No. 16-9282
CAPITAL CASE

In the SUPREME COURT of the UNITED STATES

MATTHEW REEVES,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

On Petition for a Writ of Certiorari to the
Alabama Court of Criminal Appeals

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

Should this Court decline to review Reeves's claim that the Court of Criminal Appeals improperly held that the testimony of trial counsel is strictly required to support an ineffective assistance of counsel claim (1) where this claim does not involve a split and, in any event, is not a good vehicle to review this claim because the Court of Criminal Appeals did not hold that the testimony of trial counsel is strictly required, and (2) where Reeves's ineffective assistance of counsel claims are without merit?

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STATEMENT OF THE CASE

A. The Proceedings Below

Matthew Reeves is seeking review of his post-conviction proceedings in state court in this certiorari petition. Reeves was found guilty of the capital offense of murder during a robbery in violation of section 13A-5-40(a) (2) of the Code of Alabama (1975) for the death of Willie Johnson. (R. 1210)[1] Following a sentencing hearing, the jury recommended that Reeves be sentenced to death by a 10-2 vote. (CR. 4) After weighing the aggravating and mitigating circumstances, the trial court followed the jury's recommendation and sentenced Reeves to death. (CR. 233)

On direct appeal, the Alabama Court of Criminal Appeals affirmed Reeves's conviction and death sentence. *Reeves v. State*, 807 So. 2d 18 (Ala. Crim. App. 2000). The Alabama Supreme Court denied Reeves's petition for writ of certiorari, *Ex parte Reeves,* No. 1000234 (Ala. June 8, 2001), and this Court did likewise. *Reeves v. Alabama*, 534 U.S. 1026 (2001) (mem.).

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[1] References to the record will appear as follows: references to the court reporter's transcript and the clerk's record from the direct appeal will appear as (R. ___) and (CR. ___), respectively. References to the court's reporter's transcript and the clerk's record from the Rule 32 proceedings will appear as (Rule 32 R. ___) and (Rule 32 CR. ___), respectively.

After his direct appeal was concluded, Reeves filed a petition for post-conviction relief under Rule 32 of the Alabama Rules of Criminal Procedure. (Rule 32 CR. 16) Subsequently, he filed two amended petitions (Rule 32 CR. 123, 548), each of which the State answered. (Rule 32 CR. 210, 627)

An evidentiary hearing was held on the Rule 32 petition on November 28-29, 2006. (R. 15) The Rule 32 court denied Reeves's second amended Rule 32 petition, (Rule 32 CR. 934), but the parties were not served with this order until early January 2013. Reeves eventually filed a Rule 32.1(f) petition to file an out-of-time appeal, which was granted.

On appeal, the Alabama Court of Criminal Appeals affirmed the denial of the Rule 32 petition. *Reeves v. State*, CR 13-1504, 2016 WL 3247447 (Ala. Crim. App. June 10, 2016). The Alabama Supreme Court denied Reeves's petition for writ of certiorari. *Ex parte Reeves*, No. 1160053 (Ala. Jan. 20, 2017).

B. Statement of the Facts

1. Facts concerning the crime

On November 27, 1996, Matthew Reeves, his brother, Julius Reeves, Brenda Suttles, and Emanuel Suttles decided to commit a robbery. *Reeves*, 807 So. 2d at 24. That afternoon, the four left Brenda Suttles's house on

foot to look for robbery victims. *Id.* Jason Powell noticed the four walking down the road and agreed to give them a ride. (R. 686, 759) While in Powell's car they decided to travel to White Hall in Lowndes County, Alabama, to rob a drug dealer. (R. 686, 759) On the way to White Hall, they stopped at a house in Selma, and Julius went inside and returned with a shotgun. *Reeves*, 807 So. 2d at 24. He handed the shotgun to Matthew when he got back in the car. (R. 688)

Before reaching White Hall, Powell's car broke down on a dirt road. *Id.* After a couple of hours, the victim, Willie Johnson, stopped to lend assistance and agreed to tow Powell's car back to Selma. *Id.* Julius Reeves rode in Johnson's truck with him and the others rode in Powell's car. The victim towed the car to the residence in Selma where Matthew and Julius lived with their mother. *Id.*

At that time, Julius informed the others that Johnson wanted $25 for towing the car. No one had any money to pay him, but Julius offered to give Johnson a ring as payment if he would take him to his girlfriend's house to get it. *Id.* Johnson agreed and Julius sat in the cab of the truck with Johnson, while Matthew and Brenda sat in the bed. During the ride, Matthew concealed the shotgun behind his leg. *Id.* After arriving at his girlfriend's house, Julius retrieved the ring he had promised to give Johnson

as payment for towing the car. *Id.* When Julius came out of the house, he told Matthew and Brenda that he was not going to let Johnson keep the ring and that he was their robbery victim. (R. 701) After Julius got back in the truck, Johnson drove them back to the Reeves' house. (R. 702)

As they were pulling into an alley, Matthew Reeves shot Johnson in the neck. *Reeves,* 807 So. 2d at 25. Brenda Suttles looked up when she heard the shot and saw Matthew withdrawing the barrel of the shotgun from the open rear window of the truck's cab. *Id.* Julius jumped out of the cab of the truck and asked Matthew what he had done. Matthew told Julius and Brenda to go through Johnson's pockets to get his money. *Id.* Julius pulled Johnson out of the truck, went through his pockets, and gave the money he found to Matthew. *Id.* Brenda and Julius then put Johnson back in the truck. *Id.* Brenda later testified that Johnson was making "gagging" noises and was bleeding heavily. *Id.*

Matthew, Julius, and Brenda then ran into the Reeves' house. *Id.* Matthew placed the shotgun under his bed, then told Julius and Brenda to change out of their bloodstained clothes and shoes, and stuffed them under a dresser in his bedroom. *Id.*

Matthew, Julius, and Brenda then ran to Brenda's house. There, Matthew divided approximately $360 among the three of them. *Id.*

Matthew bragged to several people throughout the evening about shooting Johnson. *Id.* People also heard Matthew bragging that the shooting would earn him a "teardrop," a gang tattoo acquired for shooting someone. *Id.*

During the early morning hours of November 28, 1996, Johnson's body was discovered in his truck. *Id.* at 26. The police found a trail of blood from the truck to the Reeves' house. *Id.* A detective from the Selma Police Department obtained consent to search the house from Matthew's mother, Marzetta Reeves. *Id.* The police recovered the bloodstained shoes and clothes, and the shotgun hidden in the bedroom shared by Matthew and Julius. *Id.* They also learned that Matthew, Julius, and Brenda were at Brenda's house and found Matthew there lying on a bloodstained jacket. *Reeves*, 807 So. 2d at 26.

Gloria Walters, a latent fingerprint expert with the Alabama Department of Forensic Sciences, undertook an analysis of the fingerprints found at the scene. Fingerprints matching Julius Reeves were taken from the door of Johnson's truck. (R. 1006) Brenda Suttle's fingerprints were lifted from the driver's-side rear fender of the victim's truck. (R. 1011) Fingerprints matching Matthew Reeves were found on the shotgun. (R. 1011)

Reeves called Detective Pat Grindle, Marzetta Reeves, his mother, and Dr. Kathaleen Ronan, a clinical psychologist employed at the Taylor Hardin Secure Medical Facility, to testify during the penalty phase of his trial. Detective Grindle described the home in which Reeves was raised. Marzetta Reeves testified to the family structure and described her son's formative years. (Rule 32 CR. 936-940)

Dr. Ronan testified concerning her evaluation of Reeves. The Rule 32 court summarized her penalty-phase testimony as follows:

> Well, I didn't get as much information from him about his background, but there certainly was extensive documentation about his background. He came from a very turbulent upbringing. There was not a great deal of structure in the home or guidance or supervision. He presented with a number of behavioral difficulties in school. There were constant attempts on the part of the school to communicate with his mother - the father was not present in the home - in order to try to get him into appropriate programs and to control his behaviors. . .
>
> Well, turbulence in my opinion would mean that there was not a lot of structure, that a child basically raises themselves. They may run in and out of the home or on the streets, not have a lot of structure. They may be subjected to abusive situations, neglectful situations. There was no stability of relationships for the child. They were in an environment which would I guess under normal conditions be considered pretty dangerous. . .
>
> Q I believe you mentioned that you gave Matthew Reeves some type of intelligence test of some sort?

A Yes, sir.

Q What did you administer to do that?

A Well, the most widely used intelligence test is called the Wexler Intelligence Scale. And there is a child's version, and there is an adult's version. And he received the child, the adult's version this time. He had received the child's version in the past.

Q What were the results of your testing?

A I gave him a verbal portion only. I didn't give him the entire test because the verbal portion tape into the issues that were being asked by the Court, somebody's ability to understand, their verbal reasoning, more so than the eye, hand coordination part of it. The results showed that he was in what we call the Borderline range of intelligence meaning that he was two steps or two what we call standard deviations below normal. And it's the borderline of mental retardation. The verbal IQ score that I got was - I believe it was a 74. And he had received the child's version of the same test when he was young, and his verbal IQ then was 75. So that just shows that basically nothing had happened. His IQ had stayed about the same.

Q And you stated that his IQ was borderline range?

A That's correct.

Q So he wasn't actually mentally retarded?

A He was not in a level that they would call him mental retardation, no."

(Rule 32 CR. 936-940)

2. Facts from the state post-conviction proceeding

The circuit court held an evidentiary hearing on the Rule 32 petition on November 28-29, 2006. Reeves's first witness was Dr. John Goff, an expert in neuropsychology and clinical psychology. Dr. Goff testified that Reeves's IQ is within the mild intellectual disability range. (Rule 32 R. 43) Dr. Goff measured Reeves's academic level by administering the Weschler Individual Achievement Test (WIAT). (Rule 32 R. 36) According to Dr. Goff, Reeves reads on a third-grade level, could do math on a fourth-grade level, and could spell on a fifth-grade level. (Rule 32 R. 38) He also administered the Wechsler Adult Intelligence Scale (WAIS-III) to assess Reeves's IQ and Reeves obtained a verbal IQ score of 71, a performance IQ score of 76, and a full-scale IQ score of 71. (Rule 32 R. 41-42) Dr. Goff also testified that Reeves was administered the Weschler Intelligence Scale for Children, Revised (WISC-R) in 1992 and achieved a full scale score of 73. (Rule 32 R. 47) Dr. Goff administered the Adaptive Behavior Assessment System (ABAS) to Beverly Seroy, a person Reeves lived with for a short time, to measure Reeves's adaptive functioning. (Rule 32 R. 55)

On cross-examination, Dr. Goff testified that if one were to just look at Reeves's IQ score of 71 without considering the Flynn Effect, his score would fall in the borderline intellectual functioning range. (Rule 32 R. 77)

He also indicated that Reeves was cooperative and was able to follow directions. Dr. Goff admitted that he did not consider any of Reeves's actions after committing the crime when considering Reeves's adaptive functioning, but acknowledged that those facts might be relevant in determining Reeves's level of intellectual functioning. (Rule 32 R. 82) Dr. Goff did not dispute that neither the scoring manual of the WAIS-III nor the *Diagnostic and Statistical Manual IV* (DSM-IV) requires application of the Flynn Effect to IQ scores. (Rule 32 R. 84) Finally, Dr. Goff acknowledged that selling drugs to buy clothes, groceries, and a car would be an indication of adaptive functioning. (Rule 32 R. 89-90)

Reeves next called Dr. Karen Salekin, who had been retained by Reeves's postconviction attorneys to conduct a mitigation investigation. (Rule 32 R. 111) Dr. Salekin testified concerning "risk factors" and "protective factors" that were present in Reeves's life. (Rule 32 R. 126) Although she identified several risk factors, she also found several protective factors in Reeves's life: (1) his time spent living with Beverly Seroy, where he responded positively to structure and discipline; (2) his time spent working for Jerry Ellis in construction where he showed a good work ethic, was responsible, did a good job, and exhibited increased motivation the longer he worked for Ellis. (Rule 32 R. 140, 196)

On cross-examination, Dr. Salekin indicated that Reeves would babysit younger children when he lived with Beverly Seroy. (Rule 32 R. 202) In addition, Reeves followed Seroy's rules, which included doing chores when he was told. (Rule 32 R. 204) Dr. Salekin also testified that while working with Jerry Ellis, Reeves assisted in roof construction. (Rule 32 R. 205) While Dr. Salekin testified that Reeves told her he was a member of a gang called the Insane Gangster Disciples, (Rule 32 R. 208), she admitted on cross-examination that she had not read Detective Grindle's penalty-phase testimony about the conditions of Reeves's house nor did she review the photographs of his house.

The State called Dr. Glen King, an expert in clinical and forensic psychology, to testify at the Rule 32 evidentiary hearing. As part of his assessment, Dr. King reviewed documentation pertaining to Reeves, including school records, prior mental examinations, and documents from the Alabama Department of Human Resources. (Rule 32 R. 219-220) Dr. King saw Reeves on two occasions at Holman Prison to conduct clinical interviews and to administer psychological tests. (Rule 32 R. 220)

Like Dr. Goff, Dr. King administered the WAIS-III to assess Reeves's intellectual functioning. This time, Reeves obtained a verbal score of 69, a performance score of 73, and a full-scale score of 68. (Rule 32 R. 222-223)

Dr. King also administered the Wide Range Achievement Test (WRAT) to assess Reeves's academic functioning. According to Dr. King, Reeves reads on a fifth-grade level, spelled on a fifth-grade level, and was able to do math on a fourth-grade level. (Rule 32 R. 223) Dr. King testified that Reeves's scores on the WRAT "were somewhat higher than ordinarily would be predicted [considering Reeves's] IQ test." (Rule 32 R. 224)

Dr. King also used the Adaptive Behavior Scale (ABS) to assess Reeves' adaptive functioning. (Rule 32 R. 226) The ABS measures different domains of adaptive functioning and relies on information from the individual as well as observations made by the person administering the test and outside data sources. According to Dr. King, Reeves scored very high in some domains and low in others. (Rule 32 R. 227-234) Based on all of the tests he administered, his clinical interviews, and his review of other records, Dr. King concluded that Reeves functions in the borderline range of intellectual ability and is not intellectually disabled. (Rule 32 R. 234, 242) He testified that he found nothing that would have caused him to have a different diagnosis in 1998. (Rule 32 R. 234, 242)

Dr. King was also questioned about the Flynn Effect. He stated that there is no requirement or policy in the field of psychology that requires an examiner administering an IQ test to add or deduct points. (Rule 32 R. 243)

Dr. King also testified that whether to consider the Flynn Effect in determining a person's intellectual functioning is not settled in the scientific community. (Rule 32 R. 245)

REASONS FOR DENYING THE PETITION

It is worth noting at the outset that Reeves has not raised any cert-worthy issue. The decision below does not conflict with any decision of this Court, and the split he asserts is illusory. Reeves is seeking nothing more than fact-bound correction of the sound decision of an intermediate state appellate court. Such review is not the proper domain of this Court. Sup. Ct. R. 10. This Court should, therefore, deny Reeves's petition for writ of certiorari.

I. This Court should decline to review Reeves's claim that the Court of Criminal Appeals improperly held that the testimony of trial counsel is strictly required to support an ineffective assistance of counsel claim (1) where this claim does not involve a split and, in any event, is not a good vehicle to review this claim because the Court of Criminal Appeals did not hold that the testimony of trial counsel is strictly required, and (2) where Reeves is not entitled to relief on his ineffective assistance of counsel claims.

There are at least two reasons this Court should decline to review the question presented in Reeves's certiorari petition. First, Reeves wrongly asserts that federal courts of appeals and state courts disagree as to whether counsel's testimony is required to overcome *Strickland's* presumption of "sound trial strategy." Second, this is a not a good vehicle to review this claim because Reeves's ineffective assistance of counsel claims are without merit.

A. There is no split on whether counsel's testimony is required to overcome *Strickland's* presumption of "sound trial strategy."

1. The Alabama Court of Criminal Appeals did not hold that the testimony of trial counsel is strictly required to support an ineffective assistance of counsel claim.

Reeves misreads both the Court of Criminal Appeals' decision and the jurisprudence of other courts when he asserts that the decision below creates a split on whether trial counsel's testimony is essential to overcome the presumption that trial counsel's performance was reasonable. Pet. 15. As

explained below, the Court of Criminal Appeals did not hold that trial counsel's testimony is strictly required to support an ineffective assistance of counsel claim. *Reeves*, 2016 WL 3247447. Instead, the Court of Criminal noted that some of his ineffective assistance of counsel claims – "what experts to hire, what witnesses to call to testify, what mitigation evidence to present, what objections to make and what issues to raise at trial" – involved strategic decisions and did not constitute per se deficient performance. *Id.* at *31.

The Court of Criminal Appeals then noted that the burden was on Reeves to prove, by a preponderance of the evidence, that his attorneys' decisions were not the result of reasonable strategy, "i.e., the burden was on Reeves to present *evidence* overcoming the strong presumption that counsel acted reasonably." *Id.* (emphasis in original) Significantly, the court did not identify what evidence counsel should present – only that Reeves failed to present evidence to overcome the strong presumption that counsel acted reasonably. *Id.* The court then noted that because Reeves failed to call his attorneys to testify, the record was silent as to counsel's reasons for making these decisions. *Id.*

The Court of Criminal Appeals conducted a similar analysis concerning Reeves's claim that his attorneys failed to adequately present

mitigating evidence. *Id.* at 32. The court first noted that Reeves's claim was that counsel failed to conduct an *adequate* mitigation investigation and did not present *all* mitigating evidence that could have been presented. *Id.* (emphasis in original) The court then noted that "[w]hen the record reflects that counsel presented mitigating evidence during the penalty phase of the trial, as here, the question becomes whether counsel's mitigation investigation and counsel's decisions regarding the presentation of mitigating evidence were reasonable." *Id.* The court also noted that Reeves failed to present evidence at the post-conviction evidentiary hearing regarding the mitigation investigation conducted by his attorneys because Reeves failed to call them to testify. Finally, the court stated the following concerning Reeves's failure to prove this ineffective assistance of counsel claim:

> Although Reeves argues that counsel's investigation was not adequate, because the record is silent as to the extent of counsel's actual investigation, we must presume that counsel exercised reasonable professional judgment in conducting the investigation and that counsel's decisions resulting from their investigation were also reasonable. The silent record before this Court regarding counsel's investigation and their resulting decisions as to what evidence to present during the penalty phase of the trial and how to present that evidence is not sufficient to overcome the strong presumption of effective assistance.

Id.

It is not true, as Reeves contends, that Alabama takes the view that trial counsel's testimony is strictly required to support an ineffective assistance of counsel claim. Rather, Alabama follows this Court's holding in *Strickland v. Washington*, 466 U.S. 668, 688-689 (1984), and *Kimmelman v. Morrison*, 477 U.S. 365, 381 (1986), that there is a strong presumption that counsel's performance falls within the "wide range of professional assistance" and that "the defendant bears the burden of proving that counsel's representation was unreasonable under prevailing professional norms that the challenged action was not sound strategy." In this case, Reeves failed to present any evidence, including the testimony of trial counsel, to prove that his attorney's strategic decisions were unreasonable. The Court of Criminal Appeals then made the sound decision that Reeves failed to prove his ineffective assistance of counsel claims.

2. The Alabama Court of Criminal Appeals' decision is consistent with decisions from other jurisdictions.

There is no split in the circuits concerning whether counsel's testimony is required to overcome *Strickland's* holding that there is a strong presumption that counsel's performance falls within the wide range of professional assistance. Reeves's argument that trial counsel's testimony is strictly required to support an ineffective assistance of counsel claim in the state courts in Alabama, Texas, and Wisconsin and in the Eleventh Circuit is

wrong. *See Callahan v. Campbell*, 427 F.3d 897, 932-933 (11th Cir. 2005) (following this Court's precedent, finding that where there was no evidence of what counsel did to prepare for penalty phase due to death of counsel, court presumed the attorney "did what he should have done and that he exercised reasonable professional judgment."); *Stallworth v. State*, 171 So. 3d 53, 92-93 (Ala. Crim. App. 2014) (finding that defendant failed to prove ineffective assistance where the attorney who testified at post-conviction evidentiary hearing was not questioned about trial counsel's strategies); *Dunaway v. State*, 198 So. 3d 530, 547 (Ala. Crim. App. 2009) (same); *Howard v. State*, 239 S.W.3d 359, 367 (Tex. Ct. App. 2007) (holding that to overcome presumption that counsel's actions were unreasonable, record must affirmatively demonstrate alleged ineffectiveness, but not holding that absence of testimony from counsel is, by itself, sufficient to defeat ineffective assistance of counsel claim); *State v. Allen,* 682 N.W.2d 433, 437 n.3 (Wisc. 2004) (noting that trial counsel must be informed when ineffective assistance claim is raised, and his or her presence is required when hearing is held on claim; there was no holding that testimony of trial counsel was required to prove an ineffective assistance claim, and Wisconsin Supreme Court affirmed dismissal because claims were not sufficiently pleaded).

The state courts in Alabama, Texas, and Wisconsin and the Eleventh Circuit follow this Court's precedent that there is a strong presumption that counsel's performance was reasonable and that "the defendant bears the burden of proving that counsel's representation was unreasonable under prevailing professional norms." The Second, Third, Seventh and Ninth Circuits and the Florida Supreme Court have not said anything meaningfully different from those courts. *See Pidgeon v. Smith*, 785 F.3d 1165 (7th Cir. 2015) (finding counsel ineffective where state court could not think of any possible strategic explanation for mistake made by counsel and holding that nothing counsel could have said at the evidentiary hearing would have made the error reasonable); *Garner v. Mayle*, 449 F. App'x 645 (9th Cir. 2011) (district court did not err in denying defendant's request for evidentiary hearing where attorney was deceased and defendant had offered no direct evidence concerning scope and quality of trial counsel's investigation, and evidence defendant wanted to present to support claim was speculative or cumulative of the evidence admitted at trial); *Mitchell v. Grace*, 287 F. App'x 233, 235-236 (3rd Cir. 2008) (noting presumption that counsel acted strategically in deciding not to call certain witness, noting that defendant bears burden of rebutting presumption, and holding that, absent evidence to the contrary, court presumed counsel was aware of the substance of what

witness might testify but made reasoned decision not to call witness); *Wilson v. Mazzuca*, 199 F. App'x 336, 337-338 (2nd Cir. 2005) (remanding case to district court for evidentiary hearing so that counsel could testify concerning whether acts or omissions were part of sound trial strategy); *Moore v. Johnson*, 194 F.3d 586, 604 (5th Cir. 1999) (not necessary to call counsel to testify at evidentiary hearing where it appeared on the face of record that counsel made no strategic decision at all); *State v. Bright*, 200 So. 3d 710, 732 (Fla. 2016) (finding ineffective assistance even though counsel was deceased and could not testify at evidentiary hearing because there was affirmative evidence in record that counsel was placed on notice as to mitigation leads but did not pursue them).

There is no split in the state or federal courts concerning whether trial counsel's testimony is strictly required to support an ineffective assistance of counsel claim. As set forth above, when the record is unclear about counsel's actions, there is a strong presumption that his actions were reasonable that can only be overcome with evidence to the contrary. However, when there is affirmative evidence in the record that proves counsel's ineffectiveness, there is no need to call counsel to testify at an evidentiary hearing. The cases Reeves identifies do not create a split, and therefore, this Court should deny certiorari.

B. This case does not present a proper vehicle to examine Reeves's claim because he is not entitled to relief on his ineffective assistance of counsel claims.

This Court should deny certiorari because Reeves's ineffective assistance of counsel claims are not worthy of consideration. Reeves's claims involve a simple application of this Court's decision in *Strickland* to the specific facts of his case. The claims he raised are fact-specific, and a decision on his claims will only apply to his case. This case is simply of such narrow score and limited precedential value that it is not worthy of certiorari.

Reeves asserts that this case is of national importance because obtaining the cooperation of trial counsel can be challenging and is a common issue for post-conviction counsel. Pet. 21, 27-28. This argument is being made for the first time in the cert petition and should not be considered. This Court will not consider questions that were not properly presented to or ruled on by the lower courts except in extraordinary circumstances. *See Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-646 (1992). This case presents no reason to deviate from that rule. This is especially so where there was no evidence, or even an allegation, in the state courts that trial counsel were not called to testify because there was friction between trial counsel and post-conviction counsel. This argument, therefore, should not be considered.

1. Reeves's argument that counsel were ineffective because they failed to present evidence that he is intellectually disabled is without merit.[2]

In his petition, Reeves argues that his attorneys' deficient performance prevented him from presenting evidence of his intellectual disability to the jury, and he now faces a sentence of death because of counsel's failure. Pet. 21-22. The argument Reeves made in the Court of Criminal Appeals – and the argument that the State will address here – is that his attorneys were ineffective because they failed to obtain an expert to evaluate his intellectual functioning.

The Rule 32 court properly rejected this claim because post-conviction counsel did not call either of Reeves's attorneys to testify at the evidentiary hearing, and the record shows that counsel decided to rely on the testimony of Dr. Ronan rather than Dr. Goff. In addition, the court found that there was no deficient performance because the trial occurred four years before this Court decided *Atkins* v. *Virginia,* 536 U.S. 304 (2002). The Court of Criminal Appeals affirmed. *Reeves*, 2016 WL 3247447, at *28-32.

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[2] Reeves does not specifically identify the ineffective assistance of counsel claims he believes the Court of Criminal Appeals improperly denied, but he appears to argue the two claims addressed in the State's brief – that counsel failed to obtain an expert to present evidence concerning his alleged intellectual disability, and that counsel failed to investigate and present meaningful mitigation.

The state courts properly found that Reeves failed to sustain his burden of proving that counsel's performance was deficient. As the Court of Criminal Appeals noted, the alleged failure of trial counsel involved a strategic decision, and Reeves did not present any evidence overcoming the strong presumption that counsel acted reasonably. *Id.* In addition, the performance of Reeves's trial attorneys was not deficient where Reeves's trial occurred in 1998, four years before this Court decided *Atkins*.

Moreover, Reeves has not shown that he was prejudiced by counsel's failure to present evidence of his alleged intellectual disability because Reeves is not intellectually disabled. As discussed above, the post-conviction court rejected the claim that Reeves is intellectually disabled after an evidentiary hearing.[3] *Reeves*, 2016 WL 3247447, at *18-20. The Court of Criminal Appeals affirmed the post-conviction court's determination. *Id.* In so doing, that court found that there was ample evidence to support the Rule 32 court's determination that Reeves does not suffer from significantly sub-average intellectual functioning (Reeves had full-scale IQ scores of 68, 71, and 73). *Id.* at *20-22. The Court of Criminal Appeals also found that the post-conviction court did not abuse its discretion when it determined that

[3] Reeves appears to argue that he has never been given a hearing on his intellectual disability claim. This is incorrect. Reeves was given a full hearing on this claim in the state post-conviction proceedings.

Reeves does not suffer from significant deficits in adaptive functioning. *Id.* at *22-24. Specifically, the Court of Criminal Appeals noted that the post-conviction court considered the following evidence when it considered Reeves's adaptive functioning: that he had technical abilities in brick masonry, welding, and automobile mechanics; that he was able to reliably work a construction job; that he was running a drug-sale enterprise when he made thousands of dollars a week; and, that he committed cold and calculated actions in murdering Willie Johnson (which included planning the robbery, hiding incriminating evidence, splitting the proceeds, and bragging that he would earn a "teardrop" for the murder). *Id.* at *24. Because Reeves is not intellectually disabled, he cannot prove that he was prejudiced by counsel's failure to obtain and present evidence from an expert that he is intellectually disabled.

Reeves also argues in his petition that the record of counsel's deficient performance is particularly strong because his attorneys failed to hire the neuropsychologist for which counsel had already successfully petitioned the trial court for funds. Pet. 24-25. However, Reeves fails to acknowledge that the attorney who successfully argued the motion for funds was allowed to withdraw from his representation of Reeves shortly after the motion was granted. There is no evidence in the record concerning what the new lead

attorney knew about the neuropsychologist or why he chose not to call one. In addition, the new attorney was not on notice from the pleadings of the need to explore Reeves's supposed intellectual disability because there was no mention of intellectual disability in the pleadings.

2. Reeves's argument that his attorneys were ineffective because they failed to investigate and present meaningful mitigating evidence is without merit.

Reeves's argument that his attorneys failed to investigate and present mitigating evidence is without merit. As the Court of Criminal Appeals found, Reeves failed to prove this ineffective assistance of counsel claim during the post-conviction evidentiary hearing. *Reeves*, 2016 WL 3247447, at *32. In addition, Reeves ignores the extensive mitigation evidence that his attorneys presented during the penalty phase of his trial. Reeves called three witnesses to testify. The first, Detective Pat Grindle, described the terrible condition of the house where Reeves lived with his mother, brother, and numerous other individuals. Detective Grindle also authenticated several photographs of Reeves's house that showed its poor condition. (R. 1118-1122)

Second, Reeves's mother, Marzetta Reeves, also described the squalid, packed house. (R. 1122-1141) She explained that Reeves did not have a father growing up and did not meet his biological father until he was

fourteen years old. (R. 1124) Ms. Reeves testified that her son repeated several grades when he was young and was "socially promoted" to the seventh grade. (R. 1126) She discussed the economic conditions in which she and her family lived, explaining that her only income was public assistance. (R. 1126) She also discussed her son's mental health history, stating that he had gone to the Cahaba Mental Health Center when he was in the second or third grade and that he had suffered from blackout spells while in school. (R. 1127) Ms. Reeves explained that when Reeves was young he sometimes slept under his bed because he was seeing things in his head. (R. 1150)

Ms. Reeves further testified that her son was baptized at the Green Street Baptist Church and attended church regularly. His pastor got Reeves involved in the Boy Scouts, where he earned badges. When Reeves was in a group home in Mobile, his mother received reports that he was doing fine and was given good recommendations. (R. 1134) Ms. Reeves testified that her son stayed out of trouble when he returned home from the Mobile group home and was working for Mr. Ellis. According to Ms. Reeves, it was not until her younger son, Julius, returned home from Mt. Meigs that Reeves started getting in trouble again. Although Julius was younger he influenced

Reeves, who would not let Julius out of his sight after Julius was shot. (R. 1141)

Third, Reeves's attorneys presented extensive mitigating evidence through the testimony of Dr. Ronan. (R. 1150-1182) She testified that Reeves lacked structure, guidance, and supervision at home, and that Reeves and his brother were roaming the streets rather than attending school. (R. 1160-1161) She also identified significant problems with Reeves's family members, including that Julius was involved in the juvenile justice system and had shown behavioral difficulties in school. Dr. Ronan testified that Reeves had been diagnosed with Attention Deficit Disorder, which was mostly untreated because his mother did not follow up on recommendations. She opined that Reeves was in the borderline range of intelligence and noted that he seemed to respond well when he was placed in a group home while committed to the Department of Youth Services. Dr. Ronan testified that there were two significant controls in Reeves's life: Julius and his involvement in gang activity. (R. 1167) She explained that it was not uncommon for individuals who come from environments lacking structure at home to become heavily involved in gang activity. (R. 1167) Dr. Ronan testified that conduct by individuals in gangs does not have the same meaning as it would for other people. Her record review indicated that there

was a lack of structure in Reeves's home life and that a lack of parenting and discipline would cause someone like him to be more susceptible to gang influences.

Dr. Ronan then testified that Reeves suffers from Adaptive Paranoia – that is, his personality adapted to the dangerous environment to which he was exposed at a young age. This disorder caused Reeves to misread social cues and made establishing close bonds with individuals difficult. (R. 1170) She went on to conclude that his anti-social behavior and borderline intelligence were the result of a combination of his intellectual functioning and his environment. (R. 1171) Dr. Ronan added that Reeves did not always get available resources primarily because of a lack of response by his mother. (R. 1182)

Thus, contrary to Reeves's argument, the evidence presented by counsel during the penalty phase of the trial gave the jurors and the trial court a vivid picture of Reeves, his background, and his mental health. The record reveals that Reeves's attorneys did investigate and present mitigating evidence. Reeves's ineffective assistance of counsel claim is without merit, and therefore, this Court should refuse to grant certiorari.

CONCLUSION

For the foregoing reasons, this Court should deny Reeves's petition for writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of July, 2017, I did serve a copy of the foregoing on the attorneys for the Petitioner, by placing same in the United States mail, first class, postage prepaid and addressed as follows:

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