No. 16-

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

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Where trial counsel does not testify about his or her own strategic decisions as part of a claim under *Strickland* v. *Washington*, 466 U.S. 668 (1984), may a defendant nonetheless establish ineffective assistance of counsel using other evidence, as most circuit and state courts hold, or is the presumption of sound strategy categorically irrebuttable in the absence of trial counsel's testimony, as the Alabama court held here?

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption. The petitioner is not a corporation.

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SCHOLARLY AUTHORITY

PETITION FOR A WRIT OF CERTIORARI

Petitioner Matthew Reeves respectfully seeks a writ of certiorari to review the judgment of the Alabama Court of Criminal Appeals.

OPINIONS AND ORDERS BELOW

The opinion of the Alabama Court of Criminal Appeals is reported at *Reeves* v. *State*, — So. 3d —, No. CR-13-1504, 2016 WL 3247447 (June 10, 2016). Pet. App. 1a-104a. The Alabama Supreme Court's order denying Petitioner's petition for a writ of certiorari is reproduced at Pet. App. 138a. The appealed trial court order is unreported and is reproduced at Pet. App. 105a-137a. The sentencing order of the Dallas County Circuit Court was issued on August 20, 1998, and was affirmed on appeal. See *Reeves* v. *State*, 807 So. 2d 18 (Ala. Crim. App. 2000).

STATEMENT OF JURISDICTION

The judgment of the Alabama Court of Criminal Appeals was entered on June 10, 2016. Pet. App. 1a. The Alabama Supreme Court denied Petitioner's petition for a writ of certiorari on January 20, 2017. Pet. App. 138a. This Court entered an order on March 13, 2017 extending the time to file this petition until May 22, 2017. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

INTRODUCTION

The Alabama Court of Criminal Appeals' decision below exacerbates a split among the courts regarding whether a defendant must present trial counsel's testimony to establish that counsel's conduct during the investigation and presentation of the defendant's case was professionally "deficient" under *Strickland* v. *Washington*, 466 U.S. 668 (1984). Five federal courts of appeals and at least one state supreme court has ruled that "[n]othing in *Strickland* or its progeny requires prisoners seeking to prove ineffective assistance to call the challenged counsel as a witness." *Pidgeon* v. *Smith*, 785 F.3d 1165, 1171-72 (7th Cir. 2015); see *Garner* v. *Mayle*, 449 F. App'x 645, 645-46 (9th Cir. 2011); *Mitchell* v. *Grace*, 287 F. App'x 233, 235 (3d Cir. 2008); *Wilson* v. *Mazzuca*, 119 F. App'x 336, 338 (2d Cir. 2005); *Moore* v. *Johnson*, 194 F.3d 586, 604 (5th Cir. 1999); *State* v. *Bright*, 200 So. 3d 710, 731 (Fla. 2016). These courts recognize that reviewing courts must examine the record as a whole, even in the absence of direct testimony from trial counsel that purports to explain strategic trial decisions, to determine whether the defendant received constitutionally effective representation.

By contrast, one federal court of appeals and the states of Alabama, Wisconsin, and Texas hold that in the absence of any testimony from trial counsel, no evidence, regardless of how compelling, can overcome *Strickland*'s presumption of sound strategy. See *Stallworth* v. *State*, 171 So. 3d 53, 92 (Ala. Crim. App. 2013); see also *Callahan* v. *Campbell*, 427 F.3d 897, 933 (11th Cir. 2005); *Howard* v. *State*, 239 S.W.3d 359, 367 (Tex. App. 2007); *State* v. *Allen,* 682 N.W.2d 433, 437 n.3 (Wisc. 2004). Only this Court can resolve

this split of authority regarding a frequently invoked Constitutional right that sits at the heart of the fairness of our criminal justice system.

This case is an ideal vehicle for this Court to review the issue. This is a capital case, and petitioner's claim of ineffective assistance of counsel concerns trial counsel's failure to contact an expert psychologist who was willing to evaluate mitigation evidence and testify about it at petitioner's capital sentencing. The trial court record establishes that trial counsel had successfully convinced the court to pay for the expert because such testimony was essential to presenting an effective argument to the jury and the court against imposing a death sentence. That expert would have given powerful mitigation testimony about petitioner's intellectual disability that would likely have prevented the jury from imposing a sentence of death. Indeed, had only one member of the jury voted differently, Mr. Reeves would have been ineligible for the death penalty. Such facts satisfy the materiality prong of *Strickland*.

Yet the Alabama courts have rejected petitioner's ineffective assistance of counsel claim on so-called Rule 32 (state post-conviction) review simply because the evidence petitioner presented to support his claim did not include testimony from his trial counsel. According to the Alabama courts, "a Rule 32 petitioner must, at his evidentiary hearing, question trial counsel regarding his or her actions and reasoning." Pet. App. 79a-80a (emphasis omitted) (quoting *Stallworth*, 171 So. 3d at 92). As the Alabama court explained: "In this case, Reeves's failure to call his attorneys to testify is fatal to his claims of ineffective assistance of counsel." Pet. App. 81a. The issue could not be more squarely presented.

Moreover, because the 11th Circuit has also adopted the restrictive rule requiring trial counsel testimony, it is urgent that this Court accept review now. Unless the 11th Circuit were to change its position, petitioner cannot obtain relief on this issue from federal habeas review.

Finally, Alabama's rule has nothing to recommend it. Trial counsel rarely admits to constitutionally deficient performance. Courts routinely recognize meritorious ineffective assistance of counsel claims based on the strength of the record, even in the face of unconvincing explanations to the contrary offered by the challenged counsel. That such claims may be raised even on direct appeal, where counsel necessarily has not been called to testify, underscores that counsel's testimony cannot be a necessary element of a claim under *Strickland*. See *Massaro* v. *United States*, 538 U.S. 500, 508 (2003). The presumption of legitimate strategic decisions can be overcome by *any* evidence strong enough to demonstrate that a particular choice fell below professional standards. See *Desert Palace, Inc.* v. *Costa*, 539 U.S. 90, 100 (2003). There is no reason to require a party claiming ineffective assistance of counsel to supplement a compelling record establishing constitutionally deficient representation with testimony making excuses for it. This Court should grant review to clarify that the Sixth Amendment requirement of effective assistance of counsel remains fully in force even when a party does not present testimony from his trial counsel.

STATEMENT OF THE CASE

1. Petitioner Matthew Reeves was born and raised in Selma, Alabama. His childhood was characterized by poverty, neglect, repeated exposure to physical

abuse, and persistent academic failures. R. 138-73, 177-79, 182, 184-85; C. 715-32.[1] On November 28, 1996, when he was 18 years old, Mr. Reeves was arrested for the robbery and murder of Willie Johnson. On January 30, 1997, he was indicted for one count of capital murder in the course of a robbery. T. 5-6. This petition raises no issues regarding his guilt.

2. Prior to Mr. Reeves's trial, Mr. Reeves's court-appointed attorneys, Blanchard McLeod (who was later replaced by Thomas M. Goggans) and Marvin Wiggins (now an Alabama judge), were in possession of "hundreds of pages of psychological, psychometric and behavioral analysis material" suggesting the need for an intellectual disability evaluation. T. 68-69. Mr. Reeves's school records revealed that he had been placed in special education classes, and had failed the first, fourth, and fifth grades. C. 734-35. Mr. Reeves never advanced beyond middle school and, when he was evaluated at age 28, he read at only a third-grade level. C. 701, 702. Mr. Reeves's school records also indicated that he had "severe deficiencies in non-verbal social intelligence skills

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[1] Citations to documents in the record but not included in the Petitioner's Appendix are referred to using the following abbreviations: "R" refers to the reporter's transcript of the hearing held before the Circuit Court of Dallas County, Alabama on the Petitioner's Rule 32 Application; "C" refers to the Clerk's record on appeal submitted to the Alabama Court of Criminal Appeals on September 13, 2014; "SC" refers to the Supplemental Record submitted to the Alabama Court of Criminal Appeals on October 29, 2014; "TR" refers to the reporter's transcript of Mr. Reeves's trial submitted to the Alabama Court of Criminal Appeals during Mr. Reeves's direct appeal of his conviction and sentence; and "T" refers to the Clerk's record in Mr. Reeves's direct appeal.

and his ability to see consequences," Pet. App. 29a, and a Department of Mental Health and Mental Retardation Outpatient Forensic Evaluation Report described Mr. Reeves as having "below normal intellectual functioning." C. 1459-69, 1866.

Aware of the possibility that Mr. Reeves was intellectually disabled and its relevance to Mr. Reeves's mitigation case, Mr. Reeves's trial counsel petitioned the trial court twice for funds to hire a clinical neuropsychologist named Dr. John Goff to evaluate Mr. Reeves. T. 64, 68-71. Trial counsel's first request for the funds was denied.

In his second request, trial counsel left no doubt that he was aware that Mr. Goff's testimony was essential to build a mitigation case at sentencing that might persuade the jury or the judge not to impose a death sentence. Counsel stated that "a clinical neuropsychologist or a person of like standing and expertise [was] *the only avenue* open to the defense to compile [information about Mr. Reeves' mitigating intellectual disability], . . . interview the client[,] and present this information in an orderly and informative fashion to the jury during the mitigation phase of the trial of the Defendant's *capital murder case*." T. 67, 68-69 (first emphasis added). At a pre-trial hearing, Mr. Reeves's counsel argued that hiring Dr. Goff or another neuropsychologist was critical to preparing for the mitigation phase of trial. T.R. 7-14. In response to a suggestion that hiring an expert could be left to a later date, Mr. Reeves's counsel explained, "it's going to be a little bit late . . . to worry about then retaining someone to assist with the preparation of the mitigation phase." T.R. 9. Mr. Reeves's counsel recalled to the court that, in another case, where defense counsel had delayed seeking funds, "Dr. Goff did not have the time to adequately

prepare for th[e] hearing." T.R. 10. Counsel explained that Dr. Goff would need time to review the existing records, interview people familiar with Mr. Reeves and to meet with Mr. Reeves several times prior to testifying. T.R. 9-10. The trial court granted the request for funds, and Dr. Goff was appointed by the court "to interview, test, and evaluate [Mr. Reeves for intellectual disability], and give trial testimony regarding the same." T. 75.

3. Mr. Reeves's trial counsel never contacted Dr. Goff. R. 66-67; C. 695. Neither did counsel hire any other mental health professional to evaluate Mr. Reeves for intellectual disability prior to his trial. In fact, during the sentencing phase of Mr. Reeves's trial, his counsel did not call a single witness to testify regarding Mr. Reeves's intellectual disability, notwithstanding that intellectual disability was an important statutory mitigating factor. Ala. Code § 13A-5-51(6) (making the defendant's "substantially impaired" capacity to appreciate the criminality of his conduct or conform his conduct to the law a mitigating circumstance). Instead, on the day that the sentencing phase of Mr. Reeves's trial took place—at a time Mr. Reeves's counsel had previously acknowledged would be too late for an expert witness to prepare adequately to give mitigation testimony (T.R. 9-10)—his counsel spoke to Dr. Kathleen Ronan for the very first time about Mr. Reeves and then called her to testify. C. 609.

Dr. Ronan was a court-appointed expert who had conducted only a limited examination of Mr. Reeves solely to assess his competency to stand trial and his mental state at the time of the offense. T.R. 1153; C. 608-10. Dr. Ronan had not conducted a sentencing-phase evaluation, which she later reported "would contain different components than those for the trial

phase evaluations, and would be more extensive in terms of testing and background investigation." C. 610. She also had not evaluated Mr. Reeves for intellectual disability. C. 609. Instead, she had administered only the verbal portion of an IQ test. T.R. 1164-65; C. 610. Most significantly, Mr. Reeves's counsel had not bothered to speak with Dr. Ronan prior to the day of her testimony to determine the scope of her evaluation of Mr. Reeves or what her testimony might include if called to the stand. C. 609. Mr. Reeves's counsel had no basis to believe that Dr. Ronan was capable of offering sound opinion testimony regarding Mr. Reeves's intellectual disabilities.

Dr. Ronan testified regarding the limited scope and purpose of her examination of Mr. Reeves. T.R. 1153, 1164-65. She explained that she had not administered a full IQ test on Mr. Reeves and that she had not assessed Mr. Reeves's adaptive skills, both of which Dr. Ronan and the State's clinical psychologist later testified (during post-conviction proceedings) are necessary components of an intellectual disability evaluation. T.R. 1164-65; R. 250-51; C. 610-11. When the State asked Dr. Ronan on cross-examination whether Mr. Reeves was intellectually disabled, she nevertheless testified that "[h]e was not in a level that they would call him mental retardation, no." T.R. 1175. Mr. Reeves's counsel did not object to the State's question or Dr. Ronan's answer, nor did his counsel attempt to elicit testimony from Dr. Ronan on redirect regarding the impropriety of offering such opinion testimony without having conducted the kind of evaluation that could support it. T.R. 1178-82.

Trial counsel's failure to develop mitigating evidence regarding Mr. Reeves's intellectual

disability cannot be explained by a decision to devote resources to an alternative strategy or focus the jury's attention on other mitigating factors. Other than Dr. Ronan, Mr. Reeves's trial counsel called only two witnesses during the sentencing phase and failed to elicit meaningful mitigation testimony from them. The first was Detective Pat Grindle, whose testimony was limited to a general physical description of Mr. Reeves's childhood home. T.R. 1118-22. The second was Mr. Reeves's mother, who testified briefly and in very general terms about Mr. Reeves's childhood. T.R. 1122-41. Ms. Reeves did not testify about the neglect, domestic violence, drug abuse, and extreme poverty that Mr. Reeves experienced as a child—facts that were later brought into evidence during Mr. Reeves's post-conviction relief proceedings via the testimony and report of Dr. Karen Salekin, a mitigation expert retained by Mr. Reeves's post-conviction relief counsel. Compare T.R. 1122-41, with R. 139-75, and C. 717-32. Ms. Reeves also testified inaccurately about Mr. Reeves's academic struggles in school and characterized his academic performance in a misleadingly positive light. Compare T.R. 1125-26, 1127-30, with R. 155-56, 177-78, 183-84; C. 734-35.

After only 50 minutes of deliberations, the jury returned with a recommendation that Mr. Reeves be sentenced to death. T.R. 1227.

4. Nearly six months later, on July 20, 1998, a judge on the county circuit court evaluated the trial record and sentenced Mr. Reeves to death. T.R. 1232. Because Mr. Reeves's trial counsel presented only scant mitigation evidence, the trial court found only two mitigating factors, Mr. Reeves's age and lack of significant prior criminal history. T.R. 1232, T. 236, 238.

Following an unsuccessful motion for a new trial (T. 230-32, 244), Mr. Reeves appealed his conviction and sentence, applied for rehearing, and petitioned for writs of certiorari to the Alabama Supreme Court and this Court, all of which were denied. *Reeves* v. *State*, 807 So. 2d 18 (Ala. Crim. App. 2000), *cert. denied sub nom. Ex parte Reeves*, No. 1000234 (Ala. June 8, 2001); *Reeves* v. *Alabama*, 534 U.S. 1026 (2001).

5. Mr. Reeves timely filed an initial petition for relief pursuant to Rule 32 of the Alabama Rules of Criminal Procedure on October 30, 2002, and an amended petition on February 26, 2003. On August 31, 2006, new counsel for Mr. Reeves filed a Second Amended Rule 32 Petition. C. 548-618. In his Rule 32 Petition, among other issues, Mr. Reeves raised claims of ineffective assistance of counsel at trial and on appeal.[2] Pet. App. 124a-136a. On October 18, 2006, the State filed its Answer to the Rule 32 Petition. C. 626-84. A hearing (the "Rule 32 Hearing") before the Circuit Court of Dallas County, Alabama on the Rule 32 Petition was held on November 28 and 29, 2006. R. 2-291.

The expert who Mr. Reeves's trial counsel failed to engage, Dr. Goff, evaluated Mr. Reeves in advance of the Rule 32 Hearing. At the Rule 32 Hearing, Dr. Goff testified that he had determined that Mr. Reeves

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[2] In his petition, Mr. Reeves also claimed that under this Court's decision in *Atkins* v. *Virginia*, 536 U.S. 304 (2005), he is constitutionally ineligible for the death penalty. Pet. App. 117a-118a. That ruling post-dates Mr. Reeves' sentencing, and Mr. Reeves' categorical ineligibility to be executed is not the subject of this petition. Regardless of whether Mr. Reeves is ineligible to be executed under *Atkins*, he had the right to effective assistance in presenting his intellectual disabilities for the jury's consideration in the mitigation phase of his trial.

was intellectually disabled. R. 66. Dr. Goff based this conclusion in part on Mr. Reeves's IQ scores of 71 and 73 (the State's expert had not yet testified about the results of the IQ test he administered to Mr. Reeves which yielded a score of 68). R. 24-26, 41-45, 75. Dr. Goff also based his diagnosis on his assessment of Mr. Reeves's adaptive functioning skills. Dr. Goff opined that Mr. Reeves had significant deficits in six skill areas (functional academics, work, health and safety, leisure, self-care, and self-direction), far more than the two categories required for a diagnosis of intellectual disability. R. 38, 50-62, 77-79; C. 701. Finally, Dr. Goff concluded, on the basis of Mr. Reeves's school and medical records, that Mr. Reeves's substantial deficits in intellectual functioning and adaptive functioning began before Mr. Reeves turned 18. R. 32-35. Dr. Goff testified that, had he been asked to evaluate Mr. Reeves and testify at the time of Mr. Reeves's trial, he would have performed a similar evaluation of Mr. Reeves. He opined with confidence that he would have reached the same conclusion, which would have substantially strengthened Mr. Reeves's mitigation case. R. 21-22, 67-68; C. 704.[3]

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[3] The test results obtained by the State's expert who evaluated Mr. Reeves provided further support for Dr. Goff's conclusion that Mr. Reeves was intellectually disabled. Although the State's expert, Dr. Glen King, testified that Mr. Reeves was not intellectually disabled, the IQ test he administered to Mr. Reeves yielded a score of 68, which he acknowledged satisfied the first requirement of the test for intellectual disability. R. 222-23, 234, 256; S.C. 384. In addition, the test Dr. King used to assess Mr. Reeves's adaptive functioning skills revealed that, in three categories (namely, prevocational/vocational activity, domestic activity, and self-direction), Mr. Reeves functioned in the bottom 25% of individuals who have already been diagnosed

At the Rule 32 Hearing, Mr. Reeves also presented testimony and a report from a forensic psychologist and professor at the University of Alabama, Dr. Karen Salekin, who evaluated mitigation evidence that could have been, but was not, presented by Mr. Reeves's trial counsel during the sentencing phase of his trial. Dr. Salekin testified that Mr. Reeves had numerous risk factors in his life and explained the negative implications of those risk factors. R. 128-74; C. 715-41. Those risk factors included the negative influence of Mr. Reeves's brother, an unstable and unsafe home, exposure to guns, crime, and violence, a family history of illicit substance abuse, multigenerational family dysfunction, maternal mental illness, physical abuse, child neglect, potential neuropsychological deficits, deficient academic performance, childhood psychological disorders, and institutionalization during adolescence, among others. *Id.* Dr. Salekin noted that the testimony of Dr. Ronan and Ms. Reeves during Mr. Reeves's trial was an inadequate substitute for the testimony of a mitigation expert because it addressed in only very general terms just a few of the risk factors affecting Mr. Reeves but failed to identify many other risk factors and discuss how the risk factors impacted Mr. Reeves over time. R. 130-32, 141, 144, 146-47, 149, 150, 154, 163-64, 166-67, 171, 174-75, 183, 187, 188, 190.

Approximately 18 months after the Rule 32 Hearing, on May 7, 2008, and before the trial court announced its decision on the Rule 32 Petition, the State filed an unsolicited 93-page proposed order denying Mr. Reeves's Rule 32 Petition in its entirety.

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as developmentally disabled and are representative of the intellectually disabled population. R. 265-68, 273-80; S.C. 385

S.C. 92-185. On September 9, 2008, Mr. Reeves filed an objection to the proposed order that challenged the wholesale adoption of the State's proposed findings of fact and conclusions of law. C. 767-71. Also on that day, Mr. Reeves filed a post-hearing brief in support of his Rule 32 Petition. C. 857-933. On October 26, 2009, nearly three years after the evidentiary hearing on the Rule 32 Petition, the Rule 32 Court entered an Order denying Mr. Reeves any relief. Pet. App. 105a-137a.

The Order denying Mr. Reeves's Rule 32 Petition was not served on Mr. Reeves, his counsel, or the State at the time it was entered, and the Order was not entered on the case docket until January 7, 2013—more than three years after it was issued. Counsel received no notice of the order through Alabama's electronic case-monitoring system until January 8, 2013. C. 1403. Ultimately, the Rule 32 Court granted Mr. Reeves relief to file an out-of-time appeal pursuant to Rule 32.1(f). C. 1436, 1438-57. The Alabama Criminal Court of Appeals reviewed the appeal on the merits. Pet. App. 1a-104a.

6. On June 10, 2016, after briefing and oral argument, the Alabama Court of Criminal Appeals affirmed the Rule 32 Court's denial of the Rule 32 Petition. Pet. App. 1a-104a. In relevant part, the court held that "Reeves's failure to call his attorneys to testify is fatal to his claims of ineffective assistance of counsel," *id.* at 81a, reasoning that, "because Reeves failed to call his counsel to testify, the record is silent as to the reasons trial counsel . . . chose not to hire Dr. Goff." *Id.* at 86a; see also *id.* at 90a ("Reeves presented no evidence at the evidentiary hearing regarding what mitigation investigation his trial counsel conducted, because Reeves failed to call trial counsel to testify.").

The Alabama Court of Criminal Appeals denied an application for rehearing, and the Supreme Court of Alabama denied Mr. Reeves's timely filed petition for writ of certiorari. Pet. App. 138a.

REASONS FOR GRANTING THE PETITION

I. COURTS ARE SPLIT OVER WHETHER TESTIMONY OF TRIAL COUNSEL IS NECESSARY TO ESTABLISH INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

A. The Alabama Court Of Criminal Appeals' Decision Adopts The Minority View On An Issue That Divides The Courts.

1. As part of proving "that counsel's assistance was so defective as to require reversal of a conviction or death sentence," a defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687.[4]

Under *Strickland*, courts deciding an ineffectiveness claim must "indulge a strong presumption that counsel's conduct falls within the

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[4] Upon proving deficient performance, the defendant must then show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Padilla* v. *Kentucky,* 559 U.S. 356, 366 (2010) (quoting *Strickland*, 466 U.S. at 694). Given the paucity of mitigation evidence presented at trial, and the strength of the mitigation evidence Petitioner has shown was available to trial counsel, including Dr. Goff's testimony regarding intellectual deficiency, petitioner will be able to satisfy the prejudice standard.

wide range of reasonable professional assistance," and that counsel "made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 689-90. Counsel's competence is presumed, *Kimmelman* v. *Morrison,* 477 U.S. 365, 384 (1986), and, "[w]hen counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect." *Yarborough* v. *Gentry,* 540 U.S. 1, 8 (2003) (per curiam).

The question this case presents is whether one particular form of evidence is *essential* to overcome that presumption. Is the presumption in favor of trial counsel's exercise of reasonable professional judgment irrebuttable unless trial counsel has offered testimony to explain his decisions? 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." 466 U.S. at 689 (quoting *Michel* v. *Louisiana,* 350 U.S. 91, 101 (1955)).

2. The Eleventh Circuit and the states of Alabama, Wisconsin, and Texas have all taken the view that trial counsel testimony is strictly required to support an ineffective assistance of counsel claim. As the decision below demonstrates, Alabama's position is stark. The Alabama Court of Criminal Appeals has ruled that "to overcome the strong presumption of effectiveness, a Rule 32 petitioner must, at his evidentiary hearing, question trial counsel regarding his or her actions and reasoning." *Stallworth*, 171 So. 3d at 92. Relying on *Stallworth*, the court below in this case unequivocally stated that "Reeves's failure to call his attorneys to testify is fatal to his claims of ineffective assistance of counsel." Pet. App. 81a. This is a rule of longstanding in Alabama, consistently

applied by the Alabama courts. As the Alabama Court of Criminal Appeals stated in 2009, "If the record is silent as to the reasoning behind counsel's actions, the presumption of effectiveness is sufficient to deny relief on [an] ineffective assistance of counsel claim." *Dunaway* v. *State*, 198 So. 3d 530, 547 (Ala. Crim. App. 2009) (quoting *Howard* v. *State*, 239 S.W.3d 359, 367 (Tex. App. 2007)), *rev'd on other grounds,* 198 So. 3d 567 (Ala. 2014).

The Wisconsin Supreme Court, similarly, has long adhered to a strict articulation of this rule, and has held that "[w]here an ineffective assistance of counsel claim is raised, trial counsel must be informed and his or her presence is required at any hearing in which counsel's conduct is challenged." *Allen,* 682 N.W.2d at 437 n.3 (construing *State* v. *Machner*, 285 N.W.2d 905 (Wisc. Ct. App. 1979)).

The Texas Court of Criminal Appeals has likewise ruled that the absence of testimony from trial counsel is, by itself, sufficient to defeat an ineffective assistance of counsel claim. *Howard*, 239 S.W.3d at 367 ("If the record is silent as to the reasoning behind counsel's actions, the presumption of effectiveness is sufficient to deny relief" on an ineffective assistance of counsel claim). Likewise, the Eleventh Circuit has also ruled that the failure to present trial counsel's testimony by itself leaves the presumption of reasonable strategy intact, even where trial counsel had died and his testimony thus could not be heard. *Callahan*, 427 F.3d at 933 ("Because [trial counsel] passed away before the Rule 32 hearing, we have no evidence of what he did to prepare for the penalty phase of [the petitioner's] trial. In a situation like this, we will presume the attorney did what he should have done, and that he exercised reasonable professional judgment.").

Further, under the Eleventh Circuit's approach, the presumption that trial counsel acted pursuant to a reasonable strategy can overcome trial counsel testimony that is functionally equivalent to no testimony at all. Where trial counsel testifies that that he or she is unable to remember or articulate sound bases for his decisions, the Eleventh Circuit fills the gap. See *Williams* v. *Head,* 185 F.3d 1223, 1227-28 (11th Cir. 1999) (presuming, where petitioner's trial counsel was unable to recall many of his thought processes during trial, that counsel "did what he should have done, and that he exercised reasonable professional judgment"); *see also Conklin* v. *Schofield,* 366 F.3d 1191, 1202, 1204-05 (11th Cir. 2004) (finding counsel's "strategy" of humanizing his client justified not presenting additional character witnesses at capital sentencing even though counsel admitted that he decided not to call them because he "gave up" after the court denied his requests for an independent medical expert).

3. Several other courts have ruled that ineffective assistance of counsel claims can succeed even though trial counsel did not testify regarding his or her strategy. These courts respect the presumption in favor of reasonable trial counsel decisions, but they also recognize that there is no particular kind of evidence that is required to overcome that presumption. These courts evaluate the strength of the inferences that can be drawn from the trial record and any other evidence concerning counsel's decisions at trial and sentencing.

The Florida Supreme Court has expressly rejected the view that trial counsel testimony is required. In *State* v. *Bright*, Florida sought to defeat petitioner's *Strickland* claim on the ground that his counsel had died without testifying in post-conviction proceedings,

thereby barring any ineffective-assistance argument as a matter of law. See *Bright*, 200 So. 3d at 731. The Florida Supreme Court rejected the State's proposal and affirmed a lower court finding of deficient performance. The court comprehensively reviewed the information that was available to counsel and the fact that counsel had failed to pursue mitigation leads despite being "on notice that Bright had a history of mental health problems." *Id.* at 732. Even though counsel's other limited investigation had "suggest[ed] that there [wa]s no mitigation available," the court reasoned that "the notice that [counsel] received" via letters from a psychologist was sufficient to conclude that "the failure to follow up could not have been a tactical decision." *id.* at 732-33.

The Florida Supreme Court has likewise refused to follow the Eleventh Circuit's practice of filling in gaps when trial counsel testifies but does not recall the reason behind decisions. When a petitioner's "former attorney[] fail[s] to provide a justification for his actions," the defendant still can "satisf[y] [his] burden of identifying particular omissions made by his penalty phase counsel that were outside the broad range of reasonably competent performance." *State* v. *Duncan*, 894 So. 2d 817, 825-26 (Fla. 2004) (per curiam). At that point, it is "the State's obligation to demonstrate, either through the trial record or the testimony of Duncan's trial counsel, a reasonable, objective justification for counsel's failure to present the available evidence of mental health mitigation." *Id.*

Like the Florida Supreme Court, the Court of Appeals for the Seventh Circuit has rejected the argument that a *Strickland* claim requires testimony from trial counsel. In *Pidgeon* v. *Smith*, 785 F.3d 1165 (7th Cir. 2015), the court of appeals held that

"[n]othing in *Strickland* or its progeny requires prisoners seeking to prove ineffective assistance to call the challenged counsel as a witness," *id.* at 1171-72, and went on to find deficient performance after concluding that "[n]othing counsel could have said at the evidentiary hearing would have made []his error reasonable," *id.* at 1173. In so holding, the *Pidgeon* court expressly noted the split between the Seventh Circuit and the Wisconsin Supreme Court on this issue. See *id.* at 1171-72 ("Although Wisconsin courts have chosen to mandate this procedure, that choice has no bearing on what federal courts must do.").

Joining the Florida Supreme Court and the Seventh Circuit, the Second, Third, Fifth, and Ninth Circuits have all looked past trial counsel's failure to testify (or inability to remember) and evaluated whether the evidence that *was* presented demonstrates that trial counsel failed to meet the constitutional standard. *Wilson*, 119 F. App'x at 338 (remanding to district court to afford trial counsel the opportunity to explain decisions, and declining to treat lack of testimony as bar to claim); *Cotto* v. *Lord*, No. 99 CIV. 4874 (JGK), 2001 WL 21246, at *6 (S.D.N.Y. Jan. 9, 2001) (holding that petitioner's counsel's death would not prejudice the state in contesting ineffective-assistance claims, because the parties could use "complete copies of the trial record, the record on appeal of the petitioner's state court collateral claim, Dr. Goldstein's report, and other material" to litigate the claim), *aff'd*, 21 F. App'x 89 (2d Cir. 2001); *Mitchell*, 287 F. App'x at 235 ("In cases where the record does not explicitly disclose trial counsel's actual strategy or lack thereof, a defendant may rebut the presumption only by showing that no sound strategy could have supported the conduct."); *Moore*, 194 F.3d at 604 ("The Court is . . . not

required to condone unreasonable decisions parading under the umbrella of strategy, or to fabricate tactical decisions on behalf of counsel when it appears on the face of the record that counsel made no strategic decision at all."); *Garner*, 449 F. App'x at 645-46 (noting that "because trial counsel is now deceased, [petitioner] has offered no direct evidence concerning the scope or quality of trial counsel's investigation," but continuing to address and to reject the merits of a *Strickland* claim based "entirely on current counsel's discovery of 'new evidence' that was not presented to the jury"); cf. *Weeden* v. *Johnson*, 854 F.3d 1063 (9th Cir. 2017) (reversing district court, granting writ of habeas corpus, and holding that trial counsel's generic testimony about "strategic" decisions did not support his failure to obtain a psychological examination for his client); see also *Roland* v. *Mintzes*, 554 F. Supp. 881, 886 (E.D. Mich. 1983) (holding that petitioner's counsel's unavailability would not prejudice the state in contesting ineffective-assistance claims, "because the existing trial court record is complete and provides an adequate basis for decision on each of Petitioner's claims, including ineffective assistance of counsel").

This Court should grant the petition to resolve the split of authority.

B. The Issue Is One Of National Importance.

The claim that one's counsel provided ineffective assistance is ubiquitous in proceedings for post-conviction relief in state and federal courts. Indeed, *Strickland* is the sixth most-cited Supreme Court case of all time, and the single most-cited case on a topic of substantive law (as distinguished from cases regarding civil procedure and pleading standards). See Adam Steinman, *The Rise and Fall of*

Plausibility Pleading?, 69 Vand. L. Rev. 333, 390 (2016).[5] Given the ubiquity of claims under *Strickland*, post-conviction counsel regularly face the question of how best to present a claim of ineffective assistance of counsel by trial lawyers. In particular, obtaining the cooperation of trial counsel can be challenging, and whether and how much effort should be expended to do so is a common issue for post-conviction counsel. Guidance from this Court will substantially aid the efforts of post-conviction counsel seeking to vindicate this important Constitutional right that goes to the heart of the integrity of our criminal justice process.

This Court has emphasized repeatedly "that the Sixth Amendment's guarantee that "'[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence' entails that defendants are entitled to be represented by an attorney who meets at least a minimal standard of competence." *Hinton* v. *Alabama*, 134 S. Ct. 1081, 1087-88 (2014) (per curiam) (alteration and omission in original). To secure that right, it is imperative to guard against errors falling below professional standards by a defendant's trial counsel and, when they occur, to ensure that such errors do not doubly prejudice defendants by forever impairing their ability to assert meritorious claims. Here, for instance, Mr. Reeves faces a sentence of death for which his intellectual disability should render him

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[5] The five cases cited more often than *Strickland* are, in order: *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp.* v. *Catrett*, 477 U.S. 317 (1986); *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544 (2007), *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009); and *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986).

categorically ineligible, yet his counsel's deficient performance precluded Mr. Reeves from raising this claim before the jury and at sentencing.

II. THE ALABAMA COURT'S DECISION IS INCORRECT.

There is nothing to recommend a rule that automatically defeats ineffective assistance of counsel claims whenever trial counsel has not testified as to his or her conduct. This Court should review the decision below and correct it.

This Court has repeatedly made plain that counsel has the "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691; see also *Hinton*, 134 S. Ct. at 1088; *Wiggins* v. *Smith*, 539 U.S. 510, 521 (2003); *Kimmelman*, 477 U.S. at 384. To be sure, tactical trial decisions receive deference from reviewing courts. But such deference merely reflects the practical difficulties facing trial counsel, and the risk that the hindsight perspective of reviewing courts not as intimately familiar with those difficulties will too often fault trial counsel for making less than perfect choices. *E.g.*, *Kimmelman*, 477 U.S. at 386 ("[U]nless consideration is given to counsel's overall performance, before and at trial, it will be 'all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.'" (quoting *Strickland*, 466 U.S. at 689)). The law requires *reasonable* efforts by trial counsel, not *perfect* efforts. See *Hinton*, 134 S. Ct. at 1088 (construing *Strickland*, 466 U.S. at 690-91). And reviewing courts are at risk of imposing too high a standard. The presumption of reasonableness protects against that risk.

But none of this supports ignoring compelling evidence of constitutionally deficient performance simply because trial counsel has not testified regarding his or her own choices. For one, such a rule cannot be reconciled with *Massaro* v. *United States*, 538 U.S. 500 (2003), where this Court noted that "there may be cases in which trial counsel's ineffectiveness is so apparent from the [existing] record" that it would be "advisable to raise the issue on direct appeal." *Id.* at 508. Because a challenge on direct appeal would occur before counsel could be called to testify at an evidentiary hearing, such testimony necessarily cannot be a prerequisite for raising a *Strickland* claim.

Furthermore, there is no reason to elevate testimonial evidence above other sorts of evidence for the purpose of resolving a Sixth Amendment claim. Rather, a *presumption* of reasonableness can be pierced by *any* evidence sufficiently compelling to overcome it, whether it is direct, circumstantial, testimonial, or documentary. See *Desert Palace*, 539 U.S. at 100 ("[C]ircumstantial evidence is 'intrinsically no different from testimonial evidence.'" (quoting *Holland* v. *United States*, 348 U.S. 121, 140 (1954))); see also *id.* (noting that there is no "circumstance in which [the Court] ha[s] restricted a litigant to the presentation of direct evidence absent some affirmative directive in a statute"). The presumption thus does not license a reviewing court, under the guise of "deference" to "strategy," to conjure up strategic decisions on behalf of silent or evasive counsel when a choice on its face appears to lack any strategic rationale. To the contrary, this Court has squarely rejected the "attempt to justify [a] limited investigation as reflecting a tactical judgment." *Wiggins*, 539 U.S. at 521, 526-27 (criticizing the

"strategic decision" invoked by the state court to justify counsel's "limited pursuit of mitigating evidence" as "resembl[ing] more a *post hoc* rationalization of counsel's conduct than an accurate description of their deliberations prior to sentencing"); *Sears* v. *Upton*, 561 U.S. 945, 954 (2010) (per curiam) ("reject[ing] any suggestion that a decision to focus on one potentially reasonable trial strategy—[*i.e.*,] petitioner's voluntary confession—was 'justified by a tactical decision' when 'counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background.'"); see also *Williams* v. *Taylor*, 529 U.S. 362, 396 (2000) (failure to uncover mitigating evidence was "not justified by a tactical decision" where counsel "did not fulfill their obligation to conduct a thorough investigation of the defendant's background").

This is particularly important when counsel's supposedly strategic choice closed counsel's eyes to potentially useful and powerful evidence, as happened here. "Under *Strickland*, counsel's investigation must determine trial strategy, not the other way around." *Weeden*, 854 F.3d 1063. It is simply impossible to conjure a "strategic" reason why trial counsel here chose not to follow through on precisely the mitigation investigation counsel told the court was essential to prepare a mitigation case for sentencing. It is clear that Mr. Reeves's counsel's performance was not "reasonable considering all the circumstances." *Strickland*, 466 U.S. at 688.

Indeed, the record of counsel's constitutionally deficient performance is particularly strong. The record already establishes, without any testimony from petitioner's trial counsel, that his counsel failed to hire (or ever again contact) the neuropsychologist for which counsel had already successfully petitioned

the trial court for funds. Counsel failed to hire any other neuropsychologist to evaluate Mr. Reeves for intellectual disability or other mitigating conditions, failed to hire a mitigation expert to investigate the voluminous mitigation evidence about which Dr. Salekin eventually testified during post-conviction proceedings, and failed to speak with the one and only expert witness counsel did call prior to the very day of her testimony (with the result that this court-appointed expert testified in a manner harmful to Mr. Reeves even though she had not adequately evaluated him to offer such testimony). Trial counsel failed to present the details of the abuse, neglect (including neglect of various psychological disorders), and violence, as well as educational difficulties, that pervaded Mr. Reeves's youth. Mr. Reeves was institutionalized as an adolescent, and Mr. Reeves had suffered both lead poisoning during childhood and a bullet to the head shortly before the crime of which he was convicted. Trial counsel offered no expert testimony about these facts or their implications for Mr. Reeves's culpability. Instead, the jury and trial court heard only Ms. Reeves testify in general terms that Mr. Reeves had been diagnosed with "hyperization," had experienced some academic difficulties, and was frequently scolded and whipped by his aunts and grandmother.

The record already establishes, without any testimony from petitioner's trial counsel, that trial counsel knew that Mr. Reeves likely suffered from an intellectual disability and other psychological disorders. Trial counsel had voluminous psychological and academic records and had repeatedly requested funds to hire Dr. Goff. Yet *after* being granted the request based in no small measure on the necessity of consulting the expert, counsel did not follow through.

Given this Court's prior decisions regarding the materiality of this kind of mitigation evidence, there is little doubt that trial counsel's deficient performance prejudiced Mr. Reeves. See *Rompilla* v. *Beard,* 545 U.S. 374, 391-93 (2005) (finding prejudice where evidence of schizophrenia, low intelligence, poor social background and substance abuse "add[ed] up to a mitigation case [bearing] no relation to the few naked pleas for mercy actually put before the jury," even though "it is possible that a jury could have heard it all and still have decided on the death penalty"); *Williams*, 529 U.S. at 398 ("[T]he graphic description of Williams's childhood, filled with abuse and privation, or the reality that he was 'borderline mentally retarded,' might well have influenced the jury's appraisal of his moral culpability"); *Wiggins*, 539 U.S. at 517, 537-38 (finding prejudice where counsel failed to investigate and present mitigating evidence of defendant's "excruciating life history," including evidence of severe physical and sexual abuse and a poor and deprived childhood).[6]

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[6] The omitted evidence of Mr. Reeves's impoverished, turbulent, and violence-ridden childhood has also repeatedly been found mitigating because it tends to diminish blame and moral culpability. *See*, *e.g.*, *Eddings* v. *Oklahoma*, 455 U.S. 104, 115 (1982) ("[E]vidence of a turbulent family history, of beatings by a harsh father, and of severe emotional disturbance is particularly relevant."); *Penry* v. *Lynaugh*, 492 U.S. 302, 319 (1989) ("[P]unishment should be directly related to the personal culpability of the criminal defendant. If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, 'evidence about the defendant's background and character 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

The Alabama courts have nonetheless refused to weigh all of this evidence simply because, in their view, petitioner's claim fails as a matter of law because his trial counsel did not offer testimony to explain their decision to abandon *any* recognizable mitigation strategy. The Alabama courts did not even try to speculate about what trial counsel might conceivably have said that would overcome all of this evidence and satisfy a reviewing court that petitioner received constitutionally effective assistance of trial counsel at his sentencing. The fact is that, in numerous cases in which trial counsel *does* testify and offer a strategic explanation, the court finds such testimony inadequate. *E.g.*, *Wiggins*, 539 U.S. at 521 (rejecting "counsel['s] attempt to justify their limited investigation as reflecting a tactical judgment"); *Weeden*, 854 F.3d 1063 (holding that trial counsel's generic testimony about "strategic" decisions did not support his failure to obtain a psychological examination for his client). Indeed, under Alabama's (and Texas's and the Eleventh Circuit's) rule, an attorney's decision to ignore mitigation evidence receives *more* deference when the attorney does not testify than when he or she does. There is no reason to incentivize deficient attorneys to refuse to cooperate with post-conviction counsel. Neither is there any reason to conclusively presume that a dead attorney must have made reasonable strategic decisions.

It is at best rare that trial counsel is willing to admit to having provided constitutionally deficient representation. It is not uncommon, moreover, for there to be friction between trial counsel and post-

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have no such excuse." (quoting *California* v. *Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring))).

conviction counsel—whose task involves impugning prior counsel's performance.[7] No value reflected in the Sixth Amendment right to counsel is served by requiring what, in this case, would very likely be a charade. The record, even without trial counsel's testimony, amply supports petitioner's assertion that he was deprived of constitutionally effective assistance of trial counsel at his capital sentencing.

III. THIS CASE IS THE PROPER VEHICLE FOR RESOLVING THIS EXCEPTIONALLY IMPORTANT QUESTION.

This case provides the ideal vehicle to resolve the question petitioner presents.

First, the decision below squarely presents the question of whether trial counsel must testify as a prerequisite for succeeding on a claim for ineffective assistance of counsel under *Strickland*. That is the express basis of the ruling. Pet. App. 79a-81a, 86a, 90a.

Second, Mr. Reeves has preserved that question for appeal throughout the proceedings below, ensuring that the issue is not encumbered by any waiver. Likewise, although this is a state-court decision, it resolved a federal issue on exclusively federal-law grounds, thereby ensuring this Court's jurisdiction. *Sears*, 561 U.S. at 946 n.1; see also 28 U.S.C. § 1257; *Padilla* v. *Kentucky,* 559 U.S. 356 (2010) (reviewing

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[7] Highlighting the complicated relationship between trial counsel and post-conviction counsel, Mr. Reeves's trial counsel had become a state judge by the time the Rule 32 proceedings were under way, and thus would have been testifying before one of his judicial colleagues about whether his prior conduct was unprofessional.

state post-conviction decision raising Sixth Amendment question).

Third, the issue is presented on direct review, arising from the denial of Mr. Reeves's post-conviction petition in the Alabama courts. As a result, it does not present any of the complications associated with federal habeas review under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Indeed, where there is a division of authority among state courts of last resort over an important question regarding a criminal defendant's constitutional rights, the need for this Court's intervention on direct review is particularly pressing. Accepting review now avoids any need to consider whether, under 28 U.S.C. § 2254(d)(1), petitioner's view reflects what the clearly established law *was* when the Alabama court rejected his claim. Moreover, given that petitioner's federal habeas claim will be heard within the Eleventh Circuit, and the Eleventh Circuit takes a similar approach to the Alabama courts, petitioner is facing the same obstacle to an appropriate consideration of his ineffective assistance of counsel claim on habeas as he faced in the Alabama courts.

Fourth, the need for uniform application of federal law in this case could not be clearer. If Mr. Reeves had received the trial counsel representation he received in a case in, for example, Florida or the Seventh Circuit, he would be entitled to present his claim of intellectual disability at a new sentencing hearing. Because petitioner is in Alabama, however, he remains on death row despite his trial counsel's constitutionally deficient performance.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 22, 2017

PETITION APPENDIX

REL: 06/10/2016

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2015-2016

CR-13-1504

Matthew Reeves

v.

State of Alabama

Appeal from Dallas Circuit Court
(CC-97-31.60)

KELLUM, Judge.

Matthew Reeves appeals the circuit court's denial of his petition for postconviction relief filed pursuant to Rule 32, Ala. R. Crim. P., in which he attacked his capital-murder conviction and sentence of death.

In 1998, Reeves was convicted of murder made capital because it was committed during the course of a robbery in the first degree, see § 13A-5-40(a)(2), Ala. Code 1975. By a vote of 10-2, the jury recommended that Reeves be sentenced to death for his capital-murder conviction. The trial court followed the jury's recommendation and sentenced Reeves to death. This Court affirmed Reeves's conviction and sentence on appeal. Reeves v. State, 807 So. 2d 18 (Ala. Crim. App. 2000). The Alabama Supreme Court denied certiorari review, and this Court issued a certificate of judgment on June 8, 2001. The United States Supreme Court subsequently denied certiorari review on November 13, 2001. Reeves v. Alabama, 534 U.S. 1026 (2001).

In our opinion affirming Reeves's conviction and sentence, this Court set out the facts of the crime as follows:

> "The State's evidence tended to show the following. On November 27, 1996, the appellant (who was 18 years old at the time) and his younger brother, Julius, visited Brenda Suttles and Suttles's 15-year-old cousin, Emanuel, at Suttles's house on Lavender Street in Selma. There, according to Suttles, everyone agreed to go out 'looking for some robberies.' (R. 684.) Shortly after noon that day, the foursome left Suttles's house on foot and walked to a nearby McDonald's restaurant, where they

saw Jason Powell driving by in his car. The appellant's brother, Julius, flagged Powell down, and Powell agreed to give the group a ride.

"Brenda Suttles and Emanuel Suttles testified that after the foursome got into Powell's car, Julius Reeves suggested that they go to White Hall, a town in neighboring Lowndes County, to rob a drug dealer. According to Brenda Suttles, everyone in the car agreed to the plan. (Powell, who also testified at trial, denied hearing the discussion about a robbery.) Before leaving Selma, the group stopped at an apartment on Broad Street. Julius Reeves went inside the apartment and returned to the car a short time later carrying a shotgun, which he handed to the appellant. With Powell driving, the group then headed for White Hall.

"Before they reached White Hall, however, Powell's car broke down on a dirt road off Highway 80. Shortly thereafter, a passing motorist, Duane Smith, stopped and told the group that he was in a hurry to meet some friends to go hunting, but that he would return around sunset and would take them to get help then. For the next couple of hours, the group sat in Powell's car and listened to music, until another passing motorist, Willie Johnson, stopped in his pickup truck and offered to tow Powell's car to Selma. Using some chains that he kept in his pickup truck, Johnson hooked Powell's car to the back of his truck. With Julius Reeves riding in the truck with him and the others in Powell's car, Johnson towed the car to the Selma residence where the appellant and Julius lived with their mother.

"When they arrived at the Reeveses' house, Julius Reeves got out of Johnson's truck and told the others that Johnson wanted $25 for towing them. However, no one had any money to pay Johnson. Julius Reeves then offered to give Johnson a ring as payment if Johnson would drive him to his

girlfriend's house to get the ring. Johnson agreed and he unhooked Powell's car from his truck. According to Jason Powell and Emanuel Suttles, Julius Reeves at this point told the others that Johnson was going to be their robbery victim. While Jason Powell and Emanuel Suttles stayed behind with Powell's car in front of the Reeveses' house, Julius Reeves got back in the cab of the truck with Johnson, and Brenda Suttles climbed into the rear bed of the truck. Testimony indicated that when Johnson started the truck, the appellant jumped into the rear bed of the truck with the shotgun, hiding the weapon behind his leg as he did so.

"When they arrived at Julius's girlfriend's house in Johnson's truck, Julius went inside and retrieved the ring he had promised to give Johnson as payment. According to Brenda Suttles, when Julius came out of the house, he walked to the rear of Johnson's truck and told her and the appellant that he was not going to let Johnson keep the ring. After Julius got back in the cab of the truck, Johnson drove everyone back to the Reeveses' house.

"Jason Powell and Emanuel Suttles, who had remained at the house with Powell's car, testified that sometime around 7:00 p.m., they saw Johnson's truck drive by the house and turn into an alley -- known as Crockett's Alley -- behind the house. According to Brenda Suttles, who was in the rear bed of the truck with the appellant, just as the truck came to a stop in the alley, she heard a loud 'pow' sound. (R. 704.) Suttles testified that when she looked up, the appellant was withdrawing the barrel of the shotgun from the open rear window of the truck's cab. Johnson had been shot in the neck and was slumped over in the driver's seat. Suttles testified that Julius Reeves jumped out of the truck's cab and asked the appellant what he had done, and that the appellant then told Julius and Suttles to go through Johnson's pockets to 'get his money.' (R. 704.) Suttles stated that Julius then

pulled Johnson out of the truck and went through his pockets, giving the money he found in the pockets to the appellant. After Julius had gone through Johnson's pockets, Suttles helped him put Johnson back in the truck's cab. According to Suttles, Johnson was bleeding heavily and making 'gagging' noises. (R. 721.)

"Jason Powell and Emanuel Suttles testified that they heard the gunshot after Johnson's truck pulled into Crockett's Alley and that a short time later they saw the appellant, Julius Reeves, and Brenda Suttles run out of the alley and into the Reeveses' house. The appellant was carrying a shotgun, they said. They followed the appellant, Julius Reeves, and Brenda Suttles into the Reeveses' house and saw the appellant place the shotgun under a bed in his bedroom. The appellant told Julius and Brenda Suttles to change out of their bloodstained clothes and shoes, and he took the clothes and shoes and stuffed them under a dresser in his bedroom. According to Emanuel Suttles, as the appellant, Julius, and Brenda changed their clothes, they were 'jumping and hollering' and celebrating about 'all the stuff [they] got' from Johnson. (R. 842.) Jason Powell testified that he heard the appellant say, 'I made the money.' (R. 786.)

"After changing their clothes, the appellant, Julius Reeves, and Brenda Suttles ran to Suttles's house. On the way, the appellant stopped to talk to his girlfriend, telling her that if she should be questioned by the police, to tell them that he had been with her all day. At Suttles's house, the appellant divided the money taken from Johnson -- approximately $360 -- among himself, Julius Reeves, and Brenda Suttles. Testimony indicated that throughout the evening, the appellant continued to brag about having shot Johnson. Several witnesses who were present at Suttles's house that evening testified that they saw the appellant dancing, 'throwing up' gang signs, and pretending to pump a

shotgun. Brenda Suttles testified that as the appellant danced, he would jerk his body around in a manner 'mock[ing] the way that Willie Johnson had died.' (R. 713.) The appellant was also heard to say that the shooting would earn him a 'teardrop,' a gang tattoo acquired for killing someone. (R. 720.)

"Yolanda Blevins, who was present during the post-shooting 'celebration' at Suttles's house, testified that the appellant called her into the kitchen and told her that he had shot a man in a truck after catching a ride with him. Blevins noticed that there was what appeared to be dried blood on the appellant's hands. LaTosha Rodgers, who was also present at Suttles's house, testified that the appellant told her that he had 'just shot somebody' in the alley. (R. 924.)

"At around 2:00 a.m. on November 28, 1996 (approximately seven hours after the shooting), Selma police received a report of a suspicious vehicle parked in Crockett's Alley. When police officers investigated, they found Johnson's body slumped across the seat of his pickup truck. There was a pool of blood on the ground on the driver's side of the truck. Several coins and a diamond ring were on the ground near the truck. On the floorboard of the truck, police found wadding from a shotgun shell. The pockets of Johnson's pants had been turned inside out and were empty. Testimony at trial indicated that Johnson was a longtime employee of the Selma Housing Authority and that on the afternoon of November 27, 1996, he had cashed his paycheck, which had been in the amount of $500.

"At the shooting scene on the morning of November 28, police also discovered a trail of blood leading from Johnson's truck to the Reeveses' house. Randy Tucker, a canine-patrol officer with the Selma Police Department, testified that his dog tracked the blood trail from the pool of blood next to

Johnson's truck, down Crockett's Alley, through the yard at 2126 Selma Avenue (the residence next to the alley), and ultimately to the front steps of the Reeveses' house at 2128 Selma Avenue.

"Pat Grindle, the detective in charge of investigating Johnson's murder, went to the Reeveses' house after learning that the blood trail led there. Det. Grindle testified that he obtained the consent of the appellant's mother, Marzetta Reeves, to search the house. In a bedroom shared by the appellant and Julius, Det. Grindle found bloodstained clothes and bloodstained shoes; under a bed in this bedroom, Det. Grindle found a shotgun. In searching the kitchen, Det. Grindle found a pair of bloodstained pants. After making these discoveries, Det. Grindle questioned Marzetta Reeves and several other persons who were in the house at that time. Det. Grindle stated that he learned that the bloodstained clothes and shoes belonged to Julius Reeves, Brenda Suttles, and the appellant. Det. Grindle then went to Suttles's house in an attempt to locate the three. At Suttles's house, Det. Grindle found the appellant lying on a couch in a front room. The appellant was placed under arrest, and the officers seized a balled-up bloodstained jacket he was using as a headrest on the couch. Det. Grindle later returned to the Reeveses' residence, where he seized a 12 gauge shotgun shell from a garbage can in the bathroom.

"An autopsy revealed that Johnson had died from a shotgun wound to his neck that severed the carotid artery, causing him to bleed to death over a period of several minutes. Bloodstain patterns in Johnson's truck indicated that he was sitting upright in the driver's seat, facing forward, when he was shot from behind, through the open rear window. The bloodstain patterns also indicated that the driver's side door had been opened and closed shortly after Johnson was shot.

> "Testimony indicated that the appellant's fingerprints were found on the shotgun that Det. Grindle had seized from under the bed in the appellant's bedroom. Brenda Suttles's and Julius Reeves's fingerprints were found on a fender of Johnson's truck. Joseph Saloom, a firearms expert with the Alabama Department of Forensic Sciences, testified that the shotgun shell seized from the bathroom at the Reeveses' residence was of the type commonly fired from the shotgun seized from the appellant's bedroom. Saloom stated that the shotgun-shell wadding found on the floorboard of Johnson's truck was of the type commonly found in the kind of shotgun shell seized from the bathroom at the Reeveses' residence."

Reeves, 807 So. 2d at 24-26.[1]

Reeves timely filed his Rule 32 petition on October 30, 2002.[2] He filed an amended petition on February 26, 2003, and a second amended petition on August 31, 2006. The circuit court, Reeves, and the State treated the second amended petition as superseding the previous petitions, and we do the

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[1]This Court may take judicial notice of its own records, and we do so in this case. See Nettles v. State, 731 So. 2d 626, 629 (Ala. Crim. App. 1998), and Hull v. State, 607 So. 2d 369, 371 n.1 (Ala. Crim. App. 1992).

[2]Rule 32.2(c), Ala. R. Crim. P., was amended effective August 1, 2002, to reduce the limitations period from two years to one year. However, in cases in which the certificate of judgment was issued before July 31, 2001, as here, the two-year limitations period applies. See Ex parte Gardner, 898 So. 2d 690, 691 (Ala. 2004).

same.[3] See, e.g., Smith v. State, 160 So. 3d 40, 47-49 (Ala. Crim. App. 2010). In his petition, Reeves raised claims of ineffective assistance of both trial and appellate counsel, of trial court error, and of juror misconduct. Reeves also alleged that he was intellectually disabled and that, therefore, his death sentence was unconstitutional under Atkins v. Virginia, 536 U.S. 304 (2002).[4] The State filed an answer to the petition on October 28, 2006. The circuit court conducted an evidentiary hearing on the petition on November 28-29, 2006. At the hearing, Reeves called two witnesses to testify, and the State called one witness. Reeves did not call his trial and appellate attorneys to testify. The

[3]All references in this opinion to the petition shall be considered references to the second amended petition filed on August 31, 2006.

[4]In Atkins, the United States Supreme Court used the term "mental retardation." However, more recently in Hall v. Florida, 572 U.S. ___, 134 S.Ct. 1986 (2014), the United States Supreme Court recognized that psychiatrists and other experts had stopped using the term "mental retardation" and had begun using the term "intellectual disability," and the Court used the terms "intellectual disability" and "intellectually disabled" throughout its opinion in Hall and again in its subsequent opinion in Brumfield v. Cain, ___ U.S. ___, 135 S.Ct. 2269 (2015). This Court followed that trend in Lane v. State, [Ms. CR-10-1343, April 29, 2016] ___ So. 3d ___ (Ala. Crim. App. 2016) (opinion after remand by the United States Supreme Court), and we do so in this opinion.

parties also submitted numerous documentary exhibits. On May 7, 2008, the State filed a proposed order denying Reeves's petition. On September 9, 2008, Reeves filed a written objection to the State's proposed order and a post-hearing brief. On October 26, 2009, the circuit court issued an order denying Reeves's petition.

The record indicates that the parties were not notified of the circuit court's ruling until January 2013. Reeves then filed another Rule 32 petition pursuant to Rule 32.1(f), Ala. R. Crim. P., requesting an out-of-time appeal from the circuit court's October 26, 2009, order denying his first petition. The circuit court ultimately granted Reeves an out-of-time-appeal on May 30, 2014. This appeal followed.

In a Rule 32 proceeding, both the burden of pleading and the burden of proof are on the petitioner. See Rule 32.3, Ala. R. Crim. P. ("The petitioner shall have the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief."). "On direct appeal we reviewed the record for plain error; however, the plain-error standard of review does not apply to a Rule 32 proceeding attacking a death sentence." Ferguson v. State, 13

So. 3d 418, 424 (Ala. Crim. App. 2008). Therefore, "[t]he general rules of preservation apply to Rule 32 proceedings," Boyd v. State, 913 So. 2d 1113, 1123 (Ala. Crim. App. 2003), and this Court "will not review issues not listed and argued in brief." Brownlee v. State, 666 So. 2d 91, 93 (Ala. Crim. App. 1995). Additionally, "[i]t is well settled that 'the procedural bars of Rule 32 apply with equal force to all cases, including those in which the death penalty has been imposed.'" Nicks v. State, 783 So. 2d 895, 901 (Ala. Crim. App. 1999) (quoting State v. Tarver, 629 So. 2d 14, 19 (Ala. Crim. App. 1993)).

The general rule is that "when the facts are undisputed [or] an appellate court is presented with pure questions of law, that court's review in a Rule 32 proceeding is de novo." Ex parte White, 792 So. 2d 1097, 1098 (Ala. 2001). On the other hand, "where there are disputed facts in a postconviction proceeding and the circuit court resolves those disputed facts, '[t]he standard of review on appeal ... is whether the trial judge abused his discretion when he denied the petition.'" Boyd v. State, 913 So. 2d 1113, 1122 (Ala. Crim. App. 2003) (quoting Elliott v. State, 601 So. 2d 1118,

1119 (Ala. Crim. App. 1992)). Even when the disputed facts arise from a combination of oral testimony and documentary evidence, we review the circuit court's findings for an abuse of discretion and afford those findings a presumption of correctness. See Parker Towing Co. v. Triangle Aggregates, Inc., 143 So. 3d 159, 166 (Ala. 2013) (noting that the ore tenus rule "applies to 'disputed issues of fact,' whether the dispute is based entirely upon oral testimony or upon a combination of oral testimony and documentary evidence" (citation omitted)). Moreover, with limited exceptions not applicable here, this Court may affirm a circuit court's judgment on a Rule 32 petition if it is correct for any reason. See Bryant v. State, 181 So. 3d 1087 (Ala. Crim. App. 2011); Moody v. State, 95 So. 3d 827, 833 (Ala. Crim. App. 2011), and McNabb v. State, 991 So. 2d 313, 333 (Ala. Crim. App. 2007), and the cases cited therein.

With these principles in mind, we address each of the issues Reeves raises on appeal.

I.

Reeves contends that the circuit court erroneously adopted verbatim that portion of the State's proposed order

addressing his claim of intellectual disability. Reeves concedes that the circuit court did not adopt the State's proposed order in its entirety. Nonetheless, he argues that the circuit court's verbatim adoption of the language from the State's proposed order as to even one claim indicates "an absence of careful and independent judicial consideration" of that claim and requires reversal. (Reeves's brief, p. 36.) Reeves maintains that the circuit court's findings on his intellectual-disability claim are not that of the circuit court itself, but solely of the State and, therefore, cannot stand. We disagree.

"Alabama courts have consistently held that even when a trial court adopts verbatim a party's proposed order, the findings of fact and conclusions of law are those of the trial court and they may be reversed only if they are clearly erroneous." McGahee v. State, 885 So. 2d 191, 229–30 (Ala. Crim. App. 2003). "While the practice of adopting the state's proposed findings and conclusions is subject to criticism, the general rule is that even when the court adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous." Bell v. State, 593

So. 2d 123, 126 (Ala. Crim. App. 1991). "[T]he general rule is that, where a trial court does in fact adopt the proposed order as its own, deference is owed to that order in the same measure as any other order of the trial court." Ex parte Ingram, 51 So. 3d 1119, 1122 (Ala. 2010). Only "when the record before this Court clearly establishes that the order signed by the trial court denying postconviction relief is not the product of the trial court's independent judgment" will the circuit court's adoption of the State's proposed order be held erroneous. Ex parte Jenkins, 105 So. 3d 1250, 1260 (Ala. 2012).

For example, in Ex parte Ingram, supra, the circuit court adopted verbatim the State's proposed order summarily dismissing Robert Shawn Ingram's Rule 32 petition. In the order, the court stated that it had considered "'the events within the personal knowledge of the Court'" and that it had "'presided over Ingram's capital murder trial and personally observed the performance of both lawyers throughout Ingram's trial and sentencing.'" Ex parte Ingram, 51 So. 3d at 1123 (citation and emphasis omitted). However, the judge who summarily dismissed the petition had not, in fact, presided

over Ingram's trial and had no personal knowledge of the trial. The Alabama Supreme Court described these errors in the court's adopted order as "the most material and obvious of errors," 51 So. 3d at 1123, and "patently erroneous," 51 So. 3d at 1125, and concluded that the errors "undermine[d] any confidence that the trial court's findings of fact and conclusions of law [we]re the product of the trial judge's independent judgment." 51 So. 2d at 1125.

In Ex parte Scott, [Ms. 1091275, March 18, 2011] ___ So. 3d ___ (Ala. 2011), the circuit court adopted verbatim as its order the State's answer to Willie Earl Scott's Rule 32 petition. The Alabama Supreme Court stated:

> "[A]n answer, by its very nature, is adversarial and sets forth one party's position in the litigation. It makes no claim of being an impartial consideration of the facts and law; rather it is a work of advocacy that exhorts one party's perception of the law as it pertains to the relevant facts."

Ex parte Scott, ___ So. 3d at ___. The Court then held that "[t]he trial court's verbatim adoption of the State's answer to Scott's Rule 32 petition as its order, by its nature, violates this Court's holding in Ex parte Ingram" that the findings and conclusions in a court's order must be those of the court itself. Ex parte Scott, ___ So. 3d at ___.

Unlike Ex parte Ingram and Ex parte Scott, the record in this case does not clearly establish that the portion of the circuit court's order denying Reeves's intellectual-disability claim was not the product of the court's own independent judgment. The circuit court's order contains no patently erroneous statements as was the case in Ex parte Ingram,[5] and the circuit court here adopted a portion of the State's proposed order, not a portion of the State's answer, as was the case in Ex parte Scott. After thoroughly reviewing the record, we conclude that the circuit court's findings on Reeves's intellectual-disability claim were its own and were not merely an unexamined adoption of the proposed order submitted by the State. See, e.g., Ex parte Jenkins, 105 So. 3d at 1260; Van Pelt v. State, [Ms. CR-12-0703, August 14, 2015] ___ So. 3d ___ (Ala. Crim. App. 2015); Spencer v. State, [Ms. CR-12-1837, February 6, 2015] ___ So. 3d ___ (Ala. Crim. App. 2015); and Mashburn v. State, 148 So. 3d 1094 (Ala. Crim. App. 2013). Therefore, we find no error on the part of the circuit court in adopting verbatim that portion of the State's

[5]In fact, in this case, unlike Ex parte Ingram, the circuit judge who ruled on the petition was the same judge who had presided over Reeves's trial.

proposed order addressing Reeves's intellectual-disability claim.

II.

Reeves also contends that the circuit court erred in denying his claim of intellectual disability under Atkins v. Virginia, 536 U.S. 304 (2002). He argues that he suffers from significantly subaverage intellectual functioning and significant deficits in multiple areas of adaptive functioning, all of which manifested before he reached the age of 18, and that the circuit court's findings and conclusions to the contrary were erroneous. Therefore, Reeves concludes, his death sentence is unconstitutional, and the circuit court erred in not granting him relief on this claim in his petition. We disagree.

> "'"In the context of an Atkins claim, the defendant has the burden of proving by a preponderance of the evidence that he or she is mentally retarded."' Byrd [v. State], 78 So. 3d [445,] 450 [(Ala. Crim. App. 2009)] (quoting Smith [v. State, [Ms. 1060427, May 25, 2007]], ___ So. 3d [___, ___ (Ala. 2007)]). 'The question of [whether a capital defendant is mentally retarded] is a factual one, and as such, it is the function of the factfinder, not this Court, to determine the weight that should be accorded to expert testimony of that issue.' Byrd, 78 So. 3d at 450 (citations and quotations omitted). As the Alabama Supreme Court has explained, questions regarding weight and

> credibility determinations are better left to the circuit courts, '"which [have] the opportunity to personally observe the witnesses and assess their credibility."' Smith, ___ So. 3d at ___ (quoting Smith v. State, [Ms. CR-97-1258, Sept. 29, 2006] ___ So. 3d. ___, ___ (Ala. Crim. App. 2006) (Shaw, J., dissenting) (opinion on return to third remand)).
>
> "'This court reviews the circuit court's findings of fact for an abuse of discretion.' Byrd, 78 So. 3d at 450 (citing Snowden v. State, 968 So. 2d 1004, 1012 (Ala. Crim. App. 2006)). '"'"'A judge abuses his discretion only when his decision is based on an erroneous conclusion of law or where the record contains no evidence on which he rationally could have based his decision.'"'"' Byrd, 78 So. 3d at 450-51 (quoting Hodges v. State, 926 So. 2d 1060, 1072 (Ala. Crim. App. 2005), quoting in turn State v. Jude, 686 So. 2d 528, 530 (Ala. Crim. App. 1996), quoting in turn Dowdy v. Gilbert Eng'g Co., 372 So. 2d 11, 12 (Ala. 1979), quoting in turn Premium Serv. Corp. v. Sperry & Hutchinson, Co., 511 F.2d 225 (9th Cir. 1975))."

Carroll v. State, [Ms. CR-12-0599, August 14, 2015] ___ So. 3d ___, ___ (Ala. Crim. App. 2015).

In Atkins, the United States Supreme Court held that the execution of intellectually disabled persons violates the prohibition against cruel and unusual punishment in the Eighth Amendment to the United States Constitution. The Court in Atkins did not establish a national standard for determining whether a person is intellectually disabled for purposes of the Eighth Amendment, but left to the states "'the task of

developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.'" Atkins, 536 U.S. at 317 (quoting Ford v. Wainwright, 477 U.S. 399, 416–17 (1986)). The Court did note, however, the following clinical definitions of intellectual disability:

> "The American Association on Mental Retardation (AAMR)[6] defines mental retardation as follows: 'Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18.' Mental Retardation: Definition, Classification, and Systems of Supports 5 (9th ed. 1992).
>
> "The American Psychiatric Association's definition is similar: 'The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many

[6]In 2007, the American Association on Mental Retardation changed its name to the American Association on Intellectual and Developmental Disabilities.

> different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system.' Diagnostic and Statistical Manual of Mental Disorders 41 (4th ed. 2000). 'Mild' mental retardation is typically used to describe people with an IQ level of 50–55 to approximately 70. Id., at 42–43."

536 U.S. at 308 n.3. The Court also noted that an intelligence quotient ("IQ") between 70 and 75 "is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition." Id. at 309 n.5.

Subsequently, in Hall v. Florida, 572 U.S. ___, 134 S.Ct. 1986 (2014), the United States Supreme Court recognized that IQ test scores, alone, are not determinative of intellectual disability or even of the intellectual-functioning prong of intellectual disability because IQ testing has a margin of error or standard error of measurement ("SEM"). The Court held unconstitutional Florida's strict IQ score cutoff of 70 for establishing intellectual disability. The Florida Supreme Court had held that a person who attained an IQ score above 70 was, as a matter of law, not intellectually disabled and was prohibited from presenting any further evidence to support a claim of intellectual disability. See Hall v. State, 109 So. 3d 704 (Fla. 2012), citing Cherry v. State, 959 So. 2d 702,

712-13 (Fla. 2007). In holding this strict IQ score cutoff of 70 unconstitutional, the United States Supreme Court recognized that IQ test scores are "imprecise" and have a "'standard error of measurement'" that "is a statistical fact [and] a reflection of the inherent imprecision of the test itself." Hall, 572 U.S. at ___, 134 S.Ct. at 1995. The Court noted that the SEM, which the Court recognized to be plus or minus five points on standard IQ tests, "reflects the reality that an individual's intellectual functioning cannot be reduced to a single numerical score," Hall, 572 U.S. at ___, 134 S.Ct. at 1996, and that, therefore, IQ test scores are not "final and conclusive evidence of a defendant's intellectual capacity," and "should be read not as a single fixed number but as a range." Hall, 572 U.S. at ___, 134 S.Ct. at 1995.

Because of the inherent imprecision in IQ testing, the Court noted, "[f]or professionals to diagnose -- and for the law then to determine -- whether an intellectual disability exists once the SEM applies and the individual's IQ score is 75 or below the inquiry would consider factors indicating whether the person had deficits in adaptive functioning." Hall, 572 U.S. at ___, 134 S.Ct. at 1996. In other words,

"an individual with an IQ test score 'between 70 and 75 or lower,' Atkins, [536 U.S.] at 309 n.5, may show intellectual disability by presenting additional evidence regarding difficulties in adaptive functioning." 572 U.S. at ___, 134 S.Ct. at 2000. The Court concluded that

> "when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits.
>
> "It is not sound to view a single factor as dispositive of a conjunctive and interrelated assessment. See DSM-5, at 37 ('[A] person with an IQ score above 70 may have such severe adaptive behavior problems ... that the person's actual functioning is comparable to that of individuals with a lower IQ score.')."

572 U.S. at ___, 134 S.Ct. at 2001.[7] See also Brumfield v. Cain, ___ U.S. ___, ___, 135 S.Ct. 2269, 2278 (2015) (holding

[7]In a two-sentence passing argument in its brief on appeal, the State asserts that Hall, decided in 2014, does not apply retroactively to cases on collateral review. In support of its position, the State relies on In re Henry, 757 F.3d 1151, 1158 (11th Cir. 2014), in which the United States Court of Appeals for the Eleventh Circuit held that Hall "announce[d] a new rule of constitutional law," but held that the new rule does not apply retroactively on collateral review for purposes of 28 U.S.C. § 2244(b). We disagree with the Eleventh Circuit's characterization of Hall as a new rule of constitutional law. We view Hall, not as a new rule of constitutional law, but simply as an application of existing law, i.e., Atkins, to a specific set of facts.

that the petitioner was entitled to a hearing on his intellectual-disability claim because, when accounting for the SEM, his IQ score of 75 was "squarely in the range of potential intellectual disability").

Shortly after Atkins was first released, the Alabama Supreme Court adopted "the broadest definition" of intellectual disability based on "[t]hose states with statutes prohibiting the execution of" intellectually disabled defendants. Ex parte Perkins, 851 So. 2d 453, 456 (Ala. 2002). The Court explained:

> "Those states with statutes prohibiting the execution of a mentally retarded defendant require that a defendant, to be considered mentally retarded, must have significantly subaverage intellectual functioning (an IQ of 70 or below), and significant or substantial deficits in adaptive behavior. Additionally, these problems must have manifested themselves during the developmental period (i.e., before the defendant reached age 18)."

Ex parte Perkins, 851 So. 2d at 456.

Later, in Smith v. State, [Ms. 1060427, May 25, 2007] ___ So. 3d ___ (Ala. 2007), the Alabama Supreme Court reiterated and clarified Alabama's definition of intellectual disability:

> "In Ex parte Perkins, [851 So. 2d 453 (Ala. 2002),] we concluded that the 'broadest' definition of mental retardation consists of the following three factors: (1) significantly subaverage

intellectual functioning (i.e., an IQ of 70 or below); (2) significant or substantial deficits in adaptive behavior; and (3) the manifestation of these problems during the defendant's developmental period (i.e., before the defendant reached age 18). 851 So. 2d at 456. All three factors must be met in order for a person to be classified as mentally retarded for purposes of an Atkins claim. Implicit in the definition is that the subaverage intellectual functioning and the deficits in adaptive behavior must be present at the time the crime was committed as well as having manifested themselves before age 18. This conclusion finds support in examining the facts we found relevant in Ex parte Perkins and Ex parte Smith[, [Ms. 1010267, March 14, 2003] ___ So. 3d ___ (Ala. 2003),] and finds further support in the Atkins decision itself, in which the United States Supreme Court noted: 'The American Association on Mental Retardation (AAMR) defines mental retardation as follows: "Mental retardation refers to substantial limitations in present functioning."' 536 U.S. at 308 n.3, 122 S.Ct. 2242 (second emphasis added). Therefore, in order for an offender to be considered mentally retarded in the Atkins context, the offender must currently exhibit subaverage intellectual functioning, currently exhibit deficits in adaptive behavior, and these problems must have manifested themselves before the age of 18.

"The definition set forth in Ex parte Perkins is in accordance with the definitions set forth in the statutes of other states and with recognized clinical definitions, including those found in the American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (4th ed. 1994). The Manual of Mental Disorders lists four degrees of mental retardation: mild, moderate, severe, and profound. Id. at 40-41. All four degrees of mental retardation require that all three prongs of the Ex parte Perkins test be satisfied before an individual can be diagnosed as mentally

> retarded; thus, if the defendant proves that he or she suffers any degree of mental retardation, the defendant is ineligible for the death penalty. However, a classification of 'borderline intellectual functioning' describes an intelligence level that is higher than mental retardation, id. at 45 and, thus, does not render a person ineligible for the death penalty."

___ So. 3d at ___ (emphasis added).

The Alabama Supreme Court's definition of intellectual disability adopted in Ex parte Perkins comports with both Atkins and Hall, supra. Although the definition references an IQ score of 70, that referenced score is not a strict cutoff for intellectual disability, and Alabama does not preclude a court's consideration of the SEM when considering a person's IQ score. See Lane v. State, [Ms. CR-10-1343, April 29, 2016] ___ So. 3d ___ (Ala. Crim. App. 2016) (opinion after remand by the United States Supreme Court). Nor does Alabama preclude a person from presenting additional evidence regarding intellectual disability merely because that person attained an IQ score above 70. Indeed, this Court, subsequent to Ex parte Perkins, twice recognized that a person may be intellectually disabled even if that person attains an IQ score above 70 on a test, see Jackson v. State, 963 So. 2d 150 (Ala. Crim. App. 2006) (holding that Rule 32 petitioner was intellectually

disabled even though he achieved a score above 70 on one of four IQ tests he had taken), and Tarver v. State, 940 So. 2d 312, 318 (Ala. Crim. App. 2004) (remanding for a hearing to determine intellectual disability where record indicated that Rule 32 petitioner had IQ scores of 76, 72, and 61), and we three times recognized the SEM in evaluating an Atkins claim. See Smith v. State, 112 So. 3d 1108 (Ala. Crim. App. 2012); Byrd v. State, 78 So. 3d 445 (Ala. Crim. App. 2009); and Brown v. State, 982 So. 2d 565 (Ala. Crim. App. 2006). Additionally, in Ex parte Smith, [Ms. 1010267, March 14, 2003] ___ So. 3d ___, ___ (Ala. 2003), the Alabama Supreme Court noted that an IQ score of 72 "seriously undermines any conclusion that [a person] suffers from significantly subaverage intellectual functioning as contemplated under even the broadest definitions," but it did not hold that an IQ score of 72 precludes a finding that a person suffers from significantly subaverage intellectual functioning or precludes a finding of intellectual disability. Both this Court's and the Alabama Supreme Court's post-Atkins opinions make clear that a court should look at all relevant evidence in assessing an intellectual-disability claim and that no one piece of

evidence, such as an IQ test score, is conclusive as to intellectual disability.[8]

At the evidentiary hearing, Reeves introduced a plethora of records from his childhood and adolescent years, including school records, medical records, mental-health records, juvenile-court records, Department of Youth Services records, and county-health-department records. Those records reflect that Reeves was habitually truant and engaged in defiant and aggressive behavior in school, that he had a lengthy criminal history, and that he had been committed to the Department of Youth Services. The records further reflect that Reeves began

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[8]Although in Hall the United States Supreme Court cited Alabama as a state that "also may use a strict IQ score cutoff at 70," 572 U.S. at ___, 134 S.Ct. at 1996 (emphasis added), it did so based on a single comment by this Court in Smith v. State, 71 So. 3d 12, 20 (Ala. Crim. App. 2008), that the Alabama Supreme Court's definition of intellectual disability did not include consideration of the SEM. However, this Court held in Smith that the petitioner had failed to plead his claim of intellectual disability, and our statement that consideration of the SEM was precluded was entirely dicta. In any event, this Court recently recognized in Lane v. State, [Ms. CR-10-1343, April 29, 2016] ___ So. 3d ___ (Ala. Crim. App. 2016) (opinion after remand by the United States Supreme Court), that this Court's statement in Smith was not supported by the Alabama Supreme Court's post-Atkins opinions and was erroneous, and we overruled Smith "[t]o the extent that Smith ... precludes a trial court from considering a margin of error or SEM when evaluating a defendant's IQ test score for purposes of an Atkins claim." ___ So. 3d at ___.

mental-health treatment in 1986, when he was 8 years old. Reeves was initially diagnosed with attention deficit disorder with hyperactivity and was later also diagnosed with conduct disorder. Nonetheless, Reeves was described as "extremely goal-directed." (C. 1556.) When Reeves began treatment, his intelligence level was "estimated to be low average range." (C. 1515.) Two years later, "it [wa]s estimated that his intelligence is somewhat below average, but not within the [intellectual-disability] range." (C. 1543.)

The records further reflect that Reeves had to repeat the first, third, and fourth grades and that he was "socially" promoted to the seventh grade when he was 14 years old based only on his "level of maturity." (C. 1688.) However, the records indicate that although Reeves failed the first grade, when he repeated that grade, he got A's and B's and made the honor roll. (C. 1513.) Additionally, Reeves's mother reported that when he was 11 years old, Reeves was tested for placement into special-education classes, but that he "did not qualify." (C. 1543.) Reeves was later placed in special-education classes for emotional conflict. When he was 14 years old, Reeves was administered the Wechsler Intelligence

Scale for Children, Revised ("WISC-R"), and he attained a verbal IQ score of 75, a performance IQ score of 74, and a full-scale IQ score of 73. At that time, Reeves was classified as being in the borderline range of intellectual functioning, but was described as having "severe deficiencies in non-verbal social intelligence skills and his ability to see consequences." (C. 1590.) Reeves was subsequently expelled from school for behavioral reasons.

Reeves also presented testimony from John R. Goff, a neuropsychologist who evaluated Reeves for purposes of the postconviction proceedings to determine whether Reeves was intellectually disabled. As part of his evaluation, Dr. Goff examined Reeves's childhood and adolescent records and administered a battery of tests to Reeves. First, Dr. Goff administered the Wechsler Adult Intelligence Scale, Third Edition ("WAIS-III"), on which Reeves attained a verbal IQ score of 71, a performance IQ score of 76, and a full-scale IQ score of 71.

However, Dr. Goff stated that Reeves's full-scale IQ score of 71 should be adjusted downward for the SEM, which he initially said was plus or minus 2 points but later said on

cross-examination was plus or minus 5 points, and for the "Flynn Effect." Dr. Goff explained that the first requirement for a diagnosis of intellectual disability is significantly subaverage intellectual functioning, which generally requires the person to have an IQ of approximately 70 or below. However, Dr. Goff said that research had shown that scores on IQ tests tend to get higher year after year by approximately 0.3 points per year. According to Dr. Goff, this increase in scores, known as the "Flynn Effect," requires that the IQ test be "normed" periodically so that the mean score on the test stays the same. Dr. Goff testified that the WAIS-III was last "normed" in 1996, 10 years before he administered the test to Reeves. According to Goff, the "Flynn Effect" is recognized as valid and requires that 0.3 points be deducted from the full-scale IQ score achieved on an IQ test for each year since the test was last normed.

Reeves's "adjusted" full-scale IQ score on the WAIS-III, Dr. Goff said, was 66. To reach this conclusion, Dr. Goff subtracted three points for the "Flynn Effect" and subtracted an additional two points for the SEM. However, Dr. Goff said that for purposes of diagnosing Reeves as intellectually

disabled "[i]t doesn't matter" whether his full-scale IQ score was adjusted "because the criteria is that the IQ score has to be around 70 [and] he qualifies because 71 is around 70."[9] (R. 43.) Dr. Goff also testified that Reeves's full-scale IQ score of 73 on the WISC-R that was administered to him in 1992, if adjusted solely for the "Flynn Effect," would have been 67.6. Dr. Goff testified that Reeves's IQ score in 1992 was "statistically identical" to his IQ score in 2006. (R. 45.) Additionally, Dr. Goff said, Dr. Kathy Ronan, who had evaluated Reeves in 1997 before Reeves's trial to determine Reeves's competency to stand trial and his mental state at the time of the offense, had administered the verbal portion of the Wechsler Adult Intelligence Scale, Revised ("WAIS-R"), the predecessor to the WAIS-III, and that Reeves had achieved a verbal IQ score of 74 at that time. Dr. Goff said that if that score were adjusted for the "Flynn Effect," it would be 69.2.

On cross-examination, Dr. Goff admitted that an article had been published in 2006, the year the evidentiary hearing

[9]We note that, in his written report, Dr. Goff stated that Reeves's full-scale IQ score of 71 placed him "within the borderline range of psychometric intelligence." (C. 699.)

was held, by Dr. James Flynn, the psychologist after whom the "Flynn Effect" was named, in which Dr. Flynn admitted that the "Flynn Effect" had not, in fact, been generally accepted as scientifically valid. Dr. Goff also admitted on cross-examination that he did not begin adjusting IQ scores for the "Flynn Effect" until approximately a year and a half before the evidentiary hearing, even though the first article about the phenomenon was published in 1984, some 22 years before the hearing. He also admitted that the "scoring manual" for the WAIS-III does not require the use of the "Flynn Effect" to get an accurate IQ score, and that the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition ("DSM-IV") does not mention the "Flynn Effect"; the DSM-IV mentions only the SEM of plus or minus five points. Dr. Goff also said that he would not have adjusted Reeves's IQ score for the "Flynn Effect" if he had evaluated Reeves in 1997, before Reeves's trial, but he maintained that he would still have concluded that Reeves was intellectually disabled. Without the "Flynn Effect," but considering the SEM, Dr. Goff said, Reeves's full-scale IQ score would fall between 66 and 76. Finally, Dr. Goff stated that Reeves would not qualify to be

institutionalized for intellectual disability based on his IQ scores, although Reeves "might qualify" for placement in a group home for the intellectually disabled. (R. 85.)

Dr. Goff testified that he also administered two tests to Reeves to determine whether he was malingering on the IQ test -- the "Test of Malingered Memory" and the "21-Item Test." (R. 48.) Dr. Goff said that these tests indicated that Reeves was not malingering, but "was putting forth a genuine effort." (R. 49.)

Dr. Goff also administered a portion of the Halstead-Reitan Neuropsychological Test battery, which assesses a person's neuropsychological functioning and cognitive abilities. Dr. Goff said that Reeves scored poorly on those tests and that Reeves did not even complete one of the tests because "[h]alfway through ... he had made enough errors so that it wasn't necessary to continue the test because we had come to the conclusion that he couldn't do it." (R. 39.) Dr. Goff said that Reeves's performance on the Halstead-Reitan tests was "not inconsistent with" and "would tend to" support a conclusion that Reeves was intellectually disabled. (R. 40.)

Dr. Goff further testified that he administered "the abbreviated version of the second edition of the Wechsler Individual Achievement Test," which assesses functional academics, one of the areas of adaptive functioning considered in evaluating whether someone is intellectually disabled. (R. 37.) Dr. Goff stated that this test indicated that Reeves could read at a third-grade level, that he could do math at a fourth-grade level, and that he could spell at a fifth-grade level, thus showing a deficit in functional academics. Dr. Goff described Reeves as illiterate because Reeves could not read at a fifth-grade level. Dr. Goff stated that Reeves was able to do basic multiplication and two-digit subtraction and addition, but stated that he could not do multi-digit multiplication, use decimals, or do division. When questioned by the circuit court, Dr. Goff said that generally a person with a low IQ will also have deficits in functional academics. However, Dr. Goff said, most mildly intellectually disabled people can learn to read at about a fifth- or sixth-grade level and that that level of reading would not qualify as a significant deficit in functional academics.

Dr. Goff testified that another test for adaptive functioning is the Adaptive Behavior Assessment System Test ("ABAS test"), which Dr. Goff said, is administered not to the individual being evaluated but to someone who is close to and familiar with the individual being evaluated. The ABAS test is "normed against the general population" to determine how a person's abilities compare to the general population, as opposed to just the intellectually disabled population. (R. 59.) Dr. Goff administered this test to Beverly Seroy, who appears to have been the former stepmother of Reeves's brother, Julius, and with whom Reeves had lived off and on for a period of time before the murder. Dr. Goff testified that he interviewed Seroy for 45 minutes before administering the test to her to determine whether she knew Reeves well enough to complete the test. Dr. Goff said that Seroy had told him that "she thought she knew [Reeves] very well." (R. 62.) Dr. Goff also said that Seroy was able to provide him with "some historical information" about Reeves. (R. 62.) Thus, Dr. Goff concluded, Seroy was an appropriate person to whom to

administer the ABAS test.[10] Dr. Goff further testified that he did not administer the ABAS test to Reeves's mother because (1) he did not know how to contact her; (2) he had been told that she was mentally ill; and (3) mothers are "not necessarily" the best people to administer the test to because, he said, they either tend to "overestimate the capacities of their offspring" or tend to "underestimate the capacities of their offspring." (R. 70.) When questioned by the circuit court about the ABAS test, which indicated that Seroy had "simply guessed" on 19 of the 24 questions regarding the "work" area of adaptive functioning, Dr. Goff stated that Seroy's guessing "does cast some doubt as to the validity of that particular finding," i.e., the finding by Dr. Goff that Reeves had significant deficits in the work area of adaptive functioning. (R. 71.)

Dr. Goff testified that the results of the ABAS test indicated that Reeves had significant deficits in the following areas of adaptive functioning: health and safety,

[10]In contrast, in his written report, Dr. Goff stated that Seroy "was not present for the most part during [Reeves's] formative years" and "[i]t was, therefore, necessary to obtain a substantial amount of information from [Reeves] and from the records in regard to the history." (C. 697.)

which Dr. Goff described as whether a person looks both ways before crossing the street, whether a person knows how to get to a hospital if necessary, and whether a person can take care of personal health needs, such as brushing teeth, taking medications, and getting an annual physical; self-care, which Dr. Goff said overlaps with health and safety, but also includes such things as whether the person can prepare food, can pay the bills, or can get a haircut when necessary without being told; self-direction; functional academics; leisure activities, which Dr. Goff described as how a person spends his or her free time, i.e., whether the person spends it productively or in goal-directed activities or whether the person "just kind of like hang[s] out and do[esn't] ever do anything in [his or her] leisure time activities" (R. 57); and work, which Dr. Goff described as whether the person has a job, whether the person arrives on time to the job, and whether the person gets along with coworkers. Dr. Goff's written report indicates that Reeves scored in the 16th percentile in the area of communication; in the 9th percentile in the areas of community use and home living; in the 5th percentile in the areas of functional academics, self-

direction, leisure, and social skills; in the 4th percentile in the area of work; and in the 2nd percentile in the areas of health and safety and self-care. (C. 701.) Dr. Goff admitted on cross-examination that he did not consider Reeves's actions surrounding the murder in assessing Reeves's adaptive functioning; Dr. Goff said that Reeves's actions surrounding the murder were not relevant to determining whether Reeves was intellectually disabled. Dr. Goff also admitted on cross-examination that it was "not surprising" that Reeves's adaptive functioning was "low" because, he said, "[m]ost people in prison have low adaptive skills." (R. 88.)

Based on Reeves's "adjusted" IQ scores, the results of the ABAS test, and all the other information before him, Dr. Goff concluded that Reeves suffered from significantly subaverage intellectual functioning and significant deficits in multiple areas of adaptive functioning and that both manifested themselves before Reeves was 18 years old. Therefore, Dr. Goff concluded that Reeves was intellectually disabled.

Reeves also presented testimony from Karen Salekin, a forensic and developmental psychologist, who conducted a

mitigation investigation for purposes of the postconviction proceedings. Dr. Salekin's testimony centered around her investigation of mitigating evidence, specifically, her assessment of risk factors in Reeves's life -- i.e., factors that negatively influenced Reeves's development -- and protective factors in Reeves's life -- i.e., factors that positively influenced Reeves's development. The bulk of that testimony need not be repeated for purposes of this issue. Pertinent to Reeves's intellectual-disability claim, Dr. Salekin testified that Reeves's school records indicated that he had struggled in school from an early age and that he had "lower intelligence." (R. 179.) However, she said that Reeves's largely "untreated" attention-deficit disorder with hyperactivity contributed to his struggles in school. (R. 179.) Dr. Salekin also testified that Reeves had attained a full-scale IQ score of 73 in 1992. She concurred with Dr. Goff that the "Flynn Effect" is recognized as valid and requires that IQ scores be adjusted downward.

Dr. Salekin further testified that Reeves's brother, Julius, had had a negative impact on Reeves, and that, although younger than Reeves, Julius was the leader of the

two. Dr. Salekin stated that her investigation revealed that Reeves was kind and considerate and that he could follow directions when he was not around Julius and that it was only when he was around Julius that his behavior deteriorated. For example, Dr. Salekin testified that Jerry Ellis had employed Reeves at his construction company for approximately three months around the time of the crime. Dr. Salekin said that Ellis reported that Reeves was a good employee -- Reeves arrived at work on time, was responsive to directions, was motivated, had a "really good work ethic," and "was responsible." (R. 140.) However, Reeves was employed by Ellis only during the time Julius was in a juvenile-detention facility. Dr. Salekin said that once Julius was released from juvenile detention, Reeves never went back to work. Dr. Salekin also testified that her investigation revealed that Reeves lived "intermittently" with Beverly Seroy because his mother's house was too crowded. (R. 193.) Dr. Salekin said that Seroy provided Reeves with structure when he lived with her, requiring that Reeves obey the rules, do his homework, do chores, and abide by a curfew. Dr. Salekin said that Seroy reported that Reeves did well when he lived with her, often

helping her take care of her own children, and that Seroy "trusted [Reeves] implicitly" to babysit her children. (R. 194.) At one point, Dr. Salekin said, Seroy even hired a tutor to help Reeves with his schoolwork and would drive Reeves to the library so that he could earn his GED.[11]

In rebuttal, the State called Glen David King, a clinical and forensic psychologist who also evaluated Reeves for the postconviction proceedings to determine whether Reeves was intellectually disabled. Dr. King, like Dr. Goff, had looked at various records relating to Reeves and administered a battery of tests to Reeves. Dr. King also had looked at the testimony of Reeves's mother during Reeves's trial and at Dr. Goff's data. Dr. King testified that he administered to Reeves the WAIS-III and that Reeves attained a verbal IQ score of 69, a performance IQ score of 73, and a full-scale IQ score of 68. Dr. King described the "Flynn Effect" as "a theoretical position" that there is "an increase in performance" on IQ tests "such that IQ scores seem to rise gradually over a period of time." (R. 242.) However, Dr.

[11]No evidence was presented that Reeves, in fact, earned his GED.

King said that the "Flynn Effect" is not required to be taken into account when evaluating someone for intellectual disability and that the "Flynn Effect" is "not settled" in the "psychological community." (R. 244-45.)

Dr. King also administered the Wide Range Achievement Test to determine Reeves's reading, spelling, and math abilities. Dr. King said that the test indicated that Reeves could read at a fifth-grade level, that he could spell at a fifth-grade level, and that he could do arithmetic at a fourth-grade level. With respect to arithmetic, Dr. King said, Reeves was able to do addition, subtraction, multiplication, and simple division. Dr. King said that Reeves's scores on the achievement test were "higher than ordinarily would be predicted by the IQ test" he had administered to Reeves. (R. 224.) In other words, Reeves's achievement-test scores "indicate[d] a level of functioning higher than the IQ scores actually indicated." (R. 224.) Dr. King said that because of the discrepancy between Reeves's scores on the IQ test and the achievement test, those scores were not adequate, by themselves, for him to reach a conclusion as to whether Reeves was intellectually disabled.

Dr. King also administered all but one of the tests that are included in the Halstead-Reitan Neuropsychological Test battery.[12] The Halstead-Reitan tests, Dr. King said, are used to determine if a person has any impairment in brain function. Dr. King said that Reeves had no impairment in "sensory perceptional functioning," which he said indicates whether a person is properly receiving external stimuli. (R. 236.) Dr. King said that Reeves had some impairment in his motor functioning. Although he had "good motor strength in his upper limb[s]," Reeves had impairment in fine motor coordination, such as tapping his fingers. (R. 237.) Dr. King stated that he could not explain "exactly why" Reeves had impairment in fine motor coordination, although sometimes deficits in this test will appear when the test is administered to a person with lower IQ. With respect to attention, concentration, and memory, Dr. King testified that Reeves had good attention and concentration, but that he scored "below average" with respect to memory. (R. 239.) Nonetheless, Dr. King said, Reeves was able to recall in

[12]Dr. King said that he did not administer the tactile-form-recognition test.

"fairly good detail ... historical events such as where he went to school and what happened when and who represented him at trial and things of that nature." (R. 239.) With respect to "language skills," Dr. King said, Reeves was "below average." (R. 240.) With respect to "visual spacial skills," which Dr. King described as "[t]he ability to copy designs," Dr. King testified that Reeves had "some impairment." (R. 240.) Specifically, Dr. King said that Reeves was "actually able to copy designs very accurately most of the time [but he had] problems with more complex designs." (R. 240-41.) As for "reasoning and logical analysis," which Dr. King described as "higher cortical functioning, ability to engage in abstract reasoning, concept formation, problem solving, taking new information and being able to apply it to solve problems," Reeves "performed well below average." (R. 241.) Dr. King stated that this indicated only that Reeves was "slower to learn new things," not that he "can't learn," and that, in his opinion, Reeves had "some impairment" in this area. (R. 241.) Dr. King testified that Reeves's results on the Halstead-Reitan tests were consistent with Reeves's being in the

borderline range of intellectual functioning, as opposed to the intellectual-disability range of functioning.

Dr. King also administered to Reeves the Adaptive Behavior Scale, Residential and Community, Second Edition ("ABS-RC-II"). Dr. King stated that this test is one of the tests recommended by the American Association on Intellectual and Developmental Disabilities for measuring adaptive functioning. The test measures skill level in several different "domains." (R. 226.) To score the test, Dr. King said, the test giver uses information provided by the test subject, the test giver's observations, and information from other individuals who know the test subject. Dr. King stated that the ABS-RC-II is "normed" or scored, not against the population as a whole, but against those in the borderline range of intellectual functioning and those who are intellectually disabled. Dr. King said that this is because "the AAMR has taken the position that in order to diagnose somebody as mentally retarded, their adaptive abilities have to be substantially below that particular group for which [the test] is normed." (R. 267.) However, on cross-examination, Dr. King conceded that the Mental Retardation Definition

Classification and Systems of Support, 10th edition, a text published by the American Association on Intellectual and Developmental Disabilities, states: "For diagnosis, significant limitations in adaptive behaviors should be established through the use of standardized measures normed on the general population including people with disabilities and people without disabilities." (R. 274.)

Dr. King obtained scores on the ABS-RC-II from Reeves in 10 different "domains" of adaptive functioning. Dr. King testified that Reeves scored in the 99th percentile in the domain of independent functioning, which Dr. King described as "behaviors that have to do with things like use of table utensils, personal hygiene, being able to dress oneself, and a sense of direction, for example, use of transportation," essentially things "that an individual who can function independently would have to engage in every day in order to take care of themselves." (R. 227.) Reeves scored in the 98th percentile in the domain of physical development, which Dr. King said simply examines whether a person has any physical disability. In the numbers and time domain, Reeves also scored in the 98th percentile. Reeves was able to tell

time and do addition, subtraction and multiplication. As noted previously, Dr. King also testified that Reeves was able to do simple division.

In the domain of language development, Reeves scored in the 84th percentile. Dr. King said that Reeves has much better verbal communication than written communication, but that Reeves was nonetheless able "at least to get his idea across" in written form. (R. 229.) For example, Dr. King cited a letter Reeves had written in which Reeves had indicated that he was not interested in going to school because he could make more money selling drugs. Dr. King stated that, although "[t]he syntax of the letter was not really very good," Reeves was nonetheless able to get his "message across" in the letter. (R. 229.)

Reeves also scored in the 84th percentile in the responsibility and socialization domains. The responsibility domain, Dr. King said, includes such things as "[t]aking care of personal belongings, general responsibility, personal responsibility, like maintaining self control, understanding concepts of being on time." (R. 232.) Socialization, Dr. King said, included such things as "[c]ooperation,

consideration for others, awareness of others, interaction with others, participation in group activities." (R. 233.) Dr. King also said that in the many hours he spent with Reeves, Reeves was "quite cooperative and easy to get along with." (R. 233.)

Reeves scored in the 63rd percentile in the domain of economic activity, which "has to do with the handling of money, banking activities, budgeting, being able to run errands, purchasing things, being able to use shopping resources." (R. 228.) With respect to this domain, Dr. King said that Reeves was able to handle his own money, to pay bills, and to purchase personal items, but that Reeves had never used a credit card.

In the domestic-activity domain, Reeves scored in the 25th percentile. Dr. King said the domestic-activity domain includes such things a "room cleaning, doing laundry, table setting, food preparation, table clearing." (R. 230.) Dr. King said that, based on all the information he had, Reeves had never been required to do any type of domestic activity growing up and had been incarcerated since he was 18 years old. Therefore, Dr. King said, "he scored very low on those

kinds of activities because I couldn't in good conscience rate him highly on those things. I didn't have any data to support it." (R. 230.)

Reeves also scored in the 25th percentile in the domains of prevocational/vocational activity and self-direction. Prevocational/vocational activity, Dr. King said, "has to do with job complexity, work, school, job performance and work school habits." (R. 230.) Dr. King said that Reeves scored low in this domain because "[h]e did not get to the age where he might be able to master use of complex job tools or equipment" and because school records indicated that Reeves often missed school and had "pretty poor school habits." (R. 230-31.)

Self-direction, Dr. King said, "has to do with showing initiative, attention, persistence and directing one's own activities." (R. 231.) Dr. King said that he scored Reeves low in this domain but that since the testing, he had had the opportunity to speak with Detective Pat Grindle, an officer with the Selma Police Department, who had known Reeves "quite well" since Reeves was about nine years old. (R. 231.) Dr. King said that Det. Grindle told him that from an early age,

Reeves "was involved in a lot of drug activity and was actually directing the behaviors and activities of others in this drug related activity." (R. 231-32.) The degree of Reeves's involvement in drug activity, including not only what Det. Grindle reported but also Reeves's admission to Dr. King that he made between $1500 and $2000 a week selling drugs and was able to purchase his own car, Dr. King said, "would indicate much more self-direction than the way that I rated him." (R. 232.)

Based on his testing of Reeves and all the other information before him, Dr. King concluded that Reeves was in the borderline range of intellectual ability, but was not intellectually disabled.

On cross-examination, Dr. King admitted that he did not speak to any of Reeves's family members in conducting his evaluation. However, he said that there was information in many of the records he examined that was inconsistent with a finding of intellectual disability. Specifically, Dr. King said that Reeves's repeated IQ scores of over 70, and his placement in "emotional conflict classes" in school as opposed to placement in "special education for mental retardation

services" were inconsistent with a finding of intellectual disability. (R. 253.) Dr. King also stated on cross-examination that, based strictly on the IQ test he administered, Reeves satisfied the first prong for determining intellectual disability -- significantly subaverage intellectual functioning -- because Reeves achieved a full-scale IQ score of 68.

In its order, the circuit court found that Reeves had failed to satisfy his burden of proving that he was intellectually disabled. After summarizing the testimony presented at the hearing and the relevant law, the court explained:

> "There is no dispute that Reeves's IQ is sub-average. However, the expert testimony about Reeves's adaptive functioning was conflicting. Before addressing the merits of Reeves's mental retardation claim, this Court believes it should first discuss the conflicting expert testimony about the Flynn Effect.
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> "Dr. Goff and Dr. Salekin indicated that the Flynn Effect is accepted in the scientific community while Dr. King stated that it was not. The Court notes that Dr. Goff testified that Dr. Flynn published his findings in 1984. However, Dr. Goff did not start utilizing the Flynn Effect until 2005 -- years after the Flynn Effect came into existence. There was no dispute that neither the publishers of the IQ tests administered on Reeves nor the DSM-IV require that the Flynn Effect must be utilized in

determining a person's intellectual functioning. While there was testimony that appellate courts outside of Alabama have addressed the application of the Flynn Effect, this Court is unaware of any Alabama caselaw requiring use of the Flynn Effect.[13] It does not appear to this Court that the issue of whether the Flynn Effect should be considered when reviewing an individual's IQ score, at least in Alabama, is settled in the scientific community.

"Reeves achieved a full scale IQ score of 73 on a test administered when he was 14 years old. The full scale IQ score of 71 achieved by Reeves on the test administered by Dr. Goff is consistent with his prior IQ score of 73. See Ex parte Smith, [Ms. 1010267, March 14, 2003] ___ So. 3d ___ (Ala. 2003) (holding that a full scale IQ score of 72 'seriously undermines any conclusion that [a defendant] suffers from significantly sub-average intellectual functioning contemplated under even the broadest definitions [of mental retardation]'). Further, Reeves testified during a pretrial suppression hearing and the Court recalls nothing indicating that Reeves's intellectual functioning was significantly sub-average. See Clisby v. Alabama, 26 F.3d 1054, 1056 (llth Cir. 1994) (holding that Clisby's testimony gave the trial judge 'an opportunity to gauge roughly his intelligence'). This Court concludes that Reeves's intellectual functioning, while certainly sub-average, is not significantly sub-average.

"A review of the trial transcript indicates that Reeves does not suffer from significant or substantial limitations in his adaptive functioning. Testimony at trial indicated that Reeves was a gang member. Further, Reeves's mother testified that

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[13]The circuit court issued the order in 2009, years before this Court first addressed the "Flynn Effect."

while Reeves attended Job Corp he earned certificates in welding, brick masonry, and auto mechanics -- jobs that would require some degree of technical skill. Reeves's mother also testified that after he returned from Job Corp that Reeves worked for Jerry Ellis doing carpentry and roofing. While he worked for Mr. Ellis, Reeves would get up as early as 5:30 a.m. to be ready for work. It was only after his younger bother Julius returned from being confined in the juvenile facility at Mt. Meigs that Reeves chose to stop working for Mr. Ellis. According to his mother, Reeves went with Julius because he was afraid his brother would get shot. Reeves had extensive contact with juvenile authorities and with law enforcement prior to his arrest for the victim's murder. In a pretrial mental evaluation, Dr. Kathy Ronan diagnosed Reeves as suffering from Adaptive Paranoia -- that is, he adapted his behavior in order to survive in the dangerous environment in which he lived. Reeves reported to Dr. King that he sold drugs and sometimes made between $1500 and $2000 per week. Reeves used the money from his drug dealing to purchase clothes, food, and a car.

"The record also reveals that Reeves and his codefendants planned to commit a robbery. It is undisputed that Reeves actively participated in the planning of the robbery. There was no evidence presented at the evidentiary hearing suggesting that Reeves's participation in the planning of the robbery or the ultimate murder and robbery of the victim was the result of being coerced or threatened by another person. The evidence from trial, including the compelling testimony from one of Reeves's codefendants, proved beyond a reasonable [doubt] that it was Reeves, and Reeves alone, that decided to murder the victim. After he shot the victim, Reeves hid incriminating items of evidence, including the murder weapon and bloody clothes that he and his codefendants had worn. In addition, Reeves split the proceeds with his codefendants, was

> boastful to others about shooting the victim, and seemed proud that he might get a tear drop -- a gang symbol indicating that a gang member had killed another person. See Ex parte Smith, [___ So. 3d at ___] (wherein the court considered Smith's actions after committing murder as a factor in concluding that Smith 'does not suffer from deficits in his adaptive functioning').
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> "'In the context of an Atkins claim, the defendant has the burden of proving by a preponderance of the evidence that he or she is mentally retarded and thus ineligible for the death penalty.' Ex parte Smith, [Ms. 1060427, May 25, 2007] ___ So. 3d ___, ___ (Ala. 2007). After considering the evidence presented at Reeves's trial and the evidence presented at the evidentiary hearing, this Court concludes that Reeves failed to meet his burden of proving by a preponderance of evidence that he is mentally retarded and that his death sentence violates the Eighth Amendment. Rule 32.3, Ala. R. Crim. P. This claim for relief is, therefore, denied."

(C. 949-53.)

With respect to the intellectual-functioning prong of intellectual disability, Reeves contends that "[i]t is undisputed that [he] has significantly subaverage intellectual functioning" and that the circuit court erred in finding that he did not. (Reeves's brief, p. 41.) Specifically, Reeves asserts that the circuit court erred in rejecting the "Flynn Effect" and in not deducting points from his IQ scores to account for that phenomenon. Reeves also appears to assert

that the circuit court was required to find that he suffered from significantly subaverage intellectual functioning because, he says, all three of his IQ scores fell within the range of significantly subaverage intellectual functioning, i.e., between 70 and 75 or below, when considering the SEM, and one of his scores was below 70 even without consideration of the SEM.[14]

We reject Reeves's argument that the circuit court erred in rejecting the "Flynn Effect" and in not deducting points

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[14]Reeves also maintains in passing that consideration of the SEM makes his IQ scores "even lower" than reported. (Reeves's brief, p. 44.) However, contrary to Reeves's belief, consideration of the SEM would not make his IQ scores "even lower." In Byrd v. State, 78 So. 3d 445, 452 (Ala. Crim. App. 2009), this Court "reject[ed the appellant's] request that we presume that a capital defendant's IQ falls at the bottom of the range of the confidence interval or 'margin of error.'" See also Carroll v. State, [Ms. CR-12-0599, August 14, 2015] ___ So. 3d ___, ___ (Ala. Crim. App. 2015). Although Byrd was released long before the United States Supreme Court's opinion in Hall, nothing in Hall requires a court to presume that a person's IQ score falls in the bottom of the SEM of plus or minus five points. As noted above, in Hall, the Supreme Court merely recognized that the SEM is a fact that means an IQ score is not determinative of intellectual functioning and must be considered, not as a fixed number, but as a range. See Ledford v. Warden, Georgia Diagnostic & Classification Prison, [No. 14-15650, March 21, 2016] ___ F.3d ___, ___ (11th Cir. 2016) ("[T]he standard error of measurement is a bi-directional concept that does not carry with it a presumption that an individual's IQ falls to the bottom of his IQ range.").

from his IQ scores to account for that phenomenon. This Court has repeatedly held that a circuit court is not required to accept, consider, or apply the "Flynn Effect" in determining intellectual disability. See Carroll v. State, [Ms. CR-12-0599, August 14, 2015] ___ So. 3d ___, ___ (Ala. Crim. App. 2015) ("[T]he circuit court could have reasonably rejected the 'Flynn Effect.'"); Smith v. State, 112 So. 2d 1108, 1131 (Ala. Crim. App. 2012) ("[T]his Court has previously held on several occasions that a trial court need not accept the 'Flynn Effect' as binding, and that it has not been accepted as scientifically valid by all courts."); and Albarran v. State, 96 So. 3d 131, 200 (Ala. Crim. App. 2011) ("[T]he circuit court could have reasonably rejected the 'Flynn Effect.'"). As noted above, Dr. King testified that it is not required that the "Flynn Effect" be taken into account when evaluating someone for intellectual disability and that the "Flynn Effect" is "not settled" in the "psychological community." (R. 244-45.) Although Dr. Goff and Dr. Salekin both testified that the "Flynn Effect" is generally recognized as valid, Dr. Goff admitted that he did not use the "Flynn Effect" for over 20 years after it was first discovered. He also admitted that

Dr. Flynn himself, the psychologist who had discovered the "Flynn Effect," had stated in a recent article that the "Flynn Effect" had not, in fact, been generally accepted as valid. Finally, Dr. Goff admitted that the "scoring manual" for the WAIS-III does not require the use of the "Flynn effect" to get an accurate IQ score and that the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition ("DSM-IV") also does not mention the "Flynn Effect" or require its application to IQ scores. Therefore, the circuit court did not err in rejecting the "Flynn Effect" and in not deducting points from Reeves's IQ scores to account for that phenomenon.

We also reject Reeves's argument that the circuit court erred in not considering the SEM. Nothing in the circuit court's order indicates that the court did not consider the SEM in evaluating Reeves's claim. Although the circuit court did not specifically mention the SEM in its order, it did state that it had considered all the evidence presented at the evidentiary hearing and that evidence included testimony about the SEM.

We further reject Reeves's argument that the circuit court was required to find that he suffered from significantly

subaverage intellectual functioning because, he says, all of his IQ scores fell within the range of significantly subaverage intellectual functioning when the SEM is considered one of his IQ scores was below 70 even without consideration of the SEM. As noted above, in Hall, the United States Supreme Court recognized that an IQ score, alone, is not determinative of intellectual disability or even of the intellectual-functioning prong of intellectual disability. The Court explained that because of the imprecision in intelligence testing, an IQ score should be considered a range, not a fixed number. Subsequently, the United States Court of Appeals for the Fifth Circuit explained:

> "The consideration of SEM as discussed by the Supreme Court, however, is not a one-way ratchet. The imprecision of IQ testing not only provides that IQ scores above 70 but within the SEM do not conclusively establish a lack of significantly subaverage general intellectual functioning, but also that IQ scores below 70 but within the SEM do not conclusively establish the opposite. In other words, a sentencing court may find a defendant to have failed to meet the first prong of the AAMR's definition of intellectual disability even if his IQ score is below 70 so long as 70 is within the margin of error and other evidence presented provides sufficient evidence of his intellectual functioning."

Mays v. Stephens, 757 F.3d 211, 218 n.17 (5th Cir. 2014). The United States Court of Appeals for the Eleventh Circuit has similarly recognized that

> "[t]he standard error of measurement accounts for a margin of error both below and above the IQ test-taker's score. As the Fifth Circuit recently concluded, the U.S. Supreme Court's consideration of the standard error of measurement 'is not a one-way ratchet.' Mays v. Stephens, 757 F.3d 211, 218 n.17 (5th Cir. 2014). We agree with the Fifth Circuit that the standard error of measurement is merely a factor to consider when assessing an individual's intellectual functioning -- one that may benefit or hurt that individual's Atkins[v. Virginia, 536 U.S. 304 (2002),] claim, depending on the content and quality of expert testimony presented. Further, the standard error of measurement is a bi-directional concept that does not carry with it a presumption that an individual's IQ falls to the bottom of his IQ range.
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> "While Hall[v. Florida, 572 U.S. ___, 134 S.Ct. 1986 (2014),] requires lower courts at least to consider the standard error of measurement when evaluating intellectual functioning, it does not, as Ledford contends, require lower courts to find that an IQ score of 75 or below necessarily satisfies the significantly subaverage intellectual functioning prong. In fact, the Supreme Court steers us away from such rigid assertions by emphasizing that an IQ score represents a 'range, not a fixed number.' Hall, 572 U.S. at ___, 134 S.Ct. at 1999.
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> "A district court's actual application of the standard error of measurement -- i.e. whether the concept would make a finding of significantly subaverage intellectual function more likely, less likely, or have no effect on the court's determination -- is a matter of fact-finding

> informed by testimony from expert witnesses. See Connor [v. GDCP Warden], 784 F.3d [752,] 766 [(11th Cir. 2015)]; Thomas [v. Allen], 607 F.3d [749,] 758 [(11th Cir. 2010)]. So long as the district court's findings regarding how the standard error of measurement informs its ultimate intellectual functioning determination are plausible in light of the record evidence viewed in its entirety, there will be no clear error."

Ledford v. Warden, Georgia Diagnostic & Classification Prison, [No. 14-15650, March 21, 2016] ___ F.3d ___, ___ (11th Cir. 2016).

In this case, Reeves had full-scale IQ scores of 68, 71, and 73. Considering the SEM, these scores indicate that Reeves's IQ could be as low as 63 or as high as 78. Reeves's expert, Dr. Goff, concluded, based on Reeves's IQ scores as well as all other information before him, that Reeves suffered from significantly subaverage intellectual functioning. On the other hand, the State's expert, Dr. King, concluded, based on Reeves's IQ scores and all other information before him, that Reeves falls within the borderline range of intellectual functioning. The circuit court, after considering all the evidence presented at the hearing, and after observing Reeves when Reeves testified at a pretrial hearing, resolved the conflicting expert testimony as to Reeves's intellectual

functioning adversely to Reeves, finding that, although Reeves's intellectual functioning was subaverage, it was not significantly subaverage as required to meet the first prong of intellectual disability. "Conflicting evidence is always a question for the finder of fact to determine, and a verdict rendered thereon will not be disturbed on appeal." Padgett v. State, 668 So. 2d 78, 86 (Ala. Crim. App. 1995). There is ample evidence in the record to support the circuit court's finding and we will not disturb the circuit court's resolution of the conflicting expert testimony. Therefore, we find no abuse of discretion on the part of the circuit court in concluding that Reeves failed to prove by a preponderance of the evidence that he suffered from significantly subaverage intellectual functioning.

As for the adaptive-functioning prong of intellectual disability, Reeves contends that he "presented evidence of significant deficits in at least six areas of adaptive functioning and therefore [he] meets" the requirements for the second prong of intellectual disability -- significant deficits in at least two areas of adaptive functioning -- and that the circuit court erred in not so finding. (Reeves's

brief, p. 45.) Specifically, Reeves asserts that the circuit court "erroneously discounted Dr. Goff's findings by pointing to anecdotal tasks that Mr. Reeves can perform, such as his purported planning of the crime, his earning of Job Corps certificates in welding, brick masonry, and auto mechanics, his extremely brief construction employment, and his purported drug selling activities," none of which, Reeves claims, undermines or refutes Dr. Goff's opinion that Reeves suffers from significant deficits in multiple areas of adaptive functioning. (Reeves's brief, pp. 50-51.) At oral argument, Reeves further argued that even discounting Dr. Goff's testimony, Dr. King testified that on the ABS-RC-II test, Reeves scored in the 25th percentile in the prevocational/vocational, self-direction, and domestic-activity domains, thus conclusively establishing that Reeves suffered significant deficits in those three areas of adaptive functioning. Therefore, Reeves concludes, the circuit court was required to find that he suffered from significant deficits in at least two areas of adaptive functioning.

Reeves's arguments in this regard appear to be based solely on his scores on the ABAS test administered by Dr. Goff

and the ABS-RC-II test administered by Dr. King. However, contrary to Reeves's apparent belief, a circuit court is not required to find that a person suffers from significant deficits in adaptive functioning merely because that person's scores on a standardized test indicate such deficits. Just as an IQ test is necessarily imprecise and, therefore, not determinative of the intellectual-functioning prong of intellectual disability, standardized tests for adaptive functioning are also necessarily imprecise and, therefore, are not determinative of the adaptive-functioning prong of intellectual disability. Cf., United States v. Davis, 611 F. Supp. 2d 472, 493 (D. Maryland, 2009) (noting that "nearly all methods of assessing an individual's adaptive functioning -- particularly in a retroactive analysis -- are imperfect" and that, therefore, "the typical approach used in forensic assessments of adaptive functioning is to collect information from a multitude of sources and look for convergence of findings in order to confirm one's conclusions"); and Singleton v. Astrue, [No. 2:11CV512-CSC, February 29, 2012) (M.D. Ala. 2012) (not reported) (noting that scores on the ABAS-II test are not determinative as to adaptive functioning

for purposes of qualification for social security disability). Although standardized tests for adaptive functioning are certainly useful in assessing a person's adaptive functioning, a court should assess such test scores in light of the circumstances of each case and in light of all other relevant evidence regarding adaptive functioning, including the person's actions at the time of the crime.

In this case, the evidence regarding Reeves's adaptive functioning was conflicting. Although Reeves scored low in the domains of domestic activity, self-direction, and work on the ABS-RC-II test administered by Dr. King and in the areas of self-direction, work, leisure activities, health and safety, self-care, and functional academics on the ABAS test administered by Dr. Goff, thus indicating significant deficits in those areas of adaptive functioning, other evidence was presented that either called into question the validity of those scores and/or indicated that Reeves's deficits in those areas were not, in fact, <u>significant</u>.

For example, Dr. King testified that Reeves scored in the 25th percentile in the domain of domestic activity because Reeves had never been required to do any type of domestic

activity growing up and had been incarcerated since he was 18 years old. Dr. Goff testified that it is not unusual for someone who is incarcerated to have low adaptive functioning. Dr. King also testified that he would have scored Reeves higher in the self-direction domain if he had known at the time that he evaluated Reeves that, from an early age, Reeves had been "involved in a lot of drug activity and was actually directing the behaviors and activities of others in this drug related activity." (R. 231-32.) Additionally, Reeves was described in his juvenile mental-health records as "extremely goal-directed," even at a young age. (C. 1556.)

Dr. King further testified that he believed that Reeves's low score in the work domain was because Reeves "did not get to the age where he might be able to master use of complex job tools or equipment" before he went to prison, and because school records indicated that Reeves often missed school and had "pretty poor school habits." (R. 230-31.) Dr. Goff concurred, stating that Reeves's deficit in the work area "may be because he had a lack of opportunity." (R. 62.) Dr. Goff further testified that the validity of Reeves's low score in this area was questionable in light of the fact that Beverly

Seroy, the person to whom he administered the ABAS test, had simply guessed on the majority of questions in this area. Additionally, as the circuit court noted in its order, Reeves had obtained certificates in brick masonry, welding, and automobile mechanics, all of which require some level of technical skill, and the record indicates that Reeves held a construction job while his brother was incarcerated and that he was a good employee. Furthermore, the evidence indicated that Reeves's "poor school habits" were more a product of his defiant behavior in school than of any deficits in adaptive functioning.

Additionally, although Reeves scored low in the health and safety, self-care, and leisure-activity areas on the ABAS test administered by Dr. Goff, on the ABS-RC-II test administered by Dr. King, Reeves achieved the highest score possible in the domain of independent functioning, which included such things as self-care and health and safety, and Reeves also scored high in the domains of responsibility and socialization. Moreover, the evidence indicated that Reeves sold drugs to make money and that he used that money to buy

personal belongings for himself, including a car, and to help pay the household bills.

Finally, Reeves scored in the 5th percentile in the area of functional academics on the ABAS test administered by Dr. Goff, and Dr. Goff testified that Reeves was functionally illiterate and could read only at a third-grade level and, therefore, that Reeves suffered from a significant deficit in this area. However, Dr. Goff indicated that the ability to read at about a fifth- or sixth-grade level would not qualify as a significant deficit in functional academics. Dr. King testified that Reeves was able to read at a fifth-grade level, thus indicating that Reeves did not have a significant deficient in functional academics.

Simply put, the circuit court in this case was faced with conflicting evidence regarding Reeves's adaptive functioning, including conflicting expert testimony. Reeves's expert, Dr. Goff, testified that Reeves suffered from significant deficits in six areas of adaptive functioning. On the other hand, the State's expert, Dr. King, indicated that, although Reeves scored low on the ABS-RC-II test in three areas of adaptive functioning, those scores were questionable for various

reasons. It was for the circuit court to resolve the conflicting evidence and the conflicting expert testimony, and it obviously resolved the conflicts adversely to Reeves. In doing so, the court appropriately looked at evidence regarding Reeves's adaptive functioning other than the expert testimony -- such as Reeves's technical abilities in brick masonry, welding, and automobile mechanics; Reeves's ability to work construction and do so reliably when he was not around his brother, Julius; Reeves's participation in a drug-sale enterprise in which he was able to make thousands of dollars a week that he then used to purchase personal items and a car; and particularly Reeves's cold and calculated actions surrounding the murder, including planning the robbery with his codefendants, hiding incriminating evidence after he had shot the victim, splitting the proceeds of the robbery with his codefendants, and bragging about the murder, claiming that he would earn a "teardrop" – a gang tattoo indicating that a gang member had killed someone – for the murder See, e.g., Ex parte Smith, [Ms. 1080973, October 22, 2010] ___ So. 3d ___, ___ (Ala. 2010) ("We find especially persuasive Smith's behavior during the commission of these murders.") There is

ample evidence in the record to support the circuit court's finding that Reeves did not suffer from significant deficits in at least two areas of adaptive functioning, and we will not disturb the circuit court's resolution of the conflicting evidence. Therefore, we find no abuse of discretion on the part of the circuit court in finding that Reeves failed to prove by a preponderance of the evidence that he suffered from significant deficits in at least two areas of adaptive functioning.[15]

For these reasons, the circuit court properly denied Reeves's claim of intellectual disability.

III.

Reeves next contends that the circuit court erred in denying several of his claims of ineffective assistance of trial and appellate counsel.

> "'In order to prevail on a claim of ineffective assistance of counsel, a defendant must meet the two-pronged test articulated by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984):

[15]Because we find no error in the circuit court's findings regarding the first two prongs of intellectual disability, we need not examine the third prong -- whether the deficits manifested before the age of 18.

> "'"First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable."

"'466 U.S. at 687, 104 S.Ct. at 2064.

"'"The performance component outlined in Strickland is an objective one: that is, whether counsel's assistance, judged under 'prevailing professional norms,' was 'reasonable considering all the circumstances.'" Daniels v. State, 650 So. 2d 544, 552 (Ala. Cr. App. 1994), cert. denied, [514 U.S. 1024, 115 S.Ct. 1375, 131 L.Ed.2d 230 (1995)], quoting Strickland, 466 U.S. at 688, 104 S.Ct. at 2065. "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." Strickland, 466 U.S. at 690, 104 S.Ct. at 2066.

"'The claimant alleging ineffective assistance of counsel has the burden of showing that counsel's assistance was ineffective. Ex parte Baldwin, 456 So. 2d 129 (Ala. 1984), aff'd, 472 U.S. 372, 105 S.Ct. 2727, 86 L.Ed.2d 300 (1985). "Once a petitioner has identified the specific acts or omissions that he alleges were not the result of reasonable professional judgment on counsel's part, the court must determine whether those acts or omissions fall 'outside the wide range of professionally competent assistance.' [Strickland,] 466 U.S. at 690, 104 S.Ct. at 2066." Daniels, 650 So. 2d at 552. When reviewing a claim of ineffective assistance of counsel, this court indulges a strong presumption that counsel's conduct was appropriate and reasonable. Hallford v. State, 629 So. 2d 6 (Ala. Cr. App. 1992), cert. denied, 511 U.S. 1100, 114 S.Ct. 1870, 128 L.Ed.2d 491 (1994); Luke v. State, 484 So. 2d 531 (Ala. Cr. App. 1985). "This court must avoid using 'hindsight' to evaluate the performance of counsel. We must evaluate all the circumstances surrounding the case at the time of counsel's actions before determining whether counsel rendered ineffective assistance." Hallford, 629 So. 2d at 9. See also, e.g., Cartwright v. State, 645 So. 2d 326 (Ala. Cr. App. 1994).

> "'"Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved

> unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way."

"'Strickland, 466 U.S. at 689, 104 S.Ct. at 2065 (citations omitted). See Ex parte Lawley, 512 So. 2d 1370, 1372 (Ala. 1987).

> "'"Even if an attorney's performance is determined to be deficient, the petitioner is not entitled to relief unless he establishes 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.' [Strickland,] 466 U.S. at 694, 104 S.Ct. at 2068."

"'Daniels, 650 So.2d at 552.

> "'"When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer -- including an appellate court, to the extent it independently reweighs the evidence -- would have concluded that the balance of aggravating and mitigating circumstances did not warrant death."

"'Strickland, 466 U.S. at 697, 104 S.Ct. at 2069, quoted in Thompson v. State, 615 So. 2d 129, 132 (Ala. Cr. App. 1992), cert. denied, 510 U.S. 976, 114 S.Ct. 467, 126 L.Ed.2d 418 (1993).

> "'....'

"Bui v. State, 717 So. 2d 6, 12-13 (Ala. Cr. App. 1997), cert. denied, 717 So. 2d 6 (Ala. 1998)."

Dobyne v. State, 805 So. 2d 733, 742-44 (Ala. Crim. App. 2000), aff'd, 805 So. 2d 763 (Ala. 2001).

"The standards for determining whether appellate counsel was ineffective are the same as those for determining whether

trial counsel was ineffective." Jones v. State, 816 So. 2d 1067, 1071 (Ala. Crim. App. 2000), overruled on other grounds, Brown v. State, 903 So. 2d 159 (Ala. Crim. App. 2004). "The process of evaluating a case and selecting those issues on which the appellant is most likely to prevail has been described as the hallmark of effective appellate advocacy." Hamm v. State, 913 So. 2d 460, 491 (Ala. Crim. App. 2002). As this Court explained in Thomas v. State, 766 So. 2d 860 (Ala. Crim. App. 1998), aff'd, 766 So. 2d 975 (Ala. 2000), overruled on other grounds, Ex parte Taylor, 10 So. 3d 1075 (Ala. 2005):

> "As to claims of ineffective appellate counsel, an appellant has a clear right to effective assistance of counsel on first appeal. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). However, appellate counsel has no constitutional obligation to raise every nonfrivolous issue. Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). The United States Supreme Court has recognized that '[e]xperienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues.' Jones v. Barnes, 463 U.S. at 751-52, 103 S.Ct. 3308. Such a winnowing process 'far from being evidence of incompetence, is the hallmark of effective advocacy.' Smith v. Murray, 477 U.S. 527, 536, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986). Appellate counsel is presumed to exercise sound strategy in the selection of issues most likely to afford relief on appeal. Pruett v. Thompson, 996 F.2d 1560, 1568 (4th Cir. 1993), cert. denied, 510

> U.S. 984, 114 S.Ct. 487, 126 L.Ed.2d 437 (1993). One claiming ineffective appellate counsel must show prejudice, i.e., the reasonable probability that, but for counsel's errors, the petitioner would have prevailed on appeal. Miller v. Keeney, 882 F.2d 1428, 1434 and n.9 (9th Cir. 1989)."

766 So. 2d at 876.

Moreover, in reviewing claims of ineffective assistance of counsel, this Court need not consider both prongs of the Strickland test. See Thomas v. State, 511 So. 2d 248, 255 (Ala. Crim. App. 1987) ("In determining whether a defendant has established his burden of showing that his counsel was ineffective, we are not required to address both considerations of the Strickland v. Washington test if the defendant makes an insufficient showing on one of the prongs."). Because both prongs of the Strickland test must be satisfied to establish ineffective assistance of counsel, the failure to establish one of the prongs is a valid basis, in and of itself, to deny the claim. As the United States Supreme Court explained:

> "Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In

> particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed."

Strickland, 466 U.S. at 697.

In his petition, Reeves raised numerous claims of ineffective assistance of trial and appellate counsel; however, he does not pursue all of those claims in his brief on appeal. Those claims that Reeves raised in his petition but does not pursue on appeal are deemed abandoned and will not be considered by this Court. See Brownlee v. State, 666 So. 2d 91, 93 (Ala. Crim. App. 1995) ("We will not review issues not listed and argued in brief."). As for the ineffective-assistance-of-counsel claims that Reeves does pursue on appeal, the circuit court found that Reeves had failed to prove these claims by a preponderance of the evidence. We agree.

The record from Reeves's direct appeal indicates that attorneys Blanchard McLeod and Marvin Wiggins were initially appointed to represent Reeves. McLeod withdrew approximately

three months before trial, and Thomas Goggans was appointed as a replacement. Reeves was represented at trial by Goggans and Wiggins. Goggans continued to represent Reeves on appeal. At the Rule 32 evidentiary hearing, Reeves did not call McLeod, Goggans, or Wiggins to testify. In its order, the circuit court found that Reeves had failed to prove his claims of ineffective assistance of trial and appellate counsel, in part, because he had failed to call Goggans and Wiggins to testify at the evidentiary hearing. On appeal, Reeves argues that the circuit court erred in finding that his failure to call his attorneys to testify resulted in his failing to prove his ineffective-assistance-of-counsel claims because, he says, "there is no requirement that trial counsel testify." (Reeves's brief, p. 62.) Specifically, Reeves argues that because the Strickland test is an objective one, testimony from counsel is not necessary to prove any claim of ineffective assistance of counsel.

However, Reeves's argument fails to take into account the requirement that courts indulge a strong presumption that counsel acted reasonably, a presumption that must be overcome

by evidence to the contrary. In Broadnax v. State, 130 So. 3d 1232 (Ala. Crim. App. 2013), this Court stated:

> "It is extremely difficult, if not impossible, to prove a claim of ineffective assistance of counsel without questioning counsel about the specific claim, especially when the claim is based on specific actions, or inactions, of counsel that occurred outside the record. Indeed, 'trial counsel should ordinarily be afforded an opportunity to explain his actions before being denounced as ineffective.' Rylander v. State, 101 S.W.3d 107, 111 (Tex. Crim. App. 2003). This is so because it is presumed that counsel acted reasonably:
>
> > "'The presumption impacts on the burden of proof and continues throughout the case, not dropping out just because some conflicting evidence is introduced. "Counsel's competence ... is presumed, and the [petitioner] must rebut this presumption by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." Kimmelman v. Morrison, 477 U.S. 365, 106 S.Ct. 2574, 2588, 91 L.Ed.2d 305 (1986) (emphasis added) (citations omitted). An ambiguous or silent record is not sufficient to disprove the strong and continuing presumption. Therefore, "where the record is incomplete or unclear about [counsel]'s actions, we will presume that he did what he should have done, and that he exercised reasonable professional judgment." Williams [v. Head,] 185 F.3d [1223,] 1228 [(11th Cir. 1999)]; see also Waters [v. Thomas,] 46 F.3d [1506,] 1516 [(11th Cir. 1995)] (en banc) (noting that even though testimony at habeas evidentiary hearing was ambiguous, acts at trial

> indicate that counsel exercised sound professional judgment).'
>
> "Chandler v. United States, 218 F.3d 1305, 1314 n.15 (11th Cir. 2000). '"If the record is silent as to the reasoning behind counsel's actions, the presumption of effectiveness is sufficient to deny relief on [an] ineffective assistance of counsel claim."' Dunaway v. State, [Ms. CR-06-0996, December 18, 2009] ___ So. 3d ___, ___ (Ala. Crim. App. 2009) (quoting Howard v. State, 239 S.W.3d 359, 367 (Tex. App. 2007))."

130 So. 3d at 1255-56.

Subsequently, in Stallworth v. State, 171 So. 3d 53 (Ala. Crim. App. 2013) (opinion on return to remand), this Court explained:

> "Further, the presumption that counsel performed effectively '"is like the 'presumption of innocence' in a criminal trial,"' and the petitioner bears the burden of disproving that presumption. Hunt v. State, 940 So. 2d 1041, 1059 (Ala. Crim. App. 2005) (quoting Chandler v. United States, 218 F.3d 1305, 1314 n.15 (11th Cir. 2000) (en banc)). 'Never does the government acquire the burden to show competence, even when some evidence to the contrary might be offered by the petitioner.' Id. '"'An ambiguous or silent record is not sufficient to disprove the strong and continuing presumption [of effective representation]. Therefore, "where the record is incomplete or unclear about [counsel]'s actions, [a court] will presume that he did what he should have done, and that he exercised reasonable professional judgment."'"' Hunt, 940 So. 2d at 1070-71 (quoting Grayson v. Thompson, 257 F.3d 1194, 1218 (11th Cir. 2001), quoting in turn Chandler, 218 F.3d at 1314 n.15, quoting in turn Williams v. Head, 185 F.3d 1223, 1228 (11th Cir. 1999)). Thus, to

overcome the strong presumption of effectiveness, a Rule 32 petitioner must, at his evidentiary hearing, question trial counsel regarding his or her actions and reasoning. See, e.g., Broadnax v. State, 130 So. 3d 1232, 1255-56 (Ala. Crim. App. 2013) (recognizing that '[i]t is extremely difficult, if not impossible, to prove a claim of ineffective assistance of counsel without questioning counsel about the specific claim, especially when the claim is based on specific actions, or inactions, of counsel that occurred outside the record[, and holding that] circuit court correctly found that Broadnax, by failing to question his attorneys about this specific claim, failed to overcome the presumption that counsel acted reasonably'); Whitson v. State, 109 So. 3d 665, 676 (Ala. Crim. App. 2012) (holding that a petitioner failed to meet his burden of overcoming the presumption that counsel were effective because the petitioner failed to question appellate counsel regarding their reasoning); Brooks v. State, 929 So. 2d 491, 497 (Ala. Crim. App. 2005) (holding that a petitioner failed to meet his burden of overcoming the presumption that counsel were effective because the petitioner failed to question trial counsel regarding their reasoning); McGahee v. State, 885 So. 2d 191, 221-22 (Ala. Crim. App. 2003) ('[C]ounsel at the Rule 32 hearing did not ask trial counsel any questions about his reasons for not calling the additional witnesses to testify. Because he has failed to present any evidence about counsel's decisions, we view trial counsel's actions as strategic decisions, which are virtually unassailable.'); Williams v. Head, 185 F.3d at 1228; Adams v. Wainwright, 709 F.2d 1443, 1445-46 (11th Cir. 1983) ('[The petitioner] did not call trial counsel to testify ... [; therefore,] there is no basis in this record for finding that counsel did not sufficiently investigate [the petitioner's] background.'); Callahan v. Campbell, 427 F.3d 897, 933 (11th Cir. 2005) ('Because [trial counsel] passed away before the Rule 32 hearing, we have no evidence of what he did to prepare for the penalty

> phase of [the petitioner's] trial. In a situation like this, we will presume the attorney "did what he should have done, and that he exercised reasonable professional judgment."')."

171 So. 3d at 92-93 (emphasis added). See also Clark v. State, [Ms. CR-12-1965, March 13, 2015] ___ So. 3d ___ (Ala. Crim. App. 2015) (holding that Rule 32 petitioner had failed to prove that his appellate counsel was ineffective for not raising issues on appeal where the petitioner did not call his appellate counsel to testify at the Rule 32 evidentiary hearing regarding counsel's reasons for not raising those issues).

In this case, Reeves's failure to call his attorneys to testify is fatal to his claims of ineffective assistance of counsel. Reeves reasserts on appeal the following claims of ineffective assistance of trial and appellate counsel that he raised in his petition:

> (1) That his trial counsel were ineffective for not hiring Dr. Goff, or another neuropsychologist, to evaluate Reeves for intellectual disability and for not then presenting testimony from that expert during the penalty phase of the trial that Reeves was intellectually disabled in order to establish a mitigating circumstance;
>
> (2) That his trial counsel were ineffective for relying during the penalty phase of his trial on the testimony of Dr. Ronan, the court-appointed

psychologist who examined Reeves before trial to determine his competency to stand trial and his mental state at the time of the offense, to present mitigation evidence;

(3) That his trial counsel were ineffective for not objecting during the penalty phase of the trial to Dr. Ronan's testimony on cross-examination that Reeves was not intellectually disabled;

(4) That his trial counsel were ineffective for not conducting an adequate mitigation investigation and for not presenting what he claimed was substantial mitigation evidence during the penalty phase of the trial;

(5) That his trial counsel were ineffective for not objecting at trial to

(a) the prosecutor's allegedly urging the jury during closing arguments at the penalty phase of the trial to consider non-statutory aggravating circumstances to impose a death sentence;

(b) the prosecutor's introducing evidence and making argument during both the guilt and penalty phases of the trial that Reeves was involved in a gang;

(c) the prosecutor's allegedly referring to the jury's penalty-phase verdict as a recommendation; and

(d) the trial court's instructing the jury that its penalty-phase verdict was a recommendation; and

(6) That his appellate counsel was ineffective for not raising on appeal the following claims:

> (a) that the prosecutor improperly urged the jury during closing arguments at the penalty phase of the trial to consider nonstatutory aggravating circumstances to impose a death sentence;
>
> (b) that the prosecutor improperly introduced evidence and made argument during both the guilt and penalty phases of the trial that Reeves was involved in a gang;
>
> (c) that the prosecutor improperly referred to the jury's penalty-phase verdict as a recommendation; and
>
> (d) that the trial court improperly instructed the jury that its penalty-phase verdict was a recommendation.[16]

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[16]We note that Reeves also reasserts on appeal the claim from his petition that his trial counsel were ineffective for allegedly not investigating the possibility that Reeves was not the shooter. However, Reeves mentions this claim only in passing in a single sentence in his brief, and he makes no argument at all in his brief regarding why he believes the circuit court's denial of this claim was error. Reeves's argument regarding this ineffective-assistance-of-counsel claim fails to comply with Rule 28(a)(10), Ala. R. App. P., and it is well settled that the "[f]ailure to comply with Rule 28(a)(10) has been deemed a waiver of the issue presented." C.B.D. v. State, 90 So. 3d 227, 239 (Ala. Crim. App. 2011). Therefore, Reeves's claim that his trial counsel was ineffective for allegedly not investigating the possibility that Reeves was not the shooter is deemed waived and will not be considered by this Court. Additionally, we note that Reeves also argues in his brief on appeal that his trial and appellate counsel were ineffective for not challenging at trial and on appeal the constitutionality of Alabama's capital-sentencing scheme. Although Reeves raised a claim in his petition that Alabama's capital-sentencing scheme was

The decisions by counsel that Reeves challenges in claims (1), (2), (3), (5), and (6), as set out above -- 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, and what issues to raise on appeal -- are typically considered strategic decisions, and do not constitute per se deficient performance. See, e.g., Walker v. State, [Ms. CR-11-0241, February 6, 2015] ___ So. 3d ___ (Ala. Crim. App. 2015) ("'An attorney's decision whether to retain witnesses, including expert witnesses, is a matter of trial strategy.' People v. Payne, 285 Mich. App. 181, 190, 774 N.W.2d 714, 722 (2009). '[I]n general, the "decision not to hire experts falls within the realm of trial strategy."'

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unconstitutional under Ring v. Arizona, 536 U.S. 584 (2002), nowhere in his petition did Reeves assert that his trial or appellate counsel were ineffective for not raising a challenge to the constitutionality of Alabama's capital-sentencing scheme at trial or on appeal. A substantive challenge to the constitutionality of a statute is not the same as a claim of ineffective assistance of counsel. Therefore, because Reeves did not raise in his petition claims that his trial and appellate counsel were ineffective for not challenging the constitutionality of Alabama's capital-sentencing scheme, those claims are not properly before this Court for review and will not be considered. See Arrington v. State, 716 So. 2d 237, 239 (Ala. Crim. App. 1997) ("An appellant cannot raise an issue on appeal from the denial of a Rule 32 petition which was not raised in the Rule 32 petition.").

State v. Denz, 232 Ariz. 441, 445, 306 P.3d 98, 102 (2013), quoting Yohey v. Collins, 985 F.2d 222, 228 (5th Cir. 1993)."); Johnson v. State, [Ms. CR-05-1805, September 28, 2007] ___ So. 3d ___, ___ (Ala. Crim. App. 2007) ("'[I]n the context of an ineffective assistance claim, "a decision regarding what witnesses to call is a matter of trial strategy which an appellate court will not second-guess."' Curtis v. State, 905 N.E.2d 410, 415 (Ind. Ct. App. 2009). '[T]he decision of which witnesses to call is quintessentially a matter of strategy for the trial attorney.' Boyle v. McKune, 544 F.3d 1132, 1139 (10th Cir. 2008)."); Dunaway v. State, [Ms. CR-06-0996, December 18, 2009] ___ So. 3d ___, ___ (Ala. Crim. App. 2009) ("'The decision of what mitigating evidence to present during the penalty phase of a capital case is generally a matter of trial strategy.' Hill v. Mitchell, 400 F.3d 308, 331 (6th Cir. 2005)."), rev'd on other grounds, [Ms. 1090697, April 18, 2014] ___ So. 3d ___ (Ala. 2014); Lane v. State, 708 So. 2d 206, 209 (Ala. Crim. App. 1997) ("This court has held that '[o]bjections are a matter of trial strategy, and an appellant must overcome the presumption that "conduct falls within the wide range of reasonable professional

assistance," that is, the presumption that the challenged action "might be considered sound trial strategy."' Moore v. State, 659 So. 2d 205, 209 (Ala. Cr. App. 1994)."); and Thomas v. State, 766 So. 2d 860, 876 (Ala. Crim. App. 1998) ("[A]ppellate counsel has no constitutional obligation to raise every nonfrivolous issue. ... Appellate counsel is presumed to exercise sound strategy in the selection of issues most likely to afford relief on appeal."), aff'd, 766 So. 2d 975 (Ala. 2000), overruled on other grounds, Ex parte Taylor, 10 So. 3d 1075 (Ala. 2005).

The burden was on Reeves to prove by a preponderance of the evidence that his counsel's challenged 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. However, because Reeves failed to call his counsel to testify, the record is silent as to the reasons trial counsel (1) chose not to hire Dr. Goff or another neuropsychologist to evaluate Reeves for intellectual disability and chose not to present testimony from such an expert during the penalty phase of the trial that Reeves was intellectually disabled in order to establish a mitigating

circumstance; (2) chose to rely during the penalty phase of the trial on the testimony of Dr. Ronan to present mitigation evidence; (3) chose not to object to Dr. Ronan's testimony on cross-examination during the penalty phase of the trial that Reeves was not intellectually disabled; and (4) chose not to object at trial to the prosecutor's allegedly urging the jury during closing arguments at the penalty phase of the trial to consider nonstatutory aggravating circumstances to impose a death sentence, to the prosecutor's introducing evidence and making argument during both the guilt and penalty phases of the trial that Reeves was involved in a gang, to the prosecutor's allegedly referring to the jury's penalty-phase verdict as a recommendation, and to the trial court's instructing the jury that its penalty-phase verdict was a recommendation. The record is also silent as to the reasons appellate counsel chose not to raise on appeal the claims that the prosecutor improperly urged the jury during closing arguments at the penalty phase of the trial to consider non-statutory aggravating circumstances to impose a death sentence, that the prosecutor improperly introduced evidence and argued during both the guilt and penalty phases of the

trial that Reeves was involved in a gang, that the prosecutor improperly referred to the jury's penalty-phase verdict as a recommendation, and that the trial court improperly instructed the jury that its penalty-phase verdict was a recommendation. Where "'"the record is silent as to the reasoning behind counsel's actions, the presumption of effectiveness is sufficient to deny relief on [an] ineffective assistance of counsel claim."'" Broadnax, 130 So. 3d at 1256 (citations omitted).

As for Reeves's claim that his trial counsel were ineffective for not conducting an adequate mitigation investigation and for not presenting what he claimed was substantial mitigation evidence during the penalty phase of the trial, claim (4), as set out above, we point out that Reeves's claim in this regard is not that counsel failed to conduct any mitigation investigation or that counsel failed to present any mitigation evidence during the penalty phase of the trial. Rather, Reeves's claim is that counsel did not conduct an adequate investigation and either did not present during the penalty phase of the trial all mitigating evidence that may have been available or did not present the mitigating

evidence in the manner he believes would have been most appropriate.

"[T]rial counsel's failure to investigate the possibility of mitigating evidence [at all] is, per se, deficient performance." Ex parte Land, 775 So. 2d 847, 853 (Ala. 2000), overruled on other grounds, State v. Martin, 69 So. 3d 94 (Ala. 2011). However, "counsel is not necessarily ineffective simply because he does not present all possible mitigating evidence." Pierce v. State, 851 So. 2d 558, 578 (Ala. Crim. App. 1999), rev'd on other grounds, 851 So. 2d 606 (Ala. 2000). When 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.

> "'[B]efore we can assess the reasonableness of counsel's investigatory efforts, we must first determine the nature and extent of the investigation that took place....' Lewis v. Horn, 581 F.3d 92, 115 (3d Cir. 2009). Thus, '[a]lthough [the] claim is that his trial counsel should have done something more, we [must] first look at what the lawyer did in fact.' Chandler v. United States, 218 F.3d 1305, 1320 (11th Cir. 2000)."

Broadnax, 130 So. 3d at 1248 (emphasis added).

At the evidentiary hearing, Reeves presented testimony from Karen Salekin, a forensic clinical psychologist who performed a mitigation investigation, regarding the mitigation evidence he believes his counsel should have presented and the manner in which he believes that evidence should have been presented. However, Reeves presented no evidence at the evidentiary hearing regarding what mitigation investigation his trial counsel conducted, because Reeves failed to call trial counsel to testify. 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. See, e.g., Woods v. State, 13 So. 3d 1, 37 (Ala. Crim. App. 2007) (holding, on appeal from four capital-murder convictions and

a sentence of death, that the appellant had failed to establish that his counsel's mitigation investigation constituted deficient performance where the record contained "no evidence about the scope of counsel's mitigation investigation" but contained indications that counsel had at least conducted some mitigation investigation).[17]

For the reasons set forth above, Reeves failed to satisfy his burden of proof as to his claims of ineffective assistance of counsel. Therefore, the circuit court properly denied those claims.

IV.

Reeves next contends that the circuit court erred in summarily dismissing his claims of juror misconduct without allowing him to present evidence to support them.

In his petition, Reeves alleged that during his trial one of the jurors who sat on his jury improperly communicated with her husband about the trial and improperly watched and read

[17]Although Woods was in a different procedural posture than this case -- it was a direct appeal from multiple convictions and a death sentence -- the principle that a record that is silent regarding the scope of counsel's mitigation investigation will not support a finding that counsel's performance is deficient is equally applicable here.

media coverage of the trial. Reeves further alleged that, during the penalty-phase deliberations, after the jury had entered an informal vote of nine in favor of the death penalty and three in favor of life imprisonment without the possibility of parole, that same juror escorted another juror -- a juror who Reeves claimed was young and emotional and had originally voted for life imprisonment without the possibility of parole -- out of the jury deliberation room and spoke to that juror in private. When the two jurors returned, Reeves alleged, the young and emotional juror changed her vote and voted for the death penalty, resulting in a jury verdict of 10 in favor of the death penalty and 2 in favor of life imprisonment without the possibility of parole. Finally, Reeves alleged that this same juror repeatedly told the other members of the jury that Reeves's family "would 'come after' the jurors after the trial" and stressed to the other jurors that "the decision to impose the death penalty truly belonged to the judge rather than the jury." (C. 585.) In support of these claims, Reeves attached to his petition an affidavit from another juror who sat on Reeves's jury, juror G.B., in

which G.B. averred essentially the same facts as Reeves alleged in his petition.

At the conclusion of the Rule 32 evidentiary hearing, the following exchange occurred:

> "[Reeves's counsel]: ... Judge, there was one other thing. I think when you ruled on the issue of juror misconduct, you indicated that we could put on the record --
>
> "THE COURT: I did, and it slipped my mind.
>
> "[Reeves's counsel]: And [cocounsel] is going to go ahead and do that."

(R. 285-86.) Reeves's counsel then made an offer of proof regarding the evidence that would be presented regarding the juror-misconduct claims if the court had allowed such evidence.

Although the record contains no order by the circuit court summarily dismissing Reeves's juror-misconduct claims before the evidentiary hearing, the above exchange indicates that the court had ruled on the claims before the hearing, apparently concluding that the claims did not warrant an evidentiary hearing. In its final order denying Reeves's petition, the court found that Reeves's juror-misconduct claims were precluded by Rules 32.2(a)(3) and (a)(5), Ala. R.

Crim. P., because they could have been, but were not, raised and addressed at trial and on appeal. Therefore, we consider Reeves's juror-misconduct claims as having been summarily dismissed without Reeves's being afforded an opportunity to present evidence to support those claims.

We agree with Reeves's argument on appeal that the circuit court erred in finding that his juror-misconduct claims were precluded by Rules 32.2(a)(3) and (a)(5) on the ground that they could have been, but were not, raised and addressed at trial and on appeal. See, e.g., Ex parte Hodges, 147 So. 3d 973 (Ala. 2011); Ex parte Harrison, 61 So. 3d 986 (Ala. 2010); Ex parte Burgess, 21 So. 3d 746 (Ala. 2008). However, the circuit court's error in this regard does not require a remand for further proceedings in this case because we conclude that Reeves's juror-misconduct claims were not sufficiently pleaded to warrant an evidentiary hearing and, therefore, that the circuit court properly refused to allow Reeves to present evidence on this claim at the Rule 32 hearing.

Rule 32.3, Ala. R. Crim. P., states that "[t]he petitioner shall have the burden of pleading and proving by a

preponderance of the evidence the facts necessary to entitle the petitioner to relief." Rule 32.6(b), Ala. R. Crim. P., states that "[t]he petition must contain a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds. A bare allegation that a constitutional right has been violated and mere conclusions of law shall not be sufficient to warrant any further proceedings." To sufficiently plead a claim of juror-misconduct, a Rule 32 petitioner must, at a minimum, identify the juror who the petitioner believes committed the misconduct, must allege specific facts indicating what actions that juror took that the petitioner believes constituted misconduct, and must allege specific facts indicating how that juror's actions denied the petitioner a fair trial. See, e.g., Moody v. State, 95 So. 3d 827, 859 (Ala. Crim. App. 2011) (holding that Rule 32 petitioner had failed to satisfy his burden of pleading his claim of juror misconduct when the petitioner "failed to identify a single juror who he believed did not answer questions truthfully during voir dire," failed to "identify which questions he believe[d] the jurors did not

answer truthfully," and "failed to plead what 'extraneous' information he believes was considered during the jury's deliberations or how that information prejudiced him.").

In this case, Reeves failed to identify in his petition the juror he believed committed the misconduct; he referred to the juror only as "Juror Jane Doe." (C. 584-85.) He also failed to identify the juror who allegedly changed her vote during the penalty-phase deliberations after allegedly speaking with Juror Jane Doe privately. G.B.'s affidavit[18] also failed to identify Juror Jane Doe or the juror who allegedly changed her vote during the penalty-phase deliberations. In a footnote in his petition, Reeves admitted that he knew the identity of both jurors; he alleged that "[s]ignificant efforts have been undertaken to identify Juror Jane Doe" and that "by speaking with certain jurors who served on Mr. Reeves's trial and have been willing to speak with Mr.

[18]"Although a Rule 32 petitioner is not required to include attachments to his or her petition in order to satisfy the pleading requirements in Rule 32.3 and Rule 32.6(b), when a petitioner does so, those attachments are considered part of the pleadings." Conner v. State, 955 So. 2d 473, 476 (Ala. Crim. App. 2006). See also Ex parte Lucas, 865 So. 2d 418 (Ala. 2002) (attachments to a Rule 32 petition are considered part of the pleadings).

Reeves's current counsel, the identities of these jurors are believed to be known." (C. 585.) Nonetheless, Reeves failed to identify either juror in his petition. In addition, although Reeves alleged that Juror Jane Doe had spoken to her husband about the case and had watched and read media reports about the case, Reeves failed to identify exactly what information Juror Jane Doe received from her husband or from the media reports or how this unidentified information prejudiced him.

Because Reeves failed to identify in his petition Juror Jane Doe, the juror he believed was improperly influenced during the penalty phase of the trial, or the specific "extraneous" information he believed Juror Jane Doe improperly considered, all of Reeves's juror-misconduct claims were insufficient to satisfy the pleading requirements in Rule 32.3 and Rule 32.6(b). Moreover, Reeves's claim that Juror Jane Doe repeatedly told the other members of the jury that Reeves's family "would 'come after' the jurors after the trial" and stressed to the other jurors that "the decision to impose the death penalty truly belonged to the judge rather than the jury" also fails to state a material issue of fact or

law upon which relief could be granted. (C. 585.) Reeves's claim in this regard is based on the debates and discussions of the jury, not on extraneous facts considered by it.[19] As this Court explained in Bryant v. State, 181 So. 3d 1087 (Ala. Crim. App. 2011):

> "It is well settled that 'matters that the jurors bring up in their deliberations are simply not improper under Alabama law, because the law protects debates and discussions of jurors and statements they make while deliberating their decision.' Sharrief v. Gerlach, 798 So. 2d 646, 653 (Ala. 2001). 'Rule 606(b), Ala. R. Evid., recognizes the important "distinction, under Alabama law, between 'extraneous facts,' the consideration of which by a jury or jurors may be sufficient to impeach a verdict, and the 'debates and discussions of the jury,' which are protected from inquiry."' Jackson v. State, 133 So. 3d 420, 431 (Ala. Crim. App. 2009) (quoting Sharrief, supra at 652). '[T]he debates and discussions of the jury, without regard to their propriety or lack thereof, are not extraneous facts.' Sharrief, 798 So. 2d at 653. Thus, 'affidavit[s or testimony] showing that extraneous facts influenced the jury's deliberations [are] admissible; however, affidavits concerning "the debates and discussions of the case by the jury while deliberating thereon" do not fall within this exception.' CSX Transp., Inc. v. Dansby, 659 So. 2d 35, 41 (Ala. 1995) (quoting Alabama Power Co. v. Turner, 575 So. 2d 551, 557 (Ala. 1991))."

[19]Reeves did not allege in his petition that Juror Jane Doe's statement to the jury that Reeves's family would "come after" the jurors after trial was based on extraneous information she had received.

181 So. 3d at 1126-27. To allow "consideration of this claim of juror misconduct -- which is based entirely on the debate and deliberations of the jury -- 'would destroy the integrity of the jury system, encourage the introduction of unduly influenced juror testimony after trial, and discourage jurors from freely deliberating, and inhibit their reaching a verdict without fear of post-trial harassment, publicity, or scrutiny.'" Bryant, 181 So. 3d at 1128 (quoting Jones v. State, 753 So. 2d 1174, 1204 (Ala. Crim. App. 1999)).

For these reasons, the circuit court properly dismissed Reeves's claims of juror misconduct without affording Reeves an opportunity to present evidence.[20]

V.

Finally, Reeves contends that the circuit court erred in denying, on procedural grounds, the claim in his petition that lethal injection constitutes cruel and unusual punishment in

[20]Although the lack of specificity and the failure to state a material issue of fact or law upon which relief could be granted were not the reasons for the circuit court's denial of these claims, we may nonetheless affirm the circuit court's judgment on this ground. See Moody v. State, 95 So. 3d 827, 833-34 (Ala. Crim. App. 2011), and McNabb v. State, 991 So. 2d 313, 333 (Ala. Crim. App. 2007), and the cases cited therein.

violation of the Eighth Amendment to the United States Constitution.

We agree with Reeves that the circuit court erred in finding his constitutional challenge to lethal injection to be precluded by Rules 32.2(a)(3) and (a)(5). Although typically such a constitutional challenge to a sentence would be subject to the preclusions in Rule 32.2(a)(3) and (a)(5), in this case Reeves was convicted and sentenced in 1998 and his convictions and sentences were affirmed on appeal in 2000, years before Alabama adopted lethal injection as its primary method of execution. See Act No. 2002-492, Ala. Acts 2002. At the time Reeves was convicted and sentenced to death and during his direct appeal, Alabama's method of execution was electrocution. It is well settled "that trial counsel cannot be held to be ineffective for failing to forecast changes in the law." Dobyne v. State, 805 So. 2d 733, 748 (Ala. Crim. App. 2000), aff'd, 805 So. 2d 763 (Ala. 2001). Because Reeves's trial and appellate counsel could not have been expected to forecast Alabama's change in its method of execution, Reeves could not have challenged the constitutionality of lethal injection at trial and on appeal.

Therefore, the circuit court erred in finding this claim to be precluded by Rules 32.2(a)(3) and (a)(5).

However, the circuit court's error in this regard does not require this cause to be remanded for further proceedings. First, it is not clear from Reeves's petition whether Reeves challenged in his petition the constitutionality of lethal injection per se or the constitutionality of Alabama's specific lethal-injection drug protocol. Because we cannot determine from the allegations in his petition exactly which claim Reeves asserted, his claim in this regard necessarily fails to satisfy the pleading requirements in Rule 32.3 and Rule 32.6(b).

Moreover, to the extent that Reeves is challenging the constitutionality of lethal injection per se, that claim has been expressly rejected by this Court numerous times. See, e.g., Townes v. State, [Ms. CR-10-1892, December 18, 2015] ___ So. 3d ___, ___ (Ala. Crim. App. 2015), and the cases cited therein. To the extent that Reeves is challenging Alabama's specific drug protocol for lethal injection, the drug protocol Reeves mentioned in his petition -- sodium thiopental, pancuronium bromide, and potassium chloride -- is no longer

the drug protocol Alabama uses for lethal injection. Therefore, Reeves's challenge in his petition to that drug protocol is moot. Additionally, it appears that in his brief on appeal Reeves is attempting to challenge Alabama's current drug protocol for lethal injection, specifically Alabama's use of midazolam as a substitute for sodium thiopental. That challenge, however, was not raised in Reeves's petition and is, therefore, not properly before this Court for review. See Arrington v. State, 716 So. 2d 237, 239 (Ala. Crim. App. 1997) ("An appellant cannot raise an issue on appeal from the denial of a Rule 32 petition which was not raised in the Rule 32 petition."). In any event, the United States Supreme Court has upheld as constitutional the use of midazolam for lethal injection. See Glossip v. Gross, ___ U.S. ___, 135 S.Ct. 2726 (2015). Therefore, Reeves is due no relief on this claim.[21]

[21]Although these were not the reasons the circuit court denied this claim, we may nonetheless affirm the circuit court's judgment on these grounds. See Moody v. State, 95 So. 3d 827, 833-34 (Ala. Crim. App. 2011), and McNabb v. State, 991 So. 2d 313, 333 (Ala. Crim. App. 2007), and the cases cited therein.

VI.

For the foregoing reasons, the judgment of the circuit court denying Reeves's Rule 32 petition is due to be affirmed.

In affirming the circuit court's judgment, we recognize that the United States Supreme Court recently vacated this Court's judgment in Johnson v. State, [Ms. CR-10-1606, May 20, 2014] ___ So. 3d ___ (Ala. Crim. App. 2014), a case in which the death penalty had been imposed, and remanded the cause for further consideration in light of its opinion in Hurst v. Florida, 577 U.S. ___, 136 S.Ct. 616 (2016). See Johnson v. Alabama, [Ms. 15-7091, May 2, 2016] ___ U.S. ___, ___ S.Ct. ___ (2016). In Hurst, the United States Supreme Court held unconstitutional Florida's capital-sentencing scheme on the ground that it violated its holding in Ring v. Arizona, 536 U.S. 584 (2002), because Florida's statute authorized a sentence of death based on a finding by the trial judge, rather than by the jury, that an aggravating circumstance existed. The impact, if any, of Hurst on Alabama's capital-sentencing scheme has not yet been addressed by this Court or by the Alabama Supreme Court. We need not address it here because Hurst is not applicable in this case.

The United States Supreme Court's opinion in Hurst was based solely on its previous opinion in Ring, an opinion the United States Supreme Court held did not apply retroactively on collateral review to cases that were already final when the decision was announced. See Schiriro v. Summerlin, 542 U.S. 348 (2004). Because Ring does not apply retroactively on collateral review, it follows that Hurst also does not apply retroactively on collateral review. Rather, Hurst applies only to cases not yet final when that opinion was released, such as Johnson, supra, a case that was still on direct appeal (specifically, pending certiorari review in the United States Supreme Court) when Hurst was released. Reeves's case, however, was final in 2001, 15 years before the opinion in Hurst was released. Therefore, Hurst is not applicable here.

Based on the foregoing, the judgment of the circuit court is affirmed.

AFFIRMED.

Windom, P.J., and Welch, Burke, and Joiner, JJ., concur.

IN THE CIRCUIT COURT OF DALLAS COUNTY, ALABAMA

STATE OF ALABAMA, *

*

Plaintiff/Respondent, FILED *

*

vs. OCT 26 2009 CASE NO. CC-1997-31

MATTHEW REEVES, CHERYL STRONG RATCLIFF DALLAS COUNTY CIRCUIT CLERK *

Defendant/Petitioner. *

ORDER DENYING RULE 32 PETITION

THIS MATTER, having come before the Court upon the Petition of Matthew Reeves for relief pursuant to Rule 32 of the *Alabama Rules of Criminal Procedure,* and the Court having conducted an Evidentiary Hearing pursuant to Rule 32, and after considering the evidence and arguments of the parties at the Evidentiary Hearing together with the evidence at the Trial of this case, **finds as follows:**

The brutal murder of Willie Johnson on Thanksgiving Day 1996, and the events immediately before and after the killing, are set forth in this Court's Sentencing Order filed August 21, 1998.

The Court made the following Findings of Fact at that time:

"On November 26, 1996, the victim in this case, Willie Johnson, stopped his vehicle to assist some motorists he believed to be in need of help. A short time later, Mr. Johnson was dead, victim of a robbery and homicide at the hands of the Defendant, Matthew Reeves.

Perhaps the most compelling testimony regarding the facts of this case and the involvement of the Defendant and co-defendants came from 21 year-old Brenda Suttles. Suttles testified that on the day of the murder she, along with the Defendant, Matthew Reeves, his Brother, Julius Reeves, and an individual named Immanuel, set out to commit a robbery. As they set out to commit the robbery, they came into contact with an individual named Tony who gave them a ride to a location where Julius Reeves secured the murder weapon.

A general discussion ensued with regard to a robbery, and it was decided that the group would travel to Whitehall, Alabama, to commit the robbery. During the trip to Whitehall, the vehicle in which the group was traveling developed mechanical problems and the group was left stranded on the side of the road.

It was at this time that Willie Johnson happened upon the group and towed the vehicle back to Selma and to the Defendant Reeves' home. Mr. Johnson advised Julius Reeves that he would charge $25 for towing them from Whitehall to Selma, and it was determined that none in the group had the money to pay. However, Julius Reeves advised Mr. Johnson that if he drove the group to Katrina White's house, he would give Mr. Johnson a ring for payment of his services. Upon returning from Katrina White's house, Mr. Johnson was instructed to drive his truck into Crockett's Alley which is a location between Selma and Alabama Avenues in Selma, Alabama.

Brenda Suttles testified that the group intended to rob Mr. Johnson at this time, and as he stopped his truck in the alley, Matthew Reeves placed the shotgun in through the sliding back window of the truck and fired one shot into the neck of Willie Johnson. It was at this time that Julius Reeves and Brenda Suttles pulled Willie Johnson from the truck and robbed him of his money.

The testimony of Brenda Suttles with regard to the group's activities after the robbery and murder was compelling as well. She stated that the group took the money and divided it, and throughout the night the Defendant Matthew Reeves partied and danced to rap music and occasionally mocked the horrible death of the victim by flinching and jerking. She also stated that Matthew Reeves had boasted about his commission of the murder, in that it would earn him a "teardrop," a gang-related sign that indicates a gang member has committed murder.

Upon further review of the Record at Trial, the Court looks to the testimony of Brenda Suttles which illustrates that the conduct of Reeves was the result of a pre-meditated plan rather than an impulsive act. She testified that they (Matthew Reeves, Julius Reeves, Immanuel Suttles, and Suttles) got together during the afternoon hours of Thanksgiving, and "went looking for some robberies."

A short time later, Julius Reeves secured the shotgun used to murder Willie Johnson and gave it to Matthew Reeves who kept it in his possession the entire afternoon carefully concealing it as he boarded Willie Johnson's truck, thereafter placing it to Willie Johnson's head and firing the shot that took Willie Johnson's life.

Matthew Reeves did not relinquish the weapon at this time, but cared for it and concealed it in his room at his home as he exchanged his bloody clothing for clean clothes, and ordered his confederates to change their bloody clothing as well.

Testimony from the trial of this case clearly established that the robbery was pre-mediated and the gun used by Matthew Reeves was secured for his purposes. Not only did Matthew Reeves pull the trigger and cause the death of Willie Johnson, but ordered his brother, Julius, and friend, Brenda Suttles, to go into the pockets of the deceased Willie Johnson, and take his money. The Defendant Reeves was not only responsible for hiding his own shoes and clothing, but hid the shoes and clothing of the other participants together with the gun used in the murder. Subsequently, it was Reeves who divided up the money and boasted of the murder and his ultimate acceptance into a gang as displayed by a teardrop he would earn from the murder.

Finding of Facts During the Penalty Phase:

The defense offered three witnesses during the penalty phase; Detective Pat Grindle, Marzetta Reeves, Defendant's mother, and Dr. Kathaleen Ronan. These witnesses testified regarding the

Defendant's formative years, and the turbulent environment in which he was raised. Detective Grindle talked of his professional relationship with the Defendant and the Defendant's brother reaching back to the age of 9 or 10 years old, when Matthew Reeves first became familiar to law enforcement.

He described the home in which Matthew Reeves was raised; there were a series of photographs that depicted a dilapidated structure with obvious structural failings to the roof. This testimony clearly represented to the Jury the difficult environment in which Matthew Reeves was raised.

Marzetta Reeves was called to describe the family structure and formative years of Matthew Reeves' childhood. She testified that in 1996, ten people lived in the four bedroom house. Matthew lived with her all his life and only met his father on 2 occasions.

She described his struggles in school, and testified that he repeated the first and third or fourth grade and ultimately was socially promoted to the seventh grade.

Academic and social issues continued to plague Matthew throughout his school career until he finally was expelled from the public school system. However, his mother reported that during his early years in school, his teachers reported he was doing well but should have one-on-one help.

Marzetta Reeves attempted to give Matthew some academic assistance and sought mental health counseling. She described numerous facilities in which Matthew was placed; specifically, a

boot camp in Chalkville, Alabama, and group home in Mobile, Alabama. She reported that the counselors indicated to her that he did well in the group home environment, and subsequently secured certificates in welding, auto mechanics, and brick masonry through Job Corp.

The final witness called by the defense was Kathaleen N. Ronan, a Clinical Psychologist employed at Taylor Hardin Secure Medical Facility in Tuscaloosa, Alabama. Dr. Ronan was ordered by the Circuit Court of Dallas County, Alabama, to evaluate the defendant on an out-patient basis for his competency to stand trial and mental state at the time of the alleged offense. This evaluation took place on June 3, 1997. Dr Ronan explained to the Jury her evaluation as follows:

"The next step is to conduct what we call mental status examination. This is to see how an individual is functioning right now. Can they concentrate? Are they attentive to the topics of discussion? Are they showing any kind of mental illness symptoms that would make them unable to communicate effectively. Do they know where they are? Do they know who they are? Do they know what the date is, why they are talking to you? What is their general fund of information? Do they know things that, you know, most of us have grown up with and know really well, like the colors of the American flag or in what direction does the sun rise? Do they have just some basic information available? If given a hypothetical social situation, can they reason what they are supposed to do? So we get an idea as to whether or not the person has any major interference due to some king of psychiatric symptoms. And then and I ask them specifically about symptoms. And have you ever had hallucinations, seen or heard things other people tell you they can't see or hear or had any firm beliefs that are not based on reality such as delusions And I will go through basically all of the symptoms that a person might experience.

At that point, I usually will ask the person to tell me everything that they can recall about the time that the offense took place. Some people say they can't remember. Some people will give a detailed account. Some people will go on and on and on for

a very long time talking about it. It depends. In Mr. Reeves' case he did give me a detailed but somewhat brief explanation about his behavior during that time frame.

The very final step is to administer what is called the competency to stand trial assessment instrument, which is basically a structured interview asking the person what they know about court procedures. For instance, what is capital murder? What does that mean? What could happen to you if you were found guilty? How do you think your case is going to turn out and why? What does a defense attorney do? What is his main role? What is the role of the District Attorney? What is a plea bargain, a whole realm of different questions to see if this person understands about the court process and what they're facing. And usually at that point the evaluation is concluded unless there is any further testing. Now in Mr. Reeves' case I did give him one part of the Wexler Intelligence Test. . .

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 Findings of Fact

Dr. John Goff was called first by the Petitioner. He evaluated Reeves on February 2, 2006, and administered a battery of tests including the WAIS III. The result Dr. Goff obtained was a full-scale IQ score of 71; a verbal IQ score of 75, and a performance IQ score of 76. However, when Dr. Goff applied the Flynn Effect, a phenomenon he defined as an inflation of IQ scores observed by Dr. James Flynn, he testified that Reeves' actual IQ was 66.

Goff then reviewed all other known IQ test results of Reeves as far back as 1992, and found Reeves' full-scale score was 73; verbal IQ was 75, and performance IQ 74. However, he then applied then Flynn phenomenon and arrived at an IQ of 67.6.

Goff then applied the same phenomenon to Dr. Ronan's WAIS-R result of 74, which was the verbal IQ administered to Reeves in 1997. After applying the Flynn Effect, he opined that Reeves' IQ would be 69.2. Dr. Goff also administered certain tests to Reeves in an effort to determine whether Reeves exhibited significant or substantial deficits in adaptive functioning. Dr. Goff concluded that the adaptive behavior assessment system test which tested communications, functional academics, self-direction, leisure activities, social skills, community use, home living, health and safety, self-care and work, indicated specific substantial skills deficits in work activities, health and safety, self-direction, as well as his ability to deal with money (See Pg. 62). Finally, Dr. Goff testified that these deficits were manifested during the developmental period before 18 years of age, and that the academic and school records supported this finding.

Dr. Karen Salekin, a Clinical Psychologist, was offered and accepted as an expert in Psychology and, in particular, Forensic Psychology and Developmental Psychology. She said that there were a number of people available in 1998 who were qualified clinicians that performed mitigation analysis. Among those mentioned by Dr. Salekin as qualified and available was Dr. Kathaleen Ann Ronan, who, in fact, testified on behalf of Reeves in the penalty phase of the Trial.

She reviewed medical and school records, interviewed friends and family members in order to determine the risk and protective

factors that would have positively or negatively influenced Reeves' development.

In reviewing the testimony at Trial of Marzetta Reeves and Dr. Ronan, Dr. Salekin criticized the testimony as being, "a hodgepodge of information put out without context." They, "just kind of point out that these risk factors exist and did not discuss it in terms of how that affected Matthew's development over the course of the time."

The balance of Dr. Salekin's testimony outlined the risk factors that existed in Reeves' life, their affect on his developmental trajectory and that they were not offered to the jury as mitigation testimony. She also pointed out two protective factors she found to exist in Reeves' life. She concluded, however, that these risk factors, existing together over the course of time negatively impacts a person's functioning in the school and social environment, as well as their employability. This, Dr. Salekin testified, is all compounded by a low level of intellectual functioning.

The State of Alabama offered the testimony of Dr. Glenn David King, a Clinical and Forensic Psychologist, as well as an attorney at law. Dr. King was retained by the State to perform a mental exam and evaluation on the Petitioner, Matthew Reeves, and to make a neuro-psychological evaluation. He met with Reeves on September 6, and again on September 27, 2006. Dr. King initially administered the WAIS III, and reported Reeves' verbal IQ score of

69; performance IQ score of 73, and full scale IQ score of 68.

The wide range achievement test indicated Reeves read and spelled on a fifth grade level and performed math on a fourth grade level. Based on the WAIS and Wide Range Achievement Test, Dr. King did not reach a definitive conclusion regarding Reeves' intellectual ability though, "I was leaning in the direction of borderline intellectual functioning." However, after considering all of the other test data, Dr. King concluded that Reeves functions in a borderline range of ability.

Dr. King acknowledged that any diagnosis of mental retardation must also consider a measure of adaptive functioning, and any indication of the existence or non-existence of mental retardation prior to the age of 18 years. This was achieved by application of the ABS-RC Second Edition (Adaptive Behavior Scale Residential and Community) an instrument approved by the American Association of Mental Retardation.

He evaluated ten domains: Independent functioning, physical development, economic activity, language development, numbers and time, domestic activity, prevocation and vocation, self-direction, responsibility, and socialization. After administering the test, reviewing records and interviewing Reeves, Dr. King opined that Reeves intellectually functions in the borderline range and his I.Q. would fall in the range of 70 to 84.

Dr. King further evaluated Reeves to determine any impairment in brain function by administering the Halstead-Reitan

Neuropsychological Test Battery. This series of tests administered to determine any brain pathology such as tumor, cerebral vascular accident or traumatic brain injury. After administering the sub-tests to determine sensory perceptual functional testing, motor functioning, attention concentration and memory, language skills, visual spatial skills, and reasoning and logical analytical skills, Dr. King concluded that Reeves was not mentally retarded. He further explained the theoretical position of the Flynn Effect, but did not apply the Flynn Effect to the evaluation of the Defendant. Dr. King stated that the application of the Flynn Effect is not required when evaluating someone's mental status although there does appear to be some research to establish the theory. Based upon Dr. King's review of the data and research accumulated by Flynn, there appears to be unreliable data to effectively apply the theory when evaluating someone's mental status.

Finally, Dr. King, upon reviewing the data of Dr. Goff and accumulating his own data, concludes that the Defendant Reeves functions in the borderline range of intellectual ability and that he functioned in the borderline range prior to the age of 18.

Dr. King stated that the Defendant would not have been mentally retarded before the age of 18.

The Court, based on the evidence and arguments of the attorneys at the Evidentiary Hearing, has considered all of the allegations of the Petitioner's Rule 32 Petition for Relief and Conviction, specifically, viz:

I. Claim that Reeves is mentally retarded.

II. Claim that Reeves was denied the effective assistance of counsel during the Sentencing phase of his Trial in that:

(a) Trial Counsel failed to procure necessary expert assistance regarding Mr. Reeves' low cognitive functioning and potential mental retardation in addition to general mitigation evidence.

(b) Trial Counsel provided ineffective assistance of counsel in relying on Dr. Ronan during the Sentencing phase of Mr. Reeves' Trial.

(c) Trial Counsel failed to object to improper opinion testimony from Dr. Ronan during the Sentencing phase of Mr. Reeves' Trial.

(d) Trial Counsel failed to investigate and present any meaningful mitigation evidence.

(e) Trial Counsel failed to illicit critical mitigating evidence from Mr. Reeves' Mother when she testified during the Sentencing phase of Mr. Reeves' Trial.

(f) Trial Counsel failed to investigate for and present witnesses to show significant mitigating evidence that was available.

(g) Trial Counsel failed to present any mitigating evidence regarding Mr. Reeves' redeeming qualities and humanity.

III. Mr. Reeves' right to a fair and impartial jury was violated by juror misconduct during deliberations.

IV. Claim of instructional errors of the Trial Court denied Mr. Reeves a fair trial and appropriate sentencing determination.

V. The prosecution's misconduct and improper arguments during Trial deprived Mr. Reeves of his rights in that:

(b) The extensive reference to supposed gang membership prejudiced Mr. Reeves' Jury;

(c) The Prosecution unconstitutionally diminished the Jury's

sense of responsibility;

(d) The Prosecution submitted non-statutory aggravating circumstances to the Jury.

VI. Trial counsel were ineffective by failing to raise and preserve meritorious claims for appeal in that:

(a) Counsel failed to prevent or otherwise object to prejudicial errors;

(b) Trial counsel failed to provide Mr. Reeves with effective assistance of counsel by failing to investigate the possibility that Mr. Reeves did not shoot Mr. Johnson;

(c) Counsel failed to provide Mr. Reeves with effective assistance of counsel on Appeal.

VII. Alabama Statutory Sentencing Scheme violates the United States Constitution and the Alabama Constitution.

VIII. Alabama's method of execution by lethal injection as applied by the State of Alabama results in the infliction of cruel and unusual punishment in violation of the United States Constitution and the Constitution of the State of Alabama.

I. CLAIM THAT REEVES IS MENTALLY RETARDED.

In Part I, paragraphs 28-42 of Reeves' second amended Rule 32 petition, Reeves claims that because he is mentally retarded he cannot be executed under the United States Supreme Court's holding in Atkins v. Virginia, 536 U.S. 304 (2002). In Atkins, the United States Supreme Court held that the execution of mentally retarded capital offenders violates the Eighth Amendment's prohibition against cruel and unusual punishment. The Atkins Court observed

that "clinical definitions of mental retardation require not only sub-average intellectual functioning, but also significant limitations in adaptive skills." Id. at 318. The Atkins Court declined to create a national standard that reviewing courts should apply in determining whether a capital offender is mentally retarded and not eligible for a death sentence. Instead, the Court left to the States "the task of developing appropriate ways to enforce the constitutional restriction upon their execution of sentences." Id.

The Alabama Legislature has not yet developed a procedure or courts to apply in determining whether a capital defendant is mentally retarded and, thus, ineligible for execution. This Court must, therefore, turn to the opinions of the appellate courts of Alabama for guidance in resolving this issue.

In Ex parte Perkins, 851 So.2d 453, 456 (Ala. 2002), the Alabama Supreme Court set forth the following standard for reviewing a mental retardation claim:

> Those states with statutes prohibiting the execution of a mentally retarded defendant require that a defendant, to be considered mentally retarded, must have significant sub-average intellectual functioning (an IQ of 70 or below), and significant or substantial deficits in adaptive behavior. Additionally, these problems must have manifested themselves during the developmental period (i.e., before the defendant reached age 18).

"[A]ll three prongs of the test set forth in Ex parte Perkins must be satisfied in order for a person to be considered mentally retarded." Ex parte Smith, 2007 WL 1519869, at *--- (Ala. May 25, 2007). "A classification of 'borderline intellectual functioning'

describes an intelligence level that is higher than mental retardation, …, and, thus, does not render a person ineligible for the death penalty." Ex parte Smith, 2007 WL 1519869, at *--- (Ala. May 25, 2007).

The Alabama Court of Criminal Appeals has examined numerous factors in determining whether a person suffers from significant or substantial limitations in adaptive functioning. See Stallworth v. State, 868 So.2d 1128, 1182 (Ala. Crim. App. 2001)(where relying on Stallworth's employment history, his history of social relationships, and his use of community resources - such as qualifying for food stamps - the Alabama Court of Criminal Appeals rejected Stallworth's claim that he had significant deficits in adaptive functioning); Lewis v. State, 889 So.2d 623, 695-698 (Ala. Crim. App. 2003)(finding that Lewis' academic history, employment history, relationship with his wife, and post-crime craftiness all weighted against a find that he had significant deficits in adaptive functioning); Clemons v. State, 2003 WL 22047260 (Ala. Crim. App. June 24, 2005)(setting forth the following factors to consider when evaluating adaptive functioning: employment history, ability to have interpersonal relationships, extent of involvement in criminal activity, post-crime craftiness, and use of community resources); Brown v. State, 2006 WL 1125007, at *32-36 (Ala. Crim. App. Apr. 26, 2006)(full scale IQ of 76 and the following evidence indicating that defendant had no deficits in adaptive functioning: that he could pick the locks of his handcuffs as well as his jail

cell, had learned to swallow razor blades and regurgitate them without injury to himself, and asserted to a police officer that he had gotten away with offenses in the past by getting sent to mental facilities and would do so in his current case); Periata v. State, 897 So.2d 1161, 1206-1207 (Ala. Crim. App. 2003)("[E]ven though the record indicates that he was in several learning disability classes and has a history of criminal activity, we do not believe that those facts alone are sufficient to show that he has significant of substantial deficits in adaptive behavior"); Yeomans v. State, 898 So.2d 878, 900-902 (Ala. Crim. App. 2004)(noting, in case involving IQ scores ranging from 67 to 83, that "though the Defendant had a tumultuous upbringing and was currently functioning in the low average range of intelligence, he has and does function 'normally' in society").

There is no dispute that Reeves' IQ is sub-average. However, the expert testimony about Reeves' adaptive functioning was conflicting. Before addressing the merits of Reeves' mental retardation claim, this Court believes it should first discuss the conflicting expert testimony about the Flynn Effect.

Dr. Goff and Dr. Salekin indicated that the Flynn Effect is accepted in the scientific community while Dr. King stated that it was not. The Court notes that Dr. Goff testified that Dr. Flynn published his findings in 1984. However, Dr. Goff did not start utilizing the Flynn Effect until 2005 - years after the Flynn Effect came into existence. There was no dispute that neither the

publishers of the IQ tests administered on Reeves nor the DSM-IV require that the Flynn Effect must be utilized in determining a person's intellectual functioning. While there was testimony that appellate courts outside of Alabama have addressed the application of the Flynn Effect, this Court is unaware of any Alabama case law requiring use of the Flynn Effect. It does not appear to this Court that the issue of whether the Flynn Effect should be considered when reviewing an individual's IQ score, at least in Alabama, is settled in the scientific community.

Reeves achieved a full scale IQ score of 73 on a test administered when he was 14½ years old. The full scale IQ score of 71 achieved by Reeves on the test administered by Dr. Goff is consistent with his prior IQ score of 73. See Ex parte Smith, 2003 WL 1145475, *9 (Ala. March 14, 2003)(holding that a full scale IQ score of 72 "seriously undermines any conclusion that [a defendant] suffers from significantly sub-average intellectual functioning contemplated under even the broadest definitions [of mental retardation]"). Further, Reeves testified during a pretrial suppression hearing and the Court recalls nothing indicating that Reeves' intellectual functioning was significantly sub-average. See Clisby v. Alabama, 26 F.3d 1054, 1056 (11th Cir. 1994)(holding that Clisby's testimony gave the trial judge "an opportunity to gauge roughly his intelligence"). This Court concludes that Reeves' intellectual functioning, while certainly sub-average, is not significantly sub-average.

A review of the trial transcript indicates that Reeves does not suffer from significant or substantial limitations in his adaptive functioning. Testimony at trial indicated that Reeves was a gang member. Further, Reeves' mother testified that while Reeves attended Job Corp he earned certificates in welding, brick masonry, and auto mechanics - jobs that would require some degree of technical skill. Reeves' mother also testified that after he returned from Job Corp that Reeves worked for Jerry Ellis doing carpentry and roofing. While he worked for Mr. Ellis, Reeves would get up as early as 5:30 a.m. to be ready for work. It was only after his younger bother Julius returned from being confined in the juvenile facility at Mt. Meigs that Reeves chose to stop working for Mr. Ellis. According to his mother, Reeves went with Julius because he was afraid his brother would get shot. Reeves had extensive contact with juvenile authorities and with law enforcement prior to his arrest for the victim's murder. In a pretrial mental evaluation, Dr. Kathy Ronan diagnosed Reeves as suffering from Adaptive Paranoia - that is he adapted his behavior in order to survive in the dangerous environment in which he lived. Reeves reported to Dr. King that he sold drugs and sometimes made between $1500 and $2000 per week. Reeves used the money from his drug dealing to purchase clothes, food, and a car.

The record also reveals that Reeves and his co-defendants planned to commit a robbery. It is undisputed that Reeves actively participated in the planning of the robbery. There was no evidence

presented at the evidentiary hearing suggesting that Reeves' participation in the planning of the robbery or the ultimate murder and robbery of the victim was the result of being coerced or threatened by another person. The evidence from trial, including the compelling testimony from one of Reeves' co-defendants, proved beyond a reasonable that it was Reeves, and Reeves alone, that decided to murder the victim. After he shot the victim, Reeves hid incriminating items of evidence, including the murder weapon and bloody clothes that he and his co-defendants had worn. In addition, Reeves split the proceeds with his codefendants, was boastful to others about shooting the victim, and seemed proud that he might get a tear drop - a gang symbol indicating that a gang member had killed another person. See Ex parte Smith, 2003 WL 1145475, at *10 (where in the court considered Smith's actions after committing murder as a factor in concluding that Smith "does not suffer from deficits in his adaptive functioning").

"In the context of an Atkins claim, the defendant has the burden of proving by a preponderance of the evidence that he or she is mentally retarded and thus ineligible for the death penalty." Ex parte Smith, 2007 WL 1519869 at *--- (Ala. May 25, 2007). After considering the evidence presented at Reeves' trial and the evidence presented at the evidentiary hearing, this Court concludes that Reeves failed to meet his burden of proving by a preponderance of evidence that he is mentally retarded and that his death

sentence violates the Eighth Amendment. Rule 32.3, Ala.R.Crim.P. This claim for relief is, therefore, denied.

II. Claim that Reeves was denied the effective assistance of counsel during the sentencing phase of his Trial.

The Court, in consideration of Petitioner's claim of ineffective assistance of counsel during the sentencing phase, recognizes that the Sixth Amendment to the United States Constitution guarantees every criminal defendant the right to counsel.

The Supreme Court of the United States in *Strickland vs. Wash*, 466 U.S. 668 (1984) established the standard governing claims of ineffective assistance of counsel and held that the defendant must prove by a preponderance of the evidence that counsel's performance was deficient and that counsel's deficient performance prejudiced his defense.

(a) Trial Counsel failed to procure necessary expert assistance regarding Mr. Reeves' low cognitive functioning and potential mental retardation in addition to general mitigation evidence.

This Court by Order dated October 20, 1997, approved funds for the purpose of hiring a neuropsychologist. Soon after the funds were approved, Defense Counsel McLeod withdrew, and the Court appointed Goggans and Wiggins.

The Court notes at this point that the Petitioner during his Evidentiary Hearing, failed to call either Goggans or Wiggins in support of their claim of ineffective assistance of counsel.

Therefore, this Court will review this claim in light of this failure and consider only that which is in the Record.

Trial Counsel made a decision to rely on the testimony of Dr. Kathy Ronan rather than retain Dr. John Goff.

When Dr. Ronan's testimony is considered in its entirety together with the records collected by Trial Counsel, there was no indication of a diagnosis of mental retardation. As a matter of fact, Dr. Ronan on cross-examination by Assistant District Attorney Wilson was asked,

"Q. So he wasn't actually mentally retarded?

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

Furthermore, the Reeves Trial took place four years before the United States Supreme Court issued its Opinion in *Atkins vs. Virginia*, 536 U.S. 304(202). Therefore, the Court nor the Jury would have been required to consider mental retardation as a mitigating circumstance. The **Court finds** that the Petitioner failed to prove by a preponderance of the evidence ineffective assistance of counsel as alleged in Sec. II(a), Failure to prove necessary expert assistance.

(b) Trial Counsel provided ineffective assistance of counsel in relying on Dr. Ronan during the Sentencing phase of Mr. Reeves' Trial.

Dr. Kathleen Ronan at the time of Trial in 1998 was an employee at the Taylor Harden Secure Medical Facility in Tuscaloosa, Alabama. As a licensed clinical psychologist and

certified forensic examiner, she had specialized training to conduct evaluations for the Court, such as competence to stand trial and mental state at the time of the alleged offense. Upon Order of this Court, she conducted a forensic evaluation of the Petitioner and testified during the penalty phase of the Trial.

The Affidavit of Dr. Ronan has been reviewed by the Court and considered in its entirety. The Court notes of particular interest, Dr. Ronan's explanation of her testimony cited above where she declared the Petitioner was not mentally retarded.

Again, the Court must point out that the Petitioner failed to call either Goggans or Wiggins in support of his Petition.

Dr. Ronan's testimony during the sentencing phase of the Trial when considered with all exhibits and documents available to her at the time including the Report prepared by her, establishes that it was reasonable for Defense Counsel to rely on her testimony and work as the sole source of mitigation evidence during the sentencing phase of his Trial. "The fact that Petitioner can find a professional witness years after his Trial that is willing to testify favorably at a post-conviction hearing in no way establishes that Trial Counsel's performance was deficient. "*Horsley vs. Alabama,* 45 Fed.3rd 1486, 1495 (11th Cir. 1995).

The Court finds that other testimony was offered during the penalty phase from Detective Pat Grindle and Marzetta Reeves (the Petitioner's Mother) that established for the Jury the difficult nature of the Petitioner's background together with his struggles

socially. The testimony clearly establishes those things that could have had an adverse affect on his development.

Taking this together with all testimony offered by Dr. Ronan during the penalty phase, one can only conclude that the Jury and this Court were given a fair evaluation of the Petitioner. Therefore, the **Court finds** that Petitioner failed to prove by a preponderance of the evidence ineffective assistance of counsel as alleged in Sec. II(b), Reliance of Dr. Ronan during the sentencing phase.

(c) Trial Counsel failed to object to improper opinion testimony from Dr. Ronan during the Sentencing phase of Mr. Reeves' Trial.

This Court had previously decided the credentials of Dr. Kathleen Ronan and the Record is clear regarding her educational background and experience at the time of the penalty phase of this Trial. Dr. Ronan was asked on cross-examination by Assistant District Attorney Wilson, if the Petitioner was mentally retarded. Dr. Ronan's response has been cited above, and the Court has considered the Affidavit of Dr. Ronan and comment on the same. The fact that Dr. Ronan now wishes to change her testimony with regard to the Petitioner, does not demonstrate that Trial Counsel's performance was deficient.

The Court notes, again, with regard to this allegation that Petitioner did not call Trial Counsel Goggans and Wiggins at his Evidentiary Hearing.

"Whether and when to object is a matter of trial strategy." *Hunt vs. State*, 940 So.2d 1041, 1064 (Ala. Crim. App. 2005)

This Court has also considered the records that were introduced by Reeves' Trial Counsel, including school records and records of past mental health treatment. In addition, the Court considered the Scale I.Q. Score of 73 when Reeves was 14 years old, together with the Evaluation of Dr. Daniel Hoke who concluded Reeves suffered from a conduct disorder and had severe borderline intellectual functioning. However, there was no diagnosis of mental retardation, and considering that together with Dr. Ronan's evaluation and testing, it would have been reasonable for Trial Counsel to conclude that Reeves was not mentally retarded and further conclude that there was no reason to object during Dr. Ronan's cross-examination. Therefore, the **Court finds** that the Petitioner failed to prove by a preponderance of the evidence ineffective assistance of counsel as alleged in Sec. II(c), Failure to object during Dr. Ronan's cross-examination.

(d) Trial Counsel failed to investigate and present any meaningful mitigation evidence.

The Court must note, once again, that Petitioner failed to call Goggans and Wiggins in support of his claim of ineffective assistance of counsel, and this Court finds this failure to be significant in terms of evaluating all claims of ineffective assistance of counsel.

Petitioner maintains that Trial Counsel did nothing to investigate his background, mental health or his neurological and cognitive impairment, and that he was prejudiced by this. However, the Record contains significant documentation from the Cahaba Center for Mental Health and Mental Retardation, Selma City Schools Special Education Program covering the adolescent and pre-adolescent years of the Petitioner, as well as assessments from the Department of Youth Services. All of these documents were admitted into evidence and presented to the Jury as mitigation evidence.

At least 2 jurors concluded after hearing the evidence in mitigation that the aggravating circumstance that he intentionally murdered the victim during the course of a robbery, did not outweigh the statutory and non-statutory mitigating circumstances, and voted for life without parole. This Court specifically found on the Record from the mitigation evidence that he grew up in a poor home environment and lacked appropriate developmental resources growing up. All of which was elicited through the testimony of Detective Grindle and Ms. Reeves.

The Court finds the mitigation evidence presented by Reeves' Trial Counsel was consistent with the type of mitigating evidence presented in other capital cases in Dallas County at the time of Reeves' Trial in 1998. *Grayson vs. Thompson,* 257 F.3rd 1194, 1215-1216 (11th Cir. 2001).

Therefore the **Court finds** that based on prevailing professional norms existing in Dallas County in 1998, that Trial

Counsel's performance was reasonable and that Petitioner has failed to prove by a preponderance of the evidence ineffective assistance of counsel as alleged in Sec. II(d), Failure to investigate and present meaningful mitigation evidence.

(e) Trial Counsel failed to elicit critical mitigating evidence from Mr. Reeves' Mother when she testified during the Sentencing phase of Mr. Reeves' Trial.

The **Court finds** this claim to have been abandoned in that Petitioner offered no testimony in support of the allegation, and further, failed to call Trial Counsel Goggans and Wiggins.

(f) Trial Counsel failed to investigate for and present witnesses to show significant mitigating evidence that was available.

Petitioner maintains that Trial Counsel should have spoken with family members and others who knew Petitioner throughout Petitioner's life. In particular, Petitioner alleges that his Aunt, Beverly Seroy, knew of the significant hardship and difficulties Mr. Reeves had faced throughout his life. Petitioner maintains that because Trial Counsel failed to contact and present this witness, the Jury and Court were left to consider only Mr. Reeves' age at the time of the crime as a mitigating factor.

The Court has previously noted the other mitigating factors, one of which was the significant hardship and difficulties Mr. Reeves faced throughout his life.

Petitioner failed to call Ms. Seroy to testify at his Evidentiary Hearing. Therefore, her potential trial testimony was not offered to this Court. The Court does note that Drs. Goff and

Salekin in preparation of their evaluation and mitigation assessment, referenced interviews with Ms. Seroy.

Once again, Petitioner failed to call his Trial Counsel Goggans and Wiggins in support of his Petition.

The **Court finds** this claim to have been abandoned in that Petitioner offered no testimony in support of the allegation from Ms. Seroy, Reeves or Reeves' Trial Counsel.

(g) Trial Counsel failed to present any mitigating evidence regarding Mr. Reeves' redeeming qualities and humanity.

The Court, once again, finds that the Petitioner abandoned this claim by failing to present testimony at the Evidentiary Hearing supporting this claim.

Petitioner asserts in his Petition that trial counsel failed to present evidence to the Jury in mitigation of an incident regarding Reeves defending a female relative and receiving a gunshot wound to the head. Petitioner claims this was evidence of his humanity and redeeming qualities and that the failure to provide this evidence and the evidence of the gunshot wound to his head, resulted in ineffective assistance of counsel.

In fact, the Record is clear that Marzetta Reeves testified in mitigation to the head wound, but medical documentation admitted at the Trial of this case from Caraway Methodist Medical Center reveals that there was "no evidence of the bullet entering the cranial vault." The medical records indicate, at best, a flesh wound with a slight fracture to the right frontal temporal bone.

Petitioner was released from the Intensive Care Unit within 24 hours of admission, and was discharged home in good condition within 48 hours of admission. Marzetta Reeves' testimony during the penalty phase clearly established Matthew's redeeming qualities and humanity as she testified at length about the Petitioner's concerns for his brother, Julius, and his constant effort to protect Julius after Julius was released from a juvenile detention facility.

To assert that trial counsel failed to reveal the redeeming qualities and humanity of Petitioner, is without merit and wholly disingenuous.

Therefore, this Court finds that Petitioner failed to prove by a preponderance of the evidence ineffective assistance of counsel as alleged in Sec. 2(g), Failure to prove mitigating evidence regarding Petitioner's redeeming qualities of humanity.

III. Mr. Reeves' right to a fair and impartial Jury was violated by juror misconduct during deliberations.

The **Court finds** that the claims of juror misconduct are procedurally barred from post-conviction review because they could have been but were not raised at Trial, and because they could have been but were not raised on direct appeal.

IV. Instructional errors of the Trial Court denied Mr. Reeves a fair trial and appropriate sentencing determination.

The **Court finds** that this claim is procedurally barred from post-conviction review because it could have been but was not

raised at Trial, and because it could have been but was not raised on direct appeal.

V. The Prosecution's misconduct and improper arguments during Trial deprived Mr. Reeves of rights guaranteed by Alabama law and the United States Constitution.

The **Court finds** that these claims are procedurally barred from post-conviction review because they could have been but were not raised at Trial, and because they could have been but were not raised on direct appeal.

VI. Claims that Reeves' trial counsel were ineffective by not preserving alleged errors for appellate review.

This Court notes that whether or not to object is often a matter of trial strategy and is presumed to be reasonable.

This Court also, once again, finds that the Petitioner failed to call trial counsel at the Evidentiary Hearing, and further finds that the Petitioner has abandoned these claims for ineffective assistance of counsel.

Nevertheless, Petitioner claims that Reeves' trial counsel were ineffective for the failing to object when the Prosecution allegedly urged the Jury to consider non-statutory aggravating circumstances, viz:

(i) The Prosecution improperly argued for the Jury to send a message to prevent crime, and improperly argued for the Jury to disregard mitigating evidence;

(ii) The Prosecution improperly raised the specter of lawlessness as a reason to impose death;

(iii) The Prosecution improperly argued that death should be imposed based on religious reasons;

(iv) Prosecution improperly argued Reeves' future dangerousness as a basis to impose death; and,

(v) The cumulative effect of the prosecutors' arguments raised a substantial possibility the Jury was influenced to render a death sentence based on improper considerations.

The **Court finds** from the Record that each enumerated claim of ineffective assistance of trial counsel is without merit and is due to be denied.

The Record clearly establishes that the Prosecution presented its impressions from the evidence and argued legitimate inferences that were drawn from the evidence. Therefore, Trial Counsel were not ineffective for failing to object to permissible argument.

The Record also clearly establishes that the Prosecutor in this case, in the penalty phase closing argument, replied in kind to statements made by the Defense Counsel in Defense Counsel's closing argument. A full review of the closing argument by both prosecution and defense counsel, for instance, clearly establishes that the prosecutor did not argue that Jurors should recommend death based on religious factors, but in fact, encouraged the Jury to base its penalty phase verdict on the facts of the case.

Finally, Petitioner claims that the Prosecution improperly argued Reeves' future dangerousness as a basis to impose the death penalty. This Court finds that the Prosecutor's remark during the penalty phase closing argument regarding the future dangerousness of the Petitioner is a valid sentencing factor.

Therefore, the claim that the cumulative effect of the Prosecutors' arguments raised a substantial possibility the Jury

was influenced to render a death sentence based on improper considerations, is without merit.

B. Claim that Trial Counsel were ineffective for failing to object when the prosecution improperly introduced evidence that Reeves was in a gang.

Evidence was presented by the State which proved that one possible motive for Reeves to murder the victim was to earn a "tear drop," a gang symbol indicating an individual had killed someone. Because Reeves' gang membership was material and relevant, this Court finds the allegation of ineffective assistance of trial counsel for having failed to object to the evidence is without merit and is due to be denied.

C. Claims that Trial Counsel were Ineffective for failure to object when this Court and the Prosecution informed the Jury that its penalty phase verdict was advisory.

The **Court finds** that this allegation of ineffective assistance of trial counsel is without merit and is due to be denied. The law of the State of Alabama is well established and has been repeatedly upheld that informing jurors their penalty phase verdict is a recommendation, is not improper. There is no impropriety in the trial court's reference to the Jury that its sentencing verdict is a recommendation.

D. Claim that Trial Counsel were ineffective for not investigating the possibility that Reeves did not shoot the victim.

The **Court finds** this claim of ineffective assistance of trial counsel is without merit and is due to be denied.

Reeves presented no evidence at his Evidentiary Hearing that would have caused any reasonable person to conclude someone other than Matthew Reeves shot the victim.

E. Claim that Reeves received ineffective assistance from his appellate counsel on direct appeal.

The **Court finds** that this claim of ineffective assistance of appellate counsel is without merit and is due to be denied.

The fact that the Jury was informed that its penalty phase verdict was a recommendation was not improper because it was a correct statement of law. Because this Court's instruction and the Prosecution's comments were correct statements of law, if Reeves' appellate counsel had raised this issue on Appeal, there is no reasonable possibility the penalty phase of trial would have been reversed. Furthermore, evidence that Reeves was in a gang was relevant, and thus admissible, to prove his motive and/or intent for murdering the victim. Because testimony about Reeves' gang membership was admissible, the Court concludes that even if his appellate counsel had raised this issue on direct appeal, there is no reasonable possibility Reeves conviction would have been reversed.

The **Court finds** that this claim of ineffective assistance of appellate counsel is without merit, and therefore, due to be denied.

VII. Claims that the capitol sentencing scheme in Alabama violates the United States and Alabama Constitutions.

The **Court finds** that these claims are procedurally barred from post-conviction review because it could have been but was not raised at Trial, and because it could have been but was not raised on direct appeal.

VIII. The Claim that lethal injection as applied in Alabama Constitutes cruel and unusual punishment.

The **Court finds** that this claim is procedurally barred from post-conviction review because it could have been but was not raised at Trial, and because it could have been but was not raised on direct appeal.

IT IS ORDERED, ADJUDGED, and DECREED that the Defendant's **Rule 32 Petition** is due to be denied.

DONE and ORDERED, this the 26th day of October 2009.

THOMAS ap R. JONES, JUDGE
FOURTH JUDICIAL CIRCUIT

1/7/13
CRAIG HAYDEN
ATTY. GOD, LOBS2

IN THE SUPREME COURT OF ALABAMA

January 20, 2017

1160053

Ex parte Matthew Reeves. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Matthew Reeves v. State of Alabama) (Dallas Circuit Court: CC-97-31.60; Criminal Appeals : CR-13-1504).

CERTIFICATE OF JUDGMENT

WHEREAS, the petition for writ of certiorari in the above referenced cause has been duly submitted and considered by the Supreme Court of Alabama and the judgment indicated below was entered in this cause on January 20, 2017:

Writ Denied. No Opinion. Main, J. - Stuart, Bolin, Shaw, Wise, and Bryan, JJ., concur. Murdock, J., dissents. Parker, J., recuses himself.

NOW, THEREFORE, pursuant to Rule 41, Ala. R. App. P., IT IS HEREBY ORDERED that this Court's judgment in this cause is certified on this date. IT IS FURTHER ORDERED that, unless otherwise ordered by this Court or agreed upon by the parties, the costs of this cause are hereby taxed as provided by Rule 35, Ala. R. App. P.

I, Julia J. Weller, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true, and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 20th day of January, 2017.

Julia Jordan Weller

Clerk, Supreme Court of Alabama