No. _____

In the
Supreme Court of the United States

♦

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS;
ATTORNEY GENERAL, STATE OF ALABAMA,
Petitioners,
v.
VERNON MADISON,
Respondent.

♦

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

♦

PETITION FOR A WRIT OF CERTIORARI

♦

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September 10, 2012

CAPITAL CASE
QUESTION PRESENTED

This petition raises effectively the same question about the Antiterrorism and Effective Death Penalty Act that prompted this Court to summarily reverse two courts of appeals in *Woodford v. Visciotti*, 537 U.S. 19 (2002) (per curiam), and *Holland v. Jackson*, 542 U.S. 649 (2004) (per curiam). The question, applied to the underlying constitutional claim in this case, is:

> When a state court cites and applies the correct standard from *Batson v. Kentucky*, 476 U.S. 79 (1986), for assessing whether a petitioner has established a prima facie case of discrimination in jury selection, does the court's use of other terminology in a sentence addressing a distinct point render its *Batson* analysis "contrary to" this Court's precedent for the purposes of determining whether the federal courts must defer to the state adjudication under 28 U.S.C. §2254(d)(1)?

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INTRODUCTION

The Court should summarily reverse in this case. The decision below is not just directly contrary to this Court's AEDPA jurisprudence. It is, more to the point, directly contrary to two of this Court's AEDPA precedents that were *themselves* summary reversals.

Those two precedents are *Woodford v. Visciotti*, 537 U.S. 19 (2002) (per curiam), and *Holland v. Jackson*, 542 U.S. 649 (2004) (per curiam). In both, Courts of Appeals declined to employ the deferential standard AEDPA mandates toward state-court judgments in federal habeas cases. Those Courts of Appeals did so because they believed that the state courts had employed the wrong legal standard. Yet the state courts had, in fact, announced the right standard. The Courts of Appeals, in declining to defer, had focused on *other* language in the state courts' opinions that in isolation did not match up precisely with the proper standard. This Court summarily reversed both times, finding the Courts of Appeals' decisions "incompatible with §2254(d)'s 'highly deferential standard for evaluating state-court rulings.'" *Visciotti*, 537 U.S. at 24 (quoting *Lindh v. Murphy,* 521 U.S. 320, 333 n.7 (1997)).

Virtually the same thing happened here. Vernon Madison argued that the prosecutors at his capital-murder trial violated *Batson v. Kentucky*, 476 U.S. 79 (1986), by striking black jurors because of their race. The state court, noting that the percentage of African Americans on the jury was almost double that in the jury pool, held that Madison had failed to establish a prima facie claim of discrimination. In doing so, the state court, much like the state courts in *Visciotti* and *Jackson*, announced the proper legal standard.

And much like the Courts of Appeals in *Visciotti* and *Jackson*, the Eleventh Circuit held that the state court had actually employed the wrong standard, based on four isolated words elsewhere in the opinion. The Eleventh Circuit then exercised *de novo* review and found that in its independent judgment Madison had established a prima facie case.

The lower court's failure to follow *Visciotti* and *Jackson* is grounds for summary reversal, and practical considerations make the need for this result all the more stark. Madison indisputably murdered a police officer 27 years ago, and the state court's *Batson* analysis was sound. Whereas 25% of the people on the venire were black, a full 50% of the people on Madison's jury had that status. The state trial court thus reasonably disposed of Madison's allegations of racism at the prima-facie stage. Yet now, because of a decision the Eleventh Circuit issued 18 years later, two former prosecutors who hold positions outside state government must offer justifications for their strikes. A federal trial court that did not witness the *voir dire* must assess whether those justifications are pretextual. And the result could be a retrial three decades after Madison committed this murder. The same concerns that have required summary reversals in numerous recent AEDPA cases compel that same disposition here.

OPINIONS BELOW

A. State-court proceedings

Because Madison has had three trials, this case's procedural history is complicated. The Alabama Court of Criminal Appeals' decision reversing Madison's first conviction and requiring a second trial is reported as *Madison v. State*, 545 So. 2d 94 (Ala. Crim. App. 1987). The same court's decision reversing his second conviction and requiring a third trial is reported as *Madison v. State*, 620 So. 2d 62 (Ala. Crim. App. 1992). Neither of those opinions is essential for present purposes, so neither is reproduced in the petition appendix. The critical state-court opinion—the Court of Criminal Appeals' decision affirming Madison's third conviction—is reported as *Madison v. State*, 718 So. 2d 90 (Ala. Crim. App. 1997), and reproduced at Pet. App. 122a-150a. The Alabama Supreme Court granted certiorari on issues that are not relevant to this petition and affirmed. That opinion is reported as *Ex parte Madison*, 718 So. 2d 104 (Ala. 1998). This Court's order denying certiorari is reported as *Madison v. Alabama*, 525 U.S. 1006 (1998) (mem.).

Because the state courts adjudicated the *Batson* question on direct review, the state postconviction proceedings are not directly relevant. The Alabama Court of Criminal Appeals' decision affirming the state trial court's denial of relief in those proceedings is reported as *Madison v. State*, 999 So. 2d 561 (Ala. Crim. App. 2006).

B. Federal-court proceedings

The district court's decision denying Madison federal habeas relief is reported as *Madison v. Allen*,

No. 1:09–00009–KD–B, 2011 WL 1004885 (S.D. Ala. March 21, 2011), and reproduced at Pet. App. 17a-121a. The Eleventh Circuit's decision affirming in part and reversing in part is reported at *Madison v. Commissioner*, 677 F.3d 1333 (CA11 2012), and reproduced at Pet. App. 1a-14a. The Eleventh Circuit's order denying rehearing is unpublished but reproduced at Pet. App. 151a-152a.

STATEMENT OF JURISDICTION

Jurisdiction is proper here. The Eleventh Circuit issued the opinion under review on April 27, 2012. Pet. App. 1a. Petitioners filed a timely application for panel and *en banc* rehearing 21 days later, on May 18, 2012. *See* Pet. App. 165a-181a; 11TH CIR. R. 40-3 (allowing 21 days to seek rehearing). The Eleventh Circuit denied rehearing on June 21, 2012. *See* Pet. App. 151a-152a. This Court has jurisdiction under 28 U.S.C. §1254(1), and Petitioners have sought certiorari within 90 days of the Eleventh Circuit's denial of rehearing. *See* S. CT. R. 13.1 & .3.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Constitutional provision involved

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. Amend. XIV, §1.

B. Statutory provision involved

The pertinent subsection from AEDPA states:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. §2254(d).

STATEMENT OF THE CASE

It is beyond dispute that in 1985, Vernon Madison "fired two shots at near point blank range into the back of" a police officer's head, killing him. Pet. App. 124a. The policeman, Corporal Julius Schulte, was investigating a report that the daughter of Madison's ex-girlfriend was missing. Pet. App. 123a. By the time Schulte arrived at the ex-girlfriend's house, the daughter had returned. *Id.* Shortly thereafter, Madison arrived as well. Pet. App. 123a-124a. Concerned neighbors asked Schulte to stay until Madison had left the ex-girlfriend and her child safely alone. Pet. App. 23a, 124a. Whatever

prompted the neighbors to make that request, Madison proved their concerns to be well founded. He pretended to leave, but later covertly walked up behind Schulte and killed him. Pet. App. 124a. Madison also shot his ex-girlfriend twice "in the back," but she survived. Pet. App. 124a-125a.

In the 27 years since then, the State has tried Madison three times for Schulte's murder. Each time, a jury has convicted Madison of capital murder; and each time, a judge has sentenced him to death. The second and third trials were necessary because state appellate courts identified procedural defects in the first two trials. *See Madison v. State*, 545 So. 2d 94, 96-100 (Ala. Crim. App. 1987) (*Batson* violation); *Madison v. State*, 620 So. 2d 62, 68-73 (Ala. Crim. App. 1992) (erroneous admission of expert testimony). Because those same courts found no similar defects in the third trial, they affirmed Madison's third conviction and death sentence 15 years ago.

Now the Eleventh Circuit has reopened the matter on the theory that the state appellate court applied the wrong legal standard to a *Batson* argument. In light of that holding, the critical facts for these purposes relate to three matters. The first is what happened during jury selection in the third trial. The second is what the state appellate court said about the *Batson* issue after that trial. The third is how the Eleventh Circuit interpreted that state-court opinion.

A. Jury selection and Madison's third trial

It is not hard to understand why Madison's lawyer admitted, when he first raised his *Batson*

challenge, that "I don't know if it's going to be successful." Pet. App. 153a. In the county where Madison was tried, only 30% of the residents are black, and only 25% of the people in his particular jury pool were black. Pet. App. 155a, 159a. In contrast, a full 50% of the people selected for his jury, six out of twelve, were black. Pet. App. 160a. This happened because prosecutors had used only 6 of their 18 peremptory strikes on African Americans. Pet. App. 154a, 161a. Nevertheless, after jury selection was over, Madison's trial counsel charged the prosecutors with purposefully discriminating against African Americans. Pet. App. 155a.

Under clearly established precedent both then and now, a trial judge evaluating a *Batson* challenge must undertake the following three-part analysis:

(1) First, the defendant must establish a prima facie case by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.

(2) Second, if the defendant makes out a prima facie case, the State must offer permissible race-neutral justifications for the strikes.

(3) Third, if the State offers a race-neutral explanation, the trial court must decide whether the defendant has proved purposeful racial discrimination.

See, e.g., *Johnson v. California*, 545 U.S. 162, 168 (2005).

Thus, Madison's counsel was required to establish a prima facie case of purposeful discrimination before they could demand that the prosecutors offer reasons for their strikes. When the court asked what circumstances established the prima facie inference,

defense counsel proposed only three. Pet. App. 157a-158a. First, they asserted that the six black venire members the prosecution had struck had only "one common characteristic: They are black." Pet. App. 159a. Second, counsel said there were "very few questions asked by the State that would give any reason to believe that there is any other basis other than race for these people to be struck." *Id.* Third, counsel observed that Madison was black and both Corporal Schulte and Madison's ex-girlfriend were white. Pet. App. 159a-160a.

The judge asked the prosecutors if they had anything to say in response to defense counsel's allegations. *Id.* The prosecutor said it would be "unfair to the State to have to stand here and give the reasons" for its various strikes when defense counsel had "not even come close" to establishing a prima facie case. Pet. App. 160a. He continued, "I don't know how the Defense can stand there with a straight face, really, and say, okay, they've – they're prejudiced or they're biased, when they stood there and struck 18 whites and we struck 11 whites and 7 blacks." Pet. App. 160a-161a. (Madison has since conceded, and the Eleventh Circuit found, that the State actually used only six of its peremptory strikes on African Americans. *See* Pet. App. 8a.)[1]

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[1] Madison said the following to the Eleventh Circuit:

> There is some confusion in the record as to the number of African American veniremembers peremptorily struck by the State. When making his *Batson* objection, defense counsel listed six African American potential jurors. (Tab R-6, Vol. 2, at 150.) However, the State referred during argument on the *Batson* motion to having used seven strikes against African Americans.

At that point the court overruled Madison's objection. Pet. App. 161a. The jury eventually found him guilty and recommended, by an 8-4 advisory vote, a sentence of life without parole. Pet. App. 122a. After a final sentencing hearing, the judge independently weighed the circumstances and sentenced him to death. Pet. App. 122a-123a.

B. The state appellate decisions

The Alabama Court of Criminal Appeals affirmed. Pet. App. 122a-150a. The critical part of the opinion for present purposes discusses Madison's failure to establish a prima facie case under *Batson*. Pet. App. 141a-145a.

That discussion repeatedly referenced the correct, "inference" standard. The court began its analysis by noting that to establish a prima facie case, Madison was required to show that the "relevant facts raise an *inference* that the prosecutor used his strikes in a discriminatory manner." Pet. App. 143a (emphasis added). In describing the trial court's ruling, the Court of Criminal Appeals invoked the "inference" language, observing that Madison had argued that certain factors could "raise an *inference* of discrimination." Pet. App. 142a (emphasis added).

> (Tab R-6, Vol. 2, at 151, 156.) It appears that the State used six peremptory strikes to remove African Americans, which is the number used by the Alabama Court of Criminal Appeals and cited by petitioner in this brief. The State also used one of its three for-cause strikes to remove a seventh African American (Tab R-6, Vol. 2, at 43, 67-68, 70, 73), a relevant fact in assessing the State's pattern of strikes.

11th Cir. Appellant Br. 14-15 n.3.

And in applying the law to the facts, the court affirmed the trial court's ruling in a way that was consistent with that standard.

The Court of Criminal Appeals recounted three factors Madison had cited in arguing that he had established a prima facie case. First, he observed that "the State struck 7 of 13 qualified black potential jurors," including one it had struck for cause, and "used 7 of its 18 strikes to remove those black potential jurors." Pet. App. 144a. Second, he asserted that "3 of the blacks removed by the State did not answer any questions on voir dire." *Id.* (footnote omitted). Third, he asserted, although he had not argued as much to the trial court, that "the prosecutor's office has a history of excluding qualified black potential jurors based on race." *Id.*

The Court of Criminal Appeals found these arguments insufficient to call the trial court's decision into question. The appellate court reasoned—yet again invoking the "inference" standard—that "[t]he only evidence" Madison actually had put before the trial judge "that arguably could lead to an *inference* of discrimination was a lack of questions or meaningful questions to 3 of the challenged jurors." Pet. App. 144a-145a (emphasis added). The court then concluded that in light of all the circumstances, including "the increased percentage of blacks who served on the jury relative to both the initial panel and the population of the county," the "trial court's denial of the appellant's *Batson* motion in the present case was not clearly erroneous." *Id.*

The Alabama Supreme Court granted certiorari on another issue and affirmed. *Ex parte Madison*,

718 So. 2d 104 (Ala. 1998). This Court denied certiorari. *Madison v. Alabama*, 525 U.S. 1006 (1998) (mem.).

C. The district court's decision

After Madison unsuccessfully sought state postconviction relief, *see Madison v. State*, 999 So. 2d 561 (Ala. Crim. App. 2006), he filed a federal habeas petition. Jurisdiction in the district court was proper under 28 U.S.C. §§1331 and 2254. That court issued a lengthy order denying the petition in its entirety. Pet. App. 17a-121a.

The court began its analysis by citing AEDPA's deferential standard for federal review of state criminal judgments. Pet. App. 55a-58a. As pertinent here, 28 U.S.C. §2254(d)(1) bars a petitioner's claim for habeas relief on "any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim … resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."

On Madison's *Batson* argument, the district court found no basis for second-guessing the state court's judgment. Pet. App. 96a-103a. Because the Court of Criminal Appeals had been the last state court to have considered the *Batson* issue, its opinion was the relevant one for the purposes of federal habeas review. And the district court held that it "agree[d]" with the Court of Criminal Appeals' ruling. Pet. App. 102a.

D. The Eleventh Circuit's decision

Although the district court denied Madison a certificate of appealability, Pet. App. 120a-121a, the Eleventh Circuit granted him one on three issues. Pet. App. 15a-16a. In a published opinion, a panel affirmed the district court's rulings on the other two issues, but reversed on *Batson*.

The court began by holding that it would review Madison's *Batson* claim *de novo* rather than deferring to the state court's adjudication under AEDPA. Pet. App. 12a-13a. The court declared that deferential review was not appropriate because the Court of Criminal Appeals' analysis was "contrary to … clearly established Federal law." 28 U.S.C. §2254(d)(1). This Court has held that a state-court adjudication is "contrary to" clearly established federal law if it employs a different legal standard from the one set forth in this Court's precedents. *See Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). According to the Eleventh Circuit, the "contrary to" clause applied here because the Court of Criminal Appeals had "used the wrong standard for establishing a prima facie case." Pet. App. 12a. The Eleventh Circuit maintained that instead of requiring Madison to merely "produce evidence sufficient to raise an inference of discrimination," as *Batson* requires, the Court of Criminal Appeals had "demanded that Madison establish purposeful discrimination at the outset." Pet. App. 13a.

In reaching that conclusion, the Eleventh Circuit did not mention the Court of Criminal Appeals' three express invocations of the correct, "inference" standard. The panel instead focused on a single,

independent sentence in the state court's opinion, and the panel neither quoted the full sentence nor explained the context in which it appears. Pet. App. 9a-10a. This sentence was the one in which the Court of Criminal Appeals had set out the standard of appellate review. Specifically, the Court of Criminal Appeals had said, "The trial court's determination as to whether the defendant has established purposeful racial discrimination should be reversed only if it is clearly erroneous." Pet. App. 145a.

Based on that sentence, the Eleventh Circuit asserted that the Court of Criminal Appeals had not employed the "inference" standard and had instead required Madison to "establish purposeful racial discrimination" outright. Thus, the Eleventh Circuit concluded, "the state-court decision falls within the 'contrary to' clause of §2254(d)(1)." Pet. App. 13a. The Eleventh Circuit therefore considered itself bound to "undertake a *de novo* review of the record." *Id.*

That review yielded a different conclusion from the one the Court of Criminal Appeals had reached 15 years before. The Eleventh Circuit said that in its independent judgment, several circumstances "in total were sufficient to support an inference of discrimination." Pet. App. 13a. First, the panel invoked the concern the Court of Criminal Appeals had flagged, asserting that the prosecutors had not "ask[ed] questions to three of the challenged jurors." Pet. App. 11a-12a. Second, the panel said the case had a "racially sensitive subject matter" because Madison is black and his victims were white. Pet. App. 12a. Third, the panel cited Madison's claim,

which he had not raised to the state trial judge, of "the district attorney's office's prior discrimination in jury selection, occurring both in Madison's first trial and in other state cases." *Id.*

Based on those considerations, the Eleventh Circuit concluded that Madison had, in fact, established a prima facie case of discrimination. Pet. App. 12a. The Eleventh Circuit therefore remanded to the district court to "complete the final two steps of the *Batson*" analysis. *Id.*

Petitioners sought panel and *en banc* rehearing, *see* Pet. App. 165a-181a, but the Eleventh Circuit denied those petitions, *see* Pet. App. 151a-152a.

REASONS FOR GRANTING THE WRIT

Alabama would not ask this Court to summarily reverse if the decision below marked an isolated and insignificant error. But the Eleventh Circuit's failure to defer to the state court's adjudication raises the same sort of systemic concerns that were present in the six AEDPA decisions summarily reversed last Term. *See Parker v. Matthews*, 132 S. Ct. 2148 (2012) (per curiam); *Coleman v. Johnson*, 132 S. Ct. 2060 (2012) (per curiam); *Wetzel v. Lambert*, 132 S. Ct. 1195 (2012) (per curiam); *Hardy v. Cross*, 132 S. Ct. 490 (2011) (per curiam); *Bobby v. Dixon*, 132 S. Ct. 26 (2011) (per curiam); *Cavazos v. Smith*, 132 S. Ct. 2 (2011) (per curiam). The Eleventh Circuit's judgment is directly contrary to two previous AEDPA summary reversals, *Woodford v. Visciotti*, 537 U.S. 19 (2002) (per curiam), and *Holland v. Jackson*, 542 U.S. 649 (2004) (per curiam). And as a practical matter, the decision below will unduly interfere with the State's good-faith efforts to enforce its criminal

laws. These considerations uniquely call for summary reversal here.

A. This Court should summarily reverse in light of *Visciotti* and *Jackson*.

The Alabama Court of Criminal Appeals purported to apply, and did apply, the governing "inference" standard for evaluating whether Madison established a prima facie case under *Batson*. As a result, the Eleventh Circuit should have deferred to the state-court adjudication under §2254(d)(1). The Eleventh Circuit's insistence that the state court applied some other standard, and thus that it was not required to defer under AEDPA, would have warranted summary reversal even if *Visciotti* and *Jackson* had not been on the books. But those precedents make the proper disposition of this case all the more clear.

1. *Visciotti* rejected the Eleventh Circuit's approach.

Visciotti summarily reversed the Ninth Circuit for doing almost exactly what the Eleventh Circuit did here. The habeas petitioner in *Visciotti* asserted a claim for ineffective assistance of counsel. *See* 537 U.S. at 21. The state courts had rejected his claim, finding he had not established prejudice under *Strickland v. Washington*, 466 U.S. 668 (1986). AEDPA's relitigation bar, set forth in 28 U.S.C. §2254(d)(1), required the Ninth Circuit to defer to that adjudication unless it was "contrary to," or an "unreasonable application of, clearly established federal law" as set forth by this Court's decisions. 28 U.S.C. §2254(d)(1). The Ninth Circuit said deference

did not apply because it read the California Supreme Court opinion as "contrary to" this Court's decision in *Strickland*. *See Visciotti*, 537 U.S. at 22.

The Ninth Circuit maintained that this was so because the state court had employed a different legal standard for assessing prejudice from the one set forth in *Strickland*. *See id.* To establish prejudice under *Strickland*, "the defendant must establish a "*reasonable probability* that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694 (emphasis added). Although the California court had quoted that standard, the Ninth Circuit read other language in the opinion as applying a more stringent test requiring the defendant "to prove, by a preponderance of the evidence, that the result of the sentencing proceedings would have been different." *Visciotti*, 537 U.S. at 22.

This Court held that the Ninth Circuit's ruling was "incompatible with §2254(d)'s highly deferential standard for evaluating state-court rulings." *Id.* at 24 (internal quotation marks omitted). The California court actually "began its analysis of the prejudice inquiry by setting forth the 'reasonable probability' criterion, with a citation of the relevant passage in *Strickland*." *Id.* at 22. Further, the state court cited the "reasonable probability" standard at least three other times. *Id.* at 22-23. In holding that the state court nonetheless erred, the Ninth Circuit had pointed to four places where the court used the term "probable" without the modifier "reasonably." *Id.* at 23. This Court responded that the state court's "occasional shorthand reference to that standard by use of the term 'probable' without the modifier,"

while perhaps "imprecise," could not "be considered a repudiation" of the *Strickland* rule. *Id.* at 23-24. That was particularly so because this Court had itself "occasional[ly] indulge[d] in the same imprecision" in *Strickland* cases. *Id.* at 24 (citing *Mickens v. Taylor,* 535 U.S. 126 (2002); *Williams v. Taylor,* 529 U.S. 362 (2000)).

This Court elaborated that the Ninth Circuit's approach was inconsistent with the principles underlying AEDPA. The Ninth Circuit had made "no effort to reconcile the state court's use of the" shorthand "with its use, elsewhere, of" the proper standard. *Id.* The Ninth Circuit also did not "even acknowledge, much less discuss," another part of the opinion correctly analyzing the issue. *Id.* "This readiness to attribute error," this Court explained, was "inconsistent with the presumption that state courts know and follow the law" and "incompatible" with §2254(d)'s demand "that state-court decisions be given the benefit of the doubt." *Id.*

2. *Jackson* likewise rejected the Eleventh Circuit's approach.

In *Jackson*, the Sixth Circuit failed to defer to a Tennessee court in much the same way. The underlying constitutional issue again involved *Strickland* prejudice. The Tennessee court "began by reciting the correct *Strickland* standard," under which the defendant needed to establish only a "reasonable probability" of prejudice. *Jackson*, 542 U.S. at 654. The Sixth Circuit "concluded that the state court had actually applied" an erroneous "preponderance standard," based on subsequent "passages from its opinion." *Id.* As in *Visciotti*, this

Court held that the Court of Appeals should have read these other passages in a manner that was consistent with the state court's correct statement of the law.

Of those passages, the most critical for present purposes was the Tennessee court's statement that "[i]n a postconviction proceeding, the defendant has the burden of proving his allegations by a preponderance of the evidence." *Id.* The Sixth Circuit had read this language as applying an erroneous "preponderance" standard, but this Court held that the Sixth Circuit's approach was inappropriate. "In context," this Court explained, "this statement is reasonably read as addressing the general burden of proof in postconviction proceedings with regard to factual contentions—for example, those relating to whether defense counsel's performance was deficient." *Id.* Even though it was theoretically "possible to read" this passage "as referring also to the question whether the deficiency was prejudicial, thereby supplanting *Strickland*," AEDPA did not allow the Sixth Circuit to read the passage that way because "such a reading would needlessly create internal inconsistency in the opinion." *Id.*

3. The Eleventh Circuit's decision was contrary to *Visciotti* and *Jackson*.

As far as AEDPA is concerned, this case is *Visciotti* and *Jackson* all over again. The Eleventh Circuit should have deferred to the Alabama Court of Criminal Appeals' adjudication under §2254(d) because the state court employed the proper "inference" standard under *Batson*. The Eleventh Circuit's finding that the state court had applied a

different standard is incompatible with AEDPA for all the reasons this Court gave in *Visciotti* and *Jackson*.

The Eleventh Circuit did not give the "state-court decision[] … the benefit of the doubt," for example, when it failed to consider that the Alabama court "began by reciting" the proper "inference" criterion. *Jackson*, 542 U.S. at 654-55 (internal quotation marks omitted). The Alabama Court of Criminal Appeals specifically said the law required Madison to show that the "relevant facts raise an *inference* that the prosecutor used his strikes in a discriminatory manner." Pet. App. 143a (emphasis added). Much like the Ninth Circuit in *Visciotti*, the Eleventh Circuit did not "even acknowledge, much less discuss," either that statement or the two other sentences in which the state court referenced the "inference" standard. *Visciotti*, 537 U.S. at 24; *see* Pet. App. 143a (noting that Madison argued to the trial court that certain factors "can raise an *inference* of discrimination" (emphasis added)); Pet. App. 144a-145a ("The only evidence that arguably could lead to an *inference* of discrimination was a lack of questions or meaningful questions to 3 of the challenged jurors." (emphasis added)).

Meanwhile, *Visciotti* and *Jackson* illustrate why the Eleventh Circuit erred by focusing on the Alabama court's single sentence containing the words "establish[] purposeful racial discrimination." *See* Pet. App. 10a. In this sentence the Alabama court simply said, "The trial court's determination as to whether the defendant has established purposeful racial discrimination should be reversed only if it is clearly erroneous." Pet. App. 145a. To paraphrase

Jackson, "[i]n context, however, this statement is reasonably read as addressing the general" standard of *appellate* review in *Batson* cases. *Jackson*, 542 U.S. at 654. Whether or not it is theoretically "possible to read" that sentence as also referring to the test for establishing a prima facie case, "such a reading" would be erroneous for at least two reasons. *Id.*

First, every pertinent indicator shows that the Court of Criminal Appeals really was setting out the standard of appellate review in this sentence rather than repudiating the "inference" standard. After all, one of the court's three invocations of the "inference" standard appeared *in the preceding sentence*. *See* Pet. App. 144a-145a ("The only evidence that arguably could lead to an inference of discrimination was a lack of questions or meaningful questions to 3 of the challenged jurors."). The court thus was far more likely using the words "established purposeful racial discrimination" as shorthand for the *Batson* inquiry generally, rather than inexplicably forsaking the "inference" standard after invoking it three times. Like the state courts' use of the *Strickland* shorthand in *Visciotti* and *Jackson*, the Alabama court's use of this *Batson* shorthand was understandable. Indeed, this Court used much the same shorthand in *Batson* itself, noting that the trial court could decide "that the facts establish, prima facie, purposeful discrimination." *Batson*, 476 U.S. at 100.

Second and in any event, the Eleventh Circuit's reading of the Alabama decision "would needlessly create internal inconsistency in the opinion." *Jackson*, 542 U.S. at 654. *Visciotti* makes plain the

federal courts' obligation "to reconcile" various passages in state-court opinions when possible, rather than reading them incoherently. 537 U.S. at 24. The Eleventh Circuit chose the latter course, and "[t]his readiness to attribute error" was "inconsistent with the presumption that state courts know and follow the law." *Id.* Because it was in the very least plausible to interpret this sentence as simply setting out the standard of appellate review, the Eleventh Circuit's approach was "incompatible with §2254(d)'s highly deferential standard for evaluating state-court rulings." *Id.* (internal quotation marks omitted).[2]

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[2] As the last state court to consider the merits of the *Batson* argument, the Court of Criminal Appeals made the critical "adjudication" for the purposes of AEDPA review. 28 U.S.C. §2254(d)(1). So the Eleventh Circuit's suggestion that the trial court also applied the wrong standard is not relevant for present purposes. *See* Pet. App. 9a-10a. But to be clear, the Eleventh Circuit's conclusion about the trial court's reasoning is equally contrary to the principles set forth in *Visciotti* and *Jackson*. Defense counsel informed the trial judge of the "inference" standard, *see* Pet. App. 157a, and the trial judge simply said, in issuing his ruling, "I deny your motion," Pet. App. 161a. "Where a state court's decision is unaccompanied by an explanation," AEDPA's deferential approach governs. *Harrington v. Richter*, 131 S. Ct. 770, 784 (2011). In suggesting that the trial court nonetheless employed the wrong standard, the Eleventh Circuit seized on the judge's question to defense counsel, "But where is the bias on the part of the State?" Pet. App. 159a. The Eleventh Circuit seems to have believed that this question represented a similar repudiation of the "inference" standard, and its replacement with a rule under which Madison had to "prove[] 'bias on the part of the State'" outright. Pet. App. 9a. No less than its analysis of the Court of Criminal Appeals' decision, the Eleventh Circuit's readiness to attribute error to the trial judge was not a fair reading of the

Whatever led the Eleventh Circuit to take its chosen route, it was not the result of any failure by Petitioners to bring these problems to its attention. Petitioners' Eleventh Circuit brief observed that the Court of Criminal Appeals had "considered whether Madison had pointed to evidence that would lead to an *inference* of discrimination" and had "used the phrase 'purposeful racial discrimination' only in its discussion of the standard of review." Pet. App. 163a-164a (emphasis added). Likewise, Petitioners' rehearing application cited *Visciotti* and *Jackson* and argued that the panel had overlooked the Alabama court's various invocations of the "inference" standard. Pet. App. 165a-181a.

The Eleventh Circuit did not acknowledge or respond to any of these arguments. Its silence raises concerns this Court should address. *See Allen v. Lawhorn*, 131 S. Ct. 562, 565 (2010) (Scalia, J., dissenting from denial of certiorari).

B. Pragmatic concerns make summary reversal necessary and appropriate.

Two practical factors cement the case for summary reversal. The first is that the Eleventh Circuit's error was outcome-determinative. The second is that unless this Court reverses, the Eleventh Circuit's decision will require precisely the sort of needless "interference with state justice" that AEDPA was meant to eliminate. *Lawhorn*, 131 S. Ct.

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transcript and was inconsistent with the principle "that state-court decisions be given the benefit of the doubt." *Visciotti*, 537 U.S. at 24.

at 565 (Scalia, J., dissenting from denial of certiorari).

1. Madison cannot prevail if AEDPA is properly applied.

As an initial matter, correcting the Eleventh Circuit's error will effectively end this case. To be sure, the Eleventh Circuit rested its decision only on the theory that the state court's decision was "contrary to" clearly established federal law; and it did not consider Madison's alternative argument that he was also entitled to relief under §2254(d)(1) because the state court's decision amounted to an "unreasonable application" of the proper standard. 28 U.S.C. §2254(d)(1). The Eleventh Circuit did not consider that question, so this Court can leave its initial consideration for remand. But for now, suffice it to say that in light of the evidence in the record, the Court of Criminal Appeals' application of the "inference" standard to Madison's case was in the very least reasonable.

The federal courts' review of the Court of Criminal Appeals' ruling on that point will be doubly deferential. *See Felkner v. Jackson*, 131 S. Ct. 1305, 1307 (2011) (per curiam). To satisfy AEDPA's "unreasonable application" standard, Madison must show that the Alabama Court of Criminal Appeals' application of the "inference" rule was not simply erroneous, but "objectively unreasonable" under this Court's decisions at the time the state court issued its decision. *Williams v. Taylor*, 529 U.S. 362, 409 (2000). On top of that, the *Batson* Court said it believed that "trial judges, experienced in supervising *voir dire,* will be able to decide if the

circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors." 476 U.S. at 97. As a result, most appellate courts review trial judges' decisions at the prima facie stage only for clear error. *See, e.g.*, *Tolbert v. Page*, 182 F.3d 677, 681-85 (CA9 1999) (collecting cases). AEDPA reinforces this approach by making state-court factual findings conclusive unless the prisoner rebuts them "by clear and convincing evidence." 28 U.S.C. §2254(e)(1).

Madison cannot overcome these hurdles. At the prima facie stage, *Batson* requires defendants to persuade trial courts that "all" the "relevant circumstances," considered together, give rise to an inference of discrimination. *Batson*, 476 U.S. at 96. And at Madison's trial, the totality of the relevant facts made it extremely difficult for him to argue for that inference. Prosecutors had used only 6 of their 18 strikes on African Americans, and the percentage of African Americans on the jury was "almost double" the percentage in the jury pool. Pet. App. 156a. When the trial judge found himself unable to infer that the prosecutors had discriminated based on race, Madison needed to find something compelling to convince the Court of Criminal Appeals that the trial judge had clearly erred. The four arguments he offered that court did not fit that bill.

a. Perhaps least persuasive was his insistence that the prosecutors must have struck the six black venire members for invidious reasons because their race was the "only . . . characteristic" they had in common. Pet. App. 142a. The trial judge demolished that theory as soon as counsel offered it. Pet. App. 159a. The judge explained that the venire members

in question "gave many answers" that could have justified the strikes. *Id.* The record supports his conclusion: Three of the struck jurors said they knew potential witnesses, and another had family who had been represented by defense counsel. Doc 18 – Tab R-6 – Pg 49, 51, 53, 81, 82.

b. Almost as unconvincing was Madison's charge that the prosecutors asked too few questions of some of the struck jurors. The judge and both sets of lawyers posed multiple questions to the entire venire before the strikes began. *See* Doc 18 – Tab R-6 – Pg 37-144. That process gave the prosecutors substantial information about all the prospective jurors. Perhaps most critically, all the venire members revealed their occupation and their spouse's. *See id.* at 143-44. Still other questions the lawyers asked the venire were of the yes/no variety. This meant that all the venire members revealed important data no matter how they answered. *See id.* at 54-55 (judge asks all venire members whether anyone in their family had been a crime victim); *id.* at 97 (defense asks all venire members whether they had family or close friends involved in law enforcement). In any event, even courts in non-AEDPA cases have held that a defendant's assertion that "jurors did not (from the perspective of the defendants) say anything during voir dire that would justify striking them hardly establishes a *prima facie* case." *Cent. Ala. Fair Hous. Ctr. v. Lowder Realty Co.,* 236 F.3d 629, 638 (CA11 2000); *accord United States v. Gordon*, 974 F.2d 97, 100 (CA8 1992); *Safeway Stores, Inc. v. Buckmon*, 652 A.2d 597, 604 (D.C. 1994).

c. Just as unavailing was Madison's supposition that the prosecutors struck some African Americans because he was black and his victims were white. These sorts of racial dynamics are no doubt relevant to the prima facie issue in some circumstances. For instance, they helped bolster the inference of discrimination in *Johnson v. California*, 545 U.S. 162 (2005), because in that case the "resulting jury, including alternates, was all white." *Id.* at 164. But as one trial judge has explained, when "the evidence of the proceedings regarding selecting the jury does not reveal any indication that the government acted improperly," these factors cannot by themselves "create the *prima facie* case." *United States v. Grandison*, 721 F. Supp. 743, 747-48 (D. Md. 1988). Here, when faced with a jury that included a much larger share of African Americans than the pool from which it was drawn, it was hardly unreasonable for the trial judge not to infer discrimination.

d. Nor did Madison call the trial judge's decision into doubt through his allegation, raised for the first time on appeal, that the Mobile County District Attorney's office had "a history" of wrongly excluding black jurors. Pet. App. 144a. As the Court of Criminal Appeals noted, Madison had not raised that concern to the trial court. *See id.* Alabama procedural law requires parties to make their evidence of *Batson* motions part of the "trial record so that there will be a sufficient record for appellate review." *Ex parte Branch*, 526 So. 2d 609, 622 (Ala. 1987). On that state procedural ground alone, it was not possible for the state appellate court to say the trial judge clearly erred on this front. And as this Court explained in *Jackson*, federal courts cannot

grant habeas relief under AEDPA "on the basis of evidence not properly before the state court." *Jackson*, 542 U.S. at 652.

At all events, although judges must always take any alleged pattern of *Batson* violations seriously, Madison's argument would not have changed the result even if he had properly presented it to the trial judge. This is not a case like *Miller-El v. Dretke*, in which this Court had before it "widely known evidence of the general policy of the Dallas County District Attorney's Office" in Texas "to exclude black venire members from juries." 545 U.S. 231, 253 (2005). Madison's evidence was simply a string-cite to six cases, two of which involved trials before this Court decided *Batson*, in which the Alabama Court of Criminal Appeals sustained *Batson* challenges in cases involving the Mobile County DA's Office. *See* Pet. App. 12a (collecting cases).[3] The Eleventh Circuit has held that merely citing cases in this way is not enough to support a *Batson* motion. The defendant instead must "connect any conduct criticized in the cited cases to [his] own prosecutor" and the "conduct in [his] case." *McNair v. Campbell*, 416 F.3d 1291, 1312 (CA11 2005).

That is something Madison did not do. Neither of the prosecutors who struck his jury—John Cherry and Buzz Jordan—is mentioned in the decisions he cited, and two of the cases affirmatively say other

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[3] The cited decisions were *Jessie v. State*, 659 So. 2d 167 (Ala. Crim. App. 1994); *Carter v. State*, 603 So. 2d 1137 (Ala. Crim. App. 1992); *Jackson v. State*, 557 So. 2d 855 (Ala. Crim. App. 1990); *Harrell v. State*, 571 So. 2d 1269 (Ala. Crim. App. 1990); *White v. State*, 522 So. 2d 323 (Ala. Crim. App. 1987); and *Williams v. State*, 507 So. 2d 566 (Ala. Crim. App. 1987).

prosecutors made the strikes. *See* Pet. App. 12a (citing cases). Neither Cherry nor Jordan appears to have had a hand in the *Batson* violation at Madison's first trial, which happened 10 years before the third trial and indeed before this Court decided *Batson*. *See Madison v. State*, 545 So. 2d 94, 96 (Ala. Crim. App. 1987) (noting that prosecutor Lloyd Copeland was "responsible for the State's jury selection" at the first trial). In any event, the Court of Criminal Appeals' reversal of that first conviction on *Batson* grounds only underscores the credibility of its later judgment affirming the trial court's decision at the third trial.

At the end of the day, whatever persuasive force any one of Madison's arguments might have had in isolation, it was reasonable for the state courts to conclude that this force evaporated once they stepped back and considered "all relevant circumstances." *Batson*, 476 U.S. at 96. These circumstances included the reality that in a county that was only 30% black, Cherry and Jordan had helped select a jury that was 50% so. In light of that fact, it was reasonable for the trial judge to conclude that the *totality* of the circumstances did not create a reasonable inference that these two prosecutors had discriminated based on race. And in light of the deference *Batson* mandated to the trial judge, it was reasonable for the Court of Criminal Appeals to conclude that it could not second-guess his judgment about those facts.

AEDPA does not allow the federal courts to question these sorts of judgment calls. "Deference," to be sure, "does not by definition preclude relief." *Miller-El v. Cockrell,* 537 U.S. 322, 340 (2003). But the Alabama courts' decisions finding no prima facie

case were in the very least reasonable. They certainly were not "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 131 S. Ct. 770, 786-87 (2011). Summary reversal thus will have the practical effect of bringing this case to a close.

2. The Eleventh Circuit's decision will unnecessarily disrupt state criminal processes.

The practical effects that the Eleventh Circuit's error will have, if allowed to stand, make summary reversal all the more appropriate. Under that court's mandate, the district court must conduct a full-fledged *Batson* hearing. That process would impose precisely the sort of needless federalism costs that AEDPA was designed to eliminate.

The hearing will be no simple task. Both prosecutors have moved on to other endeavors. Cherry is the highly respected criminal-division chief in the U.S. Attorney's office for the Southern District of Alabama; and Jordan is one of the top defense lawyers on the local bar. They and their former employer have located notes that will help refresh their recollections about the reasons for the strikes, but it still will be exceedingly difficult for the State to gather all the evidence needed to respond to the allegations Madison can be expected to make. *Cf. Lark v. Secretary Pa. Dept. of Corr.*, 645 F.3d 596, 627 (CA3 2011) (noting that a prosecutor's "memory loss, understandable considering the 21-year gap between the challenges and the evidentiary hearing,

prevented him from offering direct reasons behind the exercise of his peremptory challenges").

If the court orders a fourth trial due to these difficulties, then the *Batson* hearing will look easy in comparison. Like the retrial contemplated in a decision this Court summarily reversed last Term, Madison's fourth trial could "take place *three decades* after the crime, posing the most daunting difficulties for the prosecution." *Lambert*, 132 S. Ct. at 1199. Capital-murder trials are always costly, time-intensive, and emotional, but things are even worse "when relief is granted many years after the original conviction." *Vasquez v. Hillery*, 474 U.S. 254, 280 (1986) (Powell, J., dissenting). "Witnesses die or move away; physical evidence is lost; memories fade." *Id.* And even if the State is able to marshal the resources to obtain another capital conviction and sentence, it takes 15 years, on average, for a capital case to work its way through direct appeal and postconviction proceedings. *See* Tracy L. Snell, *Capital Punishment, 2010—Statistical Tables,* BUREAU OF JUSTICE STATISTICS (Dec. 20, 2011), http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2236. This lag time is a particular problem in this case because Madison is 61 years old. So a retrial and the 15 years of postconviction appeals that would follow would almost certainly deprive society of its ability to impose the punishment that a trial judge already has determined, three times, to be the right one for this crime.

To be sure, fundamental justice would require the State to embrace these burdens if Madison had raised real concerns that the prosecutors violated the venire members' equal-protection rights. Equitable

principles would buttress that logic if Madison had a legitimate argument that he was actually innocent. But neither of those conditions is present, and just the opposite is true. Eighteen years ago, two public servants struck a jury that bore every hallmark of compliance with the Equal Protection Clause. And nine years before that, a different public servant died while protecting his fellow citizens. Three different juries have found Madison guilty beyond a reasonable doubt, and the principles underlying AEDPA cannot require another jury to do the same. For the sake of Corporal Schulte's family and the officials who have worked in good faith to bring Madison to justice, this matter needs to come to a close.

CONCLUSION

This Court should grant certiorari and summarily reverse the Eleventh Circuit's judgment.

Respectfully submitted,

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September 10, 2012

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APPENDIX TABLE OF CONTENTS

APPENDIX A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 11-12392

D.C. Docket No. 1:09-cv-00009-KD-B

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
APRIL 27, 2012
JOHN LEY
CLERK

VERNON MADISON,
Petitioner - Appellant,

versus

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ATTORNEY GENERAL, STATE OF ALABAMA,
Respondents - Appellees.

Appeal from the United States District Court
for the Southern District of Alabama

(April 27, 2012)

Before DUBINA, Chief Judge, and BARKETT and MARTIN, Circuit Judges.

PER CURIAM:

Vernon Madison, an Alabama prisoner on death row, appeals from the district court's denial of his petition for a writ of habeas corpus, brought pursuant to 28 U.S.C. § 2254. This Court granted Madison a Certificate of Appealability as to the following issues: (1) whether the trial judge and Alabama Court of Criminal Appeals violated Batson v. Kentucky, 476 U.S. 79 (1986), and the Fourteenth Amendment by erroneously concluding that counsel had not established a prima facie case of discrimination in the prosecution's use of peremptory strikes; (2) whether the trial judge and the Court of Criminal Appeals violated the Eighth and Fourteenth Amendments by failing to consider and find mitigating evidence when imposing and affirming Madison's death sentence; and (3) whether the authority of a trial judge to judicially "override" a jury sentencing recommendation results in a sentence based on arbitrary procedures, in violation of the Eighth and Fourteenth Amendments.

I. Background

Madison, who is black, was indicted for capital murder for killing a white police officer. He was initially convicted and sentenced to death. The Court

of Criminal Appeals reversed his conviction because the dictates of Batson had been violated. Madison v. State, 545 So. 2d 94 (Ala. Crim. App. 1987) ("Madison I"). At his second trial, Madison was again convicted and sentenced to death, and the Court of Criminal Appeals again reversed his conviction, this time on the grounds that the state had elicited expert testimony based partly on facts not in evidence. Madison v. State, 620 So. 2d 62 (Ala. Crim. App. 1992) ("Madison II").

At his third trial, the jury found Madison guilty of capital murder and recommended, by an 8–4 vote, that he be sentenced to life imprisonment without parole. The trial judge, however, overrode the jury's recommendation and sentenced Madison to death. The Court of Criminal Appeals affirmed both his conviction and sentence, Madison v. State, 718 So. 2d 90 (Ala. Crim. App. 1997) ("Madison III"), and the Alabama Supreme Court affirmed as well, Ex parte Madison, 718 So. 2d 104 (Ala. 1998). Madison filed a petition for post–conviction relief pursuant to Rule 32 of the Alabama Rules of Criminal Procedure, which was dismissed by the trial court and affirmed by the Court of Criminal Appeals. Madison v. State, 999 So. 2d 561 (Ala. Crim. App. 2006). Madison then filed this petition in federal court, which was denied, and it is from this order that Madison now appeals.

II. Standard of Review

This appeal is governed by 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996. Because Madison's claims were adjudicated on the merits in his state proceedings, §

2254(d) allows federal habeas relief only if the state court adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

If we determine that a state court decision is contrary to or an unreasonable application of federal law, we must undertake a de novo review of the record. McGahee v. Ala. Dep't of Corr., 560 F.3d 1252, 1266 (11th Cir. 2009). We address Madison's arguments in turn.[1]

III. Discussion

Initially, we find that Madison's claim that Alabama's judicial override scheme violates the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment is foreclosed by precedent. See Harris v. Alabama, 513 U.S. 504 (1995) (holding that Alabama's judicial override scheme did not violate the Eighth Amendment by not specifying the weight the judge must give to a jury recommendation). Here, the trial judge stated that it gave the jury recommendation "significant weight"

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[1] We focus on the Court of Criminal Appeals's decision because it is the last reasoned decision of the state court on these issues. See McGahee, 560 F.3d at 1261 n.12.

and "all due and proper serious consideration[.]" Thus, as applied in this case, Alabama's judicial override scheme did not result in a decision that arbitrarily or capriciously disregarded the jury's recommendation of life imprisonment without parole.

We next turn to Madison's claim that the Alabama courts failed to consider the mitigating evidence of Madison's mental illness[2] and his mother's plea for mercy. Although the trial judge's sentencing order might have been inartful, it appears clear to us that the trial judge, and the Court of Criminal Appeals, considered Madison's evidence, but found it insufficient to outweigh the aggravating circumstances. Regarding the mental illness evidence, the trial judge did give "due consideration to the testimony of the [mental health expert] as evidence of a mitigating circumstance." Although the trial judge found that Madison's mental illness was not sufficiently extreme to be considered a statutory mitigating factor,[3] he did consider Madison's illness and mother's plea as non–statutory mitigating circumstances. The trial judge

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[2] In particular, Madison's expert testified that he suffered from a delusional disorder, that he had experienced persecution delusions since he was a teenager, that he was out of touch with reality, that he was unable to gather his thoughts, and that he could not appreciate the criminality of his conduct. To control his illness, Madison had been prescribed numerous anti-psychotic medications.

[3] See Ala. Code § 13a-5-51(2) (stating that one statutory mitigating factor is whether "[t]he capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance") (emphasis added).

stated that he "considered the testimony of lay witnesses and all other mitigating evidence offered by the Defendant, including that not enumerated as statutory mitigating circumstances." The trial judge concluded in his sentencing order that the "aggravating circumstances overwhelmingly outweigh the mitigating circumstances" and the Court of Criminal Appeals affirmed. Madison III, 718 So. 2d at 96–97. We cannot say that the decisions of the state trial and appellate courts in this regard were contrary to, or involved an unreasonable application of, clearly established federal law. See § 2254(d)(1).

We now address Madison's claim that the trial judge and the Court of Criminal Appeals violated Batson v. Kentucky, 476 U.S. 79 (1986), by failing to determine that Madison established a prima facie Batson case. The Equal Protection Clause of the Fourteenth Amendment prohibits using peremptory challenges to exclude jurors on the basis of race. Batson, 476 U.S. at 89. The Supreme Court has enumerated a three–step process for determining whether a Batson violation has occurred:

> First, the defendant must make out a prima facie case by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose. Second, once the defendant has made out a prima facie case, the burden shifts to the State to explain adequately the racial exclusion by offering permissible race-neutral justifications for the strikes. Third, if a race-neutral explanation is tendered, the trial court must then decide . . .

> whether the opponent of the strike has proved purposeful racial discrimination.

Johnson v. California, 545 U.S. 162, 168 (2005) (internal quotation marks, citations, and footnotes omitted).

In Johnson, the Supreme Court held that, to establish a prima facie case, a Batson objector did not "have to persuade the judge . . . that the challenge was more likely than not the product of purposeful discrimination." 545 U.S. at 170. Rather, "a defendant satisfies the requirements of Batson's first step by producing evidence sufficient to permit the trial court to draw an inference that discrimination has occurred." Id. (emphasis added). It is not until the third step of the Batson framework, after considering the objection as well as the reasons proffered for the strike, that a judge decides whether there is sufficient persuasive evidence to prove discrimination. Id. ("[W]e assumed in Batson that the trial judge would have the benefit of all relevant circumstances, including the prosecutor's explanation, before deciding whether it was more likely than not that the challenge was improperly motivated."); see also McNair v. Campbell, 416 F.3d 1291, 1310 (11th Cir. 2005) (explaining that only at the third step does the court "determine whether the defendant has proven purposeful discrimination"). Thus, we must only determine whether Madison produced sufficient evidence to permit an inference of discrimination. See Batson, 476 U.S. at 96.

When considering whether an objector has made a prima facie case as a first step, a court must

consider all relevant circumstances which include, but are not limited to: (1) a prosecutor's pattern of strikes against black jurors included in the venire, Batson, 476 U.S. at 97; (2) the prosecutor's questions and statements during voir dire examination, id.; (3) the failure of a prosecutor to ask meaningful questions to the struck jurors, Miller-El v. Dretke, 545 U.S. 231, 244–45 (2005); (4) "the subject matter of the case . . . if it is racially or ethnically sensitive," United States v. Ochoa–Vasquez, 428 F.3d 1015, 1045 n.39 (11th Cir. 2005); and (5) evidence of past discrimination in jury selection, Miller-El, 545 U.S. at 266.

In this case, the venire originally consisted of sixty members, fifteen of whom were black. After strikes for cause, there were thirteen qualified black jurors.[4] The prosecutor then used six of his eighteen peremptory strikes on the qualified black jurors. When Madison's counsel objected, the trial judge asked the prosecutor to provide a race–neutral explanation for the peremptory strikes of the black jurors. However, instead of doing so, the prosecutor protested that Madison had not established a prima facie case. When the trial judge asked the prosecutor what he meant, the prosecutor erroneously responded that to establish a prima facie case Madison not only had to show that he was a member of the group suffering discrimination, but "that the

[4] The prosecutor used one of his "for cause" strikes against a black juror.

State has a history of racial discrimination."[5] Madison's counsel responded that the prosecutor had cited the wrong test under Batson and that, under the correct test, there were sufficient relevant facts to support an inference of discrimination, which was all Madison's counsel had to show at this stage of the proceeding. Madison's counsel noted that the prosecutor had not asked meaningful questions to any of the challenged black jurors and in fact, for three such jurors, posed no questions at all. He noted that the challenged jurors only shared the common characteristic of race as they had heterogenous backgrounds of different sexes, ages, occupations, and education. He also noted that the subject matter of the case involved racial sensitivities as the defendant was black and the victim was a white police officer.[6]

Without addressing Madison's arguments or asking the prosecutor for a race–neutral reason for the strikes, the trial judge held that Madison's counsel had not proved "bias on the part of the State"

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[5] This proffered standard requiring a "history of racial discrimination" is incorrect and mirrors the prima facie requirements under Swain v. Alabama, 380 U.S. 202 (1965), which Batson specifically overruled for being too onerous. Batson, 476 U.S. at 92 ("Since this interpretation of Swain has placed on defendants a crippling burden of proof, prosecutors's peremptory challenges are now largely immune from constitutional scrutiny. . . . [W]e reject this evidentiary formulation").

[6] Madison's counsel also raised the possibility that the fact might come out in trial that Madison had at the time a white girlfriend.

and then denied the motion. The Court of Criminal Appeals affirmed that ruling, concluding that the trial judge had not erred in denying Madison's Batson claim, because Madison had not "established purposeful racial discrimination." Madison III, 718 So. 2d at 102.

Madison argues that the Court of Criminal Appeals unreasonably applied clearly established federal law because the court used the wrong standard for establishing a prima facie case when it required Madison to establish "purposeful racial discrimination" rather than to provide sufficient support for an inference of discrimination. We agree that requiring Madison to "establish[] purposeful discrimination" is the wrong standard to apply for the first step of Batson, which only requires Madison to produce sufficient "facts and any other relevant circumstances" that "raise an inference . . . of purposeful discrimination." 476 U.S. at 96 (emphasis added). The Court of Criminal Appeals's error mirrors the trial judge's conclusion that, at this first step, Madison was obliged to show "bias on the part of the State." The Supreme Court emphasized in Johnson that it "did not intend the [Batson] first step to be so onerous that a defendant would have to persuade the judge . . . that the challenge was more likely than not the product of purposeful discrimination." 545 U.S. at 170.

The Court of Criminal Appeals reached a decision contrary to clearly established federal law under 28 U.S.C. § 2254(d)(1) because the court increased Madison's prima facie burden beyond what Batson requires. In Williams v. Taylor, the Supreme Court

held that a state court decision is contrary to clearly established law under § 2254(d)(1) when it imposes a burden on the petitioner that is higher than what Supreme Court precedent requires. 529 U.S. 362, 405-06 (2000) (O'Connor, J., majority opinion) (explaining that requiring a petitioner who claims ineffective assistance of counsel to establish prejudice based on a preponderance of evidence is contrary to clearly established law because Supreme Court precedent only requires a reasonable probability of prejudice). Here, the Court of Criminal Appeals demanded that Madison establish purposeful discrimination at the outset rather than merely produce evidence sufficient to raise an inference of discrimination, which is all that Batson requires. Because the state-court decision falls within the "contrary to" clause of § 2254(d)(1), we must undertake a de novo review of the record. See id. at 406; see also McGahee, 560 F.3d at 1266 (same).

The record reflects that Madison presented to the Alabama courts several relevant circumstances that in total were sufficient to support an inference of discrimination. See Batson, 476 U.S. at 94 (holding that a prima facie case must be decided on the "totality of the relevant facts"); see also United States v. Hill, 643 F.3d 807, 839 (11th Cir. 2011) ("the prima facie case determination is not to be based on numbers alone but is to be made in light of the totality of the circumstances."). In addition to pointing out that the prosecutor used a number of his strikes against a variety of black jurors, Madison noted: (1) the failure of the prosecutor to ask

questions to three of the challenged jurors, see Batson, 476 U.S. at 97; see also Madison III, 718 So. 2d at 102 (finding this fact relevant); (2) the case's racially sensitive subject matter, see Ochoa–Vasquez, 428 F.3d at 1045 n.39;[7] and (3) the district attorney's office's prior discrimination in jury selection, occurring both in Madison's first trial and in other state cases, see McNair, 416 F.3d at 1312 (finding relevant a list of cases where the district attorney's office violated Batson).[8]

By presenting several relevant circumstances that in sum were sufficient to raise an inference of discrimination, Madison met his burden of establishing a prima facie case. Accordingly, we reverse the district court's order and remand the case for the district court to complete the final two steps of the Batson proceedings. See Ochoa-Vasquez,

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[7] Indeed, the facts in Madison mirror those in Johnson, where the Supreme Court quoted with approval the lower court's finding that it was a "highly relevant circumstance that a black defendant was charged with killing his White girlfriend's child, and that it certainly looks suspicious that all three African-American prospective jurors were removed from the jury." 545 U.S. at 167 (internal quotation marks omitted). See also Hill, 643 F.3d at 840 ("[t]he fact that the defendants are the same race as the struck jurors . . . can be relevant to the prima facie question.").

[8] Madison cited the following cases: Jessie v. State, 659 So. 2d 167 (Ala. Crim. App. 1994); Carter v. State, 603 So. 2d 1137 (Ala. Crim. App. 1992); Jackson v. State, 557 So. 2d 855 (Ala. Crim. App. 1990); Harrell v. State, 571 So. 2d 1269 (Ala. Crim. App. 1990); White v. State, 522 So. 2d 323 (Ala. Crim. App. 1987); Williams v. State, 507 So. 2d 566 (Ala. Crim. App. 1987).

428 F.3d at 1046 n.40 (stating that if the Batson objector's "evidence establishes a prima facie case, then we would need to remand to the district court for further Batson proceedings, including a statement of the reasons by the government for . . . its peremptory strikes."); see also Paulino v. Castro, 371 F.3d 1083, 1092 (9th Cir. 2004) (same).

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH INSTRUCTIONS.

BARKETT, Circuit Judge, concurring:

I concur in the majority's opinion and write separately only to voice my agreement with Justice Stevens's recognition in Harris v. Alabama, 513 U.S. 504 (1995), of the perversity of Alabama's judicial override system in capital sentencing. As Justice Stevens noted, Alabama is one of the four states that allow judicial override of a jury's recommendation of a life sentence. See Harris, 513 U.S. at 515–16 (Stevens, J., dissenting). Even though eight of the twelve jurors in Madison's case recommended that he receive a life sentence, Alabama's capital sentencing regime permitted the judge to reject, without any guiding standard, that recommendation in favor of a sentence of death, which is what the judge in this case did.

The practical consequence of Alabama's system is exactly as Justice Stevens described:

> The defendant's life is twice put in jeopardy, once before the jury and again in the repeat performance before a different, and likely less sympathetic, decisionmaker. A scheme that we

> assumed would provide capital defendants with more, rather than less, judicial protection, has perversely devolved into a procedure that requires the defendant to stave off a death sentence at each of two de novo sentencing hearings.

Id. at 521 (internal citation, quotation marks and alteration omitted). Moreover, because the sentencing decision of the first decisionmaker—i.e, a presumed reasonable jury—can be ignored without any limiting principles in favor of a sentence of death by the second decisionmaker, I question whether it can be deemed constitutional.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 11-12392

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JUL -8 2011
JOHN LEY
CLERK

VERNON MADISON,

Petitioner - Appellant,

versus

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ATTORNEY GENERAL, STATE OF ALABAMA,

Respondents - Appellees.

Appeal from the United States District Court
for the Southern District of Alabama

ORDER:

Appellant Vernon Madison's motion for certificate of appealability is granted.

s/ Rosemary Barkett
UNITED STATES
CIRCUIT JUDGE

APPENDIX C

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

VERNON MADISON,	)	
	)	
Petitioner,	)	
	)	
v.	)	**CIVIL ACTION NO.**
	)	**1:09-00009-KD-B**
RICHARD ALLEN, Commissioner of the Alabama Department of Corrections, and the ATTORNEY GENERAL OF THE STATE OF ALABAMA	)	
	)	
Respondents.	)	
	)	

ORDER

Before the Court are Petitioner Vernon Madison's Petition for Writ of Habeas Corpus (Doc. 1-2) and "Amendment to Petitioner's Habeas Corpus Petition" (Doc. 30), along with Respondents' answers to same

(Docs. 19, 38), as well as Madison's Motion for Discovery and Evidentiary Hearing (Doc. 31). On January 8, 2009, Madison initiated this action by filing a Petition for Writ of Habeas Corpus. (Doc. 1). Madison challenges a 1994 Alabama state court judgment of conviction and death sentence for a single count of capital murder.

For the reasons set forth below, Madison's claims are **DENIED** and his requests for discovery and for an evidentiary hearing[1] are **DENIED**.

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[1] Because Madison filed his federal habeas petition after April 24, 1996, this case is governed by the Antiterrorism and Effective Death Penalty Act (AEDPA). "AEDPA expressly limits the extent to which hearings are permissible, not merely the extent to which they are required." Kelley v. Sec'y for Dep't of Corr., 377 F.3d 1317, 1337 (11th Cir. 2004). The legal standard for determining when an evidentiary hearing in a habeas corpus case is allowed is articulated in 28 U.S.C. § 2254(e)(2), which provides:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—
>
> **(A)** the claim relies on—
>
> **(i)** a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> **(ii)** a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> **(B)** the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would

I. Procedural Posture

In May of 1985, a Mobile County grand jury indicted Madison for the murder of Julius Schulte. (Tab R-1 at 26; Indictment). Schulte was an officer in the Mobile Police Department's Juvenile Division. (Id.) The two-count indictment charged capital murder under § 13A-5-40(a)(5) of the Alabama Code. (Id.). The first count of the indictment "charged the appellant with killing a police officer who was on duty, and the second charged him with killing a police officer who was performing an official or job-related act." (Tab R-49; Madison v. State, 718 So. 2d 90 (Ala. Crim. App. 1997)); (Tab R-1 at 26; Indictment). Madison pled not guilty and not guilty by reason of mental disease or defect. See Madison v. State, 620 So. 2d 62, 63 (Ala. Crim. App. 1992).

Madison was tried three times for the murder of Officer Schulte. On September 12, 1985, at the conclusion of his first trial, a jury found Madison guilty of capital murder. See id. The trial court then sentenced Madison to death. See id. Madison appealed, and the Alabama Court of Criminal Appeals determined that the prosecution had violated Batson v. Kentucky, 476 U.S. 79 (1986), reversed Madison's conviction and sentence, and remanded his case for a new trial. Madison v. State,

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have found the applicant guilty of the underlying offense.

Id.

Madison has failed to establish that an evidentiary hearing is warranted in this case.

545 So. 2d 94, 99 (Ala. Crim. App. 1987) (finding that prosecutor's explanations for use of peremptory strikes to remove all seven black prospective jurors from venire were "superficial, show[ed] a lack of proper examination" and did not overcome the defendant's *prima facie* case). Following his second trial in September of 1990, Madison was again convicted and sentenced to death. Madison, 620 So. 2d at 63. Madison's second conviction and death sentence were also reversed and the case again remanded for a new trial, this time due to a violation of *Ex parte* Wesley, 575 So. 2d 127 (Ala. 1990). See Madison, 620 So. 2d at 71 (reversing because prosecution psychologist Dr. McClaren was permitted, during the guilt phase of trial, to state his opinion of the appellant's mental condition at the time the offense was committed, despite the fact that McClaren's opinion was based in part on information not in evidence).

Madison's third trial commenced on April 18, 1994. (Tab R-5 at 1; Tr. Transcript, Vol. 2, p. R-25). Three days later, on April 21, 1994, Madison was again convicted of capital murder. (Tab R-16 at 1-2; Tr. Transcript, Vol. 5, pp. R-704-705). The penalty phase of the trial was then conducted before the jury (Tab R-17 at 1; Tr. Transcript, Vol. 5, p. R-706), which, by a vote of 8 to 4, recommended a sentence of life imprisonment without parole. (Tab R-26 at 1; Tr. Transcript, Vol. 5, p. R-800). However, at the sentencing hearing on July 7, 1994, the trial court overrode the jury's recommendation and sentenced Madison to death. (Tab R-29 at 1; Tr. Transcript, Vol. 6, p. 25). On direct appeal, the Alabama Court of

Criminal Appeals affirmed Madison's capital murder conviction and death sentence. (Tab R-49; Madison, 718 So. 2d 90).

On certiorari review of Madison's direct appeal following his third trial, the Alabama Supreme Court specifically addressed whether the trial court deprived Madison of his constitutional rights by not requiring the jury to reach a unanimous agreement on which of two alternative theories supported the capital conviction. (Tab R-50; *Ex parte* Madison, 718 So. 2d 104, 106 (Ala. 1998)). The Alabama Supreme Court affirmed Madison's conviction and sentence on June 19, 1998. Id. at 105-108 (interpreting § 13A-5-40(a)(5) as stating two alternative theories of proving a single offense and concluding "that the requirement for unanimous verdicts does not extend to unanimous agreement on the theory or means by which a defendant committed the crime"). Madison then petitioned the United States Supreme Court for a writ of certiorari, which the high court denied on November 16, 1998. (Tab R-51; Madison v. Alabama, 525 U.S. 1006 (1998)).

Madison timely initiated a collateral attack on his conviction and death sentence by filing a petition for postconviction relief pursuant to Rule 32 of the Alabama Rules of Criminal Procedure on June 18, 1999. (Tab R-37; Petition Pursuant to Rule 32 of the Alabama Rules of Criminal Procedure). The State of Alabama responded on July 14, 1999, filing an answer (Tab R-38; Answer) and a motion to dismiss (Tab R-40; Motion for Dismissal). However, the circuit court did not dispose of Madison's Rule 32 motion until August 2005, after the State renewed

and revised its 1999 motion to dismiss. On August 25, 2005, the circuit court granted the renewed and revised motion to dismiss, summarily dismissing Madison's petition. (Tab R-52; Order Addressing Madison's Rule 32 Petition).[2]

Madison appealed the dismissal of his Rule 32 petition, and on September 29, 2006, the Alabama Court of Criminal Appeals affirmed the lower court's dismissal. (Tab R-53; Madison v. State, 999 So. 2d 561 (Ala. Crim. App. 2006)). On December 1, 2006, the Court of Criminal Appeals denied Madison's request for a rehearing. Id. Finally, Madison sought certiorari review in Alabama's Supreme Court, which was denied on August 15, 2008. (Tab R-54; Certificate of Judgment Denying Writ).

On December 2, 2008, Madison timely filed the instant petition pursuant to § 2254 of Title 28 of the United States Code. (Doc. 1). Respondent filed his answer to the petition on April 29, 2009. (Doc. 19). On January 20, 2010, Madison filed an amendment to his § 2254 petition. (Doc. 30). Respondent answered the amendment on April 27, 2010. (Doc. 38).

II. Factual Background

In its opinion affirming Madison's capital murder conviction and death sentence, the Alabama Supreme Court summarized the underlying facts of this case as follows:

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[2] A full history of the Rule 32 proceedings in the Mobile County Circuit Court was set forth by the Alabama Court of Criminal Appeals in Madison v. State, 999 So. 2d 561, 565-66 (Ala. Crim. App. 2006).

> The evidence presented at Madison's third trial showed that on April 18, 1985, Cpl. Julius Shulte, an officer of the Mobile Police Department, was dispatched to Cheryl Green's home to investigate a report that Green's 11-year-old daughter was missing. Corporal Shulte was not in his police uniform and was not in a marked car. He was, however, wearing a Mobile Police Department badge. Madison, who until a few days earlier had been living with Green, came to Green's home, before Cpl. Shulte arrived, to retrieve personal items that Green had thrown out of the house. By the time Cpl. Shulte arrived at Green's home, Green's daughter had already returned. Nonetheless, neighbors asked Cpl. Shulte to stay until Madison had left Green and her child safely alone.
>
> Green and Madison came out of the house and talked to Cpl. Shulte, who never got out of his car. After a brief conversation with Cpl. Shulte, Madison appeared to leave. Actually, he walked about a block away and returned with a .32 caliber pistol; he covertly walked up behind Cpl. Shulte, while Cpl. Shulte was still in his car. Madison fired two shots at near point-blank range, one into the back of Cpl. Shulte's head and one into his left temple. Madison then shot Green twice in the back and fled the murder scene. He subsequently told an acquaintance, "I just killed a cop."

(Tab R-50; *Ex parte* Madison, 718 So. 2d at 105).

III. Discussion

As outlined above, Madison has filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 ("§ 2254"), setting forth 34 claims in support of his request for habeas relief. For clarity, the Court has numbered Madison's habeas claims 1-34, in the order in which they have been asserted in Madison's pleadings, as follows:

Claim 1: The state circuit court should not have summarily dismissed Madison's Rule 32 petition. (Doc. 1-2, ¶ III.A).

Claims 2-16: Madison's trial counsel was ineffective. (Doc. 1-2, ¶ III.B (pp. 7-12 of the petition contain 15 separate ineffective assistance of trial counsel claims); Doc. 30, ¶ B.1.a-c).

Claim 17: Madison's Brady claim should not have been dismissed. (Doc. 1-2, ¶ III.C.).

Claim 18: The State of Alabama discriminated in the selection of the grand jury. (Doc. 1-2, ¶ III.D.).

Claim 19: The trial court had a *sua sponte* duty to recuse itself from deciding the case. (Doc. 1-2, ¶ III.E; Doc. 30, ¶ D.1.).

Claim 20: Madison's death sentence was imposed due to racial bias. (Doc. 1-2, ¶ III.F).

Claim 21: Madison's sentence of death by electrocution is cruel and unusual. In spite of an intervening Alabama law mandating execution by lethal injection unless an inmate chooses electrocution, the fact that Madison was sentenced to death by electrocution entitles him either to a resentencing or to a determination of the constitutionality of this method of execution. (Doc. 1-2, ¶ III.G).

Claim 22: Alabama does not provide Madison a meaningful procedure to seek clemency in violation of the International Covenant on Civil and Political Rights. (Doc. 1-2, ¶ III.H).

Claim 23: The trial court erred in using an element of the capital-murder offense as an aggravating circumstance in imposing a death sentence. (Doc. 1-2, ¶ III.I).

Claim 24: Madison's appellate counsel was ineffective. (Doc. 1-2, ¶ III.I.42, J; Doc. 30, ¶ B.2).

Claim 25: The trial court erred in denying Madison's motion for a change of venue. (Doc. 1-2, ¶ III.K).

Claim 26: The trial court erred in allowing Madison's indictment to charge two counts of capital murder for a single offense. (Doc. 1-2, ¶ III.L).

Claim 27: The trial court erred by finding no mitigating circumstances when imposing its sentence. (Doc. 1-2, ¶ III.M; Doc. 30, ¶ D.3).

Claim 28: The trial court erred when it refused to instruct the jury on manslaughter as a lesser included offense. (Doc. 1-2, ¶ III.N; Doc. 30, ¶ D.2).

Claim 29: The trial court erred by denying Madison's Batson motion and not requiring the state to articulate its reasons for striking black jurors. (Doc. 1-2, ¶ III.O).

Claim 30: The trial court erred by overriding the jury's recommendation of life imprisonment without parole and imposing the death penalty. (Doc. 1-2, ¶ III.P; Doc. 30 ¶¶ 4 & 6).

Claim 31: The trial court improperly denied Madison adequate voir dire concerning a potential juror's views on the death penalty. (Doc. 1-2, ¶ III.Q).

Claim 32: The trial court erred in admitting a replica of the badge Officer Schulte allegedly wore the night he was killed. (Doc. 1-2, ¶ III.R; Doc. 30, ¶ C.2).

Claim 33: Madison's trial counsel was ineffective for not raising certain issues at trial, resulting in those issues being procedurally barred in further appellate proceedings. (Doc. 30, ¶ B.1.d).

Claim 34: The trial court erred in allowing the sitting District Attorney of Mobile County to testify as a witness for the prosecution as to the voluntariness of Madison's statements. (Doc. 30, ¶ C.1).

As explained in greater detail below, Madison has procedurally defaulted twenty-five of these claims. The undersigned considers the remaining nine claims on the merits.

A. Procedurally Defaulted Claims

Before a federal court considers a habeas petition presented by a state prisoner, the court must first determine whether the petitioner has properly presented the issues to the state courts. A state prisoner "must give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a habeas petition." O'Sullivan v. Boerckel, 526 U.S. 838, 842 (1999). See also 28 U.S.C. § 2254(b)(1) (a prisoner in state custody shall not be granted a writ of habeas corpus unless the prisoner "has exhausted the remedies available in

the courts of the State."). The exhaustion doctrine requires that a petitioner "give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." O'Sullivan, 526 U.S. at 845. In Alabama, the established appellate review process includes an appeal to the Alabama Court of Criminal Appeals, an application for rehearing to the Alabama Court of Criminal Appeals, and an application for discretionary review by the Alabama Supreme Court. See Ala. R. App. P. 4, 39-40.

A state prisoner's failure to present his claims to the state courts in the proper manner results in a procedural default of those claims. O'Sullivan, 526 U.S. at 848. The doctrine of procedural default, as it relates to petitions filed under 28 U.S.C. § 2254, arises from principles of comity and federalism. Francis v. Henderson, 425 U.S. 536, 541 (1976). A federal court "will not consider an issue of federal law on direct review from a judgment of a state court if that judgment rests on a state-law ground that is both 'independent' of the merits of the federal claim and an 'adequate' basis for the court's decision." Harris v. Reed, 489 U.S. 255, 260 (1989). A violation of a state procedural rule is adequate to foreclose federal review if the rule is "firmly established and regularly followed." Lee v. Kemna, 534 U.S. 362, 376 (2002). A state court's decision is independent unless the resolution of the state law issue depends on a federal constitutional ruling. Stewart v. Smith, 536 U.S. 856, 860 (2002).

Procedural default can arise in two ways. First, procedural default can occur when a petitioner raises his federal claims in state court, and "the state court correctly applies a procedural default principle of state law to arrive at the conclusion that the petitioner's federal claims are barred." Bailey v. Nagle, 172 F.3d 1299, 1302-03 (11th Cir. 1999). Second, procedural default can occur when a petitioner fails to raise his federal claims in state court, rendering the claims unexhausted, and the time to do so has lapsed. Id. See also O'Sullivan, 526 U.S. at 843-45. Although unexhausted claims generally must be returned to the state court for consideration on the merits, if the federal court determines that the state procedural rules now preclude review of the claim on the merits and, thus, exhaustion would be futile, the doctrine of procedural default applies even though the state court never invoked the state procedural rule. Snowden v. Singletary, 135 F.3d 732, 736 (11th Cir. 1998).

Once a federal claim is procedurally defaulted in state court, a state habeas petitioner "is procedurally barred from pursuing the same claim in federal court absent a showing of cause for and actual prejudice from the default." Bailey, 172 F.3d at 1302 (citing Wainwright v. Sykes, 433 U.S. 72, 87 (1977)). "[C]ause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule" or that the procedural default was the result of ineffective assistance of counsel. Murray v. Carrier, 477 U.S. 478, 488 (1986). Prejudice, in

this context, means a reasonable probability that the outcome would have been different. Jenkins v. Bullard, 210 Fed. Appx. 895, 898-901 (11th Cir. 2006) (per curiam). A petitioner must show "not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." United States v. Frady, 456 U.S. 152, 170 (1982) (emphasis in original). In the absence of a showing of cause and prejudice, the Court may yet consider a procedurally defaulted claim if a "fundamental miscarriage of justice" has "probably resulted in the conviction of one who is actually innocent." Smith v. Murray, 47 U.S. 527, 537-38 (1986). Absent one of these exceptions, however, procedurally defaulted claims cannot be raised in federal habeas corpus petitions. Kelley, 377 F.3d at 1343-45 (11th Cir. 2004).

The Court will now consider those claims alleged by Respondents to be procedurally defaulted.

1. Claims Not Raised in the State Court – Claims 21 and 34

With regard to Claim 21, Madison contends in his § 2254 Petition that "[t]he Alabama court decision that the new 'choice' provided Mr. Madison in the method of his execution somehow relieves the problem of the method/methods being cruel or unusual is, with all due respect, a puzzling bit of reasoning." (Doc. 1-2, ¶ III.G). Specifically, he argues

> [ ] Were one to offer a robber the "option" of blinding himself with a hot poker or removing his hands via a sharp axe as his form of

punishment, the absurdity of this problem might be more apparent.

[ ] Despite the new "protocol" offered by the State, in its infinite kindness, the fact remains no court of law has ever sentenced Mr. Madison to be killed by the new methods, and there is no more proof that the State of Alabama is any more competent at managing these new forms of execution than its prior bungling shows on the method of electrocution. More, numerous challenges exist in the states of Missouri and California to at least one of the methods the State now "offers" for Mr. Madison to "choose[.]"[ ] The situation is almost out of a Kafka novel.

[ ] The Eighth Amendment requires states to take all feasible measures to minimize the risk of cruelty in administering capital punishment. Zant v. Stephens, 462 U.S. 862 (1983). No court would approve any method of implementation of the death sentence found to involve unnecessary cruelty in light of presently available alternatives. Furman v. Georgia, 408 U.S. 238 (1972). Other courts have recently found constitutional problems with various methods of execution. Fierro v. Gomez, 865 F.Supp. 1387 (N.D. Cal. 1994) (finding California's gas chamber unconstitutional).

[ ] Recent changes to the Alabama law regarding execution do not change this. The new "option" of execution by another equally

> questionable method of inflicting death does not remove the problem with Mr. Madison; he is under an order of death by electrocution . . . that order must either be changed, i.e., a resentencing and this clock thus turned back to allow another direct appeal, or this Honorable Court should rule on this method of execution. The procedural requirements of the law mandate that Mr. Madison be given a sentence that complies with the Eighth Amendment and due process. That must be done in order to satisfy minimum concepts of fairness and procedural oversight. Or in the alternative that this Court determines that procedurally it can simply ignore the prior order and reform it to substitute the new method of execution, then it must permit subsequent attacks on this new method. This cannot be procedurally ignored because it is the State's own actions that have brought this situation about.

(Id.).

The only claim in Madison's Rule 32 petition regarding Alabama's method(s) of execution reads as follows:

> F. EXECUTIONS IN ALABAMA ARE CONDUCTED IN A MANNER THAT CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT
>
> 15. The Eighth Amendment requires states to take all feasible measures to minimize the risk of cruelty in administering capital

punishment. Zant v. Stephenson, 462 U.S. 862 (1983). No court would approve any method of implementation of the death sentence found to involve unnecessary cruelty in light of presently available alternatives. Furman v. Georgia, 408 U.S. 238 (1972). Other courts recently have found constitutional problems with various methods of execution. Fierro v. Gomez, 865 F. Supp. 1387 (N.D. Cal. 1994) (finding California's gas chamber unconstitutional).

16. In 1989, Horace Dinkins received electrical burns on his hip, left thigh, buttocks, lower back, right shoulder, and right leg. In 1990 the Commissioner of the Alabama Department of Corrections conceded that the state's electrocution equipment and [*sic*] that the state planned to replace the chair. That same old chair is still up at Holman Prison and is still used to carry out executions. The staff is undertrained and not qualified to operate such equipment. In 1995 and in 1996 Willy Clisby and Edward Horsley were executed and burned badly during the use of the chair. Kentucky and Tennessee have passed laws rejecting electrocution as the sole method of execution, and now provide a lethal injection option. Alabama continues to require electrocution for those convicted before a certain date. The Eighth Amendment forbids the kind of slow, painful, and excruciating death that would be inflicted upon Mr. Madison if the electric chair were to be used to

> execute him. Thus unless there is some other option this Petitioner should be granted relief because his electrocution would violate the Eighth and Fourteenth Amendment[s] to the United States Constitution.

(Tab R-37, ¶ II.F).

At trial, on direct appeal, and in his Rule 32 proceedings, Madison did not mention the issues he now raises in Claim 21 of his § 2254 petition: the "option" or "choice" Madison will face and the fact that he has never been sentenced to be killed by lethal injection. Instead, in the Rule 32 petition Madison argued that the electrocution method of execution was cruel and unusual. Madison also indicated in the Rule 32 petition that his objections to the electrocution method would be mooted if "there [were] some other option." (Id.).

As noted above, Madison's Rule 32 petition was filed on June 18, 1999, and was dismissed on August 25, 2005. It remained pending for a total of more than 6 years. A little more than three years after Madison's Rule 32 petition was filed, and more than three years before the Alabama Circuit Court dismissed it, "[o]n July 1, 2002, Alabama amended its statute prescribing the method of execution so that, in all cases where a death sentence has been imposed, execution shall be by lethal injection unless the person sentenced to death chooses electrocution as the means of execution." McGahee v. Campbell, No. 05-0042-KD-M, 2007 WL 3025192, at *15 (S.D.

Ala. Feb. 14, 2007) (citing Ala. Code § 15-18-82(a)).[3] However, Madison made no effort to exhaust the claims by seeking to amend his Rule 32 petition or by filing a second Rule 32 petition regarding the method of execution claims that he sets forth in his § 2254 petition.

As a result, the method-of-execution claims contained in Madison's § 2254 petition are procedurally barred because they are unexhausted, and any attempt Madison might make now to exhaust his claims in the Alabama courts would be futile because the statute of limitations would bar such unexhausted claims.[4] See McGahee, 2007 WL 3025192, at *11 n.6 (concluding that claim regarding Alabama's method of execution by legal injection was procedurally defaulted because the petitioner had not exhausted his claim in state court and the time to do so had lapsed; the undersigned explained that at the time the Alabama legislature amended the statute to make lethal injection the standard method

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[3] In denying Madison's Rule 32 petition, the Alabama Court of Criminal Appeals held that this change in the law rendered moot Madison's argument that execution by electrocution constitutes cruel and unusual punishment. (See Tab R-53; Madison, 999 So. 2d at 570). The Court agrees. See McGahee, 2007 WL 3025192, at *15 ("[B]ecause lethal injection is now the standard method of execution in the State of Alabama, and electrocution is only an alternative, claim [that Alabama's method of execution by electrocution constitutes cruel and unusual punishment] is moot.").

[4] The Court of Criminal Appeals issued its certificate of judgment of affirmance of Madison's conviction and sentence on July 10, 1998. (See Record Vol. 9, p. 25).

of execution in Alabama, the petitioner's appeal of the denial of his Rule 32 petition was pending in the Alabama Court of Criminal Appeals, yet the petitioner did not file a second Rule 32 petition in the state court to challenge the constitutionality of lethal injection); Bailey v. Nagle, 172 F.3d 1299, 1306 (11th Cir. 1999); Ala. R. Crim. P. 32.2(c). Madison does not attempt to excuse the fact that his § 2254 method-of-execution claims have not been fully exhausted by claiming that they rest on newly discovered evidence. See Ala. R. Crim. P. 32.2(c) & 32.1(e); McGahee, 2007 WL 3025192, at *11 n.6.

Therefore, inasmuch as Claim 21 is procedurally defaulted, and Madison has proffered no excuse for his procedural default, nor has he claimed that he is "actually innocent" of the crime for which he was convicted, it will not be considered for review on the merits and is **DENIED**.

With regard to Claim 34, Madison contends for the first time in his amended petition[5] that the fact

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[5] In his original § 2254 petition, Madison mentioned in support of his putative Brady claim that:

> "Hiding the ball" at any stage of a prosecution, let alone one for death, is a violation of the prosecutor's duty. In this bizarre case, *the presiding district attorney himself actually took Mr. Madison's statement for admission at trial*. He testified at the trial itself [ ]! This is not only unusual, it lends an atmosphere of bias and "pulling out all the stops" to this trial that meant that any person who wanted to turn over this evidence [and testimony was elicited at trial regarding Mr. Madison's being under the influence of alcohol at the time he gave his statement] would have had to effectively attack his or her own boss!

that the "sitting District Attorney for Mobile County, Chris Galanos, testified as a witness for the state[] as to the voluntariness of the Petitioner's statement . . . amounted to an improper vouching for and bolstering of the . . . police officer's testimony on the same subject[] by the jurisdiction's highest elected official." (Doc. 30, ¶ C.1.).

This claim is procedurally defaulted because it is unexhausted and "any attempt [Madison] now makes to exhaust his claims in the Alabama courts would be futile under Alabama procedural default doctrine." See Bailey, 172 F.3d at 1302-03 & 1305-06 (citing Snowden, 135 F.3d at 737). Madison failed to present this claim on direct appeal, nor did he raise it in his Rule 32 petition. If Madison brought it at the present time in state court, the statute of limitations would bar this unexhausted claim. See id. at 1306; Ala. R. Crim. P. 32.2(c).

Because this claim is procedurally defaulted, and because Madison has proffered no excuse for his procedural default, nor has he claimed that he is "actually innocent" of the crime for which he was convicted, Claim 34 will not be considered for review on the merits and is **DENIED**.

2. Claims that the State Court Found Procedurally Barred – Claims 2-20, 22-24, & 33

As to those claims presented to the Alabama state courts and found to be procedurally barred, the Court must determine whether the state courts

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(Doc. 1-2, ¶ III.C.21) (emphasis in original).

denied Madison's claims based on an independent and adequate state procedural rule. Bailey, 172 F.3d at 1303. For this, the Eleventh Circuit has established a three-part test: "First, the last state court rendering a judgment in the case must clearly and expressly state that it is relying on state procedural rules to resolve the federal claim without reaching the merits of that claim." Judd v. Haley, 250 F.3d 1308, 1313 (11th Cir. 2001); Mason v. Allen, 605 F.3d 1114, 1120 (11th Cir. 2010) (quoting Judd). "Secondly, the state court's decision must rest solidly on state law grounds, and may not be intertwined with an interpretation of federal law." Id. (internal citation and quotations omitted). "Finally, the state procedural rule must be adequate; i.e., it must not be applied in an arbitrary or unprecedented fashion;" it must not be "manifestly unfair in its treatment of the petitioner's federal constitutional claim," id. (internal citation and quotations omitted); and it must be firmly established and regularly followed. Cochran v. Herring, 43 F.3d 1404, 1408 (11th Cir. 1995) (citing Ford v. Georgia, 498 U.S. 411, 423-24 (1991)). For the reasons stated below, the Court finds that Claims 2-20, 22-24, and 33 are defaulted in state court and are therefore procedurally barred and will not be considered on the merits.

Claims 2-16, 24, and 33 each allege ways in which Madison's trial and appellate counsel were ineffective. (Doc. 1-2, ¶¶ III.B (pp. 7-12 of the petition contain 15 separate ineffective assistance of trial counsel claims), I.42 & J (ineffective assistance of appellate counsel); Doc. 30 ¶¶ B (reiterating claims made in original petition and adding claim

that trial counsel were ineffective "to the extent that any potential legal issues are procedurally barred because they were not raised at trial, and therefore could not be raised on direct appeal, in a Rule 32, or Federal Habeas Corpus proceeding[]")). These same claims were raised by Madison in his Rule 32 petition. The Alabama Court of Criminal Appeals held that they were procedurally barred. With regard to the ineffective assistance of trial counsel claims, the Alabama Court of Criminal Appeals stated:

> When Madison was last tried in 1994, the procedure established in *Ex parte* Jackson, 598 So. 2d 895 (Ala. 1992) was in effect. Under Jackson, newly appointed appellate counsel could extend the time for filing a motion for a new trial until the record of the trial proceedings was completed, and counsel could then raise an ineffective-assistance-of-trial-counsel claim in the motion for a new trial and on direct appeal. The Alabama Supreme Court, noting the problems Jackson created, overruled Jackson in *Ex parte* Ingram, 675 So. 2d 863 (Ala. 1996). However, from 1992, when the Supreme Court's opinion in Jackson was released, until it was overruled in 1996, Jackson was the law.
>
> We have taken judicial notice of the record of Madison's trial proceedings. See *Ex parte* Salter, 520 So. 2d 213 (Ala. Crim. App. 1987). Madison was sentenced to death in July 1994. New counsel was appointed for purposes of appeal to this Court, and counsel filed a Jackson motion to extend the time for filing a

motion for a new trial. After the record was completed and forwarded to appellate counsel, counsel chose not to pursue any ineffective-assistance-of-trial-counsel claim. As we have stated:

> If the appellant was convicted before the Alabama Supreme Court's decision in [*Ex parte*] Ingram, [675 So. 2d 863 (Ala. 1996),] newly appointed appellate counsel could have presented claims of ineffective assistance of counsel in a motion for new trial filed pursuant to *Ex parte* Jackson, 598 So. 2d 895 (Ala. 1992). Those same claims of ineffective assistance of trial counsel could have then been presented on direct appeal. Accordingly, if the appellant was convicted before the decision in Ingram, and the appellant was, in fact, represented by separate counsel, then the allegations of ineffective assistance of trial counsel presented in the Rule 32 petition are precluded from review, because the claims could have been, but were not, raised at trial and on appeal. Rule 32.2(a)(3) & (5), Ala. R. Crim. P.

Andersch v. State, 716 So. 2d 242, 245 (Ala. Crim. App. 1997). See also Davis v. State, [Ms. CR-03-2086, March 3, 2006] --- So. 2d ---, --- (Ala. Crim. App. 2006), quoting Payne v. State, 791 So. 2d 383, 390 (Ala. Crim. App. 1999).

> Here, the circuit court correctly determined that Madison's claims of ineffective assistance of trial counsel were procedurally barred because they could have been, but were not, raised at trial or on appeal. See Rules 32.2(a)(3) and (a)(5) Ala. R. Crim. P.

(See Tab R-53; Madison, 999 So. 2d at 568-69).

As laid out above, relying on *Ex parte* Jackson, 598 So. 2d 895 (Ala. 1992), as well as Alabama Rules of Criminal Procedure 32.2(a)(3) and (a)(5), the Alabama Court of Criminal Appeals refused to consider these claims because Madison raised them for the first time in his Rule 32 proceedings. The Eleventh Circuit has indicated that "[b]ecause Alabama's Jackson rule was an independent and adequate state ground," during the relevant time period, this Court is "barred from habeas review of [Madison]'s ineffective-trial-counsel claims unless he shows cause and prejudice to overcome Alabama's procedural bar." Payne v. Allen, 539 F.3d 1297, 1313-15 (11th Cir. 2008). Based on the Court's review of the state court rules applied and the record of Madison's trial, appeals of his conviction and sentence, and Rule 32 proceedings, the Court is satisfied that the Court of Criminal Appeals clearly and expressly stated that it relied on state procedural rules to resolve these claims without reaching their merits, that the state court's decision rested solidly on state law grounds and was not intertwined with an interpretation of federal law, that the relevant state procedural law was firmly established and regularly followed, and that the procedural bar was fairly and non-arbitrarily

applied. Therefore, Claims 2-16 and 33, which were raised for the first time during Madison's Rule 32 proceedings, are defaulted in state court pursuant to independent and adequate state procedural grounds and are procedurally barred in this Court.

After reviewing the record, the Court is convinced that all of the ineffective assistance of trial counsel claims Madison raises in his habeas petition were addressed and procedurally barred in state court. However, assuming that Madison is raising any ineffective assistance of trial counsel claims for the first time before this Court, those allegations constitute new claims that are unexhausted, and any attempt by Madison to raise the claims now in state court would be futile pursuant to the rules cited immediately above and applied by the Alabama Court of Criminal Appeals in Madison's Rule 32 proceedings, as well as barred by the applicable statute of limitations. See Bailey, 172 F.3d at 1302, 1305-06; Ala. R. Crim. P. 32.2(c).

Before this Court, Madison contends that the ineffectiveness of his appellate counsel constitutes cause to excuse his failure to raise the ineffective assistance of trial counsel claims at trial or on appeal: "[t]he ineffective assistance of counsel claims are essentially cascading. If the claims are barred because they were not raised by trial counsel because they were ineffective, they should have been raised by appellate counsel. If the claims are barred because they were not raised by appellate counsel, the appellate counsel were ineffective." (Doc. 30, ¶ B.3.).

Madison is correct that "[a] petitioner can establish cause by showing that a procedural default was caused by constitutionally ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668, 690 . . . (1984)." Payne, 539 F.3d at 1314 (quoting Fortenberry v. Haley, 297 F.3d 1213, 1222 (11th Cir. 2002)). However, in order to "constitute cause," counsel's ineffectiveness must amount to "an independent constitutional violation." See id. n.16 (quoting Coleman v. Thompson, 501 U.S. 722 (1991)).

With regard to Claim 24, Madison contended in his Rule 32 petition that his appellate counsel was ineffective for, among other things, "fail[ing] to . . . challenge the competency of trial counsel." (R-32, p. 41). Regarding the ineffective assistance of appellate counsel claim that Madison alleged in his Rule 32 petition, the Alabama Court of Criminal Appeals stated:

> Madison asserted the following claim in his Rule 32 petition:
>
> > "It is well settled that any defendant is entitled to effective assistance of counsel at critical stages of any criminal proceeding. Where appeal is provided for, an appellant is entitled to effective assistance of counsel. Evitts v. Lucey, 469 U.S. 387 (1985). In the instant case, the petitioner was denied the effective assistance of counsel when his appellate attorney was disbarred during the course of his representation. The petitioner was deprived of a full and fair review of his appeal due to this, and the

> same appellate counsel failed to brief several crucial issues to the petitioner. Moreover, he failed to adequately supplement the record, and to challenge the competency of trial counsel. The failure of the appellate counsel to provide effective assistance resulted in the petitioner being denied his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, the provisions of the Alabama Constitution, and Alabama law."

(C.R. 41.) This paragraph constitutes Madison's entire argument on this issue.

The circuit court when denying relief stated:

> "Madison does not argue his appellate counsel was disbarred because of his performance in Madison's case nor does he proffer any facts in his Rule 32 petition indicating how he was prejudiced due to his appellate counsel being disbarred. See Adkins v. State, [930 So. 2d 524] (Ala. Crim. App. 2001) (holding that '[t]he fact that [Adkins' defense counsel have been disciplined by the Alabama State Bar on unrelated matters has no bearing on their performance in Adkins' trial'). Madison also fails to identify in . . . his Rule 32 petition one 'crucial issue' his appellate counsel failed to raise on direct appeal

> and fails to proffer what his appellate counsel would have added to the record that would have caused a different result on direct appeal. Finally, Madison fails to identify . . . one example of ineffective assistance from his trial counsel his appellate counsel should have raised on direct appeal. See Coral v. State, [900 So. 2d 1274] (Ala. Crim. App. 2004) (holding that '[e]ach sub-category [of ineffective assistance of counsel] is an independent claim that must be sufficiently ple[]d.'). The Court finds the allegation of ineffective assistance of appellate counsel in Madison's Rule 32 petition fails to meet the specificity and full factual pleading requirements of Rule 32.6(b); therefore, they are summarily dismissed."
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> (C.R. 215.) We agree with the circuit court's findings and adopt them as part of our opinion.

(See Tab R-53; Madison, 999 So. 2d at 568-69).

Alabama Rule of Criminal Procedure 32.6(b) provides:

> [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.

This Court and the Eleventh Circuit have held that claims not addressed by the state courts on the basis that they were insufficiently pled under Alabama Rule of Criminal Procedure 32.6(b) are procedurally defaulted. See Jenkins, 210 Fed. Appx. at 901 (noting that Rule 32.6(b) has "been firmly established and regularly followed by the Alabama courts. The Court of Criminal Appeals has consistently affirmed . . . lower court decisions that have summarily dismissed Rule 32 petitions that do not include specific facts which would entitle the petitioner to collateral relief." Id. (citations omitted)); James v. Jones, No. 06-0290-KD-M, 2007 WL 1455964, at *7 (S.D. Ala. May 17, 2007) (DuBose, J.); accord Williams v. Ferrell, No. 07-0617-WS-M, 2008 WL 725105, at *2 (S.D. Ala. 2008) (Steele, J.).

Because Madison's ineffective assistance of appellate counsel claim is procedurally defaulted, it cannot establish cause for the procedural default of his ineffective assistance of trial counsel claims. Therefore, inasmuch as Madison has failed to establish cause for his procedural default of Claims 2-16, 24, and 33 or that he is "actually innocent" of the crime for which he was convicted, these claims will not be considered for review on the merits and are **DENIED**.

With regard to Claim 17, Madison claims that the Alabama courts erred by dismissing his Brady claim. (Doc. 1-2, ¶ III.C.). Neither the Alabama Court of Criminal Appeals nor the state circuit court, in considering Madison's Rule 32 petition, reached the merits of his Brady claim, and Madison failed to present the claim at trial or on direct appeal.

Instead, the state circuit court concluded that Madison's putative Brady claim was procedurally barred pursuant to Alabama Rules of Criminal Procedure 32.2(a)(3) and (a)(5) on account of Madison's failure to comply with the rule of Payne v. State, 791 So. 2d 383, 398 (Ala. Crim. App. 1999), which mandates that a postconviction Brady claim raised for the first time in a Rule 32 petition must meet all five prerequisites of Alabama Rule of Criminal Procedure 32.1(e), which defines newly discovered evidence. (See Tab R-52, ¶ IV.51-54). The Alabama Court of Criminal Appeals, in reviewing the dismissal of Madison's Rule 32 petition, affirmed the circuit court's disposition of the Brady claim on the same ground. (See Tab R-53; Madison, 999 So. 2d at 569-70).

Based on the Court's review of the state court rules applied and the record of the state court proceedings, the Court is satisfied that the Alabama Court of Criminal Appeals clearly and expressly stated that it relied on state procedural rules to resolve this claim without reaching its merits, that the state court's decision rested solidly on state law grounds and was not intertwined with an interpretation of federal law, that the relevant state procedural law was firmly established and regularly followed, and that the procedural bar was fairly and non-arbitrarily applied. Therefore, Claim 17 is procedurally defaulted in state court pursuant to independent and adequate state procedural grounds and is procedurally barred in this Court. Inasmuch as Madison has proffered no excuse for his procedural default, nor has he claimed that he is

"actually innocent" of the crime for which he was convicted, Claim 17 will not be considered for review on the merits and is **DENIED**.

With regard to Claims 18-20, 22, and 23, as explained in greater detail below, the Alabama courts relied solely on Alabama Rules of Criminal Procedure 32.2(a)(3) and (a)(5) to find that the claims were procedurally defaulted because they were not raised at trial or on appeal. As noted in the discussion of the ineffective assistance of counsel claims, the Eleventh Circuit has previously held that a Rule 32 court's finding that a claim is procedurally defaulted under Alabama Rules of Criminal Procedure 32.2(a)(3) and (a)(5) because it was not raised at trial or on direct appeal constitutes a procedural default. See Brownlee v. Haley, 306 F.3d 1043, 1065-66 (11th Cir. 2002); Mason v. Allen, 605 F.3d 1114, 1121 (11th Cir. 2010).

With regard to Claim 18, Madison contends that the "Alabama Court" erred by dismissing his claim that the State of Alabama discriminated in the selection of the grand jury. (Doc. 1-2, ¶ III.D.). Neither the Alabama Court of Criminal Appeals nor the state circuit court in considering Madison's Rule 32 petition reached the merits of the underlying claim, and Madison failed to present the claim at trial or on direct appeal. Instead, the state circuit court concluded that Madison's putative claim of discrimination in the selection of the grand jury was procedurally barred pursuant to Alabama Rules of Criminal Procedure 32.2(a)(3) and (a)(5) on account of Madison's failure to raise the claim at trial or on appeal. (See Tab R-52, ¶ V.55). Without

explanation,[6] the Alabama Court of Criminal Appeals affirmed the circuit court's denial of this claim. (See Tab R-53; Madison, 999 So. 2d at 572).

Based on the Court's review of the state court rules applied and the record of the state court proceedings, the Court is satisfied that the state circuit court clearly and expressly stated that it relied on state procedural rules to resolve this claim without reaching its merits, that the state court's decision rested solidly on state law grounds and was not intertwined with an interpretation of federal law, that the relevant state procedural law was firmly established and regularly followed, and that the procedural bar was fairly and non-arbitrarily applied. Therefore, Claim 18 is procedurally defaulted in state court pursuant to independent and adequate state procedural grounds and is procedurally barred in this Court. Inasmuch as Madison has proffered no excuse for his procedural default, nor has he claimed that he is "actually innocent" of the crime for which he was convicted, Claim 18 will not be considered for review on the merits and is **DENIED**.

With regard to Claim 19, Madison contends that the "Alabama Court" erred in dismissing his claim that the trial court had a *sua sponte* duty to recuse

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[6] In light of the Alabama Court of Criminal Appeals' unexplained denial of this claim, the undersigned looks to the holding of the last reasoned state court opinion, in this instance the state circuit court's Rule 32 opinion. See Ylst v. Nunnemaker, 501 U.S. 797, 803-04 (1991) (federal courts "look through . . . subsequent unexplained denials to th[e last reasoned] opinion").

itself from deciding the case. (Doc. 1-2, ¶ III.E; Doc. 30, ¶ D.1.). However, neither the Alabama Court of Criminal Appeals nor the Alabama Circuit Court, in considering Madison's Rule 32 petition, reached the merits of this claim, and Madison failed to present the claim at trial or on direct appeal. Instead, the state circuit court concluded that Madison's putative claim that the trial court erred by failing to recuse itself was procedurally barred pursuant to Alabama Rules of Criminal Procedure 32.2(a)(3) and (a)(5) on account of Madison's failure to raise the claim at trial or on direct appeal. (See Tab R-52, ¶ VI.56). The Alabama Court of Criminal Appeals,[7] in reviewing the dismissal of Madison's Rule 32 petition, affirmed the circuit court's disposition of the claim on the same ground. (See Tab R-53; Madison, 999 So. 2d at 571).

Based on the Court's review of the state court rules applied and the record of the state court proceedings, the Court is satisfied that the Alabama Court of Criminal Appeals clearly and expressly stated that it relied on state procedural rules to resolve this claim without reaching its merits, that the state court's decision rested solidly on state law grounds and was not intertwined with an interpretation of federal law, that the relevant state procedural law was firmly established and regularly

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[7] In light of the Alabama Supreme Court's unexplained affirmance of the Alabama Court of Criminal Appeals' denial of this claim, the undersigned looks to the holding of the last reasoned state court opinion, in this instance the Alabama Court of Criminal Appeals' opinion affirming the circuit court's dismissal of Madison's Rule 32 petition. See Ylst, 501 U.S. at 803-04.

followed, and that the procedural bar was fairly and non-arbitrarily applied. Therefore, Claim 19 is procedurally defaulted in state court pursuant to independent and adequate state procedural grounds and is procedurally barred in this Court. Inasmuch as Madison has proffered no excuse for his procedural default, nor has he claimed that he is "actually innocent" of the crime for which he was convicted, Claim 19 will not be considered for review on the merits and is **DENIED**.

With regard to Claim 20, Madison contends that the "issue of racial bias was neither properly decided nor procedurally barred." (Doc. 1-2, ¶ III.F). Neither the Alabama Court of Criminal Appeals nor the state circuit court, in considering Madison's Rule 32 petition, reached the merits of this claim, and Madison failed to present the claim at trial or on direct appeal. However, the state circuit court concluded that Madison's putative claim that his death sentence is "unconstitutional because it was sought and imposed pursuant to a pattern of racial bias" was procedurally barred.[8] The Alabama Court

[8] The state circuit court found that the allegation was procedurally barred pursuant to Alabama Rule of Criminal Procedure 32.2(a)(3) because it could have been but was not raised at trial. (See Tab R-52, ¶ VII.57). The circuit court also found that the allegation was procedurally barred "because it was addressed and rejected on direct appeal." This finding is contradicted by the Alabama Court of Criminal Appeals' conclusion that the allegation was not raised on direct appeal. (See Tab R-53; Madison, 999 So. 2d at 571). The undersigned has reviewed the record. Neither Madison's briefing on appeal nor the petition for certiorari he filed following the denial of his appeal contains this allegation regarding "a pattern of racial bias."

of Criminal Appeals,[9] in reviewing the dismissal of Madison's Rule 32 petition, affirmed the circuit court's disposition of the claim pursuant to Alabama Rules of Criminal Procedure 32.2(a)(3) and (a)(5) on account of Madison's failure to raise the claim at trial or on direct appeal. (See Tab R-53; Madison, 999 So. 2d at 571).

Based on the Court's review of the state court rules applied and the record of the state court proceedings, the Court is satisfied that the Alabama Court of Criminal Appeals clearly and expressly stated that it relied on state procedural rules to resolve this claim without reaching its merits, that the state court's decision rested solidly on state law grounds and was not intertwined with an interpretation of federal law, that the relevant state procedural law was firmly established and regularly followed, and that the procedural bar was fairly and non-arbitrarily applied. Therefore, Claim 20 is procedurally defaulted in state court pursuant to independent and adequate state procedural grounds and is procedurally barred in this Court. Inasmuch as Madison has proffered no excuse for his procedural default, nor has he claimed that he is "actually innocent" of the crime for which he was convicted, Claim 20 will not be considered for review on the merits and is **DENIED**.

With regard to Claim 22, Madison contends that the "[t]he Alabama court erred in deciding that international law and procedural requirements could not be met under a Rule 32 petition." (Doc. 1-2, ¶

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[9] Supra note 7.

III.H). Neither the Alabama Court of Criminal Appeals nor the state circuit court, in considering Madison's Rule 32 petition, reached the merits of such a claim,[10] and Madison failed to present the claim at trial or on direct appeal. Instead, the state circuit court concluded that the putative claim in Madison's Rule 32 petition that his "execution would violate the Supremacy Clause in that Alabama provides no meaningful procedure for clemency in violation of international law, specifically the International Covenant on Civil and Political Rights, to which the United States is a signatory," (see Tab R-37, ¶ II.G), was procedurally barred pursuant to Alabama Rules of Criminal Procedure 32.2(a)(3) and (a)(5) on account of Madison's failure to raise the claim at trial or on direct appeal. (See Tab R-52, ¶ IX.60). The Alabama Court of Criminal Appeals,[11] in reviewing the dismissal of Madison's Rule 32 petition, affirmed the circuit court's disposition of the claim on the same ground. (See Tab R-53; Madison, 999 So. 2d at 571-72).

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[10] The claim, so labeled, is not clear. However, a review of the arguments listed in support of the claim reveal that the claim is substantively identical to Madison's claim in the Rule 32 petition that his execution would violate the Supremacy Clause in that Alabama provides no meaningful procedure for clemency in violation of international law, specifically the International Covenant on Civil and Political Rights, to which the United States is a signatory. (Compare Doc. 1-2, ¶ III.H, with Tab R-37, ¶ II.G).

[11] Supra note 7.

Based on the Court's review of the state court rules applied and the record of the state court proceedings, the Court is satisfied that the Alabama Court of Criminal Appeals clearly and expressly stated that it relied on state procedural rules to resolve this claim without reaching its merits, that the state court's decision rested solidly on state law grounds and was not intertwined with an interpretation of federal law, that the relevant state procedural law was firmly established and regularly followed, and that the procedural bar was fairly and non-arbitrarily applied. Therefore, Claim 22 is procedurally defaulted in state court pursuant to independent and adequate state procedural grounds and is procedurally barred in this Court. Inasmuch as Madison has proffered no excuse for his procedural default, nor has he claimed that he is "actually innocent" of the crime for which he was convicted, Claim 22 will not be considered for review on the merits and is **DENIED**.

With regard to Claim 23, Madison contends that the "[t]he Alabama court erred in denying the claim on double[-]counting the aggravating factor." (Doc. 1-2, ¶ III.I). Neither the Alabama Court of Criminal Appeals nor the state circuit court, in considering Madison's Rule 32 petition, reached the merits of such a claim, and Madison failed to present the claim at trial or on direct appeal. Instead, the state circuit court concluded that Madison's putative claim in his Rule 32 petition that "the Petitioner's right to an individualized determination of the appropriateness of his sentence was denied when the trial court double-counted both the elevator and the aggravator

of killing a police officer in imposing a death sentence," (see Tab R-37, ¶ II.I), was procedurally barred pursuant to Alabama Rules of Criminal Procedure 32.2(a)(3) and (a)(5) on account of Madison's failure to raise the claim at trial or on direct appeal. (See Tab R-52, ¶ X.61). The Alabama Court of Criminal Appeals,[12] in reviewing the dismissal of Madison's Rule 32 petition, affirmed the circuit court's disposition of the claim on the same ground. (See Tab R-53; Madison, 999 So. 2d at 572).

Based on the Court's review of the state court rules applied and the record of the state court proceedings, the Court is satisfied that the Alabama Court of Criminal Appeals clearly and expressly stated that it relied on state procedural rules to resolve this claim without reaching its merits, that the state court's decision rested solidly on state law grounds and was not intertwined with an interpretation of federal law, that the relevant state procedural law was firmly established and regularly followed, and that the procedural bar was fairly and non-arbitrarily applied. Therefore, Claim 23 is procedurally defaulted in state court pursuant to independent and adequate state procedural grounds and is procedurally barred in this Court. Inasmuch as Madison has proffered no excuse for his procedural default, nor has he claimed that he is "actually innocent" of the crime for which he was convicted, Claim 23 will not be considered for review on the merits and is **DENIED**.

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[12] Supra note 7.

B. Claims Reviewed on the Merits – Claims 1 and 25-32

The Court will now consider the merits of Madison's claims that have not been procedurally defaulted.

Title 28 U.S.C. § 2254 governs the authority of the federal courts to consider an application for a writ of habeas corpus submitted by a state prisoner. Henderson v. Campbell, 353 F.3d 880, 889-90 (11th Cir. 2003). Because Madison's petition was filed after April 24, 1996, it is subject to the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub.L 104-132, § 104, 110 Stat. 1214, 1218-1219. Lindh v. Murphy, 521 U.S. 320, 326-27 (1997). Under that statute, the role of the federal court[] is strictly limited." Jones v. Walker, 496 F.3d 1216, 1226 (11th Cir. 2007). The federal court no longer has "plenary authority to grant habeas relief," as its "authority to grant relief is now conditioned on giving deference to the states." Id.

Pursuant to 28 U.S.C. § 2254(d), habeas relief cannot be granted on claims previously adjudicated on the merits by the Alabama courts unless the state courts' adjudication either:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

The United States Supreme Court clarified the application of § 2254(d)(1) as follows:

> [A] state court acts contrary to clearly established federal law if it applies a legal rule that contradicts our prior holdings or if it reaches a different result from one of our cases despite confronting indistinguishable facts. [See 28 U.S.C. § 2254(d)(1).] The statute also authorizes federal habeas corpus relief if, under clearly established federal law, a state court has been unreasonable in applying the governing legal principle to the facts of the case. [See id.] A state determination may be set aside under this standard if, under clearly established federal law, the state court was unreasonable in refusing to extend the governing legal principle to a context in which the principle should have controlled.

Ramdass v. Angelone, 530 U.S. 156, 165-166 (2000) (citing Williams v. Taylor, 529 U.S. 362 (2000)); see also Lockyer v. Andrade, 538 U.S. 63, 73 (2003).

The Supreme Court defined "clearly established Federal law" as "the governing legal principle or principles set forth by the Supreme Court at the time the state court render[ed] its decision." Lockyer, 538 U.S. at 71-72. The Eleventh Circuit explained that Supreme Court precedent can be considered "clearly established" if it "would have compelled a particular result in the case." Neelley v. Nagle, 138 F.3d 917, 923 (11th Cir. 1998), overruled on other grounds by Parker v. Head, 244 F.3d 831, 835 (11th Cir. 2001). The Supreme Court later clarified that "[a]voiding

these pitfalls does not require citation of our cases—indeed, it does not even require awareness of our cases, so long as neither the reasoning nor the result of the state-court decision contradicts them." Early v. Packer, 537 U.S. 3, 8 (2002).

The "unreasonable application" inquiry is "whether the state court's application of clearly established federal law was objectively unreasonable." Williams, 529 U.S. at 409. This inquiry "must be assessed in light of the record the [state] court had before it." Holland v. Jackson, 542 U.S. 649, 652 (2004) (per curiam) (citations omitted). A state court's application of federal law is deemed objectively unreasonable when it "identifies the correct legal rule from Supreme Court case law but unreasonably applies that rule to the facts of the petitioner's case" or "unreasonably extends, or unreasonably declines to extend, a legal principle from Supreme Court case law to a new context." Putman v. Head, 268 F.3d 1223, 1241 (11th Cir. 2001). The Supreme Court has pointed out more than once that "[t]he question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold." Schriro v. Landrigan, 550 U.S. 465, 473 (2007). See also Williams, 529 U.S. at 412 ("an unreasonable application of federal law is different from an incorrect or erroneous application of federal law.").

With regard to § 2254(d)(2), the Supreme Court stated that "a decision adjudicated on the merits in a state court and based on a factual determination will

not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding." Miller-El v. Cockrell ("Miller-El I"), 537 U.S. 322, 340 (2003). And § 2254(e)(1) provides that:

> In a proceeding instituted by an applicant for a writ of habeas corpus by a person in custody pursuant to the judgement of a State Court, a determination of a factual issue made by a State Court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption by clear and convincing evidence.

28 U.S.C. § 2254(e)(1). See also Miller-El I, 537 U.S. at 340 (a federal court can "disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence"); Jones, 496 F.3d at 1226-27 (11th Cir. 2007) (holding that § 2254(d)(2)'s standard was satisfied where the petitioner showed "clearly and convincingly" that the state court's decision "contained an unreasonable determination of fact." Id. (internal quotations omitted)).

For the reasons stated below, the Court finds that Claims 1 and 25-32 are without merit and are due to be **DENIED**.

With regard to Claim 1, Madison contends that the Alabama Court of Criminal Appeals erred by affirming the circuit court's summary dismissal of his Rule 32 petition. (Doc. 1-2, ¶ III.A). Madison claims that this result "cannot be reconciled with well established Alabama law which prohibits

summary dismissal of a petition which is meritorious on its face, nor with clearly established federal law which mandates due process." (Id., ¶ A.8). Madison maintains that his Rule 32 petition contained clear and specific allegations that, if true, would have entitled him to relief. (Id. ¶¶ 8-9). In particular, Madison points to his allegation in the Rule 32 proceeding that trial counsel were ineffective for failing to investigate and present mitigating evidence that would have, if true, entitled him to relief. (Id., ¶ 12). As such, Madison contends that he met his burden of pleading and was entitled to an opportunity to present evidence in light of the fact that there were disputed issues of fact. (Id. ¶¶ 8-13). Madison also argues that the Alabama Court of Criminal Appeals improperly "focused on the amount of time that had expired during the pendency of th[e] Rule 32 action," which, according to Madison, is "less important than the fact that, once the Circuit Court decided to act, it denied him the ability to respond, and deprived him of due process." (Id. ¶ 13).

In its memorandum opinion affirming the circuit court's denial of relief on this claim, the Alabama Court of Criminal Appeals[13] stated:

> Madison argues that the circuit court erred in adopting the State's proposed order denying relief on the day that it was filed without first providing him the opportunity to respond to the motion.
>
> . . .

[13] Supra note 7.

Initially, we note that it was not error for the circuit court to adopt the State's proposed order when denying relief. As we have repeatedly stated:

> "'The Alabama Supreme Court and this Court have repeatedly upheld a circuit court's wholesale adoption of a proposed order prepared by one of the parties.' [Citations omitted].

[]

Nor do we agree with Madison's assertion that he was not given notice or an opportunity to respond to the State's motion for dismissal. The record shows that within 30 days of the filing of the Rule 32 petition the State responded to the petition and filed a motion to dismiss. In both the response and the motion to dismiss, the State asserted that Madison had failed to comply with the specificity requirements of Rule 32.6(b), Ala. R. Crim. P., because Madison failed to assert a factual basis for each claim. The State also asserted that many of Madison's claims were procedurally barred because they could have been, but were not, raised at trial or on appeal. See Rules 32.2(a)(3) and (a)(5), Ala. R. Crim. P. Madison was placed on notice in July 1999 of the State's defense to the Rule 32 petition and had over six years to amend the petition or to take other action. Madison failed to pursue the case.

The Supreme Court has held: "'Where a simple reading of the petition for post-conviction relief shows that, assuming every allegation of the petition to be true, it is obviously without merit or is precluded, the circuit court [may] summarily dismiss that petition without requiring a response from the district attorney.'" Bishop v. State, 608 So. 2d 345, 347-48 (Ala. 1992) (quoting and agreeing with Judge Bowen's dissent in Bishop v. State, 592 So. 2d 664, 667 (Ala. Crim. App. 1991)).

Madison relies on the Supreme Court's decision in *Ex parte* MacEwan, 860 So. 2d 896 (Ala. 2002), to support his contention that he was denied an opportunity to respond to the motion to dismiss and that, therefore, the case must be remanded to the circuit court to give him that opportunity. However, in MacEwan, the State filed a motion to dismiss MacEwan's petition, attaching an affidavit executed by MacEwan's trial counsel, and the motion was not served on MacEwan. The Supreme Court noted that the affidavit was significant because it disputed MacEwan's claims of ineffective-assistance-of-counsel. In reversing the judgment and remanding the case, the Supreme Court held that MacEwan was denied an opportunity to rebut the assertions made in the affidavit. The Supreme Court stated:

> "We cannot say with full confidence that the State's failure to serve its motion to dismiss (with the attached affidavit) on

> MacEwan's Rule 32 counsel did not prejudice MacEwan, because the trial judge neglected to enter a written order stating his reasons for summarily dismissing the petition. While such a written order is not required in a Rule 32 proceeding, it is sound judicial practice, particularly given the facts presented in this case. See Bowers v. State, 709 So. 2d 494, 495 (Ala. Crim. App. 1995). Therefore, in order to allow the trial court to properly inquire into the merits of MacEwan's ineffective-assistance-of-counsel claim, we reverse the judgment of the Court of Criminal Appeals and remand the case for that court to remand it for the trial court to hold an evidentiary hearing."

860 So. 2d at 897-98. Clearly, this case is factually distinguishable from MacEwan. Here, there was no affidavit attached to the State's motion to dismiss, and the circuit court entered a detailed order denying Madison's Rule 32 petition. Moreover, the Supreme Court implicitly recognized in MacEwan that in some instances when a petitioner is not notified that the State has filed a motion to dismiss there may be no prejudice. Clearly, this case represents just such an instance. Madison was notified of the State's asserted grounds of preclusion more than six years before the circuit court denied the Rule 32 petition.

This case languished in the circuit court for years with little action. In granting the State's renewed motion to dismiss on the day the motion was filed, the circuit court concluded the long-delayed postconviction proceedings. The issues raised in Madison's Rule 32 petition were either procedurally barred or precluded. Therefore, if any error did occur, it was harmless. Cf. Young v. State, 600 So. 2d 1073 (Ala. Crim. App. 1992) (prosecutor's failure to file response to Rule 32 petition was harmless); Moran v. State, 649 So. 2d 1292 (Ala. Crim. App. 1993) (prosecutor's failure to file timely answer to Rule 32 petition was harmless).

[]

Madison also argues in his brief to this Court that the circuit court confused his burden to "plead" facts with his burden to "prove" facts. He asserts that he pleaded facts that, if true, would entitle him to relief.

Rule 32.6(b), Ala. R. Crim. P., states:

> "The 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."

When describing a petitioner's burden under Rule 32.6(b), Ala. R. Crim. P., this Court has stated:

> "'Rule 32.6(b) requires that the *petition* itself disclose the *facts* relied upon in seeking relief.' Boyd v. State, 746 So. 2d 364, 406 (Ala. Crim. App. 1999). In other words, it is not the pleading of a *conclusion* 'which, if true, entitle[s] the petitioner to relief.' Lancaster v. State, 638 So. 2d 1370, 1373 (Ala. Crim. App. 1993). It is the allegation of *facts* in pleading which, if true, entitle a petitioner to relief. After *facts* are pleaded, which, if true, entitle the petitioner to relief, the petitioner is then entitled to an opportunity, as provided in Rule 32.9, Ala. R. Crim. P., to present evidence proving those *alleged facts*."

Boyd v. State, 913 So. 2d 1113, 1125 (Ala. Crim. App. 2003).

> "The burden of pleading under Rule 32.3 and Rule 32.6(b) is a heavy one. Conclusions unsupported by specific facts will not satisfy the requirements of Rule 32.3 and Rule 32.6(b). The *full* factual basis for the claim must be included in the petition itself. If, assuming every factual allegation in a Rule 32 petition to be true, a court cannot determine whether the petitioner is entitled to relief, the

> petitioner has not satisfied the burden of pleading under Rule 32.3 and Rule 32.6(b). See Bracknell v. State, 883 So. 2d 724 (Ala. Crim. App. 2003). To sufficiently plead an allegation of ineffective assistance of counsel, a Rule 32 petitioner not only must 'identify the [specific] acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment,' Strickland v. Washington, 466 U.S. 668, 690 . . . , but also must plead specific facts indicating that he or she was prejudiced by the acts or omissions, i.e., facts indicating 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' 466 U.S. at 694. A bare allegation that prejudice occurred without specific facts indicating how the petitioner was prejudiced is not sufficient."

Hyde v. State, [Ms. CR-04-1092, March 3, 2006], 950 So. 2d 344, 356, 2006 Ala. Crim. App. LEXIS 33, *26-27 (Ala. Crim. App. 2006).

A review of the record shows that the circuit court did not confuse Madison's burden of *pleading* facts with his burden of *proving* facts. An example of Madison's failure to plead any factual grounds is the following claim in Madison's Rule 32 petition:

> "Trial counsel failed to adequately investigate and present evidence of Mr. Madison's mental illness during the guilt and penalty phase of the trial. If not for trial counsel's failure to investigate, develop, and present this evidence at trial there is a reasonable probability that the outcome would have been different."
>
> (C.R. 34-35.) Madison stated no facts to support this claim. Clearly, this claim failed to meet the specificity requirements of Rule 32.6(b), Ala. R. Crim. P.

(Tab R-53; Madison, 999 So. 2d 561, 566-568 (Ala. Crim. App. 2006) (emphasis in original)).

Having reviewed the record in this matter, the Court agrees with the Alabama Court of Criminal Appeals that Madison failed to establish that his rights were violated by the trial court's summary dismissal of his Rule 32 petition. Moreover, as our sister court in the Middle District recently explained:

> [n]either . . . the failure of a state court to conduct an evidentiary hearing on such a petition nor summary dismissal of the petition implicates the Constitution[,] as states have no obligation to provide this avenue of relief, and when they do, nothing in the Constitution requires that . . . an evidentiary hearing be held or a particular type of order be entered denying the petition. See Murray v. Giarratano, 492 U.S. 1, 6-8 . . . (1989); Pennsylvania v. Finley, 481 U.S. 551, 557 . . .

(1987); Golston v. Attorney General of the State of Alabama, 947 F.2d 908, 911 (11th Cir. 1991).

To the extent Burden bases these claims on alleged violations of state law, he is likewise entitled to no relief. Estelle v. McGuire, 502 U.S. 62, 67 . . . (1991) ("[F]ederal habeas corpus relief does not lie for errors of state law."); Beverly v. Jones, 854 F.2d 412 (11th Cir. 1988). On appeal from denial of the Rule 32 petition, the Alabama Court of Criminal Appeals determined that the actions of the trial court in summarily denying the Rule 32 petition did not violate state law. "[A] state court's interpretation of its own laws or rules provides no basis for federal habeas relief, since no question of a constitutional nature is involved." McCullough v. Singletary, 967 F.2d 530, 535 (11th Cir. 1992); Carrizales v. Wainwright, 699 F.2d 1053, 1054-55 (11th Cir. 1983) ("Questions of pure state law do not raise issues of constitutional dimension for federal habeas corpus purposes . . . . [Any claim based on] interpretation of . . . [a state's] laws or rules provides no basis for federal habeas corpus relief, since no question of a constitutional nature is involved."). "Federal courts entertaining petitions for writs of habeas corpus must follow the state court's interpretation of a state law absent a constitutional violation." Hunt v. Tucker, 93 F.3d 735, 737 (11th Cir. 1996); Walton v. Attorney General of the State of Alabama, 986

> F.2d 472, 475 (11th Cir. 1993) (federal court is bound by decision of state court that no state law has been violated). Burden has failed to show that the Alabama appellate court's construction of Alabama law violated his federal right to due process. In light of the foregoing, Burden is due no relief with respect to his claims challenging the trial court's summary dismissal of his Rule 32 petition as these claims fail to implicate denial of any constitutionally protected right.

Burden v. Jones, No. 3:05-CV-1128-WKW, 2008 WL 4767487, at *14 (M.D. Ala. Oct. 28, 2008).

Thus, Madison's contention that his constitutional rights were violated by the trial court's summary dismissal of his Rule 32 petition, as alleged in Claim 1, is without merit and is **DENIED**.

With regard to Claim 25, Madison contends that the "[t]he court's denial of petitioner's change of venue motion resulted in an unfair and constitutionally invalid trial." (Doc. 1-2, ¶ III.K). The substance of this claim was raised in Madison's direct appeal to the Alabama Court of Criminal Appeals, and that court denied the claim on its merits. (See Tab R-49; Madison, 718 So. 2d at 99-100). Madison then raised this claim in his petition for certiorari review of his direct appeal to Alabama's Supreme Court. (See Tab R-34 ¶ 7; Tab R-50, *Ex parte* Madison, 718 So. 2d at 105). The Alabama Supreme Court affirmed the Alabama Court of Criminal Appeals' disposition of this claim without specifically addressing it. (Tab R-50, *Ex parte* Madison, 718 So. 2d at 106).

In addressing Madison's claim regarding the trial court's denial of his change of venue motion, the Alabama Court of Criminal Appeals[14] stated:

> The appellant contends that the trial court erred in denying his motion for a change of venue. He argues that there was media coverage of the crime throughout Mobile County, by newspapers, radio, and television, and that, although the crime occurred nine years before this third trial, eight members of the venire indicated that they had prior knowledge of the case.
>
> Venue should be changed when there is a showing of inherently prejudicial publicity that has so saturated the community as to have a probable impact upon the jurors. Jackson v. State, 516 So. 2d 726 (Ala. Cr. App. 1985). Here, the appellant has presented no evidence with regard to prior publicity. With regard to probable impact, the record reveals that 8 of 60 veniremembers responded that they had some prior knowledge concerning the appellant's case. The trial court conducted an individual voir dire of those eight and permitted the appellant to challenge for cause all of them to whom he objected. One was struck because he had "already given us a number of reasons," another stated that he "believe[d] that if the Defendant was indicted and he's here, probably had one or two court

[14] Supra note 7.

> trials already, that he's probably guilty, sir," and the third had been acquainted with the victim through her job as a substitute teacher. The remaining veniremembers stated that their knowledge of the appellant's case was general in nature and that they could render a fair and impartial verdict. Therefore, the trial court properly denied the appellant's motion for a change of venue.

(Tab R-49; Madison, 718 So. 2d at 99-100).

Having reviewed the record in this matter, the Court agrees with the Alabama Court of Criminal Appeals that Madison failed to establish that his constitutional rights were violated by the trial court's denial of his motion for a change of venue. Presumably, Madison relies on § 2254(d)(1) in presenting this habeas claim, as he argues that the Court's decision not to change the venue violated the dictates laid out in Rideau v. Louisiana, 373 U.S. 723 (1963), as well as Sheppard v. Maxwell, 384 U.S. 333 (1966). (Doc. 1-2, ¶ III.K). However, the Alabama Court of Criminal Appeals did not unreasonably or erroneously apply federal law in making its determination. In Rideau, the United States Supreme Court's holding that a change of venue was warranted was based exclusively on the fact that a video recording of the defendant making a detailed confession of his crimes while surrounded by police officers was broadcast multiple times in the community in which he was tried. 373 U.S. at 726-27. In finding due process violations in Sheppard, the Supreme Court noted the high level of trial publicity to which the jurors were exposed *during* trial and the

"carnival atmosphere" in the courtroom. 384 U.S. at 352-60. It is reasonable to conclude that the evidence of trial publicity presented in this case does not compare with that shown in either Rideau or Sheppard.

In addition, the Eleventh Circuit has held that the Florida Supreme Court's finding "that [a defendant]'s motion for change of venue was properly denied was neither contrary to, nor an unreasonable application of, United States Supreme Court precedent" when evidence showed that the trial commenced less than six months after the crimes occurred, articles were published in the local paper that "may have been somewhat prejudicial or inflammatory[,]" and "that 92% of potential jurors and 11 of the 12 jurors at trial had read newspaper accounts of the crime." Gaskin v. Sec'y, Dep't. of Corr., 494 F.3d 997, 1005 (11th Cir. 2007) (internal quotations omitted). In the present case, the record shows, as the Alabama Court of Criminal Appeals found, that Madison has presented no evidence of prior publicity, relying instead on generalized and conclusory assertions of such publicity, and that only 8 of the 60 potential jurors had prior knowledge of the case, far short of the 92% alleged in Gaskin. Of those potential jurors with prior knowledge, the ones not struck for cause indicated that their knowledge of the case was general in nature and that they felt able to render a fair and impartial verdict.

Thus, Madison's contention that his constitutional rights were violated by the trial court's denial of his motion for a change of venue, as alleged in Claim 25, is without merit and is **DENIED**.

With regard to Claim 26, Madison contends that "[t]he indictment erroneously charged two counts of capital murder for a single offense." As such, "this Court cannot be certain that the jury unanimously found Mr. Madison guilty of one offense." Madison also contends that this charging scheme subjected him to double jeopardy in violation of the Fifth Amendment of the United States Constitution. (Doc. 1-2, ¶ III.L). Madison raised this claim in his direct appeal to the Alabama Court of Criminal Appeals, and the court denied the claim on its merits. (See Tab R-49; Madison, 718 So. 2d at 95-96). The Supreme Court of Alabama then specifically addressed the unanimity issue of this claim on certiorari review of Madison's direct appeal and affirmed the judgment of the Court of Appeals on the merits. (See Tab R-50; *Ex parte* Madison, 718 So. 2d 104, 105 (Ala. 1998)).

Addressing the unanimity issue in this claim, the Alabama Supreme Court stated:

> Madison contends that the trial court, by allowing the jury to consider both counts, rather than requiring the State to elect one of the two counts to submit to the jury, violated his right to a unanimous verdict, which is guaranteed by various constitutional provisions, including the Sixth and Fourteenth Amendments to the Constitution of the United States. He argues that because the jury did not specify the count on which it found him guilty, neither he nor this Court can know whether he was convicted by a jury that was unanimous as to a single count.

The State contends that its purpose in charging Madison in a two-count indictment was to meet every probable contingency of the evidence. The State argues that § 13A-5-40(a)(5) states only one offense (the capital murder of a law enforcement officer) and states two alternative theories ("while [the] officer ... is on duty" or "because of some official or job-related act") on which the jury may base its conviction. Thus, the State argues, the trial court did not err in refusing to require it to elect which count would go to the jury. We agree.

The Supreme Court of the United States has held that the Sixth Amendment right to a jury trial guarantees a defendant the right to a unanimous verdict in a federal trial. Andres v. United States, 333 U.S. 740, 748 . . . (1948).[FN2] However, the Supreme Court has held that, at least in noncapital cases, neither the Sixth Amendment nor the Due Process Clause of the Fourteenth Amendment guarantees a defendant the right to a unanimous jury verdict in a state trial.[FN3] See Johnson v. Louisiana, 406 U.S. 356 . . . (1972).[FN4]

FN2. The Sixth Amendment to the Constitution of the United States provides:

" *In all criminal prosecutions, the accused shall enjoy the right to a* speedy and public *trial, by an impartial jury* of the State and district wherein the crime shall have been committed, which district shall have been

> previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence." (Emphasis added.)
>
> FN3. The Fourteenth Amendment provides in pertinent part: "No State shall ... deprive any person of life, liberty, or property, without *due process of law* . . . . " (Emphasis added.)
>
> FN4. A plurality of the Supreme Court has noted that a defendant's right to a unanimous jury verdict "is more accurately characterized as a due process right than as one under the Sixth Amendment." Schad v. Arizona, 501 U.S. 624, 634, n. 5 . . . (1991).

In Schad v. Arizona, 501 U.S. 624, 629 . . . (1991), a plurality of the Supreme Court avoided extending the federal unanimity requirement to a state capital defendant, by concluding that even if the unanimity requirement applied it would not provide relief to the defendant.[FN5] The defendant in Schad, 501 U.S. at 628 . . ., was indicted by a state grand jury for capital murder, which the relevant statute defined as "murder which is ... wil[l]ful, deliberate or premeditated ... or which is committed ... in the perpetration of, or attempt to perpetrate, ... robbery." (Quoting

Ariz. Rev. Stat. Ann. § 13-452 (Supp. 1973)). At trial, the prosecution sought to prove the capital murder offense by advancing both a theory of premeditated murder and one of felony murder. Schad, 501 U.S. a 629. . . . The jury returned a general verdict of guilty, without specifying whether it had reached a unanimous agreement either as to premeditated murder or as to felony murder. Id. Responding to the defendant's argument that the federal unanimity requirement should be applied to state capital defendants, the Supreme Court stated: "Even assuming a requirement of jury unanimity *arguendo,* that assumption would fail to address the issue of what the jury must be unanimous about." Id. at 630. . . . The Supreme Court emphasized that " 'there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict.' " Id. at 632 (citation omitted).

> FN5. We note that regardless of whether the federal right to a unanimous verdict extends to Alabama capital defendants, the Constitution of Alabama of 1901 has long provided criminal defendants a parallel guaranty of a unanimous jury verdict. See Baader v. State, . . . 77 So. 370, 372 (1917); Brown v. State, . . . 231 So. 2d 167, 169-70 (1970); Dixon v. State, . . . 167 So. 340, 348 (1936).

The rationale of Schad has been adopted in numerous jurisdictions. See People v.

Milan, . . . 507 P.2d 956, 959, 961-62 (1973) (holding that there is no error in instructing the jury on alternative theories if there is sufficient evidence that the defendant committed first-degree murder); People v. Travis, . . . 525 N.E. 2d 1137, 1148 (stating that the jury must be unanimous on the ultimate question of guilt or innocence, not on the theory applied), appeal denied, . . . 530 N.E. 2d 260 (1988), cert. denied, 489 U.S. 1024 . . . (1989); State v. Fuhrmann, 257 N.W. 2d 619, 626 (Iowa 1977) (holding that first-degree murder is one crime, although the defendant can commit the crime in several ways); State v. Wilson, . . . 552 P.2d 931, 936 (1976) (holding that the accused cannot impeach a verdict on the basis that the jury could not agree on the theory of first-degree murder), overruled on other grounds by State v. Quick, . . . 597 P.2d 1108 (1979); Commonwealth v. Devlin, . . . 141 N.E. 2d 269, 274-76 (1957) (holding that a homicide conviction is acceptable even if the jury does not specify a theory); People v. Embree, 246 N.W. 2d 6, 7 (1976) (holding that when the evidence shows that the defendant is guilty of premeditated and felony murder, a jury instruction on unanimity is irrelevant); State v. Buckman, . . . 468 N.W. 2d 589, 593 (1991) (holding that the jury need agree only that the defendant committed first-degree murder, not on the theory by which it reached the verdict); State v. Tillman, 750 P.2d 546, 563-65 (Utah 1987) (holding that the jury need not agree on the

theory supporting the conviction if there is sufficient evidence to support either theory); but see State v. Murray, . . . 782 P.2d 157 (1989) (holding that the trial court erred in giving jury instructions that offered alternative theories of murder).

Like the claim of the defendant in Schad, Madison's claim may be assessed without addressing the question whether the federal unanimity requirement applies to capital defendants in state cases, but by addressing the analytical focal point of the unanimity requirement, that is, the offense. See Schad, 501 U.S. at 630 . . . .

Section 13A-5-40(a)(5) defines the single capital offense of the murder of a law enforcement officer, but allows as the basis of the conviction two alternative theories of proof: (1) the theory that the murder was committed while the officer was "on duty"; or (2) the theory that the murder was committed because of "some official or job-related act." See generally Tucker v. State, 537 So. 2d 59, 61 (Ala. Crim. App. 1988) ("[The indictment] charged only one offense-capital murder of a peace officer-which was committed for one of two reasons: either because the officer was trying to arrest [the defendant's] stepmother or because the officer was trying to arrest [the defendant]."); see also Schad, 501 U.S. at 636 . . . ("If a State's courts have determined that certain statutory alternatives are mere means of committing a single offense, rather than

independent elements of the crime, we simply are not at liberty to ignore that determination and conclude that the alternatives are, in fact, independent elements under state law."). The jury was required to be unanimous only as to its verdict finding that Madison intentionally murdered a law enforcement officer in violation of § 13A-5-40(a)(5), not as to whether the murder occurred while the law enforcement officer was on duty or occurred because of an official act on the part of the officer.[FN6] See Schad, 501 U.S. at 629 . . . .

FN6. In Schad, 501 U.S. at 649-50 . . . , Justice Scalia, concurring in part of the judgment, observed:

> "[I]t has long been the general rule that when a single crime can be committed in various ways, jurors need not agree upon the mode of commission . . . . That rule is not only constitutional, it is probably indispensable in a system that requires a unanimous jury verdict to convict. When a woman's charred body has been found in a burned house, and there is ample evidence that the defendant set out to kill her, it would be absurd to set him free because six jurors believe he strangled her to death (and caused the fire accidentally in his hasty escape), while six others believe he left her unconscious and set the fire to kill her."

> The jury rendered a unanimous verdict finding Madison guilty of the offense of murdering a law enforcement officer as that offense is defined by § 13A-5-40(a)(5). The trial court did not err in refusing to require the State to elect a single count, or theory, on which the jury was required to agree. Accordingly, we affirm the judgment of the Court of Criminal Appeals.

(Tab R-50; *Ex parte* Madison, 718 So. 2d at 105).

Having reviewed the record in this matter, the Court agrees with the Alabama Supreme Court that Madison failed to establish that his constitutional rights were violated by the trial court's refusal to require the State to elect a single count or theory on which the jury was required to agree. Indeed, the Alabama Supreme Court's interpretation of Schad v. Arizona, 501 U.S. 624 (1991), is in line with that of the Eleventh Circuit. See United States v. Verbitskaya, 406 F.3d 1324, 1334 (11th Cir. 2005) (Pursuant to Schad, "the district court did not need to instruct the jury to unanimously agree on which theory supported the verdict.")

With regard to the double-jeopardy issue in this claim, which was not addressed by the Alabama Supreme Court, the Alabama Court of Criminal Appeals[15] stated:

> The appellant contends that the indictment improperly charged two counts of capital murder for a single offense. He argues that

[15] See Ylst, 501 U.S. at 803-04.

presenting § 13A-5-40(a)(5), Code of Alabama 1975, as two offenses exposed him to double jeopardy, enhanced his punishment, and deprived him of constitutional protections . . .

The first count of the appellant's indictment charged him with the intentional shooting of Julius Schulte while Schulte was "on duty as a police officer"; the second count charged that the shooting occurred while Schulte was "performing an official or job-related act." Both counts are alternative methods of proving a single offense. See § 13A-5-40(a)(5), Code of Alabama 1975. The trial court instructed the jury that there were "two counts contained in the indictment, each charging the Defendant with a capital offense," and stated that, if the jurors were not convinced that the State had proven "each of the essential elements of either of the capital offenses beyond a reasonable doubt," they should find the appellant not guilty of "the capital offense as charged in the indictment" and consider the lesser included offense of murder. The court further instructed the jury that, if it found the appellant guilty of "the capital felony as charged in the indictment," it would not be necessary to state the count or counts of the indictment on which they found him guilty. The jury subsequently returned a verdict form that stated, "We, the Jury, find the Defendant guilty of the capital felony as charged in the indictment." The trial court thereafter

sentenced the appellant to death by electrocution.

In Floyd v. State, 486 So. 2d 1309 (Ala. Crim. App. 1984), aff'd, 486 So. 2d 1321 (Ala. 1986), cert. denied, 479 U.S. 1101 . . . (1987), the appellant was charged with eight counts of murder during robbery, § 13A-5-40(a)(2), Code of Alabama 1975, four of which related to the taking of a taxi and four of which related to the taking of currency. In that case, this Court stated that, because the purpose and effect of the joinder of offenses was to meet every possible contingency that the evidence might show, rather than to convict the appellant of multiple offenses, the State was not required to elect the count on which the case would be submitted to the jury. In the present case, the appellant was indicted on two, rather than eight, counts of capital murder, and the trial court likewise did not require him to elect the count on which he was to be tried. However, the appellant was convicted of only one offense, and the indictment was proper.

In Meyer v. State, 575 So. 2d 1212 (Ala. Crim. App. 1990), the appellant was indicted on three counts of capital murder for one killing. He was found guilty of three counts of intentional murder, and the trial court imposed a single sentence of 50 years' imprisonment. This Court, citing Ball v. United States, 470 U.S. 856 . . . (1985), remanded the case for the circuit court to vacate two of the convictions. In Ball, the

United States Supreme Court explained that a second conviction is an impermissible punishment, even if it results in no greater sentence,[FN2] because it may have potential adverse collateral consequences such as delayed parole eligibility or an increased punishment for recidivism. In the present case, however, unlike Ball, there was no second conviction. The double jeopardy concerns, therefore, are inapplicable.

> FN2. Ball's sentences were to be served concurrently.

In Tucker v. State, 537 So. 2d 59, 61 (Ala. Crim. App. 1988), the appellant was charged in a single indictment with the murder of a peace officer while the officer was on duty or in the act of arresting or attempting to arrest the appellant or his stepmother. The appellant moved to dismiss the indictment, on the grounds that it charged two crimes and that it was so ambiguous that he could not determine what acts constituted the crime. This Court found that the indictment was properly framed to conform to the proof, in that it charged only one offense -- capital murder of a peace officer -- which was committed for one of two reasons: either because the officer was trying to arrest the appellant's stepmother or the appellant himself.

In the present case, although the instructions of the trial court were confusing, the Court sufficiently informed the jury with regard to

> the burden of proof and the necessity for unanimity in its verdict. The jurors were aware that the appellant was guilty of only one offense, as evidenced by their verdict form, which stated the single offense of "the capital felony as charged in the indictment." Their death penalty decision therefore was not improperly affected by the framing of the indictment.

(Tab R-49; Madison, 718 So. 2d at 95-96).

Having reviewed the record in this matter, the Court agrees with the Alabama Court of Criminal Appeals that Madison failed to establish that he was subject to double jeopardy by the trial court's refusal to require the State to elect a single count or theory on which the jury was required to agree. Presumably, Madison relies on § 2254(d)(1) in presenting this habeas claim, as he specifically argues that the allegedly defective indictment and charge to the jury resulted in a double-jeopardy violation under Blockburger v. United States, 284 U.S. 299 (1932). (Doc. 1-2, ¶ III.L).

The Blockburger test is applied to determine "whether [an appellant] ha[s] been charged twice for the same offense," in violation of the double jeopary clause prohibiting multiple punishments for the same offense. United States v. Ibarguen-Mosquera, No. 09-14476, 2011 WL 447870, at *7 (11th Cir. Feb. 10, 2011). See also United States v. Nyhuis, 8 F.3d 731, 735 (11th Cir. 1993) ("[T]he Blockburger test will normally be the only inquiry required when a court is confronted with a double jeopardy attack."). "'[W]here the same act or transaction constitutes a

violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.'" Ibarguen-Mosquera, 2011 WL 447870, at *7 (quoting Blockburger, 284 U.S. at 304).

The Eleventh Circuit has held that "where two counts are 'charged under the same statutory provision,' Blockburger may require an inquiry beyond the elements of the offense to determine whether there are separate crimes 'in *substance as well as form*.'" Id. (quoting United States v. Hassoun, 476 F.3d 1181, 1186 (11th Cir. 2007)) (emphasis in original). In line with this holding, the Alabama Supreme Court made a reasonable inquiry and determined that the two counts charged in Madison's indictment, rather than separate offenses, were two alternative theories of proof for a single offense provided for in Ala. Code. § 13A-5-40(a)(5). (Tab R-50; *Ex parte* Madison, 718 So. 2d at 108).

Moreover, even if the Blockburger test were to indicate a double-jeopardy violation, the only remedy available would be that prescribed in Ball v. United States, 470 U.S. 856 (1985). Ball states that when a defendant improperly receives two convictions for the same act, "the only remedy . . . is for the [trial] [c]ourt, where the sentencing responsibility resides, to exercise its discretion to vacate one of the underlying convictions. 470 U.S. at 864. The Eleventh Circuit has applied the remedy in Ball to double-jeopardy violations found using the Blockburger test. See United States v. Freyre-Lazaro, 3 F.3d 1496, 1507 (11th Cir. 1993); United

States v. Bonilla, 579 F.3d 1233, 1243 (11th Cir. 2009). The Court agrees with the Alabama Court of Criminal Appeals that Madison is entitled to no relief for a double-jeopardy violation under Ball because he has received only one conviction and one corresponding sentence.

In addition, "the Double Jeopardy Clause imposes no prohibition to simultaneous prosecutions[,]" so "even where the [Double Jeopardy] Clause bars cumulative punishment for a group of offenses, 'the Clause does not prohibit the State from prosecuting [a defendant] for such multiple offenses in a single prosecution.'" Ball, 470 U.S. at 860 n.7 (quoting Ohio v. Johnson, 467 U.S. 493, 500 (1984)). Therefore, the State of Alabama's pursuit of Madison's conviction under multiple counts did not implicate double jeopardy.

Thus, Madison's claim that his constitutional rights to a unanimous verdict and against double jeopardy were violated by the trial court's refusal to require the state to elect one of two counts to submit to the jury, as alleged in Claim 26, is without merit and is **DENIED**.

With regard to Claim 27, Madison contends that "[t]he trial court's refusal to find statutory and non-statutory mitigating circumstances deprived Mr. Madison of a reliable sentencing determination as required by the Eighth and Fourteenth Amendments to the United States Constitution and Alabama law." (Doc. 1-2, ¶ III.M; Doc. 30, ¶ D.3). Madison raised this claim in his direct appeal to the Alabama Court of Criminal Appeals, and the court denied the claim on its merits. (See Tab R-49; Madison, 718 So. 2d at

96-97). Madison then raised this claim in his petition for certiorari review of his direct appeal to Alabama's Supreme Court. (See Tab R-34 ¶ 2; Tab R-50, *Ex parte* Madison, 718 So. 2d at 105). The Alabama Supreme Court affirmed the Alabama Court of Criminal Appeals' disposition of this claim without specifically addressing it. (Tab R-50, *Ex parte* Madison, 718 So. 2d at 106).

In addressing this claim on direct appeal, the Alabama Court of Criminal Appeals[16] stated:

> The appellant contends that the trial court erred in failing to find statutory and nonstatutory mitigating circumstances. He argues with regard to the statutory circumstances that the trial court had before it evidence that the capital offense was committed while he was "under the influence of extreme mental or emotional disturbance" and that his "capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired," § 13A-5-51(2) and (6), Code of Alabama 1975. Specifically, he refers to defense expert Dr. Barry Amyx's testimony that he suffered from a delusional disorder, a psychotic illness similar to schizophrenia, and that he also suffered from persecutory delusions and a "thought disorder." Dr. Amyx expressed the opinion that the appellant could not fully appreciate the criminality of his

[16] Supra note 7.

conduct. In addition, the appellant argues that State's witness Ollie Doss testified that he looked "crazy" when she saw him on the night of the offense. He also contends that the trial court misunderstood the burden of proof with regard to mitigating circumstances and incorrectly believed that the appellant had to show that he was insane.

The trial court found with regard to § 13A-5-51(2), Code of Alabama 1975, that the capital offense was committed while the appellant was under the influence of a mental or emotional disturbance but that the disturbance was not extreme. The court also found that the appellant had a personality disorder but that he was not psychotic. Defense expert Dr. Claude Brown had testified that, in his opinion, the appellant suffered from a personality disorder, rather than a psychosis, and that there was no evidence that the appellant was delusional at the time of the murder. It is apparent from the trial court's sentencing order that the court was aware of the appropriate burden of proof with regard to insanity. The court noted that Dr. Amyx had conducted a single 90-minute session with the appellant five years after the homicide, while Dr. Claude Brown had met with the appellant at least three times, two of those occasions occurring within five months of the murder. In addition, the court found that the purposefulness of the appellant's behavior undermined his claim of extreme disturbance

and that his ability to clearly express his feelings and his opposition to previous use of an unwarranted insanity defense refuted his claim. The trial court's finding that, from a preponderance of the evidence, the § 13A-5-51(2) mitigating circumstance did not exist, is supported by the record. Because the appellant did not object to the trial court's sentencing order, this issue is affirmed under the plain error standard. Rule 45A, Ala.R.App.P.

With regard to the § 13A-5-51(6) mitigating circumstance, the trial court found that the preponderance of the evidence suggested that the appellant could appreciate the criminality of his conduct and conform his conduct to the requirements of law. The court also again stated that the appellant had a personality disorder but that he was not psychotic. The record supports the court's finding.

With regard to nonstatutory mitigating circumstances, the appellant argues that there was ample evidence offered at the penalty phase to support the existence of such circumstances. Specifically, he refers to Dr. Amyx's testimony as to the appellant's mental illness, his mother's plea for mercy, a friend's testimony concerning a positive change in the appellant since the killing, and the appellant's own statement, in which he expressed remorse and apologized to the victim's family. In addition, the appellant argues that the trial court's sentencing order was insufficient

> because it did not specifically identify the mitigating circumstances found and weighed by the court.
>
> However, the order of the trial court stated, in pertinent part, that the court "considered the testimony of lay witnesses and all other mitigating evidence offered by the Defendant, including that not enumerated as statutory mitigating circumstances." The court was not required to state that it considered a particular mitigating circumstance, and the lack of a specific finding did not mean that the court did not consider that evidence. *Ex parte* Haney, 603 So. 2d 412 (Ala.1992), cert. denied, 507 U.S. 925, 113 S.Ct. 1297 [ ] (1993). With regard to the appellant's statement, although the appellant said that he was sorry that the victim's family had suffered, he also said that "there was no perceived action on my part for this to occur," and he again claimed that the killing was committed in self-defense. Further, although the appellant said that he was asking for forgiveness, he also said that, because he knew that God had already forgiven him, he was "at peace" with himself. Similarly, the testimony of the appellant's friend was actually that the appellant would now talk about the Lord, that he appeared concerned about people, and that he was not as quick to get angry. The trial court's finding that no nonstatutory mitigating circumstances existed is supported by the record.

(Tab R-49; Madison, 718 So. 2d at 96-97).

Having reviewed the record in this matter, the Court agrees with the Alabama Court of Criminal Appeals that Madison failed to establish that his constitutional rights were violated by the trial court's refusal to find statutory and non-statutory mitigating circumstances. As the Alabama Court of Criminal Appeals noted, the sentencing order explained why the trial court found that the statutory mitigating circumstances that Madison argues were supported by evidence—those set forth in §§ 13A-5-51(2) and (6) of the Alabama Code—did not obtain. (See Tab R-49; Madison, 718 So. 2d at 96-97; Tab R-48, Sentencing Order, ¶ II(2) & (6)). Moreover, the trial court explicitly noted that it "considered" the testimony of Dr. Amyx to the effect that the defendant was under a mental or emotional disturbance while the capital offense was committed.[17] (Tab R-48, Sentencing Order, ¶ II(2)). The trial court also specifically stated that it "considered the testimony of lay witnesses and all other mitigating evidence offered by the defendant, including that not enumerated as statutory mitigating circumstances"—i.e., nonstatutory mitigating circumstances—incident to finding that "the aggravating circumstances overwhelmingly outweigh[ed] the mitigating circumstances." Id. at ¶ II(7).

[17] Despite this consideration, the trial court found that "the disturbance not being extreme, . . . the § 13A-5-51(2) mitigating circumstance . . . does not exist." (Tab R-1, Sentencing Order, ¶ II(2)).

The authorities Madison cites in his habeas petition do not cast aspersion on the Alabama Court of Criminal Appeals' analysis. Madison cites a number of federal cases holding that the sentencer may not be prevented from considering or categorically refuse to consider any relevant mitigating evidence. See Penry v. Lynaugh, 492 U.S. 302 (1989); Lockett v. Ohio, 438 U.S. 586 (1978); Jackson v. Dugger, 931 F.2d 712 (11th Cir. 1991); Hitchcock v. Dugger, 481 U.S. 393 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982) (the trial court's statements made clear that the "judge did not evaluate the evidence in mitigation and find it wanting as a matter of fact; rather he found that *as a matter of law* he was unable even to consider the evidence," id. at 113 (emphasis in original); likewise, the Court of Criminal Appeals found "that the evidence in mitigation was not relevant because it did not tend to provide a legal excuse from criminal responsibility[,]" id.); Skipper v. South Carolina, 476 U.S. 1 (1986) (reversing based on exclusion of relevant mitigating evidence); Woodson v. North Carolina, 428 U.S. 280, 303-04 (1976) (sentencing statute was unconstitutional in that it "fail[ed] to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant"). However, there is no evidence or argument suggesting that the trial court in Madison's case was prevented from considering or categorically refused to consider any mitigating circumstance.[18] On the contrary, as noted above, the

[18] Although the trial court refused to apply the statutory mitigating circumstance set forth in § 13A-5-51(6) of the

trial court engaged in an analysis based on the record with respect to both of the statutory mitigating circumstances that Madison argues were supported by evidence as well as the non-statutory mitigating evidence presented.

Finally, Madison argues that "Alabama courts have not hesitated to remand capital cases where the sentencing orders do not articulate with sufficient specificity the mitigating circumstances considered in sentencing a defendant to death." (See Doc. 1-2, ¶ III.M.73). Madison's argument on this point is based solely on Alabama law. Therefore, it fails to state a claim of unreasonable application of federal law and is not a cognizable federal claim. Pulley v. Harris, 465 U.S. 37, 41 (1984) ("A federal court may not issue the writ on the basis of a perceived error of state law"); Davis v. Jones, 506 F. 3d 1325, 1332 (11th Cir. 2007) ("We will not question the Alabama appellate court's application of state law in federal habeas corpus review." (citing Carrizales v. Wainwright, 699 F.2d 1053, 1054-55 (11th Cir. 1983) ("Questions of pure state law do not raise issues of

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Alabama Code, its decision was based on a factual analysis. The sentencing order states in pertinent part:

> The preponderance of the evidence suggests that the defendant could appreciate the criminality of his conduct and conform his conduct to the requisites of law. He had a personality disorder, but was not psychotic; consequently, the § 13A-5-51(6) circumstance does not exist and is not considered.

(Tab R-29, Sentencing Order, ¶ II(6)).

constitutional dimension for federal habeas corpus purposes.")).[19]

Thus, Madison's contention that his constitutional rights were violated by the trial court's refusal to find statutory and non-statutory mitigating circumstances, as alleged in Claim 27, is without merit and is **DENIED**.

With regard to Claim 28, Madison contends that "[t]he trial court refused to instruct the jury on manslaughter, denying Mr. Madison protections guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and by the Alabama Constitution and Alabama law." (Doc. 1-2, ¶ III.N; Doc. 30, ¶ D.2). Madison raised this claim in his direct appeal to the Alabama Court of Criminal Appeals, and the court denied the claim on its merits. (See Tab R-49; Madison, 718 So. 2d at

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[19] Madison also cites Parker v. Dugger, 498 U.S. 308 (1991), an opinion which is inapposite to the instant petition. In Parker, the United States Supreme Court held, based on the record, that the trial judge had found and weighed non-statutory mitigating circumstances, despite the fact that the trial court had not "discuss[ed] evidence of, or reach[ed] any explicit conclusion concerning nonstatutory mitigating evidence." Id. at 311, 314. The United States Supreme Court then held that the Florida Supreme Court had erred when it concluded that the trial court had not found non-statutory mitigating circumstances, but nonetheless upheld the petitioner's death sentence, despite the fact that the Florida Supreme Court simultaneously struck two of the four aggravating circumstances upon which the trial judge had relied. The factual, legal, and procedural posture of Parker differ markedly from that of the petition at bar, and, thus, it is simply inapplicable to this case.

99). Madison then raised this claim in his petition for certiorari of his direct appeal to Alabama's Supreme Court. (See Tab R-34 ¶ 2; Tab R-50, *Ex parte* Madison, 718 So. 2d at 105). The Alabama Supreme Court affirmed the Alabama Court of Criminal Appeals' disposition of this claim without specifically addressing it. (Tab R-50, *Ex parte* Madison, 718 So. 2d at 106).

In addressing Madison's claim regarding the fact that the trial court did not instruct the jury on manslaughter, the Alabama Court of Criminal Appeals[20] stated:

> The appellant contends that the trial court erred in refusing his requested jury instruction on manslaughter because, he says, he testified to facts that provided a rational basis for the lesser charge. He argues that the jury could have found that the killing arose from a sudden heat of passion caused by provocation because he stated that he argued with the victim, that he wanted to leave, and that the victim would not let him. He also argues that "he perceived ... an attack upon him" because the victim was opening the car door and he believed that the victim had a gun in his hand and was going to shoot him.
>
> However, mere words or gestures will not reduce a homicide from murder to manslaughter, Harrison v. State, 580 So.2d 73 (Ala. Cr. App. 1991), and undisputed evidence

[20] Supra note 7.

> established that the appellant failed to show legal provocation. The victim's car was found with the door closed, and his gun was found in a snapped holster, sitting on top of his clipboard on the car seat. He had been shot twice, once in the back of the head and also in the left temple, and gunpowder residue was deposited around this wound. Thus, there was no rational basis to support the appellant's requested instruction on the lesser included offense, and it was properly refused by the trial court. Dill v. State, 600 So.2d 343 (Ala. Cr. App. 1991), aff'd 600 So.2d 372 (Ala. 1992), cert. denied, 507 U.S. 924 . . . (1993).

(Tab R-49; Madison, 718 So. 2d at 99).

Presumably, Madison relies on § 2254(d)(1) in presenting this habeas claim, as he argues that the court's decision not to charge the jury on manslaughter violates Beck v. Alabama, 447 U.S. 625 (1980). (Doc. 1-2, ¶ III.N). However, Madison's argument is misplaced. The Eleventh Circuit has held that Beck's prohibition against an all-or-nothing choice between death or acquittal is not violated where the law permits the charging of lesser included non-capital offenses if the evidence supports it. See Maples v. Allen, 586 F.3d 879, 894 (11th Cir. 2009). In the instant case, Alabama law permitted the charging of a lesser included non-capital offense. However, the evidence did not support a finding of manslaughter; thus, a jury charge on this lesser included offense was properly refused by the trial court.

In Maples, the Eleventh Circuit noted that the Alabama Court of Criminal Appeals had concluded "that a [jury] charge on manslaughter due to voluntary intoxication was not required" in a capital murder trial because, among other reasons, "there was no rational basis for convicting [the defendant] of manslaughter due to intoxication[]" based on Alabama law. Id. at 893. The Eleventh Circuit held that "[t]he Alabama appellate court's decision about the charge on manslaughter due to voluntary intoxication is neither contrary to, nor an unreasonable application of, established federal law." Id. Similarly, in the present case, the Alabama Court of Criminal Appeals determined that there was no rational basis under Alabama law to support a jury charge of manslaughter based on the evidence presented, (Tab R-49; Madison, 718 So. 2d at 99), and that decision is neither contrary to nor an unreasonable application of established federal law.

Thus, Madison's contention that his constitutional rights were violated by the trial court's refusal to instruct the jury on manslaughter, as alleged in Claim 28, is without merit and is **DENIED**.

With regard to Claim 29, Madison contends that the trial court erred by denying Madison's Batson motion and not requiring the state to articulate its reasons for striking black jurors, despite the fact that Madison "made a prima facie showing of discrimination in the selection of [his] jury under Batson v. Kentucky, 476 U.S. 79 (1986) and *Ex parte* Jackson, 516 So. 2d 768 (Ala. 1986)." (Doc. 1-2, ¶ III.O). Madison raised this claim in his direct appeal

to the Alabama Court of Criminal Appeals, and the court denied the claim on its merits. (See Tab R-49; Madison, 718 So. 2d at 101-02). Madison then raised this claim in his petition for certiorari review of his direct appeal to Alabama's Supreme Court. (See Tab R-34 ¶ 2; Tab R- 50, *Ex parte* Madison, 718 So. 2d at 105). The Alabama Supreme Court affirmed the Court of Criminal Appeals' disposition of this claim without specifically addressing it. (Tab R-50, *Ex parte* Madison, 718 So. 2d at 106).

In addressing Madison's claim regarding the denial of Madison's Batson motion and the fact that the trial court did not require the state to articulate its reasons for striking black jurors, the Alabama Court of Criminal Appeals[21] stated:

> The appellant contends that the trial court erred in finding that he failed to establish a prima facie case under Batson v. Kentucky, 476 U.S. 79 . . . (1986). The record reveals the following with regard to the appellant's *Batson* challenge: The appellant objected at trial to the State's striking 6 of 13 blacks from the venire,[FN3] and the trial court instructed the prosecutor to give race-neutral explanations for his strikes. The prosecutor responded that the appellant first was required to make out a prima facie case and argued that, because the appellant had shown only that blacks had been struck, his challenge must fail because the jury contained a greater percentage of blacks than was originally on the venire. The

[21] Supra note 7.

appellant responded, citing *Ex parte* Bird, 594 So. 2d 676 (Ala. 1991), for the principle that evidence that jurors share only the characteristic of race and are heterogen[e]ous as the community as a whole in all other respects, including gender, age, occupation, and social and economic conditions, can raise an inference of discrimination, and noted, "that's what we have here." He then noted specifically that two females and four males had been struck; that Mr. D., who was a laborer at SeaPac had said nothing during the jury selection process; and that Mr. M. worked at Ingalls and had a wife in law enforcement. Thereafter, the appellant stated that the struck jurors were both female and male, younger and older, who worked as laborers, a housing board director, a food server, and an industrial worker. In addition, he stated that the prosecutor had asked few questions on voir dire examination, which would give a reason to believe that there was any basis other than race for the strikes. The trial court responded that the housing board employee had given many answers and that the State could articulate reasons for striking Mr. B., who was the industrial worker. The court also noted that the percentage of blacks serving on the jury was far greater that the percentage of blacks in the county and then asked whether the appellant could show any bias on the part of the State. After the appellant failed to offer evidence of bias, the prosecutor reiterated that the appellant had not made a prima facie

showing of racial discrimination. The trial court then denied the appellant's *Batson* motion.

> FN3. Two black veniremembers were struck for cause, one by the State and one by the appellant, and the appellant also struck an alternate juror who was black, which left six blacks on the jury panel.

In Batson v. Kentucky, 476 U.S. 79 . . . (1986), the United States Supreme Court set out the components of a prima facie case of racial discrimination in jury selection. In addition to showing that the State used peremptory challenges to remove members of a cognizable group to which he belongs and relying upon the fact that peremptory strikes permit discrimination, a claimant also must show that these facts and any other relevant facts raise an inference that the prosecutor used his strikes in a discriminatory manner. In *Ex parte* Branch, 526 So.2d 609, 622-23 (Ala. 1987), Alabama['s] Supreme Court explained that relevant factors could include, but were not limited to, the following: evidence that the jurors shared only the characteristic of their group membership and were heterogeneous in all other respects; a pattern of strikes against black jurors; past conduct of the prosecutor; type and manner of the prosecutor's questions during voir dire, including desultory voir dire; type and manner of questions to the challenged juror, including a lack of questions or meaningful questions; disparate treatment

of veniremembers with the same characteristics or type of responses; disparate examination of members of the venire; circumstantial evidence of intent due to the use of most challenges to strike blacks; and the use of peremptory challenges to dismiss all or most black jurors.

The appellant argues on appeal that the State struck 7 of 13 qualified black potential jurors, or over half of the black venirepersons, and that it used 7 of its 18 strikes to remove those black potential jurors. He further argues that 3[FN4] of the blacks removed by the State did not answer any questions on voir dire and that the prosecutor's office has a history of excluding qualified black potential jurors based on race.

> FN4. The appellant incorrectly states in his reply brief that the number of unquestioned jurors was four.

However, the only evidence actually offered by the appellant at trial was as follows: that the State struck 4 black males and 2 black females, who were variously employed; that the State struck 7 of 15 blacks, and that 3 veniremembers who were struck had not responded to any questions on voir dire. Despite repeated requests by the trial court that he produce more evidence, including, specifically, evidence of bias, the appellant offered nothing further in support of his Batson claim.

> The appellant's evidence was insufficient to show that the struck jurors shared only the characteristic of race. It also was insufficient to show a pattern of strikes against black jurors, particularly in light of the increased percentage of blacks who served on the jury relative to both the initial panel and the population of the county.[FN5] The only evidence that arguably could lead to an inference of discrimination was a lack of questions or meaningful questions to 3 of the challenged jurors. The trial court's determination as to whether the defendant has established purposeful racial discrimination should be reversed only if it is clearly erroneous. *Ex parte* Branch, supra. The trial court's denial of the appellant's Batson motion in the present case was not clearly erroneous.
>
> > FN5. The prosecutor informed the trial court that the 60-member panel was 75 % white and that the percentage of blacks on the final panel was "almost double" that on the initial panel. The trial court also noted that the final jury panel was 50% black, "far more" than the 30% population of blacks in the county.

(Tab R-49; Madison, 718 So. 2d at 101-02).

Presumably, Madison relies on § 2254(d)(1) in presenting this habeas claim by arguing a violation of Batson. However, the Eleventh Circuit has held that "it is not true that all peremptory strikes of black venirepersons are for racial reasons. In making out a *prima facie* case, the defendant must point to

more than the bare fact of the removal of certain venirepersons and the absence of an obvious valid reason for the removal. The defendant must identify facts and circumstances that support the inference of discrimination, such as a pattern of discriminatory strikes, the prosecutor's statements during voir dire suggesting discriminatory purpose, or the fact that white persons were chosen for the petit jury who seemed to have the same qualities as stricken black venirepersons." United States v. Allison, 908 F.2d 1531, 1538 (11th Cir. 1990) (internal citations and quotations omitted). Only "[o]nce a *prima facie* case has been established[] [does] the burden shift[] to the prosecutor to articulate a clear, reasonably specific and neutral explanation for challenging the black jurors." Id. at 1536.

Having reviewed the record, the Court agrees with the Alabama Court of Criminal Appeals that the only arguable evidence of a Batson violation Madison presented at trial was that 3 black venirepersons who were struck did not respond to any questions on voir dire. (See Tab R-49; Madison, 718 So. 2d at 102). When asked to produce evidence to support an inference of discrimination or bias, Madison presented nothing further. See id. As such, Madison did not establish a *prima facie* case of discrimination under Batson, and therefore the prosecution was not required to articulate reasons for challenging black jurors. Thus, Madison's contention that his constitutional rights were violated by the trial court's denial of his Batson motion and refusal to require the State to articulate

its reasons for striking black jurors, as alleged in Claim 29, is without merit and is **DENIED**.

With regard to Claim 30, Madison contends that "[t]he trial court's override of the jury's verdict of life imprisonment without parole violated Mr. Madison's rights under the Sixth and Fourteenth Amendments to the United States Constitution." (Doc. 1-2, ¶ III.P; Doc. 30 ¶¶ 4, 6). Madison raised this claim in his direct appeal to the Alabama Court of Criminal Appeals, and the court denied the claim on its merits. (See Tab R-49; Madison, 718 So. 2d at 103-04). Madison then raised this claim in his petition for certiorari review of his direct appeal to Alabama's Supreme Court. (See Tab R-34 ¶ 2; Tab R-50, *Ex parte* Madison, 718 So. 2d at 105). The Alabama Supreme Court affirmed the Court of Criminal Appeals' disposition of this claim without specifically addressing it. (Tab R-50, *Ex parte* Madison, 718 So. 2d at 106).

In addressing Madison's claim regarding the trial court's override of the jury's verdict of life without parole, the Alabama Court of Criminal Appeals[22] stated:

> The appellant contends that the trial court erred in overriding the jury's verdict of life imprisonment without parole pursuant to § 13A-5-46, *Code of Alabama* 1975. He argues that § 13A5-47, *Code of Alabama* 1975, permits a standardless override which, he says, violates the Sixth and Fourteenth

[22] Supra note 7.

Amendments to the United States Constitution because it fails to consider the jury's role in the sentencing process and permits arbitrary and uneven imposition of the death penalty.[FN6]

> FN6. The appellant concedes that the sentencing scheme is constitutional on Eighth Amendment grounds, pursuant to Harris v. Alabama, 513 U.S. 504 . . . .(1995).

However, in Spaziano v. Florida, 468 U.S. 447, 459 (1984), the United States Supreme Court determined that capital sentencing is not a trial for purposes of the Sixth Amendment's guarantee of a jury trial. In addition, the Court stated that a capital sentence need not be imposed by a jury in order to satisfy the Fourteenth Amendment requirement that the death penalty not be imposed arbitrarily or discriminatorily. The Alabama override provision requires the trial court to "consider the recommendation of the jury contained in its advisory verdict," § 13A-5-47(e), *Code of Alabama* 1975, unless the verdict has been waived. In addition, § 13A-5-53, *Code of Alabama* 1975, mandates a detailed and exacting review of the trial court's findings and decision, and subsection (b)(3) specifically requires the appellate court to review whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases.

> The record reveals that the appellant did not object to the trial court's override of the jury's advisory verdict. Therefore, reviewed under the plain error standard, the trial court's override is affirmed.

(See Tab R-49; Madison, 718 So. 2d at 103-04).

Presumably, Madison relies on § 2254(d)(1) in presenting this habeas claim, as he argues that the trial court's override of the jury's verdict of life imprisonment without parole violated Madison's rights under the Sixth and Fourteenth Amendments to the United States Constitution. However, Madison has failed to point to any Supreme Court precedent predating Madison's trial and sentencing that "would have compelled a particular result in th[is] case." See Neelley v. Nagle, 138 F.3d 917, 923 (11th Cir. 1998), overruled on other grounds by Parker v. Head, 244 F.3d 831, 835 (11th Cir. 2001). Instead, Madison cites Harris v. Alabama, 513 U.S. 504 (1995) for the proposition that the Supreme "Court left *open* whether standardless override violates the Fourteenth Amendment." (Doc. 1-2, ¶ P.88) (emphasis added); see Harris, 513 U.S. at 512 & 514 (affirming judicial override of jury recommendation of sentence of life without parole; "hold[ing] that the Eighth Amendment does not require the State to define the weight the sentencing judge must accord an advisory jury verdict"; and noting "If the Alabama statute indeed has not had the effect that we or its drafters had anticipated, such unintended results would be of little constitutional consequence. An ineffectual law is for the state legislature to amend, not for us to annul."). Thus, Harris does not support

Madison's argument that the Alabama courts acted unreasonably in applying Supreme Court precedent.

Madison also relies on Carroll v. State of Alabama, 852 So. 2d 833, 836 (Ala. 2002), which held that a "jury's recommendation of life imprisonment without the possibility of parole is to be treated as a mitigating circumstance" before a death sentence may be imposed. (See Doc. 30, ¶ D.6). Madison maintains that, in light of Carroll, his death sentence is "invalid," and that, "[a]t the least, the case must be remanded to the trial court for resentencing." (Id.). However, the Alabama Court of Criminal Appeals recently held that "Carroll . . . do[es] not apply retroactively to cases on collateral review." Bush v. State, No. CR 03-1902, 2009 WL 1496826, at *8 (May 29, 2009). Madison's direct review concluded with the United States Supreme Court's denial of his certiorari petition on November 16, 1998, (Tab R-51; Madison v. Alabama, 525 U.S. 1006 (1998)), over three years before the Carroll opinion issued. Thus, per the holding of Bush, Carroll is inapplicable to Madison's petition for collateral relief. Moreover, Carroll is an Alabama case applying Alabama law. See Carroll, 852 So.2d at 836 n.1 (declining to decide issues raised by Ring v. Arizona, 536 U.S. 584 (2002)). For that reason, the Carroll opinion does not provide Madison with any support for his federal habeas claims. Pulley, 465 U.S. at 41; Davis, 506 F. 3d at 1332; Carrizales, 699 F.2d at 1054-55. The same logic applies to Madison's reliance on Martin v. State, 931 So.2d 774 (Ala. 2005).[23] Thus, Madison's

[23] Madison's argument that Ring v. Arizona, 536 U.S. 584 (2002), provides him with grounds for relief also fails. Like

contention that his constitutional rights were violated by the trial court's override of the jury's recommendation of life imprisonment without parole, as alleged in Claim 30, is without merit and is **DENIED**.

With regard to Claim 31, Madison contends that "[t]he trial court denied full voir dire of the potential jurors when it stopped the defense from asking about the circumstances under which jurors would impose the death penalty." (Doc. 1-2, ¶ III.Q). Madison raised this claim in his direct appeal to the Alabama Court of Criminal Appeals, and the court denied the claim on its merits. (See Tab R-49; Madison, 718 So. 2d at 100-01). Madison then raised this claim in his petition for certiorari review of his direct appeal to Alabama's Supreme Court. (See Tab R-34 ¶ 2; Tab R-50, *Ex parte* Madison, 718 So. 2d at 105). The Alabama Supreme Court affirmed the Alabama Court of Criminal Appeals' disposition of this claim without specifically addressing it. (Tab R-50, *Ex parte* Madison, 718 So. 2d at 106).

In addressing Madison's claim regarding the fact that the trial court stopped the defense from asking about the circumstances under which jurors would impose the death penalty, the Alabama Court of Criminal Appeals[24] stated:

> The appellant contends that the trial court erred in denying him full voir dire of potential jurors with regard to the circumstances under

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Carroll, Ring does not apply retroactively to cases on collateral review. See Schriro v. Summerlin, 542 U.S. 348, 358 (2004).

[24] Supra note 7.

which they would impose the death penalty. Specifically, he argues, he should have been allowed to inquire if jurors who had stated that they could not impose the death sentence could do so in wartime.

The record reveals that, after veniremember R.B. stated that he did not support the death penalty, the trial court permitted the appellant to ask him whether, in "a situation like wartime, like we're in the war with Hitler, Saddam Hussein or something like that," he would oppose "going to war or our country going to wa[r] and taking other people's lives in the protection of our country." The court next questioned veniremember P. H., asking whether " if you were selected as a juror in this case-and I'm not interested in war time . . . there is no set of facts that you . . . could vote for death by electrocution?" After P.H. answered, "Yes, sir," the trial court told him that it would now let defense counsel "ask anything he wishes, to and including war time." However, when counsel attempted to ask P. H., "[C]ould you believe in State imposed killing if it was a war time and like Richard said, he could. Do you feel like in war time you might be able to do something like that," the court stated, "I'm not interested in war time . . . . So, don't ask about it."

The appellant did not object to the trial court's instruction or further attempt to question the juror concerning his beliefs about killing during a time of war. He now argues that his

> desired inquiry was whether the juror could impose a death penalty during wartime. However, it is clear from the record that his question at trial actually was whether the juror could support killing in defense of his country during wartime. This question was not sufficiently related to the issue of capital punishment to be relevant, and an affirmative response would not have rehabilitated the juror with regard to the imposition of the death penalty. Therefore, the trial court's refusal to permit the question was not an abuse of discretion.

(See Tab R-49; Madison, 718 So. 2d at 100-01).

Madison cites Swain v. Alabama, 380 U.S. 202, 221 (1965), Rosales-Lopez v. United States, 451 U.S. 182, 185 (1975), and Turner v. Murray, 476 U.S. 28, 40 (1986), none of which relate to the issue at hand. Rosales-Lopez and Turner specifically concern the right to raise issues of racial and ethnic prejudice at voir dire, while Swain addressed the racial implications of a peremptory strike system used in jury selection. None of these cases addresses the issue of a defendant's right to determine a juror's stance on capital punishment.

The United States Supreme Court has held that "the proper standard for determining when a prospective juror *may* be excluded for cause because of his or her views on capital punishment . . . is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Wainwright v. Witt, 469 U.S. 412, 424 (1985)

(internal quotations omitted) (emphasis added). However, "[a] juror who could never vote for capital punishment, regardless of the court's instructions, . . . *should* be stricken for cause. United States v. Brown, 441 F.3d 1330, 1354-55 (11th Cir. 2006) (citing Morgan v. Illinois, 504 U.S. 719, 728-29 (1992)) (emphasis added). Moreover, "'[t]he State may challenge for cause prospective jurors whose opposition to the death penalty is so strong that it would prevent them from impartially determining a capital defendant's guilt or innocence.'" Morgan, 504 U.S. at 733 (quoting Lockhart v. McCree, 476 U.S. 162, 170 n.7 (1986)).

The Alabama Court of Criminal Appeals classified Madison's attempt to question juror P.H. about his views on the death penalty during wartime as an attempt to rehabilitate the juror, since an absolute refusal by P.H. to apply the death penalty would necessitate that juror's removal for cause. (See Tab R-49; Madison, 718 So. 2d at 101). See also Brown, 441 F.3d at 1354-55. However, the Court of Criminal Appeals further determined that even an affirmative answer to Madison's line of questioning would not have sufficiently rehabilitated the juror to prevent removal for cause. Id. Even if further questioning had revealed that juror P.H. was willing to apply the death penalty during war time, the fact is that P.H. had already demonstrated an unwillingness to apply it in any non-wartime setting, such as the present case. This was a reasonable indicator that P.H.'s views would have prevented, or at the very least substantially impaired, the performance of his duties as a juror in accordance

with his instructions and his oath. As such, the prosecution had good reason to challenge the juror for cause and did so; the trial court granted the challenge and removed the juror from the venire. (See Tab R-6 at R-71 – 73).

Thus, Madison's contention that his constitutional rights were violated by the trial court's denial of full voir dire, as alleged in Claim 31, is without merit and is **DENIED**.

With regard to Claim 32, Madison contends that "[t]he trial court erred in admitting" a "replica of the badge Officer Schulte allegedly wore the night he was killed." (Doc. 1-2, ¶ III.R; Doc. 30, ¶ C.2.). Madison raised this claim in his direct appeal to the Alabama Court of Criminal Appeals, and the court denied the claim on its merits. (See Tab R-49; Madison, 718 So. 2d at 103). Madison then raised this claim in his petition for certiorari review of his direct appeal to Alabama's Supreme Court. (See Tab R-34 ¶ 2; Tab R-50, *Ex parte* Madison, 718 So. 2d at 105). The Alabama Supreme Court affirmed the Alabama Court of Criminal Appeals' disposition of this claim without specifically addressing it. (Tab R-50, *Ex parte* Madison, 718 So. 2d at 106).

In addressing Madison's claim regarding the fact that the trial court admitted "a replica of the badge Officer Schulte allegedly wore the night he was killed," the Alabama Court of Criminal Appeals[25] stated:

> The appellant contends that the trial court erred in admitting into evidence a police lapel

[25] Supra note 7.

badge that was, he says, false and artificial evidence. He argues that, in Carson v. Polley, 689 F.2d 562 (5th Cir. 1982), the admission of a replica knife was condemned as prejudicial because it was the subject of a factual dispute as to whether it was actually possessed by a man who had been subjected to police force. The appellant argues that the present case is similar, in that the central issue was a factual dispute as to whether he knew Julius Schulte was a police officer because Schulte was wearing a police badge.

However, the appellate court's objection to the evidence introduced in Carson was that it was not made clear to the jury that the replica knife had no connection with the knife allegedly in Carson's possession when he was arrested. The appellate court noted that trial courts have great discretion in this area and conceded that the replica knife could ordinarily have been admitted as illustrative or demonstrative evidence. However, the court stated that the admission of the knife was error under the facts of Carson because a deputy policy chief was allowed to testify to the chain of custody and refer to the replica as "the" knife when he was unable to positively identify the weapon. No such error exists in the appellant's case.

In Liberty National Life Ins. Co. v. Weldon, . . . 100 So.2d 696 (1957), the Alabama Supreme Court stated that articles or objects that relate to or explain the issues are admissible in

> evidence when duly identified and shown to be in substantially the same condition as at the time of the occurrence. Here, Officer John Wynne clearly testified that the police badge introduced into evidence was "not Cpl. Schulte's badge," although he stated that it was similar to the one that Schulte would have been wearing at the time of the killing. Based on Wynne's testimony, the trial court did not err in admitting the lapel badge into evidence.

(Tab R-49; Madison, 718 So. 2d at 103).

Presumably, Madison relies on § 2254(d)(1) in presenting this habeas claim, as he cites Carson v. Polley, 689 F.2d 562 (5th Cir. 1982), in support of his argument that the trial court erred in admitting the replica badge into evidence. However, the issue of whether the trial court erred in admitting the replica badge into evidence involves the interpretation and application of state law by the state courts. In reviewing an evidentiary determination of a state trial court, the federal court will "not sit as a 'super' state supreme court." Shaw v. Boney, 695 F.2d 528, 530 (11th Cir. 1983) (citations omitted). In Shaw, the Eleventh Circuit explained:

> Unlike a state appellate court, we are not free to grant the petitioner relief simply because we believe the trial judge has erred. The scope of our review is severely restricted. Indeed, the general rule is that a federal court will not review a trial court's actions with respect to the admission of evidence. A state evidentiary violation in and of itself does not support

> habeas corpus relief. Before such relief may be granted, the violation must rise to the level of a denial of "fundamental fairness."
>
> In the context of state evidentiary rulings, the established standard of fundamental fairness is that habeas relief will be granted only if the state trial error was "material in the sense of a crucial, critical, highly significant factor." Moreover, application of this standard has been notably one-sided, consistent with the reluctance of federal courts to second-guess state evidentiary rulings. This court has established a well-documented resistance to granting relief when a habeas petition alleges a federal claim based merely on a state evidentiary ruling.

Id. (internal citations omitted).

Thus, Claim 32 will be reviewed only to determine whether the alleged error "render[ed] the entire trial fundamentally unfair." Carrizales, 699 F.2d at 1055.

As the Alabama Court of Criminal Appeals found, Officer John Wynne clearly testified that the police badge introduced into evidence was not Officer Schulte's actual badge but was similar to the one that he would have been wearing at the time that he was killed. (Tr. Transcript, Vol. 3, pp. R-317-318). Wynne also testified that he saw a badge displayed on Officer Schulte's jacket when he arrived at the scene of the shooting. (Id. at pp. R-316, 338). Kimberly Hughes testified that she saw a badge on Officer Schulte's jacket, which was on the seat of his

car, shortly before he was killed. (Id. at pp. R-288-289, 292-293). Carl Freeman, who was responsible for photographing the crime scene, also identified Officer Schulte's badge on his jacket. (Id. at p. R-362-363).

In addition, other evidence was introduced that would have allowed a reasonable jury to determine that Madison knew that Officer Schulte was a police officer when he killed him. Hughes and Wynne both testified about the police equipment visible in Officer Schulte's vehicle. (Id. at pp. R-292, 315). Several witnesses also testified to statements made by Madison, both before and after the shooting, that indicated he was aware that Officer Schulte was a police officer when he shot him. (Id. at pp. R-228 ("[Madison] was saying I don't understand why the police are here or why I'm in trouble . . ."), 270 ("[Madison] – he came in – when we came in, me and Buffy, and we were in the – in the kitchen and he said – he wanted to know why the cops were out there . . ."), 271-272 ("[Madison] just kept screaming, I can't believe you called the cops. Why did you call the cops."), 377 ("Well, [Madison] just said, I just shot a cop."), 381 ("[Madison] told her, he said, Ollie, I need you tonight more than ever. He said, I need you to get me out of town. He said, I've killed a policeman.")). Therefore, even assuming that it was error for the trial court to admit the replica badge into evidence, the record simply does not support a finding that the admission of that evidence prejudiced the outcome of Madison's trial and deprived him of fundamental fairness.

The facts of this case do not compare with those presented in Carson v. Polley, in which the Fifth Circuit held that the trial court erred by admitting a replica knife into evidence. 689 F.2d at 579. As the Alabama Court of Criminal Appeals explained, in Carson a "deputy policy chief was allowed to testify to the chain of custody and refer to the replica as 'the' knife when he was unable to positively identify the weapon." Madison, 718 So. 2d at 103. As the Fifth Circuit explained:

> what is crucial in the [Carson] case is the fact that the record shows that ultimately it was not made clear to the jury that the knife was admitted solely for illustrative purposes. After admission only as a 'similar' knife, [the witness] reiterated that it was 'the knife' which had been in police custody. This testimony occurred in connection with the admission of the envelope in which the knife was alleged to have been kept. It gave far more strength to the knife as an exhibit than was proper under limited admission.

Carson, 669 F.2d at 579.

In the instant case, by contrast, it is undisputed that the jury in Madison's case had been "informed that [the badge introduced] was not [Officer Schulte's] actual badge." (Doc. 30, ¶ C.2).[26]

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[26] The remaining cases Madison cites in support of his argument are inapposite as none address, or even involve, the constitutionality of "replica" or "similar" evidence. See Johnson v. Mississippi, 486 U.S. 578, 584-86 (1988) (holding that mere evidence of an invalid conviction is irrelevant and inadmissible for the purposes of capital sentencing); Zant v. Stephens, 462

Having reviewed the record in this case, the Court is satisfied that, even assuming error by the trial court in admitting the replica badge into evidence, that purported error was not "material in the sense of a crucial, critical, highly significant factor" in the trial, and it did not "render the entire trial fundamentally unfair." Carrizales, 699 F.2d at 1055. Thus, Claim 32 fails to state a cognizable federal habeas claim and is **DENIED.**

Having reviewed the record in this, the Court agrees with the Alabama Court of Criminal Appeals and the Alabama Supreme Court, with respect to Claims 1 and 25-32, that Madison failed to establish that his constitutional rights were violated. Madison has failed to establish under the "contrary to" clause of § 2254(d)(1) that the Alabama Court of Criminal Appeals or the Alabama Supreme Court applied a rule that contradicts the governing law set forth in United States Supreme Court case law or that the courts decided the case differently than the United States Supreme Court did in a previous case presenting a set of materially indistinguishable facts. Likewise, Madison has failed to establish under the "unreasonable application" clause that the Alabama Court of Criminal Appeals or the Alabama Supreme Court, though recognizing the correct governing

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U.S. 862, 887-88 (1983) (holding that erroneous instruction did not "implicate our repeated recognition that the qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." (internal quotations omitted)); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (noting only that "the penalty of death is qualitatively different from a sentence of life imprisonment").

principles from the United States Supreme Court's decisions, unreasonably applied those principles to the facts in this case. Thus, Madison has not established that he is entitled to relief under § 2254(d)(1).

In addition, Madison has failed to establish entitlement to relief under § 2254(d)(2) by showing that the decisions of the Alabama Court of Criminal Appeals or the Alabama Supreme Court were based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. This Court must presume as correct the determinations of all factual issues made by the state courts. 28 U.S.C. § 2254(e).

Accordingly, Claims 1 and 25-32 in Madison's petition for habeas relief are without merit and are **DENIED**.

III. Conclusion

For the reasons set forth herein, the requests for habeas corpus relief in Madison's § 2254 petition (Docs. 1-2 & 30) are **DENIED**. Specifically, Claims 2-24 and 33-34 are **DENIED** because they are procedurally defaulted, and Claims 1 and 25-32 are **DENIED** because the undersigned finds that Madison's constitutional rights were not violated.

IV. Certificate of Appealability

Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts mandates that this court "must issue or deny a certificate of appealability when it enters a final order adverse to the applicant . . . . If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. §

2253(c)(2)." Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts.

In turn, § 2253(c)(2) of Title 28 provides that "a certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Section 2253 codified[27] a standard previously announced in Barefoot v. Estelle, 463 U.S. 880, 893 n. 4 (1983):

> The following quotation cogently sums up this standard: "In requiring a 'question of some substance,' or a 'substantial showing of the denial of [a] federal right,' obviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor. Rather, he must demonstrate that the issues are *debatable among jurists of reason*; that *a court could resolve the issues [in a different manner]*; or that the questions are '*adequate to deserve encouragement to proceed further*.'"

Id. (citations omitted) (emphasis added). And "[i]n a capital case, the nature of the penalty is a proper consideration" in determining whether to issue a certificate of appealability. Id. at 893.

Where a district court has rejected a claim on the merits, the petitioner seeking a certificate of

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[27] As the Supreme Court noted in Slack v. McDaniel, 529 U.S. 473 (2000), "[e]xcept for substituting the word 'constitutional' for the word 'federal,' the present § 2253 is a codification of the CPC standard announced in Barefoot v. Estelle." 529 U.S. at 474-75.

appealability must establish that "reasonable jurists would find the district court's assessment of the constitutional claim[] debatable or wrong." Eagle v. Linahan, 279 F.3d 926, 935 (11th Cir. 2001) (citing Slack, 529 U.S. at 484). However,

> [w]hen the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. . . . . Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further.

Slack, 529 U.S. at 484; Lamarca v. Sec'y, Dep't of Corr., 568 F.3d 929, 934 (11th Cir. 2009).

A certificate of appealability does not, however, require a showing that the appeal will succeed. Miller-El, 537 U.S. at 337. The Court "should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief." Id.

After reviewing the issues raised in Madison's § 2254 petition, the Court finds that Madison has failed to make a substantial showing of the denial of

a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its rulings as to each and all of the remaining issues in his habeas petition. Therefore, a certificate of appealability is hereby **DENIED** as to those issues.

DONE and **ORDERED** this the **21st** day of **March, 2011.**

s/ Kristi K. DuBose
KRISTI K. DuBOSE
UNITED STATES
DISTRICT JUDGE

APPENDIX D

ALABAMA COURT OF CRIMINAL APPEALS
OCTOBER TERM, 1996-97

CR-93-1788

Vernon Madison

v.

State

Appeal from Mobile Circuit Court
(CC-85-1385.80)

McMILLAN, Judge.

The appellant, Vernon Madison, was convicted of two counts of capital murder in the death of Julius Schulte, see §13A-5-40(a)(5), Code of Alabama 1975. The first count charged the appellant with killing a police officer who was on duty, and the second charged him with killing a police officer who was performing an official or job-related act. Following the sentencing hearing, the appellant was sentenced to death. His conviction and sentence subsequently were reversed, 345 So.2d 94 (Ala.Crim.App. 1987), and the case was retried. A second conviction and sentence of death also were reversed, 620 So.2d 62 (Ala.Crim.App. 1992), and the appellant was tried for the third time. The jury again found the appellant guilty of capital murder and recommended that he be sentenced to life imprisonment without the possibility of parole, with eight jurors voting for life imprisonment without parole and four voting for death by electrocution. After a hearing before the

trial court, the court sentenced the appellant to death by electrocution.

The facts of this case, as set out by the trial court, are as follows:

> "That on April 18, 1985, the residents of 1058 Etta Avenue were Cheryl Green,[1] the woman with whom the Defendant had lived until days prior to the murder, and Kimberly Hughes, her 11-year-old daughter.
>
> "That night, Cpl. Julius Schulte, a police officer of the City of Mobile, was dispatched and went to 1058 Etta Avenue in Mobile to investigate a missing child complaint.
>
> "When Cpl. Schulte arrived, he learned that the child, Kimberly Hughes, had come home after her mother called the police but before he arrived. He also found himself in the midst of a domestic dispute between Cheryl Green and the Defendant, for April 18, 1985, was also the night that Green had thrown the Defendant's personal effects out of the house they previously shared.
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> "The Defendant had come and gone from 1058 Etta Avenue before Cpl. Schulte arrived, ostensibly to look for Kimberly. He came back with another woman, Mary McCord, after Cpl. Schulte was on the scene, but he left her and his .32 caliber pistol at the corner before

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[1]Cheryl Green's last name also appears as "Greene" elsewhere in the record.

proceeding to the house located in the middle of the block.

"Once inside the 1058 Etta Avenue residence, the Defendant argued with Green, accusing her of calling the police on him. Even though he now knew the child was secure, Cpl. Schulte remained on the scene and called for a backup officer, because he had been asked to stay until Green and her child were safely away from the Defendant.

"The Defendant and Green came out of the house, and both talked to Cpl. Schulte, who never exited his patrol car. After that brief conversation, the defendant appeared to leave. He did not go far; rather, he simply went to the corner where Mary McCord was holding his .32 caliber pistol. He took the gun from her and left her.

"Now armed, the Defendant went back to where Green was still talking with Cpl. Schulte, who still sat innocently and unsuspectingly in his unmarked police car. The Defendant, however, returned a different way. He went over one block, and he sneaked up behind the houses on Etta Avenue. He emerged from the shadows, approached Cpl. Schulte from the left rear, and coldly and methodically fired two shots at near point blank range into the back of Cpl. Schulte's head. He then turned the weapon on Cheryl Green, shooting her in the back. After killing

his helpless victim, Cpl. Schulte, and shooting Cheryl Green, the Defendant fled the scene."

I.

The appellant contends that the indictment improperly charged two counts of capital murder for a single offense. He argues that presenting §13A-5-40(a)(5), Code of Alabama 1975, as two offenses exposed him to double jeopardy, enhanced his punishment, and deprived him of constitutional protections. He further argues that, because the jury verdict form does not reflect the count on which he was convicted, the jury may have found him guilty of what it believed were two offenses or may not unanimously have found him guilty of one offense. In addition, he argues, the jury could have found him more deserving of death because he had been convicted of two offenses rather than one.

The first count of the appellant's indictment charged him with the intentional shooting of Julius Schulte while Schulte was "on duty as a police officer"; the second count charged that the shooting occurred while Schulte was "performing an official or job related act." Both counts are alternative methods of proving a single offense. See §13A-5-40(a)(5), Code of Alabama 1975. The trial court instructed the jury that there were "two counts contained in the indictment, each charging the Defendant with a capital offense," and stated that, if the jurors were not convinced that the State had proven "each of the essential elements of either of the capital offenses beyond a reasonable doubt," they should find the appellant not guilty of "the capital offense as charged in the indictment" and consider the lesser included

offense of murder. The court further instructed the jury that, if it found the appellant guilty of "the capital felony as charged in the indictment," it would not be necessary to state the count or counts of the indictment on which they found him guilty. The jury subsequently returned a verdict form that stated, "We, the Jury, find the Defendant guilty of the capital felony as charged in the indictment." The trial court thereafter sentenced the appellant to death by electrocution.

In Floyd v. State, 486 So.2d 1309 (Ala. Cr. App. 1984), aff'd, 486 So.2d 1321 (Ala. 1986), cert. denied, 479 U.S. 1101 (1987), the appellant was charged with eight counts of murder during robbery, §13A-5-40(a)(2), Code of Alabama 1975, four of which related to the taking of a taxi and four of which related to the taking of currency. In that case, this Court stated that, because the purpose and effect of the joinder of offenses was to meet every possible contingency that the evidence might show, rather than to convict the appellant of multiple offenses, the State was not required to elect the count on which the case would be submitted to the jury. In the present case, the appellant was indicted on two, rather than eight, counts of capital murder, and the trial court likewise did not require him to elect the count on which he was to be tried. However, the appellant was convicted of only one offense, and the indictment was proper.

In Meyer v. State, 575 So.2d 1212 (Ala. Cr. App. 1990), the appellant was indicted on three counts of capital murder for one killing. He was found guilty of three counts of intentional murder, and the trial

court imposed a single sentence of 50 years' imprisonment. This Court, citing Ball v. United States, 470 U.S. 856, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985), remanded the case for the circuit court to vacate two of the convictions. In Ball, the United States Supreme Court explained that a second conviction is an impermissible punishment, even if it results in no greater sentence,[2] because it may have potential adverse collateral consequences such as delayed parole eligibility or an increased punishment for recidivism. In the present case, however, unlike Ball, there was no second conviction. The double jeopardy concerns, therefore, are inapplicable.

In Tucker v. State, 537 So.2d 59, 61 (Ala. Cr. App. 1988), the appellant was charged in a single indictment with the murder of a peace officer while the officer was on duty or in the act of arresting or attempting to arrest the appellant or his stepmother. The appellant moved to dismiss the indictment, on the grounds that it charged two crimes and that it was so ambiguous that he could not determine what acts constituted the crime. This Court found that the indictment was properly framed to conform to the proof, in that it charged only one offense -- capital murder of a peace officer -- which was committed for one of two reasons: either because the officer was trying to arrest the appellant's stepmother or the appellant himself.

In the present case, although the instructions of the trial court were confusing, the Court sufficiently informed the jury with regard to the burden of proof

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[2]Ball's sentences were to be served concurrently.

and the necessity for unanimity in its verdict. The jurors were aware that the appellant was guilty of only one offense, as evidenced by their verdict form, which stated the single offense of "the capital felony as charged in the indictment." Their death penalty decision therefore was not improperly affected by the framing of the indictment.

II.

The appellant contends that the trial court erred in failing to find statutory and nonstatutory mitigating circumstances. He argues with regard to the statutory circumstances that the trial court had before it evidence that the capital offense was committed while he was "under the influence of extreme mental or emotional disturbance" and that his "capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired," §13A-5-51(2) and (6), Code of Alabama 1975. Specifically, he refers to defense expert Dr. Barry Amyx's testimony that he suffered from a delusional disorder, a psychotic illness similar to schizophrenia, and that he also suffered from persecutory delusions and a "thought disorder." Dr. Amyx expressed the opinion that the appellant could not fully appreciate the criminality of his conduct. In addition, the appellant argues that State's witness Ollie Doss testified that he looked "crazy" when she saw him on the night of the offense. He also contends that the trial court misunderstood the burden of proof with regard to mitigating circumstances and incorrectly believed that the appellant had to show that he was insane.

The trial court found with regard to §13A-5-51(2), Code of Alabama 1975, that the capital offense was committed while the appellant was under the influence of a mental or emotional disturbance but that the disturbance was not extreme. The court also found that the appellant had a personality disorder but that he was not psychotic. Defense expert Dr. Claude Brown had testified that, in his opinion, the appellant suffered from a personality disorder, rather than a psychosis, and that there was no evidence that the appellant was delusional at the time of the murder. It is apparent from the trial court's sentencing order that the court was aware of the appropriate burden of proof with regard to insanity. The court noted that Dr. Amyx had conducted a single 90-minute session with the appellant five years after the homicide, while Dr. Claude Brown had met with the appellant at least three times, two of those occasions occurring within five months of the murder. In addition, the court found that the purposefulness of the appellant's behavior undermined his claim of extreme disturbance and that his ability to clearly express his feelings and his opposition to previous use of an unwarranted insanity defense refuted his claim. The trial court's finding that, from a preponderance of the evidence, the §13A-5-51(2) mitigating circumstance did not exist, is supported by the record. Because the appellant did not object to the trial court's sentencing order, this issue is affirmed under the plain error standard. Rule 45A, Ala.R.App.P.

With regard to the §13A-5-51(6) mitigating circumstance, the trial court found that the

preponderance of the evidence suggested that the appellant could appreciate the criminality of his conduct and conform his conduct to the requirements of law. The court also again stated that the appellant had a personality disorder but that he was not psychotic. The record supports the court's finding.

With regard to nonstatutory mitigating circumstances, the appellant argues that there was ample evidence offered at the penalty phase to support the existence of such circumstances. Specifically, he refers to Dr. Amyx's testimony as to the appellant's mental illness, his mother's plea for mercy, a friend's testimony concerning a positive change in the appellant since the killing, and the appellant's own statement, in which he expressed remorse and apologized to the victim's family. In addition, the appellant argues that the trial court's sentencing order was insufficient because it did not specifically identify the mitigating circumstances found and weighed by the court.

However, the order of the trial court stated, in pertinent part, that the court "considered the testimony of lay witnesses and all other mitigating evidence offered by the Defendant, including that not enumerated as statutory mitigating circumstances." The court was not required to state that it considered a particular mitigating circumstance, and the lack of a specific finding did not mean that the court did not consider that evidence. Ex parte Haney, 603 So.2d 412 (Ala. 1992), cert. denied, 507 U.S. (1993). With regard to the appellant's statement, although the appellant said that he was sorry that the victim's

family had suffered, he also said that "there was no perceived action on my part for this to occur," and he again claimed that the killing was committed in self-defense. Further, although the appellant said that he was asking for forgiveness, he also said that, because he knew that God had already forgiven him, he was "at peace" with himself. Similarly, the testimony of the appellant's friend was actually that the appellant would now talk about the Lord, that he appeared concerned about people, and that he was not as quick to get angry. The trial court's finding that no nonstatutory mitigating circumstances existed is supported by the record.

III.

The appellant contends that the jury was improperly charged that his conduct created a great risk of death to many persons. The trial court instructed the jury that it could consider the aggravating circumstance under §13A-5-49(3), Code of Alabama 1975, but subsequently found in its sentencing order that this circumstance did not exist. The appellant argues that, although the court's final determination was correct because the appellant was not attempting to hurt anyone other than the two intended victims, the placing of the circumstance before the jury could have convinced some jurors who otherwise would have voted for life without parole to vote for death. As there was no objection to the trial court's oral charge, this issue is subject to review under the plain error standard, Rule 45A, A.R.App.P.

The §13A-5-49(3) aggravating circumstance was properly presented to the jury. There was undisputed evidence that, after the appellant shot

Officer Schulte, he fired several shots at Cheryl Green as she attempted to run from him. Green's daughter Kimberly Hughes was standing beside her when the appellant fired, and Green attempted to shield the child from the shots. Also present, standing outside a truck that was parked immediately adjacent to Officer Schulte's car, was Buffy Trapp. John Chadwick was seated inside the truck and was so near that, when Chadwick fled after the appellant shot Green, the appellant was running behind him. In addition, the shooting took place in a residential neighborhood, and one of the neighbors, Ray Kilpatrick, witnessed the shooting from his porch.

The appellant was aware of the residential character of the neighborhood because he had previously lived there. In addition, he was positioned so that he could actually see Hughes, Chadwick, and Trapp. Therefore, the appellant could have foreseen that his firing at Cheryl Green would create a great risk of death to many persons other than the two intended victims. The appellant contends that the State argued at the close of the guilt phase that "the only risk of death during this offense" was to the two intended victims. However, the prosecutor's actual argument was that the appellant did not shoot Hughes, Chadwick, or Trapp but instead shot "the two people he was mad at." The prosecutor did not contend that the others were not at risk. Based on the record, there is no error or plain error in the trial court's presenting the §13A-5-49(3), Code of Alabama 1975, aggravating circumstance to the jury.

IV.

The appellant contends that the trial court erred in allowing nonstatutory aggravating circumstances to be submitted to the jury and also that it improperly considered nonstatutory aggravating circumstances. First, he argues that the court unlawfully used a mitigating circumstance (prior criminal history) as an aggravating factor. He also argues that the court's use of the phrase, "20-year history of at least nine criminal convictions," indicated that the court improperly considered juvenile convictions. Because the appellant did not object to the trial court's sentencing order, these issues are affirmed under the plain error standard. The appellant quotes the following portion of the trial court's sentencing order in support of his argument:

> "(1) The Defendant indeed has a significant history of prior criminal activity. The pre-sentence report documents a 20-year history of at least nine criminal convictions, most of which involve the threat or use of violence against other human beings. Therefore, the Title 13A-5-51(1) factor does exist and is considered."

(Emphasis added.)

However, the part of the sentencing order quoted by the appellant is the first in the section of the sentencing order entitled, "II. MITIGATING CIRCUMSTANCES," and it is clear from the context that this finding was inadvertently recorded as an affirmative finding. The findings of the trial court with regard to mitigating circumstances follow the

statutory order of §13A-5-51, Code of Alabama 1975, wherein "No significant history of prior criminal activity" is the first circumstance listed. In addition, the appellant admits that, in Freeman v. State, 555 So.2d 196 (Ala. Cr. App. 1988), aff'd, 555 So.2d 215 (Ala. 1989), cert. denied, 496 U.S. 912 (1990), this Court found that a similar error with respect to juvenile adjudications was harmless because the appellant also had adult criminal convictions.

The appellant also contends that the trial court improperly found nonstatutory aggravating circumstances as evidenced by the following in its sentencing order:

> "The murder of Julius Schulte was a consciousless [sic] act committed by a man whose life history is but one sequel after another of violent, assaultive acts against other human beings and with total disregard for our laws and those who are charged with enforcing them."

However, the passage in question is not included in the section of sentencing order entitled, "I. AGGRAVATING CIRCUMSTANCES." This passage appears instead in the portion of the order in which the court explains its weighing of the aggravating and mitigating circumstances. It is apparent that the passage was not referring to an improper nonstatutory aggravating circumstance.

The appellant also argues that the State and the trial court added another nonstatutory aggravating circumstance when the court allowed the prosecutor to state to the jury in his penalty phase argument, "You've seen the first three and [this] verdict makes

the fourth conviction of crimes of violence committed by this Defendant." The appellant cites in support of his argument cases that hold that convictions, not charges, are to be considered; these cases are inapplicable because the crime at issue here was a conviction. Moreover, the mere fact that certain facts were mentioned at some point in the court's sentencing order did not mean that the court improperly considered them as aggravating circumstances. Based on the record, there is no plain error.

V.

The appellant contends that the prosecutor presented victim impact arguments, which, he says, were improper because they distracted the jury from determining culpability. Specifically, he argues that during the guilt-phase closing argument, the prosecutor erred in stating the following with regard to one of the eyewitnesses to the crime:

> "I don't know if any of us can imagine what young Kim Hughes has been through in her lifetime. She was ten years old at the time she saw her mother gunned down and saw a police officer killed before her very eyes."

However, the victim in this case was Julius Schulte, not Kim Hughes, and the statements made by the prosecutor were not improper argument because they represented his inferences and conclusions drawn from evidence which had been presented at trial. In Sanders v. State, 423 So.2d 348 (Ala. Cr. App. 1982), this Court stated that the rules governing a counsel's inferences from the evidence are to be liberally construed, and that

control of closing argument rests in the broad discretion of the trial court. The prosecutor's statements concerning Kim Hughes, therefore, were not error.

The appellant also contends that the prosecutor erred in arguing the worth of the victim, as follows:

> "I want you to look at the man who was Julius Schulte. This is the man who spent 13 years of his long career working with kids as a juvenile probation officer, and as a parent and as any parent can tell you, that takes a lot of patience. He wasn't just a juvenile officer. That night he could have just said, once he found out that Kim was okay, he could have said, 'I'm out of here.' But that wasn't Julius Schulte. Julius waited, called his backup, to see if he could help further. This is the kind of man that was executed by this Defendant on that occasion, and, folks, that is why I stand before you today and I respectfully ask you to return verdicts of guilty on both counts."

The prosecutor's statements concerning Julius Schulte also represented inferences and conclusions drawn from the evidence that was presented at trial. The trial court did not abuse its discretion by permitting the prosecutor's statements during his guilt-phase argument. There is no error with regard to this issue.

VI.

The appellant contends that the trial court erred in refusing his requested jury instruction on manslaughter because, he says, he testified to facts

that provided a rational basis for the lesser charge. He argues that the jury could have found that the killing arose from a sudden heat of passion caused by provocation because he stated that he argued with the victim, that he wanted to leave, and that the victim would not let him. He also argues that "he perceived ... an attack upon him" because the victim was opening the car door and he believed that the victim had a gun in his hand and was going to shoot him.

However, mere words or gestures will not reduce a homicide from murder to manslaughter, Harrison v. State, 580 So.2d 73 (Ala. Cr. App. 1984), and undisputed evidence established that the appellant failed to show legal provocation. The victim's car was found with the door closed, and his gun was found in a snapped holster, sitting on top of his clipboard on the car seat. He had been shot twice, once in the back of the head and also in the left temple, and gunpowder residue was deposited around this wound. Thus, there was no rational basis to support the appellant's requested instruction on the lesser included offense, and it was properly refused by the trial court. Dill v. State, 600 So.2d 343 (Ala. Cr. App. 1991), aff'd, 600 So.2d 372 (Ala. 1992), cert. denied, 507 U. S. 924 (1993).

VII.

The appellant contends that the trial court erred in denying his motion for a change of venue. He argues that there was media coverage of the crime throughout Mobile County, by newspapers, radio, and television, and that, although the crime occurred nine years before this third trial, eight members of

the venire indicated that they had prior knowledge of the case.

Venue should be changed when there is a showing of inherently prejudicial publicity that has so saturated the community as to have a probable impact upon the jurors. Jackson v. State, 516 So.2d 726 (Ala. Cr. App. 1983). Here, the appellant has presented no evidence with regard to prior publicity. With regard to probable impact, the record reveals that 8 of 60 veniremembers responded that they had some prior knowledge concerning the appellant's case. The trial court conducted an individual voir dire of those eight and permitted the appellant to challenge for cause all of them to whom he objected. One was struck because he had "already given us a number of reasons," another stated that he "believe[d] that if the Defendant was indicted and he's here, probably had one or two court trials already, that he's probably guilty, sir," and the third had been acquainted with the victim through her job as a substitute teacher. The remaining veniremembers stated that their knowledge of the appellant's case was general in nature and that they could render a fair and impartial verdict. Therefore, the trial court properly denied the appellant's motion for a change of venue.

VIII.

The appellant contends that the trial court erred in excusing potential jurors allegedly without adequate cause. Specifically, he argues that the information elicited by the court was insufficient to show undue hardship, extreme inconvenience, or public necessity, as required by §12-16-63, Code of

Alabama 1975, because the court failed to ask two of those potential jurors to elaborate on what other arrangements, if any, were available for the care of their dependent relatives.

The record reveals that during voir dire, the trial court asked the veniremembers if there was a serious reason that any of them could not serve on the jury because they were to be sequestered. Two responded affirmatively. One stated that his mother had just had surgery and that she also had Alzheimer's disease and was being taken care of by a neighbor during the day, the other informed the court that his mother was terminally ill. The trial court then excused both of them, and the appellant did not object. The extreme nature of these illnesses was sufficient to show undue hardship, and the trial court did not abuse its discretion by excusing the two veniremembers from jury service.

With regard to a third veniremember, the record reveals that she was not removed from the venire until after individual voir dire had been completed. At that time, the trial court conducted an off-the-record discussion with an unidentified juror and then a bench discussion with counsel, in which the court stated, "We're going to strike [Mrs. M.] She would be excellent for the State, but she's the bookkeeper and she's got three children and nobody to get them to school. So, I'm going to strike her." The appellant made no objection and the court told Mrs. M. to go "take care of those three children." The court then instructed someone to tell him "what's the actual count now." Upon learning that it was 50, the court

stated, "That's an even number," and the parties then immediately proceeded to strike the jury.

It appears from the record that Mrs. M. was struck to bring the venire panel to an even number, rather than excused based on undue hardship. Moreover, the trial court noted circumstances with regard to Mrs. M. that would have constituted business and personal hardship. Therefore, the trial court's decision to strike Mrs. M. did not constitute error or plain error.

IX.

The appellant contends that the trial court erred in denying him full voir dire of potential jurors with regard to the circumstances under which they would impose the death penalty. Specifically, he argues, he should have been allowed to inquire if jurors who had stated that they could not impose the death sentence could do so in wartime.

The record reveals that, after veniremember R. B. stated that he did not support the death penalty, the trial court permitted the appellant to ask him whether, in "a situation like wartime, like we're in the war with Hitler, Saddam Hussein or something like that," he would oppose "going to war or our country going to wa[r] and taking other people's lives in the protection of our country." The court next questioned veniremember P. H., asking whether " if you were selected as a juror in this case -- and I'm not interested in war time ... there is no set of facts that you ... could vote for death by electrocution?" After P. H. answered, "Yes, sir," the trial court told him that it would now let defense counsel "ask anything he wishes, to and including war time."

However, when counsel attempted to ask P. H., "[C]ould you believe in State imposed killing if it was a war time and like Richard said, he could. Do you feel like in war time you might be able to do something like that," the court stated, "I'm not interested in war time.... So, don't ask about it."

The appellant did not object to the trial court's instruction or further attempt to question the juror concerning his beliefs about killing during a time of war. He now argues that his desired inquiry was whether the juror could impose a death penalty during wartime. However, it is clear from the record that his question at trial actually was whether the juror could support killing in defense of his country during wartime. This question was not sufficiently related to the issue of capital punishment to be relevant, and an affirmative response would not have rehabilitated the juror with regard to the imposition of the death penalty. Therefore, the trial court's refusal to permit the question was not an abuse of discretion.

The appellant contends that the trial court erred in finding that he failed to establish a prima facie case under Batson v. Kentucky, 476 U.S. 79 (1986). The record reveals the following with regard to the appellant's Batson challenge: The appellant objected at trial to the State's striking 6 of 13 blacks from the venire,[3] and the trial court instructed the prosecutor to give race-neutral explanations for his strikes. The

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[3]Two black veniremembers were struck for cause, one by the State and one by the appellant, and the appellant also struck an alternate juror who was black, which left six blacks on the jury panel.

prosecutor responded that the appellant first was required to make out a prima facie case and argued that, because the appellant had shown only that blacks had been struck, his challenge must fail because the jury contained a greater percentage of blacks than was originally on the venire. The appellant responded, citing Ex parte Bird, 594 So.2d 676 (Ala. 1991), for the principle that evidence that jurors share only the characteristic of race and are heterogenous as the community as a whole in all other respects, including gender, age, occupation, and social and economic conditions, can raise an inference of discrimination, and noted, "that's what we have here." He then noted specifically that two females and four males had been struck; that Mr. D., who was a laborer at SeaPac had said nothing during the jury selection process; and that Mr. M. worked at Ingalls and had a wife in law enforcement. Thereafter, the appellant stated that the struck jurors were both female and male, younger and older, who worked as laborers, a housing board director, a food server, and an industrial worker. In addition, he stated that the prosecutor had asked few questions on voir dire examination, which would give a reason to believe that there was any basis other than race for the strikes. The trial court responded that the housing board employee had given many answers and that the State could articulate reasons for striking Mr. B., who was the industrial worker. The court also noted that the percentage of blacks serving on the jury was far greater that the percentage of blacks in the county and then asked whether the appellant could show any bias on the part of the State. After the appellant failed to offer

evidence of bias, the prosecutor reiterated that the appellant had not made a prima facie showing of racial discrimination. The trial court then denied the appellant's Batson motion.

In Batson v. Kentucky, 476 U.S. 79 (1986), the United States Supreme Court set out the components of a prima facie case of racial discrimination in jury selection. In addition to showing that the State used peremptory challenges to remove members of a cognizable group to which he belongs and relying upon the fact that peremptory strikes permit discrimination, a claimant also must show that these facts and any other relevant facts raise an inference that the prosecutor used his strikes in a discriminatory manner. In Ex parte Branch, 526 So.2d 609, 622-623 (Ala. 1987), the Alabama Supreme Court explained that relevant factors could include, but were not limited to, the following: evidence that the jurors shared only the characteristic of their group membership and were heterogeneous in all other respects; a pattern of strikes against black jurors; past conduct of the prosecutor; type and manner of the prosecutor's questions during voir dire, including desultory voir dire; type and manner of questions to the challenged juror, including a lack of questions or meaningful questions; disparate treatment of veniremembers with the same characteristics or type of responses; disparate examination of members of the venire; circumstantial evidence of intent due to the use of most challenges to strike blacks; and the use of peremptory challenges to dismiss all or most black jurors.

The appellant argues on appeal that the State struck 7 of 13 qualified black potential jurors, or over half of the black venirepersons, and that it used 7 of its 18 strikes to remove those black potential jurors. He further argues that 3[4] of the blacks removed by the State did not answer any questions on voir dire and that the prosecutor's office has a history of excluding qualified black potential jurors based on race.

However, the only evidence actually offered by the appellant at trial was as follows: that the State struck 4 black males and 2 black females, who were variously employed; that the State struck 7 of 15 blacks, and that 3 veniremembers who were struck had not responded to any questions on voir dire. Despite repeated requests by the trial court that he produce more evidence, including, specifically, evidence of bias, the appellant offered nothing further in support of his Batson claim.

The appellant's evidence was insufficient to show that the struck jurors shared only the characteristic of race. It also was insufficient to show a pattern of strikes against black jurors, particularly in light of the increased percentage of blacks who served on the jury relative to both the initial panel and the population of the county.[5] The only evidence that

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[4]The appellant incorrectly states in his reply brief that the number of unquestioned jurors was four.

[5]The prosecutor informed the trial court that the 60-member panel was 75 % white and that the percentage of blacks on the final panel was "almost double" that on the initial panel. The trial court also noted that the final jury panel was 50% black, "far more" than the 30% population of blacks in the county.

arguably could lead to an inference of discrimination was a lack of questions or meaningful questions to 3 of the challenged jurors. The trial court's determination as to whether the defendant has established purposeful racial discrimination should be reversed only if it is clearly erroneous. Ex parte Branch, supra. The trial court's denial of the appellant's Batson motion in the present case was not clearly erroneous.

XI.

The appellant contends that the trial court erred in instructing the jury that it had a duty to reconcile the testimony of the witnesses. He argues that this instruction invaded the province of the jury and could have conditioned the jurors to disbelieve uncontroverted testimony.

However, the record reveals that the trial court's actual charge was, in pertinent part, as follows:

> "Now, ... you might logically assume that all witnesses who take the oath are presumed to speak the truth. Our Supreme Court has said, and I believe correctly so, that no such presumption exists. You, as the sole triers of the facts, are to determine that. I will tell you it's the law of this State that if you can reconcile the testimony of all the witnesses with that of being the truth, then, of course, you should do so. If you cannot do that, then, again, as the sole triers of the facts in this case you must determine which witness or witnesses you choose to believe and which witness or witnesses you choose not to believe.

> "I will tell you it's the law of this State that if you believe any witness has wilfully sworn falsely to a material fact, you may, if you wish, disregard that person's entire testimony. The theory of our law being simply this: If a person would testify falsely in any material aspect -- not any inadvertent answer, but would wilfully testify falsely in any material aspect, the law would presume that person would testify falsely in any other material aspect.
>
> "Of course, you may consider many other things: the demeanor of the witness on the stand, and that simply means how that person answered the questions asked them; his or her ability to see and know the facts about which he or she has testified; how that person may be affected by your verdict; or, another way of saying the same thing, is any bias or prejudice which any witnesses may possibly possess..."

The record further reveals that the appellant did not object at trial to this portion of the court's oral charge; therefore, this issue must be reviewed under the plain error standard. Rule 45A, A.R.App.P. In Williams v. State, 601 So.2d 1062 (Ala. Cr. App. 1991), aff'd, 662 So.2d 929 (Ala. 1992) (table), cert. denied, 506 U.S. 957 (1992), this Court considered a jury instruction and charge nearly identical to those given by the court in the present case. We determined in that case that there was no plain error because, although the single instruction with regard to reconciliation, viewed in the abstract, could have been confusing, that instruction should not be judged

in isolation but had to be considered in the context of the overall charge. Here, similarly, viewed in the context of the overall charge, the court's instruction with regard to reconciling the testimony of the witnesses was not plain error.

XII.

The appellant contends that the trial court erred in admitting into evidence a police lapel badge that was, he says, false and artificial evidence. He argues that, in Carson v. Polley, 689 F.2d 562 (5th Cir. 1982), the admission of a replica knife was condemned as prejudicial because it was the subject of a factual dispute as to whether it was actually possessed by a man who had been subjected to police force. The appellant argues that the present case is similar, in that the central issue was a factual dispute as to whether he knew Julius Schulte was a police officer because Schulte was wearing a police badge.

However, the appellate court's objection to the evidence introduced in Carson was that it was not made clear to the jury that the replica knife had no connection with the knife allegedly in Carson's possession when he was arrested. The appellate court noted that trial courts have great discretion in this area and conceded that the replica knife could ordinarily have been admitted as illustrative or demonstrative evidence. However, the court stated that the admission of the knife was error under the facts of Carson because a deputy policy chief was allowed to testify to the chain of custody and refer to the replica as "the" knife when he was unable to

positively identify the weapon. No such error exists in the appellant's case.

In Liberty National Life Ins. Co. v. Weldon, 267 Ala. 171, 100 So.2d 696 (1958), the Alabama Supreme Court stated that articles or objects that relate to or explain the issues are admissible in evidence when duly identified and shown to be in substantially the same condition as at the time of the occurrence. Here, Officer John Wynne clearly testified that the police badge introduced into evidence was "not Cpl. Schulte's badge," although he stated that it was similar to the one that Schulte would have been wearing at the time of the killing. Based on Wynne's testimony, the trial court did not err in admitting the lapel badge into evidence.

XIII.

The appellant contends that the trial court erred in overriding the jury's verdict of life imprisonment without parole pursuant to §13A-5-46, Code of Alabama 1975. He argues that §13A5-47, Code of Alabama 1975, permits a standardless override which, he says, violates the Sixth and Fourteenth Amendments to the United States Constitution because it fails to consider the jury's role in the sentencing process and permits arbitrary and uneven imposition of the death penalty.[6]

However, in Spaziano v. Florida, 468 U.S. 447, 108 S.Ct. 3154, 31 (1984), the United States Supreme Court determined that capital sentencing is not a trial for purposes of the Sixth Amendment's

[6]The appellant concedes that the sentencing scheme is constitutional on Eighth Amendment grounds, pursuant to Harris v. Alabama, ___ U.S. ___ , 115 S.Ct. 1031 (1955).

guarantee of a jury trial. In addition, the Court stated that a capital sentence need not be imposed by a jury in order to satisfy the Fourteenth Amendment requirement that the death penalty not be imposed arbitrarily or discriminatorily. The Alabama override provision requires the trial court to "consider the recommendation of the jury contained in its advisory verdict," §13A-5-47(e), Code of Alabama 1975, unless the verdict has been waived. In addition, §13A-5-53, Code of Alabama 1975, mandates a detailed and exacting review of the trial court's findings and decision, and subsection (b)(3) specifically requires the appellate court to review whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases.

The record reveals that the appellant did not object to the trial court's override of the jury's advisory verdict. Therefore, reviewed under the plain error standard, the trial court's override is affirmed.

XIV.

In accordance with the requirements of §13A-5-53, Code of Alabama 1975, we have reviewed the record, including the guilt and sentencing proceedings, for any error that adversely affected the substantial rights of the appellant, see Rule 45A, A.R.A.P., and have found none. In addition, we have found no evidence that the appellant's sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor.

The trial court properly found the existence of two aggravating circumstances: First, that the capital

offense was committed by a person under sentence of imprisonment, §13A-5-49(1), Code of Alabama 1975, and, second, that the appellant was previously convicted of another capital offense or a felony involving the use or threat of violence to the person, §13A-5-49(2), Code of Alabama 1975. In addition, the court properly found no mitigating circumstances.

After an independent weighing of the circumstances, this Court finds that the trial court's sentence of death was proper. This Court further finds that, considering both the crime and the defendant, the sentence is not excessive or disproportionate to the penalty imposed in similar cases. Therefore, the appellant's conviction and sentence of death are proper. The judgment of the trial court is affirmed.

AFFIRMED.

All judges concur except Cobb, J., who recuses.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 11-12392-P

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JUN 21 2012
JOHN LEY
CLERK

VERNON MADISON,

Petitioner - Appellant,

versus

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ATTORNEY GENERAL, STATE OF ALABAMA,

Respondents - Appellees.

Appeal from the United States District Court
for the Southern District of Alabama

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

BEFORE: DUBINA, Chief Judge, BARKETT and MARTIN, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ Rosemary Barkett
UNITED STATES CIRCUIT JUDGE

APPENDIX F

IN THE CIRCUIT COURT OF
MOBILE COUNTY, ALABAMA

STATE OF ALABAMA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. CC-85-
	)	1385.80
VERNON MADISON,	)	
	)	
Defendant.	)	

EXCERPTS FROM TRIAL TRANSCRIPTS DATED
APRIL 18-21, 1994

* * *

[R-148]

MR. KNIZLEY: Judge, before the rest of the jurors get out of there, we're going to make a Batson challenge on a couple of them. I don't know if it's going to be successful. I don't know how the Court might handle it, if we're successful, about replacing jurors. We don't want to let the rest of that panel get away just yet.

THE COURT: They're already gone. But you can make any Batson motion you want.

MR. KNIZLEY: Yes, sir.

* * * * * * * * * * *

[R-149]

AFTERNOON SESSION

(Jurors not present.)

MR. JORDAN: Barbara, can you mark these, please?

(State's Exhibits 36 and 37 were marked for identification. State's Exhibits 1 through 35 had been previously marked.)

THE COURT: I have been advised by Mr. Knizley that he has some motions or at least a motion.

MR. KNIZLEY: Yes, sir.

THE COURT: Proceed.

MR. KNIZLEY: Judge, we would object to the seating on the jury of several of the jurors selected by the – or we object to the striking of several of the jurors by the Prosecution, particularly the six blacks that were struck. There were only 13 blacks to choose from. There were 15 originally out of 60 and then 2 were struck for other reasons, for cause, leaving 6.

THE COURT: Dennis, keep it down.

MR. KNIZLEY: Yes, sir.

Judge, particularly juror -- a black male, juror 169, Thomas Dawson; juror --

THE COURT: For the record, don't we have seven blacks on this jury out of twelve?

MR. CHERRY: Yes, sir, we do.

MR. KNIZLEY: Judge, we have six out of twelve. One's an **[R-150]** alternate, which I struck.

THE COURT: You got six out of twelve. Okay. Go ahead.

MR. KNIZLEY: Judge, 160, a black female, Shirley Smith; 163, James McQueen, a black male; 135, Geraldine Adams, a black female; 137, Charles Hall, a black male; and 148, Willie Brown, a black male. Obviously, Judge, the Defendant in this case is black; the victim in this case was a white police officer.

THE COURT: You have to give, for the record, race neutral explanations in accordance with Batson. By the way, we may get to Powers v. Ohio in a minute. But go ahead.

MR. CHERRY: Judge, if in fact Dennis has made out a prima facie case of some type of discrimination by the State, yes, sir, we would have to do that. But under the Edwards v. State case, decided in 1993, he has to first make out that prima facie case, and that case is one of the last cases in a long line of cases which simply say that if he only shows, one, that we struck blacks; and, two, if the jury make up has a greater percentage of blacks on that jury than was initially on the panel itself, he has not made out that showing for us to even have to give those reasons, and I've got a copy of that case, if you'd like to look at it.

MR. KNIZLEY: I'm prepared to go further if the Court --

MR. CHERRY: And I would submit, Judge, further in support of that, we started out with a 75 percent white panel by our figures. The Defense struck 18 whites and one black. There are seven **[R-151]** blacks folks --

THE COURT: What I'm doing, Buzz, two of you all can't talk at the same time.

MR. JORDAN: I have bad knees. I was just standing up, Judge. I wasn't going to say anything. Stretching a little bit.

THE COURT: I'll let you run around the block, if you want to.

MR. JORDAN: I can't run.

THE COURT: Go ahead.

MR. CHERRY: There are at this time, I think, 14 jurors, including the 2 alternates. Seven of those are black.

THE COURT: He just told me 15. Are you saying there was 14?

MR. CHERRY: Well, the 14 that you have here, including the 2 alternates. It's my understanding --

THE COURT: Oh, he said it was 15 blacks.

MR. CHERRY: Initially. That's true. And that's by our count too. We struck eleven white and seven blacks, and again, under the Edwards case and the cases that it represents before it, he has not even come close to making any kind of showing where again all he can show -- and this is just language from the cases -- where he can only show that, one, we struck blacks; and, two, there's a far greater percentage of blacks on this jury than there were even on the panel. In fact, I think it's almost double. And that's exactly what these cases say, Judge, the Flowers case, the Harrell (phonetic) case.

[R-152] THE COURT: I'm not familiar with that case.

MR. CHERRY: It's addressed on page 1024, Judge.

THE COURT: Cherry, have you got anything other than the Court of Criminal Appeals?

MR. CHERRY: Just a second, Judge.

THE COURT: You know, Batson is a United --

MR. CHERRY: I understand, Judge.

THE COURT: A United States Supreme Court case.

MR. CHERRY: Well, Judge, even Batson says he first has to make a prima facie showing.

THE COURT: Yeah. Are you familiar with what it says to make a prima facie showing?

MR. CHERRY: He has to show, one, not only that these people were of a certain group, a racial group, that the Defendant is a member of that group; that the State has a history of discrimination.

THE COURT: You better go a little bit further, Mr. Knizley.

MR. KNIZLEY: Yes, sir. Judge, I would call the Court's attention to Ex Parte Byrd, who is an Alabama Supreme Court case of 1991 that addresses this issue of making a prima facie case and the Court there says that, "In determining whether there is a prima facie case the Court is to consider," and they quote, "all relevant circumstances which could lead to an inference of discrimination" and they point out for example, Judge -- they point out for example the following illustratives. "The following **[R-153]** illustrations are a type of evidence that can be used to raise the inference." The first one, they say, "The evidence that jurors in question share only this one characteristic, their membership in the race, and that in all other respects they were heterogenous as

the community as a whole." It says, "It may be significant that persons challenged, although all black, include both men and women or a variety of ages, occupations, and social and economic conditions." In this particular case that's what we have here and that's what the Supreme Court said the Court should look to to determine it's a prima facie case. We have struck two males -- I mean, excuse me, two females and four males. We have people that are laborers, we have people that work in -- laborers, for example, Mr. Dawson, who works at SeaPac and who was a laborer, who said nothing during the entire venire selection. We had --

MR. CHERRY: Excuse me. Which one, Dennis?

MR. KNIZLEY: Mr. Dawson, 169.

We had Mr. McQueen, who works at Ingalls and whose wife is in law enforcement, Mrs. McQueen. We have --

THE COURT: Reading from this case on page 1024, in the case of Edwards v. State, 628 So. 2d 1021, more particularly at page 1024, it states and I quote: "There were six black members on the 35 member or 40 member venire from which the jury was selected. After one black venireman was challenged for cause the State used two of its peremptory strikes to remove blacks. Apparently, three blacks sat on the jury," in paren, "(25 percent). The appellant's **[R-154]** Batson motion was based solely on the fact that the State struck two blacks who, 'never answered any questions whatsoever.'"

You better have a little bit more than that.

MR. KNIZLEY: Judge, that case goes further and states that the Court should consider the type and

manner of questions directed to jurors, including the lack of meaningful questions, and we submit to you, Judge, that these jurors have one common characteristic: They are black. They are female, they are male, they are younger, they are older, they are laborers, one is a director of a housing authority or housing board. one is a food server, one is an industrial worker at Degussa, they have varied backgrounds and varied educational background and have varying reasons. However, the one common thread throughout is their race. And there was very few questions asked by the State that would give any reason to believe that there is any other basis other than race for these people to be struck.

THE COURT: Well, you know, I'm not the State, but the housing board member gave many answers, if they were articulating race neutral reason why he was struck. The -- Brown was the man from Degussa. He gave -- the State could articulate reasons for striking Brown. Again, it is not my job to articulate for the State. Okay? But again I ask, you have six blacks out of the twelve on this jury, which is fifty percent, which is far more than the thirty percent of the population of this County, which is more than, gosh, any case I can remember of. Well, that's not **[R-155]** true. I had nine out of twelve one time. But where is the bias on the part of the State? Just -- you know, just tell me any bias on the part of the State.

MR. KNIZLEY: Judge, the only other point other than what we've previously brought out to the Court, we'd illustrate that again, the Defendant being black, the victim being --

THE COURT: Everybody knows --

MR. KNIZLEY: -- white and --

THE COURT: -- the victim's white.

MR. KNIZLEY: And, Judge -- and, Judge, and we don't intend for this to come out in evidence, though it may very well, the Defendant's girlfriend or whatever she may have been was white and there may be some racial impact on that aspect as some people may not like the fact of interracial dating.

MR. CHERRY: Judge, they should have asked that in voir dire.

MR. KNIZLEY: Well, we didn't -- we -- we have raised a prima facie issue. If they have some race neutral reason, we feel that we have raised the prima facie issue. If the Court finds we haven't, we take exception to that, but we understand. If they feel they have race neutral reasons, you know, we ask them to state them.

THE COURT: Do you have anything else you'd like to say?

MR. CHERRY: Judge, we have those reasons, but I don't think Dennis has made his prima facie case. And I think it's unfair to the State to have to stand here and give the reasons when he's not **[R-156]** even come close. We've gone from twenty percent of the venire to fifty percent of this jury is black, and just saying yes, they struck blacks, that's one prong of that Edwards case right there, along with the other cases, and the other is with the percentage we've got he's not even come close. And I don't know how the Defense can stand there with a straight face, really, and say, okay, they've -- they're prejudiced or

they're biased, when they stood there and struck 18 whites and we struck 11 whites and 7 blacks.

THE COURT: Are you filing a Powers v. Ohio challenge?

MR. CHERRY: No, sir, we're not.

THE COURT: I don't know why not. I believe I would, but, you know, that's your business. I do not represent the State.

Have you all got anything else you want to put in the record, Mr. Cherry?

MR. CHERRY: No, sir, Judge.

THE COURT: I deny your motion.

* * *

APPENDIX G

No. 11-12392-P

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

VERNON MADISON,

Petitioner/Appellant,

v.

KIM T. THOMAS, Commissioner,
Alabama Department of Corrections,
and the ATTORNEY GENERAL OF
THE STATE OF ALABAMA,

Respondents/Appellees.

On Appeal from the United States District Court for the Southern District of Alabama, Southern Division
(No. 09-0009)

BRIEF OF THE RESPONDENTS/APPELLEES

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October 13, 2011

* * *

Madison initially claims that "[i]n addressing Mr. Madison's *Batson* claim, the Alabama Court of Criminal Appeals cited the wrong legal standard and denied relief after stating that Mr. Madison had not 'established purposeful racial discrimination.'" Appellant's brief at 16 (citing *Madison,* 718 So. 2d at 102). This assertion is incorrect. It is clear from the face of the Court of Criminal Appeals's opinion that it discussed and applied the correct legal standard in evaluating Madison's *Batson* claim. The court used the phrase "purposeful racial discrimination" only in its discussion of the standard of review. *Madison,* 718 So. 2d at 102 ("The trial court's determination as to whether the defendant has established purposeful

racial discrimination should be reversed only if it is clearly erroneous."). In its evaluation of Madison's claim that he raised a prima facie case under *Batson*, however, the court clearly indicated that it considered whether Madison had pointed to evidence that would lead to an inference of discrimination. *Madison,* 718 So. 2d at 101-02.

* * *

APPENDIX H

No. 11-12392-P

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

VERNON MADISON,

Petitioner/Appellant,

v.

KIM T. THOMAS, Commissioner, Alabama Department of Corrections, and the ATTORNEY GENERAL OF THE STATE OF ALABAMA,

Respondents/Appellees.

On Appeal from the United States District Court for the Southern District of Alabama, Southern Division (No. 09-0009)

APPELLEES' PETITION FOR PANEL REHEARING
OR REHEARING *EN BANC*

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*** * ***

PRELIMINARY STATEMENT

The panel has reinstated Madison's habeas petition, in a capital case that is 27 years old, by reading the underlying state-court opinion in a way that is contrary to AEDPA and Supreme Court precedent. If the panel does not reconsider, the *en banc* Court should.

The panel decision does not employ the deference Congress has mandated toward state-court judgments. Madison's challenge to his conviction arises under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986). He is asserting this claim even though by his own account the prosecution used only 7 of its 18 peremptory strikes on African-Americans, and even though the percentage of African-

Americans on his jury was substantially larger than the corresponding percentages in the jury pool and the county in which he was tried. Because of these realities, the state court concluded that he had not even established a prima facie case of racial discrimination. But the panel disagreed. It applied *de novo* review rather than AEDPA deference because, in its judgment, the state court had applied the wrong legal standard under *Batson*. The panel then held that in its independent judgment Madison had established a prima facie case.

As a threshold matter, the panel should grant rehearing because it overlooked what the state court actually said. The panel said the state court improperly used a standard that required Madison to "establish discrimination" outright, rather than, as *Batson* requires at the prima facie stage, to merely put forward facts giving rise to an "inference" of discrimination. Exh. A at 11 (panel op.). Yet the state court recognized, three times, that Madison's prima facie burden was merely to "raise an inference that the prosecutor used his strikes in a discriminatory manner." Exh B. at 101 (state-court op.); *accord id.* at 101; *id.* at 102. The panel did not even mention these parts of the decision, and if the panel overlooked them, panel rehearing is warranted.

If the panel does not grant rehearing, this Court should grant *en banc* review because the decision is contrary to Supreme Court precedent. The panel said that the state court did not apply the "inference" standard because at another point in its opinion, the state court noted that "[t]he trial court's determination as to whether the defendant has

established purposeful racial discrimination should be reversed only if it is clearly erroneous." *Id.* at 102. Apparently based on that language alone, the panel found that the Court of Criminal Appeals had required Madison to undertake the more substantial burden of "establish[ing] . . . discrimination" outright at the prima facie stage. Exh. A at 11. If the panel reached that conclusion even though it was aware of the state court's separate invocations of the "inference" standard, then the panel decision was contrary to *Woodford v. Visciotti*, 537 U.S. 19, 123 S. Ct. 357 (2002), and *Holland v. Jackson*, 542 U.S. 649, 124 S. Ct. 2736 (2004). In those cases, the Supreme Court summarily reversed Courts of Appeals that did not apply AEDPA deference in similar circumstances.

There are compelling pragmatic reasons for rehearing. If the panel had applied AEDPA deference, it would have upheld the state court's judgment. Madison committed this murder decades ago, and there is no question about his guilt or his eligibility for the death penalty. The principles that led Congress to adopt AEDPA mean that this litigation needs to come to a close.

ISSUE FOR REHEARING

To establish a prima facie case under *Batson*, a defendant must point to facts giving rise to an inference of purposeful discrimination. In finding that Madison did not establish a prima facie case, the state court referenced, three times, this "inference" standard. Did the panel err in concluding that the decision nonetheless warranted no deference

under AEDPA because, in its view, the state court had applied a different standard?

STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

In 1985, Madison "coldly and methodically fired two shots at near point blank range into the back of" a police officer's head. Exh. B at 94. Since then, he has had three different trials. Each time, the jury has convicted him of capital murder and the judge has sentenced him to death. He was retried once because of *Batson* issues, and a second time because of expert-testimony problems. *See id.* But the only critical facts for present purposes are those relating to jury selection at his most recent trial.

A. The state courts' decisions

1. Madison's trial

Madison asserts that during that third trial, the prosecutor purposefully discriminated against American-Americans on the venire. He is maintaining as much even though half of the 12 people eventually selected for his jury were black—in a county where African-Americans made up only 30% of the population. *See* Exh. B at 102 n.5. He is maintaining as much even though the "percentage of blacks on" his jury "was 'almost double'" the percentage of African-Americans who were available on the venire. *Id.* And he is maintaining as much even though by Madison's own reckoning, the prosecutor used only 7 of his 18 peremptory strikes on African-Americans. *See id.* at 102.

In evaluating a defendant's *Batson* challenge, a trial judge must undertake a three-part analysis. "First, the defendant must make out a prima facie case by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." *Johnson v. California*, 545 U.S. 162, 168, 125 S. Ct. 2410, 2416 (2005) (internal quotation marks omitted). Second, if the defendant makes out a prima facie case, the State must then offer "permissible race-neutral justifications for the strikes." *Id.* (internal quotation marks omitted). "Third, if a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination." *Id.* (internal quotation marks omitted).

Here, the trial court found that Madison's *Batson* claim failed at the first step. *See* Exh. B at 101. In light of all the relevant circumstances, the trial court ruled that Madison's theory of prosecutorial racism did not pass the straight-face test, and he had failed to establish even a prima facie case under *Batson*. *Id.* The court therefore declined to subject the prosecutor to a potentially demeaning question-and-answer session about the reasons for his strikes.

2. Direct appeal

The Alabama Court of Criminal Appeals affirmed. It began by quoting the proper standard: to establish "a prima facie case," Madison was required to point to "relevant facts" that "raise an inference that the prosecutor used his strikes in a discriminatory manner." *Id.* at 101. The court then affirmed the trial court's determination that Madison had not satisfied his burden.

The court recounted three factors Madison had cited in arguing for a different inference. First, he had observed that "the State struck 7 of 13 qualified black potential jurors" and "used 7 of its 18 strikes to remove those black potential jurors." *Id.* at 102. Second, he asserted, "3 of the blacks removed by the State did not answer any questions on voir dire." *Id.* (footnote omitted). Third, he maintained, "the prosecutor's office has a history of excluding qualified black potential jurors based on race." *Id.*

The court found these arguments insufficient to call the trial court's decision into question. Of those three arguments, the only one Madison "actually offered … at trial" related to the prosecutor's failure to ask questions to three of the strikes. *Id.* And although Madison had made other arguments to the trial court, the Court of Criminal Appeals reasoned that "[t]he only evidence that arguably could lead to an inference of discrimination was a lack of questions or meaningful questions to 3 of the challenged jurors." *Id.* But the court noted that under Alabama Supreme Court precedent, "[t]he trial court's determination as to whether the defendant has established purposeful racial discrimination should be reversed only if it is clearly erroneous." *Id.* The court concluded that in light of all the circumstances before the trial court—including "the increased percentage of blacks who served on the jury relative to both the initial panel and the population of the county"—"[t]he trial court's denial of the appellant's *Batson* motion in the present case was not clearly erroneous." *Id.*

The Alabama Supreme Court, granting certiorari on another issue, affirmed the conviction and sentence. *Ex parte Madison*, 718 So. 2d 104 (Ala. 1998).

B. Federal habeas review

1. The district court's opinion

In the proceedings below, the district court denied Madison's habeas petition. *See Madison v. Allen*, No. 1:09-00009-KD-B, 2011 WL 1004885 (S.D. Ala. March 21, 2011). The court held that "[h]aving reviewed the record, the Court agrees with the Alabama Court of Criminal Appeals that the only arguable evidence of a *Batson* violation Madison presented at trial was that 3 black venirepersons who were struck did not respond to any questions on voir dire." *Id.* at *35. The court noted that "[w]hen asked to produce evidence to support an inference of discrimination or bias, Madison presented nothing further." *Id.* In light of all this, the court concluded, "Madison did not establish a *prima facie* case of discrimination under *Batson*." *Id.*

2. The panel's decision

On appeal to this Court, the panel reversed and remanded for what will effectively be a full-blown *Batson* hearing approximately 20 years after the trial.

The panel began by holding that the state court's decision was not entitled to AEDPA deference. The panel held that the state court had "used the wrong standard for establishing a prima facie case" because, under the panel's reading, the state court had "requir[ed] Madison to 'establish purposeful

racial discrimination,'" the standard that applies at the third step of the *Batson* analysis, not the prima facie stage. Exh. A at 10. Yet in holding that the state court had not required Madison to make the lesser showing of merely "provid[ing] sufficient support for an inference of discrimination," *id.*, the panel said nothing about the state court's three invocations of that standard. Concluding that the state court had "reached a decision contrary to clearly established federal law," the panel announced that it would review the *Batson* issue *de novo*. *Id.*

In conducting that review, the panel pointed to three circumstances that in its view "in total were sufficient to support an inference of discrimination." Exh. A at 11. First, the prosecutor had not "ask[ed] questions to three of the challenged jurors." *Id.* at 12. Second, the panel said the case had a "racially sensitive subject matter," *id.*, apparently because Madison is black and his victim was white. Third, the panel cited "the district attorney's office's prior discrimination in jury selection, occurring both in Madison's first trial and in other state cases." *Id.*

The panel thus reversed. Its mandate requires the District Court to "complete the final two steps of the *Batson*" analysis. *Id.*

ARGUMENT AND AUTHORITIES

This published decision could become an important new part of this Circuit's AEDPA jurisprudence. Its practical consequences, both in the short term and the long run, could be substantial. Either the panel or *en banc* Court should grant rehearing.

A. The panel should grant rehearing.

The panel should grant rehearing because it appears to have "overlooked or misapprehended" an outcome-determinative "point of law or fact." FED. R. APP. P. 40(a)(2). That critical point of law or fact is the state court's invocation, three times, of the proper standard for evaluating whether a litigant has established a prima facie case under *Batson*.

As pertinent to this case, AEDPA precludes a federal court from granting habeas relief unless the state court issued a decision that "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. §2254(d)(1). The panel held that the Alabama Court of Criminal Appeals' decision was "contrary to clearly established Federal law" and due no AEDPA deference. Exh. A at 10. It did so because it read the opinion as "requiring Madison to 'establish[] purposeful discrimination.'" *Id.* It reasoned that this was "the wrong standard to apply for the first step of *Batson*, which only requires Madison to produce sufficient 'facts and other relevant circumstances' that 'raise an *inference* … of purposeful discrimination." *Id.* (quoting *Batson*, 476 U.S. at 96, 106 S. Ct. at 1723 (emphasis added by panel)).

In so holding, the panel appears to have overlooked the state court's three invocations of the "inference" standard. The state court began by reciting the rule expressly: "a claimant also must show that these facts and any other relevant facts raise an inference that the prosecutor used his strikes in a discriminatory manner." Exh. B at 101.

The court also noted that defense counsel had argued that certain evidence could "raise an inference of discrimination." *Id.* And in reviewing the evidence, the court acknowledged that "[t]he only evidence that arguably could lead to an inference of discrimination was a lack of questions or meaningful questions to 3 of the challenged jurors." *Id.* at 102. The court then concluded that despite that "arguabl[e] … inference," it would not reverse because the lower court's weighing of the evidence was not "clearly erroneous." *Id.*

The panel did not mention any of these parts of the opinion. The panel instead concluded, apparently based on a single other sentence in the opinion, that the court actually had required Madison to "establish[] . . . discrimination." That reading of the sentence is incorrect for three reasons.

First, by that point the state court already had mentioned the "inference" standard three times. It had even done so *in the previous sentence. See* Exh. B at 102. The next sentence did not reflect a fundamentally different view about how the prima facie burden works.

Second, in that sentence, the court was not setting out the standard for establishing a prima facie case. The court instead was setting out the standard of *appellate review* in this area. The court simply explained that "[t]he trial court's determination as to whether the defendant has established purposeful racial discrimination should be reversed only if it is clearly erroneous." Exh. B at 102. The focus of that sentence was on the words

"clearly erroneous," not "established purposeful racial discrimination."

Third, even if that sentence *had* purported to set out the prima facie burden, the words "established purposeful racial discrimination" do not suggest an approach fundamentally inconsistent with *Batson*'s three-part test. At the end of the day, each step of *Batson*'s analysis focuses on whether the defendant can "establish[] . . . discrimination." *Batson*, 476 U.S. at 98, 106 S. Ct. at 1724. If the defendant cannot establish even an "inference" of discrimination at the prima-facie stage, then he or she necessarily cannot "establish[] . . . discrimination" at all.

The sentence in question thus was consistent with the parts of the opinion invoking the "inference" test. If the panel overlooked those parts, it should grant rehearing and reassess the *Batson* claim through AEDPA's deferential lens.

B. If the panel does not grant rehearing, *en banc* review is appropriate.

If the panel does not grant rehearing, the *en banc* Court should. This is so because in light of what the state court said, the panel's opinion is contrary to the Supreme Court's recent decisions in *Woodford* and *Holland*. In both those cases, the state court "began by reciting the correct … standard" for assessing certain Sixth Amendment claims. *Holland*, 542 U.S. at 654, 124 S. Ct. at 2738; *accord Woodford*, 537 U.S. at 22-23, 123 S. Ct. at 359. But in both, the Court of Appeals declined to apply AEDPA deference "based on . . . subsequent passages from [the state court's] opinion," which the Court of Appeals believed contradicted the correct standard. *Holland*, 542 U.S.

at 654, 124 S. Ct. at 2739; *accord Woodford*, 537 U.S. at 23, 123 S. Ct. at 359. And in both cases the Supreme Court summarily reversed, reasoning that AEDPA required deference. The Court's reasoning is instructive for the present case on a number of fronts.

First, the Court emphasized that a federal court must not interpret the state-court opinion in a way that "would needlessly create internal inconsistency in the opinion." *Holland*, 542 U.S. at 654, 124 S.Ct. at 2739; *accord Woodford*, 537 U.S. at 24, 123 S. Ct. at 359-60. The panel decision here has that flaw. Despite the state court's repeated invocation of the "inference" standard and an analysis that reflected that standard, the panel read another sentence from the same opinion as requiring Madison to make a greater showing.

Second, the Court held that federal courts cannot fault state courts for using imprecise "shorthand" at certain points of their opinions when they "elsewhere recite[]" the proper rule. *Holland*, 542 U.S. at 655, 124 S.Ct. at 2739; *accord Woodford*, 537 U.S. at 24, 123 S. Ct. at 359-60. In both *Woodford* and *Holland*, the state court had cited the full standard for assessing IAC claims—namely, that the defendant show a "reasonable" probability that the result would have been different. Elsewhere, those state courts had simply said that the defendant had to show that the outcome "probably" would have been different, thus omitting the "reasonable" part. The Supreme Court said that the state courts' understandable use of these shorthand approximations was no ground for denying deference. *Holland*, 542 U.S. at 655, 124

S.Ct. at 2739; *Woodford*, 537 U.S. at 24, 123 S. Ct. at 359-60. The same is true of the Alabama court's single reference to the words "established purposeful racial discrimination" in this case.

Third, the Court in *Woodford* criticized the Ninth Circuit for making "no effort to reconcile" the allegedly inconsistent portions of the state-court opinion. *Woodford*, 537 U.S. at 24; 123 S. Ct. at 360. The Supreme Court explained that "[t]his readiness to attribute error is inconsistent with the presumption that state courts know and follow the law." *Id.* The approach also was incompatible with "§2254(d)'s highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt." *Id.* (internal quotation marks omitted); *accord Holland*, 542 U.S. at 655, 124 S. Ct. at 2739. Because the panel decision has those same flaws, it conflicts with *Woodford* and *Holland* and warrants *en banc* review.

C. Practical considerations favor rehearing.

Whether by the panel or *en banc*, rehearing is imperative for two more reasons.

First, if the panel had applied deference, the case would have come out the other way. The Supreme Court has "confidence that trial judges, experienced in supervising *voir dire,* will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination." *Batson*, 476 U.S. at 97, 106 S. Ct. at 1723. Thus, "'dual layers' of deference" are at work here. *Hill v. Humphrey*, 662 F.3d 1335, 1366 n.2 (11th Cir. 2011) (Barkett, J., dissenting). The state

court's decision was hardly an objectively unreasonable application of *Batson*'s already-deferential standard. Madison did not even raise one of the factors the panel cited—the alleged previous *Batson* issues faced by the DA's office—at trial. *See* Exh. B at 102. Likewise, "[t]he fact that … jurors did not (from the perspective of the defendants) say anything during voir dire that would justify striking them hardly establishes a *prima facie* case." *Cent. Ala. Fair Hous. Ctr. v. Lowder Realty*, 236 F.3d 629, 638 (11th Cir. 2000). Half the jury was African-American, so the trial court reasonably declined to compel the prosecutor to dignify Madison's unfounded racism accusations with a response. As this Court has said, "the unchallenged presence of jurors of a particular race on a jury substantially weakens the basis for a *prima facie* case of discrimination in the peremptory striking of jurors of that race." *Id.*

Second, any further extension of the review process in this case would create immense federalism costs. Madison's most recent trial happened 18 years ago. Voir dire and the strike process were not even transcribed, and the record does not contain a list of the veniremembers. *See* Red Br. 17, 28. Yet on remand, the District Court is supposed to ask the prosecutor for nondiscriminatory reasons for the 7 strikes he made almost two decades ago. If he can even recall the reasons, the court is then supposed to determine whether those reasons are pretextual. It will be difficult for both parties to develop evidence on this front, and it will be even more difficult for the court to assess it. And if the court then grants

Madison a new trial, gathering the witnesses, evidence, and resources will be a needlessly Herculean task. These were the sorts of concerns that led Congress to adopt AEDPA's deferential standard, and they are why this Court should grant rehearing.

CONCLUSION

The Court should grant panel rehearing or rehearing *en banc*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

* * *

I also certify that I filed this document with the Clerk via Federal Express, Overnight Delivery, on the 17th day of May, 2012.

* * *