstate the evidence, nor did it implicate other specific rights of the accused such as the right to counsel or the right to remain silent." *Id.* at 182. Additionally, "[m]uch of the objectionable content was invited by or was responsive to the opening summation of the defense." *Id.* Neither of these excuses applies here. DA Valeska did "manipulate" the evidence by injecting penalty phase issues into the innocence/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 DA's misconduct in this case was prompted by any defense action.

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.

Since the CCA's ruling on the injection of sentencing considerations into the innocence/guilt phase is in error, 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 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.

C. 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.

The DA's innocence/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. The DA 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." *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).

1. The DA sought to arouse in jurors a personal hostility toward and fear of Mr. Wilson.

Throughout his arguments at the culpability phase, DA Valeska sought to arouse the jurors' personal hostility towards and fear of Mr. Wilson and distract from the fact that the only evidence of Mr. Wilson's involvement in the crime, his own statement, contradicted the State's theory of guilt.

During both opening and closing, DA 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. (Tr. R. 202-3.) He also remarked that Mr. Wilson joked with his accomplices about not having the keys to Mr. Walker's van. (Tr. R. 621.) Neither of these details had anything to do with the elements of the offense. But the DA went even further, in his opening, he asserted that the evidence would show

> He 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.

(Tr. R. 205.) And he repeated this allegation in his closing:

> They drank his milk – stood over his body and drank his milk.

(Tr. R. 607.) There is nothing in Mr. Wilson's statement to support this. In fact, Mr. Wilson emphatically denied accompanying Corley into the kitchen at all. (Tr. C. 510.) 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?" (Tr. R. 621.) In doing so, the DA invited the jury to make its innocence/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).

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," (Tr. R. 607), "death and destruction," (Tr. R. 612) and a "cold, calculated, depraved, evil, wicked person" (Tr. R. 613). 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").

Finally, after describing some of Mr. Walker's injuries, the DA directly addressed Mr. Wilson about his statement that he accidentally hit the victim. (Tr. R. 606.) 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)." (Tr. R. 607.) 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. (Tr. R. 497.) When the prosecutor asked Dr. Enstice if these injuries were sustained separately, she stated, "some could have occurred at the same time." (Tr. R. 498.) By arguing facts not in evidence, the prosecutor denied Mr. Wilson the opportunity to rebut these assertions. *Contra Skipper v. South Carolina*, 476 U.S. 1, 7 n.1 (1986); *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974).

All of these arguments were improper and prejudicial because they sought to exaggerate or distract from the facts critical to the jury's determination of 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 independently of the error for which we reverse 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.

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 reversed.

The CCA, 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 CCA ignored these inventions, but also failed to address the inflammatory character of the remarks. By upholding the DA's theatrics as mere "demonstration," *id.* at 772, the CCA ignored U.S. Supreme Court decisions cited above condemning such inflammatory tactics, rendering its decision contrary to that clearly established federal law, as well as unreasonable as to the facts.

Since the CCA's ruling is in error, this Court should review Mr. Wilson's claim using the appropriate analysis, find the DA's remarks impermissibly inflammatory and 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.

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

2. The prosecutor impermissibly appealed to the jurors' sympathies for the victim as a reason to convict.

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." (Tr. R. 605.) DA Valeska's most extreme moment came when 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?

(Tr. R. 607-08.) Defense counsel immediately objected to this unsubstantiated dramatization, but the trial court overruled the objection. (Tr. R. 608.)

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.

The prosecution asked the jury several more times to imagine what the attack must have been like for Mr. Walker. (Tr. R. 614) ("He tortured him. What's it like?"); (Tr. R. 615) ("What's it like?"); (Tr. R. 616) ("What was it like for Mr. Walker? In other words, all this force applied to him."); (Tr. R. 624) ("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 innocence/guilt phase. The prosecutor's comments, therefore, could only have distracted the jurors from the objective inquiry they were 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.

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 reversed.

In denying this part of Mr. Wilson's claim, the CCA reviewed for plain error, even though the defense objected, because Mr. Hedeen's stated grounds were that the DA was "fantasizing" (Tr. R. 608), 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 or how they went beyond the facts in evidence. As above, the CCA ignored U.S. Supreme Court decisions cited above condemning such inflammatory tactics, rendering its decision contrary to clearly established federal law, as well as unreasonable as to the facts.

Since the CCA's ruling is in error, this Court should review Mr. Wilson's claim using the appropriate analysis, find the DA's remarks impermissibly inflammatory and 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.

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

D. The prosecutor violated Mr. Wilson's right against self-incrimination by commenting on his silence during closing argument, contrary to *Griffin v. California*.

During his innocence/guilt phase closing, the DA 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?" (Tr. R. 606.) Mr. Wilson, who had exercised his Fifth Amendment right not to testify, did not respond. The DA capitalized on Mr. Wilson's silence by answering the question for him, saying, "It's the brain. The brain tells the body ... Accidentally. Accidentally."[101] (Tr. R. 606.) The prosecutor's direct confrontation of Mr. Wilson, at a time when Mr. Wilson was powerless to respond, exploited Mr. Wilson's decision not to take the stand in his own

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[101] The DA 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) ....").

defense. Such tactics forced Mr. Wilson into an unconstitutional 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 to the U.S. Constitution. Therefore, Mr. Wilson's convictions and sentence are due to be reversed.

The CCA held that the prosecutor's remarks amounted to a permissible "rhetorical question." *Wilson I*, 142 So. 3d at 761. But the U.S. Supreme Court has held that a prosecutor's statement during closing argument that the defendant "has not seen fit to take the stand and deny or explain" certain pieces of evidence was an impermissible comment on a defendant's decision not to testify. *Griffin v. California*, 380 U.S. 609, 615 (1965). Alabama caselaw has recognized the constitutional violation here, as well. In *Ex parte Wilson*, the ASC reversed because the prosecutor alluded to the fact that the defendant had not come forward to contradict or amplify his statement to police. 571 So. 2d 1251, 1264 (Ala. 1990). By directly addressing Mr. Wilson in front of the jury about whether the victim was truly hit accidentally – as described by Mr. Wilson in his statement to police – the prosecutor here did the same thing as the prosecutor in *Ex parte Wilson*.

The U.S. Supreme Court has held that "[t]he freedom of a defendant in a criminal trial to remain silent 'unless he chooses to speak in the unfettered exercise of his own will' is guaranteed by the Fifth Amendment." *Malloy v. Hogan*, 378 U.S. 1, 8 (1964). Actions that condemn the invocation of the right create "a penalty imposed

... for exercising a constitutional privilege. [They] cut[] down on the privilege by making its assertion costly." *Id.* at 614-15. *See also Griffin*, 380 U.S. at 614-15; *Wherry v. State*, 402 So. 2d 1130, 1133 (Ala. Crim. App. 1981). Alabama recognizes the seriousness of this prohibition against making any comment relating to a defendant's exercise of his Fifth Amendment rights by encoding it in its law. Ala. Code 1975, § 12-21-220; *Ex parte Purser*, 607 So. 2d 301, 304-05 (Ala. 1992).

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 or explain the evidence at trial. Courts routinely reverse convictions where the prosecution either directly or indirectly comments on the defendant's 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). 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 CCA's decision to the contrary here, excusing the question as "rhetorical," is contrary to or an unreasonable application of *Griffin*.

Since the CCA's ruling on the prosecutor's comment on Mr. Wilson's silence is in error, 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.

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

E. The trial court failed to cure the prosecutor's repeated references to the non-testifying co-defendants' confessions, in violation of Mr. Wilson's confrontation rights.

The trial court erred by allowing the State and its witnesses to repeatedly reference and allude to the substance of the confessions of Mr. Wilson's co-defendants. *See, e.g.* (Tr. R. 281-82, 295, 417). 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. (Tr. R. 281-82.) The DA then elicited that Sgt. Luker had also spoken with co-defendants Catherine Corley and Michael Jackson before recovering the van, suggesting to the jury they had given statements similar to Marsh's statement. (Tr. R. 282-83.) 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." (Tr. R. 295.) 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 (Tr. R. 417) – 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. (Tr. R. 417.)

While 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.

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, although 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) (confrontation right violated where convictions of non-testifying co-defendants admitted to prove essential element of charge).

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 reversed.

The CCA's denied this claim by declaring these references "harmless." *Wilson I*, 142 So. 3d at 814, But in other cases the CCA 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 CCA, 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."

Since the CCA'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 due process and a fair trial.

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

V. 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.

A. The prosecutor repeatedly overstepped the bounds of propriety and permissibility by arguing an inapplicable aggravator and from facts not in evidence.

Numerous instances of prosecutorial misconduct during the penalty phase are set out above in Ground III(D)(1)(c) and here incorporated by reference. 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 innocence/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" (Tr. R. 784-85), 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. (Tr. R. 795.) 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 (Tr. R. 765), even though the forensic pathologist did not testify in this manner.

Thus, the prosecutor repeatedly puffed up his case with what defense counsel rightly described in the innocence/guilt phase as "fantasy." (Tr. R. 608.) The prosecutor's comments were not proper inferences from the evidence, as they were based on evidence that was never introduced or proven at trial. Prosecutors are forbidden from arguing facts not in evidence, *Donnelly v. DeChristoforo*, 416 U.S. 637

(1974), as this practice denies the defendant an opportunity to rebut or explain such assertions, *Skipper v. South Carolina*, 476 U.S. 1, 7 n.1 (1986). These repeated assertions about 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. Owens*, 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 to the U.S. Constitution. Therefore, Mr. Wilson's sentence is due to be reversed.

The CCA 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 CCA thus compounded the harm to Mr. Wilson by lumping his behavior together with "his accomplices,'" directly contrary to 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 CCA noted that Mr. Wilson "correctly" challenged this comment, *id.* at 782, but excused it 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 CCA

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 CCA 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. (Tr. R. 764.) The CCA 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 in the context of the trial as a whole.

The CCA'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 these, conflicts with the above-cited federal law and unreasonably applies it. *See also Tucker v. Kemp*, 802 F.2d 1293, 1299 (11th Cir. 1986) (holding 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 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 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.

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" (Tr. R. 795), and to "do what's right" (Tr. R. 796). 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.

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 CCA 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

prosecutor's comment that jury "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.

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.

The CCA'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. Its opinion is, therefore, contrary to and an unreasonable application of clearly established federal law. 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.

VI. The Trial Court Erred in Its Penalty Phase Instructions to the Jury Thereby Violating Mr. Wilson's Constitutional Rights.

A. The trial court omitted any instruction informing the jury that jurors could consider a mitigating factor even if not all jurors agreed.

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. (Tr. R. 803-08.) 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.

U.S. Supreme Court precedent requires that jurors be clearly instructed 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).

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 reversed.

The CCA 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.

(Tr. R. 814.) But this instruction does not say anything about whether jurors must agree or not. There is much room for misinterpretation here because it is not clear, for example, who decides whether the State has sufficiently disproved a mitigator, all jurors unanimously or each juror individually.

Since the CCA's ruling on suppression is contrary to *McKoy* and *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.

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

B. The trial court improperly diminished the jury's role in sentencing.

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." (Tr. R. 690). This was error, as it mischaracterized the jury's role in the sentencing process "in a way that allows the jury to feel less responsible than it should for the sentencing decision." *Darden v. Wainwright*, 477 U.S. 168, 184 n.15 (1986). 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."

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 reversed.

The CCA 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* and throughout its capital jurisprudence. The CCA'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).

Because the CCA's ruling on this jury instruction is in error, 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.

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

VII. 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, contrary to U.S. Supreme Court Precedent.

During the penalty phase of Mr. Wilson's trial, counsel introduced over 400 pages of school records. (Tr. C. 539-996.) 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 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.

(Tr. C. 371.) This all-too-brief summary overlooks a wealth of mitigating factors.

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 (Tr. R. 733), which led to struggles in school and placement in a self-contained class for emotionally handicapped students (Tr. C. 764, 777). A psychologist diagnosed Mr. Wilson at the age of nine with poor social and emotional control and an underdeveloped contact with reality. (Tr. C. 541.) At age 11, Mr. Wilson was found to be battling anxiety and depression. (Tr. C. 595.) Throughout his childhood, psychiatrists placed Mr. Wilson on medication (Tr. C. 577, 609, 635, 705, 738), but at those times when he lived with his mother, she would force him to stop taking it (Tr. C. 609). 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").

The trial court also did not consider Mr. Wilson's extensive struggles in school, due in part to his significant learning disabilities (Tr. C. 595, 717), in determining the appropriate sentence. In the seventh grade, Mr. Wilson tested in the second and third grade range for reading, writing, and math. (Tr. C. 597.) For several years, Mr. Wilson did not participate in statewide testing because he was "unable to adhere to standardized testing procedures." (Tr. C. 602, 714.) 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. (Tr. C. 589.) 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, sophisticated, and thus must have played a leading role in the crime. (Tr. R. 738, 745-46, 779, 780, 793.)

In addition, while the trial court mentioned that Mr. Wilson "lived with one parent and then the other over the years" (Tr. C. 371), 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. (Tr. C. 742, 743, 764, 779.) At one point, Mr. Wilson's father made him quit school and get a job. (Tr. C. 17.) Mr. Wilson bounced from his father's home in Florida to his mother's home in Alabama. (Tr. R. 721, 727-28, 730.) He would live with his father, who would have Mr. Wilson take medication (Tr. C. 577, 609, 635, 705, 738), and then be sent to live with his mother, who would force him to stop taking the medication (Tr. C. 609; Tr. R. 726). This evidence of Mr. Wilson's difficult childhood is 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").

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 ...."). But the sentencing judge here did not do so.

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 v. Dugger*, 481 U.S. 393, 398-99 (1987) (reversing death sentence where 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.

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, if the State does not disprove its factual existence by a preponderance of the evidence, the sentencer must find it exists. 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.").

"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*[, 408 U.S. 238 (1972),] 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 Alabama courts failed to find mitigating circumstance despite overwhelming evidence). *See also Parker v. Dugger*, 498 U.S. 308, 318-23, (1991) (granting habeas corpus relief where state appellate court failed to consider "uncontroverted" mitigating evidence when addressing override of 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).

Failing to enumerate an uncontroverted mitigating circumstance is, under Alabama's weighing system, equivalent 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 therefore 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.

The trial court's refusal to find and consider in sentencing undisputed mitigating evidence in this case violated Mr. Wilson's 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 are due to be reversed.

In reviewing the propriety of Mr. Wilson's sentence, the CCA 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.

Because the CCA's ruling does not 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 of his rights to due process and a fair trial.

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

VIII. Mr. Wilson's Sentence of Death Was Obtained through a Process Not Compliant with *Ring v. Arizona*, Thereby Violating His Right to Trial by Jury.

Prior to trial, Mr. Wilson filed motions to prohibit characterization of the jury's role as advisory (Tr. C. 164), to prohibit the court from considering any aggravating circumstance not reliably found by the sentencing jury (Tr. C. 135), to bar imposition of the death penalty in the absence of a unanimous jury vote (Tr. C. 137), and to bar the death penalty under *Ring v. Arizona*, 536 U.S. 584 (2002), because the jury would not make the two factfindings necessary to make the defendant eligible for the death penalty (Tr. C. 155). The trial court denied all of these motions. Mr. Wilson maintains that *Ring* invalidated critical aspects of Alabama's capital sentencing scheme and renders his death sentence unconstitutional.

The U.S. Supreme Court held in *Ring* that "[c]apital defendants ... are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Id.* at 589.

Under Alabama law, a sentence of death can only be imposed where a jury finds (1) unanimously and beyond a reasonable doubt that a statutory aggravating circumstance exists and (2) that aggravating circumstances outweigh the mitigating circumstances. Ala. Code 1975, § 13A-5-46(e)(2). *See also Ex parte Woodard*, 631 So. 2d 1065, 1071 (Ala. 1993). In this case, the death sentence cannot be affirmed pursuant to *Ring* because a jury never made either of the factfindings necessary to support the imposition of the death penalty.

First, under *Ring*, following *Apprendi v. New Jersey*, aggravating circumstances are elements of the offense. *Apprendi*, 530 U.S. 466, 494 n.19 (2000). There is nothing in *Ring* that allows distinction between aggravating circumstances, such that one must be found by the jury, but any others not. That this cannot be so is demonstrated by the fact that appellate courts uphold death sentences even where one aggravator is found to be invalid. An aggravating circumstance cannot be a "sentencing factor" today, but an element tomorrow. Such a practice would violate defendants' right to notice.

In this case, there is no basis for concluding that the especially heinous, atrocious, and cruel aggravating circumstance was factually found by a unanimous jury to exist beyond a reasonable doubt. The trial court prevented this by denying the defense's request to submit a special verdict to the jury on the three aggravating

circumstances sought by the State. (Tr. R. 816.) Because Alabama does not require juries to specify which, if any, aggravating circumstances were found at the penalty phase, no reliable basis for imposition of a death sentence can be deduced on this record. *See, e.g.*, *Ex parte McGriff*, 908 So. 2d 1024, 1039 (Ala. 2004) (suggesting that at retrial, trial court should utilize special verdict form to expressly record jurors' votes on the issue of existence of aggravating circumstance).

Despite this absence of a jury finding, the sentencing court considered HAC, and weighted it heavily, as an aggravating circumstance in setting the punishment at death. (Tr. C. 368, 370.) Where the sentencer considers an invalid aggravator, the resulting sentence must be reversed. *Stringer v. Black*, 503 U.S. 222, 232 (1992) ("[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.").

Second, the ASC's new, post-*Ring* construction of Alabama law in *Ex parte Waldrop*, 859 So. 2d 1181 (Ala. 2002), arbitrarily rendered defendants convicted of some capital offenses automatically subject to the death penalty at the end of the first phase, while defendants convicted of other capital offenses cannot be sentenced to death without further jury factfindings at the penalty phase. This construction violates the requirements of the Due Process Clause, Equal Protection, and the Sixth, Eighth and Fourteenth Amendments as well as the integrity of the jury's judgment. Where the State puts the issue of whether death is an appropriate sentence in issue, due process entitles the defendant to inform the jury about the nature and

consequences of that decision. *Simmons v. South Carolina*, 512 U.S. 154, 162 (1994) (plurality opinion). It is impermissible to mislead the jury about the significance of its verdict. *Caldwell*, 472 U.S. at 328-29. The ASC has impermissibly eased the State's burden of proving that the death penalty is appropriate by ensuring that the jury is unaware that its innocence/guilt phase finding authorizes the trial judge to impose the death penalty without additional process. *Ex parte Waldrop*, 859 So. 2d at 1188. When defense counsel attempted to inform the jury in his sentencing phase opening that the jury's guilty verdict actually placed Mr. Wilson at risk of execution, the trial court excluded this argument after the prosecution objected. (Tr. R. 699-700.) Thus, under the ASC's interpretation of *Ring* and Alabama law, Mr. Wilson's jury made the decision to expose him to a death sentence without knowing the consequences of their verdict. Yet other Alabama defendants are not so exposed. *See, e.g.*, *Ex parte McNabb*, 887 So. 2d 998, 1005 (Ala. 2004) ("McNabb contends – correctly – that, despite his conviction for capital murder, he could not have been sentenced to death unless at least one of the aggravating circumstances set forth in § 13A-5-49 was found by the jury to exist beyond a reasonable doubt.").

Third, the jury's 10-2 verdict (Tr. C. 356) also indicates that the jurors did not unanimously agree that any aggravation outweighed the mitigating circumstances. Under Alabama law, a defendant cannot be sentenced to death without this finding. Therefore, the weighing exposes a defendant to a sentence greater than that to which he would be subject without this finding. Hence, this finding must be made by the jury. *Apprendi*, 530 U.S. at 494.

Failure to have the jury make all the findings necessary to the imposition of a sentence of death, exposing some, but not all, defendants to a sentence of death following the innocence/guilt phase, and misleading the jury about their role in sentencing violated Mr. Wilson's rights to equal protection, to due process, to trial by jury, 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 reversed.

The CCA denied this claim solely on the authority of *Ex parte Waldrop*. *See Wilson I*, 142 So. 3d at 802-3. The court did not engage with the issues raised here.

Because the CCA's ruling cannot be squared with the demands of *Ring* and *Hurst*, this Court should review Mr. Wilson's *Ring* claim using the appropriate analysis, find that the required jury findings were not made here, and grant Mr. Wilson a new penalty phase because of the violation of his rights to due process, equal protection, and jury trial.

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

IX. The Trial Court Violated Mr. Wilson's Right to Due Process and the Presumption of Innocence by Failing to Make On-the-Record Findings Specific to Mr. Wilson for Shackling Him before the Jury, contrary to *Deck v. Missouri*. Defense Counsel Were Ineffective for Failing to Challenge Mr. Wilson's Shackling.

On information and belief, Mr. Wilson was shackled throughout his trial. The shackling would have been visible to the jury, because of the layout of courtrooms in the Houston County Courthouse. Counsel tables in these courtrooms face each other, instead of the bench. Therefore, the jury, seated behind the prosecution's table, would

have a clear view of Mr. Wilson, seated at the defense table. No skirt or other obscuring method was used to hide Mr. Wilson's legs from the jury.

In *Deck v. Missouri*, 544 U.S. 622, 626 (2005), the Supreme Court recognized that the federal Constitution forbids a State to use visible shackles in the innocence/guilt phase of a criminal trial unless the use is "justified by an essential state interest," such as courtroom security, specific to the defendant on trial. *See also Holbrook v. Flynn*, 475 U.S. 560, 568-569 (1986). This rule has deep roots in the common law. In the 18th century, Blackstone wrote that "it is laid down in our ancient books, that, though under an indictment of the highest nature, a defendant must be brought to the bar without irons, or any manner of shackles or bonds; unless there be evident danger of an escape." 4 W. Blackstone, *Commentaries on the Laws of England* 317 (1769). "In light of *Holbrook*, *Illinois v. Allen*, 397 U.S. 337, early English cases, and lower court shackling doctrine dating back to the 19th century, it is now clear that this is a basic element of due process protected by the Federal Constitution." *Deck*, 544 at 629.

The court did not hold an on-the-record hearing to justify the use of shackles. And defense counsel never insisted that the court explain reasons specific to Mr. Wilson for ordering shackling. *Id.* at 632 ("[D]ue process does not permit the use of visible restraints if the trial court has not taken account of the circumstances of the particular case."). Counsel failed to raise any on-the-record objection to the shackles.

The shackling of Mr. Wilson in the presence of the jury was not justified by an essential state interest. The crimes with which Mr. Wilson had been charged were

serious and violent; however, Mr. Wilson had not yet been convicted of these crimes. Furthermore, nothing in the record indicates that the court considered factors specific to Mr. Wilson before approving the shackling. There was no evidence that Mr. Wilson had been uncooperative with officials during transfer to the courtroom, nor that he had created any disturbance during the proceedings. In addition, no alternative measures (such as concealing shackles behind a table covering) were considered.

The defendant in a criminal trial has a right to the presumption of innocence. However, this presumption of innocence was tainted by the presence of shackles, which, at the very least, subliminally affected the prospective jurors' impressions of Mr. Wilson even before any evidence had been presented.

Shackling, in and of itself, is "inherently prejudicial." *Holbrook*, 475 U.S. at 568. The practice of shackling, like the administration of antipsychotic drugs, often has negative effects that "cannot be shown from a trial transcript." *Riggins v. Nevada*, 504 U.S. 127, 137 (1992). Trial counsel's failure to object to this practice was ineffective assistance of counsel and prejudicial to Mr. Wilson because it undercut the presumption of innocence and made him appear exceptionally dangerous. As a result, Mr. Wilson was denied his rights to the effective assistance of counsel, to a fair and impartial jury, 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. Thus, his convictions and death sentence are due to be reversed.

X. 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.

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.

That such an analysis must be applied can be deduced also from the "totality of the circumstances" or "prejudice" standards applicable to virtually every category of error Mr. Wilson has alleged. Claims alleging a *Brady* violation must show a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different," *United States v. Bagley*, 473 U.S. 667, 682 (1985); claims of ineffective assistance of counsel "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *Strickland*, 466 U.S. at 694; 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)). And "[w]hen specific guarantees of the Bill of Rights are involved, th[e Supreme] Court has taken special care to assure that prosecutorial conduct in no way impermissibly infringes them." *Donnelly*, *id.* This necessarily requires a consideration of the prosecutorial conduct in conjunction with the impairment of the specific constitutional right. 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.

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 other misconduct in presenting false "blood" evidence through

an unqualified expert 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 errors left the jury with no avenue to convict Mr. Wilson of anything other than a capital offense. Trial counsel's errors also impacted this issue: failing to investigate Mr. Wilson's co-defendants and to challenge Sgt. Luker as an "expert" on serology and blood spatter or his account of blood trailed throughout the house left the State's errors uncorrected. They further failed to demonstrate that Mr. Wilson's statement could not be fairly interpreted as DA Valeska would have it. Their incompetent suppression argument had a similar effect because they failed to show that the incompleteness of the statement rendered it unreliable, precisely as the events at trial show. The harm from all of these errors combined completely undercut the fairness of the proceedings and renders the result wholly unreliable.

Harm from the innocence/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 counsel's failure to impeach witness during first 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 innocence/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").

In the penalty phase, counsel again relied on a version of events that would have rendered Mr. Wilson less culpable than the prosecution argued, that Mr. Walker was rendered unconscious by the first blow, but 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 brutality the State created out of false evidence and 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 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 that violence of this degree must be punished at the maximum. 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.

Given this inextricable mix of errors and failures, fundamental fairness demands that this Court consider the accumulated harm to Mr. Wilson's rights enumerated above respecting each individual claim under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution. Because the accumulated prejudice of these violations of Mr. Wilson's rights adversely affected

Mr. Wilson's substantial rights and seriously affected the fairness and integrity of the judicial proceedings, Mr. Wilson's convictions and sentence must be vacated.

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.

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 (C. 450-61), the CCA did not apply the correct standard when reviewing these issues. The CCA 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, so, did not actually conduct cumulative error review. This is contrary to *Strickland*, 466 U.S. at 694, and to the ASC's admonition in *Ex parte Woods*, 789 So. 2d 941, 942 n.1 (Ala. 2001).

Similarly, instances of prosecutorial misconduct and trial court error were each treated individually with no consideration of the accumulated harm.

The accumulation of error in this case was particularly harmful. For example, 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 not only deprived Mr. Wilson of a clear defense to capital murder, but also set the scene for the jury, and the CCA, 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.

Because the CCA's ruling on each of Mr. Wilson's claims is contrary to U.S. Supreme Court precedent respecting cumulative review, this Court should grant the writ and order a new trial and new penalty phase to correct the violation of Mr. Wilson's rights enumerated above.

CONCLUSION

For all of the reasons set out above in detail, Mr. Wilson did not convicted or 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 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

(F) Grant such further and other relief as may be appropriate.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2019, the foregoing has been filed with the Clerk of the Court and a copy is being served upon the following by United States Mail:

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