

No. _____

In the Supreme Court of the United States

CHRISTOPHER LEE PRICE, Petitioner,

v.

KIM T. THOMAS, COMMISSIONER, ALABAMA
DEPARTMENT OF CORRECTIONS

***ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT***

**APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI**

AARON M. KATZ	DOUGLAS HALLWARD-DRIEMEIER
DAN KROCKMALNIC	<i>Counsel of Record</i>
DANIEL V. MCCAUGHEY	ROPES & GRAY LLP
ROPES & GRAY LLP	One Metro Center
Prudential Tower	700 12th Street, NW
800 Boylston Street	Suite 900
Boston, MA 02199	Washington, DC 20005
	(202) 508-4600
	<i>Douglas.Hallward-Driemeier</i>
	<i>@ropesgray.com</i>

TABLE OF CONTENTS

APPENDIX A: May 10, 2012 Opinion of the Court of Appeals for the Eleventh Circuit.....1a

APPENDIX B: February 25, 2009 Opinion of the Federal District Court.....20a

APPENDIX C: Court of Appeal’s July 3, 2012 Denial of Petitioner’s Rehearing Petition.....281a

APPENDIX D: May 30, 2003 Opinion of the Alabama Court of Criminal Appeals.....282a

APPENDIX E: April 1, 2002 Opinion of the Alabama Circuit Court for Fayette County.....343a

APPENDIX F: June 20, 1997 Opinion of the Alabama Court of Criminal Appeals.....407a

APPENDIX G: June 23, 2006 Denial of Certiorari by the Alabama Supreme Court.....545a

APPENDIX H: September 4, 1998 Denial of Certiorari by the Alabama Supreme Court.....546a

APPENDIX I: Constitutional Provisions, Statutory Provisions, and Federal Rules Involved.....547a

APPENDIX A

**MAY 10, 2012 OPINION OF THE COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT**

UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

CHRISTOPHER LEE PRICE, Petitioner-Appellant,
versus
RICHARD F. ALLEN, Respondent-Appellee.

No. 09-11716

May 10, 2012, Decided
May 10, 2012, Filed

PER CURIAM:

We previously issued an opinion in this case, *Price v. Allen*, No. 09-11716, 675 F.3d 1266, 2012 U.S. App. LEXIS 6547, slip op. (11th Cir. March 30, 2012). On Price's motion for panel rehearing, we hereby vacate our earlier opinion and substitute this one in its place to more fully address Price's claim regarding the prosecutor's statements on future dangerousness during the penalty phase of his trial.

Christopher Lee Price appeals from the denial of his petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254.

**I. FACTUAL AND PROCEDURAL
BACKGROUND**

Price was convicted on February 5, 1993 for the capital felony murder of William Lynn, a minister in

the small town of Fayette County, Alabama, that occurred during the course of a robbery at Lynn's home. A detailed description of the facts of this crime can be found in the Alabama state court's decision in Price's direct criminal appeal. See Price v. State, 725 So. 2d 1003, 1011-12 (Ala. Crim. App. 1997). Price was tried and found guilty for capital murder and robbery and the jury voted ten to two to recommend a death sentence for the murder, which the state trial court followed, sentencing Price to death. On direct appeal, the Court of Criminal Appeals of Alabama¹ and Alabama Supreme Court² affirmed Price's conviction and sentence, and the United States Supreme Court denied certiorari review.³

Price commenced his state habeas court proceedings by filing a petition for post-conviction relief pursuant to Rule 32 of the Alabama Rules of Criminal Procedure. Upon the state's motion and after having the opportunity to amend his petition, the state habeas court dismissed Price's petition in part and denied it in part, which the Alabama Court of Criminal Appeals affirmed. The Alabama Supreme Court denied certiorari review.

Concurrent with his request for discretionary review in the Alabama Supreme Court, Price filed in federal court for a writ of habeas corpus, which was stayed until the conclusion of his state habeas proceedings. Upon review by the district court, Price's

¹ Price v. State, 725 So. 2d 1003 (Ala. Crim. App. 1997).

² Ex parte Price, 725 So. 2d 1063 (Ala. 1998).

³ Price v. Alabama, 526 U.S. 1133, 119 S. Ct. 1809, 143 L. Ed. 2d 1012 (1999).

federal habeas petition was denied in part and dismissed in part. We granted Price's request for a Certificate of Appealability on the following issues:

- whether the state trial court erred in denying Price's motion for a change of venue;
- whether Price's counsel was ineffective in litigating a change of venue motion;
- whether the prosecution's comments during the penalty phase about Price's future dangerousness constituted reversible error;
- whether Price's counsel was ineffective during the penalty phase of his trial; and
- whether the district court erred in denying Price's request for an evidentiary hearing.

II. APPLICABLE STANDARDS OF REVIEW

We review the district court's conclusions on legal questions and mixed questions of law and fact de novo and its factual findings for clear error. Rhode v. Hall, 582 F.3d 1273, 1279 (11th Cir. 2009), cert. denied, 130 S. Ct. 3399, 177 L. Ed. 2d 313 (2010). However, our review of a state court's decision⁴ is limited by the

⁴ When the last state court rendering judgment affirms without explanation, we presume that it rests on the reasons given in the last reasoned decision. Ylst v. Nunnemaker, 501 U.S. 797, 803-805, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991); Sweet v. Sec'y, Dep't of Corr., 467 F.3d 1311, 1316-17 (11th Cir. 2006). The last reasoned decision in this case on Price's claim regarding his motion for a change of venue was the appellate court's decision on direct appeal and as to all other issues was

terms of 28 U.S.C. § 2254, as amended by the Anti-Terrorism and Effective Death Penalty Act (“AEDPA”), Pub. L. No. 104-132, 110 Stat. 1218 (1996). See 28 U.S.C. § 2254; Williams v. Taylor, 529 U.S. 362, 402-03, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000).

Under AEDPA, we accord a presumption of correctness to a state court’s factual findings. 28 U.S.C. § 2254 (e)(1) (“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 of correctness by clear and convincing evidence.”). We therefore grant habeas relief to a petitioner challenging a state court’s factual findings only in those cases where the state court’s decision “was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” Id. § 2254(d)(2); see also Wiggins v. Smith, 539 U.S. 510, 528-29, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003).

AEDPA similarly constrains our review of legal questions decided on the merits in state court. [**5] Under the statute, we cannot grant habeas relief “with respect to any claim that was adjudicated on the merits in State court proceedings” unless:

[T]he 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

the appellate court’s review of the Rule 32 trial court’s decision.

(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.

§ 2254(d). The Supreme Court has further explained the requirements of § 2254(d) as follows:

Under the “contrary to” clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the “unreasonable application” clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court’s decisions but unreasonably applies that principle to the facts of the prisoner’s case.

Williams, 529 U.S. at 412-13.

III. CONVICTION

Price argues that his Sixth and Fourteenth Amendment rights to an impartial jury were violated when the state trial court denied his request for a change of venue, and that his trial counsel was ineffective in litigating his request seeking a change of venue. He argues that the circumstances of the crime, the nature of the local community, and the surrounding pre-trial publicity were sufficient to trigger a presumption of jury prejudice necessitating a change of venue. He also seeks an evidentiary hearing in federal court on these claims.

As to the denial of Price’s motion for a change of venue, we review the state appellate court’s decision on

direct appeal which affirmed the trial court's denial of this motion. We must determine whether that decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "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," § 2254(d).

The Fourteenth Amendment protects a defendant's Sixth Amendment right to have his case decided by an impartial jury, Irvin v. Dowd, 366 U.S. 717, 722, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961), and a defendant may request a "transfer of the proceeding to a different district . . . if extraordinary local prejudice will prevent a fair trial--a basic requirement of due process," Skilling v. United States, 561 U.S. ___, 130 S. Ct. 2896, 2913, 177 L. Ed. 2d 619 (2010) (quotation marks and citation omitted). The Supreme Court has stated that an impartial jury, however, is not one in which the jurors must be totally ignorant of the facts and issues involved in the case. Irvin, 366 U.S. at 722. "To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." Id. at 723.

In deciding whether a defendant should have been granted a change of venue based on a presumption of juror prejudice--as Price here argues he was entitled to--, a court must consider the "totality of circumstances that [a defendant's] trial was not fundamentally fair." Murphy v. Florida, 421 U.S. 794,

799, 95 S. Ct. 2031, 44 L. Ed. 2d 589 (1975). Most recently in Skilling, the Supreme Court explained that in each of its cases where it had overturned a conviction due to a presumption of prejudice, those “conviction[s] [had been] obtained in a trial atmosphere that [was] utterly corrupted by press coverage.” 130 S. Ct. at 2914. The Court reiterated that its decisions, however, “cannot be made to stand for the proposition that juror exposure to . . . news accounts of the crime . . . alone presumptively deprives the defendant of due process.” Id. (quoting Murphy, 421 U.S. at 798-99).

The Court in Skilling noted several factors that have been pertinent to its determination of whether a presumption of juror prejudice has existed in its prior decisions. First, it pointed out that its decisions have emphasized “the size and characteristics of the community in which the crime occurred” and their impact on the ability to convene an impartial venire. Id. at 2915. The Court has considered whether the associated media coverage has included a “confession or other blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight.” Id. at 2916 (citing Rideau v. Louisiana, 373 U.S. 723, 83 S. Ct. 1417, 10 L. Ed. 2d 663 (1963), in which a local television station broadcast, on three separate occasions just before trial, the filmed interrogation and confession of the defendant). The Court also has taken into account the length of time that has elapsed from the crime until the trial and the degree of media coverage during that time. Id.; see also Patton v. Yount, 467 U.S. 1025, 1032-33, 104 S. Ct. 2885, 81 L. Ed. 2d 847 (1984) (“[T]he record of publicity in the months preceding, and at the time of, the second trial does not reveal the barrage of inflammatory publicity immediately prior to trial, amounting to a huge . . .

wave of public passion[.]”) (internal quotation marks and citations omitted).

Upon direct review of the trial court’s denial of Price’s request for a change of venue, the state appellate court noted that Price submitted a number of newspaper articles from the Fayette County *Times-Record* and the *Tuscaloosa News* that had been published about one year before the beginning of Price’s trial. Price v. State, 725 So. 2d at 1051. The state court found that the articles were neither “inflammatory nor prejudicial” to Price and did not so saturate the community as to impact the prospective jurors, so that there was no basis to overrule the state trial court’s denial of the request for a change of venue. Id. at 1051-52.

We conclude that the state appellate court’s decision was not contrary to or an unreasonable application of Supreme Court precedent regarding the presumption of prejudice necessary for a change of venue. The nine news articles submitted to the state court in support of the change of venue at Price’s trial had been published within weeks of the crime, the last of which was published more than a year before Price’s trial. Price did not submit to the trial court any articles that had been published near to or during the trial, and the articles he submitted did not contain anything equivalent to a confession or blatantly prejudicial information that weighed in favor of a finding of prejudicial pre-trial publicity.⁵

⁵ Price argues that the state appellate court applied the wrong principle to his change of venue claim and thus its decision was necessarily “contrary to” clearly established federal law and we should therefore review

Price next argues that his trial counsel was ineffective in litigating the motion for a change of venue and requests a federal court hearing on this claim. In his Rule 32 Petition, Price alleged that although his trial counsel filed a motion for a change of venue, counsel did not seek expert assistance to investigate the saturation of the local community with accounts of the crime, did not support the motion with a legal memorandum and did not sufficiently explore the jury's partiality during voir dire. The Rule 32 trial court denied this claim, which the state appellate court affirmed concluding that Price failed to "state a claim of ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)," because he did not allege how his trial counsel was deficient or how the outcome of the trial would have been different had trial counsel performed differently.

Under Strickland v. Washington, trial counsel is ineffective when:

First, . . . counsel's performance was deficient. This requires showing that counsel made errors

this claim de novo. We disagree with Price's argument that because the court's analysis only addressed the impact of the newspaper articles, and did not explicitly evaluate his arguments about the local community sentiment, it necessarily applied the wrong legal principle to this claim. The state court laid out the relevant Supreme Court and state court decisions on the presumption of prejudice and there is nothing in its decision that would lead up to conclude that it did not apply the correct federal law.

so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment. Second, . . . the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To be found deficient, trial counsel’s performance must be “outside the wide range of professionally competent assistance.” *Id.* at 690. Professionally competent assistance includes a duty to conduct a reasonable investigation. *Id.* at 690-91. The Court has emphasized that only when counsels’ choices are made after a “thorough investigation of law and facts relevant to plausible options” are those choices “virtually unchallengeable.” *Id.* at 690. When, however, “strategic choices [are] made after less than complete investigation [they] are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.” *Id.* at 690-91. Thus, at bottom, “counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances” *Id.* at 691. This means that when we assess the attorney’s decision not to investigate, we “must consider . . . whether the known evidence would lead a reasonable attorney to investigate further.” *Wiggins*, 539 U.S. at 527. To establish prejudice, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is

a probability sufficient to undermine confidence in the outcome.” Strickland, 466 U.S. at 694.

We cannot say that the state appellate court’s resolution of this claim was contrary to or an unreasonable application of Strickland. Although Price argues that his trial counsel was ineffective in her litigation of the motion for a change of venue, he failed to allege or present any facts in his Rule 32 Petition in support of a finding of the presumption of prejudice that his trial counsel had not already presented at the time she argued this motion during Price’s trial. Accordingly, we are unable to conclude that Price’s trial counsel was deficient in her investigation of this motion or that any such alleged deficiency prejudiced him, and thus we cannot say that the state appellate court’s dismissal of this claim was contrary to or an unreasonable application of Supreme Court precedent.⁶

IV. SENTENCING

A. Ineffective Assistance of Counsel During Sentencing

Price argues that he received ineffective assistance of counsel during the penalty phase of his trial in violation of his Sixth Amendment rights based on his trial counsel’s failure to investigate his background for mitigation evidence. Price specifically alleged in his Rule 32 Petition that his trial counsel did not conduct any background investigation even though he had numerous cousins, aunts, uncles, grandparents, friends and school teachers in the immediate vicinity who could

⁶ For the same reasons, we deny Price’s request for an evidentiary hearing on this issue.

have provided insight into his upbringing and background. He also alleged that his trial counsel failed to retain a mental health expert for purposes of exploring the impact of his upbringing on the crime, even though his trial counsel asked for and obtained \$2500 from the state to retain an expert for this purpose. Price argues that the cumulation of these deficiencies in his trial counsel's performance, along with his mother's cursory penalty phase testimony,⁷

⁷ Price has also alleged that his trial counsel failed to prepare its only penalty phase witness, Price's mother Judy Files, for testifying. His trial counsel presented no evidence in mitigation other than Files, who testified on direct examination for a total of about fifteen minutes. For the most part, Files's testimony consisted of her non-descript and minimally detailed responses to the often leading questions posed by Price's trial counsel. She testified that she and Price had been physically abused by Price's father until they left him and moved to Texas. Price was subsequently physically and verbally abused by a later boyfriend of Files and then by Files's next husband. Files also testified that Price was a polite and respectful child who did what she told him to, went to school regularly, and had a job while in high school. Price alleges that this testimony provided a starkly incomplete picture of his background, lacked any expert insight into what effect his upbringing might have had on his mental status and was presented without the benefit of a thorough background investigation. The state appellate court concluded that defense counsel adequately questioned Files and that it was a reasonable sentencing phase strategy for Price's trial counsel to rely exclusively on the testimony of Files.

prejudiced him by leaving the jury with an incomplete, inaccurate and inadequate depiction of his personal history and the effect his upbringing had on his mental status at the time the crime occurred.

With regard to Price's claim that he received ineffective assistance of counsel in the penalty phase of his trial, the Rule 32 court concluded, without the benefit of an evidentiary hearing, that Price "failed to state a claim of ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)," which the state appellate court affirmed. Because the state court resolved this claim on a motion to dismiss, without taking evidence, we review the merits of this claim based on the record before the state appellate court, which in this case consists of the allegations in Price's Rule 32 Petition. See Cullen v. Pinholster, 131 S.Ct. 1388, 179 L. Ed. 2d 557 (2011) and Borden v. Allen, 646 F.3d 785 (11th Cir. 2011).

The state appellate court concluded that Price's trial counsel made a reasonable strategic decision not to retain a mental health expert because the court-ordered psychologist, Dr. Karl Kirkland, had opined that Price was competent to stand trial and was not insane. The state appellate court explained that "a reasonable attorney could decide not to call a psychologist" and instead "allow the jury to draw its own conclusions regarding the circumstances of Price's childhood based on Mrs. Files's description of Price's childhood without opening the door for the State to present the opinion of Dr. Kirkland."

Additionally, the state appellate court found that Price had not sufficiently alleged prejudice. Price's allegations, the court reasoned, did not show that

better preparation of Files would have elicited any mitigating evidence that might have changed the trial's outcome. The court also found that Price's allegations did not show that contacting Price's relatives, friends, and teachers or seeking school records would have turned up evidence sufficient to create a reasonable probability of a different outcome. Price's paternal grandmother's testimony, in particular, would have been cumulative, the court explained, because the evidence counsel introduced at the penalty phase--Files's testimony--already revealed that Price had suffered abuse as a child.

To prevail on his ineffective assistance of counsel claim for failure to investigate mitigation evidence, Price first must show that his counsel's performance was deficient, i.e. that it "fell below an objective standard of reasonableness," see Strickland, 466 U.S. at 688, and second he must establish that the deficiency prejudiced him, id. at 687. Prejudice requires a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

We need not address whether Price's trial counsel was deficient in failing to conduct an investigation of Price's background for mitigation evidence because we cannot say that the state appellate court's application of Strickland's prejudice standard was unreasonable. Price alleged in his Rule 32 Petition, and in the amendment thereto, that had his trial counsel conducted an adequate investigation of his background, the following evidence would have been available to present to the jury: His mother "would have been able to provide many details about Mr.

Price's life, upbringing, and character that were not otherwise presented to the jury and the Court, but which would have been relevant mitigation evidence." His numerous other family members and friends would have discussed "a detailed history of dislocation, abuse and neglect that far exceeded the terse, incomplete description provided by Mrs. Files at Mr. Price's sentencing." They would have "testified about their love for Mr. Price and of the pride they shared in his extraordinary drawing skills." His friends would also have described Price as a "nice kid who did not get in fights" and that he "was known to be a follower who would go along with what other people wanted to do." His school records would have revealed that he "did well in school and was generally well-behaved in class." Finally, Price alleged that an independent psychologist would have revealed that "the abuse and neglect Mr. Price suffered from an early age at the hands of his father and mother had a direct and specific impact on his character and personality as a young man."

We, however, cannot say that had these allegations been before the jury that there is a reasonable probability that the outcome of Price's sentencing would have been different. Although the state appellate court did not consider whether Price was prejudiced by his counsel's failure to retain a mental health expert, we cannot say, even if reviewing this claim without AEDPA's added deference,⁸ that the

⁸ See Rompilla v. Beard, 545 U.S. 374, 390, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005) (holding that when state court addresses only deficient performance element of two-part Strickland analysis, federal court review of prejudice element is de novo).

failure prejudiced Price. On Strickland's prejudice prong, Price has offered no more than a conclusory assertion that a mental-health expert could have testified to a connection between the abuse Price suffered as a child and his subsequent actions. See e.g. Powell v. Allen, 602 F.3d 1263, 1275 (11th Cir. 2010) (finding no prejudice where petitioner failed to allege the existence of an expert report, or what, specifically that expert's report would reveal about the petitioner's mental status).

As to the allegations regarding the evidence that his friends, family members and school records would have revealed, we also find them to be too general and conclusory to be able say that there is a reasonable probability that this evidence would have changed the outcome of Price's sentencing. Although he alleges that his family members would have testified to more specific instances of abuse than did his mother, he does not give any indication of their nature or number such that we could say a jury that learned about these instances would have recommended a life sentence. Likewise, we cannot say that a jury would have rendered a different sentence had it heard from Price's friends and family of their love for him and that he was a good kid where Price's mother already testified to essentially these same facts at Price's sentencing hearing.⁹

⁹ We note, however, that this would be a different case if Price had alleged facts showing that the undiscovered instances of abuse he suffered were more severe or pervasive than Files's testimony suggested or had he alleged what specifically a mental health expert would have said about his mental status. Cf.

B. Prosecution's Future Dangerousness Argument

Price argues that the prosecution made improper statements regarding his future dangerousness during its penalty phase closing arguments in violation of Price's Eighth Amendment and Due Process rights. The state court concluded that the prosecutor was not arguing that Price would kill again unless sentenced to death, but rather was arguing that a death sentence for Price would be a deterrent to other would-be offenders. Price v. State, 725 So. 2d at 1044.

Williams v. Allen, 542 F.3d 1326, 1342 (11th Cir. 2008) (finding prejudice where a post-conviction evidentiary hearing revealed numerous instances of abuse, undiscovered by trial counsel, that “paint[ed] a vastly different picture of [the petitioner’s] background than that created” by the limited evidence of abuse introduced at the penalty phase of the trial); id. at 1331-34 (detailing the evidence of abuse introduced during the post-conviction proceedings). While we recognize that Price was not required to allege facts in his petition that would have been equivalent to the type of proof that one would expect in an evidentiary hearing, because our review of the state court’s resolution of his Strickland claim is limited to the record before the state court, see Pinholster, 131 S. Ct. at 1398, we are bound to review the merits of his claim given the allegations in his Rule 32 Petition, because the state court ruled on his claim without the benefit of an evidentiary hearing.

Even assuming that the prosecution's statements were improper, to obtain habeas relief, Price must show that "there has been a violation of due process," which "occurs if, but only if, the improper argument rendered the sentencing stage trial fundamentally unfair." Romine v. Head, 253 F.3d 1349, 1366 (11th Cir. 2001). "An improper prosecutorial argument has rendered a capital sentencing proceeding fundamentally unfair if there is a reasonable probability that the argument changed the outcome, which is to say that absent the argument the defendant would not have received a death sentence." *Id.* (internal citation omitted). "In determining whether arguments are sufficiently egregious to result in the denial of due process, we have considered the statements in the context of the entire proceeding, including factors such as: (1) whether the remarks were isolated, ambiguous, or unintentional; (2) whether there was a contemporaneous objection by defense counsel; (3) the trial court's instructions; and (4) the weight of aggravating and mitigating factors." Land v. Allen, 573 F.3d 1211, 1219--20 (11th Cir. 2009).

Considering the prosecution's statement in the context of the overall proceedings, we do not find that it rendered the sentencing phase fundamentally unfair. Price's trial counsel did not make any contemporaneous objection to the statement and the statement itself was isolated and also arguably made in the context of an argument for general deterrence, thereby tempering its impact. Accordingly, we cannot say that there is a reasonable probability that absent the prosecution's statement Price would not have received a death sentence, and therefore deny habeas relief on this claim.

V. CONCLUSION

Accordingly, we AFFIRM the district court's denial of habeas relief on Price's claims regarding (1) his motion for a change of venue; (2) his trial counsel's effectiveness in litigating the motion for a change of venue; (3) the prosecution's statements during the penalty phase; and (4) his trial counsel's effectiveness at the penalty phase of his trial.

AFFIRMED.

APPENDIX B

**FEBRUARY 25, 2009 OPINION OF THE
FEDERAL DISTRICT COURT**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
ALABAMA
JASPER DIVISION

6:03-cv-01912-LSC-JEO

CHRISTOPHER LEE PRICE,
Petitioner,

vs.

RICHARD F. ALLEN, Commissioner,
Alabama Department of Corrections,
Respondent.

MEMORANDUM OPINION

This is a petition for writ of habeas corpus brought by a person in custody under a judgment of a court of the State of Alabama. *See* 28 U.S.C. § 2254. Upon consideration, the court finds that the petitioner is not entitled to any relief.

I. PROCEDURAL HISTORY

On February 5, 1993, after a four (4) day trial, petitioner Christopher Lee Price (“Price” or “the petitioner”), was convicted of murder during the commission of a robbery, a capital offense, in the Circuit Court for Fayette County, Alabama. The court immediately convened the penalty phase of trial, and the jury returned a 10-2 recommendation that Price be sentenced to death.

After conducting a sentencing hearing on

February 12, 1993, the trial court found two aggravating circumstances: (1) the murder was committed during the course of a robbery, and (2) the murder was heinous, atrocious and cruel. (C.R. Vol. 1, 214-15).¹ The court also found two statutory mitigating circumstances: (1) Price had no significant criminal history, and (2) he was nineteen (19) years old when the crime was committed. *Id.* at 216-17. The court additionally found several non-statutory mitigating circumstances, including: (1) Price's father was murdered when Price was three years old, (2) after his father was murdered, Price was verbally, physically and possibly sexually abused by a string of his mother's live-in companions, and (3) that a psychological evaluation revealed Price had an anti-social personality and an emotional disturbance from an early age in conjunction with his difficult childhood. *Id.* at 217- 18. Still, the trial court found the aggravating circumstances outweighed the mitigating circumstances and sentenced Price to death. *Id.* at 219.

¹ The court adopts the following method of referencing documents and transcript excerpts. References to specific pages of the court record on direct appeal are designated "C.R.____," and references to the transcript on direct appeal are designated "R. ____." References to the supplemental record on direct appeal are designated "S.R. ____." References to the court record of the Rule 32 proceedings are designated " Rule 32 C.R.____," and references to transcripts pertaining to testimony taken during the collateral process are designated "Rule 32 R.____." References to the record in the respondent's checklist (document 19) are designated "Tab ____."

On June 20, 1997, the Alabama Court of Criminal Appeals affirmed Price's capital conviction and death sentence. *Price v. State*, 725 So. 2d 1003 (Ala. Crim. App. 1997). The Alabama Supreme Court affirmed the conviction and sentence on September 4, 1998. *Ex Parte Price*, 725 So. 2d 1063 (Ala. 1998).

A petition for a *writ of certiorari* was denied by the United States Supreme Court on May 24, 1999. *Price v. Alabama*, 526 U.S. 1133 (1999).

On May 23, 2000, Price filed a Petition for Relief from Judgment pursuant to Rule 32 of the Alabama Rules of Criminal Procedure. (Rule 32 C.R., Vol. 11, Tab. 39 at 1-39). On June 26, 2000, the State of Alabama filed an Answer, and five months later, on December 11, 2000, the State filed a motion requesting dismissal of some of Price's claims, on the grounds that they were insufficiently pled and/or procedurally barred. *Id.* at Tab 40 at 41-80, and Tab 41 at 80-87.

The motion to dismiss was granted by the trial court on the same day it was filed. However, it also contained instructions that Price could, within "21 days from the date of this order[,] . . . supply the information necessary to comply with Rule 32's full-fact pleading requirements and . . . have [the claim now known in the habeas petition as Claim A.1.(a)-(c)] reinstated into the petition." *Id.* at Tab 42 at 1.

Protracted litigation pertaining to the aforementioned instructions and claim from January 2, 2001, to April 1, 2002, finally gave way to an amended dismissal order. *Id.* at Vol. 12 at 304- 64. The State's proffered reasons to support the dismissal, as quoted below, adequately summarize the substance of the trial court's final order. The only ground raised by Price calling into question the validity of the Court's

[dismissal] order was that the allegation that the Court's order did not take into account the amendments to [claims A.1. (a)-(c)] of the Rule 32 petition, filed in January, 2001. Because the amendment did not cure the defect of the Rule 32 petition - that it was insufficiently pleaded and insufficiently specific - the State's failure to brief on the issue of amendment does not affect the validity of the

Court's order finding that the petition was not specific enough. *See, Swicegood v. State*, 646 So. 2d 159 (Ala. Cr. App. 1994) (noting that a trial judge's ruling on a Rule 32 petition may be affirmed on appeal if it is correct for any reason).

The amendment did nothing to affect the fact that, as pleaded, Price had failed to allege the facts necessary to establish that he was entitled to relief. *See*. A.R.Cr.P., 32.3. In addition, without the names of the missing witnesses, Price's petition did not contain the full disclosure of the factual basis for his claim. *See*. A.R.Cr.P., 32.6(b). By requiring the State of Alabama to go through the substantial cost of noticing and attending his deposition at Holman prison in order to get this information, Price caused prejudice to the State. Accordingly, as it currently reads the Court's order correctly dismisses the Rule 32 petition and the sole amendment. *Id.* at 301-02.

The Alabama Court of Criminal Appeals affirmed the denial of relief on May 30, 2003. *Price v. State*, CR-1-1578 (Ala. Crim. App. 2003). On July 25, 2003, Price filed a petition for writ of certiorari in the Alabama Supreme Court.

Three days later, Price filed the current action seeking 28 U.S.C. § 2254 relief from the state court's judgment. (Doc. 1). However, this matter was stayed

until a ruling was made on the petition for writ of certiorari still pending before the Alabama Supreme Court. On June 26, 2006, the Alabama Supreme Court rejected certiorari review. *Ex Parte Price*, No. 1021742 (Ala. 2006). On August 7, 2006, Price filed his “Third Amended Petition” (“Petition”), which is presently before the court. (Doc. 16). The parties have had a full opportunity to brief the applicable issues.

II. FACTUAL BACKGROUND

The Alabama Court of Criminal Appeals, in its decision on direct appeal, set out a concise rendition of the facts in this case. This outline of the facts is more than adequate for purposes of this opinion. Therefore, those facts are set out *in toto* as follows:

Through the testimony of Bessie Lynn and through the admission of a statement the appellant gave to authorities in Chattanooga, Tennessee, approximately one week after the offense, the State established evidence tending to show the following:

On the evening of December 22, 1991, Bill and Bessie Lynn returned to their home following a church service at the Natural Springs Church of Christ, where Bill Lynn had served as minister. The victims’ home was located in the Bazemore community of north Fayette County. Bill Lynn had begun assembling Christmas toys for his grandchildren, while Bessie Lynn had dressed for bed and was upstairs in her bedroom watching television. The electricity suddenly failed and, because the security lights outside remained on, and because the electricity was still on in a neighbor’s home, Bill Lynn told his wife to call

the power company to report the outage. He then walked outside to check the power box. Bessie Lynn heard a noise outside and, upon looking out of her window, saw an individual in what she called a "karate stance," holding what appeared to be a sword in his right hand, high above his head in a striking position. Bessie Lynn testified that the individual was dressed completely in black. Bill Lynn yelled for his wife to telephone the police, and, upon discovering that the telephone lines had been cut, she hurried downstairs, where she picked up a candle and armed herself with a pistol that the Lynns kept in a kitchen drawer by a bank deposit bag.

The bank deposit bag contained cash and checks received from an automobile parts business operated by Bill Lynn. Bessie Lynn testified that she then hurried outside and that when she did someone struck her and knocked her to the ground. She testified that she got up and fired a gunshot into the air and began calling for her husband. She found him in the yard and tried to give him the gun, telling him to shoot the people, but Bill Lynn, who had been severely wounded told her there were no bullets left in the gun. She then told her husband that she was going for help; he told her to give the culprits anything that they wanted. Bill Lynn had told his wife at that point that he knew he was going to die. Bessie Lynn, who was in their van and attempting to insert the key into the ignition, became aware of two men, one on each side of the van. They ordered her out of the van, and when she got out she was beaten with an

object. One of the individuals was demanding money. They ordered her back into the house, where the two individuals, both dressed in black, demanded her money and jewelry. They took a rifle and shotgun from the house, the pistol that Bill Lynn still had, and the checks and cash from the bank deposit bag. They also ordered Bessie Lynn to give them her jewelry. She responded that she did not wear jewelry other than her two rings and asked if she might keep her wedding ring. She was instructed to take her rings off and to drop them in a bag, which they took. The culprits instructed Mrs. Lynn to remain where she was and they searched for something in the kitchen and then outside the house. Bessie Lynn testified that when the two men came back in the house, a vehicle apparently drove by the house. The two men then went out the back door, and Bessie Lynn testified that she then ran out the front door. She ran back to her husband to tell him that she was going to go for help. He asked her to hurry, and she ran to her father's house, which was located nearby. From her father's house she telephoned for help. Bill Lynn died before he reached the hospital. Bessie Lynn was treated for wounds to her head, her hands, her chest, and her thighs.

Several days later, the appellant was arrested in Chattanooga, Tennessee, where he had been visiting friends. He gave a statement to the authorities in Tennessee, admitting his participation in the offenses, but claiming that his accomplice had actually killed Bill Lynn and wounded Bessie Lynn. He subsequently gave

another statement to Alabama authorities.

Price v. State, 725 So. 2d at 1011-12.

III. STANDARDS OF REVIEW

A. The Antiterrorism and Effective Death Penalty Act of 1996

The Antiterrorism and Effective Death Penalty Act (“AEDPA”) amended the federal habeas corpus provisions of 28 U.S.C. § 2254 on April 24, 1996. The present petition was filed after that date. Accordingly, AEDPA’s amendments apply to the claims in this case. *See* Pub. L. No. 104-132, § 107(c), 110 Stat. 1214, 1226 (1996); *Penry v. Johnson*, 532 U.S. 782, 792 (2001); *see also McNair v. Campbell*, 416 F.3d 1291, 1297 (11th Cir. 2005); *Hightower v. Schofield*, 365 F.3d 1008, 1013 (11th Cir. 2004).² AEDPA “modified a federal habeas court’s role in reviewing state prisoner applications in order to prevent federal habeas ‘retrials’ and to ensure that state-court convictions are given effect to the extent possible under law.” *Bell v. Cone*, 535 U.S. 685, 693 (2002) (citing *Williams v. Taylor*, 529 U.S. 362, 403-04 (2000)). *See* 28 U.S.C. § 2254(e)(2);³ *McNair*, 416 F.3d at

² *Cf. Lindh v. Murphy*, 521 U.S. 320, 327 (1997) (holding that AEDPA’s amendments do not apply to habeas petitions filed prior to the Act’s effective date); *Johnson v. Alabama*, 256 F.3d 1156, 1169 (11th Cir. 2001) (same); *Thompson v. Haley*, 255 F.3d 1292, 1295 (11th Cir. 2001) (same).

³ 28 U.S.C. § 2254(e)(2) provides that:

If the applicant has failed to develop the factual basis of a claim in State court proceedings, the

1297 (observing that § 2254(e)(2) as amended by AEDPA “mandates that a petitioner who failed to develop the factual basis for a claim in state court shall not be granted a federal evidentiary hearing absent extraordinary circumstances”).

Further, a state court’s factual determinations are presumed correct unless rebutted by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1);⁴

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 have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2).

⁴ 28 U.S.C. § 2254(e)(1) provides that: “In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment 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

McNair, 416 F.3d at 1297.

Moreover, AEDPA requires federal courts to give greater deference to state court determinations of federal constitutional claims than required by previous law. *See, e.g., Fugate v. Head*, 261 F.3d 1206, 1215 (11th Cir. 2001) (holding that AEDPA's amendments to § 2254 established "a more deferential standard of review of state habeas judgments"); *Spreitzer v. Peters*, 114 F.3d 1435, 1441 (7th Cir. 1997) (same). 28 U.S.C. § 2254(d) provides that whenever a state court fairly addresses the legal merits of a federal constitutional claim, and adequately explains the basis for its decision, this court cannot grant habeas relief *unless* the state court's 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). The statutory phrase "clearly established federal law, as determined by the Supreme Court of the United States," refers to "the holdings, as opposed to the dicta, of [the Supreme Court's] decisions as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000) (O'Connor, J., majority opinion); *see also, e.g., Warren v. Kyler*, 422 F.3d 132, 138 (3rd Cir. 2005) ("[W]e do

rebutting the presumption of correctness by clear and convincing evidence."

not consider those holdings as they exist today, but rather as they existed as of the time of the relevant state-court decision.”) (internal quotation marks and citation omitted).

The “contrary to” and “unreasonable application” clauses of § 2254(d)(1) have been “interpreted as independent statutory modes of analysis.” *Alderman v. Terry*, 468 F.3d 775, 791 (11th Cir. 2006) (citing *Williams v. Taylor*, 529 U.S. at 405-07).⁵ A state-court determination can be “contrary to” clearly established Supreme Court precedent in at least two ways:

First, a state-court decision is contrary to this Court’s precedent if the state court arrives at a conclusion opposite to that reached by this Court on a question of law. *Second*, a state-court decision is also contrary to this Court’s precedent if the state court confronts facts that are materially indistinguishable from a relevant

⁵ *See also Williams v. Taylor*, 529 U.S. at 404 (O’Connor, J., majority opinion) (“Section 2254(d)(1) defines two categories of cases in which a state prisoner may obtain federal habeas relief with respect to a claim adjudicated on the merits in state court. Under the statute, a federal court

may grant a writ of habeas corpus if the relevant state-court decision was either (1) “contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States,” or (2) “involved an unreasonable application of . . . clearly established Federal law, as determined by

the Supreme Court of the United States.”).

Supreme Court precedent and arrives at a result opposite to ours.

Williams v. Taylor, 529 U.S. at 405 (emphasis supplied). See also, e.g., *Brown v. Payton*, 544 U.S. 133, 141 (2005) (same); *Early v. Packer*, 537 U.S. 3, 8 (2002) (*per curiam*) (same); *Putman v. Head*, 268 F.3d 1223, 1240-41 (11th Cir. 2001) (same). The Eleventh Circuit has observed that the majority opinion in *Williams* does not limit the construction of § 2254(d)(1)'s "contrary to" clause to the two examples set forth above; rather, the statutory language "simply implies that 'the state court's decision must be substantially different from the relevant precedent of [the Supreme] Court.'" *Alderman v. Terry*, 468 F.3d at 791 (quoting *Williams*, 529 U.S. at 405).

On the other hand, a state-court determination of a federal constitutional claim can result in an "unreasonable application" of clearly established Supreme Court precedent in either of two ways:

First, a state-court decision involves an unreasonable application of this Court's precedent if the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case. Second, a state-court decision also involves an unreasonable application of this Court's precedent if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.

Williams v. Taylor, 529 U.S. at 407. See also, e.g., *Putnan v. Head*, 268 F.3d 1223, 1240-41(11th Cir. 2001)

(same).⁶ “[A] federal habeas court making the ‘unreasonable application’ inquiry should ask whether the state court’s application of clearly established federal law was *objectively* unreasonable.” *Williams v. Taylor*, 529 U.S. at 409 (emphasis added).

In other words, the question that should be asked is *not* whether the state court “correctly” applied Supreme Court precedent when deciding the federal constitutional issue, but whether the state court’s determination was “reasonable,” *even if incorrect*. See, e.g., *Bell v. Cone*, 535 U.S. 685, 694 (2002) (observing that the “focus” of the inquiry into the reasonableness of a state court’s determination of a federal constitutional issue “is on whether the state court’s application of clearly established federal law is objectively unreasonable, and . . . an unreasonable application is different from an incorrect one”);

⁶ The Eleventh Circuit has observed that § 2254(d)(1)’s “unreasonable application” provision is the proper statutory lens for viewing the “run-of-the-mill state-court decision applying the correct legal rule.” *Alderman v. Terry*, 468 F.3d at 791 (quoting *Williams v. Taylor*, 529 U.S. at 406).

In other words, if the state court identified the correct legal principle but unreasonably applied it to the facts of a petitioner’s case, then the federal court should look to § 2254(d)(1)’s “unreasonable application” clause for guidance. “A federal habeas court making the ‘unreasonable application’ inquiry should ask whether the state court’s application of clearly established federal law was *objectively* unreasonable.” 529 U.S. at 409, 120 S. Ct. at 1521 (emphasis added). *Alderman v. Terry*, 468 F.3d at 791.

Williams v. Taylor, 529 U.S. at 411 (holding that a federal habeas court “may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.”).

In addition to the companion provisions of § 2254(d)(1), subsection (d)(2) regulates federal court review of state court findings of fact. That provision limits the availability of relief to decisions that were “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)(2).

B Claims of Ineffective Assistance of Counsel

The Supreme Court established a two-pronged standard for judging ineffective assistance of counsel claims under the Sixth Amendment in *Strickland v. Washington*, 466 U.S. 668 (1984).⁷

⁷ Ineffective assistance of counsel claims are specifically limited to the performance of attorneys who represented a defendant at trial or on direct appeal from the conviction. *See* 28 U.S.C. § 2254(i) (“The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.”). *See also* *Coleman v. Thompson*, 501 U.S. 722, 752 (1991) (“There is no constitutional right to an attorney in state post-conviction proceedings. Consequently, a petitioner cannot claim

constitutionally ineffective assistance of counsel in such

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. *First*, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. *Second*, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable. *Id.* at 687 (emphasis supplied); *see also Williams*, 529 U.S. at 390 (same). The two parts of the *Strickland* standard are conjunctive, and a petitioner accordingly bears the burden of proving *both* "deficient performance" and "prejudice" by "a preponderance of competent evidence." *Chandler v. United States*, 218 F.3d 1305, 1313 (11th Cir. 2000) (*en banc*). Thus, a court is not required to address both aspects of the *Strickland* standard when a habeas petitioner makes an insufficient showing on one of the prongs. *See, e.g., Holladay v. Haley*, 209 F.3d 1243, 1248 (11th Cir. 2000) ("Because both parts of the test must be satisfied in order to show a violation of the Sixth Amendment, the court

proceedings.") (citations omitted).

need not address the performance prong if the defendant cannot meet the prejudice prong, or vice versa.”).

1. The performance prong

To establish that counsel’s performance was deficient, a defendant “must show that counsel’s representation fell below an objective standard of reasonableness”: a rule that is defined in terms of “reasonableness under prevailing professional norms.” *Strickland*, 466 U.S. at 688; *see also Williams*, 529 U.S. at 390-91 (same); *Darden v. Wainwright*, 477 U.S. 168, 184 (1986) (same). The *Strickland* Court instructed lower federal courts to be “highly deferential” when engaging in such assessments, and to “indulge a strong presumption that counsel’s conduct [fell] within the wide range of reasonable professional assistance”:

Judicial scrutiny of counsel’s performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel’s assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time. Because of the difficulties inherent in making the evaluation, *a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance*; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might

be considered sound trial strategy. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. *Strickland*, 466 U.S. at 689 (emphasis supplied) (citations and internal quotation marks omitted); *see also, e.g., Rogers v. Zant*, 13 F.3d 384, 386 (11th Cir. 1994) (holding that, “[w]hen reviewing whether an attorney is ineffective, courts should always presume strongly that counsel’s performance was reasonable and adequate”) (internal quotation marks omitted)).

To overcome the presumption that counsel’s conduct fell within the wide range of reasonable professional assistance, the habeas petitioner “must establish that no competent counsel would have taken the action that his counsel did take.” *Chandler*, 218 F.3d at 1315 (footnote and citation omitted). The reasonableness of counsel’s performance is judged from the perspective of the attorney, at the time of the alleged error, and, in light of all the circumstances. *See, e.g., Johnson v. Alabama*, 256 F.3d 1156, 1176 (11th Cir. 2001) (giving lawyers “the benefit of the doubt for ‘heat of the battle’ tactical decisions”); *Mills v. Singletary*, 161 F.3d 1273, 1285- 86 (11th Cir. 1998) (noting that *Strickland* performance review is a “deferential review of all of the circumstances from the perspective of counsel at the time of the alleged errors”).

Under this standard, there are no “absolute rules” dictating what reasonable performance is or what line of defense must be asserted. [*Chandler*, 218 F.3d] at 1317. Indeed, as we have recognized, “[a]bsolute rules would interfere with counsel’s independence-which is also constitutionally protected-

and would restrict the wide latitude counsel have in making tactical decisions.” *Putman v. Head*, 268 F.3d 1223, 1244 (11th Cir. 2001); *Michael v. Crosby*, 430 F.3d 1310, 1320 (11th Cir. 2005). “Even if many reasonable lawyers would not have done as defense counsel did at trial, no relief can be granted on ineffectiveness grounds unless it is shown that no reasonable lawyer, in the circumstances, would have done so.” *Rogers v. Zant*, 13 F.3d 384, 386 (11th Cir. 1994).

In short, an attorney’s performance will be deemed deficient only if it is objectively unreasonable (*i.e.*, falls below the wide range of competence demanded of attorneys in criminal cases), and it is shown that no competent attorney would have taken the action that petitioner’s counsel did take. *See, e.g.*, *Chandler*, 218 F.3d at 1315; *Cross v. United States*, 893 F.2d 1287, 1290 (11th Cir. 1990).

2. The prejudice prong

To satisfy the prejudice prong, a habeas petitioner “must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694; *see also Williams*, 529 U.S. at 391 (same). Stated somewhat differently, “[a] finding of prejudice requires proof of unprofessional errors so egregious that the trial was rendered unfair and the verdict rendered suspect.” *Johnson*, 256 F.3d at 1177 (quoting *Eddmonds v. Peters*, 93 F.3d 1307, 1313 (7th Cir. 1996) (in turn quoting *Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986)) (internal quotation marks omitted); *see also, e.g., Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993) (holding that, to show

prejudice, “a defendant must show that counsel’s errors were so serious that they rendered the defendant’s trial unfair or unreliable, not merely that the outcome would have been different”).

When an ineffectiveness claim is based upon counsel’s failure to properly investigate and present additional evidence, *Fortenberry v. Haley*, 297 F.3d 1213, 1225 (11th Cir. 2002), advises that “counsel has a duty to make reasonable investigations or to make a reasonable decision that make particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel’s judgments.” *Id.* at 1225, (citing *Strickland*, 466 U.S. at 691). Additionally, when examining an ineffectiveness claim during the sentencing phase of the trial, it is understood that where a petitioner’s counsel was deficient at sentencing, the relevant question for determining prejudice is whether the “entire postconviction record, viewed as a whole and cumulative of mitigation evidence presented originally, raised a reasonable probability that the result of the sentencing proceeding would have been different if competent counsel had presented and explained the significance of all of the available evidence.” *Fortenberry*, 297 F.3d at 1229 (quoting *Williams v. Taylor*, 529 U.S. at 399).

A habeas petitioner “must affirmatively prove prejudice, because [a]ttorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial.” *Gilreath v. Head*, 234 F.3d 547, 551 (11th Cir. 2000) (quoting *Strickland*, 466 U.S. at 693). The fact that counsel’s error may have “had some conceivable

effect on the outcome of the proceeding” is not sufficient to show prejudice. *Strickland*, 466 U.S. at 693; *see also Gilreath*, 234 F.3d at 551 (same); *Tompkins v. Moore*, 193 F.3d 1327, 1336 (11th Cir. 1999) (same). Instead, a petitioner must present competent evidence proving “that trial counsel’s deficient performance deprived him of ‘a trial whose result is reliable.’” *Brown v. Jones*, 255 F.3d 1272, 1278 (11th Cir. 2001) (quoting *Strickland*, 466 U.S. at 687). Accordingly, “[t]he benchmark for judging any claims of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial [or subsequent direct appeal] cannot be relied upon as having produced a just result.” *Strickland*, 466 U.S. at 686.

3 Deference accorded state court findings of historical fact

“State court findings of historical facts made in the course of evaluating an ineffectiveness claim are subject to a presumption of correctness under 28 U.S.C. § 2254(d).” *Thompson v. Haley*, 255 F.3d 1292, 1297 (11th Cir. 2001).

C. PROCEDURAL DEFAULTS

1. Generally

It is a well-settled principle of law that a state prisoner “may not obtain federal habeas corpus relief on a claim that the state courts refused to hear because the petitioner did not raise his claim seasonably at trial or on direct appeal from his conviction, unless the petitioner shows cause for not raising the claim and resulting prejudice.” *Presnell v. Kemp*, 835 F.2d 1567, 1567- 68 (11th Cir. 1988) (citations omitted); *see also, e.g., Coleman v.*

Thompson, 501 U.S. 722, 750 (1991) (holding that the procedural default doctrine “applies to bar federal habeas when a state court declined to address a prisoner’s federal claims because the prisoner had failed to meet a state procedural requirement”); *Judd v. Haley*, 250 F.3d 1308, 1313 (11th Cir. 2001) (“A state prisoner seeking federal habeas relief cannot raise a federal constitutional claim in federal court unless he first properly raised the issue in the state court system.”).

This so-called “procedural default doctrine” bars federal habeas review of state court rejections of a state prisoner’s claim when three circumstances coexist: (1) the last state court to review the claim (2) states clearly and expressly that its disposition of that claim rests on a state procedural bar, and (3) that state law ground “is *independent* of the federal question and *adequate* to support the judgment.” *Coleman*, 501 U.S. at 729-30 (emphasis supplied); *see also, e.g., Harris v. Reed*, 489 U.S. 255, 262-63 (1989); *Johnson v. Singletary*, 938 F.2d at 1173. The rule applies with equal force “regardless of ‘whether the state-law ground is substantive or procedural.’” *Lee v. Kemna*, 534 U.S. 362, 374 (2002) (quoting *Coleman*, 501 U.S. at 729).

A state procedural rule is “independent of the federal question” when it “rests solidly on state law grounds [that are] not intertwined with an interpretation of federal law.” *Judd*, 250 F.3d at 1313 (quoting *Card v. Dugger*, 911 F.2d 1494, 1516 (11th Cir. 1990)).

A state court’s procedural rule is deemed to be “adequate to support the judgment” when it is “firmly established and regularly followed,” *Hurth v. Mitchem*,

400 F.3d 857, 858 (11th Cir. 2005),⁸ and, it is not “applied in an arbitrary or unprecedented fashion” that is “‘manifestly unfair’ in its treatment of the petitioner’s federal constitutional claim.” *Judd*, 250 F.3d at 1313 (quoting *Card*, 911 F.2d at 1517). This does not mean that the procedural rule must be applied rigidly in every instance, or that occasional failure to do so eliminates its “adequacy.” Rather, the “adequacy” requirement means only that the procedural rule “must not be applied in an arbitrary or unprecedented fashion.” *Judd*, 250 F.3d at 1313.

There are only three circumstances in which an otherwise valid state-law ground will not bar a federal habeas court from considering a constitutional claim that was procedurally defaulted in state court: (1) where the petitioner had good “cause” for not following the state procedural rule and was actually “prejudiced” by not having done so; (2) where the state procedural rule was not “firmly established and regularly followed”; and (3) where failure to consider the petitioner’s claims will result in a “fundamental miscarriage of justice.” See *Edwards v. Carpenter*, 529 U.S. 446, 455 (2000) (Breyer, J., concurring). See also, e.g., *Coleman*, 501 U.S. at 749-50 (holding that a state procedural default “will bar federal habeas review of the federal claim, unless the habeas petitioner can show cause for the default and prejudice attributable thereto, or demonstrate that failure to

⁸ See also, e.g., *Lee*, 534 U.S. at 376; *Hill v. Jones*, 81 F.3d 1015, 1023 (11th Cir. 1996); *Cochran v. Herring*, 43 F.3d 1404, 1408, modified on reh’g, 61 F.3d 20 (11th Cir. 1995).

consider the federal claim will result in a fundamental miscarriage of justice”) (citations and internal quotation marks omitted); *Murray v. Carrier*, 477 U.S. 478, 496 (1986) (“[W]here a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default.”); *Smith v. Murray*, 477 U.S. 527, 537 (1986) (same); *Davis v. Terry*, 465 F.3d 1249, 1252 n.4 (11th Cir. 2006) (“It would be considered a fundamental miscarriage of justice if ‘a constitutional violation has probably resulted in the conviction of one who is actually innocent.’”) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995) (in turn quoting *Murray v. Carrier*, 477 U.S. at 496)).

2 The “cause and prejudice” standard

The “cause *and* prejudice” standard clearly is framed in the conjunctive and, therefore, a petitioner must prove both parts. To show cause, a petitioner must prove that “some objective factor external to the defense impeded counsel’s efforts” to raise the claim previously. *Murray*, 477 U.S. at 488.

Objective factors that constitute cause include “interference by officials” that makes compliance with the State’s procedural rule impracticable, and “a showing that the factual or legal basis for a claim was not reasonably available to counsel.” *Ibid.* In addition, constitutionally “[i]neffective assistance of counsel . . . is cause.” *Ibid.* Attorney error short of ineffective assistance of counsel, however, does not constitute cause and will not excuse a procedural default. *Id.*, at 486-88, 106 S. Ct., at 2644-45. *McCleskey v. Zant*, 499 U.S. 467, 493-94 (1991). *See also Murray*, 477 U.S. at 488-89 (“Ineffective assistance of counsel . . . is cause

for a procedural default.”); *Reed v. Ross*, 468 U.S. 1, 16 (1984) (“[W]here a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures.”).

Once cause is proved, a habeas petitioner also must prove prejudice. He 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).

3. The “fundamental miscarriage of justice” standard

In a “rare,”⁹ “extraordinary,”¹⁰ and “narrow class of

⁹ *Schlup v. Delo*, 513 U.S. 298, 321 (1995) (“To ensure that the fundamental miscarriage of justice exception would remain ‘rare’ and would only be applied in the ‘extraordinary case,’ while at the same time ensuring that the exception would extend relief to those who were truly deserving, this Court explicitly tied the miscarriage of justice exception to the petitioner’s innocence.”).

¹⁰ *McClesky v. Zant*, 499 U.S. 467, 494 (1991) (“Federal courts retain the authority to issue the writ of habeas corpus in a further, narrow class of cases despite a petitioner’s failure to show cause for a procedural default. These are extraordinary instances when a constitutional violation probably has caused the conviction of one innocent of the crime. We have described this class of cases as implicating a

cases,”¹⁰ a federal court may consider a procedurally defaulted claim in the absence of a showing of “cause” for the procedural default, if (1) a “fundamental miscarriage of justice” has “probably resulted in the conviction of one who is actually innocent,” *Smith v. Murray*, 477 U.S. 527, 537-38 (1986) (quoting, respectively, *Engle v. Isaac*, 456 U.S. 107, 135 (1982), and *Murray v. Carrier*, 477 U.S. at 496¹¹), or if (2) the petitioner shows “by clear and convincing evidence that[,] but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty.” *Schlup v. Delo*, 513 U.S. 298, 323-27 & n.44 (1995) (quoting *Sawyer v. Whitley*, 505 U.S. 333, 336 (1992)); see also, e.g., *Smith v. Murray*, 477 U.S. at 537-38.

With these elemental precepts in mind, the court now turns to the petitioner’s claims.

IV. DISCUSSION

A Mr. Price did not receive effective

fundamental miscarriage of justice.”) (citing *Murray v. Carrier*, 477 U.S. 478, 485 (1986)).

¹¹ Specifically, the *Murray v. Carrier* Court observed that, “in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default.” 477 U.S. at 496.

assistance of counsel at the sentencing phase of his trial. (Paragraphs 21-41 of the petition).

¶ Mr. Price's trial counsel did not conduct, nor did they engage an investigator to conduct, the reasonable investigation into mitigating circumstances the law requires.

Price alleges he “was prejudiced by trial counsel’s failure to seek and find readily available evidence relevant to both statutory and non-statutory mitigating factors in his case through the testimony of Price’s family, friends and teachers as well as an independent psychological evaluation.” He also contends that this claim is not procedurally defaulted. (Petition at 19 and Reply Brief¹² at 13-32). The respondent subdivides this claim into sections A. 1.(a)-(e).¹³ This court will follow the respondent’s subdivision

¹² The reply brief is located at document 28 in the record.

¹³ The respondent enumerates the petitioner’s allegations as counsel’s failure to:

- a. Seek out or contact any family member other than Price’s mother,
- b. Seek out or contact Price’s friends, acquaintances and school teachers.
- c. Obtain Price’s school records.
- d. Adequately interview and properly prepare Price’s mother for her testimony, and

of the claims.

a. Counsel were ineffective for failing to seek out or contact any family member other than Price's mother.

b. Counsel were ineffective for failure seek out or contact Price's friends and acquaintances.

c. Counsel were ineffective for failure seek out or contact Price's school teachers and obtain Price's school records.

Sub-claims A.1.a.-c. are almost identical to the Rule 32 claims quoted in the appellate court's opinion on collateral review, differing only in that the habeas petition identifies Price's witnesses by name as opposed to relationship. The appellate court addressed these claims:

. . . . After being granted opportunity to amend claims no. [A.1.(a)-(c)¹⁴] the following was presented in Price's first amendment to his Rule 32, Ala. R. Crim. P., petition.

“[A.1.a.]. Trial counsel did not seek out or contact any of Mr. Price's family members other than his mother, although his aunts, uncles, cousins, grandparents and step-grandparents were located

e. Engage an independent psychologist to evaluate Price.

¹⁴ For clarity's sake, the court has substituted its categorization of the claims for those in the opinion.

within the immediate vicinity. Had counsel spoken with these members of Mr. Price's family, counsel would have discovered a detailed history of dislocation, abuse and neglect that far exceeded the terse, incomplete description provided by Mrs. Files at Mr. Price's sentencing. Mr. Price and his mother relocated across state lines over half a dozen times before Mr. Price was in junior high school. Mrs. Files and Mr. Price lived in Mississippi, Florida and Texas, in addition to Alabama, at different times while he was growing up. Mr. Price's paternal grandmother saw his father physically abuse both Mr. Price and his mother. This grandmother recalls specific instances of physical abuse and neglect that Mrs. Files did not testify to at trial. Mr. Price lived with this grandmother for some time when he was very young, and spent weekends at her house when he was older; thus, she was a valuable resource that counsel should have contacted in preparation for Mr. Price's sentencing hearing. [¹⁵] Aunts and uncles, as well as grandparents had contact with Mr. Price throughout his childhood. In addition to the abuse and neglect they witnessed, these family members could have testified about their love for Mr. Price and of the pride they shared in his extraordinary drawing

¹⁵ Underlined portion added by appellate court.

skills. The family could have provided examples of pictures created by Mr. Price over the years. This artistic skill was relevant evidence in mitigation and should have been uncovered. Because of trial counsel's failure in this regard, this relevant mitigation evidence was not presented at sentencing.

"[A.1.b.]. Trial counsel did not seek out or contact any of Mr. Price's friends or acquaintances, although Mr. Price had lived and attended school in the Jasper-Winfield area for eight years and his friends were located in the immediate vicinity. Had counsel contacted these friends and acquaintances, counsel would have discovered that Mr. Price was known as a nice kid who did not get in fights. Mr. Price had a girlfriend at the time of this crime who could have testified about Mr. Price's interest in marriage, family, and a career after high school. Mr. Price's friends from junior high school and high school would have told counsel that Mr. Price was known to be a follower who would go along with what other people wanted to do; copying what others wore, how they spoke, and what activities they liked to pursue. These friends would have talked about how Mr. Price seemed to have changed in the summer and fall leading up to his arrest, when he was associating with Co-defendant 'Bookie' Coleman. Because of trial counsel's ineffectiveness in this

regard, this relevant mitigation evidence was not presented at sentencing.”

“[A.1.c.]. Trial counsel neither located and gathered Mr. Prices’s school records nor attempted to contact Mr. Price’s former teachers. Had counsel obtained these records and interviewed Mr. Price’s teachers, counsel would have discovered that Mr. Price did well in school and was generally well-behaved in class. Mr. Price maintained good grades and was not remembered as a disciplinary problem or as a student who got into fights. This relevant mitigation evidence was not presented at sentencing because of trial counsel’s failure in this regard.”

([Rule 32] C.[R.] 97-100).

After careful consideration of Price’s claim and after oral argument^[16], we find that with the possible exception of the pleadings concerning the paternal grandmother, the circuit court correctly ruled that these claims were not specifically pleaded.^[17]

¹⁶ There is no transcript or tape recording of the oral argument before the Alabama Court of Criminal Appeals in the record.

¹⁷ The language of the circuit court’s final order pertaining to Claims A. 1.(a)-(c), issued on April 2, 2002, summarily dismissed these claims pursuant to Rule 32.7(d) of the A. R. Crim. P. “for failure to comply with [the specificity requirements of] Rule 32.6. . . .” Specifically, the court stated the claims were due to be

dismissed

for failure to comply with [the specificity requirements of] Rule 32.6. . . Price filed an amendment to his petition on January 2, 2001. This amendment affected [sub-claims (a)-(c)]. Even though this amendment offered more wording than . . . the original petition, the Court finds that Price again failed to supply the information to bring the petition into compliance with Rule 32.6(b). This constitutes undue delay and the Court finds that the State of Alabama has been prejudiced.

....

The [relatives, friends, acquaintances and teachers] . . . alluded to in [sub-claims A.1. (a)-(c)] were known to Price and could have been provided in the original Rule 32 petition [filed in May 2000] or the amendment to the petition [filed January 2, 2001]. Price did nothing to supply these names until the State of Alabama deposed petitioner [on November 8, 2001]. . . . Thus, Price has acted with undue delay.

....

Furthermore, the school records referred to in [sub-claim A.1.(c)] are not attached to the Rule 32 petition or the amendment, nor have any been submitted to the court since the Rule 32 petition was filed. . . . [N]othing in the petition informs the Court of what in

“. . . Considering all the evidence introduced during the guilt and penalty phases of the trial, we cannot see how the evidence that the appellant argues should have been elicited at the penalty phase would have had any impact on his sentence. It certainly would not have changed the outcome, and it did not render the sentencing fundamentally unfair or unreliable.” *Pierce v. State*, [Ms. CR-96-1668, Mar. 2, 1999] ___ So. 2d ___ (Ala. Crim. App. 1999), rev’d on other grounds, [Ms. 1981270, Sept. 20, 2002] ___ So. 2d ___ (Ala. 2002)[.]

Regarding the paternal grandmother, to the extent that it may have been sufficiently pleaded, we agree with the circuit court’s finding that the paternal grandmother’s testimony would have been cumulative to the testimony of Mrs. Files. Apparently the paternal grandmother would have testified that she saw Price’s father physically abuse both Price and his mother. After review of the record from direct appeal, we agree with the circuit court’s findings, that this would have been cumulative to Mrs. Files’s testimony.

these records constitutes mitigating evidence, and copies of these alleged records are nowhere to be found. Thus, the court finds that [sub-claim A. 1.(c)] is subject to summary dismissal for failure to comply with Rules 32.3 and 32.6(b) of the *Alabama Rules of Criminal Procedure*.

(Rule 32 C.R., Vol. 12, at 314-17).

(Vol. 24, Tab 61 at 27-29).

In his habeas petition, Price now identifies his relatives, girlfriend, friends and teachers by name.¹⁸ (Petition at 15-17). The respondent declares that these legal names constitute new factual support for his claim in the present petition. (Doc. 21 at 18; Doc. 22 at 6). The respondent also contends that the Alabama Court of Criminal Appeals properly affirmed the trial court's summary dismissal for "failure to comply with the specificity and full factual pleading requirements of Rules 32.3 and 32.6(b) of the Alabama Rules of Criminal Procedure." (Doc. 22, at 7 (citing *Price*, mem. op., at 27-29 and C.R. 314-16)).¹⁹

Price replies that

[a] claim can be procedurally defaulted only if all three of the following conditions are met: (1) the state's rule must have been applied independently of an interpretation of federal law; (2) the rule must have been clearly and explicitly identified as the primary basis for the judgment of the last court to rule on a claim; and (3) the rule must not

¹⁸ They are Hoyt and Louise Price, Teena Barnett, Amy Collins Crosby, Jessie Chaney, Chris Hadder, James Dockins, Alan Davis, Wayne Hamilton, Brenda Edgil and Dale Sears. (Petition at pp. 15-17).

¹⁹ However, as can be seen in previous footnote number 17, with the exception of the school records portion of sub-claim A.1. (c), the trial court summarily dismissed all sub-claims on the basis of Rules 32.6(b) and 32.7(d). Only the school records aspect of the claim was dismissed pursuant to Rules 32.3 and 32.6(b).

have been applied in an “arbitrary or unprecedented” manner, such that barring litigation of the petitioner’s federal claims on the merits would be “manifestly unfair.” *Card v. Dugger*, 911 F.2d 1494, 1516-17 (11th Cir. 1990). None of these three conditions are satisfied here. The Court of Criminal Appeals routinely tangles its unfair application of Rule 32.6(b) with an analysis of the merits of Mr. Price’s claims under federal law. Moreover, even if all of those conditions were satisfied, a petitioner who, like Mr. Price, “substantially complied” with a state rule remains entitled to federal review. *Lee*, 534 U.S. at 382; *Meagher v. Dugger*, 861 F.2d 1242, 1247 (11th Cir. 1988).

(Doc. 28 at 34).

To determine whether a claim is procedurally defaulted or subject to § 2254 examination, the court must determine if “it fairly appears that the state court rested its decision primarily on federal law,” and if the state court’s opinion contains a “‘plain statement’ that [its] decision rests upon adequate and independent state grounds.” *Harris v. Reed*, 489 U.S. 255, 261 (1989).²⁰

²⁰ The Supreme Court reiterated this test in *Coleman v. Thompson*, 501 U. S. 722, 723 (1991), writing,

Since ambiguous state court decisions can make it difficult for a federal habeas court to apply the independent and adequate state ground doctrine, this Court has created a conclusive presumption that there is no such ground if the decision of

This court must therefore determine whether the appellate court's order in Price's case as to these claims fairly appears to rest primarily on resolution of, or to be interwoven with the federal claim, and whether it clearly and expressly relies on an independent and adequate state ground. See *Coleman v. Thompson*, 501 U.S. 722, 735 (1991). Contrary to Price's argument, and excepting the paternal grandmother, the appellate court's decision regarding sub-claims A. 1.(a)-(c) was based primarily on Alabama procedural rules independent of federal law. The court made a plainly stated decision expressly based on state procedural rules.²¹

the last state court to which the petitioner presented his federal claim fairly appeared to rest primarily on resolution of those claims, or to be interwoven with those claims, and did not "clearly and expressly" rely on an independent and adequate state ground. See *Harris, supra*, 489 U.S. at 261, 266, 108 S.Ct at 1042, 1045; *Michigan v. Long*, 463 U.S. 1032, 1040-41, 103 S.Ct. 3469, 3476, 3477, 77 L.Ed.2d 1201. Pp. 2555-2557.

²¹ Admittedly, after the procedural default ruling (and without contextual explanation), the appellate court launched into the following quotation:

“. . . Considering all the evidence introduced during the guilt and penalty phases of the trial, we cannot see how the evidence that the appellant argues should

The petitioner raises a reviewable issue, however, with regard to the claim concerning the paternal grandmother. The appellate court dedicated six pages in its opinion to reviewing the mitigating testimony presented at the penalty phase of the trial and concluded that her testimony would have been cumulative. (Vol. 61, Tab 24 at 29-35). This court finds that the portion of the court's opinion regarding the paternal grandmother relies primarily on or is intertwined with federal law and there is no plain statement by the court that its decision was based

have been elicited at the penalty phase would have had any impact on his sentence. It certainly would not have changed the outcome, and it did not render the sentencing fundamentally unfair or unreliable.”

(Vol. 24, Tab 61 at 29 (citations omitted)). This simply appears to be an observation or afterthought by the appellate court. Stretched to its best limits, it is but a cursory, shorthand examination of the claim. Still, neither the statement standing alone, nor a reading of the procedural default finding and statement together supports a conclusion that the appellate court's decision primarily rested on or was so intertwined with federal law that the *Harris* presumption should apply.

Assuming arguendo, that *Harris* does apply, for reasons stated *infra.*, the state court's decision was neither contrary to or an unreasonable application of clearly established federal law, nor was it based upon an unreasonable determination of the facts in light of the evidence before it.

upon an independent state procedural rule. Thus, this claim is subject to substantive review.

Before addressing the merits of the claim concerning the parental grandmother, this court will address the petitioner's other arguments as to why these witness claims are not procedurally barred. Price asserts two more arguments to support his position that the state's opinion is not adequate to preclude federal review of these claims. Specifically, he alleges the state court arbitrarily and capriciously applied state procedural specificity requirements to procedurally default this claim, and even if it did not, he is still entitled to 2254(d) review because he substantially complied with the state pleading rules.

The conflict over the sufficiency of Price's state court pleadings initially concerns the fact that Price only identified individuals by their relationship to him as opposed to their legal names in the pleadings. Price believes that substitution of a relative, friend or teacher's legal name was by the appellate court. Stretched to its best limits, it is but a cursory, shorthand examination of the claim. Still, neither the statement standing alone, nor a reading of the procedural default finding and statement together supports a conclusion that the appellate court's decision primarily rested on or was so intertwined with federal law that the *Harris* presumption should apply.

Price argues, "Rule 32.6(b) was applied here with unprecedented harshness in a manner inconsistent with established Alabama case law. . .". (Doc. 28 at 23). In its motion to dismiss Price's first Rule 32 petition, the State asserted that Price had not properly provided the names of his witnesses. (Rule 32 C.R., Vol. 11, Tab. 41 at 81). The trial court dismissed the claim in the

first petition with strict instructions that the claim could be reinstated if Price corrected the deficiency about which the State complained. *Id.*, Tab 42 at 1. Price filed an amended petition which contained additional factual support for the claim, but still did not include the names of his mitigating witnesses. The State did not file an amended answer, and it did not discover the proper names of individuals by way of deposition.²² This court fails to see how the State was

²² While being questioned by the State during the deposition, Price identified the family members that should have been contacted as his mother, Judy Files, his stepfather Danny Files, his Aunt Jerri Scott, and his grandmother, Louise Price. (Rule 32 R., Vol. 12, pp. 392-93). Price identified the friends that should have been contacted as Billy Wethington, Jesse Cheney and Kevin Cheney, and the teachers as Mrs. Weeks and Coach Seals. *Id.* at 394-395. The State did not, however, inquire as to the specific mitigating information that would be elicited from each witness.

Later in the deposition, he conferred with his own counsel and at her behest Price identified additional witnesses, those being his grandmother Evelyn Sexton, and friend Danny Ray Davis. *Id.* at 444. He answered that those were the witnesses he could remember, but agreed that it was “possible” there could be other witnesses that could have been contacted during the trial, but that he could not recollect them on the day of the deposition. *Id.* at 444-445.

Several months after the deposition, the State pointed to the deposition as evidence of Price’s failure to disclose and undue delay in support of a second motion to dismiss. (Rule 32 C.R., Vol. 11-12, Tab 43 at 193-245).

prejudiced by the delay, however, the fact remains that Price was instructed to amend his petition to include the legal names of his mitigating witnesses and he did not do so.

The present inquiry, therefore, invites a determination of whether the Alabama courts, in their application of 32.6(b), have routinely required a petitioner in order to meet his burden of pleading to include identification of witness names when factual disclosure of all other aspects of the claim have been met. Although Price offers numerous Alabama state cases as proof that Rule 32.6(b) was arbitrarily applied in his case, none of them involve the pleading insufficiency identified in this case. (Reply (doc. 28) at 24-27). This court cannot find whether Alabama courts have or have not consistently dismissed cases in Price's particular posture for lack of specificity.

The only provided indication that such an application, if it does exist, has been inconsistently enforced is within Price's own case, when the Court of Criminal Appeals lauded the trial court's summary dismissal of the claim for lack of specificity, but simultaneously found a possibility that Price met the pleading requirements with regard to the "paternal

As an aside, the reader is reminded that in the habeas petition, Price describes these witnesses as Hoyt and Louise Price, Teena Barnett, Amy Collins Crosby, Jessie Chaney, Chris Hadder, James Dockins, Alan Davis, Wayne Hamilton, Brenda Edgil and Dale Sears. (Doc. 16 at 15-17).

grandmother,'²³ and then proceeded to conduct a merits review with regard to all evidence pertaining to her.

Other than this instance, however, there is no information upon which it can be determined that the state courts' application of Rule 32.6(b) under these circumstances is inadequate simply because the state court used it in Price's case to dismiss the claim. It would be inappropriate under these facts for this court to find for federal preclusionary purposes that the state procedural rule at issue here must be applied in such a manner that either requires a Rule 32 petitioner to identify or excuses him from identifying a witness by legal name under all circumstances.

Price is also not entitled to a merits review premised on his contention that he substantially complied with the rules. The only basis upon which the state courts ever found his pleadings to lack specificity was on his failure to adequately identify his mitigation witnesses. Yet, Price continually refused to follow the court's written instruction to identify his witnesses by name, and he had a lengthy amount of time and plenty of opportunities to do so. He also had the assistance of counsel, but still failed to act. These actions are not commensurate with an effort to substantially comply with state procedural rules, and Price cannot benefit from this argument. Additionally, the court is not

²³ Perhaps because only one individual in the world could possibly be Price's paternal grandmother. Nevertheless, it still remains identification by relationship as opposed to legal name in a claim where all other factual support for the claim has been fully disclosed.

persuaded by the cases²⁴ cited by Price to support his position. (Reply at 26-28).

²⁴ Particularly, the court is not impressed with the citation to *Lee v. Kemna*, 534 U.S. 362 (2002) and *Meagher v. Dugger*, 861 F.2d at 1242 (11th Cir. 1988). In *Lee v. Kemna*, the petitioner's counsel was in the middle of a jury trial when he discovered several of the witnesses had left the courthouse. These witnesses had been present at all times during the trial up to that point, and there was some indication that a court official told them to leave. Counsel moved for a continuance in order to secure the witnesses, but same was denied. The state court justified the denial of the motion on the grounds that such motions are required to be in writing. The Supreme Court held that, because the circumstances necessitating the motion unfolded before the trial court's eyes during the middle of a jury trial, it was a manifestly unfair for petitioner's counsel to have to file a written motion supporting his need for additional time to secure the witnesses.

Meagher involved an attempt to withdraw a guilty plea by a *pro se* petitioner. The applicable post-conviction rules required such a motion to be made under oath. Meagher did so. Meagher's supporting memorandum was sworn to and notarized. The Florida appellate court refused to acknowledge Meagher had complied with the rule because he did not incorporate his memorandum by reference in his motion to withdraw the guilty plea. The Eleventh Circuit reversed, finding that Meagher had substantially complied with the rule and also commented *pro se* pleadings are held to less stringent requirements.

As to the school records portion of Claim A.1.(c), Price offers no reply to the state court's ruling that this claim was properly dismissed for lack of specificity under Rule 32.6(b). He does strenuously argue throughout the brief that Rule 32.6(b) was improperly applied in his case. The state court dismissed the school records portion for lack of specificity on the ground that Price never described the beneficial information purportedly contained in the record. In light of the contentions advanced in the Rule 32 pleadings by Price on this claim,²⁵ this court finds that the state court determination was arbitrary and capricious. However, as will be discussed below, this court is of the opinion that Price is not entitled to habeas relief as to this claim.

d Counsel were ineffective for failing to adequately interview and properly prepare Price's mother for her penalty phase testimony.

The court addresses sub-claim (d) by examining its appearance in the Rule 32 petition, as quoted in the appellate court's opinion on collateral review. The Alabama Court of Criminal Appeals made the following findings of fact and conclusions of law:

²⁵ The petition alleged that had counsel obtained "records and interviewed Mr. Price's teachers, counsel would have discovered that Mr. Price did well in school and was generally well-behaved in class. Mr. Price maintained good grades and was not remembered as a disciplinary problem or as a student who got into fights." (Rule 32 C.R., Vol. 11, Tab 42 at 99-100).

Claim [A. 1 .d.] of Price's petition alleged that he received ineffective assistance of counsel during the penalty phase of his trial because trial counsel failed to conduct, or engage an investigator to conduct, a reasonable investigation into mitigating circumstances.

"[A.1.d.]. Trial counsel did not adequately interview Mr. Price's mother, Mrs. Judy Files, or prepare her for her penalty phase testimony. Counsel did not inform Mrs. Files of the nature of the questions the defense and prosecution would put to her. As a result of counsel's and Mrs. Files' lack of preparation, Mrs. Files provided short, incomplete answers to the mostly narrow, leading questions that trial counsel herself posed. Had Mrs. Files been adequately interviewed and properly prepared, she would have been able to provide many details about Mr. Price's life, upbringing, and character that were not otherwise presented to the jury and the Court, but which would have been relevant mitigation evidence."

([Rule 32] R. 5.)

Price "has not shown that there was any additional evidence that would have convinced the trial court to change its decision regarding sentencing." *Pierce v. State*, ___ So. 2d at ___, rev'd on other grounds, ___ So. 2d ___ (Ala. 2002). Thus, the trial court correctly ruled that the claim had not been sufficiently pleaded.

Moreover, the judge presiding over the Rule 32 proceedings dismissed this claim based on his "personal knowledge" that defense counsel adequately questioned Mrs. Files

during the penalty phase of the trial. ([Rule 32 C.R.] 313.)

“Thus, the appellant has not shown that there is a reasonable probability that the outcome of his trial would have been different, but for trial counsels’ performance.” *Hamm v. State*, ___ So. 2d at ___ (quoting *Williams v. State*, 782 So. 2d 811, 825 (Ala. Crim. App. 2000), quoting in turn *Brooks v. State*, 695 So. 2d 176, 182 (Ala. Crim. App. 1996). Because Price failed to state a claim upon which relief could be granted, summary disposition of this claim was appropriate.

(Vol. 24, Tab 61 at 26).

This court finds no fault with the state court’s decision that the claim was insufficiently pled. To the extent the Court of Appeals also conducted a short “merits” review, that does not entitle the petitioner to further review by this court. It is entirely appropriate for an appellate court to make an alternate ruling without sacrificing the independence of its procedural default decision. *Thigpen v. Thigpen*, 926 F.2d 1003, 1009 n.17, (11th Cir. 1991).

Additionally, in making this claim in state court, Price alleged his mother only provided short answers to narrow questions elicited at the penalty phase, when she could have been able to provide many details about Mr. Price’s life, upbringing, and character if she had been adequately interviewed and properly prepared. Price never provided any factual support for this conclusory statement. There is absolutely nothing arbitrary in the appellate court’s adherence to the trial court’s finding that this claim was insufficiently pled under state procedural rules. The state court therefore properly

dismissed the claim for failure to follow adequate, independent and fairly applied state procedural rules, and this claim is procedurally defaulted.

Price now also adds that Mrs. Files “failed to disclose” that she frequently whipped him until he was seventeen (17) years old, when his grandmother intervened on the basis that such punishment was “inappropriate and too severe.” (Petition at 17). He also alleges that she did not reveal that she often engaged in sexual relations with men while an adolescent Price was in the same room. *Id.*²⁶ Price complains “there [is] no evidence to suggest [his] counsel had performed a basic investigation to reveal this information.” *Id.* at 18. These are facts that were not timely presented in support of the claim in state court, and as such, are procedurally defaulted from consideration in this habeas petition. Further, the court notes that since the substance of the information pertains to purported abuse by his mother - facts that were well known to Price himself and which could have been easily communicated to counsel - Price’s claim that counsel failed him because the information was not discovered because trial counsel failed to perform “a basic investigation,” particularly when his mother was the only mitigating witness called to testify in his behalf and could have easily been examined on the subject is not persuasive. There is simply no excuse for the delay in failing to raise these particular factual allegations before now.

²⁶ This allegation made its first appearance in a petition for writ of certiorari on collateral review. (Rule C.R. Vol. 22 at 7).

e Counsel were ineffective for failing to engage an independent psychologist to evaluate him.

Price next alleges his trial counsel were ineffective because they did not hire an independent psychologist, nor did they make any effort to “rebut the report of Dr. Karl Kirkland prepared on behalf of the State.” (Petition at 18). Even worse, counsel specifically requested, and was granted permission to hire an independent psychologist for the express purpose of contesting Dr. Kirkland’s report and to prepare a mitigation case, but “inexplicably failed” to do so. *Id.*

Price believes this error was objectively unreasonable and prejudiced his defense because an independent psychologist would have uncovered abuse that Mrs. Files withheld at trial, and additionally would have been able to establish and explain to the jury the causal connection between Price’s piteous childhood, its effect on his “personality and choices as he grew,” and his “family history of mental illness.” *Id.* Such an expert also “may have rebutted Dr. Kirkland’s competency assessment.” *Id.* at 19. He concludes that counsels’ failure to employ a psychologist for him could not have been a matter of strategic decision making “on any level.” *Id.* Because this claim was properly presented in the state courts, it will be examined on the merits.

f Discussion of the merits²⁷

The court begins its merits discussion with the opinion of the Court of Criminal Appeals on collateral review in connection with the mitigating evidence actually presented at trial, that being the testimony of Price's mother, Judy Files. The record shows the following:

[t]he defense obtained the following mitigating evidence from Judy Files, Mr. Price's mother, at his sentencing hearing.^[28]

²⁷ Subclaim A.1.(e) is the only claim for which there is no dispute that § 2254(d) review is necessary. To the extent the merits discussion involves subclaims (a)-(d), (excepting the paternal grandmother and Price's school records), it shall be understood to be an alternate ruling to the finding that subclaims (a)-(d) are procedurally defaulted.

²⁸ Mrs. Files' testimony was redacted by the Alabama Court of Criminal Appeals in its opinion. This court has reviewed the entire examination of Mrs. Files during the penalty hearing. (R. Vol. at 895-908). If there is any testimony by Mrs. Files pertinent to the nature and gravity of Price's piteous childhood that was omitted by the Court of Criminal Appeals, said testimony or summarization thereof will be inserted in bold face type at the appropriate place in the transcript as set out in the appellate court's version.

Additionally, the Alabama Court of Criminal Appeals inserted a footnote in this portion of its opinion, advising that one (1) page of Mrs. Files' testimony (R. Vol. at 904) was absent from the collateral record. Said page

“Q [by defense counsel]: “And tell the Court about your early life with Wallace [Lee Price, Mr. Price’s father] after Chris was born.

“A [by Mrs. Files]: “Well, **when Chris was two we moved to Florida and . . .** Wallace drank a lot. And he made [Mr. Price at age two, drink] a pint of liquor one night till [Mr. Price] got to staggering so bad and he put him in the shower.

“....

“Q **He made Chris drink a pint of liquor?**

“A **Yes, ma’am. Then we moved back to Fayette somewhere around ‘74. And he still drank and ran up and down the roads and beat us.”**

“Q The early years, then of Chris’s life, were you a victim of domestic violence at that time?

“A Yes, ma’am.

“Q Was Wallace Price a batterer? Did he batter you?

“A When he was drinking.

“Q **When he was drinking. If he wasn’t drinking, what was Wallace’s condition?**

is present in the trial record and also will be inserted in bold face type.

“A Good as gold.

“Q Was he a good daddy at that time?

“A Yes, ma’am.

“Q [Did the times when he was a good daddy become fewer and farther between?] Was he drinking more?

“A Yeah. He drank quite a bit there at the last up before I left.

“Q And you’ve said he abused you. Did he abuse Chris in those early years?

“A Yes, ma’am. He poured a bowl of hot macaroni and cheese on his head one night [when Chris was four].

“....

“Q What happened when you tried to stop him? “A I got whipped.

“....

“Q Were there occasions of daily emotional abuse as well as physical abuse?

“A Well not every day, no.”

“Q There [was] emotional abuse as well as physical abuse that Chris endured?

“A Yeah. He saw things that [Wallace] done to me, pulling knives and guns.

“Q There were times when there were violent episodes that happened in your home that Chris witnessed at an early

age?

“A Yes, ma’am.

“Q These were numerous?

“A They got to being regular at the end.

“

“Q Did the abuse get worse and worse for Chris?

“A Yes.

“Q Tell the Court what happened in the summer of 1975 when you and Chris and Wallace were in the channel swimming.

“A [Wallace] tried to drown me in front of [Chris] and he told him, ‘Please, daddy, don’t.’

“Q How old was Chris at that time? “A Three years old.

“Q And he attempted to intervene – “A Yes, ma’am.

“Q - when Wallace tried to drown you. Were there times when Chris witnessed Wallace with weapons that he held to your head?

“A Yes, ma’am.

“Q What happened to Wallace Price?

“A He was shot and killed in ‘77.

“Q And where were you and Chris at that time? “A Amarillo, Texas.

“Q Why were you there?

“A We had left — fled for our life.

“Q For fear of what?

“A Fear [Wallace] was going to kill us.

“....

“Q After Wallace Price died, was there someone else that lived in your home that mistreated Chris?

“A Yes, ma’am. John Harris moved in with us [about a year and a half after Wallace died].

“....

“Q What happened when Johnny Harris lived there and Chris was there?

“A [H]e whipped him one day till he like to beat him to death, and mental abuse, verbal.

“Q Were you working two jobs to support the three of you at that time?

“A Yes, ma’am.

“Q When you discovered that he had nearly beaten Chris to death, what happened to Johnny Harris?

“A I sent him home.

“Q And he was no longer a part of your life? “A No, ma’am.

“Q Following - what happened during the time he lived with you all? Was he a substance abuser, alcohol, drugs?

“A Johnny drank beer is all.

“Q After Johnny, who was the next person in Chris’ life? “A I married Ted Sills from Monticello, Mississippi.

“Q And how long did you and Chris live with him? “A Nearly four years.

“Q What were the conditions when you lived with Ted? “A He drank and smoked pot.

“Q Did he do those things in front of Chris?

“A Yes, ma’am.

“Q Did he verbally abuse Chris?

“A Yes.

“Q Did he physically abuse Chris? “A Well, I never did see that.

“Q Did Chris ever tell you that he had been physically abused when you were not home?

“A Yes, ma’am.

“Q And when did you divorce him?

“A In 1984.

“Q When did you marry Danny Files?

“A In August of ‘85.

“....

“Q [H]e was a positive influence, was he not? “A Yes, ma’am.

“Q During these several years in limbo

after Wallace died, were there occasions when you were having to work two jobs and there was sometimes not enough for food or very little money for food?

“A Well, we always had plenty to eat, but I had to work two jobs sometimes to make ends meet.

“Q And there were occasions when the men in your life didn’t work and you were supporting them as well?

“A Yes, ma’am.

“....

“Q . . . [T]here were long periods of time when you’d be gone for two shifts and [Chris would] be left with someone you now know was a physical abuser?

“A Yes, ma’am.

“Q Were there other significant incidents in Chris’ life that have had a profound effect on him?

“A Well, that just went on, like I said, while I was with them others, long periods of time, you know. . . .

“....

“Q . . . Were there occasions where you had to seek law enforcement intervention to protect yourself and your child from Wallace Price?

“A Yes, ma’am.

“Q Would that happen on more than

one occasion?

“A Well, only one time we had him locked up for trying to - - He was trying to kill me that day.

“Q Were there occasions when you had to call them when the violence escalated?

“A (Witness nodding head)

“Q Were there times when you had to leave your home because you knew the violence was going to escalate?

“A Yes. I had to leave several times.

“Q And Chris would see these escalations?

“A Yes, ma'am.

“Q More than one occasion that Chris would intervene? “A Several times.

“Q And would sometimes he take the beating and sometimes you would take the beating?

“A Well, he would just get slapped and I would take the beating.

“Q Were you ever hospitalized from these beatings?

“A No, ma'am.

“Q Judy, tell the Court overall what kind of a child that Chris has been for you.

“A He didn't give me any trouble till he was seventeen years old.

“Q Was he polite?

“A Yes, ma’am.

“Q Was he respectful?

“A (Witness nodding head).

“Q Did he do what you told him to do?

“A (Witness nodding head).

“Q Did he carry his load in your home?

“A Yes, ma’am.

“Q Did he go to school?

“A On a regular basis.

“Q Make fairly good grades?

“A And he had a job.

“Q He worked when he was in high school?

“A Yes, ma’am.

“Q Isn’t it a fact that he was still in high school, the middle of his senior year, in fact, when this incident happened?

“A Yes, ma’am.

“Q Was [Chris] working [at the time Mr. Lynn was killed]?

“A Yes, ma’am. He worked at D’s Pizza in Winfield.

“Q He was not a lazy child?

“A No, ma’am.

“Q Is there anything else you’d like to tell this Court about Chris?”

“A I know he’s not heartless and I just want things to work out for him.

“Q He is a good, mourningful [sic] individual in your opinion. “A Yes, ma am. I think he’s worth saving.”

(Record from sentencing hearing on direct appeal 896-905. [footnote omitted])

[On cross-examination, Ms. Files denied that she had ever noticed, or that Price had informed her, that he was disturbed by his experiences. On redirect, however, she admitted that during his adolescence, she and Price did have some discussion about the death of his father and history of abuse, but provided no details. *Id.* at 906-07. Additionally, the following colloquy was had between the prosecutor and Ms. Files:

“Q Was Chris himself ever hospitalized on any of these [abuse] occasions?”

“A No, sir.

“Q He never had any injuries that required him to be treated by a doctor?”

“A He just blacked his eyes sometimes and just bruised him, that’s

all.²⁹”

(Vol. 24, Tab 61 at 29-35).

Nothing in the record before this court meets the § 2254(d) standards entitling the petitioner to any relief on the various allegations included in this first claim (Claim A.1.). The state court’s conclusion that trial counsel was not constitutionally ineffective is neither contrary to nor an unreasonable application of federal law, nor an unreasonable determination of the facts in light of the evidence presented to it. With regard to the allegations that trial counsel did not seek out other family members, friends, acquaintances, and school teachers, this court agrees that when all the evidence from both the guilt and penalty phases of the trial are considered, the court cannot conclude that this evidence would have had any impact on his sentence. Contrary to Price’s contention, his mother’s testimony was neither terse nor incomplete. At trial, Price’s mother described, and the jury and trial court heard testimony about a childhood riddled with turmoil. None of the purported mitigating evidence Price would have offered during collateral proceedings constituted information that had not already been revealed by his mother at trial. In addition to describing his piteous childhood, Price’s mother also stated that Price attended school regularly, was a good student, was employed and had never been a disciplinary problem until he was seventeen. There is no reasonable probability, given all of the aggravating and mitigating factors in this case, that testimony from Price’s aunt and paternal grandmother as to their love for him and his artistic skills (in addition to abuse

²⁹ *Id.* at 907.

testimony already given by his mother), would have swayed the jury or the trial court to recommend or sentence Price to life without parole. In sum, this court agrees with the conclusion of the Alabama Court of Criminal Appeals, “It certainly would not have changed the outcome, and it did not render the sentencing fundamentally unfair or unreliable.” (Vol. 24, Tab 61 at 29).

Additionally, there is no factual support for the proposition that Price’s teachers or his school records would have led to any information that was not cumulative to that given by his mother. Finally, with regard to Price’s friends and girlfriend, calling these witnesses could have been a double-edged sword. Prior to the murder, Price already had adult felony criminal convictions on his record. Additionally, in his pre-sentence investigation report, Price informed the probation officer that, at the time of the murder, his teenage girlfriend had been threatening to turn him into authorities for having sexual relations with her as a minor, that she was pregnant, and that he did not have enough money to pay for the abortion. (C.R. Vol. 1 at 196-97). In short, none of the information that could have been offered by his friends, as Price has presented it, would have been compelling, persuasive character evidence in light of Price’s record, and calling his former girlfriend could have been a catastrophe in the making.

Turning to the petitioner’s claim involving the paternal grandmother, the Court of Criminal Appeals stated:

Trial counsel was not ineffective because the paternal grandmother’s testimony, as plead in the petition (and as presented to this Court in

oral argument), would have been cumulative of evidence actually presented at the sentencing hearing by Mrs. Files. That is, that Price was beaten by his father and stepfathers, and had, in general, a very bad early childhood. Unpresented cumulative testimony does not establish that counsel was ineffective. See *Pierce v. State*, — So. 2d at —, rev'd on other grounds, — So. 2d — (Ala. 2002) (“ Trial counsel’s performance was not “outside the wide range of professionally competent assistance simply because they failed to present evidence that would have been cumulative of other evidence presented at trial.”“)

Thus, Price has not shown how his trial counsel’s conduct was deficient or how the outcome of his trial would have been different had his trial counsel performed differently regarding this claim. Therefore, Price has failed to state a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). Because Price failed to state a claim upon which relief could be granted, summary disposition of this claim was appropriate.

(R. Vol. 24, Tab 61 at 35). This court agrees with the Court of Criminal Appeals and finds the purported testimony sufficiently cumulative to preclude any relief.

As to the allegation that trial counsel failed to present mental health testimony as mitigating evidence, the Court of Criminal Appeals made the following findings of fact and conclusions of law:

. . . . The circuit court found trial counsel’s

actions to be a tactical choice.

Here, pursuant to the circuit court's order, an outpatient forensic evaluation report was prepared for Price by Dr. Karl Kirkland, a licensed psychologist and a certified forensic examiner. Dr. Kirkland's report concluded that there was no evidence "of any mental disorder that would, affect [Price's] ability to appreciate the criminality of his behavior or to be able to distinguish right from wrong at the time of the offense." ([Rule 32]C.[R.] 462.)

....

The circuit court concluded in its order that:

"Based on Dr. Kirkland's report, it is entirely impossible for Price to establish that a reasonable lawyer would have sought to obtain a psychologist to testify as to any effect that Price's upbringing had on committing this crime. Dr. Kirkland's report was a guarantee to defense counsel that any such psychologist would face cross-examination on the issue. In addition, defense counsel could be sure that the State of Alabama would call Dr. Kirkland in rebuttal Thus, where Dr. Kirkland would testify without hesitation that, even considering Price's upbringing and

social conditions as a child, there are no mental problems present that would have ever reached the level of severity that would have rendered this individual

incapable of appreciating the criminality of his behavior at the time of this particular offense, ‘a reasonable attorney could decide not to call a psychologist to attempt to draw a line between Price’s upbringing and the capital murder of Bill Lynn.’”

([Rule 32] C.[R.] 322.)

The circuit court continued by stating that it appeared to be reasonable strategy to allow the jury to draw its own conclusions regarding the circumstances of Price’s childhood based on Mrs. Files’s description of Price’s childhood without opening the door for the State to present the opinion of Dr. Kirkland. Counsel’s tactical decision to not present possible mitigating evidence does not render counsel ineffective. (Vol. 24, Tab 61 at 46-48).

To the extent that Price claims that counsel were constitutionally ineffective for failing to hire and call to the stand a psychologist to testify in his behalf. This court disagrees. First, Price’s statement that his expert could have rebutted Dr. Kirkland’s competency assessment is vague, general and conclusory. There is no indication or factual support, much less an independent claim, made by Price to support that he was legally incompetent at the time the crimes were committed.

As for an expert designed solely to explain Price’s personality disorders for mitigating purposes, it is clear counsel requested, was granted money to hire an expert, and then failed to hire an expert to examine Price’s mental history from a mitigating standpoint. Even if this error constitutes objectively deficient counsel under *Strickland* and *Wiggins*, Price must still

show he was prejudiced by the error. This he cannot do. During collateral proceedings, the trial court granted discovery pertaining to his physical and mental health from various corrections facilities, as requested by Price's counsel. Since none of these medical records, or even a factual allegation that could be purportedly supported by the records, has appeared in the record or been made by Price, the court can only assume the records revealed no additional mitigating mental health evidence beneficial to Price.

The appellate court's contention that the jury and trial court had the ability, within each of their decision-making processes, to make the causal connection between Price's grossly piteous childhood and the development of personality disorders, was not an unreasonable interpretation of the facts in light of the evidence before it. Since no expert was called to testify specifically about mental health issues, if anything, Price was afforded an inference in his favor, if for no other reason than the lack of explanation and further elucidation of his mental issues.

Additionally, close examination of the trial court's sentencing order shows that the trial judge indeed made those inferences, in favor of Price. The order reads, *in pare materia*,

STATUTORY MITIGATING
CIRCUMSTANCES

The Court finds that the statutory mitigating circumstances listed in Ala Code § 13A-5-51 (2)(3)(4)(5)(6) are inapplicable. The Court finds that the mitigating circumstance[s] listed in Ala Code § 13A-5-51(1)(7) are applicable.

1. The defendant has no significant

history of prior criminal activity.

The Court finds that this statutory mitigating factor is applicable. The certified records of the Circuit Clerk of Walker County, Alabama show that the defendant plead guilty to charges of: criminal trespass; auto burglary; criminal mischief; and receiving stolen property in September of 1990. All of these crimes appear to be related and arise out of the same series of events.

The record does not show that an application for the defendant to be treated as a youthful offender was filed in these cases. If the convictions were to be set aside, they could still be used to show a history of criminal activity to some degree, however, the court finds that they are not sufficient to indicate a significant history of prior criminal activity.

....

7. The age of the defendant at the time of the crime.

The Court finds that this statutory mitigating factor is applicable. The defendant in this cause was nineteen years of age when he committed the crime and this age was considered by the Court as a mitigating factor.

OTHER RELEVANT MITIGATING
CIRCUMSTANCES

The defendant offered evidence of the following non-statutory mitigating circumstances that the Court deemed to be relevant and which were considered by the Court in weighing the aggravating and mitigating circumstances in determining the sentence to be imposed.

1. The defendant's father was murdered when the defendant was a small child. The Court considered this factor and the possible impact that such a traumatic event could have on the emotional stability of the defendant.
2. The defendant was verbally, physically and possibly sexually abused by a string of live in companions of his mother that occupied his house after the murder of his father.
3. The court file contained and the Court considered a psychological evaluation that indicated that the defendant has been diagnosed as having an antisocial personality and was emotionally disturbed at an early age. This report was considered in conjunction with the evidence of the instability of his home life and the traumatic events that occurred during his early years.

(R. Vol. 1 at 215-18).

It is clear that any evidence that could have been interpreted to be mitigating evidence in Price's favor was construed in that manner by the trial judge. As articulated above by the trial court judge, Price had no

significant criminal history, and detailed his finding by revealing Price had not been offered youthful offender status and that his criminal convictions arose from one continuing act. Additionally, although Price's mother did not testify that Price had been sexually abused, the court surmised the same was possible, and considered this too, as mitigating evidence. Finally, the trial court actually found Dr. Kirkland's assessment of Price's personality disorders to be mitigating evidence in favor of Price because he considered the assessment in conjunction with (*i.e.*, to establish a causal connection to) the evidence of Price's piteous childhood. In fact, the trial judge also expressly reiterated that he found Price's anti-social personality disorder to be a mitigating factor in his Rule 32 opinion. (Rule 32 C.R., Vol. 12 at 323).³⁰

In conclusion, even if it could be said that counsel's investigation was desultory in some areas, examination of the aggravating and mitigating factors actually presented at trial and the evidence Price desired to present during the post-conviction proceeding does not show that there exists a reasonable probability the jury would have recommended life

³⁰ The court has examined Price's submission of an affidavit of Dr. Kimberly Ackerson, a licensed psychologist. (See Doc. 28, Ex. B). He alleges the affidavit shows the penalty phase of his case would have been "strengthened significantly" by an independent psychologist. (Doc. 28 at 42). The affidavit offers nothing of the sort. It is, for the most part, a repeat of Price's petition, and does not sway the court's position.

without parole and the trial court would have not sentenced Price if Price's counsel had presented it. Accordingly, Price cannot show that the state court's decision was contrary to or an unreasonable application of clearly established federal law, nor can he show same was an unreasonable interpretation of the facts in light of the evidence before it. Price's request for habeas relief with regard to Claim A. 1.(a)-(e) is due to be denied.

2. Counsel did not accompany Price to, or advise him in preparation for critical pre-trial and pre-sentencing proceedings. (Paragraphs 42-45 of the petition).

3. Trial counsel requested no penalty phase instructions from the trial court. (Paragraphs 46-47 of the petition).

Price contends that counsel failed to advise him about or accompany him to the probation office in anticipation of the preparation of his pre-sentence investigation report, nor did counsel accompany him to his mental health examination by Dr. Karl Kirkland. (Doc. 16 at 20). He also alleges that “[a] criminal defendant is entitled to the assistance of counsel at all critical stages of pre-trial and trial proceedings under the Sixth Amendment to the United States Constitution.” *Id.* According to Price, his trial counsel's failure to prepare him to speak with Dr. Kirkland violated his Sixth Amendment right to counsel and constituted ineffective assistance. *Id.*

Price also asserts that his trial counsel failed to object to “the admission into evidence of Dr. Kirkland's report.” *Id.* at 21. Specifically, he asserts he

was entitled to a warning that any incriminating statements made by him to Dr. Kirkland could “be used against him at trial, and to counsel’s assistance in evaluating whether to waive his Fifth Amendment protection against compelled testimonial self-incrimination.” *Id.* Further, counsel did not test “the effectiveness of the waiver asserted by the State,” even though it was the State’s burden to show Price’s waiver was “knowing, intelligent and voluntary.” *Id.* Price asserts he was prejudiced as a result of this failure because

[t]he report included an incriminating summary statement of the offense and an incomplete psychological profile. Had counsel objected to the admission of Dr. Kirkland’s report, there is a reasonable probability that the trial court would have excluded the report in whole or in part, and that Mr. Price’s sentence would have been different.

Id. Price further asserts that his counsel failed to provide him assistance at a critical stage of his proceedings because they requested no penalty phase instructions. *Id.*

The respondent asserts that these claims fail to satisfy federal pleading requirements. (Doc. 21 at 51-58). Alternatively, the respondent contends some of the subclaims are procedurally defaulted or that Price has not shown that the state court’s decisions are contrary to or an unreasonable application of clearly established federal law. *Id.*

Since “habeas corpus review exists only to review errors of constitutional dimension,” a habeas corpus petition must meet the “heightened pleading requirements [of] 28 U.S.C. § 2254 Rule 2c.”

McFarland v. Scott, 512 U.S. 849, 856 (1994) (other citations omitted)). The petitioner must specify all the grounds for relief available to the petitioner, state the facts supporting each ground, and state the relief requested. 28 U.S.C. § 2254 Rule 2(c)(1)(2) & (3).

A “general reference to the transcripts, case records and brief on appeal patently fails to comply with Rule 2(c).” *Phillips v. Dormire*, 2006 WL 744387, *1, (E.D. Mo. 2006) (citing *Adams v. Armontrout*, 897 F.2d 332, 333 (8th Cir. 1990)). With regard to the facts supporting his case, the burden of proof is on the habeas petitioner to establish a factual basis for the relief he seeks. *Hill v. Linahan*, 697 F.2d 1032, 1034 (11th Cir. 1983). Consequently, a petitioner must at least state the evidence establishing the alleged constitutional violation. The mere assertion of a ground for relief, without more factual detail, does not satisfy petitioner’s burden of proof or the requirements of 28 U.S.C. § 2254(e)(2) and Rule 2(c), *Rules Governing § 2254 Cases in the United States District Courts*.

Claims A.(2) and (3) are simply a series of conclusory statements, and as such are due to be dismissed pursuant to the procedural rules governing habeas proceedings. Price offers no factual support for what counsel should have done as reasonably competent counsel in those circumstances and proffers no support for why he was suffered any prejudice. Thus, the claims are insufficiently pled for habeas purposes. Because the state court arrived at the same finding, the claims are procedurally defaulted because they were dismissed pursuant to adequate and independent state procedural rules. Even if these claims were not due to be dismissed for failure to comply with federal pleading requirements or because

they are procedurally defaulted, they would also be due to be denied on the merits.

B. Ineffective assistance of counsel at guilt phase

1 Trial counsel did not litigate an important pre-trial motion. (Paragraphs 48-50 of the petition).

Price declares that defense counsel failed to litigate or request a continuance to gather factual evidence in support of a pre-trial motion for change of venue due to “overwhelming pretrial publicity.” (Doc. 16 at 22-23). Specifically, he states that counsel did not even seek “expert assistance to investigate the extent to which the overall county had been saturated with accounts of the crime in the media . . .,” even though [t]he victim was a much loved clergyman of a local church to which a large portion of the jury venire belonged. ^[31] The crime itself was sensational, occurred days before Christmas, and culminated in a multi-state manhunt that led to the out-of-state arrest of Mr. Price approximately ten (10) days after the crime. The petit jury venire was selected for a specially scheduled session of criminal court.^[32] When the trial was continued for one week, the entire special session was postponed; even the State was aware that a substantial portion of the venire would be disqualified

³¹ There is no citation to the record to support this bald assertion.

³² While there are hints in the record that Price’s case was specially set, Price provides no citation to the record showing that the case was specially set simply because of publicity concerns. Again, this is a bald assertion.

during voir dire because of the controversial and high-profile exposure of Mr. Price's case. *Id.* at 23.

Price has not shown that the denial of his ineffectiveness claim pertaining to the motion for change of venue, as it was presented to the state court in collateral proceedings, in any way violates or unreasonably applies the *Strickland* standard and its progeny, nor does it represent an unreasonable determination of the facts in light of the evidence. Price has failed to present a factually or legally supported claim of ineffectiveness. He further proffered no evidence of any media coverage at the Rule 32 hearing other than the newspaper articles already presented at trial. Thus, Price has not shown his trial counsel were objectively deficient for failing to further research and present evidence concerning the subject, nor has he presented any evidence to show there was a reasonable likelihood the outcome of his trial would have been different had that evidence been presented. This claim is due to be denied.

2 Trial counsel did not conduct nor ensure that the trial court conducted adequate voir dire of potential jurors. (Paragraphs 51-53 of the petition).

Price complains that his trial counsel conducted an inadequate individual *voir dire* of the jury venire by “fail[ing] to ask routine questions designed to discover relationships potential jurors may have had with witnesses at trial and organizations to which the victims or witnesses belonged.” (Doc. 16 at 23-24). Specifically, he asserts that counsel was unable to tell if certain venire persons held biases as a result of their personal relationships with witnesses, and/or affiliations with

law enforcement or religious entities. *Id.* at 23-24. Price also complains that counsel failed to “object to the inadequacy of the trial court’s *voir dire*” after the parties and the court were made aware of a glib conversation that had taken place between two jurors, in the presence of other venire persons, concerning the type of murder weapon purportedly used in the crime. *Id.* at 24.

The respondent answers that the foregoing allegations fail to satisfy federal pleading requirements; the claims are procedurally defaulted because they were summarily dismissed pursuant to state procedural rules; and, the petitioner has not shown that any state court ruling on the merits is contrary to or an unreasonable application of clearly established federal law. (Doc. 21 at 67-74).

The court’s review of this claim shows that it is due to be dismissed as vague and conclusory. Alternatively, it is procedurally defaulted. Still further, the court finds that Price has failed to show he is entitled to any federal relief pursuant to 28 U. S.C. § 2254(d).

C The trial court erred when it denied Price’s motion for change of venue despite a clear showing of prejudicial and pervasive media coverage and potential juror knowledge of the case, thus violating his right to a fair trial and due process of law. (Paragraphs 54-60 of the petition).

Price next declares the trial court erroneously denied his motion for change of venue, even though he presented sufficient evidence to show the “county [in which he was convicted was] soaked with prejudicial publicity[.]” (Doc. 16 at 24-27). In support of his

contention, he quotes portions of trial counsel's *argument* in support of the motion for change of venue and refers to newspaper articles - both of which were delivered and admitted immediately after the jury was selected. *Id.* at 25 and (R. Vol. 3, at 364-67). He also declares that every juror except Joey Simmons had heard of the case before trial, and it is "likely" that six jurors may have been prejudiced by a glib exchange that took place about the perpetrator and the use of an axe during the crime. *Id.* at 27.

1. Pre-trial Publicity and Change of Venue-General Constitutional Law.

In *Meeks v. Moore*, 216 F.3d 951, 960-61 (11th Cir. 2000), the Eleventh Circuit announced:

The law on pretrial publicity as it relates to the necessity for a change of venue is clear. The standards governing this area derive from the Fourteenth Amendment's due process clause, which safeguards a defendant's Sixth Amendment right to be tried by a panel of impartial, indifferent jurors. The trial court may be unable to seat an impartial jury because of prejudicial pretrial publicity or an inflamed community atmosphere. In such a case, due process requires the trial court to grant defendant's motion for a change of venue.

Coleman v. Kemp, 778 F.2d 1487, 1489 (11th Cir. 1985) (internal citations and quotation marks omitted). [FOOTNOTE OMITTED] This does not mean, however, that a defendant is entitled to a change of venue whenever potential jurors have been exposed to the facts of the case.

It is not required . . . that jurors be totally

ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Irvin v. Dowd, 366 U.S. 717, 722-23, 81 S. Ct. 1639, 1642-43, 6 L. Ed. 2d 751 (1961).

A defendant is entitled to a change of venue if he can demonstrate either “actual prejudice” or “presumed prejudice.”

To find the existence of actual prejudice, two basic prerequisites must be satisfied. First, it must be shown that one or more jurors who decided³³ the case entertained an opinion, before hearing the evidence adduced at trial, that the defendant was guilty. Second, these jurors, it must be determined, could not have laid

³³ The word “decided” references only those individuals who are chosen as jurors in a defendant's case. See *Spivey v. Head*, 207 F.3d 1263, 1270 (11th Cir. 2000). Therefore, venirepersons who are not chosen as jurors are immaterial to the actual prejudice standard.

aside these preformed opinions and rendered a verdict based on the evidence presented in court. *Coleman v. Zant*, 708 F.2d 541, 544 (11th Cir. 1983) (internal citations and quotation marks omitted). If a defendant cannot show actual prejudice, then he must meet the demanding presumed prejudice standard.

Prejudice is presumed from pretrial publicity when pretrial publicity is sufficiently prejudicial and inflammatory and the prejudicial pretrial publicity saturated the community where the trials were held. The presumed prejudice principle is rarely applicable, and is reserved for an extreme situation [W]here a petitioner adduces evidence of inflammatory, prejudicial pretrial publicity that so pervades or saturates the community as to render virtually impossible a fair trial by an impartial jury drawn from the community, jury prejudice is presumed and there is no further duty to establish bias. *Kemp*, 778 F.2d at 1490 (internal citations and quotation marks omitted); *see also Manning v. State*, 378 So. 2d 274, 276 (Fla. 1979) (“[A] determination must be made as to whether the general state of mind of the inhabitants of a community is so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely on the evidence presented in the courtroom.”). *Meeks v. Moore*, 216 F.3d at 960- 61.³⁴

³⁴ *See also, Mills v. Singletary*, 63 F.3d 999, 1009 (11th Cir. 1995) (quoting *United States v. De La Vega*, 913 F.2d 861, 864-65 (11th Cir. 1990), *cert. denied*, 500 U.S. 916 (1991); *United States v. Lehder-Rivas*, 955 F.2d 1510, 1525 (11th Cir. 1992), *cert. denied*, 506 U.S.

To determine whether [a petitioner] has established presumed prejudice, we examine whether: (1) the pretrial publicity was sufficiently prejudicial and inflammatory; and (2) the publicity saturated the community in which the trial was held. *See Coleman*, 708 F.2d at 544 (relying on *Murphy v. Florida*, 421 U.S. 794, 798-99, 95 S. Ct. 2031, 2035-36, 44 L. Ed. 2d 589 (1975); *Rideau v. Louisiana*, 373 U.S. 723, 726-27, 83 S. Ct. 1417, 1419-20, 10 L.Ed.2d 663 (1963); and *Mayola v. Alabama*, 623 F.2d 992, 997 (5th Cir.1980), *cert. denied*, 451 U.S. 913, 101 S. Ct. 1986, 68 L. Ed. 2d 303 (1981)). This court has repeatedly noted that the principle of presumed prejudice “is rarely applicable and reserved for extreme situations.” *Bundy v. Dugger*, 850 F.2d 1402, 1424 (11th Cir. 1988), *cert. denied*, 488 U.S. 1034, 109 S. Ct. 849, 102 L. Ed. 2d 980 (1989); *Woods v. Dugger*, 923 F.2d 1454, 1459 (11th Cir.), *cert. denied*, 502 U.S. 953, 112 S. Ct. 407, 116 L. Ed. 2d 355 (1991). *Mills v. Singletary*, 63 F.3d at 1010. A proper inquiry involves review of a “number of factors [to] determin[e] whether the totality of the circumstances raise” the presumption of prejudice. *Patton v. Yount*, 467 U.S. [1025,] 1030 [(1984)]. A trial court’s findings concerning this issue will be overturned “only for ‘manifest error.’” *Id.* (citing *Irvin v. Dowd*, 366 U.S. at 723).

2 Price’s case.

a The state appellate court’s opinion.

The Alabama Court of Criminal Appeals examined this claim and found as follows:

924 (1992)).

The appellant argues that the trial court improperly denied his motion for a change of venue, because, he says, he made a clear showing of media saturation and because of the potential jurors' familiarity with the facts of the offense. In his brief on appeal, the appellant cites language by defense counsel in his motion for a change of venue specifically alluding to the fact that the victim was well known in the community, and that the crime was very sensational based on the fact that the victim was a preacher and it was committed during the Christmas season.

....

In the present case, in support of his motion for a change of venue, the appellant introduced a number of newspaper articles from the Fayette County Times-Record and the Tuscaloosa News. The articles introduced by the appellant were released approximately a year before the appellant was brought to trial. They were neither inflammatory nor prejudicial to the appellant. There was no showing that the pretrial publicity had so saturated the community as to have a probable impact on the prospective jurors.

. . . . An extensive and thorough voir dire examination was conducted wherein 6 venire members indicated that they had not heard or read about the offense. Of the remaining venire members, 8 prospective jurors who indicated that they may have been partial were struck for cause. The remaining venire members were individually questioned; 4 of these potential

jurors were thereafter excused as the questioning revealed possible partiality. The others all stated that they could disregard any pretrial publicity and render a fair and impartial verdict based solely on the evidence presented at trial. Thus, the appellant has also failed to show the existence of any actual jury prejudice.

There has been no showing of “manifest error” by the trial court concerning the findings of impartiality of the jury and there has been no showing of abuse of discretion by the trial court in overruling the appellant’s motion for a change of venue.

Price v. State, 725 So. 2d at 1049-51.

b. Price’s claim and argument.

In his petition and reply brief, Price fails to recognize the distinction between actual prejudice and presumed prejudice. In doing so, he also fails to separate those facts that are pertinent to the actual prejudice standard from those that are pertinent to the presumed prejudice standard.

i Actual prejudice.

The only facts alleged by Price that are pertinent to the actual prejudice standard are:

- (1) his declarations that every juror except Joey Simmons had heard of the case before trial, and
- (2) that it was “likely” six jurors may have been prejudiced by a comment about the perpetrator and an axe that occurred during voir dire. (Doc. 17 at 27).

These facts are insufficient to demonstrate actual prejudice for a number of reasons.

First, simply asserting that a juror “heard” of the case before trial completely fails to state a constitutional claim under the actual prejudice standard. In order to show actual prejudice, Price must demonstrate that a particular juror (or jurors) held a fixed opinion about the case because of the publicity, and said juror(s) could not set aside that opinion in order to render a decision based solely upon the evidence and the law.

Second, the assertion that six (6) jurors “likely” were prejudiced by a glib courtroom comment by one venireperson about whether “the man, the gun, or the trigger” caused the murder, to which another venireperson responded that he heard it was the axe, also fails to state such a claim. Price has simply failed to show the jurors developed any opinion, much less a fixed opinion concerning the exchange, and he certainly has not shown that the jurors could not have decided the case according to the evidence and the law.

This court finds that Price has failed to show he suffered actual prejudice such that the trial court’s refusal to change venue³⁵ was either contrary to or involved an unreasonable application of clearly established federal law, or was based upon an unreasonable determination of the facts in light of the evidence before it.

³⁵ While this court agrees with the state court’s conclusion that Price failed to show he was actually prejudiced by pre-trial publicity, it does not agree with the appellate court’s inclusion of individuals who were not chosen as jurors in its actual prejudice analysis.

ii. Presumed Prejudice.

Price alleges he met the presumed prejudice standard through media coverage and *voir dire*. The court will examine each factor, and Price's position, to determine whether the state court's decision was contrary to or an unreasonable application of clearly established federal law, or an unreasonable determination of the facts based upon the evidence before it.

1 Media Coverage.

As factual support for this aspect of his claim, Price attempts to characterize trial counsel's oral argument as evidentiary proof that media coverage of his case was both prejudicial and pervasive. (Doc. 16 at 25-26) and (R. Vol. 3 at 366-67). In actuality, 16 pages of newspaper articles constitute the only media evidence counsel submitted in support of the motion. (Doc. 26).³⁶

³⁶ Immediately after *voir dire*, defense counsel argued the motion for change of venue and in support thereof offered "Defendant's Exhibit 1" into evidence. She identified Exhibit 1 as "[A]ll the newspaper articles except for the last three days probably." (R. Vol. 3 at 368). The Exhibit was titled by the trial's court reporter as "Defendant's Hearing Exhibit 1," and is described as 16 pages of newspaper articles. (See court reporter's index of trial exhibits at R. Vol. 2 at 7 of the record filed by the respondent). These articles were not filed along with Price's habeas petition, so the court issued an order to expand the record to include "Defendant's Exhibit 1." On January 17, 2007, the parties filed a copy of "Defendant's

Thus, trial counsel's oral argument shall only be considered to the extent that she alleged the newspaper articles established prejudicial and pervasive publicity.

Before continuing, it is important to note that in his reply brief, Price alleges that while he believes the "prejudicial pre-trial clippings" submitted at trial were sufficient evidence supporting the motion for change of venue, he also has supplemental evidence of additional newspaper articles that have never before been presented. (Doc. 28 at 57). Attached to the reply brief at Exhibit C is a six page list of various newspaper articles, revealing only the date, newspaper and caption of each article. Price offers to submit the articles at the court's behest and insists that, "at the very least, [he] is entitled to an evidentiary hearing to supplement the record demonstrating prejudicial pretrial publicity" because "[t]o the extent that 'the material facts were not adequately developed at the state court hearing,' *Townsend [v. Sain]*, 372 U.S. [293] at 313 [(1963)]," that failure should be attributed to "trial counsel's ineffectiveness and the trial court's own failure to demand greater proof to support the motion for change of venue when it was abundantly clear that such proof was available." *Id.*

Price additionally argues that his case is "exactly" like the petitioner in *Coleman v. Zant*, 708 F.2d 541, 546 (11th Cir. 1983), wherein the Eleventh Circuit ordered an evidentiary hearing when, "through no fault of the petitioner, it was 'impossible to determine what kind of coverage emanated from local television

Exhibit 1." (See Exhibit 1 to Doc. 26).

and radio programs to which Seminole County residents were exposed.’ 708 F.2d 546. In that case, exactly as in this one, trial counsel had referenced ‘extensive radio and television coverage’ but did not submit documentary evidence to substantiate it. *Id.*” (Doc. 28 at 57).

Price’s argument is without merit for several reasons. First, *Coleman* was decided prior to AEDPA, which as stated earlier, places more stringent limitations on the scope of habeas review. This claim is presented as one of trial court error only, and pursuant to 28 U.S.C. § 2254(d), the scope of this court’s review is limited to determining whether the state appellate court’s decision to uphold the trial court’s denial of the motion was contrary to or an unreasonable application of clearly established federal law, or based upon an unreasonable determination of the facts in light of the evidence before it. In short, based upon the manner in which Price has presented the substantive claim, this court has no authority to allow Price to expand the factual basis for his claim to the extent he proposes, and make a 2254(d) decision that includes those facts.

Price attempts to persuade this court otherwise by contending that “any incompleteness in the record was due to the failings of trial counsel and the circuit court, not Mr. Price.” *See* 28 U.S.C. § 2254(e)(2) (an evidentiary hearing can only be denied where the petitioner himself “failed to develop” the factual record below). (Doc. 28 at 58). Again, this argument is without merit. Section 2254(e)(2) cannot be interpreted as applying only to Price as an individual. If that were the case, then federal district courts would be constantly re-litigating substantive constitutional claims that have already been exhausted and decided

on the merits during the direct review process.

Moreover, what Price fails to note is that the Eleventh Circuit granted Coleman's request for an evidentiary hearing because his state post-conviction attorney repeatedly tried, but

was unable, through no fault of his own, to bring live witnesses to the state habeas hearing. At the time of that hearing, Ga. Code Ann. § 38-801(e) limited the state habeas court's subpoena power by providing that a subpoena for attendance at a hearing or trial could be served only within 150 miles of the hearing or trial situs. The habeas judge rejected petitioner's constitutional attack on that statute. Record on Appeal, at 251-53. Since material witnesses resided more than 150 miles from the location of the state habeas hearing, and since many of these witnesses were hostile and unwilling to testify voluntarily, State Habeas Hearings, vol. I, at 18; *id.*, vol. II, at 22-23, it is clear that petitioner was unable to bring live witnesses to the state habeas hearing. Petitioner was also effectively precluded from obtaining the testimony of such witnesses by oral deposition, because petitioner was indigent and the state habeas court declined to provide funds which would have been necessary to pay a court reporter or stenographer to transcribe such depositions. State Habeas Hearings, vol. I, at 29 & 34-35; *id.*, vol. II, at 22. Although petitioner apparently could have compelled witnesses to answer written interrogatories or to file sworn affidavits, respondent has not argued either in brief or at oral argument that petitioner's failure to pursue such alternatives, or that any other

acts or omissions, constituted inexcusable neglect or deliberate bypass. Moreover, it is uncertain at best whether such methods would have been effective to elicit from hostile witnesses the subtle and complex facts relative to the degree of prejudice in the community at the time of the trial. Under the particular circumstances of this case, the failure to adduce the missing material facts “cannot realistically be regarded as ... [petitioner’s] inexcusable default.” *Townsend v. Sain*, 372 U.S. at 322, 83 S. Ct. at 762.

Coleman v. Zant, 708 F.2d at 548. Unlike *Coleman*, there is no evidence whatsoever that Rule 32 counsel (and certainly not trial counsel³⁷) repeatedly attempted to obtain and present evidence of additional media coverage, but were continually thwarted by any state court. Additionally, federal precedent demands the burden be placed upon the defendant’s trial counsel to persuade the trial court that a motion for change of venue is necessary. Price has not previously alleged

³⁷ Admittedly, a reading of *Coleman* appears to show that the Eleventh Circuit ordered an evidentiary hearing be held on the substantive motion for change of venue claim, even though it was the post-conviction trial court who refused to allow counsel to obtain the records necessary to prove that claim. As stated earlier, *Coleman* was decided in a pre-AEDPA climate. Regardless, it makes no difference to the court’s analysis, and to the extent *Coleman* and 28 U.S.C. 2254(e)(2) mesh with regard to whether an applicant failed to develop the factual basis of a claim in State court proceedings.

that the trial court must do so *sua sponte* and, in any event, points to no Supreme Court case that places the onus on the trial judge to satisfy this burden.

For the foregoing reasons, Price has not established any federal constitutional or statutory basis upon which this court can consider the supplemental evidence, and Price's motion for an evidentiary hearing in which to do so is due to be denied. The additional articles are nothing more than an attempt to submit new facts in support of this claim, facts, which Price could have presented or attempted to present at any time during direct or collateral review, but failed without any explanation to do so.

Regarding the 16 newspaper clippings admitted into evidence at trial, this court observes that the clippings constitute nine newspaper articles generated between December 24, 1991, and February 5, 1992 (within six weeks of the murder). Seven of the articles were published in *The Tuscaloosa News*, a Tuscaloosa County, Alabama, newspaper and two of the articles were published in *The Times-Record*, a Fayette County, Alabama newspaper. Price complains the articles are evidence of pervasive prejudice because

. . . . Mr. Lynn's funeral made the front page of the *Tuscaloosa News*, and the funeral director called it the most well-attended funeral he had seen in ten years. See Ex. A, [to Doc. 26] at 7. ("Minister Touched Many Lives", Jan. 5, 1992). The local media focused on the gruesomeness of Mr. Lynn's death, the beating and robbery of Lynn's wife, and the fact that the crime took place just before Christmas. *Id.* [³⁸]

³⁸ The court has carefully examined the January 5,

A large number of the articles dealing with the crime specifically discussed Mr. Price at length and always portrayed him in the most unsympathetic light. [³⁹] The front page article in the *Tuscaloosa News* reporting on Mr. Lynn's funeral referred to Mr. Price's prior criminal record for auto theft and reported that he had been seen the day after the murder riding around in a pickup truck with the sign "Bad Boys" displayed in the back window. *Id.* [⁴⁰] Another

1992, article, and other than the title of the article, finds none of the information about which Price complains. *See Exhibit A to Doc. 26 at 7.*

³⁹ This sentence is insufficient to state a claim for relief. That the papers may have discussed Price extensively does not automatically suffice as evidence the discussion was prejudicial. Additionally, to the extent Price complains the articles portrayed him in the most "unsympathetic light," the sentence is too conclusory to satisfy federal pleading requirements. It is not the responsibility of the court to comb through the clippings and determine what might be unsympathetic comments and the number of those comments. The court does acknowledge the sentence may simply be a prefatory one, with the remainder of the paragraph being Price's factual evidence in support thereof.

⁴⁰ Although not specifically cited by Price, this can be none other than the January 5, 1992 article in *The Tuscaloosa News*. (Exhibit A to Doc. 26 at 7).

story ran under the inflammatory headline “Stabbing Kills Their Christmas.” *Id.* at 13 (*Tuscaloosa News*, Dec. 25, 1991).^[41] A third reported that clothes fitting the description of what Mrs. Lynn said her attackers were wearing had been found at Mr. Price’s residence. ^[42] The story even included an inflammatory picture of Mr. Price laughing with his co-defendant, Bookie Coleman, while in custody, giving the misleading impression he lacked all remorse. *Id.* at 16 (“2 Bound Over in Killing of Minister in Fayette,” *Tuscaloosa News*, Feb. 4, 1991).^[43] Most telling of all, perhaps, a December 30, 1991 editorial in the *Tuscaloosa News* reported that Price and his codefendant were previously

This front page article has a picture of Mr. Lynn’s grave site, with the caption underneath stating that the flowers at his grave were “evidence of the deep community sentiment for the slain minister.” *Id.* In the body of the article, the staff writer comments that the community was shocked for two reasons: first by Lynn’s death and, “Another [reason] is a sign spotted by a resident on a suspects pickup truck the day after the slaying. It read, “Bad Boys.” *Id.*

⁴¹ This is from a December 25, 1991, article in *The Tuscaloosa News*. *Id.* at 13.

⁴² This is from a February 5, 1992, article in *The Times-Record*, a Fayette County newspaper, reporting the testimony from the preliminary hearing. *Id.* at 11-12.

⁴³ Price is incorrect. The photograph is from a February 4, 1992, article in *The Tuscaloosa News*. *Id.* at 16

charged with “rape, sodomy, receiving stolen property” - prior bad acts that would not have been admissible at trial.”⁴⁴ *Id.* at 6; see also Ala. R. Evid. 404(b); *Marshall*, 360 U.S. at 313. The editorial summed up the sentiment that the local press conveyed to the potential jury pool: “Why are bad people allowed to prowl the street, so often to stalk new victims?” Ex. A at 6.

(Doc. 28 at 54-55).

After careful examination of the articles about which Price complains, this court cannot say that the appellate court’s denial of relief is contrary to or an unreasonable application of clearly established federal law. Some of the offending information Price contends is contained within certain articles is simply nonexistent. Other highlighted offensive information, such as the “Bad Boys” sign and reports of clothing being found at Price’s mother’s residence, is largely factual, and therefore cannot be deemed prejudicial under the present circumstances. See *United States v. De La Vega*, 913 F.2d 861, 865 (11th Cir. 1990) (relief intended for extreme situations).

Prejudice is not presumed simply because jurors were exposed to inadmissible evidence in that the defendant’s criminal record was publicized. *Mills v. Singletary*, 63 F.3d 999, 1012 (11th Cir. 1995) (quoting *Marsden v. Moore*, 847 F.2d 1536, 1543 (11th Cir.), *cert. denied*, 488 U.S. 983 (1988); *cf. Bundy v. Dugger*, 850 F.2d 1402, 1425 (11th Cir. 1988)).

⁴⁴ At this juncture, Price asserts in footnote that “In fact, Mr. Coleman alone had been charged with rape and sodomy.” *Id.* at 55, n.27.

This court does not find the headline (“Stabbing Killed Their Christmas”) complained of by Price to be so inflammatory and sensational that it should be deemed constitutionally prejudicial. While the article describing Price as “laughing” on his way out of the courtroom is inflammatory, it was not, as alleged by Price, published in a Fayette County newspaper. It was actually published in *The Tuscaloosa News*.

Even if the articles did contain inflammatory and sensational information⁴⁵, Price has failed to show the community was saturated by it. The court has before it only nine newspaper articles, and only two out of the nine articles were published in the county where the crime occurred. Of the two articles published in Fayette County, he makes a specific complaint about one, and that was an article containing testimony from the preliminary hearing to the affect that clothing had been discovered at Price’s mother’s home. Price has never made an attempt to show the circulation numbers of either of these newspapers to residents in Fayette County, Alabama, during the time period at issue. He has not shown that any

⁴⁵ For instance, although not mentioned by Price, the court finds that there is some information in the articles that could be considered inflammatory. An example would be an article in which Sheriff Turner comments that the Lynn case has been wrapped up by the arrests of Price and Coleman and that law enforcement were comfortable that Price and Coleman had committed the crime. (Exhibit 1 to Doc. 28 at 14-15 (December 30, 1991 article from *The Tuscaloosa News*)).

members of the jury venire read any of the offensive articles. Additionally, all of the offending articles were published within six weeks of the murder. Price's case came to trial approximately one year after the publication of the last article. The length of time between these publications and the trial significantly reduces any prejudice Price could have possibly suffered. "That time soothes and erases is a perfectly natural phenomenon familiar to all." *Patton v. Yount*, 467 U.S. at 1034 (other citations omitted).

Price has failed to show that the state court's determination on this issue was a decision contrary to § 2254(d). By way of example, the court compares Price's supporting evidence to that presented in the landmark Supreme Court case of *Irvin v. Dowd*. In *Irvin*, the defendant showed that 46 articles, many containing very prejudicial information, were published and delivered to 95% of the households in Gibson County, Indiana (pop. 30,000), during the seven months immediately preceding Irvin's trial. *See* 366 U.S. at 724. *Irvin* demonstrates how substantial and overwhelming prejudicial and pervasive pretrial publicity must be in order to gain constitutional attention in the context of a motion for change of venue.

2 Voir Dire.

Price next declares that "*voir dire* itself" showed the jury pool was "clearly prejudiced by media saturation and local gossip[]" because only six members out of the 50 member pool⁴⁶ had not heard of Price's case. (Doc. 16 at 26). Price also alleges that

⁴⁶ Number apparently derived from R. Vol. 3 at 368-72.

“[t]he jurors’ answers during individual questioning revealed an all out media blitz that included radio, television and print coverage.” *Id.* The only factual basis Price offers for this “blitz” assertion is that venireperson Holliman said there had been radio, television and newspaper coverage of the event, and that “everybody” was saying Price was guilty. *Id.* Venireperson Blackwell had read five news accounts of the murder and “specifically mentioned the Tuscaloosa News.” *Id.* Venireperson Husk said the Fayette paper treated Price’s upcoming trial as a “big thing.” *Id.* Finally, venireperson Sanderson said she had heard from her husband, a deputy sheriff, that Price confessed. (Doc. 28 at 55).

Additionally, Price alleges that all of the *jurors* in his case, except one, had heard of his case. Finally, during individual *voir dire*, six of the jurors may have overheard a glib conversation between venireperson Shepherd and another venireperson concerning the purported murder weapon. (Doc. 16 at 27).⁴⁷

The relevant question at this juncture is “whether the jurors at [petitioner’s] trial had such fixed opinions that they could not judge impartially the guilt of the defendant.” *Patton v. Yount*, 467 U.S. at 1035. Price makes no comment regarding the relevant question, and certainly makes no argument that the state appellate court’s decision that those potential

⁴⁷ Price also comments that the Grand Jury must have been affected by the publicity, and therefore the indictment should be dismissed as well. This conclusory allegation is insufficient to satisfy § 2254(d).

jurors having fixed opinions failed to establish presumed prejudice.

The Eleventh Circuit has observed that a “low percentage of veniremen excused for prejudice resulting from pretrial publicity is strong evidence of the absence of prejudicial community bias.” *Spivey v. Head*, 207 F.3d 1263, 1271 (11th Cir. 2000) (citation and internal quotation marks omitted). Compare *Patton v. Yount*, 467 U.S. at 1029 (77% of venire admitted they would carry an opinion into the jury box), and *Irvin v. Dowd*, 366 U.S. at 727 (62% excused for cause) with *Mills v. Singletary*, 63 F.3d 999, 1011-12 (11th Cir. 1995) (holding that the jury was not prejudiced, even though 70 of 84 venirepersons (83%) had some knowledge of the case, 55 (65%) had read at least one newspaper article about the case, and 24 (28.6%) were stricken for cause).

Faced with the foregoing statistics, and understanding that “a trial court’s findings [regarding] juror impartiality may ‘be overturned only for “manifest error,””⁴⁸ Price has fallen short of showing that the appellate court’s findings of fact and conclusions of law regarding pretrial publicity and *voir dire* are contrary to or an unreasonable application of clearly established federal law. This claim is due to be denied.

⁴⁸ *Mu’Min v. Virginia*, 500 U.S. 415, 428-29 (1991) (citing *Patton v. Yount*, 467 U.S. 1025, 1031(1984) (quoting *Irvin v. Dowd*, 366 U.S. at 723).

D. The trial court's exclusion of five jurors based on erroneous applications of the *Witherspoon/Witt* standard, violated Mr. Price's rights to due process, to a fair trial, and to a fair and impartial jury, as guaranteed to him by the federal constitution. (Paragraphs 61-64 of the petition).

Price alleges that his right to a fair trial, impartial jury, and due process of law were violated⁴⁹ during *voir*

⁴⁹ In his reply brief, Price claims "[t]he sole ground upon which these perspective jurors were excluded was that they had indicated, to varying degrees, that they would never consider voting to impose the death penalty - a position perfectly compatible with the Alabama death statutes and the applicable jury instructions." (Doc. 28 at 63-67). Price then argues that Alabama statutory law does not *require* a juror to vote in favor of death; therefore a juror can state that he would never recommend death under any circumstances, and still be in compliance with his oath as juror to follow Alabama law. *Id.*

After careful examination of this claim as presented by Price on direct appeal (C.R. Vol. 8, Tab. 26 at 27-28), it is apparent that this particular argument has never been presented before now, and as such, the court finds that it is procedurally defaulted. Alternatively, the argument is dependent on state law, a topic beyond federal habeas corpus jurisdiction. Finally, and as a second alternative, the argument has no merit. The proper focus is not on the whether jurors are not required to recommend the death penalty under

dire because the trial court erroneously granted the State's *Witherspoon/Witt* challenges against venirepersons Ray Enis, Harriet Kemp, Ruby Little, Ruby Nalls and Christopher Savage. (Doc. 16 at 27). Price admits these venirepersons "did express reluctance to impose the death penalty," but argues the challenges should not have been granted without discovering and properly deciding "whether they could obey their oath, notwithstanding their views on capital punishment." *Id.* at 28. The respondent counters that the affirmation of the trial judge's decision was neither contrary to or an unreasonable application of clearly established Federal law, nor an unreasonable interpretation of the facts in light of the evidence before it. (Doc. 22 at 36 (citing 28 U.S.C. § 2254(d)).

This claim, as raised by Price on direct appeal, reads in pertinent part as follows:

Prospective jurors Ray Enis (R. 145-48, 186), Harriet Kemp (R. 221-25), Ruby Little (R. 226-27), Ruby Nalls (R. 258-60), and Christopher Savage (R. 294- 98), were challenged for cause by the State after brief questioning about their beliefs on the subject of capital punishment. None, however, was asked

Alabama law, but whether the jurors will fairly and impartially consider evidence of aggravating and mitigating circumstances. The ability of a juror to follow his oath by considering and giving effect to evidence of aggravating factors within the scheme of Alabama death penalty law is substantially impaired if the juror would never, under any circumstances, recommend the death penalty.

specifically whether they could obey their oath, notwithstanding their views on capital punishment. Absent such an inquiry, the record cannot support an exclusion for cause. *See Morgan v. Illinois*, 112 S. Ct. 2222 (1992).

(C.R. Vol. 8, Tab. 26 at 27-28) (underlined in original).

The Alabama Court of Criminal Appeals made the following findings of fact and conclusions of law concerning this issue.

The appellant also argues that the trial court erred by granting five of the prosecutor's challenges for cause of prospective jurors, based on their views concerning the death penalty. One was challenged without exception, the removal of another was specifically objected to as the removal of a black potential juror, while the grounds for the objections to the challenges of the remaining three are unclear.

Three of the potential jurors indicated clearly that they would never return an advisory verdict of the death penalty and that they could not consider that option. Although the appellant argues that their removal was improper because, he says, they were never specifically asked whether they could obey their oath, notwithstanding their views on capital punishment, the record indicate (sic) that these potential jurors were fully informed of what their duties as jurors would be in considering all of the evidence, following the trial court's instructions, and arriving at an advisory verdict.

Another of these prospective jurors,

during her questioning, gave one possibly equivocal response concerning whether she could look at both sentencing options; however, she subsequently reaffirmed her firm stand against the imposition of the death penalty.

The last of these prospective jurors was extensively questioned because, on follow-up questioning by defense counsel, he stated that the option of the death penalty “could pass through [his] mind.” Defense counsel then echoed the potential juror’s statement, acknowledging that he could then consider that option, to which the potential juror responded, “Yes.” The trial court then questioned the potential juror in order to clarify his responses and explain his duty to consider the death penalty. The potential juror then responded that he could never consider imposing or recommending the death penalty, but apparently he could consider only the abstract concept of the death penalty.

Each of these potential jurors was fully informed as to their prospective duties and questioned as to the effect the consideration of the imposition of the death penalty might have on their ability to serve as a fair juror. These five jurors explained that they could not, under any circumstance, consider the death penalty as a possible sentence and were properly excluded. *Witherspoon v. Illinois, supra*. In *Wainwright v. Witt*, 469 U.S. 412, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985), the United States Supreme Court held that the determination of whether a prospective juror in a capital murder case is properly excluded based on the juror’s views concerning the death penalty involves a

question of fact. Therefore, a proper review of this determination requires that we give great deference to the trial judge's discretion, because the judge was present and capable of observing the potential jurors and their responses.

“Last Term, in *Patton [v. Yount]*, 467 U.S. 1025, 104 S. Ct. 2885, 81 L. Ed. 2d 847 (1984)], we held that a trial judge's finding that a particular venireman was not biased and therefore was properly seated was a finding of fact We noted that the question whether a venireman is biased has traditionally been determined through *voir dire* culminating in a finding by the trial judge concerning the venireman's state of mind. We also noted that such a finding is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province. Such determinations were entitled to deference even on direct review.

...

“*Patton's* holding applies equally well to a trial court's determination that a prospective capital sentencing juror was properly excluded for cause.

...

“. . . The trial judge is of course applying some kind of legal standard to what he sees and hears, but his predominate function in determining juror bias involves credibility

findings whose basis cannot be easily discerned from an appellate record. . . .” 469 U.S. at 428-29, 105 S. Ct. at 854-55. *See also Reynolds v. United States*, 98 U.S. 145, 156-57, 25 L. Ed. 244 (1878) (“[T]he manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words. That is seen below, but cannot always be spread upon the record. Care should, therefore, be taken in the reviewing court not to reverse the ruling below upon such a question of fact, except in a clear case.”). *See also Stewart v. State*, 405 So. 2d 402, 407-08 (Ala. Cr. App. 1981), overruled on other grounds, *Ex parte Cobb*, 703 So. 2d 871 (Ala. 1996); *Nobis v. State*, 401 So. 2d 191, 198 (Ala. Cr. App. 1981), cert. denied, 401 So. 2d 204 (Ala. 1981).

In the present case, there is no indication that the trial court abused its discretion in determining that these potential jurors should properly be excused for cause based on their views concerning the imposition of the death penalty.

Price v. State, 725 So. 2d at 1025-26.

Prior to engaging in discussion regarding whether the opinion of the Court of Criminal Appeals is contrary to or an unreasonable application of clearly established federal law, this court turns to the Supreme Court’s developmental description of its *Witherspoon* jurisprudence as set out in *Morgan v. Illinois*, 504 U.S. 719 (1992). The Supreme Court wrote,

Witherspoon limited a State’s power broadly to exclude jurors hesitant in their ability

to sentence a defendant to death, but nothing in that decision questioned “the power of a State to execute a defendant sentenced to death by a jury from which the only venire men who were in fact excluded for cause were those who made unmistakably clear that . . . they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them. . . .” 391 U.S., at 522, n.21, 88 S. Ct., at 1777, n.21 (emphasis in original); *see also id.*, at 513-514, 88 S. Ct., at 1772-1773.

In *Wainwright v. Witt*, 469 U.S. 412, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985), we revisited footnote 21 of *Witherspoon*, and held affirmatively that “the State may exclude from capital sentencing juries that ‘class’ of veniremen whose views would prevent or substantially impair the performance of their duties in accordance with their instructions or their oaths.” 469 U.S., at 424, n.5, 105 S. Ct., at 852, n.5; *see also Lockett v. Ohio*, 438 U.S. 586, 595-96, 98 S. Ct. 2954, 2959-60, 57 L. Ed. 2d 973 (1978). Indeed, in *Lockhart v. McCree* we thereafter spoke in terms of “‘*Witherspoon*-excludables” whose removal for cause “serves the State’s entirely proper interest in obtaining a single jury that could impartially decide all of the issues in [a capital] case.” 476 U.S., at 180, 106 S. Ct., at 1768. From *Witt*, moreover, it was but a very short step to observe as well in *Lockhart*:

“[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. *Ipsa facto*, the State must be given the opportunity to identify such prospective jurors by questioning them at voir dire about their views of the death penalty." 476 U.S., at 170, n. 7, 106 S. Ct., at 1763, n.7.

This passage in *Lockhart* expanded but briefly upon what we had already recognized in *Witt*:

"As with any other trial situation where an adversary wishes to exclude a juror because of bias, then, it is the adversary seeking exclusion who must demonstrate, through questioning, that the potential juror lacks impartiality. It is then the trial judge's duty to determine whether the challenge is proper." 469 U.S., at 423, 105 S. Ct., at 852 (citation omitted; emphasis added).

....

[J]urors - whether they be unalterably in favor of, or opposed to, the death penalty in every case - by definition are ones who cannot perform their duties in accordance with law, their protestations to the contrary notwithstanding.

Morgan v. Illinois, 504 U.S. at 732-33.

Since the appellate court did not publish the names of the venirepersons in its opinion, this court has carefully reviewed the opinion in conjunction with the *voir dire* of Ray Enis, Harriet Kemp, Ruby Little, Ruby Nalls and Chris Savage in order to determine whether the appellate court's findings of historical fact and its legal conclusion that the trial court did not abuse its discretion by excusing them should afford Price

28 U.S.C. § 2254(d) relief. The colloquies at trial show the following:

1 Ray Enis

Ray Enis, a black male, was the first person to answer when the State asked the entire venire who opposed the death penalty. (R. Vol. 2, Tab. 45 at 145). Mr. Enis stated, “I’m a fixed mind. I just don’t believe in [it].” *Id.* Enis then answered twice that he would not vote for the death penalty under any circumstances. *Id.* All attempts by defense counsel to rehabilitate Enis were fruitless and he continued to answer unequivocally that he was a “fixed-minded” person when it came to his opposition to the death penalty, and that he would never recommend the death penalty, even if the defendant were Adolf Hitler. *Id.* at 147-48.

Citing his fixed opinion against the death penalty, the State made a *Witherspoon* challenge. *Id.* at 185-186. Defense counsel objected to his disqualification, but *only* on *Batson* grounds because of Enis’ race. *Id.* Mr. Enis was excused.

The Alabama Court of Criminal Appeals employed the correct legal standard, addressing whether Enis’ views on the death penalty would prevent or substantially impair his duty as a juror in accordance with instructions given him by the court and his oath. Not only was the court’s resolution not “contrary” to Supreme Court precedent, it also was not an unreasonable application of it. Enis unmistakably expressed the view that his opposition to the death penalty was even stronger than the obligations imposed by his oath as a juror. There was no *Witherspoon* error in this case as to Mr. Enis’ exclusion. Consequently, it cannot be said that the

Court of Criminal Appeals' rejection of this claim was contrary to, or an unreasonable application of, Supreme Court precedent. This claim is due to be denied.

2 Harriet Kemp

The trial judge asked Ms. Kemp, a black female, if she could consider both the death penalty and life without parole as punishment. (R. Vol. 3 at 221). She responded, "I'm afraid I would. I'm against the death penalty." *Id.* After being asked three additional clarifying questions by the court, Ms. Kemp responded that she was "not for the death penalty," that she would only recommend life without parole as punishment and that she would not, under any circumstances, recommend death as punishment. *Id.* at 222. When defense counsel questioned Ms. Kemp regarding her anti-death stance, Ms. Kemp steadfastly answered that she would never consider the death penalty as punishment, even if the defendant were Adolf Hitler. *Id.* at 224.

The State challenged Ms. Kemp on *Witherspoon* grounds. *Id.* Defense counsel responded, "And, Your Honor, for the record, I would put on the record that Ms. Kemp is a black female and that she's just been challenged for cause by the State." *Id.* at 224-25. The trial judge then asked the State if the challenge was based on the answers Kemp had just given, and the

State answered, "Yes, sir." *Id.* at 225. The trial judge then asked, "You do not challenge her because of her race?", to which the State replied, "We challenge her . . . under the *Witherspoon* case, Your Honor, which says that they are properly excluded if they are against the death penalty under all

circumstances. And that's what she said." *Id.* The trial judge excused Ms. Kemp. *Id.*

Like Mr Enis, Ms. Kemp expressed her complete opposition to the death penalty. By default, therefore, it would have been impossible for her to satisfy her oath, as a juror, to follow the law. This is precisely the type of juror envisioned by the Supreme Court when upholding the right of the state to have an impartial jury composed of people not automatically predisposed against the death penalty. Furthermore, defense counsel proffered no opposition to the State's *Witherspoon* challenge. Accordingly, to the extent Price's claim pertains to Ms. Kemp, it is without merit, and is due to be denied.

3 Ruby Little

The trial judge instructed Ruby Little, a white female, that Price's case was a capital case; *e.g.*, if Price were found guilty, "the jury would also be called upon to recommend one of two punishments, either the death penalty or life without parole." *Id.* at 225. When asked if she could consider both the death penalty and life without parole as punishment, Ms. Little answered, "Life on parole." *Id.* at 225-26. In response to further questioning by the trial judge, Ms. Little stated twice that she did not believe in capital punishment. *Id.* at 226.

Counsel were then given an opportunity to question Ms. Little. The defense asked Ms. Little if she could ever consider the death penalty as an option, and she answered, "No, I don't think so." *Id.* Additional defense questions resulted in Ms. Kemp responding that she "[didn't] know" if her opinion would make it difficult to listen to the evidence and make a decision in the case, and she "[didn't] know" and "couldn't say" if

there were any cases in which she would think the death penalty was appropriate. *Id.* The State asked no questions.

The trial judge again asked Little if she could, “[u]nder any circumstances”, vote for the death penalty, and she replied, “I don’t think I would vote for the death penalty.” *Id.* at 227.

The State immediately moved to strike Ms. Little for cause, and defense counsel objected “based on the Sixth, Eighth and Fourteenth Amendments to the United States constitution and the Alabama constitution.” *Id.* The trial court granted the challenge, whereupon the State made it a “point . . . for the record [to assert] . . . that [Ms. Little] is a white lady and that the State is consistent in challenging jurors who have fixed opinions against the death penalty under any circumstances.” *Id.*

The Alabama Court of Criminal Appeals employed the correct legal standard with regard to Ms. Little’s ability to sit as a juror. Not only was the state court’s resolution not “contrary” to Supreme Court precedent, it also was not an unreasonable application of it. Ms. Little’s responses, even from the cold record⁵⁰, clearly showed the obligations imposed by

⁵⁰ Assuming *arguendo*, it could be suggested that Ms. Little’s answers were possibly ambiguous based on dry reading of the trial transcript, Price still cannot overcome the presumption of correctness accorded the state court in connection with its findings of historical fact, and as such, he has not provided sufficient evidence to entitle him to habeas relief. *See Hightower v. Schofield*, 365 F.3d 1008, 1040 (11th Cir. 2004) (“Given the difficulty of reviewing such equivocal

her oath as a juror would be substantially impaired by her opposition to the death penalty. There was no *Witherspoon* error in this case. Consequently, it cannot be said that the Alabama Court of Criminal Appeals' rejection of this claim was contrary to, or an unreasonable application of, Supreme Court precedent. As such, Price cannot obtain *habeas* relief on this claim under

§ 2254(d), and it is due to be denied.

4 Ruby Nalls

The trial court explained to Ms. Nalls, a black female, that if the jury found Price guilty of a capital offense, it would then have to recommend a punishment of life without parole or death. *Id.* at 257-58. He then asked Ms. Nalls if she could recommend or consider “each of these options,” to which she responded, “I have to give you an answer?” *Id.* at 258. The court replied, “Yes, you do. I’ll ask you very specifically, would you consider the death penalty, that being the most serious?” *Id.* Ms. Nalls said, “No.” *Id.* The court then twice asked if there were any circumstances under which she would consider the death penalty, and she answered, “No, I could not[.]” and “No.” *Id.* at 259.

answers from the cold record, years after they were uttered, it is obvious why [reviewing courts] accord great deference to trial judge determinations of juror bias.”) (citing *Wainwright v. Witt*, 469 U.S. 412, 429-30 (1985) (holding that a trial court’s determination of juror bias is a matter of fact, to be reviewed as such under 28 U.S.C. § 2254)), *vacated and remanded on other grounds*, 545 U.S. 1124 (2005).

Defense counsel then asked Ms. Nalls if she could consider the death penalty, and Nalls again replied, “No.” *Id.* Twice more she was asked if she thought there were any circumstances under which death would be appropriate and she replied, “No, I don’t know[]” and “No.” *Id.* at 259-60. In fact, she agreed it would be difficult for her to listen to guilt evidence knowing that the death penalty option could follow. *Id.* at 260.

The State immediately challenged her for cause, to which defense counsel noted for record that Ms. Nalls was a black female, and objected on the Sixth, Eighth and Fourteenth Amendments to the United States constitution and its Alabama constitutional counterparts. *Id.* Nalls was excused.

Ms. Nalls repeatedly expressed her complete opposition to the death penalty and consideration of it as punishment under any circumstances. Therefore, it would have been impossible for her to follow the law. Consequently, it cannot be said that the Alabama Court of Criminal Appeals’ rejection of this claim was contrary to, or an unreasonable application of, Supreme Court precedent. Price cannot obtain *habeas* relief on this claim under § 2254(d), and it is due to be denied.

5 Christopher Savage

The trial court judge afforded Mr. Savage, a black male, the same preliminary instruction as Ms. Nalls. *Id.* at 293-94. He then asked if Savage could consider both life without parole and the death penalty as punishment options, to which Savage stated, “Probably life without parole.” *Id.* at 294. The court then asked Savage if he was expressing that “under no circumstances” would he consider the death penalty,

and Savage answered, “No, sir. No death penalty.” *Id.* When asked again, Savage answered that he would only consider the death penalty if Price wanted and requested to be sentenced to death. *Id.* at 294-95.

Defense counsel then asked Savage several times if there were some circumstances under which he would believe death was appropriate (including if the defendant were Adolf Hitler or Charles Manson) and Savage replied, “No.” *Id.* at 295. Questions thereafter by defense counsel centered on whether Savage could “consider” the death penalty, and Savage stated yes, to the extent it could “Pass through [his] mind.” *Id.* at 296. The trial court then stated, “I think the question has to be directed to whether or not you could consider imposing it . . . not if you would think that there is such a thing as the death penalty” *Id.* at 297. Savage interrupted, asserting, “I would oppose it.” *Id.* The conversation further went,

THE COURT: You might consider it and recognize that it exists, but aren't you stating to this Court rather affirmatively that you would never under any circumstances consider imposing it - -

[SAVAGE]: No, sir.

THE COURT: - - or implementing or recommending?

[SAVAGE]: Like I said, could pass through my mind, but I couldn't see frying somebody, committing murder.

Id. at 297.

The prosecutor even asked Savage if there were any circumstances he would vote for the death penalty

after a capital murder conviction where death or life without parole were options, and Savage stated, “I still have to go for life without parole.” *Id.*

There was no *Witherspoon* error in this case in excluding Mr. Savage because he was vehemently opposed to the death penalty and could not, under any circumstances, consider it as punishment for a capital offense. The Alabama Court of Criminal Appeals’ rejection of this claim was not contrary to, or an unreasonable application of, Supreme Court precedent. This claim is due to be denied.

E. The prosecution’s pervasive misconduct during closing arguments at the guilt phase of trial] requires reversal under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. (Paragraphs 65-70 of the petition).

Price alleges the prosecutors, in violation of his right to a fair trial, due process of law and a reliable verdict, engaged in “[five instances] of inflammatory, extraneous . . . and unfounded arguments” during closing at the trial’s guilt phase - arguments that “[i]ndividually and collectively” require his conviction to be reversed “under the Fifth, Sixth, Eighth and Fourteenth Amendments.” (Doc. 16 at 29 and 32, respectively). Price declares, in direct opposition to the respondent’s answer (doc. 22, pp. 40-48), that the Alabama Court of Criminal Appeals’ holding⁵¹ that

⁵¹ No objections were voiced to any of the comments at trial. When the comments were brought to the attention of the Alabama Court of Criminal Appeals, a plain error review was conducted pursuant

these statements were not improper was contrary to and unreasonably applied clearly established Supreme Court precedent[,]” and additionally denied him “a fundamentally fair trial[.]” (Doc. 28, p. 74).⁵²

1. Improper reference to the “tireless effort” of law enforcement.

In his petition, Price characterizes the above allegation in the following manner:

[Prosecutor Johnston] talked to the jury about the amount of time and effort the police and sheriff’s departments had put into prosecution of Mr. Price. These remarks were improper. The effort expended by law enforcement personnel in bringing a case to trial is irrelevant to the question of guilt. When Mr. Johnston told the jury that law enforcement agents’ work on the case would be “without any result” should they

to Rule 45A of the Alabama Rules of Appellate Procedure. *Price*, 725 So. 2d at 1027.

⁵² In his reply brief, Price contends that the appellate court found all prosecutorial comments about which he complained to be proper and thus made no findings regarding prejudice. (Doc. 28 at 78-89). *See also, Price v. State*, 725 So. 2d at 1026-32. Based upon this premise, he argues that if this court finds appellate court’s findings regarding propriety are contrary to or an unreasonable application of clearly established law, or based on an unreasonable determination of the facts in light of the evidence before it, then the habeas standard of review for the prejudice prong of the claim is *de novo*.

not consider the evidence, he was asking for a guilty verdict on the basis of - or at least heavily influenced by - the number of hours logged by the police rather than by whether the State had met its burden of proof. In asking the jury to consider the evidence with an eye toward police workload, Mr. Johnston denied Mr. Price a fair trial.

(Doc. 16 at 29). Price did not object to Johnston's statement at trial, and when the claim was raised on direct appeal, the Alabama Court of Criminal Appeals found "no error in this argument by the prosecutor [as it properly] concerned the strength of the State's case and implored the jurors to consider the acts and evidence presented." *Price*, 725 So. 2d at 1027-28. The court examined the pertinent portion of Johnston's statement in its entirety:

During his closing argument, the prosecutor made the following comments to the jury:

"Now, the Sheriff's Department and the-- his people and the detectives in Chattanooga, the friends in Chattanooga, all these people have come here to testify. They have gathered all the evidence that they know about in this case. And we've done our best to trace it all the way through and bring it into the courtroom for your consideration. But, of course, the jury has the authority to decide this case, whether Chris Price is guilty or innocent. Whatever the police officers have done, whatever the detectives have done, whatever all these

witnesses have done, whatever the laboratory people have done, is without any result unless the jury will seriously consider these facts and this evidence.”

The appellant argues that these comments served to pressure the jury to convict the appellant because of the prosecutor’s exhortations that all of the prosecution personnel had put a great deal of work into obtaining this conviction; thus, the inference to be drawn was that it was the jury’s duty to convict the appellant and that justice could be done only by returning a conviction. The appellant cites *Arthur v. State*, 575 So. 2d 1165, 1185 (Ala. Cr. App. 1990), *cert. denied*, 575 So. 2d 1191 (Ala. 1991), in support of his argument. [⁵³] However, this case is distinguishable from *Arthur*. In *Arthur* the prosecutor erroneously argued to the jury that it could do its job only

⁵³ Price’s appellate brief reads,

Arguments which, in effect, exhort the jury to “do justice” by returning a conviction imply that “in order to do so, it can only reach a certain verdict, regardless of its duty to weight the evidence and follow the court’s instructions on the law.” *Arthur v. State*, 575 So. 2d 1165, 1184 (Ala. Cr. App.) (citing *U.S. v. Young*, 470 U.S. 1, 18 (1985)), *cert. denied*, 575 So. 2d 1191 (Ala. 1990).

(R. Vol. 8, Tab. 26 at 34).

by convicting the appellant, “regardless of its duty to weigh the evidence and to follow the court’s instructions on the law.” [FN3] In the present case, however, the prosecutor clearly stated that the work done by the prosecution would be “without any result unless the jury will seriously consider the facts and this evidence.” Thus, the prosecutor did not argue that the jury should convict the appellant, despite the evidence and law. Rather, his argument was that, a consideration of the facts and evidence presented by the prosecution should persuade the jury that a prima facie case had been presented to support a conviction.

The present claim fails to identify any Supreme Court precedent to support his conclusion that the Court of Criminal Appeal’s decision was contrary to or an unreasonable application of clearly established federal law. (Doc. 16 at 29 & 32). Although his reply brief somewhat repeats the initial claim by alleging that prosecutor Johnston’s statement improperly suggested “that the State’s ‘effort’ in gathering evidence . . . was relevant to the jury’s assessment of the weight of that evidence[,]” the brief also is devoid of any precedential support.

Nevertheless, since Price’s appellate brief relied on *Arthur v. State* (which in turn quoted *United States v. Young*), and the appellate court arrived at its conclusion by distinguishing *Arthur* from Price’s case, this court has examined *Young* to determine whether Price’s claim merits § 2254(d) relief. After comparing the factual and legal findings of the *Price* and *Young* cases, it is obvious that Price cannot rely on *Young* to

show that the appellate court's ruling in his case was contrary to or an unreasonable application of clearly established federal law.

In *Young*, the Supreme Court did find that “[t]he prosecutor . . . was in error to try to exhort the jury to ‘do its job’⁵⁴; that kind of pressure . . . has no

⁵⁴ Earlier in the opinion the Supreme Court had written:

Finally, the prosecutor addressed defense counsel's claim that respondent had acted with honor and integrity. The prosecutor briefly recapped some of the respondent's conduct and stated:

“I don't know whether you call it honor and integrity, I don't call it that, [defense counsel] does. If you feel you should acquit him for that it's your pleasure. I don't think you're doing your jobs as jurors in finding facts as opposed to the law that this Judge is going to instruct you, you think that's honor and integrity then stand up here in Oklahoma courtroom and say that's honor and integrity; I don't believe it. . . .”

Young, 470 U.S. at 5-6.

place in the administration of criminal justice[.]” *United States v. Young*, 470 U.S. 1, at 18 (additional citation omitted). Regardless, the Supreme Court found neither this comment nor the combination of any of several other improper prosecutorial comments resulted in an unfair trial, in part, because of the “overwhelming evidence” of Young’s guilt of the crime with which he was charged. *Id.* at 19. The Court wrote,

The prosecutor’s remarks cannot be said to rise to the level of plain error. Viewed in context, the prosecutor’s statements, although inappropriate and amounting to error, were no such as to undermine the fundamental fairness of the trial and contribute to a miscarriage of justice.

United States v. Young, 470 U.S. at 16 (other citations omitted).

The *Price* and *Young* cases are not materially indistinguishable. And even if the court were to assume, for the sake of argument, that it was unreasonable for the state court to refuse to apply the rationale underlying *Young*’s improper argument determination in a manner which required it find that the comment in *Price*’s case was improper, *Young* still affords *Price* no relief. That is because [i]mproper arguments [only] render [a trial] fundamentally unfair and require reversal when there is a reasonable probability that they changed the outcome of the case. *See id.* at 1402. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 1401 (quoting *Strickland v. Washington*, 466 U.S. 668, 669, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). *Spivey v. Head*, 207 F.3d 1263, 1275-76 (11th Cir. 2000).

Since the guilt phase evidence against Price was overwhelming, there is simply no reasonable probability that the jury would have acquitted Price had the remark not been made. “The comment [did not] ‘so infect[] the trial with unfairness as to make the resulting conviction a denial of due process.’” *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974)). This claim is due to be denied.

The court also notes that the petitioner has inserted an additional, but closely related, legal theory to support this claim in his reply brief. Specifically, Price declares “[t]he further implication of the prosecutor’s statement was that the amount of effort the State had put into the case - at both the investigative and prosecutorial levels - reflected the State’s belief in Mr. Price’s guilt[.]” (Doc. 28 at 75). Price further argues the comment was “even more ‘clearly improper’” because the Eleventh Circuit has ruled that it is inappropriate for the state to suggest it “‘only prosecute[s] the guilty[,]’”, and therefore the jury should be “‘heavily persuaded’” by the state’s decision to prosecute. *Id.* (quoting *Brooks v. Kemp*, 762 F.2d 1383, 1410 (11th Cir. 1985)), *Hall v. United States*, 419 F.2d 582, 587 (5th Cir. 1969)).

This theory was not raised in the trial court, on direct appeal, in petitioner’s Rule 32 petition, or on collateral appeal from the denial of his Rule 32 petition.⁵⁵ Price’s failure to raise this claim until now

⁵⁵ The respondent’s answer and brief do not address this aspect of Price’s claim because the legal support for the claim did not make its first appearance

means that it is procedurally barred from review. *Bailey v. Nagle*, 172 F.3d 1299, 1305 (11th Cir. 1999) (quoting *Picard v. Connor*, 404 U.S. 270, 276 (1971)) (claims are procedurally defaulted when the petitioner “deprived the state courts of ‘the first opportunity to hear the claim sought to be vindicated in a federal habeas proceeding’”).

Even if the claim - as characterized in the reply brief - was ripe for review, the court does not find that the prosecutor’s remark was improper for the new reason proposed by Price. The remark cannot reasonably be interpreted to have been one which encouraged the jury to convict Price because the prosecutor only sought convictions in cases in which the defendant was truly guilty. More importantly, Price cannot show his trial was rendered fundamentally unfair by the remark, regardless of the related theories behind its alleged impropriety.

2 Vouching for State Witness Micah Donaldson’s Credibility

Price next alleges the prosecution improperly vouched for the credibility of “the State’s key witness, Micah Donaldson, . . . [by telling the jury that] ‘there wasn’t any reason in the world for him to lie’ and . . . Donaldson ‘ha[d] no interest in this case whatsoever.’” (Doc. 28 at 76 (quoting R. Vol. 3 at 386, and citing *United States v. Eyster*, 948 F.2d 1196, 1206 (11th Cir. 1991), *United States v. Morris*, 568 F.2d 396, 402 (5th Cir. 1978)).⁵⁶ Specifically, Price contends

until Price filed his reply brief in this action.

⁵⁶ In his reply brief, Price explains his reliance on *Eyster* and *Morris*, by writing:

this error was especially prejudicial because Mr. Donaldson's testimony was critical to the state's case. His testimony contradicted the statement Mr. Price had given to Chattanooga authorities by placing the sword that killed the victim in Price's hands. The fact that both Mr. Johnston and Mr. Moore felt the need to vouch for Mr. Donaldson's veracity shows how important they considered his testimony to their case. Concluding Mr. Donaldson's testimony was truthful was key to the jury's deliberations; without the prosecutorial error, there is a reasonable probability that the outcome of the trial would have been different. The jury would have acquitted Mr. Price, or found him guilty of felony murder rather than capital murder, or

See Eyster, 948 F.2d at 1206 (holding that the prosecution cannot “place[] the prestige of the government behind the witness, . . . mak[e] personal assurances of the witness’ veracity, or implicitly vouch[] for the witness’ veracity by indicating that information not presented to the jury supports the testimony”); *United States v. Morris*, 568 F.2d 396, 402 (5th Cir. 1978) (holding that the “prosecuting attorney committed an error when he stated that the government officers who testified had no interest in the case” and expressing “dismay[] that an attorney would make this statement to a jury.”).

(Doc. 28 at 76).

could have sentenced him to life without parole rather than death. [⁵⁷]

(Doc. 16 at 30).

In examining Price's claim on direct appeal, the Alabama Court of Criminal Appeals made the following findings of fact and conclusions of law.

The appellant argues that the prosecutor improperly vouched for the credibility of State's witness Micah Donaldson, the appellant's friend in Chattanooga with whom he stayed following the offense and in whose home he was eventually apprehended. Donaldson testified that the appellant told him that he had murdered Bill Lynn and that he planned to deny having killed Lynn. The prosecutor, in his rebuttal argument at the guilt phase, commented on this evidence, stating:

“All right. What about some other evidence, testimony to identify who that person was? What was said from the witness stand? When you listen and look

⁵⁷ Although Price contends prosecutor Moore also “vouched” for Donaldson, the only factual allegations for this claim are based on prosecutor Johnston's comments at the guilt phase of trial. Moreover, Price provides no support for his conclusory assertion that Johnston's comment rendered the penalty phase of his trial unfair. These factually vague and legally unsupported interjections fail to satisfy the specificity requirements for pleadings under the Federal Rules Governing Habeas Cases.

at the evidence that applies, you remember to take into account who has a self interest in this thing. Who is going to say something to cover themselves up? He told Micah Donaldson in Chattanooga, 'I did it. It's true.' That's the words he said. 'It's true. I did it.' I killed the man. That's exactly what I said. It wasn't the police. Micah Donaldson, there wasn't any reason in the world for him to lie about that, none. He has no interest in this whatsoever."

....

There was no impropriety by the prosecutor making these comments proper inferences from the evidence[.]

Price, 725 So. 2d at 1029. The appellate court utilized a comparison case to explain why it found Johnston's statement to be a permissible inference from the evidence, as opposed to personal vouching. The court stated:

Similarly, in *DeBruce v. State*, 651 So. 2d 599 (Ala. Cr. App. 1993), *aff'd*, 651 So. 2d 624 (Ala. 1994), the prosecutor argued to the jury that a State's witness was telling the truth and that the robbery/murder occurred just as the witness had testified. The prosecutor further argued that a defense witness was not telling the truth, but had presented "a baldfaced lie." *Id.* at 610. This Court found no impropriety by the prosecutor's comments, stating:

"A distinction must be made between an argument by the prosecutor personally

vouching for a witness, thereby bolstering the credibility of the witness, and an argument concerning the credibility of a witness based upon the testimony presented at trial. '[P]rosecutors must avoid making personal guarantees as to the credibility of the state's witnesses.' *Ex parte Parker*, 610 So. 2d1181 (Ala. 1992). See *Ex parte Waldrop*, 459 So. 2d 959, 961(Ala. 1984), *cert. denied*, 471 U.S. 1030, 105 S. Ct. 2050, 85 L. Ed. 2d 323 (1985).

“Attempts to bolster a witness by vouching for his credibility are normally improper and error.”. . . The test for improper vouching is whether the jury could reasonably believe that the prosecutor was indicating a personal belief in the witness' credibility. . . . This test may be satisfied in two ways. First, the prosecution may place the prestige of the government behind the witness, by making explicit personal assurances of the witness' veracity. . . . Secondly, a prosecutor may implicitly vouch for the witness' veracity by indicating that information not presented to the jury supports the testimony.' *United States v. Sims*, 719 F.2d 375, 377 (11th Cir. 1983), *cert. denied*, 465 U.S. 1034, 104 S. Ct. 1304, 79 L. Ed. 2d 703 (1984).

Here, the district attorney did not give any personal assurance of McCant's veracity and did not imply that he had information that had not been presented

to the jury that supported McCant's testimony. 'The credibility of a witness is a legitimate subject of criticism and discussion.' *Flint v. State*, 370 So. 2d 332, 335 (Ala. Cr. App. 1979). Here, as in *Smith v. State*, 344 So. 2d 1239, 1242 (Ala. Cr. App.), *cert. denied*, 344 So. 2d 1243 (Ala. 1977), '[t]he prosecutor's remarks were grounded on some testimony given by the witness himself.' *See also Watson v. State*, 398 So. 2d 320, 328 (Ala. Cr. App. 1980), *cert. denied*, 398 So. 2d 332 (Ala.), *cert. denied*, 452 U.S. 941, 101 S. Ct. 3085, 69 L. Ed. 2d 955 (1981) (reference in closing argument to defendant as a 'bald face liar' was 'a hard blow but it was not foul')."

DeBruce v. State, 651 So. 2d at 610-11. *See also Hunt v. State, supra*, at 942-943. *Price*, 725 So. 2d at 1030-31.

After careful examination of Price's allegations and the opinion of the Court of Criminal Appeals, this court finds that the appellate court's decision was neither contrary to nor an unreasonable application of clearly established federal law. It is well established that a

prosecutor's vouching for the credibility of witnesses and expressing his personal opinion of the guilt of the accused pose two dangers: such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize a defendant's right to be tried solely on the basis of the evidence presented to the jury and the

prosecutor's opinion carries the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence. *See Berger v. United States*, 295 U.S. [78], at 88-89, 55 S. Ct. [629], at 633[, 7 L. Ed. 1314 (1935)].

United States v. Young, 470 U.S. 1, 18-19 (1985).

Price has not shown that the prosecutor's remark, when considered in its entirety, constituted anything but comment based on the evidence. Johnston repeatedly stated that he was drawing the jury's attention to the *evidence* - which in this instance was Donaldson's testimony as heard by the jury from the witness stand. Contrary to Price's argument (doc. 28 at 93), the fact that the prosecutor stated Donaldson had no motivation to lie and nothing to gain, when considered in the context of the entire remark, is not an intimation by the prosecutor that there was additional evidence to which the jury had not been made privy. Moreover, the entire record contains such extensive evidence of Price's guilt that there is no reasonable probability that the jury would have acquitted Price had the prosecutor not made his remarks concerning Micah Donaldson's testimony.

Price has failed to show the state court's decision "was contrary to or involved an unreasonable application of clearly established law" or "was based upon an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." 28 U.S.C. § 2254(d). This claim is due to be denied.

3 Personal opinion.

Price next contends that prosecutor Moore

“attempted to impose his opinion of the proper verdict. . . .” by “announc[ing] to the jury [during his rebuttal closing] that, from his perspective, this was an easy case, [and] the only ‘challenge’ [for the prosecution was] to get the jury to believe that the victim really was stabbed repeatedly in his front yard.” (Doc. 16 at 30). To put the weight of the prosecutor’s office behind such an affirmative opinion of guilt was improper according to Price. *Id.* at 31 (citing *United States v. Molina*, 934 F.2d 1440, 1444 (9th Cir. 1991)).

When examining this claim on direct appeal, the Alabama Court of Criminal Appeals made the following findings of fact and conclusions of law:

The appellant argues that the prosecutor wrongfully injected his own views into the jury’s determination by making the following argument:

“I tell myself, you know, this is easy, you know, an easy case. You have an eyewitness. You have a confession. You have all this evidence. Billy Law and Butch and the sheriff and all of them found it exactly where he said it was, right out there, all of it. The pistol, Barry Corkeren went right to it. You know, locked case.”

However, this comment did not constitute plain error.

“The remark of the State’s attorney was no more than a comment that a certain phase of the State’s evidence was uncontradicted. Certainly, the State’s attorney should be permitted to comment

on the character of the evidence presented by the State and its strength. That certain evidence is uncontradicted tends to show its strength. Our statute does not abrogate the right of the State' [s] counsel to comment on legitimate inferences in this regard.”

Welch v. State, 263 Ala. 57, 58, 81 So. 2d 901, 902 (1955), quoting *Littlefield v. State*, 36 Ala. App. 507, 512-13, 63 So.2d 565, 570, *cert. denied*, 258 Ala. 532, 63 So. 2d 573 (1952). *See also Taylor v. State*, 279 Ala. 390, 185 So. 2d 414 (1966); *George v. State*, 54 Ala. App. 90, 92, 304 So. 2d 908 (1974).

The prosecutor had a right to comment on the strength of the evidence the State had presented and to draw any reasonable inferences from it. There was no impropriety in these comments.

Price, 725 So. 2d at 1031.

Price insists the prosecutor's statement was not merely a comment on the strength of the evidence. (Doc. 28 at 76). To support this conclusion Price argues, “By leading with the phrase, ‘*I tell myself*,’ the prosecution was conveying to the jury its own impressions of the evidence, which rendered the statement clearly improper.” *Id.* (citing *United States v. Kerr*, 981 F.2d 1050- 53 (9th Cir. 1992).

After careful review, it is apparent that Price has failed to show the state court's decision “was contrary to or involved an unreasonable application of clearly established law” or “was based upon an unreasonable determination of the facts in light of the

evidence presented in the State court proceedings.” 28 U.S.C. § 2254(d). Price cites no Supreme Court cases with materially indistinguishable facts to support his contention that the prosecutor’s comment was an impermissible expression of his personal opinion, and the Ninth Circuit case upon which he relies is not binding upon this court.

Whenever a prosecutor predicates an argument with “I believe” or “I think,” it begs the court’s attention for a closer look to determine if together, the predicate and the body of the argument attached to it are truly improper personal opinion, or a comment on the strength of the evidence. However, in this case, the isolated remark taken in context indeed appears to be comment on the evidence.

Additionally, in *Brooks v. Kemp*, the Eleventh Circuit found that a prosecutor’s argument, even if ambiguous, was not improper on the basis that, “[t]he Supreme Court has directed, . . . that ‘a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.’” *Brooks v. Kemp*, 762 F.2d 1410-11 (quoting *Donnelly v. DeChristoforo*, 416 U.S. [637], 647 [1974]).

Again, Price has provided no Supreme Court precedent showing the court’s determination was contrary to or an unreasonable application of clearly established federal law. Additionally, for purposes of federal review, even if the comment were improper, it did not render the guilt phase of Price’s trial fundamentally unfair. This claim is due to be denied.

4. Inflammatory comment.

5. Conflating the role of the prosecutors with that of the jurors.

The next two complaints regarding prosecutorial comments shall be addressed together for two reasons. First, when the particular comments at issue are viewed in the record, they all flow from the same portion of the prosecutor's rebuttal closing argument at the guilt phase of trial. (R. Vol. 6 at 851-54). Second, the manner in which the state appellate court wrote its opinion appears to have melded its discussion about the complaints together.

Price alleges prosecutor Moore used inflammatory rhetoric by referring to the sword that caused the death of Mr. Lynn, and simultaneously encouraging the jury to use their "sword of justice" on Mr. Price related exclusively to punishment. . ." to "shift[] the jury's attention away from the proper question of whether Mr. Price had committed capital murder and toward how Mr. Price ought to be punished for that crime." *Id.*⁵⁸ Price believes the prosecutor's "inflammatory allusion" was improper because it directed the jury toward "passion and prejudice rather than to an understanding of the facts and of the law[,]"" and alleges that "instructing the jury that it was their turn to dole out sword punishment" is an example of same. (Doc. 28 at 77) (quoting *United States v. Phillips*, 664 F.2d 971, 1030 (5th Cir. 1981) (cite for internal quotation not provided by Price).

⁵⁸ Price then string cites *Stano v. Dugger*, 921 F.2d 1125, 1160 (11th Cir. 1991) with no explanation.

Finally, Price contends the comments confused the jury's task, *e.g.*, to determine Price's guilt, with punishment - punishment being an issue wholly immaterial at the guilt phase of trial. *Id.* (citing *Weaver v. Bowersox*, 438 F.3d 832, 840-41 (8th Cir.), *cert. dismissed as improvidently granted*, 550 U.S. 598 (2007)). Price contends the appellate court's adjudication of this claim is contrary to and an unreasonable application of clearly established "Supreme Court precedent." (Doc. 16 at 32 and Doc. 28 at 77). He also contends the State "improperly conflated its prosecutorial role with the jury's role." (Doc. 16 at 31). Specifically, Price alleges that while prosecutor Moore was explaining the jury's job and its responsibility to Fayette County, Mr. Moore asked the jury, what are "we" going to do. By asking "what *we* going to say" and "what are *we* going to do," Mr. Moore [improperly] associated his person, and consequently his prosecutorial role and perspective on the case, with the person, role and perspective of the jurors.... [⁵⁹] *Id.* at 31 (citing generally, *United States v. Sanchez*, 176 F.3d 1214, 1225 (9th Cir. 1999) (it is improper for the prosecutor to state that it is the duty of the jury to find the defendant guilty); *United States v. Pollizi*, 801 F.2d 1543, 1558 (9th Cir. 1986) (same)).

Price concedes the above comments might not have been improper in isolation, and at the same time insists that in "context [they] exceeded the bounds of

⁵⁹ Price identifies the comments as "We can't turn our head from [the] crime[.]" and "How are we going to speak for Fayette? . . . What are we going to do?". (Doc. 28 at 77 (quoting trial record at 851 & 854)).

prosecutorial rhetoric and served to exacerbate the prejudicial effect. . .” of other allegedly improper comments. (Doc. 28 at 77). The respondent states that the “sword of justice” and “we” claims were addressed on the merits by the Alabama Court of Criminal Appeals, but contends that Price has failed to show that the appellate court’s decision entitles him to relief pursuant to 28 U.S.C. § 2254. (Doc. 22 at 45- 47 (citing *Price v. State*, 725 So. 2d at 1031-33)).

This court has carefully reviewed the state appellate court’s opinion, and it *appears* that the portion applicable to Price’s claims reads:

The appellant argues that the prosecutor sought to make the jurors identify with the State’s position by using the term “we” to refer to both the prosecution and the jury as a single group, as well as by certain other of his comments. The appellant refers to the following portion of the prosecutor’s closing argument to the jury during the guilt phase:

“I told you at the outset that you would be the sole and exclusive judges of the facts of this case, that it would be up to you to look to the evidence with a view of determining what the true facts are. I’m not going to belabor it, but I do have to remind you of certain facts. You’re the sole and exclusive judges of the facts. It’s not my role in the case and it’s not up to me to decide whether or not the State has proved the charges in this case. That’s entirely up to you.

Now, what is this evidence that’s been before you? First, various

witnesses have testified. Some of them were lay witnesses; that is, they are just people who come in and testify about the things that they have seen, heard, felt and so forth. Then there are some that we will call expert witnesses. An expert is simply one who, because of their education, training or experience, has attained some skill or knowledge or experience of some science, profession, business or occupation which is not of common knowledge to the average lay person.

Now, whether a witness is an expert or whether a witness is a lay witness, if a witness, during the trial of the case, during the time they are testifying up here sitting on the stand if they testify and during their testimony they express an opinion, draw a conclusion, the jury is not required to accept the conclusions or expressed opinions of those witnesses, but rather, the jury must determine for yourselves the weight to be given to that testimony and evidence when considered in connection with all of the evidence in the case.

I told you at the outset that you are the sole and exclusive judges of the evidence. You are likewise the exclusive judges of the weight of the evidence, its believability, its credibility, what weight you will accord to that evidence.

When you take your place in the jury box, you do not have to blindly accept anything and everything that comes before you. You have the right to weigh the evidence and in weighing that evidence you have the right to consider anything which you in your everyday affairs would consider in passing upon the truthfulness and the accuracy of statements made to you. For instance, when witnesses testify before you, those witnesses present themselves in front of you. You have the right to observe their demeanor; that is, how they appear while they testify. Thus, you may consider whether they testified frankly and straightforwardly or did they testify evasively. Were they testifying about facts which were within their knowledge or were they guessing.

You may consider those things which you in your every-day affairs would consider in passing upon the accuracy of statement made to you. You also have the right to consider any item of impeachment that is against the witness; for instance, whether or not a witness might be biased, if a witness is sympathetic to one side or prejudiced against another side, if they are connected with a party in the case, if they are kin to someone, if they're friends with someone or if they're enemies of someone. You as a jury have right to consider those types of things in passing upon the witness'

testimony because in that instance it would be human nature that they might be more favorable to one side or prejudiced against the other side, if there is evidence of ill feelings or friendship or kinship, or if they're connected by their stations in life or something of that nature.

Any connection that they might have to one side or the other can be considered in determining whether or not the witness might be biased in favor of one side or against the other side.

You should attempt in every way that you can to reconcile all of the testimony in this case so that, if possible, to make all the witnesses speak the truth. But if you cannot do that and you find that the evidence is in conflict on material points, then it's up to you to decide what are the true facts. In other words, you must weigh the evidence and decide what is believable and what is not believable, but in passing upon the evidence, you cannot capriciously disregard the testimony of a single witness. You should look at all of the evidence in the case with a view of determining what the true facts are and then make your decision from the evidence. If you find that some of the evidence is unworthy of belief, then you have the right not to consider that evidence, but you first start out with all of the evidence with a view of

determining what the true facts are and then sort through out, always remembering that your job is to determine the truth.”

There is no impropriety in a prosecutor’s appeal to the jury for justice and to properly perform its duty. “We view the comments as a call for justice, not sympathy, and, thus, conclude that they are within the latitude allowed prosecutors in their exhortation to the jury to discharge its duty.’ *Ex parte Waldrop*, 459 So. 2d 959 (Ala. 1984), *cert. denied*, 471 U.S. 1030, 105 S. Ct. 2050, 85 L. Ed. 2d 323 (1985); *Rutledge v. State*.” *Gentry v. State*, 689 So. 2d 894, 906 (Ala. Cr. App. 1994), *reversed on other grounds*, 689 So. 2d 916 (Ala. 1996).

“The fact that an argument has emotional overtones does not independently indict it as improper, and the propriety of argument rests primarily in the relation of its content to issues relevant to the sentencing jury’s concern. *Brooks v. Kemp* [762 F.2d 1383 (11th Cir. 1985), *cert. denied*, 478 U.S. 1022, 106 S. Ct. 3337, 92 L. Ed. 2d 742 (1986)]. We view the above arguments as being a general appeal for law enforcement and justice, and an appeal to the jury to discharge its duties in such a manner as to punish for the commission of crime and to deter others from committing like offenses. *Ex parte Waldrop* [459 So. 2d 959 (Ala.1984)]. The arguments were directed to a relevant sentencing concern of the jury, they were not delivered in an excessive and intolerable manner, and they did not divert the jury’s attention from its proper function. *Brooks v.*

Kemp.”*Rutledge v. State*, 523 So. 2d 1087, 1101 (Ala. Cr. App. 1987), *reversed on other grounds*, 523 So. 2d 1118 (Ala. 1988). There was no impropriety by the prosecutor in his appeal to the jury for justice, even if this appeal had emotional overtones.

Price v. State, 725 So. 2d at 1032-1033.

The prosecutor’s entire comment, in context, from the record, read:

You know what’s hard about this case? Is to make ya’ll realize that this really happened. Is to make ya’ll realize that this really happened. This ain’t a TV show. This is not a book. It’s not a movie. Bazemore, not New York City. Ten or so miles, as the crow flies, from here. It happened. That’s why we show you these pictures, not to shock you or anything like that, but to let you know this happened. It’s real. I got to make you face the horror of this thing to realize what happened. That’s the hardest part.

You know, in Fayette, you know, the normal topic, we worry about things like how are we going to pay Christmas we just had? Where is our quarterback going to play college ball? Are we going to have a good turkey season this year? Are we going to keep the grandkids this weekend, not what are we going to do by the fact that Bill Lynn was stabbed and hacked thirty-eight times in his yard in Bazemore. That’s what’s got to sink in with y’all. This is real. We can’t turn our head from it.⁶⁰ Y’all

⁶⁰ Price complains about this sentence. (See

have got a big responsibility. Y'all are the one [sic] that got to look right into it and decide what we're going to do about it.

The dictionary says that justice is defined as the upholding of what is right, real simple. The doing or upholding of what is right, the right thing to do. Another definition given in the dictionary for justice is fairness. There is great irony here. The judge, the lawyers for the defendant said, we want a fair trial.

You went back there and we talked to you one at a time. That's what you were asked. Can you give us a fair trial? That's all me [sic] and Mr. Johnston [another prosecutor] want. I think I can talk for him. That's all we want. All we want is what's fair. I'm sure Mrs. Lynn would tell you the same thing. That's all we want is what's fair.

You've all seen the - - the TV shows or whatever, you've seen the picture of the Statue of Justice, the lady that's standing there and she has the long white robes on. She's blindfolded, and that signifies that under our legal system that justice is blind. It doesn't matter if you're rich, poor, young, old, black, white, whatever religious faith or belief. It doesn't matter.

In her left hand, you've all seen this. She holds the scales of justice. She can't see who is putting that on there, but she holds them up. The evidence is put on the scales and she weighs

them to see what the outcome is.

Here is another great irony in this case. What does she hold in her right hand? We never talk about this. She holds the scales in her left hand. She's blindfolded. What does she hold in her right hand? A sword. It ain't like this [referring to the murder weapon, a sword with a bent blade]. It's not a cheap replica, something used for murder and mayhem. The sword she holds is straight and it's true. It's forged from pure metal. It's a tool of justice, not a tool of murder, mayhem. It's a tool for the upholding of what is right, of fairness. That tells us that in justice comes punishment.

That man over there has proved to you what kind of punishment can be done with a sword. As jurors, looking at the Statue of Justice, she also has the right for punishment also. That's part of the system. That's part of justice. It's your turn to use that sword now.⁶¹

Y'all are representatives of Fayette County now when you come up here. You know, the list comes from Montgomery and every from Fayette could be on the jury. And they pick out certain names and we all met here and now we've whittled it down to here. Here is where we are. You're our conscience for Fayette. You're also going to be the voice of Fayette when you come back with your verdict. How are you going to speak? What are you going to say? How are we going to speak for Fayette? There

⁶¹ Price interprets this as urging the jury to use a sword to inflict punishment. (See Doc. 28 at 77).

is [sic] a lot of people out here listening. The Bessie Lynn's of Fayette are out there listening. More important than that is the Christopher Price's are out there listening too. What are we going to say? What are we going to do? [⁶²]

(R. Vol. 6 at 851-54).

After careful examination of the “we” comments at issue, this court cannot find the state court’s determination regarding propriety to be an affront to constitutional law. Taken in context, it is apparent that the prosecutor was attempting to use “we” in the sense that the jury needed to ask themselves what they were going to do. His constant use of the word throughout closing to refer at times to the prosecution only, or the prosecution, defense, and court, or even the system as a whole as it was taking place through Price’s trial in the Fayette County courtroom does not alleviate much concern. Nevertheless, it still appears the prosecutor was trying to use the word “we” in the instances complained about by Price as a way to get the jury to question itself. Therefore, the ambiguous “we” remarks should not be construed in the worst possible light when considered in context. They are not improper. Even if they were, they were insufficiently prejudicial to entitle the petitioner to any relief.

The “sword” comment is another matter. Although the prosecutor began with his Statue of Justice imagery in a rather benign and legally correct

⁶² Price complains about these last two sentences. (Doc. 28 at 77).

manner (that being a decision made on impartiality and fairness), he turned it into a reference to punishment when he repeatedly compared it to the sword used to murder Mr. Lynn. Had the prosecutor clarified that by punishment, he meant a finding of guilt for a crime the jury believed Price had committed, that clearly would have been a proper argument. But for most, punishment intrinsically means the penalty meted out after it has been determined the party committed an offensive act, rather than the process to determine whether or not the act has indeed been committed. And since the sword caused the death of Mr. Lynn, it is but a short leap to infer that death was also the inferential punishment for Price as well.

Thus, while the court believes that the state court's finding that the sword comment was proper is erroneous, it does not find, in light of the entire argument, that the state court's decision represents an unreasonable application of clearly established federal law such that Price is entitled to relief on the first prong of the prosecutorial misconduct argument.

Even if the sword as punishment comment was improper in that it injected punishment into the guilt phase of trial, the court does not find that Price's trial was rendered fundamentally unfair because of it. The guilt evidence against Price was overwhelming. Moreover, in its jury instructions, the trial court specifically informed the jury it was to consider only Price's guilt and in no way should it consider punishment. (R. Vol. 6 at 886-87).

Price's final assertion is that "[i]ndividually and collectively," the above comments "require reversal under the Fifth, Sixth, Eighth and Fourteenth

Amendments.” (Doc. 16 at 32). Price is incorrect. At most, one of the comments was inappropriate. Even if the comments were improper, “remarks made in the course of a prosecutor’s closing argument will warrant reversal if the challenged remarks are . . . prejudicial to a substantial right of the defendant.” *United States v. Boyd*, 131 F.3d 951, 955 (11th Cir. 1997) (other citations omitted); *see also United States v. Blakey*, 14 F.3d 1557, 1560 (11th Cir. 1994). A defendant is prejudiced when there is “a reasonable probability that, but for the prosecutor’s offending remarks, the outcome of the ... [proceeding] would have been different. [A] reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* (internal quotation marks and citation omitted). *United States v. Baker*, 432 F.3d 1189, 1252 (11th Cir. 2005). As stated by the Supreme Court,

It “is not enough that the prosecutors’ remarks were undesirable or even universally condemned.” *Darden v. Wainwright*, 699 F.2d, at 1036. The relevant question is whether the prosecutors’ comments “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974).

Darden v. Wainwright, 477 U.S. at 181.

Prosecutorial misconduct only requires a new trial if the arguments are improper and substantially prejudicial. *United States v. Hernandez*, 145 F.3d 1433, 1438 (11th Cir. 1998). The comments the petitioner complains about at the guilt phase, when viewed in the context of the trial as a whole, fail to satisfy this standard. These claims are due to be

denied.

- F. The trial court's charge on evaluating the credibility of witnesses was flawed inasmuch as it created a presumption that witnesses were truthful, and impermissibly diluted the State's burden of proof of guilt beyond a reasonable doubt, in violation of the Fifth, Eighth and Fourteenth Amendments. (Paragraphs 71-73 of the petition).**

Price alleges the trial court's jury instruction regarding the credibility of witnesses was constitutionally deficient under Alabama law and the United States Constitution because it invaded the factfinding province of the jury, confused the presumption of innocence and diluted the State's burden of proof. (Doc 16 at 32-33). As factual support for the claim, the petitioner points to the following portion of the instruction:

You should attempt in every way that you can to reconcile all of the testimony in this case so that, if possible, to make all the witnesses speak the truth. But if you cannot do that and you find that the evidence is in conflict on material points, then it's up to you to decide what are the true facts. In other words, you must weigh the evidence and decide what is believable and what is not believable, but in passing upon the evidence, you cannot capriciously disregard the testimony of a single witness. You should look at all of the evidence in the case with a view of determining what the true facts are and then make your decision from the evidence. If you find that some of the

evidence is unworthy of belief, then you have the right not to consider that evidence, but you first start out with all of the evidence with a view of determining what the true facts are and then sort through it, always remembering that your job is to determine the truth. (emphases added [by Price]).

Id.

Price attacks the first underlined sentence because he believes it informed the jurors that they must presume the witnesses were truthful, and argues such a presumptive charge “invades the jury’s exclusive right to determine the credibility of witnesses.” *Id.* (referring generally to *United States v. Scheffer*, [523 U.S. 303, 313-14], 118 S. Ct. 1261, 1267-68 (1998)).⁶³ He surmises the jury must have been “undoubtedly confused” by the charge since it asked them to reconcile the testimony to make it speak the truth - “without any assessment of the witnesses’ credibility.” *Id.* at 33. According to Price, the jurors were left “with the impression they should both credit all witnesses’ testimony (if not contradicted) and also reject some of those same witnesses’ testimony.” *Id.*

⁶³ In *United States v. Scheffer*, the Supreme Court was asked to determine whether an evidentiary prohibition against the use of scientifically unreliable polygraph tests violated an accused’s Fifth and Sixth Amendment right to present a defense. The Court held there was a “legitimate government interest” to uphold the constitutionality of the evidentiary rule, and that was to preserve “the [jury’s] core function of making credibility determinations in criminal trials.” 523 U.S. at 313.

Under this scenario, the jurors were allowed “to convict [Price] without making a finding as to reasonable doubt on all elements.” *Id.* (citing [*In Re*] *Winship*, 397 U.S. [358] at 361[(1970)]; *Harvell v. Nagle*, 58 F.3d 1541, 1542-43 (11th Cir. 1995)).⁶⁴

Next, Price alleges the second underlined passage “encourages, even requires an initial ‘sorting’ between the testimony that jurors do and do not believe, before applying the law to the facts.” *Id.* He concludes that “strictly speaking, it is not the jury’s job to decide where ‘the truth’ lies (based on opinion,

⁶⁴ *In Re Winship* is a bedrock Supreme Court case ruling that the Due Process Clause mandates the government, in all criminal cases, prove beyond a reasonable doubt each and every element of an offense against the defendant. In *Harvell*, the Eleventh Circuit advised,

When reviewing reasonable-doubt charges, we consider the instruction as a whole to determine if the instruction misleads the jury as to the government’s burden of proof. See *United States v. Veltman*, 6 F.3d 1482, 1492 (11th Cir. 1992). The Supreme Court has phrased the proper constitutional inquiry as whether “there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard. *Victor [v. Nebraska]*, 551 U.S. [1, 6 (1994)].

Id. at 1542.

supposition, inadmissible evidence, and so forth); rather the panel is convened solely to determine whether the carefully defined elements of the charges have been proved beyond a reasonable doubt.” *Id.* Price demands a reversal and new trial to correct the trial court’s errors. *Id.*

Since there was no objection to the charge at trial, the Alabama Court of Criminal Appeals conducted a plain error review of the claim on direct appeal. *Price v. State*, 725 So. 2d at 1036. In doing so, it examined the portions of the instruction about which Price complained and the instruction as a whole before determining that no “plain error” occurred under either of Price’s theories. *Id.* The appellate court’s findings of fact and conclusions of law are set out below.

In the present case, the trial court gave the following entire charge to the jury concerning its role as the trier of fact in examining the credibility of witness testimony:

“Now, whether a witness is an expert or whether a witness is a lay witness, if a witness, during the trial of the case, during the time they are testifying up here sitting on the stand, if they testify and during their testimony they express an opinion, draw a conclusion, the jury is not required to accept the conclusions or expressed opinions of those witnesses, but rather, the jury must determine for yourselves the weight to be given to that testimony and evidence when considered in connection with all of the evidence in the

case. I told you at the outset that you are the sole and exclusive judges of the evidence. You are likewise the exclusive judges of the weight of the evidence, its believability, its credibility, what weight you will accord that evidence. When you take your place in the jury box, you do not have to blindly accept anything and everything that comes before you. You have the right to weigh the evidence and in weighing that evidence you have the right to consider anything which you in your everyday affairs would consider in passing upon the truthfulness and the accuracy of statements made to you. For instance, when witnesses testify before you, those witnesses present themselves in front of you. You have the right to observe their demeanor; that is, how they appear while they testify. Thus, you may consider whether they testified frankly and straightforwardly or did they testify evasively. Were they testifying about facts which were within their knowledge or were they guessing? You may consider those things which you in your everyday affairs would consider in passing upon the accuracy of statements made to you. You also have the right to consider any item of impeachment that is against the witness; for instance, whether or not a witness might be biased, if a witness is sympathetic to one side or prejudiced against another side, if they are connected with a party in the

case, if they are kin to someone, if they're friends with someone or if they're enemies of someone. You, as a jury, have a right to consider those types of things in passing upon the witness's testimony because in that instance it would be human nature that they might be more favorable to one side or prejudiced against the other side, if there is evidence of ill feelings or friendship or kinship, or if they're connected by their stations in life or something of that nature. Any connection that they might have to one side or the other can be considered in determining whether or not the witness might be biased in favor of one side or against the other side. You should attempt in every way that you can to reconcile all of the testimony in this case so that, if possible, to make all the witnesses speak the truth. But if you cannot do that and you find that the evidence is in conflict on material points, then it's up to you to decide what are the true facts. In other words, you must weigh the evidence and decide what is believable and what is not believable, but in passing upon the evidence, you cannot capriciously disregard the testimony of a single witness. You should look at all of the evidence in the case with a view of determining what the true facts are and then make your decision from the evidence. If you find that some of the evidence is unworthy of belief, then you

have the right not to consider that evidence, but you first start out with all of the evidence with a view of determining what the true facts are and then sort through it, always remembering that your job is to determine the truth.”

[R. Vol. 6, Tab. 13 at 865-868].

Even if a particular statement in an instruction may be misleading, confusing, or erroneous, it does not rise to the level of plain error if the instruction, when reviewed completely, properly presents the law. *Williams v. State*, 538 So. 2d 1250, 1253 (Ala. Cr. App. 1988). There was no plain error in these instructions.

The appellant argues that the trial court diluted the State’s burden of proof by instructing the jurors to sort the bad testimony from the good testimony, without providing any guidelines as to the reasonable doubt standard. The cited instruction by the trial court informed the jury that it should determine the credibility of the evidence. This is one of the required tasks of examination by a jury in determining whether the evidence presented by the State has proved that the defendant is guilty beyond a reasonable doubt. This was a proper charge by the trial court and was not plain error.

Price v. State, 725 So. 2d at 1003, 1036-37.

The respondent answers that Price cannot show the state court’s decision was contrary to or an

unreasonable application of clearly established federal law. (Doc. 21 at 115-121 and Doc. 22 at 49-50). In his reply, Price concentrates solely on the presumptive credibility aspect of his claim (doc. 28 at 79-81), arguing that

the Alabama Court of Criminal Appeals implicitly conceded that the instruction was erroneous. The Court of Criminal Appeals held only that the jury charge *as a whole* did not dilute the State's burden of proof. This was contrary to, or an unreasonable application of, *Cupp v. Naughten*: Unlike in *Naughten*, here the trial court did not cure its 'ailing instruction by charging the jury properly on the State's burden of proof. Accordingly, the instruction was, *a fortiori*, a structural violation of the Due Process Clause. See *Cool v. United States*, 409 U.S. 100, 104 (1972); *Jackson v. Virginia*, 443 U.S. 307, 320 n.14 (1979). Accordingly, Mr. Price's conviction must be vacated. *Id.* at 81.

Price is not entitled to 28 U.S.C. § 2254(d) relief pursuant to *Cupp*, *Cool* or *Jackson*. First, the holding in *Cupp v. Naughten* does not warrant any relief in this case. In *Cupp*, the trial judge read a statutory "presumption-of-truthfulness instruction" regarding witnesses to the jury. *Cupp*, 414 U.S. at 143. The Ninth Circuit Court of Appeals found that the instruction violated the defendant's right to due process of law because it impermissibly shifted the burden of proof from the State to the defendant, an error uncured by the fact that "the trial court [also had twice given] explicit instructions affirming the presumption of innocence and declaring the obligation of the State to prove guilt beyond a reasonable doubt." *Id.* at 144.

The Supreme Court reversed, stating, “Before a federal court may overturn a conviction resulting from a state trial in which this instruction was used, it must be established not only that the instruction is undesirable, erroneous, or even ‘universally condemned,’ but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment.” *Naughten*, 414 U.S. at 146. The Court then stated that “the question is not whether the trial court failed to isolate and cure a particular ailing instruction, but rather whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.” *Id.* at 147. In ruling that the instruction did not infect the entire trial process, the Supreme Court held:

In this case, while the jury was informed about the presumption of truthfulness, it was also specifically instructed to consider the manner of the witness, the nature of the testimony, and any other matter relating to the witness’ possible motivation to speak falsely. It thus remained free to exercise its collective judgment to reject what it did not find trustworthy or plausible. . . . [and] freed respondent from any pressure to take the witness stand himself. . . .

The jury here was charged fully and explicitly about the presumption of innocence and the State’s duty to prove guilt beyond a reasonable doubt. Whatever tangential undercutting of these clearly stated propositions may, as a theoretical matter, have resulted from

the giving of the instruction of the presumption of truthfulness is not of constitutional dimension. The giving of that instruction, whether viewed in terms of the reasonable-doubt requirement in *In Re Winship, supra*, or of offense against ‘same principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,’ *Snyder v. Massachusetts*, 291 U.S. 95, 105, 54 S. Ct. 330, 332, 78 L. Ed. 674 (1934), did not render the conviction constitutionally invalid.

Cupp, 414 U.S. at 149-150. *Cupp* and its progeny were recently reaffirmed by the Eleventh Circuit:

Federal habeas relief is unavailable “for errors of state law.” *Estelle v. McGuire*, 502 U.S. 62, 67, 112 S. Ct. 475, 480, 116 L. Ed. 2d 385 (1991) (quoting *Lewis v. Jeffers*, 497 U.S. 764, 780, 110 S. Ct. 3092, 3102, 111 L. Ed. 2d 606 (1990)). A jury instruction that “was allegedly incorrect under state law is not a basis for habeas relief,” *id.* at 71-72, 112 S. Ct. at 482, because federal habeas review “is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States.” *Id.* at 68, 112 S. Ct. at 480. Unlike state appellate courts, federal courts on habeas review are constrained to determine only whether the challenged instruction, viewed in the context of both the entire charge and the trial record, “so infected the entire trial that the resulting conviction violate[d] due process.” *Id.* at 72, 112 S. Ct. at 482 (quoting *Cupp v. Naughten*, 414 U.S. 141, 147, 94 S. Ct. 396, 400-01, 38 L. Ed. 2d

368 (1973)).

Jamerson v. Secretary for Dept. of Corrections, 410 F.3d 682, 688 (11th Cir. 2005).

Applying the proper standard of review to this case, the court finds that there is no reasonable probability that the portion of the trial court's credibility instruction at issue so infected his trial that his conviction offends due process. At most, it is ambiguous or confusing as to whether a witness' statement should carry the presumption of truth. Even if the instruction had clearly directed the jury to presume the witnesses were truthful, as in *Cupp*, Price still cannot establish that it infected his entire trial. Elsewhere in its instructions (and unmentioned by Price and the appellate court), the trial court informed the jury that it was the "sole and exclusive judge of the facts. . . . That's entirely up to you." (R. Vol. 6, Tab13 at 864). Moreover, the trial court gave repeated instructions on reasonable doubt and the presumption of innocence. *Id.* at 856- 868. This claim is without merit and is due to be denied.

G. The arresting officer's warrantless seizure of Mr. Price's suitcase, the source of a black pair of pants entered into evidence as a prosecution exhibit, violated the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments because it cannot be considered to have occurred incident to Mr. Price's arrest. (Paragraphs 74-77 of the petition).

Price alleges the arresting officer's warrantless seizure of his suitcase violated his "Fourth, Fifth, Sixth, Eighth and Fourteenth Amendment[]" constitutional rights because the seizure was not

incident to his arrest. (Doc. 16 at 34). The State answers that *Stone v. Powell*, 428 U.S. 465, 494 (1976), prohibits this court from considering this claim. (Doc. 22 at 52) (“[W]here the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas relief on the ground that the evidence obtained in an unconstitutional search or seizure was introduced at his trial.”)).

In his reply, Price concedes “that his prior counsel litigated this Fourth Amendment claim in the state court[,] . . . [and] agrees with the State [it] is foreclosed by *Stone v. Powell*, 428 U.S. 465 (1976).” (Doc. 28 at 81). Accordingly, this claim is due to be denied.

H. By arguing, without any basis in the evidence, that Mr. Price would likely kill again unless put to death, the prosecutor sullied the trial with inflammatory and unsupported speculation. (Paragraphs 77-82 of the petition).

During the penalty phase of his trial, Price alleges the prosecutor engaged in speculative, inflammatory and improper argument concerning his future dangerousness, and as a result, his sentencing proceeding was rendered fundamentally unfair under the Fifth and Fourteenth Amendments to the United

States Constitution. (Doc. 16 at 36-37). As the factual basis for his claim, Price points to a portion of the prosecutor's closing statement, arguing that the prosecutor graphically described the injuries to the victim, urging that "if there has even been a more heinous, cruel or atrocious infliction of death on any individual in Fayette County, I haven't heard about it." [Price then takes issue with the following prosecutorial argument]:

[“]Now, the only way I know of to assure that Chris Price is not a threat, doesn't have any opportunity to inflict this kind of injury on anyone else in Fayette County, is to have the jury recommend a sentence of death for him. I seriously ask you to make that recommendation to the Court.[“]

Id. at 36 (quoting Rule 32 R., Vol. 17 at 911).⁶⁵

According to Price, even though life without parole was an obvious alternative, the prosecutor's argument improperly "played on the jury's fears" by arguing that death was "the only way" to prevent Price from returning to Fayette County to kill again. *Id.* Such an assertion, Price argues, was "as flatly false as it was inflammatory." *Id.* (citing *Darden v. Wainwright*, 477 U.S. 168, 180 & n.10 (1986); *Davis v. Zant*, 36 F.3d 1538, at 1549-50 (11th Cir. 1994) (quotation omitted)).⁶⁶ Price declares the appellate

⁶⁵ This was not the entire comment. The entire comment is set out in the appellate court's opinion further herein.

⁶⁶ Price also contends, for the first time, that the prosecutor's "misstatement" encouraged the jury to

believe that he would not remain behind bars for the rest of his life if they were to side with his defense counsel's request for life without parole, and that "[n]ot surprisingly, the jurors promptly asked questions to the trial court about the impact of any sentencing recommendation they made." *Id.* at 37. He does not provide citations to the record. He also makes no mention of this argument in his reply brief.

Price's failure to first present the above argument to the state court renders this aspect of his claim procedurally defaulted. Alternatively, Price has cited no constitutional precedent in support of his complaint that the prosecutor wrongfully argued that he could be paroled, and his failure to factually support the claim would necessitate its dismissal as conclusory pursuant to the Rules Governing Habeas Corpus proceedings. Finally, and as a second alternative, the trial court and opposing counsel repeatedly informed the jury that the only penalties available to Price, if convicted of capital murder, were death or life without parole. The trial court also instructed the jury that a sentence of life without parole meant that Price would spend the rest of his natural life incarcerated with no possibility of parole. The prosecutor never mentioned parole, life without parole, or even hinted that Price could one day be released from prison on parole. When the isolated comment is viewed in its context, there is simply no possibility that it could reasonably be construed as an attempt by the prosecutor to create a baseless fear that Price might one day be paroled. Further, when the comment is also viewed in the context of the trial as a whole, there is certainly no reasonable possibility that the jury could have construed it as such. The penalty phase proceedings were not rendered

court's determination that the argument did not violate his constitutional right to due process of law was contrary to clearly established federal law. (Doc. 28 at 82-83).

Moreover, Price states that since “future dangerousness” is not a statutory aggravating factor in Alabama⁶⁷, the prosecution introduced no evidence from which his future dangerousness could have been inferred, and due process required he be given notice that the prosecution intended to make future dangerousness an issue at sentencing. (Doc. 16 at 37). The prosecution's failure to do so allegedly caused Price to be unprepared to rebut the charge, a situation that violated his “fundamental due process rights under the Fifth and Fourteenth Amendments to the United States Constitution.” *Id.* (citing *Gardner v. Florida*, 430 U.S. 349, 362 (1977) (“[S]ending a man to

fundamentally unfair by the remark.

⁶⁷ Price refers to ALA. CODE. §§ 13A-5-49 and 13A-5-45(c) as proof that Alabama does not consider future dangerousness to be a statutory aggravating circumstance, and without additional explanation, cites *Proffitt v. Wainwright*, 658 F.2d 1227, 1266-67 (11th Cir. 1982) to support his contention that the prosecution's reliance on a non-statutory aggravating factor is itself constitutional error. (Doc. 28 at 82-83). Price also makes the comment that “general deterrence” is not a statutory aggravating factor under Alabama law, and asserts that such an argument could possibly violate individualized sentencing requirements. *Id.* at 84, n.47 (citing *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)(other notation omitted)).

death ‘on the basis of information he had no opportunity to deny or explain’ violates fundamental notions of due process.”)). Again, Price contends the appellate court’s determination to the contrary violated clearly established Supreme Court precedent.

Finally, Price argues that the absence of any evidence of his future dangerousness reduced the prosecutor’s argument to one that improperly encouraged the jury to sentence Price to death simply because he killed once, and therefore would necessarily kill again. (Doc. 16 at 37). Price further declares the appellate court’s determination that “the prosecutor was not arguing that the appellant would kill again if he was not sentenced to death, but that such a sentence would act as a deterrent to other possible offenders[,]” is a factual finding “diametrically opposed to the record.” (Doc. 28 at 83-84). Since Price believes this factual finding is “clearly erroneous,” he asserts it is entitled to no deference. *Id.* at 83, n.46 (citing 28 U.S.C. § 2254(e)(1)).

The respondent answers that Price cannot show he is entitled to relief pursuant to 28 U.S.C. § 2254(d), and contends that § 2254(e)(1) mandates a presumption of correctness with regard to the appellate court’s factual findings. (Doc. 22 at 54-56). The appellate court’s opinion on the issue is as follows:

The appellant argues that during his closing argument at the sentencing phase of the trial the prosecutor impermissibly commented that the appellant would probably kill again unless he was put to death; the appellant argues that this comment “sullied” the trial with inflammatory and unsupported speculation. The record indicates that the appellant failed to

object to this comment at trial; therefore, any error in the prosecutor's argument to the jury must be analyzed pursuant to the plain error standard. Rule 45A, Ala. R. App. P. The comment made by the prosecutor during his closing argument at the sentencing phase was as follows:

“One of the most vivid descriptions of what happened to Bill Lynn, on the stand that came forth in my listening to the testimony, was what the little EMT girl said about trying to move his head. Do you remember that? He was cut so severely that she put her hand entirely, all four fingers, inside the wounds on his head and tried to move it and couldn't even turn his head. His entire scalp moved around his head and, that is, the bone structure would not move. If there has ever been a more heinous, cruel, or atrocious infliction of death on any individual in Fayette County, I haven't heard about it.

Now, the only way that I know of to assure that Chris Price is not a threat, doesn't have an opportunity to inflict this kind of injury on anyone else in Fayette County, is to have the jury recommend a sentence of death on him. That sentence recommendation to the Court will demonstrate to any individual in this county contemplating a similar action, will demonstrate the conscience of this community that it will not be tolerated. I seriously ask you to make that

recommendation to the Court. And in asking you to do that, I realize that this is not a duty you would have chosen.”

The appellant argues that this argument by the prosecutor was reversible error, based on the Alabama Supreme Court’s holding in *Ex parte Smith*, 581 So. 2d 531 (Ala. 1991). *See also Ex parte Washington*, 507 So. 2d 1360 (Ala. 1986). However, the comment in *Ex parte Smith*, 581 So. 2d at 532, was made by the prosecutor during the guilt phase of the defendant’s trial and, in holding that the comment constituted plain error, the Court determined that the prosecutor had attempted to prove guilt by arguing that the defendant would commit future illegal acts. [footnote omitted]. However, a review of the entire argument by the prosecutor in the present case reveals that the prosecutor was not arguing that the appellant would kill again if he was not sentenced to death, but that such a sentence would act as a deterrent to other possible offenders. Similarly, in *Carroll v. State*, 599 So. 2d 1253, 1270 (Ala. Cr. App. 1992), *aff’d*, 627 So. 2d 874 (Ala. 1993), *cert. denied*, 510 U.S. 1171, 114 S. Ct. 1207, 127 L. Ed. 2d 554 (1994), the prosecutor stated during his argument at the penalty phase, “How many people does [the defendant] get to kill?” In construing the prosecutor’s argument to be a plea for law enforcement, this Court stated:

“Although we do not approve of [this argument], we do not consider it to constitute reversible error. [It] can be interpreted as merely an argument for

law enforcement and society's right of self-protection, *Kuenzel v. State*, 577 So. 2d 474, 503-04 (Ala. Cr. App.), *affirmed*, 577 So. 2d 531 (Ala.), *cert. denied*, 502 U.S. 886, 112 S. Ct. 242, 116 L. Ed. 2d 197 (1991), rather than an improper comment on the possibility that the appellant will commit future illegal acts, *Ex parte Smith*, 581 So. 2d 531, 533 (Ala. 1991)." 599 So. 2d at 1270.

In *Williams v. State*, 601 So. 2d 1062, 1072-73 (Ala. Cr. App. 1991), *aff'd*, 662 So. 2d 929 (Ala. 1992), *cert. denied*, 506 U.S. 957, 113 S. Ct. 417, 121 L. Ed. 2d 340 (1992), the prosecutor, during his closing argument at the guilt phase of the defendant's trial, argued that the defendant admitted the murder by the allegorical statement "I ate the mouse." The prosecutor then stated that the defendant had also stated, "I ate the little mouse and I will eat another little mouse if you give me a chance." Although the defendant in *Williams v. State* claimed that this argument was a comment by the prosecutor that he would kill again, this Court held that the statement was a legitimate argument in response to a statement made by the defendant to third parties and admitted earlier at trial.

This Court stated, "Furthermore, [s]tatements of counsel in arguments to the jury must be viewed as having been made in the heat of debate, and such statements are usually valued by the jury at their true worth." *Williams v. State*, *supra*, at 1073, *quoting Stephens v. State*, 580 So. 2d 11 (Ala. Cr. App.

1990), *affirmed*, 580 So. 2d 26 (Ala.1991), *cert. denied*, 502 U.S. 859, 112 S. Ct. 176, 116 L. Ed. 2d 138 (1991).

This comment made by the prosecutor did not constitute plain error. *Price v. State*, 725 So. 2d at 1044.

When examining the constitutional standard applicable to claims of improper prosecutorial argument during the sentencing phase of trial under § 2254(d), it

[has been] pointed out⁶⁸ that] prosecutorial arguments will not warrant habeas corpus relief unless they meet two requirements. First, they must have encouraged the jury to take into account matters that are not legitimate sentencing considerations. *Brooks*, 762 F.2d at 1403.[FN8] Second, they must have been so prejudicial, when viewed in the context of the entire sentencing proceeding, as to have rendered that proceeding “fundamentally unfair.” *Id.* at 1400 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 645, 94 S. Ct. 1868, 1872, 40 L. Ed. 2d 431 (1974)). The test for fundamental unfairness is whether “there is a reasonable probability that [the errors] changed the outcome of a case.” *Brooks*, 762 F.2d at 1402; *see also Drake*, 762 F.2d at 1460.

⁶⁸ The Eleventh Court is referring to its *en banc* opinions in *Brooks v. Kemp*, 762 F.2d 1383 (11th Cir. 1985), *Drake v. Kemp*, 762 F.2d 1449 (11th Cir. 1985), *Tucker (William) v. Kemp*, 762 F.2d 1480 (11th Cir. 1985) and *Tucker (Richard) v. Kemp*, 762 F.2d 1496 (11th Cir. 1985).

FN8. In *Brooks* and its companion cases we identified a number of matters which have been recognized as legitimate sentencing considerations. These include the character and background of the defendant (including future dangerousness and possible rehabilitation), the circumstances of his offense, and accepted penological justifications such as deterrence and retribution. See *Brooks*, 762 F.2d at 1406-08; *Drake*, 762 F.2d at 1458.

Johnson v. Wainwright, 778 F.2d 623, 630 (11th Cir. 1985).

The Supreme Court has also explained how legitimate sentencing considerations are to comport with the establishment of statutory aggravating factors:

Our cases indicate . . . that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty. But the Constitution does not require the jury to ignore other possible aggravating factors in the process of selecting, from among that class, those defendants who will actually be sentenced to death. [FN17] What is important at the selection stage is an individualized determination on the basis of the character of the individual and the circumstances of the crime. See *Eddings v. Oklahoma*, 455 U.S. 104, 110-12, 102 S. Ct. 869, 874, 71 L. Ed. 2d 1 (1982); *Lockett v. Ohio*, 438 U.S. 586, 601-05, 98 S. Ct.

2954, 2963-65, 57 L. Ed. 2d 973 (1978) (plurality opinion); *Roberts (Harry) v. Louisiana*, 431 U.S. 633, 636-37, 97 S. Ct. 1993, 1995, 52 L. Ed. 2d 637 (1977); *Gregg [v. Georgia]*, 428 U.S. [153,] 197, 96 S. Ct. [2909,] 2936 [(1976)] (opinion of STEWART, POWELL, and STEVENS, JJ.); *Proffitt v. Florida*, 428 U.S. [242,] 251-52, 96 S. Ct. [2960,] at 2966 (opinion of STEWART, POWELL, and STEVENS, JJ.) [(1976)]; *Woodson v. North Carolina*, 428 U.S. 280, 303-04, 96 S. Ct. 2978, 2990-91, 49 L. Ed. 2d 944 (1976) (plurality opinion). [footnote omitted]

FN17. See *Gregg, supra*, 428 U.S., at 164, 196-97, 206, 96 S. Ct., at 2920, 2936, 2940; *Proffitt v. Florida*, 428 U.S. 242, 256-57, n.14, 96 S. Ct. 2960, 2968-2969, n.14, 49 L. Ed. 2d 913 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.). Similarly, the Model Penal Code draft discussed in *Gregg, supra*, 428 U.S., at 192-95, 96 S. Ct., at 2934-35, sets forth lists of aggravating and mitigating circumstances but also provides that the sentencer “shall take into account . . . any other facts that it deems relevant . . .”ALI Model Penal Code § 210.06 (Proposed Official Draft, 1962). . . .

Zant v. Stephens, 462 U.S. 862, 878-79 (1983).

Thus, the Supreme Court recognizes statutory aggravating factors as a way for states like Alabama to narrow the class of individuals who are *eligible* for the death penalty. If statutory aggravating factors are found, then the defendant is deemed eligible for the death penalty. The jury’s next step is to decide

whether to recommend (*e.g.*, select) capital punishment for the defendant. In doing so, the jury may consider the legitimate sentencing concerns, among which is future dangerousness based on the character and background of the defendant, if the evidence supports it.

Proper prosecutorial argument, no matter how “prejudicial’ or ‘persuasive,’ can never be unconstitutional.” *Brooks v. Kemp*, 762 F.2d at 1403. The “scope of permissible argument [at sentencing,]” allows the

prosecutor to urge the jury to find a statutory aggravating circumstance [only on the] basis . . . [of] the relevant facts introduced in evidence and the proper inferences therefrom. [FN 40] . . . [A]fter an aggravating circumstance has been found, arguments [within] the realm of recognized sentencing concerns— *e.g.*, . . . individual circumstances of the crime and defendant, future dangerousness, rehabilitation and penological justifications for the death penalty are [proper] . . . because they urge death for . . . [relevant reasons. . . [Still,] an argument based upon one of these core concerns may, under certain conditions, be improper in its mode of presentation to the jury. [FN 41].

FN40. The [prosecutor’s] sentencing argument does not present this problem. The jury had already found facts at the guilt phase which were aggravating circumstances under Georgia law. . . .

FN41. For example, it would be improper for a prosecutor to argue about individual circumstances of the defendant contained

in a presentence report which the defendant had not been able to examine. *Gardner v. Florida*, 430 U.S. 349, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977). And, it would obviously be improper for the prosecutor to make argument on valid subjects using facts not introduced in evidence before the jury. *United States v. Warren*, 550 F.2d 219, 229 (5th Cir. 1977) (conviction reversed because government argued important fact not in evidence), *cert. denied*, 434 U.S. 1016, 98 S. Ct. 735, 54 L. Ed. 2d 762 (1978); *Conner v. State*, 251 Ga. 113, 303 S.E. 2d at 276 (1983) (wrong for prosecutor to “go outside the facts appearing in the case and lug in extraneous matters”).

Brooks v. Kemp, 762 F.2d at 1408.

Brooks took into consideration Georgia’s statutory sentencing law when it examined the propriety of the prosecutor’s argument. However, substitution of Alabama’s sentencing law, as it was applied in Price’s particular case, yields the same result. Alabama law requires a finding of the existence of “at least one aggravating [factor] as defined in section 13A-5-49. . . , [or] the sentence shall be life imprisonment without parole.” ALA. CODE § 13A-5-45(f). Moreover, pursuant to § 13A-5-45(c), at capital sentencing hearings⁶⁹, “evidence may be

⁶⁹ This would include the penalty phase as well, which is to be conducted before a jury, unless waived. ALA. CODE § 13A-5-46.

presented as to any matter that the court deems relevant to sentence and shall include any matters relating to the aggravating and mitigating circumstances referred to in Section[] 13A-5-49.”

Two statutory aggravating factors were argued and found at the sentencing stage of Price’s case: (1) the murder was committed during the course of a robbery, and (2) the murder was heinous, atrocious and cruel. (C.R. Vol. 1, 214-15 and ALA. CODE §§ 13A-5-49(4) & (8)). It is noted that the jury had already found Price guilty beyond a reasonable doubt of the capital offense of murder during the course of a robbery before the sentencing phase began. Thus, under Alabama law, the State had already proven the first aggravating factor beyond a reasonable doubt. ALA. CODE § 13A-5-50.

The existence of two statutory aggravating factors in Price’s case satisfied the death eligibility requirement under Alabama law. Once the eligibility requirement was met, under “the Alabama capital punishment statute and the United States Constitution[,] sentencing judges [are permitted] to consider a defendant’s prior criminal record and other nonstatutory aggravating factors in deciding whether to impose the death penalty. ALA. CODE § 13A-5-45(d)-47(a); [*Zant v.*] *Stephens*, 462 U.S. at 887-88, 103 S. Ct. at 2746-47.” *Lindsay v. Smith*, 820 F.2d 1137, 1154 (11th Cir. 1987).

Therefore, examination of non-statutory aggravating circumstances and any mitigating circumstances arising from the evidence proffered at each phase of the trial was proper in the determination whether Price should be sentenced to death. These included the individual circumstances of the crime and

the defendant, future dangerousness, rehabilitation and penological justifications for the death penalty. It follows that if future dangerousness is a legitimate sentencing concern, then it was not *per se* improper for the prosecutor to argue the subject, assuming the evidence supported it.

To the extent that Price is arguing that *Darden v. Wainwright*, 477 U. S. 168, 180 & n.10, provides proof that the prosecutor's argument concerning "future dangerousness"⁷⁰ was contrary to federal constitutional law, it is without merit. *Darden* is inapposite because it involved the impropriety of prosecutorial argument regarding future dangerousness at the guilt phase of trial, a subject wholly irrelevant to whether or not Darden had committed the offense.⁷¹ Therefore, the state appellate court's decision was not contrary to clearly established Supreme Court precedent pertaining to the narrow issue of relevant sentencing considerations.

However, Price also contends there was no evidentiary basis from which the prosecutor could justify arguing that he was a "threat" and deserved the death penalty because it was the "only way" to prevent further harm to the citizens of Fayette County.

⁷⁰ The court recognizes that the appellate court did not find that the prosecutor's argument, when read in context, pertained to Price's future dangerousness.

⁷¹ Additionally, even though the Supreme Court in *Darden* found the comment to be improper, it still did not find that Darden was constitutionally prejudiced thereby. *Id.* at 180.

Since Price believes the statement was not supported by the evidence, he contends it was improper and deprived him of a fundamentally fair trial. He argues that the state appellate court's findings of fact to the contrary are clearly erroneous when compared to the record and therefore entitled to no deference. Price compares his case to *Davis v. Zant*, 36 F.3d 1538 (11th Cir. 1994), where

[o]n at least five separate occasions during closing, the prosecutor made such statements which were either patently false or misleading with respect to this central defense. These misstatements portrayed the core of the defense case as an afterthought fabricated during trial after the state closed its evidence. The statements were not only clearly false, but the record in this case establishes beyond doubt that the misrepresentations were intentional and known to the prosecutor to be false.

Davis, 36 F.3d at 1549.

This court disagrees with Price's assertion that *Davis* provides him relief. First, Price does not allege that the prosecutor repeatedly made patently false and misleading statements about the defense case in closing. Price's complaint is based upon one comment, taken out of context. It is true that the prosecutor in Price's case clearly stated that Price was a threat and that the only way he knew to prevent Price from harming others in the future was to recommend the death penalty. Examining the argument in context, the record also shows that immediately prior to the questionable comment, the prosecutor reminded the jury of details supporting his argument that the crime was heinous, atrocious or cruel, and immediately after

the comment, the prosecutor asked for the death penalty as a means to deter any other individual from committing such an act.

Thus, the prosecutor's comment appears to be argument for the death penalty due to Price's future dangerousness, that dangerousness being based on the heinous, atrocious and cruel nature of the crime he committed. But it is also, as found by the Court of Criminal Appeals, an argument for the death penalty as a deterrent for the type of heinous crime Price had been convicted of committing. The state court decision that the comment was proper is not contrary to or an unreasonable application of clearly established federal law.⁷²

Even if the comment was improper, it did not prejudice Price. The Eleventh Circuit has explained:

In applying [the prejudice prong], we remain aware of the primary importance of

⁷² The court is unimpressed with Price's argument that since he was not notified that future dangerousness would be an issue, he was not prepared to rebut the argument. Any rebuttal could have immediately taken place by way of objection to the comment, and argument that Price had no significant criminal history and no possibility of returning to Fayette County. The court fails to see what additional information would have been necessary to dispute the prosecutor's remark, such that any lack of notice would have foundered the trial counsel's ability to immediately thwart it with the foregoing pieces of information, information that was already very much a part of the record.

examining the entire context of the trial proceeding. *Brooks*, 762 F.2d at 1413. Thus, a reviewing court should not assess prosecutorial comments in isolation, shorn of their context. See *Johnson v. Wainwright*, 778 F.2d 623, 631 (11th Cir. 1985) (evaluating challenged comments in light of “the rest of the prosecutor’s speech”), *cert. denied*, 484 U.S. 872, 108 S. Ct. 201, 98 L. Ed. 2d152 (1987). “In this regard, isolated or ambiguous or unintentional remarks must be viewed with lenity.” *Brooks*, 762 F.2d at 1400. We also consider the lack of an objection in examining the impact of a prosecutor’s closing argument, as the omission “may demonstrate defense counsel’s belief that the live argument, despite its appearance in a cold record, was not overly damaging.” *Brooks*, 762 F.2d at 1397 n.19; see also *Davis v. Zant*, 36 F.3d 1538, 1551 n.20 (11th Cir.1994) (“The failure to object can sometimes serve to clarify an ambiguous record as to whether a particular argument was in fact misleading or prejudicial.”). This court also evaluates whether “defense counsel’s closing argument ... ameliorate[d] the damage done to the defense by the prosecutor’s [statements].” *Davis*, 36 F.3d at 1551; see also *Brooks*, 762 F.2d at 1397-98. Moreover, we consider the trial court’s instructions to the jury, as they “may remedy effects of improper comments.” *Brooks*, 762 F.2d at 1400. And, of course, we consider the evidence of guilt and the weight of aggravating and mitigating factors. See *Brooks*, 762 F.2d at 1415-16. “A court need not determine whether specific arguments are proper or improper if, taken as a whole, they

would not require relief.” *Brooks*, 762 F.2d at 1403 n.31.

Cargill v. Turpin, 120 F.3d 1366, 1379 (11th Cir. 1997).

Reviewing the record, the court finds that the complained-of reference was terse and not “overly damaging.” *Cargill*, 120 F.3d at 1379. Trial counsel did not object, supporting the conclusion that the matter does not warrant relief at this juncture. Accordingly, the court finds that this claim is due to be denied.

I Because the State failed to meet its burden of proving that Mr. Price waived his *Miranda* rights before giving statements to Tennessee authorities and to Alabama officials, the trial court’s failure to suppress the statements violated the Fifth, Sixth, Eighth and Fourteenth Amendments. (Paragraphs 83-88 of the petition).

Price alleges the trial court erred when it failed to suppress two separate statements he gave to law enforcement officers because the “State failed to meet its burden of proving that [he] waived his *Miranda* rights before giving statements to the Tennessee authorities and the Alabama officials.” (Doc. 16 at 38). He argues the suppression hearings before and during trial prove this conclusion because the law enforcement officers “who took each of the statements claimed in broad terms that warnings had been administered pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966).” *Id.* He further argues that the use of broad terms “fail[ed] to show, beyond a reasonable doubt⁷³], that

⁷³ First and foremost, the minimum standard of evidentiary proof for admission of a statement is not

the warnings were properly given on either occasion.” *Id.* Still further, he alleges that Chattanooga Detective Michael Mathis unlawfully induced him to make his first statement, which became the “centerpiece of the prosecution’s case” against him. *Id.* at 38-39. Price argues that Mathis misled him into making the Tennessee statement by telling him “that he [Mathis] would vouch for [Price’s] cooperation.” (Doc. 28 at 87).

The Alabama Supreme Court was the last state court to examine this claim. *Ex Parte Price*, 725 So. 2d 1063 (Ala. 1998). The Court affirmed the appellate court’s findings to the extent that it found the State had proven Price was properly advised of his *Miranda* rights prior to giving a statement to Chattanooga detective Michael Mathis. *Id.* at 1067-68. The Alabama Supreme Court also found that Price’s statement to Mathis was voluntary, and was not the product of coercion. *Id.* at 1072-73. However, contrary

beyond a reasonable doubt, but by a preponderance of the evidence:

“[T]he burden of showing admissibility rests, of course, on the prosecution.” *Brown v. Illinois*, 422 U.S. 590, 604, 95 S.Ct. 2254, 45 L. Ed. 2d 416 (1975). The prosecution bears the burden of proving, at least by a preponderance of the evidence, the *Miranda* waiver, *Colorado v. Connelly*, 479 U. S. 157, 169, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986), and the voluntariness of the confession, *Lego v. Twomey*, 404 U.S. 477, 489, 92 S. Ct. 619, 30 L. Ed. 2d 618 (1972).

Missouri v. Seibert, 542 U.S. 600, 609 n.1 (2004).

to the opinion of the Court of Criminal Appeals, the Alabama Supreme Court found the State did not prove Alabama authorities advised Price of his *Miranda* rights, and ruled that the motion to suppress should have been granted. *Id.* at 1068-71. It additionally found that admission of the information and physical evidence recovered from Price as a result of that statement did not constitute plain error. *Id.* at 1072.

Price agrees the Alabama Supreme Court was correct when it found the State did not prove Alabama authorities had properly advised him of his *Miranda* rights, but asserts the remainder of the Court's opinion is contrary to and an unreasonable application of clearly established Supreme Court precedent. (Doc. 28 at 85-89). With the exception of Detective Mathis's testimony as to whether he coerced Price into making the Tennessee statement, there is no indication whatsoever that Price disputes the Alabama Supreme Court's historical findings of fact. Accordingly, those findings shall be presumed to be correct (28 U.S.C. § 2254(e)(1)), and the court will carefully examine whether Price has overcome that presumption with regard to Detective Mathis.

The Alabama Supreme Court's findings of fact and conclusions of law were lengthy and are as follows:

Before trial, Price gave two statements to law enforcement authorities. He gave the first statement to Detective Michael Mathis of the Chattanooga, Tennessee, Police Department on December 29, 1991 (the "Tennessee statement"). The record indicates that Detective Mathis made audiotapes of that interview and later provided the audiotapes to Sheriff James Turner in Fayette County, Alabama. Sheriff

Turner testified that his secretary prepared a typed transcript of the tapes of Detective Mathis's interview. [⁷⁴]

Price gave the second statement to Sheriff Turner on December 29, 1991, in Fayette County (the "Alabama statement"). Sheriff Turner testified that this interview was also recorded on audiotape and that a typed transcript was prepared. [⁷⁵]

Price filed a pretrial motion to suppress, requesting that the trial court suppress "[a]ny statements made by [Price], whether oral, written or videotaped, which the State intends to introduce into evidence or otherwise use at the trial of this case." Price did not specify in the motion why the statements should be suppressed. The trial court conducted a hearing on Price's motion on December 15, 1992, during which the State presented evidence regarding both statements. At the hearing, the trial judge denied Price's motion to suppress, as to both statements.

On appeal, Price contends that both statements should have been suppressed

⁷⁴ In footnote, the Court wrote, "Ultimately, the State read the entire typed transcript of the statement, in its entirety, into evidence at trial." *Ex Parte Price*, 725 So.2d at 1066 n.1.

⁷⁵ In footnote, the Court wrote, "Nothing in the record indicates that this statement was introduced into evidence at trial." *Id.* at n.2.

because, he says: (1) with regard to both of the statements, the State failed to adequately demonstrate that the law enforcement authorities had properly advised him of his *Miranda* rights (*Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)) before questioning him; and (2) the Tennessee statement was the product of an improper inducement.

It is well established that extrajudicial confessions and other inculpatory statements are prima facie involuntary and that for such a statement or confession to be admissible the State must prove by a preponderance of the evidence that it was voluntary. *Ex parte Singleton*, 465 So. 2d 443, 445 (Ala. 1985). To satisfy this burden, the State must show: (1) that proper *Miranda* warnings were given before any questioning by the police and (2) that the statement was voluntary, i.e., that it was not procured through coercion or improper inducement. See *Stariks v. State*, 572 So. 2d 1301, 1304 (Ala. Crim. App. 1990); *McLeod v. State*, 718 So. 2d 727, 729 (Ala. 1998). The initial determination of admissibility is made by the trial court, and the trial court's determination will not be disturbed unless it is contrary to the great weight of the evidence or is manifestly wrong. *McLeod*, *supra*; *Stariks*, *supra*.

....

Although there is no talismanic incantation required to satisfy the requirements of *Miranda*, it is well settled that, before being questioned, an accused in custody must be

informed in clear and unequivocal terms that he has the right to remain silent, that anything he says can be used against him in court, that he has the right to have counsel present at the interrogation, and that if he is indigent and cannot afford to pay a lawyer, the court will appoint one to represent him during the interrogation. See *Ex parte Siebert*, 555 So. 2d 780, 781-82 (Ala.1989), citing, *California v. Prysock*, 453 U.S. 355, 359-60, 101 S. Ct. 2806, 69 L. Ed. 2d 696 (1981); *Wallace v. State*, 290 Ala. 201, 275 So. 2d 634 (1973). If the defendant is not advised of each of these rights before being questioned, then any statement he makes during the questioning is not admissible against him as evidence of guilt. See, e.g., *Berkemer v. McCarty*, 468 U.S. 420, 429, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984) (statements made in response to custodial interrogation are inadmissible as evidence of guilt unless the defendant was advised of the rights established in *Miranda*).

....

We will first consider whether the State demonstrated that Price had been properly advised of his *Miranda* rights before being questioned by Detective Mathis in Chattanooga.

Price argues that this Court may consider only the evidence that was before the trial court when it denied the motion to suppress and, therefore, that it may not consider any additional evidence relevant to this issue that was produced subsequently at trial. He contends

that the State did not actually produce evidence at the suppression hearing that precisely identified which rights were explained to him before he provided the Tennessee statement; therefore, he argues, the State failed to show that he was properly advised of his *Miranda* rights. However, Price has cited no legal authority or persuasive reason in support of a rule requiring this Court to consider only the evidence presented to the trial court at the pretrial suppression hearing. Accordingly, we will apply the long-standing rule that, in considering whether the trial court properly overruled a defendant's motion to suppress an extrajudicial confession or other inculpatory statement, a reviewing court may consider both the evidence presented at the pretrial suppression hearing and the evidence presented at trial. *See, e.g., Henry v. State*, 468 So. 2d 896, 899 (Ala. Crim. App. 1984); *United States v. Smith*, 527 F.2d 692, 694 (10th Cir. 1975) (“In passing on the correctness of the trial court’s denial of [the defendant’s] motion to suppress, we are not limited to a consideration of just the evidence introduced at the hearing on the motion to suppress. In addition thereto, we may also consider the evidence adduced at trial, even though such may not have been presented at the pretrial suppression hearing.”).^[76]

⁷⁶ In footnote, the Court wrote, “Because we conclude that it is appropriate to review the evidence adduced at trial, we express no opinion as to whether the evidence produced at the pretrial suppression hearing demonstrated that Price was properly advised of his

Before he attempted to introduce the Tennessee statement into evidence at trial, the prosecutor questioned Detective Mathis. Detective Mathis testified that before he questioned Price, he informed Price of his constitutional rights and that he used the “standard rights form” required by the Chattanooga Police Department. He testified that he explained every portion of that form to Price and, before continuing, ascertained whether Price understood what was being read to him. Detective Mathis was then asked to describe specifically what he had told Price; he stated that Price was told:

“[B]efore we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. You have the right to talk to a lawyer for advice before we ask you any questions and have him with you during the questioning. If you cannot afford a lawyer, one will be appointed for you before any questions if you wish. If you decide to answer questions now without a lawyer present, you still have the right to stop answering questions at any time. You also have the right to stop answering questions at any time until you talk to a lawyer.”

This statement complied with both

Miranda rights.” *Id.* at 1068 n.3.

Alabama and Federal law regarding the obligation to inform an accused in custody of his rights under *Miranda*. See *Wallace, supra*. Accordingly, after reviewing the complete record on this issue, we conclude that the State demonstrated that Price was properly advised of his *Miranda* rights before being questioned by law enforcement authorities in Chattanooga, Tennessee.

We will next address Price's argument that the State failed to prove that he was properly advised of his *Miranda* rights before he gave the Alabama statement to Sheriff Turner in Fayette County.^[77] At the outset, we

⁷⁷ In footnote, the Court wrote,

Price has not contended that his statement given to Sheriff Turner in Fayette County was procured through force, intimidation, or inducement; therefore, the only issue with regard to the Alabama statement is whether it was preceded by an adequate *Miranda* warning.

We note that the record in this case shows that the State met its burden of proving that the Alabama statement was voluntary. Sheriff Turner testified that Price was not threatened or offered any inducement or reward for providing a statement. He further testified that Price was not told that it would be better for him to make a statement. In the absence of any evidence to the contrary, we note that this

note that the record indicates that the State did not seek to introduce this statement into evidence at trial; indeed, it appears from the record that neither the audiotape of the statement nor the typed transcript of that tape was ever considered directly by either the trial court or the jury. At first blush, therefore, it appears that Price was not prejudiced by any error in regard to this issue.

However, the record does reflect that Sheriff Turner testified at trial that he had interviewed Price and that, during the interview, they had discussed the location of a .44 caliber pistol and a holster. Specifically, Sheriff Turner testified that Price gave him directions explaining how the police could locate these pieces of evidence. The State also presented evidence indicating that these two items had belonged to Bill Lynn. In short, the State introduced evidence tending to show that Price had provided a statement to Sheriff Turner and that this statement contained information concerning the location of items that had belonged to the victim. There can be no doubt that, by linking Price to the crime, this reference to the Alabama statement was inculpatory to some extent and contributed in at least some measure to Price's conviction. Accordingly, if

testimony was sufficient to show that Price's statement to law enforcement officials in Fayette County was voluntary.

Id. at 1068 n.4.

the State failed to prove that Price had been properly advised of his *Miranda* rights before Sheriff Turner interviewed him, the State should not have been permitted to introduce evidence of that statement. *See, e.g., Berkemer, supra.* [⁷⁸]

⁷⁸ In footnote, the Court wrote,

In light of the fact that the State introduced evidence of the statement itself, we do not address whether the trial court erred in admitting into evidence the physical items (i.e., the .44 caliber pistol and the holster) that were apparently located in part as a result of that statement. Cf. *United States v. Sangineto-Miranda*, 859 F.2d 1501, 1518 (6th Cir.1988) (holding, pursuant to *Oregon v. Elstad*, 470 U.S. 298, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985), that cocaine found as a result of a *Miranda* violation was admissible even though the *Miranda* statement itself was not admissible, because “where police simply fail to administer warnings, the admissibility of nontestimonial physical evidence derived from the uncounselled statements should turn on whether the statements were voluntary within the meaning of the fifth amendment”); *Baker v. State*, 555 So. 2d 273, 280 (Ala. Crim. App. 1989) (holding that clothing that was located based on information obtained during an improper interrogation was admissible under

The facts relevant to whether Price was fully informed of his *Miranda* rights before being questioned by Sheriff Turner are as follows: At the pretrial suppression hearing, Sheriff Turner was asked whether he had advised Price of his “constitutional right to counsel and to not give a statement and the other rights commonly referred to as *Miranda* rights.” Sheriff Turner responded by saying that Price had been advised “of his rights” and that the audiotapes of the interview reflected that fact. However, the record of the suppression hearing does not show that the trial judge reviewed either the audiotapes or the typed transcript of Price’s statement to Sheriff Turner before ruling on whether that statement should be suppressed; nor does the record show that Sheriff Turner read the typed transcript aloud at the suppression hearing.

During her cross-examination of Sheriff Turner at the suppression hearing, Price’s counsel asked Sheriff Turner whether Price had been given the *Miranda* warnings “from a form.” Specifically, the record contains the following colloquy:

“[Defense counsel:] Sheriff Turner, did you Mirandize [sic] [Price] from a form?”

Elstad). Our review of this issue is limited to whether the State should have been permitted to present evidence of the statement itself.

Id. at 1069, n.5.

“[Sheriff Turner:] He was read his rights and advised that he could not talk to us until he obtained an attorney, that he also could stop answering questions at any time or make [sic] any statements until he talked to an attorney, at which time he understood these rights.

“[Defense counsel:] My point is did you Mirandize him from a form?

“[Sheriff Turner:] Yes, ma’am.

“[Defense counsel:] You got it in your files? “[Prosecutor:] I don’t know.

“[Defense counsel:] Is that standard procedure in your office that there is a-

“[Sheriff Turner:] No, ma’am, not necessarily on signing off, but do Mirandize them [sic].

“[Prosecutor:] Did I furnish you such a form?

“[Defense counsel:] I don’t think with this statement, no. I think with the other statement.

“[Prosecutor:] If I didn’t furnish that, I didn’t have it then.

“[Defense counsel:] You were present, then, when Deputy Strickland Mirandized him from a form or a card?

“[Sheriff Turner:] Yes, ma’am.”

After hearing further testimony regarding the voluntariness of the Alabama

statement,^[79] the trial judge denied Price's motion to suppress that statement.

During the State's case-in-chief, the prosecutor questioned Sheriff Turner concerning his role in the investigation of Bill Lynn's murder and, as described above, specifically asked Sheriff Turner if he had interviewed Price. Sheriff Turner answered that he had interviewed Price. The prosecutor then asked Sheriff Turner:

“Prior to talking to [Price], did you advise him of his right to have an attorney if he wanted to, to not make a statement if he did not want to, to stop making a statement at any time and consult an attorney and that if [sic] any statement he did make could be used against him in court? Did you do that?”

Sheriff Turner answered that a deputy had advised Price of his rights and that the statement of his rights had included all of what the prosecutor had asked about in his question; he did not testify that the statement of his rights contained any information not included in the prosecutor's question.

The record indicates that the evidence set out is the only evidence presented that was relevant to the question whether Price was

⁷⁹ In footnote, the Court wrote, “See discussion, *supra*, note 4.” *Id.* at 1069 n.6.

advised of his *Miranda* rights before being questioned by Sheriff Turner. Although Sheriff Turner testified at the pretrial suppression hearing that the Alabama statement had been audiotaped and that the tape reflected that Price had been informed of his rights, there is no indication in the record that either the audiotape or the typed transcript of the statement was introduced as evidence during the trial. We further note that, on cross-examination, Price's trial counsel did not ask Sheriff Turner any questions concerning what warnings the deputy actually gave Price. Her questions were limited to whether the warnings were given "from a form," and she did not ask what was printed on the form.

The testimony set out above does not contain a complete statement of the rights provided by *Miranda v. Arizona*. For example, in his question to Sheriff Turner, the prosecutor did not ask him if Price had been advised that, if he could not afford an attorney, one would be appointed for him. See *Miranda v. Arizona*, 384 U.S. 436, 473, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) ("[i]n order fully to apprise a person interrogated of the extent of his rights under this system then, it is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him"); *Wallace, supra*. Also, it is clear that, although Sheriff Turner presented testimony indicating that Price's rights were read to him from a preprinted card or form, Sheriff Turner did not read that card at trial. *Cf. Carr v. State*, 640 So.

2d 1064, 1070 (Ala. Crim. App. 1994) (holding that the State demonstrated that the defendant had been fully informed of his *Miranda* rights, because a law enforcement officer testified at trial that he had orally informed the defendant of his *Miranda* rights by reading those rights from a preprinted card and read that card at trial). Furthermore, the testimony set out above provides no evidence that Price actually signed a waiver-of-rights form before being interviewed. In short, the State never articulated precisely which rights were explained to Price before he was questioned by Sheriff Turner. The question presented, therefore, is whether the State satisfied its burden of proving that Price was properly advised of his rights before he was questioned in Fayette County, when it presented Sheriff Turner's testimony that Price had been read his *Miranda* rights from a form or card, without specifying the contents of that form or card.

....

The record in this case does not indicate precisely which rights were explained to Price. In the absence of any evidence indicating the contents of the form that was read to Price or explaining Sheriff Turner's understanding of what rights must be explained to a suspect, we are forced to conclude that there was no evidence from which the court could have properly concluded that Price was advised of each of the rights established in *Miranda* before he provided his statement to Sheriff Turner. . . . A court cannot fill in an evidentiary gap with

supposition or a presumption concerning a witness's knowledge. In short, this Court cannot presume that Price was advised of all of his rights, based solely on testimony that Price was "Mirandized" from a form; therefore, the State failed to demonstrate that Price had been informed of his *Miranda* rights before being questioned by Sheriff Turner. *Cf. United States v. Gilmer*, 793 F. Supp. 1545, 1554-56 (D. Colo. 1992). . . .

We note that the record shows that, although Price filed a general pretrial motion to suppress any statement he had made to law enforcement authorities,

Price's trial counsel did not object when the State asked Sheriff Turner whether he had interviewed Price. However, because Price was convicted of capital murder, this Court will review the record for plain error and, if it finds such error, correct it by "appropriate appellate action." *See* Rule 39(k), Ala. R. App. P.

Therefore, having determined that the trial court erred in permitting the State to admit evidence of Price's statement to Sheriff Turner, we must determine whether this error was so egregious as to amount to plain error and thus require a reversal of Price's conviction for capital murder. In order to constitute "plain error," the error must be a particularly egregious one that seriously affects the fairness, integrity or public reputation of judicial proceedings. *See, e.g., Kuenzel v. State*, 577 So. 2d 474, 481-82 (Ala. Crim. App. 1990), and cases cited therein. In addition, the claimed error

must have had an unfair prejudicial impact on the jury's deliberation. *Id.*

Our examination of the record in this case leads us to conclude that the admission of the evidence of Price's Alabama statement did not amount to plain error. As indicated above, the court did not admit into evidence the statement itself. Instead, the evidence at issue here consisted primarily of Sheriff Turner's testimony that he had interviewed Price and that, during the course of the interview, they had discussed the location of the .44 caliber pistol and the holster Price and his accomplice had taken from the victim's residence. There is no doubt that this evidence helped link Price to the crimes at issue. However, Price himself discussed these pieces of physical evidence with Detective Mathis in the Tennessee statement, which, as we discuss in Part VII, 725 So. 2d at 1072, was properly admitted into evidence. Moreover, the additional evidence connecting Price to the crimes was overwhelming. In the Tennessee statement, Price directly implicated himself in the crimes and provided law enforcement authorities with the location of most of the physical evidence linking him to the crimes. Because the State produced overwhelming evidence, beyond Sheriff Turner's testimony concerning the Alabama statement, connecting Price to the crimes, we conclude that the error in allowing Sheriff Turner to testify regarding the statement did not rise to the level of plain error. *Cf. Bush v. State*, 523 So. 2d 538, 557 (Ala. Crim. App. 1988) (holding that the erroneous admission of the defendant's first statement

could not have contributed to the defendant's conviction because the first statement was merely cumulative of the evidence contained in the properly admitted second statement); *Kinder v. State*, 515 So. 2d 55, 69 (Ala. Crim. App. 1986) (any error in the admission of the defendant's statement was rendered harmless when the defendant admitted to the same facts on the witness stand).⁸⁰

⁸⁰ In footnote, the Court wrote,

We note that in *Taylor v. State*, 337 So. 2d 773, 775 (Ala. Crim. App. 1976), the Court of Criminal Appeals, relying on *Lawn v. United States*, 355 U.S. 339, 78 S. Ct. 311, 2 L. Ed. 2d 321 (1958), held that, in general, "once the court has ruled on a motion to suppress, supported by competent evidence as to the validity vel non of the search and seizure, it is not necessary for the defendant again at the trial to object to the evidence on constitutional grounds, and that the failure to do so does not constitute a waiver," unless special circumstances require further objection. *See also Tillman v. City of Enterprise*, 627 So. 2d 1160, 1161 (Ala. Crim. App. 1993); *Smith v. State*, 612 So.2d 1314 (Ala.Crim.App.1992) (applying rule to pretrial motion challenging photographic lineup), overruled on other grounds, *Ex parte Thomas*, 659 So. 2d 3 (Ala. 1994).

At first blush, this rule seems to contradict the

Price also argues that his statement to Tennessee authorities was not voluntary and should have been suppressed because, he claims, it was the product of an improper inducement; specifically, Price contends that the

general rule, expressed in *Liberty Nat'l Life Ins. Co. v. Beasley*, 466 So. 2d 935, 936 (Ala. 1985), that “an appellant who suffers an adverse ruling on a motion to exclude evidence . . . made in limine, preserves this adverse ruling for post judgment and appellate review only if he objects to the introduction of the proffered evidence or other matters and assigns specific grounds therefor at the time of trial, unless he has obtained express acquiescence of the trial judge that such subsequent objection to evidence proffered at trial and assignment of grounds therefor are not necessary.”

Because this issue has not been addressed by either the parties or the Court of Criminal Appeals, we decline to address whether the rule expressed in *Taylor* is a proper statement of the law and, if so, whether it is applicable to the case at hand. Moreover, Price did not specifically allege at the pretrial suppression hearing that the State failed to prove that he had been properly advised of his *Miranda* rights; therefore, an objection might have been required even if the rule described above is applicable to this case. In any event, it is clear that even if Price properly preserved this issue for appellate review, any error with regard to the admission of evidence of the Alabama statement was harmless in this case. *Cf. Bush v. State*, 523 So. 2d at 557; *Kinder v. State*, 515 So. 2d at 69; *Id.* at 1072 n.7.

statement was procured through a promise of leniency. It is well established that a confession, or any inculpatory statement, is involuntary if it is either coerced through force or induced through an express or implied promise of leniency. *Bram v. United States*, 168 U.S. 532, 18 S. Ct. 183, 42 L. Ed. 568 (1897). A court should examine the totality of the circumstances to determine if an implied promise of leniency caused the defendant to make a confession. *Ex parte Gaddy*, 698 So. 2d 1150 (Ala. 1997). The test of involuntariness of a confession, or other inculpatory statement, is whether in his discussions with the police, which may have included bargaining, the defendant's will was overborne by the apprehension of harm or hope of favor. *McLeod*, *supra*, 718 So. 2d at 729. To determine whether a defendant's will has been overborne, it is necessary to assess "the conduct of the law enforcement officials in creating pressure and the suspect's capacity to resist that pressure' [and] '[t]he defendant's personal characteristics as well as his prior experience with the criminal justice system are factors to be considered in determining [the defendant's] susceptibility to police pressures.'" *McLeod*, 718 So. 2d at 730 (quoting an earlier case).

During cross-examination at the suppression hearing, Price's trial counsel asked Detective Mathis whether he had told Price that if he gave a statement it would go easier on him. Detective Mathis answered that he had not told Price that. Price's trial counsel then asked Detective Mathis whether he had told Price that he would give a good report as to his

cooperation, and Detective Mathis answered:

“I very possibly could have said that I would be willing to say that he cooperated. That’s something that I frequently will say that I do tell people. You know, if they cooperate, then I will be the first to say that, yes, they did.”

Price contends that this testimony shows that the Tennessee statement was not voluntarily given.

We disagree. Looking at the totality of the circumstances in this case, we cannot conclude that Price’s statement to Detective Mathis in Chattanooga was procured through an improper inducement. Detective Mathis testified he did not tell Price that it would be better for him to confess or to make a statement and that he did not offer him any kind of inducement to obtain the statement. Likewise, the evidence does not suggest that Price was threatened with physical intimidation or psychological pressure.

Price was 19 years old when he gave his statement to the police, and Detective Mathis testified that Price told him he was about to graduate from high school and that he could read and write. Detective Mathis further testified that

Price signed a waiver-of-rights form, and the transcript of the statement shows on its face that Price was fully informed of his *Miranda* rights. In addition, the record indicates that Price had had at least some measure of experience with the judicial system as a

juvenile.

The evidence shows that Price was not held an inordinate length of time before being interviewed, and it shows that before and during the interview he was fed breakfast, was provided soft drinks, was permitted to smoke, and was permitted to use the rest room. Finally, we note that the interview lasted approximately one and a half hours and was therefore not inordinately long.

We conclude that the possibility that Detective Mathis might have told Price that he would make Price's cooperation known was insufficient, given the totality of the circumstances, to make Price's confession involuntary. Cf. *Ex parte Gaddy, supra*; *McLeod v. State, supra*. In addition, as indicated above, we conclude that the State demonstrated that Price was fully informed of his *Miranda* rights before being questioned by Detective Mathis. Accordingly, we hold that the trial court properly denied Price's motion to suppress the Tennessee statement and properly admitted that statement into evidence at trial.

....

Conclusion

The State failed to prove that Price had been adequately advised of his *Miranda* rights before he gave his statement to law enforcement authorities in Fayette County, Alabama; however, any error in this regard did not amount to reversible error. We note that our decision on the admissibility of the Alabama statement does

not impact Price's noncapital conviction for robbery in the first degree based on the robbery of Bessie Lynn. As noted above, Price did not object at trial to the State's reference to the Alabama statement or to the admission of the physical evidence that was located in part because of that statement. Because Price's conviction for robbery in the first degree is not subject to the plain error rule, we do not review this issue with regard to that conviction. *See Liberty Nat'l Life Ins. Co. v. Beasley*, 466 So. 2d 935 (Ala. 1985).^[81] Furthermore, the record shows that the State met its burden of proving that the Alabama statement was voluntary. ^[82] Finally, we conclude that the State demonstrated that Price had been advised of his *Miranda* rights before he was interviewed by Detective Mathis in Chattanooga and that the Tennessee statement was voluntary.

....

Ex parte Price, 725 So. 2d at 1067-74.

Price argues that the state court's adjudication of this claim was contrary to and an unreasonable application of clearly established federal law. (Doc. 28

⁸¹ In footnote, the Court wrote, "See discussion, *supra*, note 7." *Id.* at 1074 n.8.

⁸² In footnote, the Court wrote, "At the pretrial suppression hearing, Sheriff Turner testified that Price was not threatened or pressured, and was not offered any reward or inducement, to provide his statement." *Id.* at 1074 n.9.

at 86-89). He further alleges that the Alabama Supreme Court gave improper weight to the fact that he signed the Tennessee waiver and had past experiences with the juvenile justice system. Additionally, he asserts that the Court failed to consider his youth, lack of sleep, and intoxication, particularly in light of Mathis's "misleading instructions." *Id.* at 87. Price offers the Eleventh Circuit decision *Hart v. Attorney General of State of Florida*, 323 F.3d 884, 895 (11th Cir. 2003), in support of his contentions. Price writes as follows:

In *Hart*, an officer told the defendant, "honesty will not hurt you." [323 F.2d at] 894. Because this statement contradicted the *Miranda* warning that [anything you say can be used against you in court, the court held that the defendant "did not truly understand the nature of his right against self-incrimination or the consequences that would result from waiving it." *Id.* at 895; *see also United States v. Beale*, 921 F.2d 1412, 1435 (11th Cir. 1991) (finding waiver invalid where the defendant was told signing form would not hurt him.) (Doc. 28 at 88). Lastly, Price argues that the admission of the physical items into evidence as a result of his statement to Sheriff Turner prejudiced him. *Id.* at 89.

This court concludes that Price's complaints are without merit. The Alabama Supreme Court carefully and completely examined and properly applied the "totality of circumstances" test to Price's Tennessee statement. Furthermore, *Hart* affords Price no relief because, unlike the officer in that case, Detective Mathis in no way made any statement to Price that blatantly abrogated or contradicted the *Miranda* warnings given to him. Finally, it was not unconstitutional for the items found as a result of Price's

Alabama statement to be admitted into evidence. *See United States v. Patane*, 542 U.S. 630 (2004) (“[f]ailure to give *Miranda* warnings does not require suppression of physical fruits of suspect’s unwarned but voluntary statements.”). Thus, he cannot argue he was prejudiced thereby. Even if a prejudice argument was available to Price, he overlooks the fact that the Alabama Supreme Court expressly found that he had also revealed the locations of the disputed items in his Tennessee statement. This effectively refutes any prejudice argument.

The state court’s decision was not based on an unreasonable determination of the facts in light of the evidence, nor are its findings regarding those facts or its legal conclusion – that the statement was voluntary – contrary to or an unreasonable application of federal law.

J. The introduction of cumulative, inflammatory photographs of the decedent’s body vitiated the fairness of the trial and deprived Christopher Price of the reliable verdicts to which he was entitled under the federal constitution. (Paragraphs 89-91 of the petition).

Price alleges the State was allowed to introduce “inflammatory [photographs of the victim’s wounds], over his objection, and that this error denied him “a [fundamentally] fair trial and introduced unreliability into the factfinding process.” (Doc. 16 at 40-41). According to Price, admission of the photographs was improper because they had a substantial tendency to prejudice the jury against him and, at most, they had only limited probative value. *Id.* at 41.

Price also contends the prosecutor “argue[d] intemperately for both a guilty verdict and the death penalty by recalling what the photographs showed” thus injecting “‘passion and prejudice’ into the jury’s calculus” in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. *Id.* In support of this assertion, Price cites the following as a direct quote of the prosecutor’s statement:

You’ve seen the diagrams. There are a lot of pictures. The one picture I really want to emphasize to you, this case is gruesome and horrible enough without my having to emphasize that to you. And I really have to kind of divorce myself from how horrible it is in order to be able to talk about it. It’s just the way I guess of insulating ourselves from how horrible it is. But I believe that the evidence supports the theory that this arm and this bone was completely cut into, practically breaking the arm off, with the sword. It was a terrible blow, whatever it was, and Chris Price, under the evidence, had the sword throughout the murder. [T]he Code says that you may consider that this offense was especially heinous, atrocious or cruel compared to other murders, other capital offenses. . . . The facts really are so atrocious and cruel and heinous – that there is not much I can say to emphasize that, the pictures that you saw, the drawings that the doctor was permitted to explain to you, and that were introduced into evidence about how he was killed.

Id. at 41.

Price provides no citation for the above

“arguments.” *Id.* Upon examination of the record, it becomes evident that the first paragraph is derived from the prosecutor’s closing argument at the guilt phase⁸³ of trial and the second paragraph is derived from the prosecutor’s closing argument at the penalty phase.⁸⁴ To the extent Price suggests the prosecutor made improper penalty phase comments at the guilt phase of the trial, it is rejected.

In his reply brief, Price devotes his supporting argument exclusively to the comment made at the guilt phase of the trial. (Doc. 28 at 89-91). Federal analysis begins with the Alabama Court of Criminal Appeals’ findings of fact and conclusions of law.

The appellant argues that the introduction of allegedly cumulative and inflammatory photographs of the decedent’s body vitiated the fairness of the trial and deprived him of reliable (sic) verdict. However, the location and condition of the wounds to the victim were relevant in the present case, because the appellant’s defense was that he had not

⁸³ R. Vol. 6 at 821.

⁸⁴ R. Vol. 6 at 910. Price makes no intelligible, independent claim concerning the prosecutor’s reference to the photographs during the penalty phase of the trial, as evidence supporting the heinous, atrocious and cruel aggravating factor. Even if it could be considered as an attempt to make a claim, it is so insufficiently supported that it fails to satisfy the specificity requirements for habeas pleadings, and is due to be dismissed.

committed the murder and he argued that he did not have the sword. There was evidence that both a sword and knife had been used in the attack on the deceased; thus, as the prosecutor argued at trial, whether the wounds could have been caused by either or both of these weapons, and which weapon caused the death, became relevant. Moreover, the condition of the body was relevant because the appellant argued that he did not intend to murder the deceased, rather he intended to commit a robbery.

“As a general rule, photographs are admissible in evidence if they tend to prove or disprove some disputed or material issue, to illustrate or elucidate some other relevant fact or evidence, or to corroborate or disprove some other evidence offered or to be offered, and their admission is within the sound discretion of the trial judge. *Fletcher v. State*, 291 Ala. 67, 277 So. 2d 882 (1973); *Hopkins v. State*, 429 So. 2d 1146 (Ala. Crim. App.), *cert. denied*, 429 So. 2d 1146 (Ala. 1983); *Godbolt v. State*, 429 So. 2d 1131 (Ala. Crim. App. 1983); *Carpenter v. State*, 400 So. 2d 417 (Ala. Crim. App.), *cert. denied*, 400 So. 2d 427 (Ala. 1981). Photographs which depict the character and location of external wounds on the body of a deceased are admissible even though they are cumulative and based upon undisputed matters. *Wicker v. State*, 433 So. 2d 1190 (Ala. Crim. App. 1983); *Hopkins v. State*; *Hines v. State*, 365 So. 2d 320 (Ala. Crim. App.), *cert. denied*,

365 So. 2d 322 (Ala. 1978). The fact that a photograph is gruesome and ghastly is no reason to exclude its admission into evidence, if it has some relevancy to the proceedings, even if the photographs may tend to inflame the jury. *Warrick v. State*, 460 So. 2d 320 (Ala. Crim. App. 1984); *Carpenter v. State*; *Richards v. State*, 337 So. 2d 171 (Ala. Crim. App.), *cert. denied*, 337 So. 2d 173 (Ala. 1976).”

Magwood v. State, 494 So. 2d 124, 141 (Ala. Cr. App. 1985), *affirmed*, 494 So. 2d 154 (Ala. 1986), 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986). “There is irony in a convicted murder’s (sic) contending on appeal that pictures of the corpse of his victim might have inflamed the jury. That risk ‘comes with the territory.’” *Grice v. State*, 527 So. 2d 784, 787 (Ala. Cr. App. 1988).

Although he (sic) appellant also argues that the trial court erred in allowing into evidence photographs depicting the crime scene, he failed to object to these photographs at trial; therefore, his objection as to these photographs is subject to the plain error doctrine. Rule 45A, Ala. R. App. P. [footnote omitted]. These photographs were relevant to show the location and exact details of the offense and were illustrative of a number of witnesses’ testimony. “Perpetrators of crimes that result in gruesome scenes have reason to expect that photographs of those gruesome scenes will be taken and admitted into evidence.” *Jenkins v. State*, 627 So. 2d 1034, 1045 (Ala. Cr. App. 1992), *affirmed*, 627 So. 2d

1054 (Ala. 1993), *cert. denied*, 511 U.S. 1012, 114 S. Ct. 1388, 128 L. Ed. 2d 63 (1994). In the present case, although these photographs may have tended to inflame the jury, they had some relevancy and therefore were properly admitted into evidence.

Price v. State, 725 So. 2d at 1052-53.

Price argues that the appellate court's evidentiary ruling regarding the photographs is contrary to and an unreasonable application of clearly established federal law. (Doc. 28 at 89). He further charges that the appellate court neglected to conduct a fundamental fairness analysis and as such, contends he is entitled to *de novo* examination of this aspect of his claim. *Id.* at 91.

Price's complaint regarding the appellate court's evidentiary decision in this matter lacks merit. This court

review[s] state court evidentiary rulings on a petition for habeas corpus to determine only "whether the error, if any, was of such magnitude as to deny petitioner his right to a fair trial." *Futch v. Dugger*, 874 F.2d at 1487 (quoting *Osborne v. Wainwright*, 720 F.2d 1237, 1238 (11th Cir. 1983)). Erroneously admitted evidence deprives a defendant of fundamental fairness only if it was a "crucial, critical, highly significant factor' in the [defendant's] conviction." *Williams v. Kemp*, 846 F.2d 1276, 1281 (11th Cir. 1988), *cert. denied*, 494 U.S.1090, 110 S. Ct. 1836, 108 L. Ed. 2d 965 (1990) (quoting *Jameson v. Wainwright*, 719 F.2d 1125, 1126-27 (11th Cir. 1983), *cert. denied*, 466 U.S. 975, 104 S. Ct. 2355, 80 L. Ed. 2d 827 (1984)). The

introduction of graphic photographic evidence rarely renders a proceeding fundamentally unfair. *Futch v. Dugger*, 874 F.2d at 1487; see also, e.g., *id.* (photograph of victim, nude, showing wounds made by gunshot); *Evans v. Thigpen*, 809 F.2d 239, 242 (5th Cir. 1987), *cert. denied*, 483 U.S. 1033, 107 S. Ct. 3278, 97 L. Ed. 2d 782 (1987) (nine color slides of homicide victim) (cited with approval in *Futch v. Dugger*, 874 F.2d at 1487).

Jacobs v. Singletary, 952 F.2d 1282, 1296 (11th Cir. 1992).

This court has carefully reviewed the record. There is no indication that introduction of the photographs was fundamentally unfair such that Price's right to due process of law was violated. Price continues to protest that the guilt case against him consisted of "weak circumstantial evidence," but his rendition of the facts is inaccurate. Proof of his guilt at trial was overwhelming. See *Price v. State*, 725 So. 2d at 1072 ("the State produced overwhelming evidence"). Thus, Price's indirect attempt to argue that the state court's factual findings regarding relevancy were unreasonable in light of the evidence presented at trial also lacks any foundation.

The Court of Criminal Appeals was clear that the photographs were relevant because Price: (1) denied that he murdered Mr. Lynn, and (2) Mr. Lynn's severed arm indicated that the weapon used must have been the sword, as opposed to a knife. *State v. Price*, 725 So. 2d at 1052-53. These two factors, along with a multitude of other evidence, including aspects of Price's statements to Tennessee police and Micah Donaldson, corroborative physical evidence and the

eyewitness testimony of Mrs. Lynn, were relevant and powerful indicators showing that Price, not his co-defendant, murdered Mr. Lynn.

This evidence included an admission by Price that the defendants expected to have to murder the Lynns and in fact, wanted the Lynns to be home during the robbery for the express purpose of having a physical confrontation with them, that Price held the interest in and practiced martial arts, that Price dressed in a black shirt and pants with a karate belt around his waist for commission of the crime, that Price owned and purposely brought the sword that caused Mr. Lynn's severed arm to the crime scene, and Mrs. Lynn's testimony that she saw one of the defendants in what appeared to be a karate uniform, in a karate stance with the sword raised in attack mode against her husband.

For the foregoing reasons, Price's claim that the photographs deprived him a fair trial lacks merit whether it is subjected to 28 U.S.C. § 2254(d) or *de novo* review. This claim is due to be denied.

K. The "heinous, atrocious or cruel" aggravating circumstance applied in Mr. Price's sentencing lacked a sufficient limiting instruction and is therefore unconstitutionally vague as applied, in violation of the Eighth and Fourteenth Amendments of the United States Constitution and of Alabama law. (Paragraphs 92-95 in the petition).

Price alleges the appellate court's approval of the trial court's heinous, atrocious or cruel ("HAC") instruction is contrary to and an unreasonable application of federal law because "it did not satisfy

the limiting and channeling requirements of *Furman* [*v. Georgia*, 408 U.S. 238 (1972),] *Godfrey* [*v. Georgia*, 446 U.S. 420, 428 (1980)], [*Maynard v. Cartwright*, 486 U.S. 356 (1988),]” and “*Walton v. Arizona*, 479 U.S. 639, 653 (1990).” (Doc. 16 at 42-44 and Doc. 28 at 92). Price’s argument in support of the claim is twofold, but since the respondent answers that this claim does not merit habeas relief (doc. 22 at 62-63, doc. 21 at 142-45), and the decision of the Court of Appeals quotes the trial court’s heinous, atrocious or cruel instruction in its entirety, the court finds it beneficial to set out the applicable portions of that decision prior to examining the reasons Price alleges the instruction was unconstitutionally vague. The findings of fact and conclusions of law articulated by the Court of Criminal Appeals are as follows:

The appellant argues that the aggravating circumstance that the offense was especially heinous, atrocious, or cruel when compared to other capital offenses was applied to his sentencing with insufficient limiting instructions and was, therefore, unconstitutionally vague. The record indicates that the appellant failed to object on this ground until this appeal; therefore, this claim must be reviewed pursuant to the plain error doctrine. Rule 45A, Ala. R. App. P. In the present case, the appellant relies on *Maynard v. Cartwright*, 486 U.S. 356, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988), in arguing that the trial court’s jury instructions concerning the “especially heinous, atrocious, and cruel” statutory aggravating circumstance was unconstitutionally vague. However, the jury was extensively instructed as to the meaning of these terms and how they are

to be applied in the context of capital sentencing. Similarly, in *Haney v. State*, 603 So. 2d 368, 387 (Ala. Cr. App. 1991), *aff'd*, 603 So. 2d 412 (Ala. 1992), *cert. denied*, 507 U.S. 925, 113 S. Ct. 1297, 122 L. Ed. 2d 687 (1993), the defendant relied on *Maynard v. Cartwright*, *supra*, in claiming that the trial court's instructions on this aggravating circumstance in her case were too vague to adequately guide the jury. This Court held that the instructions in *Haney v. State*, *supra*, at 385-86, were distinguishable from those in *Maynard v. Cartwright*, *supra*. This Court held:

“Unlike *Maynard [v. Cartwright]*, the jury here was instructed on the meaning of the words of the aggravating circumstances in the context of capital sentencing. These instructions correctly followed the previously recognized limiting construction of the aggravating circumstance established by the Alabama Supreme Court in *Ex parte Kyzer*, 399 So. 2d 330, 334 (Ala. 1981), wherein the court s[t]ated: ‘The aggravating circumstance listed in § 13-1-6(8) [now § 13A-5-49(8)] was intended to apply to only those conscienceless or pitiless homicides which are unnecessarily torturous to the victim.’ For other cases in which we applied the rule established in *Ex parte Kyzer*, see *Hallford v. State*, 548 So. 2d 526 (Ala. Cr. App. 1988), *aff'd*, 548 So. 2d 547 (Ala.), *cert. denied*, 493 U.S. 945, 110 S. Ct. 354, 107 L. Ed. 2d 342 (1989); *Bui v. State*, 551 So. 2d 1094 (Ala. Cr. App.

1988), *aff'd*, 551 So. 2d 1125 (Ala. 1989). See also *Ex parte Bankhead; Bush v. State*, 431 So. 2d 555 (Ala. Cr. App. 1982), *aff'd*, 431 So. 2d 563 (Ala.), *cert. denied*, 464 U.S. 865, 104 S. Ct. 200, 78 L. Ed. 2d 175 (1983).”

Id. at 387.

In the present case, the trial court instructed the jury concerning this aggravating circumstance as follows:

“The other aggravating circumstance which you may consider in this case is, if you find from the evidence that it has been proved beyond a reasonable doubt, you may consider whether the capital offense was especially heinous, atrocious or cruel when compared to other capital offenses. The State asserts in this case the killing of Bill Lynn was especially heinous, atrocious, and cruel when compared to other capital murders. You will have to determine whether or not the evidence in this case, in fact, has proved beyond a reasonable doubt that, in fact, the killing of Bill Lynn was especially heinous, atrocious and cruel when compared to other capital murders.

The term ‘heinous’ means extremely wicked or shockingly evil. The term ‘atrocious’ means outrageously wicked and violent. The term ‘cruel’ means designed to inflict a high degree of pain with utter indifference to or even

enjoyment of the suffering of others. What is intended to be included in this aggravating circumstance is only those cases where the actual commission of the capital offense is accompanied by such additional acts as to set the crime apart from the norm of capital offenses. For a capital offense to be especially heinous, atrocious or cruel, it must be a conscienceless or pitiless crime which is unnecessarily tortuous to the victim. All capital offense (sic) are heinous, atrocious, and cruel to some extent, but not all capital offenses are especially heinous, atrocious, cruel compared to other capital offenses.

You should not find or consider this aggravating circumstance unless you find that this particular capital offense involved a conscienceless or pitiless crime which was unnecessarily torturous to the victim.

Now, the fact that death has occurred or that a death scene may appear gruesome does not prove that the crime was especially heinous, atrocious, and cruel. Instead, the jury must determine if these elements are present based upon a careful and rational review of all the evidence that has been submitted to you during the trial of this case, both in the guilt/innocence phase and in the sentence phase of the case.

As I stated to you before, the

burden of proof is on the State to convince you beyond a reasonable doubt as to the existence of the aggravating circumstance asserted that the capital offense in this case was especially heinous, atrocious, or cruel when compared to other capital offenses.”

These instructions are substantially the same as the relevant instruction in the “Proposed Pattern Jury Instructions Use in the Sentence Phase of Capital Cases Tried Under Act No. 81-178.” A trial court’s following of an accepted pattern jury instruction weighs heavily against any finding of plain error. *Ex parte Harrell*, 470 So. 2d 1309, 1315 (Ala. 1985), *cert. denied*, 474 U.S. 935, 106 S. Ct. 269, 88 L. Ed. 2d 276 (1985).

In the present case, there was no plain error as to the trial court’s charge to the jury.

Price v. State, 725 So. 2d at 1057-58.

The court now turns to Price’s complaints regarding the RAC instruction. As stated earlier, Price’s argument is twofold. First, Price alleges the instructions were not sufficiently limited because the definitions of “heinous”, “atrocious” and “cruel” used by the trial court were “virtually identical to those used in the instructions issued [and found to be constitutionally defective] in *Cartwright*.” *Id.* (citing *Cartwright*, 483 U.S. at 356). Price further alleges that in his case and in the *Cartwright* case, the trial court defined “‘heinous’ as ‘extremely wicked or shockingly evil’ . . . [and] ‘atrocious’ as ‘outrageously wicked and violent’” as compared to *Cartwright’s* “‘outrageously wicked and vile.’” *Id.* Additionally, in

Price's case, the trial court defined "cruel" as "designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others"; [while] *Cartwright* defined it as "pitiless, or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the sufferings of others. *Id.* Further, by describing the circumstance as encompassing "conscienceless or pitiless crime[s] which are unnecessarily tortuous to the victim[.]" the instruction assigned jurors the task of establishing what level of torture would be "necessary." Because most reasonable jurors would be unable or unwilling to carry out such a ruthless calculation, the instruction fails to provide the "clear and objective standards" that *Godfrey* requires." *Id.* at 43-44.⁸⁵

Second, Price complains the instruction was not sufficiently limited because the trial court urged the jurors to compare "the crime to 'other capital offenses' or 'other capital murders,'" and then failed to describe the nature of any other capital crimes to the jurors. *Id.* at 44.⁸⁶ Price dedicates his reply brief to this second complaint, and insists the Court of Criminal Appeals' ruling offends the Supreme Court's decision in *Cartwright*, as interpreted by the Eleventh Circuit in a three-pronged vagueness test first enunciated in *Lindsay v. Thigpen*, 875 F.2d 1509 (11th Cir. 1989).

⁸⁵ Price does not actively pursue this argument in his reply brief. Nevertheless, the court will address it in its discussion.

⁸⁶ This particular aspect of Price's claim was not clearly raised on direct appeal. *See* (C.R. Vol. 8, Tab. 26 at 76-78 and C.R. Vol. 9, Tab. 32 at 80-82).

(Doc. 28 at 92-93).

Price does correctly identify the Supreme Court and Eleventh Circuit cases that discuss the subject and the standards necessary to address his claims. However, his conclusion that the cases prove the decision of the Court of Criminal Appeals decision in this matter was contrary to or an unreasonable application of clearly established federal law is belied by the cases upon which he relies and their progeny. For instance, in *Lindsay v. Thigpen*, the Eleventh Circuit wrote,

We read *Godfrey* and *Cartwright* to require that, in order to survive an eighth-amendment vagueness challenge, a sentencing court's consideration of the "especially heinous, atrocious or cruel" aggravating factor in a capital case must satisfy a three-part test. First, the appellate courts of the state must have narrowed the meaning of the words "heinous, atrocious or cruel" by consistently limiting their application to a relatively narrow class of cases, so that their use "inform[s] [the sentencer of] what [it] must find to impose the death penalty." *Cartwright*, 108 S. Ct. at 858. Second, the sentencing court must have made either an explicit finding that the crime was "especially heinous, atrocious, and cruel" or an explicit finding that the crime exhibited the narrowing characteristics set forth in the state-court decisions interpreting those words. [FN5]. Third, the sentencer's conclusion - that the facts of the case under consideration place the crime within the class of cases defined by the state court's narrowing construction of the term "heinous, atrocious, or cruel" - must not have

subverted the narrowing function of those words by obscuring the boundaries of the class of cases to which they apply.

FN5. Where the jury is the sentencer, a recitation that the murder was “especially heinous, atrocious or cruel” would not satisfy the second prong of this test unless the jury had been properly instructed regarding the narrow meaning of those words as interpreted by the state courts. Unlike a state-court judge, who is presumed to know and apply the appropriate, narrow construction of the term, an uninstructed lay jury could reasonably conclude that any intentional taking of human life was “especially heinous, atrocious or cruel.” *Godfrey*, 446 U.S. at 428-29, 100 S. Ct. at 1764-65; *Cartwright*, 108 S. Ct. at 1859.

A survey of Alabama cases reveals that the first prong of the analysis is satisfied. Since the 1981 case of *Kyzer v. Alabama*, 399 So. 2d 330 (Ala.1981), the Alabama appellate courts have confined the application of the “heinous, atrocious or cruel” aggravating factor to “those conscienceless or pitiless homicides which are unnecessarily torturous to the victim.” *Kyzer*, 399 So. 2d at 334 (citing *State v. Dixon*, 283 So. 2d 1 (Fla. 1973)). [FOOTNOTE OMITTED]. The class of cases that are “unnecessarily torturous to the victim” is not too indefinite to serve the narrowing function mandated by the eighth amendment. See *Proffitt v. Florida*, 428 U.S. 242, 255-56, 96 S. Ct. 2960, 2986, 49 L. Ed. 2d 913 (opinion of Stewart, Powell, Stevens, JJ.),

reh 'g denied, 429 U.S. 875, 97 S. Ct. 198, 50 L. Ed. 2d 158 (1976). Thus, when Lindsey was sentenced in 1982, the courts of

Alabama had already developed and consistently applied a narrowing construction of the term “heinous, atrocious or cruel as compared to other capital offenses.”

Lindsey v. Thigpen, 875 F.2d 1509, 1513-14 (11th Cir. 1989).

Based on the foregoing portion of *Lindsay*, it is impossible for Price to refute that the trial court’s definitions of “heinous,” “atrocious” and “cruel”, as given to the jury and as understood to be followed by the trial court in his case, satisfied the proper channeling requirements mandated by *Cartwright* and this Circuit.

The court now turns to the second argument in support of this claim. In addition to the “heinous, atrocious or cruel” portion of Alabama’s statutory HAC factor, Price adds that the statute lacks even more constitutional limitation because it “requires that the homicide must be ‘heinous atrocious or cruel compared to other capital offenses.’” (Doc. 28 at 96 (quoting ALA. CODE 1975, § 13A-5-49(8) (emphasis added [by Price]). This argument is raised for the first time in the present habeas petition. As such, this court finds it to be procedurally defaulted.

Even if this claim were not defaulted, it is without merit. In order to successfully argue this aspect of his claim, Price attacks the *Lindsay* and *Kyzer* decisions for “abbreviat[ing] and misstat[ing]” Alabama’s HAC statute for failing to address the “compared to other capital offenses” language in the

statute - language that Price believes fails to sufficiently channel the instruction such that it overcomes constitutional vagueness. (Doc. 28 at 96). Price then contends the comparative language causes the HAC factor to lose its “‘specific and detailed guidance,’ as well as its ability to “‘make rationally reviewable the process for imposing a sentence of death [for the jury and judge].”” *Id.* at 92-93 (quoting *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) and referring to *Walton v. Arizona*, 497 U.S.639, 653 (1990) and *Maynard v. Cartwright*, 486 U.S. 356 (1988)).

Price cites no Supreme Court case in which it has been held that a HAC instruction identical to Alabama’s is unconstitutionally vague as applied. Price also fails to mention that in *Bradley v. Nagle* 212 F.3d 559, 570 (11th Cir. 2000), the Eleventh Circuit found Alabama’s channeling instruction and the comparative aspect of it to be constitutionally adequate for equal protection purposes. Finally, Price can point to no Supreme Court, Eleventh Circuit or Alabama case in which it has been held, in order to deliver a constitutionally satisfactory RAC instruction, that the trial court must instruct the jury by engaging in a factually comparative study of capital murders for which the death penalty was imposed to those capital murders for which life without parole was imposed.

The court now turns to the remaining two prongs of this analysis. In the most recent application of *Lindsay*, the Eleventh Circuit reaffirmed RAC instructions such as the one delivered in Price’s as being a consistent, narrowed interpretation of the factor. *Marquard v. Secretary for the Dept. of Corrections*, 429 F.3d 1278 (11th Cir. 2005). In *Marquard*, the Court explained:

The Supreme Court has held that the words “especially heinous, atrocious or cruel,” when used alone as an aggravating factor, are so vague as to offend the Eighth Amendment. See *Maynard v. Cartwright*, 486 U.S. 356, 365, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988); *Bradley v. Nagle*, 212 F.3d 559, 570 (11th Cir. 2000). “Thus, in order to apply that aggravating factor in a constitutional manner, the sentencing court must give a limiting instruction to the jury.” *Bradley*, 212 F.3d at 570.’

Under this Court’s precedent, a “court’s consideration of the ‘especially heinous, atrocious or cruel’ aggravating factor must satisfy a three part test.” *Lindsey v. Thigpen*, 875 F.2d 1509, 1514 (11th Cir. 1989). “First, the appellate courts of the state must have narrowed the meaning of the words by consistently limiting their application to a relatively narrow class of cases, so that their use informs the sentencer of what it must find before it imposes the death penalty.” *Lindsey*, 875 F.2d at 1514 (quotation marks and citations omitted). This Court already has established that . . . [pursuant to] *Bradley v. Nagle*,] 212 F.3d [559,] at 570-71 [(11th Cir. 2000)] . . . Alabama[‘s] RAC statutory aggravating factor was sufficiently limiting as to be constitutional.) *Marquard v. Secretary for the Dept. of Corrections*, 429 F.3d at 1315-16.⁸⁷

⁸⁷ In *Bradley*,

the jury was instructed that the term “heinous” means extremely wicked or shockingly evil, the term “atrocious”

The trial court's application of *Lindsay's* second prong, as affirmed by the Court of Criminal Appeals, is also constitutionally sound. Again, the second prong requires

“the sentencing court [to make] either an explicit finding that the crime was ‘especially heinous, atrocious or cruel’ or an explicit finding that the crime exhibited the narrowing characteristics” implemented by the state courts. *Lindsey*, 875 F.2d at 1514; *Bradley*, 212 F.3d at 570.

Marquard, 429 F.3d 1278 at 1316. Price's trial judge did make an express written finding that the crime was HAC, and listed those facts he considered in support of the finding in his sentencing order. He wrote:

The capital offense was especially heinous, atrocious or cruel compared to other capital offenses. This crime was one of those

means outrageously wicked or violent, and the term “cruel” means designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others. They were also informed that the degree to which this crime is heinous, atrocious, or cruel must exceed that which exists in all capital offenses, and that in order to find the aggravating circumstance, they must find that the crime was “unnecessarily torturous to the victim.”

Bradley v. Nagle, 212 F.3d 559, 570 (11th Cir. 2000).

conscienceless or pitiless homicides which are unnecessarily torturous to the victim. This Court finds beyond a reasonable doubt that this capital homicide was especially heinous, atrocious or cruel when compared with other capital offenses.

The evidence proved beyond a reasonable doubt that Christopher Price helped plan and participated in the crime that was committed on the 22nd day of December, 1991, at the home of Bill and Bessie Lynn.

At the trial of this cause a sword and dagger were introduced into evidence as being the instruments that were used in the killing. There were a total of thirty-eight (38) cuts, lacerations and stab wounds. Some of the stab wounds were a depth of three (3) or four (4) inches. Other wounds to the body and head indicated that the victim was repeatedly struck in a hacking or chopping motion. One of his arms was almost severed and his head was lined with numerous wounds three (3) to four (4) inches in length. His scalp was detached from the skull of his head in places. The victim died a slow, lingering and painful death probably from the loss of blood. He was still alive when an ambulance attendant got to him probably thirty (30) minutes to an hour after the initial attack began.

(C.R. Vol. 1 at 214-15).

Finally, the undersigned uses *Marquard* as the application template to analyze and decide the third prong of *Lindsey* in Price's case.

Third, the sentencer's conclusion as to step two "must not have subverted the narrowing function of those words by obscuring the boundaries of the class of cases to which they apply." *Lindsey*, 875 F.2d at 1514; *Bradley*, 212 F.3d at 570-71. In other words, to reverse under step three, this Court would have to find that the [Alabama] courts' determination that [Price's] conduct was "unnecessarily torturous to the victim" was clearly erroneous. *Bradley*, 212 F.3d at 571. Given the evidence in this case . . . [this court] cannot conclude that the state court's determination was clearly erroneous. [footnote omitted]

Accordingly, [the state court's] decision . . . that the HAC constitutionality claim lacks merit . . . was not contrary to, and did not involve an unreasonable application of, clearly established federal law.

Marquard, 429 F.3d 1278 at 1317. This claim is due to be denied.

L. The trial court's repeated failure to question prospective jurors adequately about their ability to set aside bias arising from publicity, personal relationships, or past events, violated Mr. Price's right to due process, to a fair trial, to a fair and impartial jury, and to freely exercise his peremptory challenges, contravening the federal constitution. (Paragraphs 96-99 in the petition).

Price alleges "it is 'the trial judge's responsibility [during *voir dire*] to remove prospective jurors who will not be able [to serve]

impartially,” that the judge presiding in his case failed to do so, and the failure constitutes “reversible error.” (Doc. 16 at 46 (quoting *Rosalez-Lopez v. United States*, 415 U.S. 182, 188 (198 1) and *Swain v. Alabama*, 380 U.S. 202, 219 (1965)). He complains generally that some potential venire members answered questions pertaining to “relationships” and “acquaintances” with the victims in a manner that raised “‘flags’ of possible bias[,]” but the trial court “routinely failed to assure itself that [said venirepersons] would render a verdict on the evidence alone.” *Id.* at 45. From this premise, Price concludes that he was deprived of his “rights to freely exercise his peremptory challenges, to due process, and to a fair trial by an impartial jury under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.” *Id.* (citing *Irvin v. Dowd*, 366 U.S. 717, 723, 727 (1961)).

As the factual basis for the claim, Price declares venire man Benjamin Tucker stated that he was a longtime acquaintance of the victim, and “would try” to consider only the evidence presented to him. (Doc. 16 at 45). Price faults the trial court for failing to inquire further into Mr. Tucker’s potential bias. *Id.* Later, during individual *voir dire*, Price alleges Tucker stated he “had worked with several of the victim’s family members,” and when counsel asked him if wanted to sit as a juror in the case, Tucker refused to directly answer the question. *Id.* Again, Price faults the trial court for failing to inquire further into Mr. Tucker’s potential bias.

Price also complains that venireperson Harbin testified that “she had heard the victim preach on several occasions,” but the trial court failed to inquire whether this “would affect her ability to deliberate

impartially.” *Id.*

Finally, Price contends that the trial court failed to inquire further when four prospective venire persons (Tucker included) asserted that “their relatives had been crime victims. . . . despite the distinct possibility that their loved ones’ experiences would give rise to bias against Price.” *Id.* at 45-46. Price does not reveal the names of the three (3) remaining venire persons in his petition. Still, he believes the respondent’s contention that this aspect of his claim should be dismissed as conclusory (doc. 21 at 149) is “absurd” because the respondent quoted the Alabama Court of Criminal Appeals’ opinion in its brief, and the opinion “extensively discussed each of the ‘five specific potential jurors’ whose questioning has been challenged by Mr. Price.” (Doc. 28 at 102 (citing Respondent’s Brief (doc. 21 at 146-48) (in turn quoting *Price*, 725 So. 2d at 1053-54))).

Price believes the State “essentially blames” him for failing to adequately question and ferret out biased jurors. (Doc. 28 at 103 (citing Respondent’s Br. (doc. 21) at 146) and *Price*, 725 So. 2d at 1053-54 n.8). Price declares “[t]his argument completely ignores the Supreme Court’s mandate that “the obligation to empanel an impartial jury lies in the first instance with the trial judge.”“ *Id.* at 103 (quoting *Mu’Min v. Virginia*, 500 U.S. 415, 423 (199 1) (quoting *Rosalez-Lopez*, 451 U.S. at 189)).

Price also accuses the State of “emphasizing” that his claim must fail because none of the prospective venire members about whom he complains were even chosen to sit on the jury. *Id.* (citing Respondent’s Br. (doc. 21) at 149) and *Price*, 725 So. 2d at 1053-54). He argues “that fact alone will defeat such a claim only

when the ‘jury that sits is impartial[,]’” and that his jury was not impartial for various other reasons. *Id.* (quoting *Ross v. Oklahoma*, 487 U.S. 81, 88 (1988)).

This claim was denied by the Alabama Court of Criminal Appeals, see *Price v. State*, 752 So. 2d 1053-54, and the Alabama Supreme Court affirmed that decision. See *Ex Parte Price*, 725 So. 2d at 1074. In his reply brief, Price declares the appellate court’s decision to “reject this claim, [by] holding that the trial court’s *voir dire* discharged [its] responsibility[,]” is “contrary to and an unreasonable application of existing federal law. . .” (Doc. 28 at 101). He makes no complaints about the appellate court’s historical factual findings. The opinion reads:

The appellant argues that the trial court repeatedly failed to question prospective jurors concerning their ability to set aside bias arising from publicity, personal relationships, or past events, and that its failure to do so violated his rights to due process, a fair trial, an impartial jury, and hampered his ability to exercise his peremptory challenges freely. Specifically, the appellant alleges that certain veniremembers made statements indicating that they may have had biases concerning the present case, but the trial court failed to further inquire into the possible biases. He refers to five specific potential jurors.

The appellant first refers to a potential juror who indicated that he had been an acquaintance of the decedent for a long time; he further indicated that he “would try” to follow the trial court’s instructions in considering only the evidence in the case in arriving at a

verdict.

The appellant also submits that, during individual questioning, this potential juror was equivocal as to his ability to fairly consider the evidence because of his acquaintance with the victim's family. Thus, the appellant argues that the trial court should have further questioned this potential juror, *sua sponte* based on these responses. However, the record indicates that the appellant neither objected to the lack of questioning nor challenged this potential juror for cause. The potential juror was thoroughly questioned, and the appellant was in no way limited as to his ability to question him. This potential juror indicated that he would try "to the best of [his] knowledge" to render a fair and impartial verdict based on the evidence. He also responded that he thought he could disregard his prior general knowledge concerning the case. At the close of his questioning, the defendant himself asked this potential juror if he would be able to give him a fair trial if he were to sit on the jury, and the potential juror stated that he believed that he could. Although the record is silent as to which party exercised the peremptory challenge as to this juror, this potential juror did not sit on the jury.

Thus, the appellant has failed to show any prejudice that he might have suffered based on the trial court's failure to further question this potential juror. Moreover, as the potential juror's responses were consistent and straightforward, there is no indication that further questioning was necessary.

“The defendant is not entitled to jurors who are totally ignorant of the facts and issues involved in the case or to jurors who never entertained a preconceived notion as to the defendant’s guilt or innocence. *Ex parte Grayson*, 479 So.2d 76, 80 (Ala.), cert. denied, 474 U.S. 865, 106 S. Ct. 189, 88 L. Ed. 2d 157 (1985). A defendant is entitled to a trial by jurors who can lay aside any preconceived impressions or opinions and render a verdict based on the evidence which is presented at trial, *id.*”

Oryang v. State, 642 So. 2d 989, 993 (Ala. Cr. App. 1994). *Cf. Williams v. State*, 710 So. 2d 1276 (Ala. Cr. App. 1996) (the trial court’s failure to sua sponte excuse a venire member who had indicated that she had “one foot already over” on a verdict of guilt and a sentence of death was not error where the defendant allowed the venire member to remain as an alternate on the jury; moreover, the defendant’s reliance on *Hunter v. State*, 585 So. 2d 220 (Ala. Cr. App. 1991) was distinguishable in that the Hunter case “involved an erroneous denial by the trial court of a challenge for cause, which forced the defendant in that case to use a peremptory strike to correct the court’s error.” [FN8])

FN8. The appellant in the present case also relies on *Hunter v. State*; however, that case is also distinguishable from the present case in that the appellant failed to make a challenge for cause of the venire member, nor is there an indication in the record that he used a peremptory strike

against this potential juror.

The appellant also argues that the trial court erred in failing, *sua sponte*, to further question a potential juror who indicated that her husband had been the victim of a stabbing a year before trial. The record indicates that the appellant did not object to the trial court's failure to question this potential juror; he also did not challenge this venire member for cause. This failure to object weighs against any finding of prejudice. *Kuenzel v. State, supra*. The record indicates that, during individual questioning of this potential juror, the appellant determined that the venire member's husband had been wounded in a previous stabbing. His ability to further question the potential juror concerning this matter was in no way limited, and there was no indication that further questioning was required. The potential juror stated that, if she were to be selected as a juror, she would base her judgment on the evidence presented at trial and the law as instructed by the trial court. Moreover, this record contains no jury strike list from which to determine which party struck this potential juror. Therefore, the appellant has failed to demonstrate any possible prejudice, *Williams v. State*, 710 So. 2d at 1325, and his reliance on *Hunter v. State* is again misplaced. See footnote 8.

The appellant also argues that the trial court should have, *sua sponte*, further questioned a potential juror who indicated that her father had been murdered. The appellant neither objected to this failure to question at trial, nor did he raise a challenge for cause

against this potential juror. This failure to object weighs against any finding of prejudice. *Kuenzel v. State, supra*. A review of the individual questioning of this potential witness indicates that she stated that, if she were to be selected as a juror, she would listen to the evidence and render a fair and impartial verdict based only on the evidence and the law as instructed by the trial court. This questioning does not demonstrate any need for further questioning concerning any possible bias. Moreover, this potential juror did not serve on the jury, and there is no indication in the record as to which party struck her from service. Thus, the trial court's failure to further question this veniremember was not error.

The appellant further complains of the trial court's failure to *sua sponte* further question two potential jurors concerning their biases: one who indicated that she had heard the decedent preach and another who had indicated that his nephew had been murdered. Following questioning by defense counsel of each of these veniremembers, the appellant challenged them for cause. The trial court granted both challenges; therefore, the appellant suffered no prejudice by the trial court's failure to further question them. Moreover, the appellant did not request further questioning and did not object to the trial court's failure to do so. There was no plain error on this ground.

Price v. State, 752 So. 2d 1053-54.

The respondent asserts that Price is not entitled to habeas relief because the appellate court's decision is

neither contrary to nor an unreasonable application of clearly established federal law. (Doc. 22 at 63-65). This court agrees.

As stated by the Eleventh Circuit:

The right to a jury trial “guarantees to the criminally accused a fair trial by a panel of impartial ‘indifferent’ jurors. *Irvin v. Dowd*, 366 U. S. 717, 722, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961); see *Ross v. Oklahoma*, 487 U.S. 81, 85, 108 S. Ct. 2273, 101 L. Ed. 2d 80 (1988) (“It is well settled that the Sixth and Fourteenth Amendments guarantee a defendant on trial for his life the right to an impartial jury.”). Claims that the jury was not impartial must focus on the jurors who actually sat. See *Ross*, 487 U.S. at 86, 108 S. Ct. 2273; *Heath v. Jones*, 941 F.2d 1126, 1133 (11th Cir. 1991) (holding that habeas petitioner can only raise the trial court’s denials of challenges for cause of those venire members who eventually sit on the jury).

Spivey v. Head, 207 F.3d 1263, 1273 (11th Cir. 2000).

Moreover,

As with any other trial situation where an adversary wishes to exclude a juror because of bias, then, it is the adversary seeking exclusion who must demonstrate, through questioning, that the potential juror lacks impartiality. See *Reynolds v. United States*, 98 U.S. 145, 157, 25 L. Ed. 244 (1879). It is then the trial judge’s duty to determine whether the challenge is proper. This is, of course, the

standard and procedure outlined in *Adams*⁸⁸], but it is equally true of any situation where a party seeks to exclude a biased juror. *See, e.g., Patton v. Yount*, 467 U.S. 1025, 1036, 104 S. Ct. 2885, 2891, 81 L. Ed. 2d 847 (1984) (where a criminal defendant sought to excuse a juror for cause and the trial judge refused, the question was simply “did [the] juror swear that he could set aside any opinion he might hold and decide the case on the evidence, and should the juror’s protestations of impartiality have been believed”).

Wainwright v. Witt, 469 U.S. 412, 423-24 (1985). Additionally, utilization of a peremptory strike by a defendant to rid himself of an undesirable venireperson cannot bootstrap the claim into a constitutional realm. These edicts were reexamined and reaffirmed in *Morgan v. Illinois*, 504 U.S. 719, 729-30 (1992), wherein the Supreme Court wrote,

⁸⁸ *Adams v. Texas* and its progeny decree that a member of the jury venire may be examined by or at the request of counsel, and challenged for cause if he harbors such a fixed opinion “those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.” They do not mandate that the trial court conduct its own *voir dire* of the jury venire *sua sponte*. *Adams v. Texas*, 448 U.S. at 43 (*relying upon Witherspoon v. Illinois*, 391 U.S. 510, 522-23 n.21 (1968)); *see also, Turner v. Murray*, 476 U.S. 28 (1986); *Wainwright v. Witt*, 469 U.S. 412, 424 (1987); and *Gray v. Mississippi*, 481 U.S. 648, 657-658 (1987).

[I]n *Ross v. Oklahoma*, *supra*, a state trial court refused to remove for cause a juror who declared he would vote to impose death automatically if the jury found the defendant guilty. That juror, however, was removed by the defendant's use of a peremptory challenge, and for that reason the death sentence could be affirmed. But in the course of reaching this result, we announced our considered view that because the Constitution guarantees a defendant on trial for his life the right to an impartial jury, 487 U.S., at 85, 108 S. Ct., at 2276-77, the trial court's failure to remove the juror for cause was constitutional error under the standard enunciated in *Witt*. We emphasized that "[h]ad [this juror] sat on the jury that ultimately sentenced petitioner to death, and had petitioner properly preserved his right to challenge the trial court's failure to remove [the juror] for cause, the sentence would have to be overturned." 487 U.S., at 85, 108 S. Ct., at 2277 (citing *Adams [v. Texas]*, 448 U.S. 38, 45 (1980)), *supra*.

504 U.S. at 728-29.

Since neither Tucker nor Harbin served on his jury, it is immaterial for federal constitutional purposes even if Price had to use a peremptory strike to rid himself of them. (Price's motion to remove Harbin for cause was actually granted). This claim is due to be denied. As for the three remaining unknown prospective jurors, this court specifically finds that to extent the claim pertains to them, it is due to be dismissed because it is conclusory in nature and because it fails to state a valid claim for relief under § 2254. (Doc. 21 at 149). Since "habeas corpus

review exists only to review errors of constitutional dimension,” a habeas corpus petition must meet the “heightened pleading requirements [of] 28 U.S.C. § 2254 Rule 2c.” *McFarland v. Scott*, 512 U.S. 849, 856 (1994) (other citations omitted). The petitioner must specify all the grounds for relief available to him, state the facts supporting each ground, and state the relief requested. 28 U.S.C. § 2254 Rule 2(c)(1)(2) & (3). A “general reference to the transcripts, case records and brief on appeal patently fails to comply with Rule 2(c).” *Phillips v. Dormire*, 2006 WL 744387, *1, (E.D. Mo. 2006) (citing *Adams v. Armontrout*, 897 F.2d 332, 333 (8th Cir. 1990)). Price has continuously failed to meet this requirement.

Price offers no Supreme Court precedent to support his contention that it is solely the trial court’s responsibility to, *sua sponte*, conduct its own examination of potentially biased jurors in an effort to satisfy its obligation to seat fair and impartial jury. Price’s contention incorrectly implies that, if a petitioner simply claims - for whatever reason - that his jury was not impartial, then the petitioner’s responsibility to question, challenge and/or use a peremptory strike against a potentially biased juror is obviated and instead becomes the sole responsibility of the trial judge. Additionally, Price has made no attempt to overcome the factual findings of the Court of Criminal Appeals concerning this issue. The decision of the Court of Criminal Appeals, as affirmed by the Alabama Supreme Court, was neither contrary to nor involved an unreasonable application of clearly established federal law. Therefore, he is not entitled to any relief.

M. The double counting of robbery⁸⁹ as element of the offense and aggravating circumstances violated Christopher Price's right to an individualized sentence and his protection against double jeopardy guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Alabama law. (Paragraph 100 of the petition).

Price alleges that the State "double counted" his robbery charge and conviction as both an aggravating circumstance during the penalty phase of the trial and as intentional murder during a robbery during the guilt phase of the trial in violation of his right to fair and reliable sentencing. (Doc. 16 at 46). Price acknowledges that both the Alabama Supreme Court in *Ex Parte Kennedy*, 472 So. 2d 1106, 1108 (Ala. 1985), and the United States Supreme Court in *Lowenfeld v. Phelps*, 484 U.S. 231 (1988), have upheld the constitutionality of such double-counting. However, he "believes that the governing law may be reversed in light of the unsettled circuit split relative to 'weighing' jurisdictions like Alabama." *Id.* at 46-47 (citing *United States v. McCullah*, 87 F.3d 1136 (10th Cir. 1986)).

This claim is without merit. It is well known that dual use of an aggravating circumstance to

⁸⁹ In the title of his claim in the petition, Price uses the word burglary. However, the body of the claim reveals that same was a scrivener's error since robbery is the term utilized there.

satisfy an element of the capital offense during the guilt phase and as a factor in the sentencing phase is constitutional. See *Tuilaepa v. California*, 512 U.S. 967, 971 (1994) (citing *Lowenfeld v. Phelps*, 484 U. S. at 244-246 (wherein the Supreme Court stated, “the trier of fact must convict the defendant of murder and find one ‘aggravating circumstance’ (or its equivalent) at either the guilt or penalty phase. . . . The aggravating circumstance may be contained in the definition of the crime or in a separate sentencing factor (or in both)”). Price’s claim, therefore, is due to be denied.

N. The trial court’s finding that the defense failed to present a prima facie case of racial discrimination in the exercise of the State’s challenges to prospective jurors was erroneous and contrary to the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution. (Paragraphs 101-03 of the petition).

Price alleges the trial court erred when it ruled that defense counsel had failed to make a prima facie case of discrimination against the State for striking Annie Sanders, Annie Smith and Shelia Cannon, who constituted three out of five African-Americans on the venire. He also declares the prosecution, under the guise of a *Witherspoon v. Illinois*, 391 U.S. 510 (1968), challenge, struck three other African-American venire members; namely Ray Enis, Harriet Kemp and Christopher Savage. *Id.* at 47-48.

The Alabama Court of Criminal Appeals addressed this matter:

The appellant argues that the trial court’s finding that the defense failed to present a prima facie case of racial discrimination in the exercise

of the State's peremptory challenges to prospective jurors was erroneous. The record indicates that, following the striking of the jury and before it was seated, the following transpired:

"[Defense counsel]: At this time, Your Honor, I would like to place on the record the information that during the selection process there were five black jurors who were available to us. The State struck three, number 59, number 66 and number 5, all being black females. . . . I ask that the race of each of those jurors be noted on the record and I would like the State to justify each of their strikes.

"THE COURT: Is that all you have?

"[Defense counsel]: Well, no sir. Based on the Sixth and the Fourteenth Amendments and my client's right to a fair cross-section, I would argue that by the elimination of those jurors, we no longer have a fair cross-section of his peers because the number has been diminished, . . . leaving us with 2 black jurors out of 14 with 2 alternates not being the black ones. He has a right to a fair cross-section and I would argue that by their elimination he no longer has any fair cross-section. In cases as important as this, he is entitled.

"[Prosecutor]: I'd like to point out, Your Honor, that the venire that we began with was 10% black. We had 49 to strike from, of whom 5 were black. The number

seated is-of the jurors seated is 1/6 or 16% - 16 2/3 black, and of those, including alternates, is 14% black, so based strictly on the number, it is a fair cross-section of the racial continuity of the venire itself.

“THE COURT: Do you have anything else to offer in support of your motion?”

“[Defense Counsel]: No, nothing more than I’ve already argued. I just wanted to note it for the record.

“THE COURT: Then your motion will be denied.

“[Prosecutor]: Your Honor, could I ask you to include on the

record whether or not the basis for your denial is that they have not made a prima facie showing of a racial discriminatory jury strike pattern?”

“THE COURT: I think the record would reflect that. “[Prosecutor]: Is that the basis of your ruling, sir? “THE COURT: Yes.”

Thus, the trial court held that the appellant failed to establish a prima facie case of racial discrimination. In support of the appellant’s motion, the only assertion made by defense counsel was that there were five black potential jurors and the State struck 3 of them. Two blacks served on the appellant’s jury, neither of whom were alternates. Defense counsel also made a blanket allegation that the appellant was deprived of a fair cross-section of

his peers because the number of blacks on the venire panel had been diminished in arriving at the number of blacks actually serving on the appellant's jury.

“A defendant claiming a *Batson* [*v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986)] violation must make a prima facie showing that the prosecution used its peremptory strikes in a discriminatory manner. *Jackson v. State*, 594 So. 2d 1289 (Ala. Cr. App. 1991). Only when the defendant establishes facts and circumstances that raise an inference of discrimination must the state give its reasons for its peremptory strikes. *Carter v. State*, 603 So. 2d 1137 (Ala. Cr. App. 1992).’ *Stokes v. State*, 648 So. 2d 1179, 1180 (Ala. Cr. App. 1994). We will reverse a trial court’s ruling on a *Batson* motion only when that ruling is clearly erroneous. *Ex parte Branch*, 526 So. 2d 609 (Ala. 1987).” *Clemons v. State*, 720 So. 2d 961, 974 (Ala. Cr. App. 1996).

In *Edwards v. State*, 628 So. 2d 1021, 1024 (Ala. Cr. App. 1993), the trial court found that the defendant had failed to establish a prima facie case of racial discrimination where there had been 6 black members on a 35-40 member venire, i.e., the venire was 15%-17% black. One black venire member was removed for cause, and the State struck two blacks, apparently leaving three on the jury, so that blacks comprised 25% of the jury. The defendant objected based only on the fact that the State struck two blacks who had never answered any questions during voir dire questioning. The trial court held that the defendant had failed

to make a prima facie showing of racial discrimination, stating:

“*Batson, Ex parte Branch*, 526 So. 2d 609 (Ala. 1987), and their progeny make it very clear that “[t]he burden of persuasion is initially on the party alleging discriminatory use of peremptory challenges to establish a prima facie case of discrimination.” *Ex parte Bird*, 594 So. 2d 676, 679 (Ala. 1991) (quoting *Ex parte Branch*, 526 So. 2d at 622). Until this burden is met, the challenged party ‘is under no obligation to offer explanations for its peremptory strikes.’ *Jackson v. State*, 594 So. 2d 1289, 1292 (Ala. Cr. App. 1991). See also *Huntley v. State*, 627 So. 2d 1013 (Ala. 1992). Merely showing that the challenged party struck one more members of a particular race is not sufficient to establish a prima facie case. *Harrell v. State*, 571 So. 2d 1270, 1271 (Ala. 1990), cert. denied, 499 U.S. 984, 111 S. Ct. 1641, 113 L. Ed. 2d 736 (1991); *Ashley v. State*, 606 So. 2d 187, 192 (Ala. Cr. App. 1992); *Jones v. State*, 603 So. 2d 419, 420-21 (Ala. Cr. App. 1992). See also *Hood v. State*, 598 So. 2d 1022, 1023 (Ala. Cr. App. 1991). ‘When the evidence shows only that blacks were struck and that a greater percentage of blacks sat on the jury than sat on the lawfully established venire, an inference of discrimination has not been created.’ *Harrell v. State*, 571 So. 2d at 1271. The trial court properly

denied the appellant's *Batson* motion.”

Edwards v. State, supra, at 1024.

“In *Ashley v. State*, 606 So. 2d 187 (Ala. Cr. App. 1992), the prosecution used three of its seven strikes to remove blacks from the pool of potential jurors. This court held that the “appellant failed to establish a prima facie case under *Batson* and *Ex parte Branch* [526 So. 2d 609 (Ala. 1987)] because the appellant failed to show any evidence of discrimination other than the number of blacks struck.” *Ashley*, 606 So. 2d at 192. Similarly in the present case, the only evidence presented to the trial court by the appellant was the fact that three out of the seven potential black jurors were struck by the prosecution. There was no evidence presented that any of the factors set out in *Ex parte Branch*, 526 So. 2d 609 (Ala. 1987), which may be used to establish a prima facie case, existed.

The evidence presented at trial was not sufficient to prove a prima facie case of a *Batson* violation. The trial court did not err in denying the appellant's *Batson* motion.’ *Moore v. State*, 677 So. 2d 828, 829 (Ala. Cr. App. 1996).

“When determining whether a challenging party has shown a prima facie case of racial discrimination in the use of peremptory strikes, “the court is to consider ‘all relevant circumstances’ which could lead to an inference of [such] discrimination.” *Ex parte Branch*, 526 So. 2d 609, 622 (Ala. 1987). The challenging party “may establish a prima facie case of *purposeful* discrimination in selection of the petit jury *solely* on evidence concerning the

prosecutor's exercise of peremptory challenges at the defendant's trial." *Batson*, 476 U.S. at 96, 106 S. Ct. at 1723 (emphasis added). Normally, the challenging party has not shown that the prosecution used its peremptory strikes in a racially discriminatory manner where the *only* evidence presented in support of a prima facie case of discrimination is the fact that blacks were struck by the prosecution. *Ex parte Branch*, 526 So. 2d 609, 622-23 (Ala. 1987), contains a nonexclusive list of factors that a challenging party might use to establish a prima facie case of discrimination.

This list includes, "[a] *pattern of strikes* against [jurors of a certain gender or race] on a particular venire; e.g., 4 of 6 peremptory challenges were used to strike black jurors." *Branch*, 526 So. 2d at 623 (emphasis added). A pattern "implies that the action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group,' *Hernandez [v. New York]*, 500 U.S. 352, 360, 111 S. Ct. [1859] at 1866 [114 L. Ed. 2d 395 (1991)] (quoting *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279, 99 S. Ct. 2282, 2296, 60 L. Ed. 2d 870 (1979)) (footnote and citation omitted in *Hernandez*)." *Freeman v. State*, 651 So.2d 576, 583 (Ala. Cr. App. 1994). When determining whether peremptory strikes were used in a manner to suggest discriminatory "pattern of strikes," "[m]erely showing that the challenged party struck one or more members of a particular race is not sufficient to establish a prima facie case [of discrimination]." *Edwards v. State*, 628 So. 2d

1021, 1024 (Ala. Cr. App. 1993).’ *Bell v. State*, 676 So. 2d 1349, 1350 (Ala. Cr. App. 1995) (Emphasis in original.)” *Clemons v. State*, 720 So. 2d at 975.

In the present case, the appellant relied solely on the number of strikes against blacks made by the State, without any supporting evidence indicating a discriminatory intent or purpose. Thus, the appellant has failed to make a prima facie showing of racial discrimination by the State in removing blacks from the jury.

Price v. State, 725 So. 2d at 1058-60.

Price now argues that the Alabama Court of Criminal Appeals’ opinion offends federal law because it erroneously “rejected this claim for failure to state a prima facie case of racial discrimination [by] emphasizing that the jury included a slightly higher percentage of African-Americans (two of twelve, or 16.7%) than did the original venire (five of forty-nine) or 10.2%.” *Id.* at 104. Price’s premise is incorrect. The court found that a *prima facie* case had not been demonstrated because Price “relied solely on the number of strikes against blacks made by the State, without any supporting evidence indicating a discriminatory intent or purpose.” *Price*, 725 So. 2d at 1060.

Furthermore, Price argues

that a defendant who suspects racial bias in the use of peremptory strikes “may make out a prima facie case of purposeful discrimination by showing that the totality of relevant facts gives rise to an inference of discriminatory purpose.” [*Batson v. Kentucky*, 476 U.S. 79,] 94 (citing *Washington v. Davis*, 426 U.S. 229, 239-42

(1976)). Upon such a showing, the burden shifts to the prosecution to offer a race-neutral explanation for the strikes. As the Supreme Court recently confirmed, the initial burden of establishing a *prima facie* case is not intended to be “onerous” because often facts about discriminatory intent “are impossible for the defendant to know with certainty.” *Johnson v. California*, 545 U.S. 162, 170 (2005) (holding that defendant does not have to show, at the *prima facie* stage, that the prosecution’s strikes were more likely than not racially motivated). The Supreme Court has sensibly concluded that a defendant should not be forced to “engag[e] in needless and imperfect speculation when a direct answer can be obtained by asking a simple question” of the prosecution. *Id.* at 172. For that reason, “*Batson* [leaves] a defendant free to challenge the prosecution without having to cast [such a] wide net.” *Miller-El v. Dretke*, 545 U.S. 231, 239 (2005).

(Doc. 28 at 104-05).

Price correctly pinpoints that a reasonable inference is the guiding standard for establishing a *prima facie* showing of discrimination in the *Batson* context. However, he fails to adequately address the internal requirements of that standard, which were explained in *Batson*:

The standards for assessing a *prima facie* case in the context of discriminatory selection of the venire have been fully articulated since *Swain*. See *Castaneda v. Partida*, *supra*, 430 U.S., at 494-95, 97 S. Ct., at 1280; *Washington v. Davis*, 426 U.S., at 241-42, 96 S.

Ct., at 2048-49; *Alexander v. Louisiana*, *supra*, 405 U.S., at 629-31, 92 S. Ct., at 1224-26. These principles support our conclusion that a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the defendant first must show that he is a member of a cognizable racial group, *Castaneda v. Partida*, *supra*, 430 U.S., at 494, 97 S. Ct., at 1280, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. [⁹⁰] Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." *Avery v. Georgia*, 345 U.S., at 562, 73 S. Ct., at 892. Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the

⁹⁰ Subsequent to *Batson*, the Supreme Court ruled that, as a matter of equal protection, the defendant had the right to a jury selected by non-discriminatory means. Thus, *Batson* was expanded beyond the race correlation between the defendant and potential jurors. See *Powers v. Ohio*, 499 U.S. 400 (1991). As a consequence, Price, as a white defendant, had standing to make a *Batson* motion against a prosecutor who has moved to exclude black jurors.

prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empaneling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination.

In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances. For example, a “pattern” of strikes against black jurors included in the particular venire might give rise to an inference⁹¹ of discrimination. Similarly, the prosecutor’s questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose. These examples are merely illustrative. We have 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 against black jurors.

Batson v. Kentucky 476 U.S. at 96-97. *See also, Johnson v. California*, 545 U.S. at 169 (2005) (“[A] *prima facie* case of discrimination can be made out by offering a wide variety of evidence . . . so long as the

⁹¹ “An ‘inference’ is generally understood to be a ‘conclusion reached by considering other facts and deducing a logical consequence from them.’” *Johnson v. California*, 545 U.S. 162, 168 (2005) (quoting Black’s Law Dictionary 781 (7th ed. 1999)).

sum of the proffered facts give ‘rise to an inference of discriminatory purpose.’ [*Batson*,] 476 U.S. at 94”).

Price’s reliance on selected quotes from *Johnson v. California*, 545 U.S. 162, and *Miller-El v. Dretke*, 545 U.S. 231, do not provide persuasive constitutional support for his position because the specific factual circumstances and legal issues giving rise to his claim are different. First, the Supreme Court granted certiorari review in *Johnson*⁹² because California had enacted a state statute requiring the defendant to show a “strong likelihood” of discriminatory intent in order to satisfy his burden of showing *prima facie* discrimination during jury

⁹² After challenges for cause were completed in *Johnson*, the prosecutor used three of his 12 peremptory challenges to strike all three remaining black veniremen on the 43 member panel. Defense counsel made a *Batson* objection after each strike, but the trial court refused to demand the prosecutor explain the basis for his challenge, by finding counsel had not satisfied a California statute that required the defendant to meet a “strong likelihood” standard in connection with *prima facie* showing of discrimination. *Id.* at 165. Instead, the trial judge conducted her own examination of the record, and surmised that there was a sufficient basis for the strikes based on equivocal or confused answers on jury questionnaires. *Id.* at 165-66. In addition to the statistical disparity of strikes against black veniremen, the *Johnson* case also involved a black defendant charged with killing his white girlfriend’s child. *Id.*

selection. The Supreme Court ruled that the two standards were not the same, that the State of California had no authority to require this additional step at the *prima facie* stage of a discrimination challenge, and that *Batson's* “reasonable inference” test was the absolute control for equal protection purposes. *Id.* at 165-69.

Moreover, the first prong of the *Batson* test was never an issue in *Miller-El v. Dretke*, 545 U. S. 231. In *Miller-El*, the trial court examined the *voir dire* record and held an evidentiary hearing where the prosecutor was questioned as to his reasons for striking black venire persons.⁹³ Thereafter, the trial court found no purposeful discrimination. *Id.* at 236. As such, unlike Price’s case, all three *Batson* prongs were examined by the trial court, and an ultimate ruling as to whether discrimination occurred was made. The Supreme Court reversed, and held that the trial court’s⁹⁴ reasoning was contrary to and an unreasonable

⁹³ This hearing took place on remand by the Texas Court of Criminal Appeals as *Batson* was decided while *Miller-El's* direct appeal was pending.

⁹⁴ The court also notes that *Miller-El v. Dretke* is actually the second of two habeas cases to reach the Supreme Court, the first being *Miller-El v. Cockrell*, 534 U. S. 1122 (2002). In *Miller-El v. Dretke*, the Supreme Court referred to the same relevant factual circumstances pertinent to its *prima facie* discrimination discussion in *Miller-El v. Cockrell*:

The numbers describing the prosecution’s use of peremptories are remarkable. Out of 20 blacks members of the 108- person venire panel for *Miller-*

application of federal law, and its factual strikes against black veniremen, the *Johnson* case also involved a black defendant charged with killing his white girlfriend's child. *Id.*

It is true that *Johnson* holds that a state court cannot subject a defendant to a higher burden than the "reasonable inference" standard, but application of a constitutionally deficient state standard is not the issue in Price's case. Price's assertion that "*Batson* [leaves] a defendant free to challenge the prosecution without having to cast [such a] wide net[]" also affords him no assistance. (Doc. 28 at 105 (quoting *Miller-El*, 545 U.S. at 239)). The Supreme Court made this observation in *Miller-El* when describing the unworkable and ineffectual *pre-Batson* rules for establishing jury discrimination. *Id.* at 238-40 (citing *Swain v. Alabama*, 380 U.S. 202 (1965) (wherein the defendant was required to allege and prove a history of systemic discrimination in order to satisfy a jury discrimination challenge)).

The foregoing does not mean that *Johnson* and *Miller-El* are of no assistance. Both cases recapitulated

El's trial, only 1 served. Although 9 were excused for cause or by agreement, 10 were peremptorily struck by the prosecution. *Miller-El v. Cockrell*, 537 U.S. at 331, 123 S. Ct. 1029. "The prosecutors used their peremptory strikes to exclude 91 % of the eligible African- American venire members Happenstance is unlikely to produce this disparity." *Id.* at 342. 123 S. Ct. 1029.

and adhered closely to *Batson's* inference of the discrimination standard. In so doing, the Supreme Court set out all relevant circumstances it deemed pertinent to each defendant's *prima facie* showing of discrimination. In *Johnson*, the relevant facts were that the prosecutor utilized three peremptory strikes to rid the jury of all black venirepersons in a case where a black defendant was accused of killing a white child. *Johnson*, 545 U.S. at 164-65. In *Miller-El*, the relevant facts were that the prosecutor struck ten black individuals from the venire, a total of 91 % of the eligible black veniremembers, and "more powerful [evidence through]. . . side by side comparisons of some black venirepersons who were struck and white panelists allowed to serve." *Miller-El*, 545 U.S. at 240-41.

Soon after the *Johnson/Miller -El* decisions, the Eleventh Circuit was afforded an opportunity to examine and discuss exemplar relevant circumstances for consideration when faced with a *prima facie Batson* question. See *United States v. Ochoa-Vasquez*, 428 F.3d 1015, 1039-45 (11th Cir. 2005). The Eleventh Circuit wrote,

This [Circuit] has cautioned that "the mere fact of striking a juror or a set of jurors of a particular race does not necessarily create an inference of racial discrimination." [*Central Alabama Fair Housing Ctr. v.] Lowder [Realty Co.,] 236 F.3d [629,] at 636 [(11th Cir. 2000)]; [United States v.] Novaton, 271 F.3d [968,] at 1002 [(11th Cir. 2001)]. While statistical evidence may support an inference of discrimination, it can do so "only" when placed "in context." *Lowder*, 236 F.3d at 638; [*United States v.] Allen-Brown, 243 F.3d [1293,]at 1298**

[(11th Cir. 2001)]. For example, “the number of persons struck takes on meaning *only* when coupled with other information such as the racial composition of the venire, the race of others struck, or the voir dire answers of those who were struck compared to the answers of those who were not struck.” *Lowder*, 236 F.3d at 636-37 (emphasis in original); *see also Novaton*, 271 F.3d at 1002 (same); *Allen-Brown*, 243 F.3d at 1298 (evaluating the strike pattern in light of the racial composition of remaining potential jurors); *Stewart*, 65 F.3d at 925 (stating that “no particular number of strikes against blacks automatically indicates the existence of a prima facie case,” and considering, *inter alia*, the number of struck black jurors as a percentage of the black venire members).

In determining whether the totality of the circumstances shows a “pattern” that creates an inference of discrimination, this Court has considered a number of factors. First, whether members of the relevant racial or ethnic group served unchallenged on the jury. *See Lowder*, 236 F.3d at 638 (“[T]he 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.”); *Novaton*, 271 F.3d at 1002, 1004 (same); [*United States v.*] *King*, 196 F.3d [1327] at 1335 [(11th Cir. 1999)] (finding that “not only was there no pattern of discriminatory strikes, there was a sort of ‘antipattern’” where the State accepted one black juror and then struck the second of three black venire members); *United States v.*

Puentes, 50 F.3d 1567, 1578 (11th Cir. 1995) (“Although the presence of African-American jurors does not dispose of an allegation of race-based peremptory challenges, it is a significant factor tending to prove the paucity of the claim.”); *Cochran v. Herring*, 43 F.3d 1404, 1412 (11th Cir. 1995) (same); *Stewart*, 65 F.3d at 926 (same).

Similarly, we have considered whether the striker struck all of the relevant racial or ethnic group from the venire, or at least as many as the striker had strikes. See *Lowder*, 236 F.3d at 637 (“[T]he number of jurors of one race struck by the challenged party may be sufficient by itself to establish a prima facie case where a party strikes all or nearly all of the members of one race on a venire” (citing *United States v. Williams*, 936 F.2d 1243, 1246 (11th Cir.1991))); cf. *Dennis*, 804 F.2d at 1210-11 (affirming finding of no prima facie case where the government did not use all of its strikes and thus “did not attempt to exclude all blacks, or as many blacks as it could, from the jury”); *Allison*, 908 F.2d at 1537 (same, where “the prosecutor preserved three black jurors, even though he had enough peremptory challenges to strike all the black jurors”).

Second, we have considered whether there is a substantial disparity between the percentage of jurors of a particular race or ethnicity struck and the percentage of their representation on the venire. *Lowder*, 236 F.3d at 637. For example, in *Lowder*, we concluded that there was no prima facie case of discrimination where the plaintiffs used both of

their peremptory strikes against white jurors. In so holding, we stated that there was no significant disparity between the plaintiffs' 100% rate of challenging white jurors and the 80% representation of white jurors on the venire. *Id.* On the other hand, in *Stewart*, we upheld a finding of a prima facie case based in part on the fact that, in exercising three peremptory challenges against black jurors, the defense struck 75% of black venire members. 65 F.3d at 925.

Third, this Court has considered “whether there is a substantial disparity between the percentage of jurors of one race [or ethnicity] struck and the percentage of their representation on the jury.” FN39 *Lowder*, 236 F.3d at 637; *Novaton*, 271 F.3d at 1002.

FN39. The factors discussed here do not constitute an exhaustive list of potentially relevant factors in determining whether an inference of discrimination arises. Rather, the heart of Ochoa's argument seems to be that the statistical evidence creates a “pattern” of discrimination, and thus we focus on the factors relevant to establishing such a pattern. However, in other cases, other factors may be relevant.

For example, the court may consider “the voir dire answers of those who were struck compared to the answers of those who were not struck.” *Lowder*, 236 F.3d at 637. In some *Batson* claims, the subject matter of the case may be

relevant if it is racially or ethnically sensitive. For example, in *Stewart*, the defense used its peremptory challenges to strike 3 of the 4 potential black jurors, causing the jury to have only one black member. 65 F.3d at 925. The district court found a prima facie case of race discrimination and this Court affirmed. *Id.* This Court noted that “no particular number of strikes against blacks automatically indicates the existence of a prima facie case,” but it concluded that a prima facie case existed in part because the defendants were being prosecuted for a racially motivated hate crime against blacks. *Id.* In contrast, there is no contention that the subject matter in Ochoa’s case is relevant.

United States v. Ochoa-Vasquez, 428 F.3d at 1044-45.

In the present case, Price relies on the fact that the prosecutor used his peremptory challenges to strike three out of five black venirepersons as the basis to support his *prima facie* showing. He also attempts to add three additional black individuals who were successfully challenged for cause by the prosecutor on *Witherspoon/Witt* grounds, by arguing the *Witherspoon* challenges were a guise to hide discrimination based on race. As to the latter complaint, Price completely fails to show any inference of discrimination on the basis of prosecutorial subterfuge. This declaration is both conclusory and completely belied by the record. Each of these venire persons repeatedly and unequivocally testified that he/she was against the death penalty and would not recommend a death sentence under any circumstances. *See infra*, Claim D. Finally, considering

that the *Witherspoon* challenged jurors were properly excused for cause, their dismissal is irrelevant to Price's complaints regarding the remaining three black venirepersons peremptorily struck by the prosecutor. Even if it were relevant, because they were properly excused, they provide no weight in favor of Price's *prima facie* showing. This aspect of Price's claim is due to be denied.

The next question is whether the state court's determination that the prosecutor's use of three of his peremptory strikes against black venirepersons did not satisfy Price's *prima facie* showing that an inference of discrimination was contrary to or an unreasonable application of clearly established law. Based upon the applicable Supreme Court precedent previously discussed and the Eleventh Circuit's interpretation and application of same, it is evident that Price is not entitled to relief. The Alabama Court of Appeals accurately identified and applied the first prong of the *Batson* standard in Price's case. His contention that the state court erroneously rejected his attempt at a *prima facie* claim because it improperly relied on jury composure of 16.7% blacks compared to venire composure of 10.2% is incorrect.

Price is also incorrect when he argues that it is immaterial there were two black jurors. Supreme Court and Eleventh Circuit dictate that such information is absolutely relevant to the question of whether, as a statistical matter, a defendant has shown the prosecutor was engaging in a pattern of peremptory strikes against a racial group during the selection of a jury. Other than pointing to the fact that the prosecutor used peremptory strikes against three of the five jurors, Price offers and has never offered any other relevant evidence in his case to support a

reasonable inference of discrimination.

- O. Comments by the prosecutor and the trial court allowed the jury to convict Mr. Price of capital murder without the requisite intent to kill, depriving Mr. Price of due process and rendering the verdict unreliable within the meaning of the Fifth, Sixth, Eighth and Fourteenth Amendments. (Paragraphs 104-05 of the petition).**

Price alleges the prosecutor made statements during his summation that likely “confuse[d] the jury and [led] them to believe incorrectly that [he] could be found guilty of capital murder as long as he participated in the robbery and was not ‘surprised’ by the killing.” (Doc. 16 at 49). Price concedes the trial court’s jury instruction pertaining to felony murder was an accurate statement of the law, but takes umbrage with the capital murder instruction’s use of the word “surprise” as a means to clarify the intent element of capital murder. *Id.* According to Price, the word actually muddied the jury’s understanding of the *mens rea* requirement for capital murder and diluted the State’s burden of proof. (Doc. 28 at 125).

Price complains that “[t]he confusing effect of the combination of the prosecutor’s statement and the trial court’s charge deprived the jury of clear direction on this point by using confusing and contradictory language.” (Doc. 16 at 49). He then concludes the inconsistent instructions to the jury deprived him of a fair trial because “an actual intent to kill is required for a capital murder conviction[]” under the Eighth Amendment. (Doc. 28 at 109). Price concludes that the

guilty verdict is unreliable, and demands a new trial for relief. (Doc. 16 at 50). The respondent answers⁹⁵ that Price's claim cannot withstand § 2254(d) review. (Doc. 22 at 70).

Price did not object to the prosecutor's statement or the judge's instructions at trial. The Court of Criminal Appeals properly conducted a plain error review of the claim. *Price v. State*, 725 So. 2d at 1016-17. According to the appellate court,

[the prosecutor argued,] “[Price] was in it up to his eyeballs from the very beginning to the very end. . . . Under either theory of capital murder, either that Chris Price himself wielded this weapon which inflicted wounds on Bill Lynn and killed him, which we feel the evidence sustains, either that way, if you should decide in your deliberations under the judge's charge that he merely was there and only intended to kill although he did not wield this weapon, there is still evidence to support that he knew what was going to happen, that he supported what was going to happen, and in no way was that any

⁹⁵ The respondent also asserts that this claim is procedurally defaulted because Price did not fairly present it as a federal claim in state court. (Doc. 22 at 69). However, on direct appeal, the Court of Criminal Appeals acknowledged that Price was presenting a federal claim. *Price v. State*, 725 So. 2d at 1016 (“comments made by the prosecutor and the trial court allowed the jury to convict him of capital murder without finding he intended to kill the victim, in violation of the state a federal Constitutions”).

surprise to Chris Price of the outcome. Nothing surprised him.”

....

[Moreover,] [t]he record indicates that the trial court charged the jury as follows:

“In order to be guilty of capital murder, the person on trial, whether that person physically committed the act which proved fatal or not, must have formed an intent in his mind to participate in the capital murder, the actual killing of that person, whether the person on trial physically committed the act or not or whether he merely stood by ready to take up the killing if necessary or to assist in the killing, which, in fact, was perpetrated by another. He has to have actually formed the intent to murder as opposed to being surprised by the act of some fellow actor in a robbery or other crime. That requires that an individual specifically have informed an intent to commit a murder, distinguishes capital murder from the other types of homicide, specifically felony murder.

In this case the defendant is charged with capital murder. He is charged with participating in the death of Bill Lynn intentionally while engaged in robbery in the first degree. Whether or not he physically committed the act which proved to be fatal, he had to be a participant in the act of killing Bill Lynn either by intentionally killing himself or

participating in the events with complicity by assisting or standing by to assist or encouraging or aiding or being a part in the actual, intentional murder of Bill Lynn. It is not enough that he was merely a bystander who was surprised by the acts of another person or something of that nature.

A person commits the crime of intentional murder if, with the intent to cause the death of another person, he causes the death of that person or yet another person. A person acts intentionally then when, with respect to a result or to conduct, his purpose is to cause that result or to engage in that conduct. So then when we speak of someone acting intentionally, we're speaking of someone acting with respect to a result with a purpose to cause that result, what many of us in Alabama would say, that a person meant to do that which they did. If they meant to do it, if their purpose was to do it and they carried it out, then that's the type of intent that we're speaking of. So a person accused of an intentional homicide must intentionally, as opposed to negligently, accidentally, or recklessly cause the death of the deceased in order to invoke the capital statute.

Now, in this case, as I say, if the defendant, during the commission of a robbery, intentionally killed Bill Lynn himself, then under the laws of the State of

Alabama, he would be guilty of capital murder if he was engaged in committing robbery in the first degree.

Now, the fact that someone died or is killed during the commission of a robbery does not automatically provide the intent in the instance of capital murder. The intent to kill must be real and specific in order to invoke the capital statute. In determining whether or not a person acted intentionally, of course, the jury has a right to look at all of the facts and circumstances surrounding the death of the person who is now deceased with a view of determining how that individual met his or her death and what might have been the intention of anyone who inflicted the wound or wounds or participated in the acts which caused the death of that person.

It is also a fundamental point in the state of Alabama that, when, by pre-arrangement or even on the spur of the moment, two or more persons intentionally determine to enter upon a common enterprise or adventure and a capital offense is contemplated in their mind, then if that purpose and collusion to kill is carried out, each would be guilty of the offense committed, whether that individual did any overt act or not. This rests upon the principle that anyone who, with the intent to participate in the intentional killing, is then present and encouraging, aiding, abetting or assisting

the active perpetrator in the commission of that offense, is a guilty participant and in the eyes of the law is equally guilty as the one who actually did the physical act.

This community of purpose or collusion in the killing need not be established by direct, positive testimony due to its inherent nature, but a jury must determine whether or not there has been such a collusion and intent on the part of the defendant and its extent, if any, from all of the evidence and the testimony in the case.

Now, if a person actively participates in the robbery or intending to assist and encourage, aid, abet or in any way carry out or help perpetrate an intentional murder during the commission of that robbery, then that individual would be guilty whether or not he personally committed the fatal act, but he could not be guilty of capital murder if he did not take some part in and form the intent to participate in the killing.”

Price v. State, 725 So. 2d at 1016-18.

Thereafter, the appellate court concluded,

There was no error in the trial court’s charge on intent as it relates accomplice liability for a capital offense or for the offense of felony murder.

These charges were clearly necessary to distinguish that element as it relates to the charged capital offense and the lesser

included offense of felony murder. *Starks v. State*, 594 So. 2d 187, 193-94 (Ala. Cr. App. 1991) (the trial court failed to properly instruct the jury as to the intent element of capital murder, thereby failing to clearly distinguish that offense from the lesser included offense of felony murder). *Davis v. State*, 440 So. 2d 1191, 1194 (Ala. Cr. App. 1983), *cert. denied*, 465 U.S. 1083, 104 S. Ct. 1452, 79 L. Ed. 2d 770 (1984) (the trial court had properly charged the jury as to the intent necessary for capital murder, the felony murder doctrine, and as to the distinction between the intent required for a capital felony and that required for the lesser included offense of non-capital murder); *Womack v. State*, 435 So. 2d 754, 763 (Ala. Cr. App.), *aff'd*, 435 So. 2d 766 (Ala.), *cert. denied*, 464 U.S. 986, 104 S. Ct. 436, 78 L. Ed. 2d 367 (1983) (the trial court properly instructed the jury as to the “intent to kill requirement” by instructing the jury that the felony murder doctrine was relevant only as a lesser included offense of noncapital murder, and that the jury could not convict the defendant for capital murder without finding beyond a reasonable doubt that he had possessed the intent to kill). *See also Ex parte Brown*, 686 So. 2d 409 (Ala. 1996), *cert. denied*, 520 U.S. 1199, 117 S. Ct. 1558, 137 L. Ed. 2d 705 (1997).

This charge was also proper given the evidence presented at trial; the State’s theory of

the case was that the appellant and his accomplice committed the capital murder of Bill Lynn, while the appellant's theory of the case was that he merely intended to commit a robbery but never intended to, and never actually participated in, the murder of Bill Lynn. Moreover, it was permissible for the prosecutor to argue the State's theory of the case as supported by the evidence to the jury. The State had presented sufficient evidence to provide a foundation for the jury to consider the offense of capital murder. " '[A] defendant is entitled to a charge on a lesser included offense if there is any reasonable theory from the evidence that would support the position.' *Ex parte Oliver*, 518 So. 2d 705, 706 (Ala. 1987). This is true regardless of 'however weak, insufficient, or doubtful in credibility' the evidence is concerning that offense. *Chavers v. State*, 361 So. 2d 1106, 1107 (Ala. 1978)." *Fletcher v. State*, 621 So. 2d 1010, 1019 (Ala. Cr. App. 1993). A trial court should also give a charge as to a lesser included offense even when " "the evidence supporting the defendant's position is offered by the State." *Silvey v. State*, 485 So. 2d 790, 792 (Ala. Cr. App. 1986). " " *Fletcher v. State, supra*, quoting *Starks v. State*, 594 So. 2d 187, 195 (Ala. Cr. App. 1991).

Furthermore, the prosecution may properly argue to the jury its version of the facts and evidence that support the State's theory of the case. "When these comments are examined in light of the entire record, it is clear that the prosecutor's purpose in making these statements was to comment on evidence in this case and to

draw legitimate inferences therefrom; specifically, to point out the weaknesses in the appellant's theory of the case, as established by the appellant's testimony." *Gaddy v. State*, 698 So. 2d 1100 (Ala. Cr. App. 1995), *aff'd*, 698 So. 2d 1150 (Ala. 1997). Thus, there was no error as to this claim.

Id. at 1018-19.

Price contends the appellate court's decision "that the jury charge accurately instructed the jury on the meaning of 'intent to kill' was contrary to and an unreasonable application of clearly established Supreme Court precedent." (Doc. 28 at 109). He supports this argument with a single quotation from *Enmund v. Florida*, 458 U.S. 782, 793 (1982) ("[T]he death penalty may not be imposed where defendant 'did not kill, attempt to kill or intend to kill.'"). *Id.*

After careful review, the court finds Price is not entitled to relief on this claim. The applicable standard of review is well-established:

Federal habeas relief is unavailable "for errors of state law." *Estelle v. McGuire*, 502 U.S. 62, 67, 112 S. Ct. 475, 480, 116 L. Ed. 2d 385 (1991) (quoting *Lewis v. Jeffers*, 497 U.S. 764, 780, 110 S. Ct. 3092, 3102, 111 L. Ed. 2d 606 (1990)). A jury instruction that "was allegedly incorrect under state law is not a basis for habeas relief," *id.* at 71-72, 112 S. Ct. at 482, because federal habeas review "is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Id.* at 68, 112 S. Ct. at 480. Unlike state appellate courts, federal courts on habeas review are constrained to determine only whether the

challenged instruction, viewed in the context of both the entire charge and the trial record, “so infected the entire trial that the resulting conviction violate[d] due process.” *Id.* at 72, 112 S. Ct. at 482 (quoting *Cupp v. Naughten*, 414 U.S. 141, 147, 94 S. Ct. 396, 400-01, 38 L. Ed. 2d 368 (1973)).

Jamerson v. Secretary for Dept. of Corrections, 410 F.3d 682, 688 (11th Cir. 2005).

The court finds that there is no reasonable probability that the use of the word “surprise” in the trial court’s capital murder instruction, when viewed in the context of the entire charge and trial record, so infected Price trial that his conviction offends due process. Price attempts to persuade the court that he suffered constitutional prejudice from confusion arising from the remark and instructions because the State’s capital murder case against him was weak and that the State relied heavily on accomplice liability to support its capital theory. This is an unduly narrow description of the evidence and the prosecution’s theory. In reality, the evidence that Price committed capital murder was very strong and it is clear that the prosecution’s theory rested not only on Price being the primary mastermind and orchestrator of the crime, but his having been the primary perpetrator as well. There is no reasonable probability the jury would have acquitted Price had the word “surprise” not been used for descriptive purposes in the trial court’s capital murder instruction. This claim is due to be denied.⁹⁶

⁹⁶ To the extent Price complains that the instructions contravened Alabama precedent (doc. 28 at 109), this court has no jurisdiction to interfere with a

P. The trial court's failure to ask each prospective juror whether he or she had heard or been affected by improper discussions outside the courtroom during jury selection, violated Mr. Price's rights under the federal constitution and Alabama law. (Paragraphs 106-09 of the petition).

Price alleges venire person Shepherd, before jury selection, discussed the murder with other jurors, including that Price was guilty and speculation that Price killed someone with an axe. (Doc. 16 at 50). Counsel moved for a mistrial, which was denied by the trial court. *Id.* Price now faults the trial court for its failure to question all venirepersons about Shepherd's conversation and to determine whether Shepherd's statements prejudiced their view. *Id.* (citing *Parker v. Gladden*, 385 U.S. 363, 364 (1966); *United States v. Brantley*, 733 F.2d 1429, 1439 (11th Cir. 19 84) (quoting *United States v. McKinney*, 429 F. 2d 1019, 1026) (5th Cir. 1970) ("In response to such an allegation, the trial judge 'must conduct a full investigation. . . . '")).

The respondent counters that the trial court's decision was affirmed by the Court of Criminal Appeals and Price cannot show that court's decision was either contrary to or an unreasonable application of clearly established federal law or that the decision was based upon an unreasonable interpretation of the facts in light of the evidence. (Doc. 22 at 71-73).

The opinion of the Court of Criminal Appeals reveals that the court examined the individual *voir*

state court's interpretation of its own law.

dire of venire person Shepherd in its entirety. *Price v. State*, 725 So. 2d at 1012- 16. It acknowledged, and Price does not dispute, that Shepherd's demeanor was so evasive and obstinate that immediately after his individual *voir dire*, the parties and the trial judge agreed to his removal from the venire. *Id.* at 1014. Nevertheless, the trial court denied Price's motion for mistrial. In affirming the decision of the trial judge, the Court of Criminal Appeals found

[t]he prospective juror clearly informed the court that the conversation he had with the other prospective jurors was in jest. Moreover, the only subject matter concerned the possibility that the victim had been killed with an ax. In the present case, the evidence at trial was clear that a knife and a sword had been used either separately or together as the murder weapon or weapons. There was no issue raised concerning the murder weapon; thus, any initial speculation that an ax may have been the murder weapon could not have prejudiced the appellant.

....

[T]he potential juror who had been privy to the conversation was removed for cause. Thereafter, defense counsel asked a number of potential jurors whether they had heard such a conversation taking place; however, none indicated that they had and defense counsel refrained from asking any other potential jurors whether they too had heard the conversation. Although a reversal may be mandated when juror misconduct "might have influenced the verdict," which "casts a 'light burden' on the

defendant,” *Ex parte Lasley*, 505 So. 2d 1263, 1264 (Ala. 1987), in the present case the appellant has not met even this burden. In *Riddle v. State*, 661 So. 2d at 276-77, this Court noted that, as in the present case, “the defense did not request individual voir dire of the empaneled jury. There is no indication in the record that individual voir dire was necessary.” *Id.*, citing *Brown v. State*, 571 So. 2d 345, 350-52 (Ala. Cr. App.), *cert. quashed*, 571 So. 2d 353 (Ala. 1990), *vacated*, 501 U.S. 1201, 111 S. Ct. 2791, 115 L. Ed. 2d 966 (1991). Thus, in the present case, where the potential jurors who were not struck for cause all indicated that they could eliminate the influence of any previous feelings and could render a verdict according to the evidence, *Rowell v. State*, 570 So. 2d 848, 855 (Ala. Cr. App. 1990), and the subject matter of the conversation concerned an aspect of the case that was not contested by either party, the trial court’s decision to deny the motion for a mistrial and his failure to *sua sponte* question the venire panel was not erroneous.

Price v. State, 725 So. 2d at 1016.

When the factual circumstances and legal rulings in Price’s case are compared to the cases cited⁹⁷ by Price, his argument must fail for two reasons. First, Shepherd’s conversation was benign compared

⁹⁷ “See e.g. *Parker v. Gladden*, 385 U.S. 363, 364 (1966); *United States v. Brantley*, 733 F.2d 1429, 1439 (11th Cir. 1984) (quoting *United States v. McKinney*, 429 F.2d 1019, 1026 (5th Cir. 1970)).” (Doc. 16 at 50).

to the type and source of information at issue in the cases cited by the petitioner (*Parker, Brantley* and *McKinney*). Second, the issue with venireperson Shepherd was discovered and examined during *voir dire*, while the difficulties in *Parker, Brantley* and *McKinney* involved prejudicial extraneous information and juror misconduct during deliberations, all of which were discovered post-trial, and litigated by way of post-conviction proceedings. By way of example, in *Parker*,

a court bailiff assigned to shepherd the sequestered jury [in a second degree murder case], which sat for eight days, stated to one of the jurors in the presence of others, while the jury was out walking on a public sidewalk: “Oh that wicked fellow (petitioner), he is guilty”; and on another occasion said to another juror under similar circumstances, “If there is anything wrong (in finding petitioner guilty) the Supreme Court will correct it.” [footnotes omitted].

385 U.S. at 363-64. These statements were heard by one and possibly up to three jurors. In *Brantley*, the court learned after trial that a juror had informed the other members of the jury during deliberations that she knew the defendant’s daughter and that the defendant had “been in this kind of trouble before.” 733 F.2d at 1439. Finally, in *McKinney*, the jurors, while deliberating the guilt of a defendant charged with escape, discussed how they read newspaper articles saying the defendant had escaped before and was essentially an escape artist. 429 F.2d at 1019.

The comment made by Shepherd and the other venire person in this case was inappropriate and in

poor taste, but it certainly did not render Price's trial fundamentally unfair. The Court of Criminal Appeals correctly noted that the comment did not contain information which the jury was not made privy to at trial, nor did it create some sort of disputable issue regarding the murder weapon in any material sense.

Considering the foregoing, counsel's probing the matter through questioning of a few venire persons was adequate. Additionally, as Price himself points out, it was within the trial court's "broad discretion" to examine the circumstances of Shepherd's behavior and gauge whether the incident warranted examination of every single venire person. (Doc. 28 at 110 (quoting *United States v. Harris*, 908 F.2d 728, 733 (11th Cir. 1990)).

Considering all circumstances surrounding the comment, the trial court did not compromise Price's right to a fair and impartial jury. Price has not shown the state court's decision is contrary to or an unreasonable application of clearly established federal law nor has he shown it was an unreasonable determination of the facts in light of the evidence before it.

Q Mr. Price did not receive effective assistance of counsel during his direct appeal. (Paragraphs 110-14 of the petition).

Price contends his appellate counsel failed to raise several trial errors on direct appeal, and that, had he raised the claims, there was a reasonable probability the outcome of his appeal would have been different. (Doc. 16 at 51-53). Specifically, Price contends his trial counsel failed to object to two improper prosecutorial comments. The first comment

occurred at the guilt phase of the trial, that being the prosecutor's appeal to law enforcement. *Id.* at 52. This claim is due to be dismissed outright. Appellate counsel did raise this claim on direct appeal and same was reviewed on the merits. It has also already been examined extensively in the habeas petition and has been found insufficient to afford the petitioner any relief. (See Claim E(1) herein).

The second comment took place at sentencing when the prosecutor informed the jury that Price deserved the death penalty because he had already been shown more mercy than he had shown the victim in that Price was at least afforded a trial and other due process. (Doc. 16 at 52). Price contends the latter comment improperly urged the jury to sentence him to death because he exercised his Sixth Amendment guarantee to a jury trial. *Id.* This bare allegation is insufficient to state a claim entitling him to any relief.

Price lastly alleges that appellate counsel did not raise as error the fact that trial counsel did not object to the admission of Dr. Kirkland's mental health report at sentencing. *Id.* This conclusory assertion does not merit any further discussion, particularly in view of the court's previous discussion of the report. (See Claim A.2 herein). Price is entitled to no relief on this claim

V. CONCLUSION

Having now carefully reviewed the record, pleadings, briefs, and arguments presented, the court finds that Price is not entitled to relief from his conviction or sentence. Accordingly, by separate order, the court will deny Price's request for an evidentiary hearing, and deny his petition for a writ of habeas corpus.

APPENDIX C

**COURT OF APPEALS' JULY 3, 2012 DENIAL OF
PETITIONER'S REHEARING PETITION**

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

NO. 09-11716-P

CHRISTOPHER LEE PRICE, Petitioner-Appellant
versus
RICHARD F. ALLEN, Respondent-Appellee.

On Appeal from the United States District Court for
the
Northern District of Alabama

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

Before: TJOFLAT, BARKETT and WILSON, 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 D:

**MAY 30, 2003 OPINION OF THE ALABAMA
COURT OF CRIMINAL APPEALS**

Court of Criminal Appeals
State of Alabama

MEMORANDUM

CR-01-1578 Fayette Circuit Court CC-92-3.61

Christopher Lee Price v. State of Alabama

Released: May 30, 2003

Cobb, Judge.

Christopher Lee Price appeals from the denial of his petition for postconviction relief filed pursuant to Rule 32, Ala.R.Crim.P., challenging his February 5, 1993, conviction for murder made capital because the murder occurred during the course of a robbery in the first degree. See § 13A-5-40(a) (2), Ala. Code 1975. The jury recommended by a vote of 10-2 that the death sentence be imposed. This Court affirmed Price's conviction and sentence of death. *Price v. State*, 725 So. 2d 1003 (Ala. Crim. App. 1997). The Alabama Supreme Court affirmed this Court's judgment, *Ex parte Price*, 725 So. 2d 1063 (Ala. 1998), and the United States Supreme Court denied certiorari review, *Price v. Alabama*, 526 U.S. 1133 (1999). The certificate of judgment was issued on December 8, 1998.

The facts underlying Price's conviction are as follows.

“On the evening of December 22, 1991,
Bill and Bessie Lynn returned to their home

following a church service at the Natural Springs Church of Christ, where Bill Lynn had served as minister. The victims' home was located in the Bazemore community of north Fayette County. Bill Lynn had begun assembling Christmas toys for his grandchildren, while Bessie Lynn had dressed for bed and was upstairs in her bedroom watching television. The electricity suddenly failed and, because the security lights outside remained on, and because the electricity was still on in a neighbor's home, Bill Lynn told his wife to call the power company to report the outage. He then walked outside to check the power box. Bessie Lynn heard a noise outside and, upon looking out of her window, saw an individual in what she called a 'karate stance,' holding what appeared to be a sword in his right hand, high above his head in a striking position. Bessie Lynn testified that the individual was dressed completely in black. Bill Lynn yelled for his wife to telephone the police, and, upon discovering that the telephone lines had been cut, she hurried downstairs, where she picked up a candle and armed herself with a pistol that the Lynns kept in a kitchen drawer by a bank deposit bag. The bank deposit bag contained cash and checks received from an automobile parts business operated by Bill Lynn. Bessie Lynn testified that she then hurried outside and that when she did someone struck her and knocked her to the ground. She testified that she got up and fired a gunshot into the air and began calling for her husband. She found him in the yard and tried to give him the gun, telling him to

shoot the people, but Bill Lynn, who had been severely wounded told her there were no bullets left in the gun. She then told her husband that she was going for help; he told her to give the culprits anything that they wanted. Bill Lynn had told his wife at that point that he knew he was going to die. Bessie Lynn, who was in their van and attempting to insert the key into the ignition, became aware of two men, one on each side of the van. They ordered her out of the van, and when she got out she was beaten with an object. One of the individuals was demanding money. They ordered her back into the house, where the two individuals, both dressed in black, demanded her money and jewelry. They took a rifle and shotgun from the house, the pistol that Bill Lynn still had, and the checks and cash from the bank deposit bag. They also ordered Bessie Lynn to give them her jewelry. She responded that she did not wear jewelry other than her two rings and asked if she might keep her wedding ring. She was instructed to take her rings off and to drop them in a bag, which they took. The culprits instructed Mrs. Lynn to remain where she was and they searched for something in the kitchen and then outside the house. Bessie Lynn testified that when the two men came back in the house, a vehicle apparently drove by the house. The two men then went out the back door, and Bessie Lynn testified that she then ran out the front door. She ran back to her husband to tell him that she was going to go for help. He asked her to hurry, and she ran to her father's house, which was located nearby. From her father's house she telephoned for help. Bill

Lynn died before he reached the hospital. Bessie Lynn was treated for wounds to her head, her hands, her chest, and her thighs.

“Several days later, the appellant was arrested in Chattanooga, Tennessee, where he had been visiting friends. He gave a statement to the

authorities in Tennessee, admitting his participation in the offenses, but claiming that his accomplice had actually killed Bill Lynn and wounded Bessie Lynn. He subsequently gave another statement to Alabama authorities.”

Ex parte Price, 725 So. 2d at 1065-66, (quoting Price v. State, 725 So. 2d at 1011-1012.)

Before addressing Price’s appellate claims, we note the following principles that apply to a review of a circuit court’s denial of a Rule 32 petition. Because Price was convicted of capital murder, his direct appeal included not only review of the issues presented by Price, but also, the record was searched for “plain error.” Ex parte Price, 725 So. 2d at 1071, Price v. State, 725 So. 2d at 1011, n.1). Thus, “even though this petition challenges a capital conviction and a death sentence, there is no plain-error review on an appeal from the denial of a Rule 32 petition.” Dobyne v. State, 805 So. 2d 733, 740 (Ala. Crim. App. 2000), *aff’d*, 805 So. 2d 763 (Ala. 2001), citing Pierce v. State, [Ms. CR-96-1668, Mar. 2, 1999] ___ So. 2d ___, (Ala. Crim. App. 1999), *rev’d on other grounds*, [Ms. 1981270, Sept 20, 2002] ___ So. 2d ___ (Ala. 2002). “In addition, “the procedural bars of Rule 32 apply with equal force to all cases, including those in which the death penalty has been imposed.” State v. Tarver, 629 So. 2d 14, 19 (Ala. Crim. App. 1993).” Williams v. State, 783 So. 2d 108,

112 (Ala. Crim. App. 2000) (quoting Brownlee v. State, 666 So. 2d 91, 93 (Ala. Crim. App. 1995).

Claims presented in a petition but not pursued on appeal are deemed to be abandoned. See, e.g., Brownlee v. State, 666 So.2d 91, 93 (Ala. Cr. App. 1995) (holding that “we will not review issues not listed and argued in brief.”) New claims presented for the first time on appeal are not properly before the appellate court. See Arlington v. State, 716 So.2d 237, 239 (Ala. Cr. App. 1997) (holding that “[a]n appellant cannot raise an issue on appeal from the denial of a Rule 32 petition which was not raised in the Rule 32 petition.”) Claims listed in an appellate brief that do not include supporting argument, as required by Rule 28(a) (10), Ala.R.App.P., are not properly before this Court.

“[A] judge who presided over the trial or other proceedings and observed the conduct of the attorneys at the trial or other proceedings need not hold a hearing on the effectiveness of those attorneys based on conduct that he observed.” Ex parte Hill, 591 So.2d 462, 463 (Ala. 1991).

“[W]hen the facts are undisputed and an appellate court is presented with pure questions of law, that court’s review in a Rule 32 proceeding is de novo.” Ex parte White, 792 So. 2d 1097, 1098 (Ala. 2001). However, where there are disputed facts in a postconviction proceeding resolved by the circuit court “[t]he standard of review on appeal .. is whether the trial judge abused his discretion when he denied the petition. Ex parte Heaton, 542 So. 2d 931 (Ala. 1989).” Elliott v. State, 601 So. 2d 1118, 1119 (Ala. Cr. App. 1992). Regardless of the criterion for review, this Court has consistently held regarding repostconviction proceedings that: “If the circuit court is correct for any

reason, even though it may not be the stated reason, we will not reverse its denial of the petition. See Roberts v. State, 516 So. 2d 936 (Ala.Cr.App. 1987).” Reed v. State, 748 So. 2d 231, 233 (Ala. Crim. App. 1999).

Price’s May 23, 2000, petition contains 103 paragraphs in support of his contentions that he received ineffective assistance of counsel, that constitutional errors were committed, and that errors were committed by the trial court.

On June 26, 2000, the State filed an “Answer” containing the State’s response to each claim contained in the petition. Of particular note for purposes of this review were claims nos. 9-12. The State asserted claims nos. 9-12 -- that counsel was ineffective for failing to contact family members, friends, or former teachers to provide mitigating evidence at the penalty phase of the proceedings -- were insufficiently pleaded and “due to be summarily dismissed unless the petitioner makes a more specific showing.” (C. 42-3.) See Rules 32.3, 32.6(b), and 32.7(d), Ala. R. Crim. P.

On December 11, 2000, the State filed a “Motion to Dismiss” the petition asserting that Price’s claims were either insufficiently pleaded, failed to state a material issue of fact or law, or was procedurally bared because the claim could have been, but was not, raised at trial or during direct appeal. See Rules 32.2(a) (3) and (5), Ala.R.Crim.P. Regarding Price’s claim that counsel was ineffective for failing to contact family members, friends, or former teachers to provide mitigating evidence at the penalty phase of the proceedings, the State asserted that Price had not, in the six months since the filing of the State’s answer, revealed the identity of the individuals that he alleged

should have been contacted by trial counsel. Thus, the State asserted that these claims were insufficiently pleaded and due to be summarily dismissed.

Also, on December 11, 2000, the circuit court issued an “Order of Dismissal” dismissing the majority of Price’s claims, including his claims that counsel was ineffective for failing to contact family members, friends, or former teachers to provide mitigating evidence at the penalty phase of the proceedings. However, regarding that particular claim, the circuit court stated that “[t]he petitioner has 21 days from the date of this order to supply the information necessary to comply with Rule 32’s full-fact pleading requirements and to have these particular paragraphs reinstated into the petition.” (C. 88.)

On January 2, 2001, Price filed “First Amendment to Petition Pursuant to Rule 32 of the Alabama Rules of Criminal Procedure.” This amendment sought to comply with the circuit court’s order of December 11, 2000, by supplying further information regarding his claims that counsel was ineffective for failing to contact family members, friends, or former teachers to provide mitigating evidence at the penalty phase of the proceedings.

On February 21, 2002, the State filed its “Motion to Dismiss the Rule 32 Petition.” (C. 193.) The motion presented various assertions in support of summary dismissal.

On March 18, 2002, the circuit court adopted the State’s proposed order and granted the State’s motion to summarily dismiss Price’s Rule 32 petition. On March 25, 2002, Price filed a “Motion for Reconsideration of Order of Dismissal” asserting that he had, on February 19, 2002, informed the circuit

court of his intentions to “oppose the State’s motion and proposed Order and respectfully requesting that the Petitioner be given until March 22, 2002, to do so.” (C. 184.) The motion made clear that “the State did not object to Petitioner’s request to have until March 22, 2002, to file his opposition to the State’s Motion.” (C. 184-85.) Price argued that “arguments put forth by the State ... [were] flawed and, in many cases, inaccurate.” (C. 185.) Thus, Price argued that depriving him the opportunity to respond to the State’s motion violated his due process rights under the United States Constitution.

On April 1, 2002, the State filed a “Response to Price’s Motion for Reconsideration of Final Order of Dismissal,” (C. 300), wherein the State conceded that “the State of Alabama did not oppose [Price’s] request for additional time in which to respond.” (C. 300.) However, the state asserted that Rule 32.7(d), Ala.R.Crim.P., provides for summary dismissal of a Rule 32 petition at the discretion of the circuit court “without the need for briefing by either party.” (C. 300.) Thus, the State argued that Price was not denied due process.

On April, 1, 2002, the circuit court denied Price’s motion to reconsider and again issued its order of March 18, 2002, summarily dismissing Price’s Rule 32 petition. The instant appeal followed.

I.

Price contends that the United States Court’s decision in Ring v. Arizona, 536 U.S. 584 (2002), requires that he be resentenced. This claim was not raised in Price’s petition. Thus, this claim is not properly before this Court. See Kaska v. State, 740 So.2d 475, 477 (Ala. Crim. App. 1998) (“an appellant

cannot raise issues on appeal from the denial of a Rule 32 petition that were not raised in the original Rule 32 petition”).

Moreover, Price’s reliance upon the decision in Ring v. Arizona is misplaced. Specifically, Price argues that “the trial court improperly concluded that two aggravating factors applied to Mr. Price’s case [(murder during a robbery and that the crime was heinous atrocious and cruel)] despite no guidance from the jury’s Sentencing Recommendation Form that the jury had found two aggravating factors proved beyond a reasonable doubt. The trial judge’s erroneous finding violated Mr. Price’s Sixth Amendment right to a jury trial in capital prosecutions. Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 2443 (2002). By including this improperly found aggravating factor in its ‘weighing calculus of aggravating versus mitigating factors, the trial court unconstitutionally skewed the balance in favor of death. The use of this invalid ‘aggravating factor in the weighing process invalidates the sentence, Stringer v. Black, 503 U.S. 222, 237 (1992), and, as this Court has recognized, makes it appropriate to remand to the trial court for a new sentencing hearing, see Poole v. State, 2001 WL 996300, at *16 n. 8 (Ala. Crim. App. Aug. 31, 2001).” (Price’s brief at page 20-21.)

Price continues: “There is nothing ... in the jury’s Sentencing Recommendation Form to indicate that the jurors unanimously found the second aggravating factor proven beyond a reasonable doubt,” (Price’s brief at page 22), and, “[s]ince the jury did not determine that the second aggravating factor had been sufficiently proved, it was error for the sentencing judge to rely upon that factor when weighing the aggravating and mitigating factors.” (Price’s brief at page 23.) Thus, according to Price, his case should be

remanded for a new sentencing hearing wherein he is afforded “with the individualized sentence required by the Eighth Amendment.” (Price’s brief at page 24.)

Price’s claims have been addressed and decided adversely to him either by this Court or by the Alabama Supreme Court. See, Ex parte Waldrop, [Ms. 1001194, November 22, 2002] ___ So. 2d ___ (Ala. 2002); See also, See Stallworth v. State, [Ms. CR-98-0366, January 31, 2003] ___ So. 2d ___ (Ala. Crim. App. 2003)(opinion on return to second remand); Turner v. State, [Ms. CR-99-1568, November 22, 2002] ___ So. 2d ___ (Ala. Crim. App. 2002); and Tomlin v. State, [Ms. CR-98-2126, November 22, 2002] ___ So.2d ___ (Ala. Crim. App. 2002) (opinion on rehearing). “Only one aggravating circumstance must exist in order to impose a sentence of death. Ala. Code 1975, § 13A-5-45(f). Thus, ... the jury, and not the trial judge, determined the existence of the “aggravating circumstance necessary for imposition of the death penalty.”“ Clark v. State, [Ms. CR-99-1062, Feb. 28, 2003] ___ So. 2d ___, (Ala. Crim. App. 2003) (quoting Ex parte Waldrop, ___ So. 2d at ___ quoting in turn Ring v. Arizona, 536 U.S. at 609). As in Waldrop, the jury in this case found the existence of that one aggravating circumstance: that the murders were committed while Price was engaged in the commission of a robbery.

“... At that point, [Price] became •”exposed” to, or eligible for, the death penalty. The trial court’s subsequent determination that the murders were especially heinous, atrocious, or cruel is a factor that has application only in weighing the mitigating circumstances and the aggravating circumstances, a process that we held earlier is not an “element” of the offense.”

Clark v. State, ___ So. 2d at ___ (quoting Ex parte Waldrop, ___ So. 2d at ___).

The procedure by which Price was sentenced to death fully complied with the United States Supreme Court's decision in Ring and, thus, Prices's sentence to death is proper. Even if this claim was properly before us, Price would not be entitled to relief.

II.

A.

Price contends that the circuit court erred and violated his due process rights when the court dismissed his petition without allowing him the opportunity to oppose the State's motion to dismiss -- which according to Price, contained factual errors and "deeply flawed legal arguments." (Price's brief at page 25.) According to Price, this action by the circuit court deprived him "of his right to present evidence to support his claim of ineffectiveness [of counsel] as required by Rule 32." (Price's brief at page 25.) Moreover, Price argues that the circuit court's error was exacerbated because the State asserted in its motion to dismiss that it would not object to allowing Price until March 22, 2002, to respond to its motion.

We do not find error with the circuit court's granting of the State's motion to dismiss without benefit of Price's motion in opposition.

"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 [my] summarily dismiss that petition." Tatum v. State, 607 So. 2d 383, 384 (Ala. Crim. App. 1992) (quoting Bishop v. State, 608 So. 2d 345, 347-48 (Ala. 1992) quoting in

turn, Bishop v. State, 592 So. 2d 664, 667 (Ala. Crim. App. 1991) (Bowen, J., dissenting)); Rule 32.7(d), Ala.R.Crim.P. Because it is clear from the face of

Price's petition, for the reasons discussed below, that his claims are precluded and/or meritless, the circuit court's summary denial of Price's petition, without receiving Price's motion in opposition to the State's motion to dismiss, was not error.

II.

B.

Price contends that the circuit court's "wholesale adoption" of the State's proposed order denying Price's Rule 32 petition violated Price's right to due process. According to Price, such action taken by the circuit court was an abdication of "its responsibility to provide an independent and impartial review of the issues before it." (Price's brief on appeal at page 32.)

““While the practice of adopting the State's proposed findings of fact and conclusions of law is subject to criticism, the general rule is that even when the court adopts proposed findings and conclusions verbatim, the findings are those of the court and may be reversed only if clearly erroneous. Anderson v. City of Bessemer, N.C., 470 U.S. 564, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985); Hubbard v. State, 584 So. 2d 895 (Ala. Cr. App. 1991); Weeks v. State, 568 So. 2d 864 (Ala. Cr. App. 1989), cert. denied, 498 U.S. 882, 111 S. Ct. 230, 112 L. Ed. 2d 184 (1990); Morrison v. State, 551 So. 2d 435 (Ala. Cr. App.

1989), cert. denied, 495 U.S. 911, 110 S. Ct. 1938, 109 L. Ed. 2d 301 (1990).”

“Wright v. State, 593 So. 2d 111, 117-18 (Ala. Cr. App. 1991), cert. denied, 506 U.S. 844, 113 S. Ct. 132, 121 L. Ed. 2d 86 (1992). “

Pierce v. State, [Ms. CR-96-1668, Mar. 2, 1999] ___ So. 2d ___, ___ (Ala. Crim. App. 1999), rev'd on other grounds, [Ms.1981270, Sept 20, 2002] ___ So. 2d ___ (Ala. 2002); see also, Hamm v. State, [Ms. CR-99-0654, February 1, 2002] ___ So. 2d ___ (Ala. Crim. App. 2002); Morrison v. State, 551 So. 2d 435 (Ala. Crim. App. 1989). The circuit court's 61 page order sufficiently addressed each of Price's claims. As discussed below, our review of the record supports the circuit court's summary denial of Price's Rule 32, Ala.R.Crim.P., petition. Thus, the circuit court's adoption of the State's proposed order was not error. Moreover, as previously stated, “[i]f the circuit court is correct for any reason, even though it may not be the stated reason, we will not reverse its denial of the petition. See Roberts v. State, 516 So. 2d 936 (Ala.Cr.App. 1987).” Reed v. State, 748 So. 2d 231, 233 (A.La. Crim. App. 1999).

III.

Price contends that the circuit court erred by dismissing his ineffective assistance of counsel claims (claims 6 through 84 of his petition) without providing him an opportunity to prove the claims. Price claims that summary dismissal of these claims was error for the following reasons: 1) the circuit court misapplied Rule 32.3, Ala.R.Crim.P., by requiring Price to provide proof of his claims during the pleading phase of the proceedings; 2) the circuit court misapplied Rule 32.6(b), Ala.R.Crim.P., which requires that a petition

set forth a specific statement of the grounds entitling the petitioner to relief; 3) the trial court erred in its conclusion that the petition failed to state a claim and did not contain a material issue of fact or law; and, 4) the circuit court erred by failing to consider the cumulative effect Price's ineffective assistance of counsel claims.

Before addressing Price's individual claims concerning the alleged erroneous denial of his ineffective assistance of counsel claims, we note the following regarding the legal standards relevant to consideration of claims of ineffective assistance of counsel.

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

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

resulted from a breakdown in the adversary process that renders the result unreliable.’

““466 U.S. at 687, 104 S. Ct. at 2064.

“““The performance component outlined in Strickland is an objective one: that is, whether counsel’s assistance, judged under “prevailing professional norms,” was “reasonable considering all the circumstances.” Daniels v. State, 650 So. 2d 544, 552 (Ala.Cr.App. 1994), cert. denied, 488 U.S. 1051, 109 S. Ct. 884, 102 L. Ed. 2d 1007 (1 9 9 5) , quoting Strickland, 466 U.S. at 688, 104 S. Ct. at 2065. ‘A court deciding an actual ineffectiveness claim must judge the reasonableness of counsel’s challenged conduct on the facts of the particular case, viewed as of the time of counsel’s conduct.’ Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

“““The claimant alleging ineffective assistance of counsel has the burden of showing that counsel’s assistance was ineffective. Ex parte Baldwin, 456 So. 2d 129 (Ala. 1984), aff’d, 472 U.S. 372, 105 S. Ct. 2727, 86 L. Ed. 2d 300 (1985). ‘Once a petitioner has identified the specific acts or omissions that he alleges were not the result of reasonable professional judgment on counsel’s part, the court must determine whether those acts or omissions fall “outside the wide range of professionally competent assistance.” [Strickland,] 466 U.S. at 690, 104 S. Ct. at 2066.’ Daniels, 650 So. 2d at 552. When reviewing a

claim of ineffective assistance of counsel, this court indulges a strong presumption that counsel's conduct was appropriate and reasonable. Hallford v. State, 629 So. 2d 6 (Ala.Cr.App. 1992), cert. denied, 511 U.S. 1100, 114 S. Ct. 1870, 128 L. Ed. 2d 491 (1994); Luke v. State, 484 So. 2d 531 (Ala.Cr.App. 1985). "This court must avoid using "hindsight" to, evaluate the performance of counsel. We must evaluate all the circumstances surrounding the case at the time of counsel's actions before determining whether counsel rendered ineffective assistance. Hallford, 629 So. 2d at 9. See also, e.g., Cartwright v. State, 645 So. 2d 326 (Ala.Cr.App. 1994).

““Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide

range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action “might be considered sound trial strategy.” There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.’

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

“““Even if an attorney’s performance is determined to be deficient, the petitioner is not entitled to relief unless he establishes that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” [Strickland,] 466 U.S. at 694, 104 S. Ct. at 2068.’

“““Daniels, 650 So. 2d at 552.

““““When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of

aggravating and mitigating
circumstances did no warrant death.’

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

““In a Rule 32 proceeding, the petitioner has ‘the burden of pleading and [later] proving by a preponderance of the evidence[,] the facts necessary to entitle the petitioner to relief.’ Rule 32.3, Ala. R. Crim. P. See Fortenberry v. State, 659 So. 2d 194 (Ala.Cr.App. 1994), cert. denied, 516 U.S. 846, 116 S. Ct. 137, 133 L. Ed. 2d 84 (1995); Wilson v. State, 644 So. 2d 1326 (Ala.Cr.App. 1994); Elliott v. State, 601 So. 2d 1118 (Ala.Cr.App.1992).”

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

“Moreover, “[a] finding of no plain error is one factor to consider when assessing the performance of counsel.” Fortenberry, 659 So. 2d 194, 200 (Ala.Cr.App. 1994), cert. denied, 516 U.S. 846, 116 S. Ct. 137, 133 L. Ed. 2d 84 (1995), quoting Hallford, 629 So. 2d 6, 10 (Ala.Cr.App. 1992), cert. denied, 511 U.S. 1100, 114 S. Ct. 1870, 128 L. Ed. 2d 491 (1994). “A finding of no manifest injustice under the “plain error” standard on a direct appeal serves to establish a finding of no prejudice under the test for ineffective assistance of counsel provided in u, 466 U.S. 668,.104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).” Williams v. State, 783 So. 2d 108, 133

(Ala.Cr.App. 2000), quoting State v. Clark, 913 S.W.2d 399, 406 (Mo.Ct.App. 1996). See also Thomas v. State, 766 So. 2d 860 (Ala. Crim. App. 1998).’

“Dobyne v. State, [Ms. CR-98-0030, June 30, 2000] 805 So. 2d 733, (Ala. Crim. App. 2000).”

Hamm v. State, So. 2d at .

III.

A.

Price contends that the circuit court erred by ruling that several of his claims were due to be dismissed at the pleading stage because these claims failed to meet the necessary burden of proof entitling him to review of these claims.

Rule 32.3, Ala.R.Crim.P., states:

“The petitioner shall have the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief. The state shall have the burden of pleading any ground of preclusion, but once a ground of preclusion has been pleaded, the petitioner shall have the burden of disproving its existence by a preponderance of the evidence.”

(Emphasis added.)

Price correctly states that his initial burden was to plead sufficient facts, which if true, would have entitle him to relief.

“[A]t the pleading stage of Rule 32 proceedings, a Rule 32 petitioner does not have the burden of proving his claims by a

preponderance of the evidence. Rather, at the pleading stage, a petitioner must only provide “a clear and specific statement of the grounds upon which relief is sought.” Rule 32.6(b), Ala.R.Crim.P. Once a petitioner has met his burden of pleading so as to avoid summary disposition pursuant to Rule 32.7(d), Ala.R.Crim.P., he is then entitled to an opportunity to present evidence in order to satisfy his burden of proof.’

“Ford v. State, 831 So. 2d 641, 644 (Ala. Crim. App. 2001). A claim may not be summarily dismissed because the petitioner failed to meet his burden of proof at the initial pleading stage, a stage at which the petitioner has only a burden to plead. See Smith v. State, 581 So. 2d 1283, 1284 (Ala. Crim. App. 1991) (‘When the State does not respond to a petitioner’s allegations, the unrefuted statement of facts must be taken as true. Chaverst v. State, 517 So. 2d 643, 644 (Ala.Cr.App. 1987). Further, when a petition contains matters which, if true, would entitle the petitioner to relief, an evidentiary hearing must be held. Ex parte Boatwright, 471 So. 2d 1257, 1258 (Ala. 1985).’).”

Johnson v. State, 835 So. 2d 1077, 1079 (Ala. Crim. App. 2001)(emphasis in Johnson.)

Price also claims that in addition to erroneously requiring him to meet his burden of proof at the pleading stage, the circuit court also improperly applied the specificity requirement of Rule 32.6(b), Ala. R. Crim. P., to several of his claims.

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.”

Regarding specificity, Price argues that “[nothing in Rule 32 requires these sorts of painstaking, excruciatingly-detailed allegations.” (Price’s brief at page 58.) His argument continues:

“Contrary to the trial court’s conclusions, Mr. Price is not required at the pleading stage to offer detailed proffers of testimony. A petition is not meant •to set out all of the evidence that will be presented at the hearing - that is the purpose of the hearing itself. At the pleading stage, Mr. Price is required to provide only a ‘clear and specific statement of the grounds upon which relief is sought.’ See Ala. R. Crim. P., 36.6(b)”

(Price’s brief at page 58.) We note that in his brief on appeal, Price seems to assert that the State had opportunities to amplify Price’s claims (as when the State deposed Price), and therefore, was not prejudiced by any alleged deficiency in his pleadings. As discussed *infra*, it is the petitioner’s burden to sufficiently plead the claims in his petition. It is not the State’s burden to discover the factual basis underlying bare assertions contained in a Rule 32 petition.

Neither of Price’s arguments is persuasive. In order to meet the burden of pleading, Rule 32.6(b), Ala. R. Crim. P., requires not only that a petitioner plead a “clear and specific statement of the grounds upon which relief is sought,” but also include a “full

disclosure of the factual basis of those grounds.” (Emphasis added.) Rule 32.6(b), Ala. R. Crim. P., continues: “[a] bare allegation that a constitutional right has been violated and mere conclusions of law shall not be sufficient to warrant any further proceedings.” (Emphasis added.)

The State correctly asserts that it has long been settled that when seeking post-conviction relief “[o]ne of the threshold requirements for a meritorious petition for writ of error coram nobis['] is that the petition make ‘full disclosure of the facts relied on, not mere conclusions as to •the nature and effect of those facts [citation omitted].’⁹⁸“ Todd v. State, 484 So. 2d 528, 530 (Ala. Crim. App. 1985) (quoting Corley v. State, 397 So. 2d 223, 224 (Ala.Crim. App. 1981)). “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) (emphasis in Boyd). 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, that entitles a petitioner to relief. After facts are plead, which if true entitle the petitioner to relief, the petitioner is then entitled to an opportunity (as provided in Rule 32.9, Ala.R.CrimP.) to present evidence proving those alleged facts.

As seen from the discussion that follows, Price’s petition asserted only conclusions without providing facts supporting those conclusions.

⁹⁸ The writ of error coram nobis was replaced by Rule 32, Ala.R.Crim.P.

III.

B.

On appeal, Price presented little argument in support of his contention that claims nos. 38, 42, and 43 contained in his petition were sufficiently plead and not subject to summary dismissal for failing to meet the necessary burden of proof as ruled by the circuit court.⁹⁹ In footnote no. 25, Price also asserted that the circuit court “dismissed paragraphs 12, 31, 32, 33, 38, 40, 42 and 43 for, inter alia, failing to satisfy Rule 32.3 of the Alabama Rules of Criminal procedure.” (Price’s brief at page 42.) Before addressing these claims we again note that “[i]f the circuit court is correct for any reason, even though it may not be the stated reason, we will not reverse its denial of the petition. See Roberts v. State, 516 So. 2d 936 (Ala.Cr.App. 1987).” Reed v. State, 748 So. 2d 231, 233 (Ala. Crim. App. 1999).

Claim no. 38 of Price’s petition alleged that he received ineffective assistance of counsel during the guilt phase of his trial based on the following:

⁹⁹ We note that although the circuit court incorrectly referred to the burden of proof in some instances in its order when it should have referred to the burden of pleading, the rationale for summary dismissal discussed in those instances was applicable to a discussion concerning the burden of pleading.

“38. Mr. Price’s trial counsel did not contact the State’s witnesses before trial and, consequently, were unprepared to elicit testimony on cross-examination essential to their theory of the case. Has counsel been adequately prepared, counsel could have elicited this testimony, and there is a reasonable probability that the verdict in Mr. Price’s case would have been different.”

(C. 16.) Claim 38 does not provide the reviewing court with a “clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds.” Rule 32.6(b), Ala. R. Crim. P. (Emphasis added.) This claim is a bare, general assertion of the petitioner’s subjective opinion that because he was convicted and sentenced to death, counsel should have performed differently. Thus, this claim alleges a conclusion -- inadequate performance of counsel -- where no facts creating the alleged conclusion are disclosed. No tangible fact tending to establish counsel’s alleged inadequate performance was presented to the circuit court. The individuals counsel allegedly failed to adequately cross-examine are not disclosed, what information was omitted from cross-examination is not disclosed, and what testimony favorable to Price would have been obtained had counsel adequately prepared is not disclosed. A broad sweeping conclusion asserting error is nothing more than a “hail mary” hope for a hearing at which facts supporting the conclusion might be discovered. This is not contemplated within Rule 32, Ala.R.Crim.P.

Thus, Price has not shown how his trial counsel’s conduct was deficient or how the outcome of his trial would have been different had his trial counsel performed differently regarding this claim. Therefore,

Price has failed to state a claim of ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668 (1984). Because Price failed to state a claim upon which relief could be granted, summary disposition of this claim was appropriate.

Claims nos. 42 and 43 of Price's petition alleged that he received ineffective assistance of counsel during the guilt phase of his trial because trial counsel failed to litigate the following pre-trial motion:

"42. Finally, although trial counsel moved for a change of venue due to overwhelming pre-trial publicity within and immediately outside of Fayette County ... at hearing, counsel was unprepared to substantiate the need for the venue change, and thus effectively conceded venue to the State. ... A criminal defendant is entitled to trial by a fair and impartial jury. See Sheppard v. Maxwell, 384 U.S. 333, 361 (1966). See also Ala. Code § 15-2-20 (1975); Arthur v. State, 472 So. 2d 650, 659 (Ala. Crim. App. 1984), rev'd on other grounds, 472 So. 2d 665 (Ala. 1985). The victim in this case, Mr. Lynn, was a much loved clergyman of a local church to which a large portion of the jury venire belonged. The crime itself was sensational, occurred days before Christmas, at Mr. Lynn's home, and culminated in a multi-state manhunt that led to the out-of-state arrest of Mr. Price approximately ten days after the crime. The petit jury venire was selected for a specially scheduled session of criminal court and all potential jurors knew they would potentially be seated on Mr. Price's jury. When the trial was continued for one week, the entire special session was postponed; even the state was

aware that a substantial portion of the jury venire would be disqualified during voir dire because of the controversial nature and high profile exposure of Mr. Price's case.

“43. Nonetheless, trial counsel neither sought expert assistance to investigate the extent to which the overall county had been saturated with accounts of the crime in the media, nor submitted written memoranda to assist the Court in understanding why the law compelled a change of venue in this case. The partiality of the jury was inadequately explored during voir dire. See *infra* issue A.2.e (incorporated by reference). [¹⁰⁰] Had counsel adequately litigated this motion, there is a reasonable probability that Mr. Price would have been tried in a different county and that the outcome of the proceedings against him would have been different. See Irvin v. Dowd, 366 U.S. 717 (1961) (even though each juror said to Court he or she could render a fair verdict, jurors' assurances did not render trial fair where defendant would otherwise have been entitled to a fair and impartial verdict.)”

(C. 17-18.)

The trial court correctly concluded that this claim was insufficiently plead. (C. 342, 343, 344.)

¹⁰⁰ Issue A.2.e. contained in Price's petition is a bare assertion that counsel did not adequately conduct voir dire, nor did counsel ensure that the trial court adequately conduct voir dire of the potential jurors. See Rules 32.3 and 32.6(b), Ala. R. Crim. P.

““The mere fact that publicity and media attention were widespread is not sufficient to warrant a change of venue. Rather, Ex parte Grayson[, 479 So. 2d 76 (Ala. 1985),] held that the appellant must show that he suffered actual prejudice or that the community was saturated with prejudicial publicity.” Slagle v. State, 606 So. 2d 193, 195 (Ala.Cr.App. 1992).’ Wilson v. State, 777 So. 2d 856, 924 (Ala.Crim.App. 1999), aff’d, 777 So. 2d 935 (Ala. 2000), cert. denied, 531 U.S. 1097 (2001). Moreover, we must consider the length of time between the alleged pretrial publicity and the trial. Wilson. ‘When requesting a change of venue, “the burden of proof is on the defendant to ‘show to the reasonable satisfaction of the court that a fair and impartial trial and an unbiased verdict cannot be reasonably expected in the county in which the defendant is to be tried.”’ Jackson v. State, 791 So.2d 979, 995 (Ala.Crim.App. 2000), cert. denied, 791 So. 2d 1043 (Ala. 2000), quoting Hardy v. State, 804 So. 2d 247, 293 (Ala.Crim.App. 1999). Whether to grant a motion for a change of venue is addressed to the sound discretion of the trial court. Acklin v. State, 790 So. 2d 975 (Ala.Crim.App. 2000), cert. denied, 790 So. 2d 1012 (Ala. 2001), cert. denied, U.S. , 121 S. Ct. 2565, 150 L. Ed. 2d 729 (2001). The trial court is in a better position than is an appellate court to rule on such a motion.”

Stallworth v. State, [Ms. CR-98-0366, September 28, 2002] __ So. 2d __, __ (Ala. Crim. App. 2001)

As claim no. 38, this claim is also a bare, general assertion of the petitioner’s subjective opinion that counsel should have performed differently. This claim

is utterly lacking facts suggesting that counsel inadequately litigated a motion for change of venue, that the jury was impartial, that an investigator would have disclosed facts requiring a change of venue, or that the trial court did not understand the law concerning a change of venue.

Thus, Price has not alleged how his trial counsel's conduct was deficient or how the outcome of his trial would have been different had his trial counsel performed differently regarding this claim. Therefore, Price has failed to state a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). Because Price failed to state a claim upon which relief could be granted, summary disposition of this claim was appropriate.

Moreover, the judge presiding over the Rule 32 proceedings dismissed this claim based on his personal recollection.

“The record here establishes the Court’s personal knowledge that a reliable result was achieved regarding the motion for a change of venue. The voir dire of the jury -- that is, the questions asked and the answers given -- did not indicate the need for a change of venue. Had the responses of the jury venire indicated that a change of venue was warranted, the Court would have granted a change of venue, sua sponte.”

(C. 341-42.)

Additionally, “on direct appeal all issues were scrutinized, including those issues reviewable only under the ‘plain-error’ doctrine,” *Dobyne v. State*, 805

So. 2d at 740, aff'd 805 So. 2d 763 (Ala. 2001), and no error was disclosed.

Other than his assertion that the circuit court erred when it dismissed claims at the pleading stage because the claims failed to establish the burden of proof necessary to go forward, Price presented no specific argument to support that claims nos. 12, 31, 32, 33, and 40, were in fact sufficiently plead. Price

“cites no specific legal authority in support of his assertions, and he presents little, if any, argument to support his claims. As we have noted, ‘this practice “smacks of ‘sandbagging,’” which has been condemned by the United States Supreme Court. *Burgess v. State*, 723 So. 2d 742, 761, (Ala. Cr. App. 1997).”

Drinkard v. State, 777 So. 2d 225, 277 (Ala. Crim. App. 1998) rev'd on other grounds 777 So. 2d 295 (Ala. 2000). Nevertheless, because this is a death penalty case, we have reviewed these claims and find that summary dismissal was correct as these claims were all insufficiently pleaded.

III.

C.

Price claims that the circuit court's summary dismissal of certain claims based on the ground that these claims were insufficiently specific was error. Price argues that claims 9-12, 16, 23, 27, 31-33, 38, 40, 42-43, 68, and 69 did comply with Rule 32.6(b), Ala. R. Crim. P.

1. Claim no. 9 of Price's petition alleged that he received ineffective assistance of counsel during the penalty phase of his trial because trial counsel failed to

conduct, or engage an investigator to conduct, a reasonable investigation into mitigating circumstances.

“9. Trial counsel did not adequately interview Mr. Price’s mother, Mrs. Judy Files, or prepare her for her penalty phase testimony. Counsel did not inform Mrs. Files of the nature of the questions the defense and prosecution would put to her. As a result of counsel’s and Mrs. Files’ lack of preparation, Mrs. Files provided short, incomplete answers to the mostly narrow, leading questions that trial counsel herself posed. Had Mrs. Files been adequately interviewed and properly prepared, she would have been able to provide many details about Mr. Price’s life, upbringing, and character that were not otherwise presented to the jury and the Court, but which would have been relevant mitigation evidence.”

(C. 5.)

Price “has not shown that there was any additional evidence that would have convinced the trial court to change its decision regarding sentencing.” *Pierce v. State*, ___ So. 2d at ___, rev’d on other grounds, ___ So. 2d ___ (Ala. 2002). Thus, the trial court correctly ruled that the claim had not been sufficiently pleaded.

Moreover, the judge presiding over the Rule 32 proceedings dismissed this claim based on his “personal knowledge” that defense counsel adequately questioned Mrs. Files during the penalty phase of the trial. (C. 313.)

“““Thus, the appellant has not shown that there is a reasonable probability that the

outcome of his trial would have been different, but for trial counsel's performance."“ Hamm v. State, ___ So. 2d at ___ (quoting Williams v. State, 782 So. 2d 811, 825 (Ala. Crim. App. 2000), quoting in turn Brooks v. State, 695 So. 2d 176, 182 (Ala. Crim. App. 1996)). Because Price failed to state a claim upon which relief could be granted, summary disposition of this claim was appropriate.

2. Claims nos. 10, 11, and 12 of Price's petition alleged that he received ineffective assistance of counsel during the penalty phase of his trial because trial counsel failed to conduct, or engage an investigator to conduct, a reasonable investigation into the mitigating circumstances. After being granted opportunity to amend claims nos. 10, II, and 12, the following was presented in Price's first amendment to his Rule 32, Ala. R. Crim. P., petition.

“10. Trial counsel did not seek out or contact any of Mr. Price's family members other than his mother, although his aunts, uncles, cousins, grandparents and step-grandparents were located within the immediate vicinity. Had counsel spoken with these members of Mr. Price's family, counsel would have discovered a detailed history of dislocation, abuse and neglect that far exceeded the terse, incomplete description provided by Mrs. Files at Mr. Price's sentencing. Mr. Price and his mother relocated across state lines over half a dozen times before Mr. Price was in junior high school. Mrs. Files and Mr. Price lived in Mississippi, Florida and Texas, in addition to Alabama, at different times while he was growing up. Mr. Price's paternal grandmother saw his father physically abuse

both Mr. Price and his mother. This grandmother recalls specific instances of physical abuse and neglect that Mrs. Files did not testify to at trial. Mr. Price lived with this grandmother for some time when he was very young, and spent weekends at her house when he was older; thus, she was a valuable resource that counsel should have contacted in preparation for Mr. Price's sentencing hearing. Aunts and uncles, as well as grandparents had contact with Mr. Price throughout his childhood. In addition to the abuse and neglect they witnessed, these family members could have testified about their love for Mr. Price and of the pride they shared in his extraordinary drawing skills. The family could have provided physical examples of pictures created by Mr. Price over the years. This artistic skill was relevant evidence in mitigation and should have been uncovered. Because of trial counsel's failure in this regard, this relevant mitigation evidence was not presented at sentencing.

"11. Trial counsel did not seek out or contact any •of Mr. Price's friends or acquaintances, although Mr. Price had lived and attended school in the Jasper-Winfield area for eight years and his friends were located in the immediate vicinity. Had counsel contacted these friends and acquaintances, counsel would have discovered that Mr. Price was known as a nice kid who did not get in fights. Mr. Price had a girlfriend at the time of this crime who could have testified about Mr. Price's interest in marriage, family, and a career after high school. Mr. Price's friends from junior high school and

high school would have told counsel that Mr. Price was known to be a follower who would go along with what other people wanted to do; copying what others wore, how they spoke, and what activities they liked to pursue. These friends would have talked about how Mr. Price seemed to have changed in the summer and fall leading up to his arrest, when he was associating with Co-defendant 'Bookie' Coleman. Because of trial counsel's ineffectiveness in this regard, this relevant mitigation evidence was not presented at sentencing.

"12. Trial counsel neither located and gathered Mr. Price's school records nor attempted to contact Mr. Price's former teachers. Had counsel obtained these records and interviewed Mr. Price's teachers, counsel would have discovered that Mr. Price did well in school and was generally well-behaved in class. Mr. Price maintained good grades and was not remembered as a disciplinary problem or, as a student who got into fights. This relevant mitigation evidence was not presented at sentencing because of trial counsel's failure in this regard."

(C. 97-100.)

After careful consideration of Price's claim and after oral argument, we find that with the possible exception of the pleadings concerning the paternal grandmother, the circuit court correctly ruled that these claims were not specifically pleaded.

"... Considering all the evidence introduced during the guilt and penalty phases of the trial, we cannot see how the evidence that

the appellant argues should have been elicited at the penalty phase would have had any impact on his sentence. It certainly would not have changed the outcome, and it did not render the sentencing fundamentally unfair or unreliable.”

Pierce v. State, [Ms. CR-96-1668, Mar. 2, 1999] ___ So. 2d ___ (Ala. Crim. App. 1999), rev'd on other grounds, [Ms. 1981270, Sept 20, 2002] ___ So. 2d ___ (Ala. 2002)

Regarding the paternal grandmother, to the extent that it may have been sufficiently pleaded, we agree with the circuit court's finding that the paternal grandmother's testimony would have been cumulative to the testimony of Mrs. Files. Apparently the paternal grandmother would have testified that she saw Price's father physically abuse both Price and his mother. After review of the record from direct appeal, we agree with the circuit court's findings, that this would have been cumulative to Mrs. Files's testimony.

The defense obtained the following mitigating evidence from Judy Files, Mr. Price's mother, at his sentencing hearing.

“Q. [by defense counsel:] And tell the Court about your early life with Wallace [Lee Price, Mr. Price's father] after Chris was born.

“A. [by Mrs. Files:] Well ... Wallace drank a lot. And he made [Mr. Price at age two, drink] a pint of liquor one night till [Mr. Price] got to staggering so bad and he put him in the shower.

“Q. The early years, then of Chris's life, were you a victim of domestic violence at that time?

“A. Yes, ma’am.

“Q. Was Wallace Price a batterer? Did he batter you?

“A. When he was drinking.

“....

“Q. ... Was he drinking more?

“A. Yeah. He drank quite a bit there at the last up before I left.

“Q. And you’ve said he abused you. Did he abuse Chris in those early years?

“A. Yes, ma’am. He poured a bowl of hot macaroni and cheese on his head one night [when Chris was four].

“Q. What happened when you tried to stop him?

“A. I got whipped.

“Q. ... [T]here [was] emotional abuse as well as physical abuse that Chris endured?

“A. Yeah. He saw things that [Wallace] done to me, pulling knives and guns.

“Q. There were times when there were violent episodes that happened in your home that Chris witnessed at an early age?

“A. Yes, ma’am.

Q. These were numerous?

“A. ... They got to being regular at the end.

“....

“Q. Did the abuse get worse and worse for Chris?

“A. Yes.

“Q. Tell the Court what happened in the summer of 1975 when you and Chris and Wallace were in the channel swimming.

“A. [Wallace] tried to drown me in front of [Chris] and he told him, ‘Please, daddy, don’t.’

“Q. How old was Chris at that time?

“A. Three years old.

“Q. And he attempted to intervene?

“A. Yes, ma’am.

“Q. When Wallace tried to drown you. Were there times when Chris witnessed Wallace with weapons that he held to your head?

“A. Yes, ma’am.

“Q. What happened to Wallace Price?

“A. He was shot and killed in ‘77.

“Q. And where were you and Chris at that time?

“A. Amarillo, Texas.

“Q. Why were you there?

“A. We had left -- fled for our life.

“Q. For fear of what?

“A. Fear [Wallace] was going to kill us.

“....

“Q. After Wallace Price died, was there someone else that lived in your home that mistreated Chris?

“A. Yes, ma’am. John Harris moved in with us [about a year and a half after Wallace died].

“Q. What happened when Johnny Harris lived there and Chris was there?

“A. ... [H]e whipped him one day till he like to beat him to death, and mental abuse, verbal.

“....

“Q. When you discovered that he had nearly beaten Chris to death, what happened to Johnny Harris?

“A. I sent him home.

“Q. And he was no longer a part of your life?

“A. No, ma’am.

“....

“Q. After Johnny, who was the next person in Chris’ life?

“A. I married Ted Sills from Monticello, Mississippi.

“Q. And how long did you and Chris live with him?

“A. Nearly four years.

“Q. What were the conditions when you lived with Ted?

“A. He drank and smoked pot.

“Q. Did he do those things in front of Chris?

“A. Yes, ma’am.

“Q. Did he verbally abuse Chris?

“A. Yes.

“Q. Did Chris ever tell you that he had been physically abused when you were not home?

“A. Yes, ma’am.

“Q. And when did you divorce him?

“A. In 1984.

“Q. When did you marry Danny Files?

“A. In August of ‘85.

“....

“Q. [H]e was a positive influence, was he not?

“A. Yes, ma’am.

“Q. During these several years in limbo after Wallace died, were there occasions when you were having to work two jobs and there was sometimes not enough for food or very little money for food?

“A. Well, we always had plenty to eat, but I had to work two jobs sometimes to make ends meet.

“Q. And there were occasions when the men in your life didn’t work and you were supporting them as well?

“A. Yes, ma’am.

“....

“Q. [T]here were long periods of time when you’d be gone for two shifts and [Chris would] be left with someone you now know was a physical abuser?

“A. Yes, ma’am.

“Q. Were there other significant incidents in Chris’ life that have had a profound effect on him?

“A. Well, that just went on, like I said, while I was with them others, long periods of time, you know.

“....

“Q. Was [Chris] working [at the time Mr Lynn was killed]?

“A. Yes, ma’am. He worked at D’s Pizza in Winfield.

“Q. He was not a lazy child?

“A. No, ma’am.

“Q. Is there anything else you’d like to tell this Court about Chris?

“A. ... I know he’s not heartless and I just want things to work out for him.

“Q. He is a good, mourningful [sic] individual in your opinion.

“A. Yes, ma’am. I think he’s worth saving.”

(Record from sentencing hearing on direct appeal 896-905.¹⁰¹)

Trial counsel was not ineffective because the paternal grandmother's testimony, as plead in the petition (and as presented to this Court in oral argument), would have been cumulative of evidence actually presented at the sentencing hearing by Mrs. Files. That is, that Price was beaten by his father and stepfathers, and had, in general, a very bad early childhood. Unpresented cumulative testimony does not establish that counsel was ineffective. See Pierce v. State, ___ So. 2d at ___ rev'd on other grounds, So. 2d (Ala. 2002)(“Trial counsel's performance was not “outside the wide range of professionally competent assistance simply because they failed to present evidence that would have been cumulative of other evidence presented at trial.”“)

Thus, Price has not shown how his trial counsel's conduct was deficient or how the outcome of his trial would have been different had his trial counsel performed differently regarding this claim. Therefore, Price has failed to state a claim of ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668 (1984). Because Price failed to state a claim upon which relief could be granted, summary disposition of this claim was appropriate.

3. Claim no. 16 of Price's petition alleged that he received ineffective assistance of counsel during the penalty phase of his trial because trial counsel did not

¹⁰¹ Page 904 of the transcript of the sentencing hearing is missing from the transcript provided as an exhibit to Price's Rule 32 petition.

object contemporaneously to errors made by the prosecutor.

“16. Mr. Price’s trial counsel did not object to errors in the prosecutor’s sentencing argument. First, District Attorney Johnston improperly urged the jury to sentence Mr. Price to death for his exercise of his constitutional rights. Mr. Johnston argued that the jury had a duty to sentence Mr. Price to death by electrocution based, in part, on the fact that because Mr. Price had been afforded a trial and the procedural protections of Alabama’s capital sentencing scheme, Mr. Price had already been shown more mercy than he showed the murder victim, and for the jury to afford Mr. Price anymore mercy would be unfair to the victim. (R. 909- 911.) This argument urged the jury to punish Mr. Price for exercising his basic, Sixth Amendment right to a jury trial. It is a fundamental constitutional principle that a prosecutor may not demand that a jury impose a death sentence to punish a defendant for exercising this right. See generally, Cunningham v. Zant, 928 F.2d 1006, 1020 (11th Cir. 1991). By not objecting, defense counsel allowed the jury to determine Mr. Price’s fate as if instructed by the Court that it was appropriate to punish Mr. Price for forcing the jurors to participate in the stress and discomfort of the week’s trial. See generally, Stano v. Duclger, 921 F.2d 1125, 1160 (11th Cir. 1991) (when the Court does not correct misleading comments by the prosecutor, it is as if the court had instructed the jurors that the prosecutor’s comments were a correct statement of the law.)”

(C. 8.) (Emphasis added.)

The circuit court dismissed this claim as being insufficiently pleaded because only the page numbers and not the alleged offending remarks were cited in the petition. However, the circuit court reviewed the pages cited by Price and also found that his claim had no merit. We agree with both rulings of the circuit court. It is not entirely clear that pages 909-911 reflect Price's assertion that the prosecutor was urging the jury to punish Mr. Price for exercising his basic, Sixth Amendment right to a jury trial.

Transcript pages 909-911 reflect the following argument by the prosecutor during the penalty phase of the trial.

“... It wasn't the choice of Bill Lynn to die as he told his wife the very last thing he said.

“He didn't want to die then, but that choice was not permitted him by Chris Lee Price. He made the decision himself that Bill Lynn was to die. He didn't offer Bill Lynn a trial. He didn't offer him an aggravating circumstance, consideration or mitigating circumstance consideration. He didn't offer him a moment to offer to give him the money voluntarily.

“He only offered Bill Lynn one choice and that was to defend himself. And he did the best he could. Obviously it wasn't good enough. In that sense I think and it's my recommendation to the jury that you seriously consider a sentence of death for Chris Price because that is the sentence he imposed on Bill Lynn.

“Further, the Code says that you may consider that this offense was especially heinous, atrocious or cruel compared to other murders, other capital offenses. We asked you to consider all of the evidence in this case in deciding whether or not that aggravating circumstance is established to your satisfaction and to satisfy your possible reasonable doubt about that circumstance. The facts really are so atrocious and cruel and heinous -- and the judge is going to explain to you what those terms mean -- that there is not much I can say to emphasize that, the pictures that you saw, the drawings that the doctor was permitted to explain to you and that were introduced into evidence about how he was killed.

“We counted, I think, more than thirty hack, stab, lacerations, wounds or whatever about his body all over. And these wounds are so severe that it only demonstrates in my mind -- and I suggest to you that you should seriously consider a recommendation of death in this case because of the nature of those wounds and how they were inflicted. They were inflicted as Bill Lynn screamed for his life.

“Again, he gave Bill Lynn no choice about his sentence in this case. He gave him no choice about a trial in his case. He had no choice as to how he would die even though he didn’t want to.

“One of the most vivid descriptions of what happened to Bill Lynn, on the stand that came forth in my listening to the testimony, was what the little EMT girl said about trying to move his head. Do you remember that? He was

cut so severely that she put her hand entirely, all four fingers, inside the wounds on his head and tried to move it and couldn't even turn head. His entire scalp moved around his head and, that is, the bone structure would not move. If there has ever been a more heinous, cruel or atrocious infliction of death on any individual in Fayette County, I haven't heard about it.

“Now, the only way that I know of to assure that Chris Price is not a threat, doesn't have an opportunity to inflict this kind of injury on anyone else in Fayette County, is to have the jury recommend a sentence of death for him. That sentence recommendation to the Court will demonstrate to any individual in this county contemplating a similar action, will demonstrate the conscience of this community that it will not be tolerated I seriously ask you to make that recommendation to the Court. ...”

(R.909-911.)

Though not stated as such, this argument seems more akin to an argument asking the jurors not to be governed by sympathy towards Price because he showed no sympathy toward the victim. Thus, as a claim that the prosecutor was urging the jury to punish Mr. Price for exercising his basic, Sixth Amendment right to a jury trial, this claim is not specifically pleaded.

Moreover, we agree on the merits that counsel was not ineffective for failing to object to the above comments by the prosecutor.

“We find that this line of argument is within the latitude allowed prosecutors in their

exhortations to the jury to discharge its duties in such a manner as to punish crime, protect the public, and deter others from committing like offenses.”

Haney v. State, 603 So. 2d 368, 395 (Ala. Crim. App.), aff'd, 603 So. 2d 368 (Ala. 1991).

Moreover, “on direct appeal all issues were scrutinized, including those issues reviewable only under the ‘plain-error’ doctrine,” Dobyne v. State, 805 So. 2d at 740, aff'd, 805 So. 2d 763 (Ala 2001), and no error was disclosed.

Thus, Price has not shown how his trial counsel’s conduct was deficient or how the outcome of his trial would have been different had his trial counsel performed differently regarding this claim. Therefore, Price has failed to state a claim of ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668 (1984). Because Price failed to state a claim upon which relief could be granted, summary disposition of this claim was appropriate.

4. Claim no. 23 of Price’s petition alleged that he received ineffective assistance of counsel during the penalty phase of his trial because trial counsel did not object to erroneous jury instructions.

“23. In addition to sitting mute during the District Attorney’s improper arguments, Mr. Price’s trial counsel also did not object to improper penalty phase instructions from the Court. A defendant whose life is at stake has the right to careful instructions guiding the jury on the applicable constitutional principles. See Gregg v. Georgia, 428 U.S. 153, 192-93 (1976). Contrary to this requirement, the Court’s oral

charge to the jury confused, misled, and failed to instruct the jury on those principles, including, but not limited to, the burden of proof. (R. 916, 921, 926-27, 932) and the consideration of mitigating circumstances (R. 919, 928-33).

(C. 10.)

The circuit court correct ruled that claim no. 23 was insufficiently pleaded. The claim does not provide the reviewing court with a “clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds.” Rule 32.6(b), Ala. R. Crim. P. (Emphasis added.)

Moreover, the circuit court reviewed the jury charges and found no error, and thus ruled that the claim was also without merit. Because after a plain-error review this Court found no error on direct appeal, and no error has been specified in the petition, we find no error with the trial court’s ruling on the merits.

Thus, Price has not shown how his trial counsel’s conduct was deficient or how the outcome of his trial would have been different had his trial counsel performed differently regarding this claim. Therefore, Price has failed to state a claim of ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668 (1984). Because Price failed to state a claim upon which relief could be granted, summary disposition of this claim was appropriate.

5. Claim no. 27 of Price’s petition alleged that he received ineffective assistance of counsel during the penalty phase of his trial because trial counsel did not

accompany Mr. Price to, nor advise him in preparation for pre-trial and pre-sentencing proceedings.

“27. Trial counsel did not accompany Mr. Price to nor prepare him for his probation interview for that office’s preparation of its pre-sentence report. As a result, Mr. Price did not know what the nature of the inquiry would be nor how to approach an interview that would play a critical role in the Court’s determination of his sentence. The pre-sentence report was admitted into evidence and was considered by the Court at Mr. Price’s final sentencing hearing. (R. 957) The probation interview was an opportunity for defense counsel to advocate on Mr. Price’s behalf with a state agency that would play an important part in the determination of Mr. Price’s final sentence. Had Mr. Price been accompanied by his counsel or at least been prepared for this interview, the pre-sentence report would have presented a more accurate assessment of Mr. Price’s personal history and reputation, and there is a reasonable probability that the Court would have given a different sentence to Mr. Price.”

(C. 12.)

The circuit court correctly ruled that claim no. 27 was not sufficiently pleaded. It does not provide the reviewing court with a “clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds.” Rule 32.6(b), Ala. R. Crim. P. (Emphasis added.) This claim is a bare, general assertion of the petitioner’s subjective opinion that because he was sentenced to death, counsel should have performed differently. This

claim fails to identify anything specific and tangible that counsel should have done that would have resulted in a different outcome in sentencing. The assertion that this was an opportunity for counsel to advocate on behalf of Price does not establish either prong of Strickland v. Washington, 466 U.S. 668 (1984). Likewise, Price has not identified any specific information that he would or would not have given had counsel better prepared Price for the presentence interview. Thus, he also fails to meet either prong of Strickland regarding that claim.

Moreover, “it is a matter of trial strategy whether an attorney appears at a presentence report interview. A probation officer may be much more likely to give credence to the statements of one who does not have his legal gladiator at his side. This in all likelihood could work in a defendant’s favor.” State v. Tarver, 629 So. 2d 14, 21-22 (Ala. Crim. App. 1993). Additionally, this court has held that “the appellants’ right to counsel does not extend to the presentence interview.” Musgrove v. State, 638 So. 2d 1347, 1352 (Ala. Crim. App. 1992), *aff’d*, Ex parte Musgrove, 638 So. 2d 1360 (Ala. 1993) (quoting United States v. Jackson, 886 F.2d 838, 845 (7th Cir. 1989)). Therefore, counsel was not ineffective for not attending the presentence interview.

Thus, Price has not shown how his trial counsel’s conduct was deficient or how the outcome of his trial would have been different had his trial counsel performed differently regarding this claim. Therefore, Price has failed to state a claim of ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668 (1984). Because Price failed to state a claim upon which relief could be granted, summary disposition of this claim was appropriate.

6. Claims no. 31, 32, and 33 of Price's petition alleged that he received ineffective assistance of counsel during the penalty phase of his trial because trial counsel did not request any penalty phase instructions from the court.

"31. Trial counsel did not request any penalty phase instructions from the Court. The Court's instructions on the law governing the jury's determination of whether aggravating and mitigating circumstances had been proved, how those circumstances the jury found to exist should be weighed, and the respective role of judge, jury and counsel in the penalty phase hearing, critically guide the jury's determination of a just and fair sentence. See e.g., Dugger, 921 So. 2d 1125, 1160 (11th Cir. 1991)('When a trial court does not correct misleading comments ... the court has given the state's imprimatur to those comments; the effect is the same as if the trial court had actually instructed the jury that the prosecutor's comments represented a correct statement of the law.')

"32. Furthermore, jurors are presumed to follow the instructions they are given. See generally, Richardson v. Marsh, 481 U.S. 200, 206 (1987)(jurors are presumed to follow the admonitory instructions given to them by the Court.)

"33. By not requesting any specific instructions, defense counsel failed to provide the Court necessary assistance at a critical stage of the proceedings, and inexplicably declined the opportunity to shape what the Court would tell the jury. Defense counsel should have

drafted and presented to the Court jury instructions for all relevant penalty phase instructions in Mr. Price's case. Had counsel prepared and requested careful instructions, there is a reasonable probability that the Court would have used them, that the instructional errors described above would have been avoided, and the outcome of Mr. Price's penalty phase proceedings would have been different."

(C. 14.)

The circuit court correctly ruled that claims nos. 31, 32, and 33 were not sufficiently pleaded. The claims do not provide the reviewing court with a "clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds." Rule 32.6(b), Ala. R. Crim. P. (Emphasis added.) This claim is a bare, general assertion of the petitioner's subjective opinion that because he was sentenced to death, counsel should have performed differently. This claim fails to identify anything specific and tangible that counsel should have done that would have resulted in a different outcome in sentencing.

Moreover, "on direct appeal all issues were scrutinized, including those issues reviewable only under the 'plain-error' doctrine," Dobyne v. State, 805 So. 2d at 740, aff'd, 805 So. 2d 763 (Ala. 2001), and no error was disclosed.

Thus, Price has not shown how his trial counsel's conduct was deficient or how the outcome of his trial would have been different had his trial counsel performed differently regarding this claim. Therefore,

Price has failed to state a claim of ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668 (1984). Because Price failed to state a claim upon which relief could be granted, summary disposition of this claim was appropriate.

7. Claims nos. 42 and 43 of Price's petition alleged that he received ineffective assistance of counsel during the guilt phase of his trial because trial counsel did not litigate important pre-trial motions. For the reasons set forth in part III.B., we find no error with the trial court's dismissal of these claims.

8. Claims nos. 68 and 69 of Price's petition alleged that he received ineffective assistance of counsel during the guilt phase of his trial because trial counsel did not adequately conduct voir dire, nor ensure that the court adequately conducted voir dire of potential jurors.

"68. Trial counsel did not adequately conduct voir dire of the jury. In a capital case, a thorough voir dire is essential to protecting a defendant's right to a fair and impartial jury. See Gray v. Mississippi, 481 U.S. 648 (1987); Tomlin v. State, 695 So. 2d 157 (Ala. Crim. App.) (capital conviction reversed where venire member did not answer voir dire questions). Although counsel did request and was granted some individual voir dire, counsel failed to ask routine questions designed to discover relationships potential jurors may have had with witnesses at trial and organizations to which the victim or witnesses belonged. Without this information, counsel was unable to assess whether jurors would be likely to believe key state witnesses, based on prior personal

relationships, or biases in favor of law enforcement or church affiliation. Had trial counsel adequately conducted voir dire of the jury, counsel would have been better able to exercise her peremptory and for-cause strikes, and there is a reasonable probability that the outcome of the trial or sentencing would have been different.

“69. Furthermore, Mr. Price’s trial counsel did not object to the inadequacy of the Court’s voir dire. The record reflects that the Court and prosecutor actively participated in voir dire. Counsel had a responsibility to her client to ensure that if the Court prevented her from taking a thorough voir dire, she ensured the Court fulfilled its responsibility to question thoroughly potential jurors. Counsel did not do so. Has counsel insisted on adequate voir dire, there is a reasonable probability that she would have discovered information that would have enabled her to use her peremptory and for-cause strikes more effectively to produce a different verdict or sentence for her client. But for counsel’s deficient performance, there is a reasonable probability that the outcome of Mr. Price’s trial would have been different.”

(C. 26-27.)

The circuit court correctly ruled that claims no. 68 and 69 were not sufficiently pleaded. The claims do not provide the reviewing court with a “clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds.” Rule 32.6(b), Ala. R. Crim. P. (Emphasis added.) This claim is a bare, general

assertion of the petitioner's subjective opinion that because he was sentenced to death, counsel should have performed differently. This claim fails to identify anything specific and tangible that counsel should have done that would have resulted in a different outcome at the guilt phase or in sentencing.

Thus, Price has not shown how his trial counsel's conduct was deficient or how the outcome of his trial would have been different had his trial counsel performed differently regarding this claim. Therefore, Price has failed to state a claim of ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668 (1984). Because Price failed to state a claim upon which relief could be granted, summary disposition of this claim was appropriate.

III.

D.

Price contends that the trial court erred in concluding that his petition failed to state a claim and did not contain material issues of fact and law. In footnote number 29, Price asserts that the circuit court "dismissed paragraphs 9, 13, 16, 21, 23-28, 31-35, 40, 42-43, 55-56, 58-59, 66,68-69, and 74 through 84 citing Rule 32.7(d) as the ground for dismissal. In addition, the trial court apparently dismissed paragraphs 29, 30, 41, and 64 under Rule 32.7(d), although it failed to cite any rule as to those paragraphs." (Price's brief at page 60.) However, Price presented argument in support only of claim no. 13.

Claim no. 13 asserted that Price was denied effective assistance of counsel at the penalty phase of his trial because trial counsel did not conduct nor engage an investigator to conduct a reasonable

investigation into mitigating circumstances for the following reason.

“13. Trial counsel did not engage a psychologist to evaluate Mr. Price, either to assist in preparing an affirmative case for a life sentence or to rebut the report prepared on behalf of the state by Dr. Karl Kirkland. Had trial counsel engaged an independent psychologist, and conducted an investigation of Mr. Price’s family and social history, counsel would have discovered that the abuse and neglect Mr. Price suffered from an early age at the hands of his father and mother had a direct and specific impact on his character and personality as a young man. Although Mrs. Files testified briefly to some of the abuse Mr. Price suffered as a small child, her description was incomplete and the jury was never provided with an explanation of how those experiences shaped Mr. Price’s personality and choices as he grew up. Without a link between past abuse and present character and personality, the jurors were at a loss to understand why the suffering Mr. Price endured as a child was relevant to their assessment of the acts they determined he had committed at the Lynn house so many years later. An independent psychologist would have presented relevant mitigation evidence that was not otherwise before the jury. Trial counsel’s inexplicable failure to obtain the assistance of a psychologist deprived the jury and the Court of this evidence.”

(C. 6.)

Price further argues on appeal that because trial counsel had been granted funds to obtain an independent psychologist for the purpose of establishing mitigating evidence, trial counsel was ineffective for failing to do so. The circuit court found trial counsel's actions to be a tactical choice. Here, pursuant to the circuit court's order, an outpatient forensic evaluation report was prepared for Price by Dr. Karl Kirkland, a licensed psychologist and a certified forensic examiner. Dr. Kirkland's report concluded that there was no evidence "of any mental disorder that would affect [Price's] ability to appreciate the criminality of his behavior or to be able to distinguish right from wrong at the time of the offense." (C. 462.)

““An attorney has a duty to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence. Thompson v. Wainwright, 787 F.2d 1447, 1451 (11th Cir. 1986). First, it must be determined whether a reasonable investigation should have uncovered such mitigating evidence. If so, then a determination must be made whether the failure to put this evidence before the jury was a tactical choice by trial counsel. If so, such a choice must be given a strong presumption of correctness, and the inquiry is generally at an end. Funchess v. Wainwright, 772 F.2d 683, 689-90 (11th Cir. 1985). If, however, the failure to present the mitigating evidence was an oversight, and not a tactical decision, then a harmlessness review must be made to determine if there is a reasonable probability that, but for counsel's unprofessional errors, the

result of the proceeding would have been different. Thus, it must be determined that defendant suffered actual prejudice due to the ineffectiveness of his trial counsel before relief will be granted.”

Pierce v. State, ___ So. 2d at ___ rev'd on other grounds, [Ms. 1981270, Sept 20, 2002] ___ So. 2d ___ (Ala. 2002 (quoting Daniels v. State, 650 So. 2d 544, 568-70 (Ala. Crim. P. 1994), cert. denied 514 U.S. 1024 (1995), quoting in turn Middleton v. Dugger, 849 F.2d 491, 493 (11th Cir. 1998)).

The circuit court concluded in its order that:

“Based on Dr. Kirkland’s report, it is entirely impossible for Price to establish that a reasonable lawyer would have sought to obtain a psychologist to testify as to any effect that Price’s upbringing had on committing this crime. Dr. Kirkland’s report was a guarantee to defense counsel that any such psychologist would face cross-examination on the issue. In addition, defense counsel could be sure that the State of Alabama would call Dr. Kirkland in rebuttal Thus, where Dr. Kirkland would testify without hesitation that, even considering Price’s upbringing and social conditions as a child, ‘there are no mental problems present that would have ever reached the level of severity that would have rendered this individual incapable of appreciating the criminality of his behavior at the time of this particular offense,’ a reasonable attorney could decide not to call a psychologist to attempt to

draw a line between Price's upbringing and the capital murder of Bill Lynn."

(C. 322.)

The circuit court continued by stating that it appeared to be reasonable strategy to allow the jury to draw its own conclusions regarding the circumstances of Price's childhood based on Mrs. Files's description of Price's childhood without opening the door for the State to present the opinion of Dr. Kirkland. Counsel's tactical decision to not present possible mitigating evidence does not render counsel ineffective.

Other than his assertion concerning claim no. 13, Price presented no specific argument to support that claims nos. 9, 16, 21, 23-28, 29, 30, 31-35, 40, 41, 42-43, 55-56, 58-59, 64, 66, 68-69, and 74 through 84 were erroneously dismissed. Nevertheless, we have reviewed these claims and find no error in the summary dismissal of these claims.

III.

E.

Price contends that the circuit court erred in dismissing his ineffective assistance of counsel claim "without making a determination as to cumulative prejudice." (Price's brief on appeal at page 74.) Specifically, he asserts that the rejection of the underlying substantive claims on direct appeal (pursuant to a plain error review) does not prohibit finding counsel's performance to be ineffective in regard to those claims. We agree with the State's reliance on *Williams v. State*, 783 So. 2d 108, 133 (Ala. Crim. App. 2000):

“Because we determined that the remarks did not constitute plain error even if objectionable, appellant cannot relitigate the issue under the guise of ineffective assistance of counsel in a post-conviction proceeding. A finding of no manifest injustice under the “plain error” standard on a direct appeal serves to establish a finding of no prejudice under the test for ineffective assistance of counsel provided in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).”

Here, because there was no showing of counsel’s ineffectiveness, there is no showing that cumulative effect of the alleged errors was reversible error.

IV.

Price contends that the trial court erred in dismissing the remaining claims in his petition (those not asserting ineffective assistance of counsel) without providing him an opportunity to prove his claims. In his brief he presents argument supporting a juror misconduct claim and argument supporting a claim that Brady v. Maryland, 373 U.S. 83 (1963) was violated at his trial.

Price’s claims regarding juror misconduct were asserted as follows.

“85. Members of Mr. Price’s jury consulted and applied extraneous materials in arriving at a sentence for Mr. Price, thereby depriving Mr. Price of a reliable sentencing proceeding according to the laws of Alabama and the United States. The jurors were not forthcoming with this information before they rendered their decision on Mr. Price’s sentence.

“86. A juror may not consult outside sources for a rule or principle to apply in determining the sentence that ought to be imposed under Alabama and United States law. See McCray v. State, 565 So. 2d 673 (Ala. Crim. App. 1990)(convictions reversed and remanded based on juror’ testimony that some jury members read Alabama Pattern Jury Instructions during deliberations); Fulton v. Callahan, 621 So. 2d 1235, 1248-49 (Ala. 1993) (Civil case reversed where juror looked up words ‘oppression’ and ‘wantonless’; words were relevant to verdict and damages). In Alabama, a jury must limit its sentencing inquiry to determining which, if any, statutory aggravating circumstances and mitigating circumstances have been proved, and then to weighing those circumstances to arrive at a just sentence.

“87. Since jurors relied on extraneous information in arriving at their sentencing recommendation, Mr. Price’s sentence must be vacated under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and under Alabama law.”

(C. 30-31.)

Price’s claims regarding Brady was asserted as follows.

“88. In this case, exculpatory material and crucial mitigating evidence were withheld by the District Attorney and other prosecuting officials in violation of Brady v. Maryland, 373 U.S. 83 (1963). See also, Ex parte Monk, 557 So. 2d 832 (Ala. 1989). Disclosure of the suppressed

evidence would have made a different result reasonably probable. The State's withholding of this information denied Mr. Price his rights to due process, a fair trial and a reliable sentencing proceeding in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, the Alabama Constitution and Alabama law. Kyles v. Whitley, 514 So. 2d 419 (1995); United States v. Bagley, 473 U.S. 667 (1985); Green v. Georgia, 442 U.S. 95 (1979)."

(C. 31.)

Summary dismissal of these claims was proper. The circuit court correctly ruled that claims nos. 85 through 88 do not provide the reviewing court with a "clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds." Rule 32.6(b), Ala. R. Crim. P. (Emphasis added.) The claims are bare, general assertions failing to disclose exactly what transpired factually that underlies the general assertions put forth in the petition. Moreover, these claims are procedurally barred because they could have been, but were not, raised at trial or on appeal. Rule 32.2(a) (3) and (5), Ala. R. Crim. P. Dobyne v. State, 805 So. 2d at 740, aff'd, 805 So. 2d 763 (Ala. 2001) (a juror-misconduct claim that implicates constitutional violations under Rule 32.1(a), Ala. R. Crim. P. is subject to the preclusive bars found in Rule 32.2., Ala. R. Crim. P.); Williams v. State, 782 So. 2d 811, (Ala. Crim. App. 2000) (Brady violation subject to procedural bars.)

In footnote no. 32, Price asserts that "the remaining claims in Mr. Price's Petition comprise

paragraphs 85-96.” (Price’s brief on appeal at page 78.) Price presented no specific argument to support that summary dismissal of claims nos. 89 through 96 was error. Nevertheless, we have reviewed these claims and find that summary dismissal was correct as these claims were all insufficiently pleaded.

Based on the forgoing, the circuit court’s summary dismissal of Price’s Rule 32 petition is affirmed.

AFFIRMED.

McMillan, P.J., and Baschab, Shaw, and Wise, JJ., concur.

APPENDIX E

**APRIL 1, 2002 OPINION OF ALABAMA
CIRCUIT COURT FOR FAYETTE COUNTY**

IN THE FAYETTE COUNTY CIRCUIT COURT
CHRISTOPHER LEE PRICE,

Petitioner,

STATE OF ALABAMA,

Respondent

ORDER

Having considered the Rule 32 petition in the above-styled cause, the State of Alabama's answer, the State's original motion to dismiss, the State of Alabama's second motion to dismiss, and the deposition of Petitioner, the Court **DISMISSES** the Rule 32 petition pursuant to Rule 32.7(d) of the *Alabama Rules of Criminal Procedure*. The Court finds that dismissal is the appropriate action for the following reasons:

THE FACTS OF THE CRIME

The allegations asserted in Price's petition must be reviewed in the context of the evidence presented during his capital murder trial. *See, e.g., Thomas v. State*, 766 So.2d 860, 870 (Ala. Crim. App. 1998). The Alabama Court of Criminal Appeals set forth the following facts in its opinion affirming Price's sentence and conviction:

Through the testimony of Bessie Lynn and through the admission of a statement the appellant gave to authorities in Chattanooga,

Tennessee, approximately one week after the offense, the State established evidence tending to show the following:

On the evening of December 22, 1991, Bill and Bessie Lynn returned to their home following a church service at the Natural Springs Church of Christ, where Bill Lynn had served as minister. The victims' home was located in the Bazemore community of north Fayette County. Bill Lynn had begun assembling Christmas toys for his grandchildren, while Bessie Lynn had dressed for bed and was upstairs in her bedroom watching television. The electricity suddenly failed and, because the security lights outside remained on, and because the electricity was still on in a neighbor's home, Bill Lynn told his wife to call the power company to report the outage. He then walked outside to check the power box. Bessie Lynn heard a noise outside and, upon looking out of her window, saw an individual in what she called a "karate stance," holding what appeared to be a sword in his right hand, high above his head in a striking position. Bessie Lynn testified that the individual was dressed completely in black. Bill Lynn yelled for his wife to telephone the police, and, upon discovering that the telephone lines had been cut, she hurried downstairs, where she picked up a candle and armed herself with a pistol that the Lynns kept in a kitchen drawer by a bank deposit bag.

The bank deposit bag contained cash and checks received from an automobile parts business operated by Bill Lynn. Bessie Lynn testified that she then hurried outside and that when she did someone struck her and knocked her to the ground. She testified that she got up and fired a gunshot into the air and began calling for her husband. She found - him in the yard and tried to give him the gun, telling him to shoot the people, but Bill Lynn, who had been severely wounded told her there were no bullets left in the gun. She then told her husband that she was going for help; he told her to give the culprits anything that they wanted. Bill Lynn had told his wife at that point that he knew he was going to die. Bessie Lynn, who was in their van and attempting to insert the key into the ignition, became aware of two men, one on each side of the van. They ordered her out of the van, and when she got out she was beaten with an object. One of the individuals was demanding money. They ordered her back into the house, where the two individuals, both dressed in black, demanded her money and jewelry. They took a rifle and shotgun from the house, the pistol that Bill Lynn still had, and the checks and cash from the bank deposit bag. They also ordered Bessie Lynn to give them her jewelry. She responded that she did not wear jewelry other than her two rings and asked if she might keep

he wedding ring. She was instructed to take her rings off and to drop them in a bag, which they took. The culprits instructed Mrs. Lynn to remain where she was and they searched for something in the kitchen and then outside the house. Bessie Lynn testified that when the two men came back in the house, a vehicle apparently drove by the house. The two men then went out the back door, and Bessie Lynn testified that she then ran out the front door. She ran back to her husband to tell him that she was going to go for help. He asked her to hurry, and she ran to her father's house, which was located nearby. From her father's house she telephoned for help. Bill Lynn died before he reached the hospital. Bessie Lynn was treated for wounds to her head, her hands, her chest, and her thighs.

Several days later, the appellant was arrested in Chattanooga, Tennessee, where he had been visiting friends. He gave a statement to the authorities in Tennessee, admitting his participation in the offenses, but claiming that his accomplice had actually killed Bill Lynn and wounded Bessie Lynn. He subsequently gave another statement to Alabama authorities.

Price v. State, 725 So. 2d 1003, 111-112 (Ala. Crim. App. 1997). These facts, as well as the opinion of that court, guide the Court in its resolution of the petition.

A. THE ALLEGATION THAT PRICE WAS

**DENIED EFFECTIVE ASSISTANCE OF
COUNSEL DURING BOTH PHASES OF
HIS TRIAL AND DURING HIS DIRECT
APPEAL.**

The claims raised in Issue “A” of Price’s Rule 32 petition are ineffective assistance of counsel (“IAC”) claims. The standard of review for these cases is clear, as shown below.

The United States Court of Appeals for the Eleventh Circuit recently issued an en banc opinion addressing the issue of ineffective assistance of counsel under the Strickland analysis. *Chandler v. United States*, 218 F.3d 1305 (11th Cir. July 21, 2000) (*En Banc*). The standard for reviewing counsel’s performance, set by Strickland and reiterated in *Chandler*, places upon petitioner a very heavy burden.

The *Strickland* standard requires a showing that (1) trial counsel’s representation fell below an objective standard of reasonableness, and (2) a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. *Chandler*, 718 F.3d at 1312-1313 (citing, *Darden v. Wainwright*, 477 U.S. 168 (1986)). Because both parts of the test must be satisfied in order to show a violation of the Sixth Amendment, a court need not address the performance prong if the defendant cannot meet the prejudice prong, or vice versa. *Holladay v. Haley*, 209 F.3d 1243, 1248 (11th Cir. April 19, 2000).

The burden of persuasion is on a petitioner to prove, by a preponderance of competent evidence, that counsel’s performance was unreasonable. *Id.* at 1313 (citing, *Strickland v. Washington*, 466 U.S. 668, 688 (1984)). See also, Ala.R.Crim.P., 32.3. Petitioner must

establish that particular and identified acts or omissions of counsel “were outside the range of professionally competent assistance.” *Id.* at 1314 (citing, *Strickland*, at 688).

Judicial scrutiny of counsel’s performance “must be highly deferential.” *Chandler*, 218 F.3d at 1314. “It is important to note that judicial scrutiny of an attorney’s performance is appropriately highly deferential because the craft of trying cases is far from an exact science; in fact, it is replete with uncertainties and obligatory judgment calls.” *Chandler*, 218 F.3d at 1314n.13 (citing, *Bolender v. Singletary*, 16 F.3d 1547, 1557 (11th Cir. 1994)). “It does not follow that any counsel who takes an approach we would not have chosen is guilty of rendering ineffective assistance...[n]or does the fact that a particular defense ultimately proved to be unsuccessful demonstrate ineffectiveness.” *Id.* at 1314.

This presumption of reasonableness “impacts on the burden of proof and continues throughout the case, not dropping out just because some conflicting evidence is introduced. *Id.* at 1314 n.15. “An ambiguous or silent record is not sufficient to disprove the strong and continuing presumption...where the record is incomplete or unclear about [counsel]’s actions, [the court] will presume that he did what he should have done, and that he exercised reasonable professional judgement.” *Id.* This presumption is like the “presumption of innocence” in a criminal trial and, thus, must be disproved by Petitioner. *Id.*

Because counsel’s conduct is presumed reasonable, “for a petitioner to show that the conduct was unreasonable, a petitioner must establish that no competent counsel would have taken the action that his

counsel did take.” *Chandler*, 218 F.3d at 1315.

The test has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial.

Waters v. Thomas, 46 F.3d 1506, 1512 (11th Cir. 1995) (*En Banc*).

Furthermore, “a [reviewing] court must avoid using the distorting effects of hindsight’ and must evaluate the reasonableness of counsel’s performance ‘from counsel’s perspective at the time.’” *Chandler*, at 1316 (citing, *Strickland*, 466 U.S. at 689). “No particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.” *Strickland*, 466 U.S. at 690.

The experience of a particular attorney is also relevant. As the Eleventh Circuit has noted, “When courts are examining the performance of an experienced trial counsel, the presumption that his conduct was reasonable is even stronger.” *Chandler*, 218 F.3d at 1316 (emphasis added). As the Eleventh Circuit bluntly put it: “Experience is due some respect.” *Id.* at 1316 n.18.

The Alabama Lawyer is a publication by the Alabama State Bar is known to the Court as a source containing the dates that attorneys were admitted to the practice of law in Alabama. The Court finds that this source is generally known within the territorial jurisdiction of this Court and that it is a source whose

accuracy, in this regard, cannot reasonably be questioned. Thus, the Court finds that the Alabama Lawyer, Vol. 62, No. 4 (2001) is a source from which the admission dates of Attorneys Edwina Miller and Milt Brown may be found and the Court takes judicial notice of those dates. A.R.Evid., 201.

The Court takes judicial notice that Edwina Miller was admitted to the practice of law in Alabama in 1982, approximately 11 years before the start of Price's capital murder trial. Ala. Lawyer, Vol. 62, No. 4, p. 159 (2000). The Court takes judicial notice that Milt Brown was admitted to the practice of law in Alabama in 1990, approximately 3 years prior to the start of Price's capital murder trial. *Id.* at p. 67.

1. The Allegation That Price Was Denied Effective Assistance of Counsel During The Penalty Phase of his Trial.

a. The Allegation That Price's Trial Counsel Did Not Conduct, Nor Did They Engage An Investigator to Conduct, the Reasonable Investigation Into Mitigating Circumstances Required by Law.

Paragraph 8 of the Rule 32 petition, the first paragraph of this claim, fails to state an independent claim for relief. See, *Thomas v. State*, 766 So. 2d 860, 892 (Ala. Crim. App. 1998) (“...a review of a claim of ineffective counsel is not triggered until the petitioner has identified specific acts or omissions.”). Thus, the Court does not interpret this claim as asserting an independent claim for relief.

In paragraph 9, Price asserts that trial counsel

did not adequately interview Price's mother, Judy Files. As a result, alleges Price, the answers provided by Files were incomplete. (Pet. at 3)

As the Eleventh Circuit has noted:

It is common practice for petitioners attacking their death sentences to submit affidavits from witnesses who say they could have supplied additional mitigating circumstance evidence, had they been called, or, if they were called, had they been asked the right questions. This case is no exception. But the existence of such affidavits, artfully drafted though they may be, usually proves little of significance. This case is no exception in that respect, either. That other witnesses could have been called or other testimony elicited usually proves at most the wholly unremarkable fact that with the luxury of time and the opportunity to focus resources on specific parts of a made record, post-conviction counsel will inevitably identify shortcomings in the performance of prior counsel. As we have noted before, “[i]n retrospect, one may always identify shortcomings,” Cape v. Francis, 741 F.2d 1287, 1302 (11th Cir.1984), cert. denied, 474 U.S. 911, 106 S.Ct. 281, 88 L.Ed.2d 245 (1985), but perfection is not the standard of effective assistance.

The widespread use of the tactic of attacking trial counsel by showing what “might have been” proves that nothing is

clearer than hindsight--except perhaps the rule that we will not judge trial counsel's performance through hindsight. See, e.g., Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984) ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight"); Atkins v. Singletary, 965 F.2d 952, 958 (11th Cir.1992) ("Most important, we must avoid second-guessing counsel's performance. As is often said, 'Nothing is so easy as to be wise after the event.' " (Citation omitted.)); White v. Singletary, 972 F.2d 1218, 1220 (11th Cir.1992) ("Courts also should at the start presume effectiveness and should always avoid second guessing with the benefit of hindsight."); Thompson v. Wainwright, 784 F.2d 1103, 1106 (11th Cir.1986) ("Hindsight, however, is not the appropriate perspective for a court to examine counsel's effectiveness."). We reiterate: "The mere fact that other witnesses might have been available or that other testimony might have been elicited from those who testified is not a sufficient ground to prove ineffectiveness of counsel." Foster v. Dugger, 823 F.2d 402, 406 (11th Cir.1987), cert. denied, 487 U.S. 1241, 108 S.Ct. 2915, 101 L.Ed.2d 946 (1988), quoted in Atkins v. Singletary, 965 F.2d at 960.

Waters, 46 F.3d at 1513-1514 (emphasis added) (*En*

Banc). In *Chandler*, a similar claim was made. There, trial counsel was alleged to have been deficient based on his failure to ask the “right questions” of two mitigating witnesses. *Chandler*, 218 F.3d at 1321 n.30. After reviewing the testimony that was actually elicited from the witness during Chandler’s trial, the court concluded that, “We cannot say that the Constitution demanded that more be done with these witnesses.” *Id.*

Likewise, the testimony of Judy Files demonstrates that trial counsel did enough in this case. *Cf.*, *Chandler*, 218 F.3d at 1320 (“Although Petitioner’s claim is that his trial counsel should have done something more, we first look at what the lawyer did in fact.”). Based on the record of Price’s trial (R. 895-908), the Court denies the allegation contained in paragraph 9 and summarily dismisses this claim. A.R.Cr.P., 32.7(d). The Court does so based on its personal knowledge, although, admittedly, the Court does not have first-hand knowledge of trial counsel’s preparations. As the Alabama Supreme Court recently held in *Ex parte MacEwan*, No. 1992219, 2001 WL 823699 (Ala. July 20, 2001)¹, however:

¹ The Court notes that the Alabama Supreme Court reversed *MacEwan* on application for rehearing. This rationale, however, was not attacked by the Court’s new opinion. The reversal in *MacEwan* was based on the absence of a written order dismissing the petition, as well as the State’s failure to serve *MacEwan*’s counsel with the State’s motion to dismiss. In any event, in *Ex parte Hill*, 591 So. 2d 462 (Ala. 1991), the Supreme Court reached the same conclusion. That case has never been reversed or overruled.

MacEwan would misapply Walker, in an attempt to create a rule holding that when a defendant alleges ineffective assistance of trial counsel, any action taken by trial counsel that was done outside the presence of the trial judge must be subject to an evidentiary hearing. In preparing and presenting a defense, trial counsel takes countless actions that are not performed directly in the presence of the trial judge. MacEwan misconstrues the law, and the result she urges is untenable. The “personal knowledge” discussed in Walker clearly refers to trial counsel’s performance at trial; it is not necessary that the trial judge have first-hand knowledge of every step of an attorney’s preparation in order to effectively evaluate an attorney’s performance at trial. In order to evaluate the effectiveness of an attorney’s representation at trial, it is sufficient that the judge personally observe the attorney’s performance at trial.

Because the trial judge who considered MacEwan’s postconviction petition was the same judge who had presided over MacEwan’s murder trial, he had first-hand knowledge of MacEwan’s representation at trial and at trial he would have noticed if her attorneys’ performance was so deficient that they were not acting as the ‘counsel’ guaranteed by the Sixth Amendment. See Strickland, supra. Thus, we must reject MacEwan’s argument that she is entitled to an evidentiary hearing on the basis that the trial judge ruling on her petition did not have personal knowledge concerning her trial counsel’s performance.

The personal knowledge of the Court based on

the questioning of Judy Files, in addition to the discussion, above, as to why these types of claims are disfavored in ineffective assistance of counsel contexts, warrants the summary dismissal of this claim. A.R.Cr.P., 32.7(d).

In addition, because paragraph 9 does not specify which “details about Mr. Price’s life, upbringing, and character that were not otherwise presented to the jury and the Court, but which would have been relevant mitigation evidence,” were available but not provided by Files, this claim fails to comply with Rule 32.6(b) of the Alabama Rules of Criminal Procedure. This failure to provide the full factual basis for this claim serves as an equally valid ground for dismissing this claim without an evidentiary hearing. A.R.Cr.P., 32.6(b), 32.7(d).

Paragraph 10 is dismissed for failure to comply with Rule 32.6(b) of the Alabama Rules of Criminal Procedure. Price filed an amendment to his petition on January 2, 2001. This amendment affected paragraphs 10-12. Even though this amendment offered more wording than paragraphs 10-12 of the original Rule 32 petition, the Court finds that Price again failed to supply the information necessary to bring the petition into compliance with Rule 32.6(b). This constitutes undue delay and the Court finds that the State of Alabama has been prejudiced. Thus, this claim is summarily dismissed. A.R.Cr.P., 32.7(d).

In dismissing this claim, the Court notes that Petitioner was able to give the State of Alabama the names of the family members referred to in this paragraph during a deposition conducted on November 8, 2001. Considering that this is the type of information which the petitioner would have easily available, the

Court finds that the failure to disclose this evidence, requiring the State of Alabama to seek permission from this Court to conduct an evidentiary deposition and then to conduct that deposition at Holman Prison constituted prejudice to the State of Alabama and justifies dismissal of this claim.

The Court also notes that at the deposition, Price refused to answer a question as to whether these names were provided to collateral counsel, asserting the “attorney-client” privilege. According to the *Alabama Rules of Evidence*, “[t]he attorney-client privilege applies only to those communications that are confidential in the sense that the person or persons making them did not intend that they be disclosed- to third persons...” *A.R.Evid.*, 502 (Advisory Committee’s Notes on Subsection (a)(5)). Price’s assertion of the attorney-client privilege constitutes grounds for finding that Price never intended to correct the deficiency in his pleading, as he never intended to convey this information to third persons.

Furthermore, because of the nature of these potential witnesses-Price’s family members—these individuals could have and should have been identified in the original Rule 32 petition. At this late date, Price cannot amend his petition to include these names because he has not acted with due diligence and the State of Alabama has suffered prejudice due to Price’s failure to disclose this information up front. *See, e.g., Neelley v. State*, 642 So. 2d 494, 496 (Ala. Crim. App. 1993) (Upholding the trial court’s refusal to allow an amendment upheld in a capital case where the amendment was not based on surprise, newly discovered evidence, or changed circumstances). *See also, Whitehead v. State*, 593 So. 2d 126, 129 (Ala. Crim. App. 1991) (“Courts may properly refuse permission to

amend...where there is no showing of diligence or that the facts were unknown to the applicant prior to his application.”) (*citing, Cochran v. State*, 548 So. 2d 1062 (Ala. Crim. App. 1989)).

Finally, the information generally alleged in this paragraph would constitute cumulative evidence of that produced at Price’s trial through his mother. Cumulative evidence would not be sufficient to establish an IAC claim. For all of these reasons, the Court summarily dismisses the claim contained in paragraph 10 of the Rule 32 petition.

Paragraphs 11 and 12 are dismissed by the Court for the same reasons as paragraph 10, above. The friends, acquaintances, and teachers alluded to in these paragraphs were known to Price and could have been provided in the original Rule 32 petition or the amendment to that petition. Price did nothing to supply these names until the State of Alabama deposed Petitioner. Thus, Price has acted with undue delay.

Furthermore, the school records referred to in paragraph 12 are not attached to the Rule 32 petition or the amendment, nor have any been submitted to the Court since the Rule 32 petition was filed. In *Scroggins v. State*, CR-99-2538, 2001 WL 996201 (Ala. Crim. App. Aug. 31, 2001), the court upheld the dismissal of a Rule 32 petition without a hearing, noting that:

Scroggins argues that the trial court never had jurisdiction over this cause because the warrant for his arrest and the underlying affidavit were insufficient ‘to support the arrest and formal charge of the Appellant.’ (Appellant’s brief, p. 7.) However, Scroggins did not state specifically how the warrant and affidavit were lacking. Rule 32.6(b). Nor did he satisfy his burden of

pleading under Rule 32.3 by attaching to his petition a copy of the warrant and the affidavit.

Likewise, nothing in the present petition informs the Court of what in these records constitutes mitigating evidence, and copies of these alleged records are nowhere to be found. Thus, the Court finds that the claim in paragraph 12 is subject to summary dismissal for failure to comply with Rules 32.3 and 32.6(b) of the *Alabama Rules of Criminal Procedure*.

As for the claim in paragraph 13 of Price's petition, that trial counsel were ineffective for not seeking an additional psychological evaluation, this claim is not a valid ineffective assistance of counsel claim. In response to an order issued by this Court, Dr. Karl Kirkland issued a six page report to the Court and to trial counsel evaluated various aspects of Price's mental health. Based on this report, the Court finds that a reasonably competent attorney could have decided that no further mental health inquiries were necessary or required. *See, Elledge v. Dugger*, 823 F.2d 1439, 1447 n.17 (11th Cir. 1987) ("We emphasize that the duty is only to conduct a reasonable investigation. Counsel is not required to 'shop' for a psychiatrist who will testify in a particular way.").

This report offers no suggestion to a reasonable person that further mental health evaluations are needed. Some of the excerpts from this report include the following:

...Price is a right handed, alert, cooperative single white male in no acute distress at the time of this evaluation. He is 5'9" and weights 155 lbs....He is a young man who was poised, attentive, interested, open, and cooperative throughout this evaluation...He has no speech or

hearing problems.

Mr. Price does not evidence any defect of memory, concentration, or attention. He is able to demonstrate above average memory skills by being able to remember 3 out of 3 objects after 5 seconds, 30 seconds, and 2 minutes. He was able to tell me the correct day, date, and is aware of the current situation. He does not evidence any symptoms of a thought disorder or any type of mental illness. He is able to use abstract reasoning skills in an average fashion. He does not harbor any delusional or unrealistic beliefs (sic) about his situation. He has a reasonably good fund of general information. Assessment of his thought process suggests that he is functioning in the low average of intellect. His ability to interpret proverbs is rather concrete but his general judgment appears to be average to above average. For example, he was able to tell me that a promise should be kept in order to show people that you have "credibility."

The flow of speech was normal in terms of rather, rhythm, and tone. There are no peculiarities present. His thought process was normal, logical, and relevant. He denies ever experiencing any suicidal ideation. He denies ever experiencing any hallucinations. There are no delusional beliefs. There are no ideas of reference. Motor activity level was normal and he does not evidence any difficulties with eye contact or any unusual or bizarre behavior. Affect was appropriate and well modulated. He does not evidence any clinical or vegetative signs of depression.

The patient indicates that he comes from a family with a strong history of alcoholism. His father was an extremely bad alcoholic who was killed in a gunfight when the patient was only 4 years old. There is no family history of mental illness or other drug addiction. When the patient was a very young boy his father made him drink a pint of whiskey according to his self-report. He later tried alcohol and marijuana as an adolescent but really never has developed any abusive tendencies with alcohol or any other drug. For example, he tried cigarettes at age 8 and never tried them again.

He has been evaluated previously by psychologists in the Department of Corrections. He has no other prior psychological or mental health evaluation or treatment.

The defendant has a very complete memory of his behavior at the time of the offense. He is at least of low average intelligence and has good social judgment and reasoning skills. He is not suffering from any type of mental illness which would detract from his ability to appreciate the criminality of his behavior at the specific time of this particular offense. He is (sic) not using any drugs or alcohol at the time of the offense.

Review of collateral data such as previous records through the Department of Corrections, the DA file, and the current extensive clinical interview all assist this examiner in reaching the conclusion that there are no mental problems present that would have ever reached the level of severity that would have rendered this individual incapable of appreciating the

criminality of his behavior at the time of this particular offense.

(Report of Dr. Kirkland, pp. 2-5) (emphasis added). Dr. Kirkland concluded his evaluation by noting that he found no evidence “of any mental disorder that would affect [Price’s] ability to appreciate the criminality of his behavior or to be able to distinguish right from wrong at the time of the offense.” (Report of Dr. Kirkland, p. 6)

Based on these findings by a very qualified Certified Forensic Examiner for the State of Alabama, a competent attorney could have decided that no further mental health inquiry was warranted. Based on the limited amount of time and resources available for one preparing for trial, the Court cannot say that it would be unreasonable to focus attention on other, more promising avenues of defense. See, *Chandler*, 218 F.3d at 1314 n.14 (“In accordance with this principle, courts must recognize that counsel does not enjoy the benefit of unlimited time and resources...Every counsel is faced with a zero-sum calculation on time, resources, and defenses to pursue at trial.”) See also, *id.* at 1318 n.22 (“As we have recognized, *Strickland’s* approach toward investigation ‘reflects the reality that lawyers do not enjoy the benefit of endless time, energy or financial resources.’...How a lawyer spends his inherently limited time and resources is also entitled to a great defense by the Court.”).

Although Price suggests that a psychologist should have been retained to “rebut the report prepared on behalf of the state by Dr. Karl Kirkland,” he does not suggest in what specific ways Dr. Kirkland’s report could be rebutted. In addition, the Court finds Price’s allegation to be based on a huge

misunderstanding of the events surrounding his mental health evaluation. Dr. Kirkland's report was not prepared on behalf of the State of Alabama, in as much as the State of Alabama is the body that was charged with prosecuting Price for the murder of Bill Lynn. Instead, Dr. Kirkland's report was prepared at the request of the Court to give the Court a fair assessment of Price's mental health at the time of the offense and an evaluation of his competency to stand trial pursuant to Rule 11 of the Alabama Rules of Criminal Procedure. The final paragraph of Dr. Kirkland's report illustrates that the report was prepared for neither party. As noted by Dr. Kirkland:

As a mental health professional, I recognize that the determination of a defendant's competency to stand trial and mental state at the time of an alleged offense are properly matters for the court to decide. Therefore the opinions given in this report in regard to these issues are of an advisory nature only. I appreciate that opportunity of participating in the evaluation of this individual with you. Please feel free to contact me if further information is needed.

If Price is basing his claim on an allegation that Dr. Kirkland was somehow an agent of the prosecutor's office, thus requiring an evaluation by a defense psychologist, such an allegation lacks merit. The Court will not accept the premise that an independent mental health evaluation performed pursuant to Rule 11 of the Alabama Rules of Criminal Procedure automatically requires defense counsel to retain an "independent" expert for their own purposes. That is not the law in Alabama.

Instead, Price would have to allege facts

suggesting that trial counsel could have shown a need, pursuant to *Ake v. Oklahoma*, 470 U.S. 68 (1985), to obtain funds for retaining a psychologist. Such facts are totally missing from the petition. *Ake* requires a showing that a denial of funds for a mental health expert would deprive the defendant of a fair trial.

Based on Dr. Kirkland's report, it is entirely impossible for Price to establish that a reasonable lawyer would have sought to obtain a psychologist to testify as to any effect that Price's upbringing had on committing this crime. Dr. Kirkland's report was a guarantee to defense counsel that any such psychologist would face cross-examination on the issue. In addition, defense counsel could be sure that the State of Alabama would call Dr. Kirkland in rebuttal. A reasonable attorney could conclude that such a rebuttal could lead a juror to believe that the defense was trying to "create" a mental health defense. *See, Chandler*, 218 F.3d at 1321 ("A lawyer reasonably could have determined that character evidence would not be compelling in this case. And a lawyer reasonably could also fear that character evidence might, in fact, be counterproductive: it might provoke harmful cross-examination and rebuttal witnesses. Misgivings about hurtful cross-examination and rebuttal Witnesses have been decisive to the Supreme Court when it has determined that counsel was effective.") (emphasis added) Thus, where Dr. Kirkland would testify without hesitation that, even considering Price's upbringing and social conditions as a child, "there are no mental problems present that would have ever reached the level of severity that would have rendered this individual incapable of appreciating the criminality of his behavior at the time of this particular offense," a reasonable attorney could decided not to call a

psychologist to attempt to draw a line between Price's upbringing and the capital murder of Bill Lynn.

For this reason, the Court finds that trial counsel's decision to rely on Price's mother's description of Price's upbringing, without seeking an "expert" to present this information, was reasonable. Such a strategy prevented the State of Alabama from being able to introduce Dr. Kirkland's findings in rebuttal, and allowed the jury to draw their own conclusions about the alleged abuse and alcoholism in Price's family. Although collateral counsel now say they would have performed differently, this is not the IAC standard. See, Card, 911 F.2d at 1507 ("Although Card's current counsel makes it quite clear that had he been trial counsel, the case would have been tried differently, this is not the test for ineffective assistance."). Having found that any choice not to call a psychologist to function in the role described by the Rule 32 petition would be within the wide range of reasonably effective assistance, the Court denies and dismissed this claim. A.R.Cr.P., 32.7(d).²

² The Court found, as a mitigating factor, the diagnosis of Price as having "antisocial personality disorder." Although the Court found this to justify the existence of a mitigating factor, it does not follow that had it been presented to the jury, a jury would have found it mitigating. See, *Clisby v. Alabama*, 26 F.3d 1054, 1056 n.2 (11th Cir. 1994); ALA. CODE § I3A-3-1(b) (1975) ("Severe mental disease or defect' does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct."). Thus, the Court also finds a decision not to pursue this diagnosis through an expert witnesses was reasonable.

b. The Allegation That Trial Counsel Did Not Object Contemporaneously to Errors Made by the Prosecutor and the Court During Penalty Phase Proceedings.

In this claim, Price alleges IAC based on trial counsel's failure to object to several arguments made by the prosecutor at his trial. In general, this type of IAC claim is disfavored. The Alabama Court of Criminal Appeals commented in *Thomas* that "[E]ffectiveness of counsel does not lend itself to measurement by picking through the transcript and counting the places where objections might be made." *Thomas*, 766 So. 2d at 876. As noted in that case, "Even though there were several instances where counsel could have objected, 'that does not automatically mean that the [appellant] did not receive an adequate defense in the context of the constitutional right to counsel.'" *Id.* "The Sixth Amendment does not require counsel to raise 'every conceivable objection.'" *Id.* See also, *Chandler*, 218 F.3d at 1319 ("Counsel is not required to present every nonfrivolous defense.").

Additionally, the burden on Price is extremely high, to the point of being almost impossible to establish. If the Court finds any objective reason exists for not objecting, Petitioner cannot prevail. In order to prevail, Price must establish that "no competent counsel would have not objected]." *Chandler*, 218 F.3d at 1315.

The difficulty of the challenge before Petitioner is made clear in other decisions that have confronted this type of "failure to object" issue. For example, in *Thomas* it was noted by a lawyer—a lawyer the Court

of Criminal Appeals found to have rendered effective assistance of counsel—that:

I've been trying cases on a regular basis for 25 years, and I guess when I first started trying cases I thought, well, everything the other side does wrong or is perceived wrong, you get up and object. I guess that's what you learn in law school, but I found out later that that could be the worst thing you can do. I think that ... if there's something that's objectionable that can affect the outcome of the trial, then you need to get up and object, but if it's something of a minor nature, then when you get up and object, all you are going to do is just call attention to it a second time. I tried not to object unless it was something of a crucial nature because I think it hurts you otherwise.

Thomas, 766 So. 2d at 928-929. For that reason, the court concluded that, "Failure to object to argument is within the 'wide range' of reasonable professional assistance for which a strong presumption of sound judgment is due." *Id.*

The presumption of reasonableness accorded trial counsel is further strengthened by *Hubbard v. State*, 584 So. 2d 895, 906 (Ala. Crim. App. 1991), where the court noted that "trial counsel had sound strategic grounds for not objecting to the cited remarks made by the prosecution during closing argument. The decision was based on trial counsel's experience and their opinion that the prosecution argument was not persuasive." As these cases note, a reasonable attorney could choose not to object based on a fear of calling the jury's attention once more to the prosecutor's comment, or because that attorney finds it is not

persuasive.

Finally, the deficient performance prong of *Strickland* is an objective one, meaning that counsel's reasoning is not always necessary to a determination of IAC for failing to object. So long as a reasonable attorney may have chosen not to object, it is irrelevant why trial counsel in this particular case chose not to object. As the Eleventh Circuit noted:

If some reasonable lawyer might have pursued a certain defense or not called a certain witness [or not object to certain arguments], we fail to understand why we would order a new trial on the ground that the actual lawyer had not used the defense or witness in the first trial [or did not object at the first trial]: at a new trial, a different lawyer (even a reasonable one) might again not use the witness or defense. If two trials are identical, one should not be constitutionally inadequate and the other constitutionally adequate.

Chandler, 218 F.3d at 1315 n.17. Thus, if the Court finds that a reasonable lawyer could have decided not to object to the arguments put forth in the Rule 32 petition, it can deny the claims without an evidentiary hearing. In addition, where the Court determines no prosecutorial misconduct occurred, an evidentiary hearing is not required.

When deciding if prosecutorial argument requires reversal, the relevant question is whether the prosecutors' comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process? *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974). This standard guides the Court's inquiry into whether Price received effective assistance of

counsel.

In his first substantive IAC claim in this subpart, Price alleges IAC based on trial counsel's failure to object to argument contained on pages 909-911 of the record. Price, however, does not cite the allegedly offending remarks, thus his claim does not satisfy the requirements of Rule 32.6(b). The Court, however, has resolved this claim by reviewing pages 909-911 of the record and searching for error. Because the Court found no error, it has resolved the question of whether failure to object resulted in ineffective assistance of counsel. It did not. Nothing in the State's argument contained on pages 909-911 of the record required an objection by trial counsel in order for Price to receive effective assistance of counsel.

When compared to the comments present in *McNair v. State*, 653 So. 2d 320 (Ala. Crim. App. 1994), it is clear that the comments on pages 909-911 were not reversible error, if they were erroneous at all. Instead, any erroneous remarks; if any, "were valued by the jury at their true worth, as having been uttered in the heat of debate and were not expected to become factors in the formation of the verdict." *Id.* See also *Duren.v. State*, 590 So. 2d 360, 364 (Ala. Crim. App. 1990). In addition, the jury was instructed by the Court at the outset of Price's trial that:

...what [the attorneys] are about to say to you is not to be considered by you as being evidence in the case. The

evidence will come later from the testimony of the witnesses that appear and from the various documentary evidence that may be presented...I Would caution you at this time and at no time during the course of this trial things that the

attorneys say to be considered by you as being evidence in the case.

(R. 370) The jury is presumed to follow their instructions. *Jackson v. State*, CR-97-0998, 2000 WL 337507, at *47 (Ala. Crim. App. Mar. 31, 2000). For these reasons, the remarks on pages 909-911 of the record cannot be construed as reversible error.

Because these remarks were not reversible error, and based on *McNair*, a reasonable defense lawyer might have decided not to object based on a desire to prevent bringing the remarks to the jury's attention a second time. *Thomas*, 766 So. 2d at 928-929.³ Because such a decision would have been reasonable, this issue is summarily dismissed pursuant to Rule 32.7(d). A.R.Cr.P., 32.7(d).

The prosecutor's remarks referred to in paragraphs 17-20 of Price's Rule 32 petition were reviewed by the Court of Criminal Appeals. That court noted that "a review of the entire argument by the prosecutor in the present case reveals that the prosecutor was not arguing that the appellant would kill again if he was not sentenced to death, but that

³ As noted by the court in *Chandler*, "The presumption [of reasonable performance by trial counsel] is not some presumption that the particular defense lawyer in reality focused on and, then, deliberately decided to do or not to do a specific act. Instead, the presumption to which we refer is the presumption that what the particular defense lawyer did at trial—for example, what witnesses he presented or did not present—were acts that some reasonable lawyer might do." *Chandler*, 218 f.3d at 1314 n.15.

such a sentence would act as a deterrent to other possible offenders.” *Price*, 725 So. 2d at 1044. Based on this, the court found no plain error.

This finding of no plain error prevents *Price* from prevailing before this Court. As noted by the court in *Williams v. State*, 783 So. 2d 108, 133 (Ala. Crim. App. March 31, 2000):

Finally, the appellant raises several ineffective-assistance-of-counsel claims that involve substantive issues he raised and this court reviewed under the plain error rule on direct appeal. See, Rule 45A, A.R.App.P.

Because we determined that the remarks did not constitute plain error even if objectionable, appellant cannot relitigate the issue under the guise of ineffective assistance of counsel in a post-conviction proceeding. A finding of no manifest injustice under the ‘plain error’ standard on a direct appeal serves to establish a finding of no prejudice under the test for ineffective assistance of counsel provided in *Strickland v. Washington*.

As we stated in *Thomas*:

In implicitly rejecting the underlying substantive issue as failing to present any plain error, Rule 45A, Ala.R. App.P., the Alabama Supreme Court implicitly found that the alleged error did not or probably did not adversely affect the substantial right of *Thomas*. Thus, we must concur with the attorney general that *Thomas*’s ineffective trial counsel argument fails because, by virtue of the Alabama

Supreme Court's implicit ruling, Thomas cannot satisfy the prejudice prong of Strickland.

(citations omitted). For this reason, the claim contained in paragraphs 17-20 of Price's Rule 32 petition is summarily dismissed.

Paragraph 21 is summarily dismissed, for it fails to state a material issue of law or fact and fails to state a claim upon which relief may be granted. A.R.Cr.P., 32.7(d). Truthfully informing the jury that its verdict is a recommendation has been repeatedly upheld, as not violating *Caldwell v. Mississippi*, 472 U.S. 320 (1985), as Price asserts. Both the Alabama Court of Criminal Appeals and the Alabama Supreme Court have previously held that "the comments of the prosecutor and the instructions of the trial court accurately informing a jury of the extent of its sentencing authority and that its sentence verdict was 'advisory' and a 'recommendation' and that the trial court would make the final decision as to sentence does not violate *Caldwell v. Mississippi*[" Kuenzel v. State, 577 So. 2d 474, 502 (Ala. Crim. App. 1990), quoting, *Martin v. State*, 548 So. 2d 488, 494 (Ala. Crim. App. 1988). See also, *Ex parte Hays*, 518 So. 2d 768, 777 (Ala. 1986); *White v. State*, 587 So. 2d 1236 (Ala. Crim. App. 1990). The Court dismisses this claim pursuant to Rule 32.7(d). A.R.Cr.P., 32.7(d).

In paragraph 23, Price refers to several pages of the Court's charge to the jury, alleging that the charge "confused, misled, and failed to instruct the jury on those principles..." (Pet. at 8) Because Price did not quote the allegedly erroneous charges and failed to explain in his petition how the charge was deficient, this claim is dismissed pursuant to Rule 32.6(b). In

addition, the Court finds that a review of the instructions in this case does not reveal any error. Thus, this claim could also be dismissed pursuant to Rule 32.7(d). A.R.Cr.P., 32.7(d).

In paragraph.24, Price alleges IAC based on trial counsel's failure to object to the Court's charge on heinous, atrocious, and cruel as an aggravating circumstance. (Price's Pet. at 8-9) The Court instructed the jury as follows:

The other aggravating circumstance which you may consider in this case is, if you find from the evidence that it has been proved beyond a reasonable doubt, you may consider whether the capital offense was especially heinous, atrocious and cruel when compared to other capital murders. You will have to determine whether or not the evidence in this case, in fact, has proved beyond a reasonable doubt that, in fact, the killing of Bill Lynn was especially heinous, atrocious, and cruel when compared to other capital murders.

The term "heinous" means extremely wicked or shockingly evil. The term "atrocious" means outrageously wicked and violent. The term "cruel" means designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others. What is intended to be included in this aggravating circumstance is only those cases where the actual commission of the capital offense is accompanied by such additional acts as to set the crime apart from the norm of capital offenses.

For a capital offense to be heinous, atrocious or cruel; it must be a conscienceless or pitiless

crime which is unnecessarily tortuous to the victim. All capital offenses are heinous, atrocious and cruel to some extent, but not all capital offenses are especially heinous, atrocious, cruel compared to other capital offenses.

You should not find or consider this aggravating circumstance unless you find that this particular offense Involved a conscienceless or pitiless crime which was unnecessarily tortuous to the victim.

Now, the fact that death has occurred or that a death scene may appear gruesome does not prove that the crime was especially heinous, atrocious, and cruel. Instead, the jury must determine if these elements are presented based upon a careful and rational review of all the evidence that has been submitted to you during the trial of this case, both in the guilt/innocence phase and in the sentencing phase of the case.

As I stated to you before, the burden of proof is on the State to convince you beyond a reasonable doubt as to the existence of the aggravating circumstance asserted that the capital offense in this case was especially heinous, atrocious, or cruel when compared to other capital offenses.

(924-925) The Court finds that Price cannot establish—as he must to prevail—that no competent attorney would have failed to object to this instruction. Furthermore, because this instruction was clear and not, as Price contends, vague, the Court finds that Price cannot establish prejudice as to this claim. A.R.Cr.P., 32.7(d).

Finally, Price cannot establish prejudice as to his claim, in paragraphs 25-26, that trial counsel were ineffective for failing to object to the Court's finding that this murder was especially heinous, atrocious, and cruel. The Alabama Court of Criminal Appeals, engaging in its mandatory appellate review of Price's death sentence, found that "the trial court correctly found the existence of two aggravating circumstances...that the capital murder was especially heinous, atrocious, and cruel when compared to other capital cases." *Price*, 725 So. 2d at 1062. That court went on to find that "[c]onsidering the evidence of the circumstances surrounding the death victim's murder, it is clear that it was unnecessarily torturous, pitiless, conscienceless, extremely wicked, • and shockingly evil." *Id.* Considering these findings by the Court of Criminal Appeals, Price cannot establish prejudice under Strickland.

For these reasons, this subpart is summarily dismissed. A.R.Cr.P., 32.7(d).

c. The Allegation That Trial Counsel Did Not Accompany Price To, Nor Advise Him In Preparation For, Critical Pre-trial and Pre-sentencing Proceedings.

In paragraph 27 of the petition, Price alleges ineffective assistance of counsel based on trial counsel's failure to accompany Price to (or prepare him for) his probation interview for the preparation of the pre-sentence report. (Price's Pet. at 10, para. 27) This claim is dismissed for failure to state a material issue of law or fact and for failure to state a claim upon which relief may be granted. A.R.Cr.P., 32.7(d). *See, State v.*

Tarver, 629 So. 2d 14, 21-22 (Ala. Crim. App. 1993) (“Further, it is a matter of trial strategy whether an attorney appears at a pre-sentence report interview. A probation officer may be much more likely to give credence to the statements of one who does not have his legal gladiator at his side. This in all likelihood could work in a defendant’s favor. The appellant’s counsel’s performance was not ineffective here and would not have been even if the appellant’s trial testimony had not been cumulative of the statements made in the presentence report.”). Because a reasonable attorney could have decided not to attend the pre-sentence interview, Price cannot prevail here. This claim is dismissed. A.R.Cr.P., 32.7(d).

Furthermore, the petition does not suggest how Price was unprepared, or how trial counsel could have better prepared Petitioner for the interview. Other than a general allegation of prejudice, paragraph 27 does not specifically state how Price was prejudiced as a direct result of the alleged failure to prepare him for this interview. Obviously, then, this paragraph fails to comply with Rule 32.6(b). In addition, because prejudice is not specifically pleaded as to this claim, Price has failed to state a claim that is meritorious on its face. Thus, the Court dismisses the claim. *See, Alderman v. State*, 647 So. 2d 27, 33 (Ala. Crim. App. 1994), *citing, Moore v. State*, 502 So.2d 819, 820-21 (Ala. 1986).

As to Price’s claim in paragraph 28 that he was denied effective assistance of counsel because his trial counsel did not attend the psychological evaluation performed by Dr. Kirkland, Price must demonstrate that no competent attorney would have failed to attend this evaluation. As a matter of law, the Court finds that Price could never establish that no competent attorney

would have failed to attend the evaluation conducted by Dr. Kirkland. The Court is unaware of a single attorney that has ever appeared before the Court who actually attended a client's mental health evaluation. Thus, the Court is unwilling to find that no competent attorney would fail to undertake such an unusual step. Price cannot prevail here.

Further, Price's allegation seems to suggest that the very act of not attending the evaluation constituted ineffective assistance of counsel. Price's allegation, however, does not allege specific Prejudice relating to the failure of trial counsel to attend this evaluation. For this reason, the Court finds that paragraph 28 fails to state a claim upon which relief may be granted, as prejudice is required under Strickland. Thus, this is summarily dismissed as it is not meritorious on its face. A.R.Cr.P., 32.7(d).

Finally, the claim contained in paragraphs 29-30 is summarily dismissed. First, the claim in paragraph 29 is wholly unsupported by the record. The record does not demonstrate that any comment made by Price during the mental health evaluation was used against him at trial. If anything, the report helped Price, as the Court used it to find the existence of a mitigating circumstance. (R. 960) Based on the Court's personal knowledge that Dr. Kirkland's report did not prejudice Petitioner, this claim is summarily dismissed. See *Ex parte Hill*, 591 So. 2d 462 (Ala. 1991) (Allowing the trial court to summarily dismiss a Rule 32 petition based on its own personal knowledge, when that knowledge is placed in the order denying relief).

d. The Allegation That Trial Counsel Did Not Request Any Penalty Phase Instructions From the Court.

This claim is summarily dismissed as it is not meritorious on its face. *See, Alderman v. State*, 647 So. 2d 27, 33 (Ala. Crim. App. 1994), *citing, Moore v. State*, 502 So.2d 819, 820-21 (Ala. 1986) (“It is well established that a [Rule 32] petition ... must contain more than mere naked allegations that a constitutional right has been denied. An evidentiary hearing on a ... petition is required only if the petition is ‘meritorious on its face.’ A petition is ‘meritorious on its face’ only if it contains a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the facts relied upon (as opposed to a general statement concerning the nature and effect of those facts) sufficient to show that the petitioner is entitled to relief if those facts are true. ... [T]he petition is not ‘meritorious on its face,’ because it lacks the specific factual support necessary to show the trial court that [the petitioner] is entitled to relief (i.e., that [the petitioner’s] counsel was constitutionally ineffective....) Unsupported conclusions of law simply will not suffice.”). Here, Price does not suggest to the Court a single, specific jury instruction that should have been, but was not, offered by trial counsel.

Instead, this claim consists entirely of an IAC allegation based on trial counsel’s failure to suggest any proposed jury instructions. This is insufficient as a matter of law to warrant any further proceedings. *See, Chandler*, 218 F3d at 1314 (“The petitioner must establish that particular and identified acts or omissions of counsel ‘were outside the wide range of professionally competent assistance.’”); *Thomas*, 766

So. 2d at 889 (*citing, Strickland*, 466 U.S. at 690) (An IAC claim is not actually triggered until “a petitioner has identified the specific acts or omissions that he alleges were not the result of reasonable professional judgment on counsel’s part.). As the Eleventh Circuit has noted, “No absolute rules dictate what is reasonable performance for lawyers.” *Id.* at 1317 (emphasis added). Thus, a claim that trial counsel were ineffective simply for failing to offer any proposed jury instructions is insufficient to warrant any further proceedings. This claim is dismissed. A.R.Cr.P., 32.3, 32.6(b), 32.7(d).

e. The Allegation That Trial Counsel Did Not Litigate The Legality Of Imposing A Sentence of Death on Mr. Price.

In paragraph 34, Price contends trial counsel rendered ineffective assistance of counsel because they failed to challenge the use of murder during the course of a robbery as an elevating factor for a capital charge and as an aggravating circumstance for determining sentence. Price cannot prevail, as he can never establish prejudice. That is, had this issue been litigated, the Court finds that there is not a reasonable probability that the outcome of Price’s trial would have been different. *See, e.g., Ex parte Kennedy*, 472 So. 2d 1106 (Ala. 1985) (Allowing the use of an elevating factor in a capital crime to be “double counted” as an aggravating circumstance); *Haney v. State*, 603 So. 2d 368 (Ala. Crim. App. 1991), *aff’d*, 603 So. 2d 412 (Ala. 1992) (Same); *Kuenzel v. State*, 577 So. 2d 474, 489 (Ala. Crim. App. 1990), *aff’d*, 577 So. 2d 531 (Ala. 1991) (Same). This claim is denied and dismissed. A.R.Cr.P., 32.7(d).

Paragraph 35 is due to be summarily dismissed because, as a matter of law, Price cannot establish prejudice. The claim that Alabama's manner of execution is unconstitutional lacks legal merit. *See, e.g., Johnson v. Kemp*, 759 F.2d 1503, 1510 (11th Cir. 1985) ("The contention that death by electrocution violates the Eighth Amendment is frivolous."); *Felker v. Turpin*, 101 F.3d 95 (11th Cir. 1996); *Boyd v. State*, 746 So.2d 364 (Ala. Crim. App. March 26, 1999); *Hardy v. State*, CR-95- 0589, 1999 WL 171314 (Ala. Crim. App. March 26, 1999); *Sneed v. State*, CR-95-0587, 1999 WL 254455 (Ala. Crim. App. April 30, 1999); *Jackson v. State*, CR-97-2050, 1999 WL 339263 (Ala. Crim. App. May 28, 1999); *Ingram v. State*, CR-94-1733, 1999 WL 669390 (Ala. Crim. App. Aug. 27, 1999); *Whitehead v. State*, CR-95-2129, 1999 WL 669323 (Ala. Crim. App. Aug. 27, 1999). This claim is summarily dismissed. A.R.Cr.P., 32.7(d).

Finally, paragraph 36 is summarily dismissed because it fails to comply with Rule 32.6(h) and is not meritorious on its face. *See, Alderman v. State*, 647 So. 2d 27, 33 (Ala. Crim. App. 1994), *citing, Moore v. State*, 502 So.2d 819, 820-21 (Ala. 1986) ("It is well established that a [Rule 32] petition ... must contain more than mere naked allegations that a constitutional right has been denied. An evidentiary hearing on a ... petition is required only if the petition is 'meritorious on its face.' A petition is 'meritorious on its face' only if it contains a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the facts relied upon (as opposed to a general statement concerning the nature and effect of those facts) sufficient to show that the petitioner is entitled to relief if those facts are true. "... [T]he petition is not 'meritorious on its face,' because it lacks the specific

factual support necessary to show the trial court that [the petitioner] is entitled to relief (i.e., that [the petitioner's] counsel was constitutionally ineffective....) Unsupported conclusions of law simply will not suffice.”). Thus, this claim is dismissed.

2. The Allegation That Price Was Denied Effective Assistance of Counsel During the Guilt Phase of His Trial.

a. The Allegation That Trial Counsel Did Not Investigate the State's Trial Witnesses.

This entire claim consists of the following two sentences:

Mr. Price's trial counsel did not contact the State's witnesses before trial and, consequently, were unprepared to elicit testimony on cross-examination essential to their theory of the case. Had counsel been adequately prepared, counsel could have elicited this testimony, and there is a reasonable probability that the verdict in Mr Price's case would have been different.

(Price's Pet. at 14) This pleading is insufficient to warrant further proceedings. *See, Williams*, 783 So. 2d at 129-130 (“His entire argument in his petition consisted of the following statement: ‘Trial counsel failed to use the services of a forensic expert. Therefore, the defendant did not have the benefit of a skilled forensic investigator who could analyze the forensic evidence presented by the state.’...the circuit court properly found that the appellant had not satisfied the specificity requirements of Rule 32.6(b), Ala. R. Crim. P. (C.R. 673) In addition, the appellant did not satisfy the pleading requirements of Rule 32.3,

Ala. R. Crim. P.”). Likewise, here, the Court finds that Price failed to satisfy the specificity requirements of Rule 32.6(b) and the pleading requirements of Rule 32.3.

For example, Price did not allege which witnesses were not cross-examined properly by trial counsel, what evidence could have been solicited on cross-examination (which goes towards prejudice), what Price alleges the “theory of the case” to have been, and how this cross-examination was essential to that theory. Although Price attacks the representation of his trial counsel, in paragraph 41, for presenting “boilerplate” argument to this Court, his petition submits nothing but insufficiently pleaded, textbook variety boilerplate arguments such as paragraph 38. This “boilerplate” is insufficient to warrant further proceedings. A.R.Cr.P., 32.3, 32.6(b), 32.7(d). This claim is summarily dismissed.

b. The Allegation That Trial Counsel Did Not Litigate Important Pre-trial Motions.

Paragraph 39 of the Rule 32 petition does not allege an independent claim for relief. Paragraph 40 claims that Price’s trial counsel failed to adequately litigate the “fair cross section” claim concerning the composition of the grand jury. Although Price asserts that evidence should have been located and presented by trial counsel in support of this motion, he does not allege a single piece of specific evidence that was available but not submitted at trial. Thus, this claim fails to comply with Rule 32.6(b) of the Alabama Rules of Criminal Procedure. Furthermore, this claim fails to comply with Rule 32.3 of the Alabama Rules of Criminal Procedure.

Furthermore, the Court denies this type of failure to fully litigate claim as a matter of law. The Court interprets this argument as an attempt to fault trial counsel for failing to prevail. “A defense attorney,” however, “is not ineffective solely because his client is sentenced to death.” *Fleming v. Kemp*, 748 F. 2d 1435 (11th Cir. 1984). The Court considers the argument that Price’s trial counsel failed to “fully” litigate flawed for the same reason the Eleventh Circuit rejected that argument in *Alvord v. Wainwright*, 725 F.2d 1282 (11th Cir. 1984). When trial counsel’s actions are reasonable, counsel “cannot be faulted simply because [they] did not succeed.” *Id.* at 1289 n.12. Furthermore, this type of argument is the epitome of second-guessing and Monday morning lawyering.

Paragraph 41 of the Rule 32 petition claims that Price’s trial counsel failed to adequately litigate the motion challenging the State’s statutory limits on indigent defender compensation. This claim is dismissed because Price cannot establish prejudice as a matter of law. The claim that Alabama’s old statutory scheme for compensation of indigent defender counsel violates the constitution lacks legal merit. Alabama’s appellate courts have repeatedly rejected this claim, which borders on the frivolous. *See, e.g., Ex parte Smith*, 698 So. 2d 219 (Ala. 1997); *Ex parte Grayson*, 479 So. 2d 76 (Ala. 1985); *Taylor v. State*, CR-97-2531, 2000 WL 127202 at *48 (Ala. Crim. App. Feb. 4, 2000); *Griffin v. State*, CR-97-1026, 1999 WL 1128995 (Ala. Crim. App. Dec. 10, 1999); *Bryant v. State*, CR-98-0023, 1999 WL 1046430 (Ala. Crim. App. Nov. 19, 1999); *Bui v. State*, 717 So. 2d 6 (Ala. Crim. App. 1998) (Rule 32); *Burgess v. State*, 723 So. 2d 742 (Ala. Crim. App. 1997).

Paragraphs 42-43 of the Rule 32 petition allege

ineffective assistance of counsel for failing to “adequately” litigate the motion for a change of venue. As noted by the Alabama Supreme Court in *Ex parte Hill*, 591 So. 2d 462, the Rule 32 trial court may dismiss or deny a petition based on facts over which the court has personal knowledge. The record here establishes the Court’s personal knowledge that a reliable result was achieved regarding the motion for a change of venue.

The voir dire of the jury—that is, the questions asked and the answers given—did not indicate the need for a change of venue. Had the responses of the jury venire indicated that a change of venue was warranted, the Court would have granted a change of venue, *sua sponte*.

The failure of Price to adequately plead this claim in accordance with the requirements of Rule 32 allows the Court to dismiss this allegation. A.R.Cr.P., 32.3, 32.6(b). For example, Price does not name one media outlet that “saturated” the local community. Furthermore, the dates of the alleged media saturation are not given in the Rule 32 petition. The passage of time, however, is a factor that cannot be ignored in considering whether jurors can bring objectivity into a trial following publicity surrounding a crime. *United States v. Lehder-Rivas*, 955 F.2d 1510, 1524 (11th Cir. 1992); *Owens v. State*, 531 So. 2d 2, 10 (Ala. Crim. App. 1989). The failure of the petitioner to assign a date to the alleged reports prevents him from carrying his burden of proof. A.R.Cr.P., 32.3.

The absence of specific dates and names of media outlets, however, is only a minor deficiency in the petition. Regardless of the dates and other missing factual allegations, the allegations put forth in these

paragraphs fail to state a material issue of law or fact. As the Alabama Court of Criminal Appeals has noted:

In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented.

Primm v. State, 475 So. 2d 1149, 1154 (Ala. Crim. App. 1985) (quoting, *Irvin v. Dowd*, 366 U.S. 717 (1961)). It is well-settled that widespread publicity is not sufficient to require a change of venue. *Mullins v. State*, 545 So. 2d 205 (Ala. Crim. App. 1989). Also, the jury does not have to be ignorant of the case, but:

The relevant question is not whether the community remembered the case, but whether the jurors at [the accused's] trial had such fixed opinions that they could not judge impartially the guilt of the defendant.

Fortenberry v. State, 545 So. 2d 129, 141 (Ala. Crim. App. 1988). Based on the law as set forth by the Court of Criminal Appeals, the Court concludes that Price's unsupported assertion that "the overall county had been saturated with accounts of the crime in the

media” is not dispositive in this collateral attack, and would not have been dispositive at Petitioner’s trial. See *McWhorter v. State*, 781 So. 2d 257, 299 (Ala. Crim. App. 1999) (citing, *Beddow v. State*, 96 So. 2d 175 (1956)) (“Newspaper articles, without more, are not evidence on a motion for change of venue; their effect must be shown.”).

There are no facts pleaded in this petition showing the effect of these “reports” on the jury. The record is made, all Petitioner had to do was go through the record of voir dire and make allegations concerning any jurors affected by pretrial publicity. The Court has read the record of voir dire, in addition to having sat through it during the original trial, and notes that no need for a change of venue can be demonstrated.

Generally, newspaper articles which objectively report the commission of a crime, do not carry inflammatory headlines, and do not - editorialize on the facts in a manner to inflame the community or create an atmosphere or prejudice are an insufficient basis on which to grant a motion for change of venue. *Gray v. State*, 319 So. 2d 750 (Ala. Crim. App. 1975). Instead, the defendant must prove to the satisfaction of the trial court that the community was so saturated by the publicity that the defendant cannot receive a fair trial. *Id.*

Because Price has failed to plead facts which would establish to a reasonable probability that a change of venue would have been granted had trial counsel litigated the motion as he now suggest it should have been done, this claim is dismissed. Furthermore, the Court has reviewed the transcript of voir dire and finds that the jury in this case did not have fixed opinions about this case warranting a change of venue.

c. The Allegation That Trial Counsel Did Not Object to Errors by the Prosecutors and the Court.

Paragraph 44 of the Rule 32 petition fails to set forth an independent claim for relief.

Paragraph 45 of the petition claims that “the jury was never instructed on the appropriate and limited function of attorney argument during the guilt phase of the trial? Price’s assertion is plainly and directly refuted by the record. The Court instructed the jury as follows:

...what [the attorneys] are about to say to you is not to be considered by you as being evidence in the case. The evidence will come later from the testimony of the witnesses that appear and from the various documentary evidence that may be presented...I would caution you at this time and at no time during the course of this trial things that the attorneys say to be considered by you as being evidence in the case.

(R. 370) Thus the underlying factual basis for paragraph 45, that the jury was never instructed on how to consider attorney argument, is without merit.

In addition, paragraph 45 fails to state an independent claim for relief. There are no specific acts or omissions by trial counsel targeted by Price. Thus, paragraph 45 is not considered as an independent claim for relief.

The prosecution argument referred to in paragraph 46 of Price’s Rule 32 petition was reviewed

by the Alabama Court of Criminal Appeals during the direct appeal of this case. That court characterized the State's argument as saying "that, a consideration of the facts and evidence presented by the prosecution should persuade the jury that a prima facie case had been presented to support a conviction? *Price*, 725 So. 2d at 1028. The Court of Criminal Appeals concluded its review by stating "In the present case, there is no error in this argument by the prosecutor, which concerned the strength of the State's case and implored the jurors to consider the acts and evidence presented." *Id.* At 1029. Because the Court of Criminal Appeals found no error in this comment, the Court finds, as a matter of law, that Price cannot establish deficient performance or prejudice based on his trial counsel's failure to object to these remarks. *Williams*, 783 So. 2d at 133 ("In implicitly rejecting the underlying substantive issue as failing to present any plain error, Rule 45A, Ala.R. App.P., the Alabama Supreme Court implicitly found that the alleged error did not or probably did not adversely affect the substantial right of Thomas. Thus, we must concur with the attorney general that Thomas's ineffective trial counsel argument fails because, by virtue of the Alabama Supreme Court's implicit ruling, Thomas cannot satisfy the prejudice prong of Strickland.").

The remarks referred to in paragraphs 47-49 of the petition were also reviewed by the Court of Criminal Appeals. After reviewing these comments, the Court of Criminal Appeals stated; "There was no impropriety by the prosecutor in making these comments because they were grounded in the evidence and were proper inferences from the evidence; moreover, the credibility of witnesses is proper subject matter for arguments to the jury." *Price*, 725 So. 2d at

1029. The court concluded by noting, “In the present case, there was no impropriety in the prosecutor commenting on an inference from the evidence that the witness’s statements were credible.” *Id.* at 1031. Based on this finding by the Court of Criminal Appeals, Price cannot establish prejudice.

The Court of Criminal Appeals also reviewed the remarks referred to in paragraphs 50-51 of the Rule 32 petition. The court found no error and did not agree with Price that the arguments were “inflammatory rhetoric.” *Price*, 725 So. 2d at 1031-1032. Because the court found no error, Price cannot establish prejudice under *Strickland*. In addition, the Court finds that a review of the prosecutor’s argument shows that the State did not engage in improper argument. Thus, Price cannot prevail. See *Card v. Dugger*, 911 F.2d 1494, 1520 (11th Cir. 1990) (“Counsel cannot be labeled ineffective for failing to raise issues which have no merit.”).

In paragraphs 52-53 of the petition, Price alleges IAC based on trial counsel’s failure to object to the State’s “consistent associat[ion of] the jury’s role with his own prosecutorial one.” (Price’s Pet. at 19) The Court of Criminal Appeals reviewed the claim that the State attempted to pull the jurors into a prosecutorial role and found no error in the State’s argument. *Price*, 725 So. 2d at 1032-1033. Thus, Price cannot establish prejudice under *Strickland*. See *Williams*, 783 So. 2d at 133. This claim is dismissed. A.R.Cr.P., 32.7(d).

In paragraphs 55-56 of the petition, Price claims IAC based on trial counsel’s failure to object to the manner in which Price’s statement was presented to the jury. Price cannot establish prejudice. The Court of Criminal Appeals has previously examined this type of

issue. That court found as follows:

Griffin further contends that the trial court erred when it “allowed the prosecution to present Griffin’s federal guilty plea as a role play.” (Issue XVII in Griffin’s brief to this Court at p. 116.) Essentially, he argues that the in-court presentation of the guilty plea with individuals in the courtroom reading different roles was improper.

There was nothing improper with the state, in addition to admitting the redacted plea allocution into evidence, also reading it aloud for the jury. See *Hyde v. State, supra*. Neither the record before us nor Griffin’s general assertions in his brief to this Court establish a sufficient basis for us to conclude that the trial court abused its discretion in allowing the “roleplay.” We cannot presume error based on a silent record and on the speculation of appellate counsel. *Pressley v. State, supra*; *Magwood v. State*, 689 So.2d 959 (Ala. Crim. App. 1996), cert. denied, 522 U.S. 836, 118 S.Ct. 108, 139 L.Ed.2d 61 (1997); *George v. State*, 717 So.2d 827, 834 (Ala. Crim. App.), rev’d on other grounds, 717 So.2d 844 (Ala. 1996), on remand, 717 So. 2d 849 (1997), affd, 717 So. 2d 858 (Ala. 1998), cert. denied, 525 U.S. 1024, 119 S.Ct. 556, 142 L.Ed.2d 462 (1998); *Arthur v. State, supra*; and *Gaddy v. State*, 698 So. 2d 1100 (Ala. Crim. App. 1995), affd, 698 So. 2d 1150 (Ala.), cert. denied, 522 U.S. 1032, 118 S.Ct. 634, 139 L.Ed.2d 613 (1997). In light of the broad discretion granted the trial court in determining the procedure and presentation of evidence in the courtroom, we conclude no error occurred here.

Griffin v. State, 790 So. 2d 267, 306 (Ala. Crim. App. 1999), rev'd on other grounds, 790 So. 2d 351 (Ala. 2000). Based on *Griffin*, this claim is summarily dismissed, as the Court finds that the State's manner of presenting the statement to the jury was permissible. A.R.Cr.P., 32.7(d).

In paragraphs 58 and 59 of the Rule 32 petition, Price alleges IAC based on trial counsel's failure to object to the Court's instructions on witness credibility. Although Price cites to specific pages of the record, a trial court's instructions to the jury must be considered as a whole and in context. As the Court of Criminal Appeals has noted, "When reviewing a trial court's jury instructions, we must view them as a whole, not in bits and pieces, and as a reasonable juror would have interpreted them." *Ingram v. State*, 779 So. 2d 1225 (Ala. Crim. App. 1999).

When the Court's jury instructions are read as a whole, it is clear that the instructions were not inaccurate, arid that the jury was well-informed of its function as the exclusive finders of fact and the sole judges of witness credibility. Thus, Price cannot prevail as to this claim. A.R.Cr.P., 32.7(d).

The Court's intent charge, the subject of paragraphs 61-63 of Price's Rule 32 petition, was reviewed by the Court of Criminal Appeals. That court found that there was no error in the trial court's charge on intent as it relates to accomplice liability for a capital offense or the offense of felony murder." *Price*, 725 So. 2d at 1018. Because the Court's instructions were not erroneous, as established by the Court of Criminal Appeals, Price cannot establish deficient performance or prejudice under *Strickland*. See *Williams*, 783 So. 2d at 133. Thus, this claim is

dismissed. A.R.Cr.P., 32.7(d).

d. The Allegation That Trial Counsel Did Not Request Needed Instructions From The Court.

The underlying factual basis for the IAC claim asserted in paragraph 64 of Price's petition is directly refuted by the record. This paragraph is rooted in the false argument that because trial counsel did not request jury instructions on the role of the jury, attorneys (including attorneys' statements), and the court, that the jury was not instructed on these issues. As noted twice, above, however, the Court gave the jury an instruction on the jury's use of attorney argument. (R. 370) (I would caution you at this time and at no time during the course of this trial things that the attorneys say to be considered by you as being evidence in the case.") In addition, the Court instructed the jury on the role of the court and the jury. The following excerpts from the record prove Price's claim lacks merit:

I told you at the outset that you would be the sole and exclusive judges of the facts of this case, that it would be up to you to look to the evidence with a view of determining what the true facts are. I'm not going to belabor it, but I do have to remind you of certain facts. You're the sole and exclusive judges of the facts. It's not my role in the case and it's not up to me to decide whether or not the State has proved the charges in this case. That's entirely up to you.

I have presided over the trial of the case to be

sure it's tried in an orderly fashion. I've ruled on legal issues that have come up in the case and I now instruct you as to the law in the case. Other than that, as required by my duties as a judge, I try to stay out of a case and not get involved in it any more than is required. And so, you should not at any time in this case try to glean from anything that I have said or done as to what I might think about the case. I am not entitled to have an opinion and I am not entitled to pass any opinion that I might have to a jury. Therefore, do not try to guess or conjecture with regard to what I might think about this case. That's quite irrelevant in this matter because you are the sole and exclusive judges of the facts.

(R. 864) Shortly thereafter, the Court instructed the jury that

I told you at the outset that you are the sole and exclusive judges of the evidence. You are likewise the exclusive judges of the weight of the evidence, its believability, its credibility, what weight you will accord to that evidence.

When you take your place in the jury box, you do not have to blindly accept anything and everything that comes before you. You have the right to weight the evidence and in weighing that evidence you have the right to consider anything which you in your everyday affairs would consider in passing on the truthfulness and the accuracy of statements made to you...You have the right to observe demeanor; that is, how they appear while they testify. Thus, you may consider whether they testified

frankly and straightforwardly or did they testify evasively. Were they testifying about facts which were within their knowledge or were they guessing.

(R. 866) The Court's charge, as a whole, clearly demonstrates that the charges Price now asserts should have been requested were, in fact, given. Thus, Price cannot establish prejudice in trial counsel's failure to request such instructions, because he was not prejudiced by that failure.

Further, Price cannot establish prejudice as to the claim in paragraph 65 of the petition because the Court of Criminal Appeals found that the Court's intent charge was correct, and not "repetitive, confused and overbroad" (Price's Pet. at 23, para. 65), as Price contends. Thus, this claim is dismissed. A.R.Cr.P., 32.7(d).

In paragraph 66 of the petition, Price alleges IAC based on trial counsel's failure to request the Court to instruct the jury that it could disregard Price's statement to the Chattanooga Police if the jury decided the statement had not been voluntarily provided. (Price's Pet. at 23) During the Court's charge to the jury, the following instruction was given:

...there has been some testimony with regard to statements alleged to have been made by the defendant. And with regard to any of those statements and the weight or credibility which you would give to such statements, you may consider all of the facts and circumstances which surround the taking of such a statement in deciding the weight or credibility which you would give to that statement, including the totality of the circumstances, both in the

statement itself and of the presentation of that statement before you through the evidence.

The weight and credibility to be given to any statements alleged to have been made by a defendant is for the consideration of the jury.

(R. 870) Thus Price suffered no prejudice because the jury was properly charged by the Court. Thus, this claim is dismissed. A.R.Cr.P., 32.7(d).

In addition, the Court finds that Price suffered no prejudice due to the fact that Micah Donaldson testified at the trial as to Price's inculpatory statements to him. These statements were given outside of police custody and were not the product of interrogation by the State. In the light of Donaldson's testimony, the Court finds that no reasonable probability exists that the outcome of the trial would have been different had trial counsel requested the precise instruction alluded to in paragraph 66. Thus, this claim is dismissed for failure to state a claim upon which relief may be granted. A.R.Cr.P., 32.7(d).

e. The Allegation That Trial Counsel Did Not Adequately Conduct Voir Dire, Nor Ensure That the Court Adequately Conducted Voir Dire of Potential Jurors.

This claim is dismissed pursuant to Rule 32.7(d). A review of the voir dire, as a whole, demonstrates that the information obtained from the jury venire was sufficient to insure that the defendant received a fair trial. That Price now asserts that additional questions should have been asked does not mean that trial counsel rendered ineffective assistance of counsel. Cf.,

Proffitt v. Wainwright, 685 F.2d 1227, 1250 (11th Cir. 1982) (Court notes that even if “we may in hindsight agree that the attorney’s performance was less than stellar, we cannot conclude that it fell below the standard of reasonably effective assistance?”); *Harmon v. Barton*, 894 F.2d 1268, 1275 (11th Cir. 1990) (“We recognize that even representation by the most competent lawyer is no guarantee that all colorable issues will be raised?”). The Court finds that even if additional questions could have been asked, this does not establish ineffective assistance of counsel.

Further, because the voir dire process is very unique, Price cannot establish ineffective assistance of counsel. Usually, different attorneys will handle the process in different ways. What one attorney finds desirable in voir dire another may find unnecessary. As the Fifth Circuit has noted:

The selection of a jury is inevitably a call upon experience and intuition. The trial lawyer must draw upon his own insights and empathetic abilities. Written records give us only shadows for measuring the quality of such efforts... the reality that the selection process is more an art than a science, and more about people than rules.

Romero v. Lynaugh, 884 F.2d 871, 878 (5th Cir. 1989) Cf., *Foster v. Dugger*, 823 F.2d 402, 408 (11th Cir. 1987). As a general matter, criticizing a lawyer for asking or not asking certain questions smacks of Monday morning lawyering and crosses the line into the second-guessing prohibited by the Eleventh Circuit. *Chandler*, 218 F.3d at 1314 (*En Banc*) (“We must avoid second-guessing counsel’s performance...”). As the Alabama Court of Criminal Appeals has noted, “Whether to

conduct voir dire on a particular subject is, in most instances, a strategic decision.” *Thomas v. State*, 766 So. 2d 860, 891 (Ala. Crim. App. 1998).

Price’s petition does not suggest a single, specific question that should have been asked by trial counsel. Thus, this claim is insufficiently specific. A.R.Cr.P., 32.6(b). Further, Price has not pleaded an allegation that any jurors who sat during Price’s trial possessed any of the biases alluded to in this claim. Thus, there is no actual claim of prejudice. This claim is dismissed, then, for failure to plead a claim that is meritorious on its face. A.R.Cr.P., 32.7(d).

Finally, Price cannot establish deficient performance. Under the *Strickland* test, as discussed in *Chandler*, Price must establish that “no competent attorney would have taken the action that his counsel did take.” *Chandler*, 218 F.3d at 1315 (*En Banc*). In another Eleventh Circuit case, however, the court approved of an attorney’s belief “that it was [not] necessarily appropriate to question [the jury] about their racial views because he felt that when a lawyer was preparing to try a case before a jury, “the less you rile a prospective juror, ... the better off you are going to be.” *Baldwin v. Johnson*, 152 F.3d 1304, 1316 (11th Cir. 1998). The Eleventh Circuit found that attorney rendered effective assistance of counsel in defense of his client. Thus, Price cannot establish deficient performance because a reasonable trial lawyer could have felt that unduly questioning jurors and placing them on the spot could have been detrimental to the defense. Further, under the facts of this case, a reasonable trial lawyer could have felt that law enforcement credibility was not likely to be a huge issue in the case, because Price made a very inculpatory statement to Micah Donaldson, outside of

police custody. This statement corroborated the statement given to police. In addition, Price's ability to lead the police to hidden evidence corroborated the statement and insulated law enforcement from attacks on credibility grounds.

The Court finds that when the voir dire is reviewed as a whole, it cannot be said that Price was prejudiced by any lack of voir dire in this case. Furthermore, Price cannot prove deficient performance, because he cannot establish that no competent attorney would have failed to go into the areas alluded to in this claim. Finally, because Price does not specifically refer to any particular questions that were not asked or specifically allege prejudice, this claim is deficiently pleaded. A.R.Cr.P. 32.6(d). The Court dismissed this claim pursuant to Rule 32.7(d).

f. The Allegation That Trial Counsel Did Not Preserve Her Objection to the Introduction of Tainted Physical Evidence.

This claim is dismissed for failure to state a claim upon which relief may be granted. The Alabama Supreme Court examined the issue of Price's statement to Alabama law enforcement authorities and found no plain error and no reversible error. *Ex parte Price*, 725 So. 2d 1063, 1068-1072 (Ala. 1998). Because admission of this statement did not constitute plain or reversible error, Price cannot establish prejudice based on the failure of trial counsel to challenge the statement and the admission of physical evidence discovered as a result of this statement. *Williams v. State*, 783 So. 2d 108, 133 (Ala. Crim. App. March 31, 2000) ("Because we determined that the remarks did not constitute plain error even if objectionable,

appellant cannot relitigate the issue under the guise of ineffective assistance of counsel in a post-conviction proceeding. A finding of no manifest injustice under the ‘plain error’ standard on a direct appeal serves to establish a finding of no prejudice under the test for ineffective assistance of counsel provided in *Strickland v. Washington*.”).

For this reason, the Court summarily dismisses this claim. A.R.Cr.P., 32.7(d).

g. The Allegation That Trial Counsel Did Not Litigate The Voluntariness of Price’s Statement to the Chattanooga Police at Trial.

In paragraph 74, Price makes the patently false claim that trial counsel did not litigate the voluntariness of Price’s statement to the Chattanooga Police Department. The record of Price’s trial, however, clearly establishes that a suppression hearing was held at which time Chattanooga Police Officer Michael D. Mathis was questioned concerning the circumstances surrounding Price’s statement to Tennessee authorities. (R. 19-33) At that time, the Court considered the *Miranda* and due process claims affecting the statement. Thus, trial counsel did litigate this issue. Thus, the underlying factual basis for this claim is erroneous.

This claim is due to be summarily dismissed. First, the Alabama Supreme Court found that the statement Price gave the Chattanooga Police was voluntary. *Price*, 725 So. 2d at 1074. Thus, Price cannot establish prejudice and this claim is properly dismissed without an evidentiary hearing. A.R.Cr.P., 32.7(d).

Furthermore, the-Court instructed the jury that:

...there has been some testimony with regard to statements alleged to have been made by the defendant. And with regard to any of those statements and the weight or credibility which you would give to such statements, you may consider all of the facts and circumstances which surround the taking of such a statement in deciding the weight or credibility which you would give to that statement, including the totality of the circumstances, both in the statement itself and of the presentation of that statement before you through the evidence.

The weight and credibility to be given to any statements alleged to have been made by a defendant is for the consideration of the jury.

(R. 870) Thus, Price's claim that this Court did not provide such a charge is plainly wrong. This fact undercuts Price's assertion of prejudice. This claim, then, is dismissed. A.R.Cr.P., 32.7(d).

3. The Allegation That Price Was Denied Effective Assistance of Counsel During His Direct Appeal.

In paragraphs 76-84 of the Rule 32 petition, Price alleges IAC based on the failure of appellate counsel to raise certain claims on direct appeal. This claim, however, is insufficient to warrant relief. In addressing a similar claim, the Eighth Circuit noted that:

Certainly previous appointed counsel might have chosen to press this issue on appeal, and such a choice would have been reasonable. It

does not follow that the opposite choice—to drop the issue—was unreasonable. Law is an art, not a science, and many questions that an attorney must decide are questions of judgment and degree. Among the most difficult are decisions as to what issues to press on appeal. Lawyers have often been told that it is not good strategy to argue on appeal every conceivable point contained in a record.

Simmons v. Lockhart, 915 F.2d 372, 375 (8th Cir. 1990). As the United States Supreme Court has noted:

Every trial presents a myriad of possible claims. Counsel might have overlooked or chosen to omit respondents' due process argument while pursuing other avenues of defense. We have long recognized, however, that the constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim.

Engle v. Isaac, 456 U.S. 107, 133-134 (1982). Because Price has asserted that more should have been done, the starting point for the Court's analysis must be what appellate counsel actually did. *See, Chandler*, 218 F.3d at 1320 (*En Banc*).

The State of Alabama attached Price's brief to the Alabama Court of Criminal Appeals as Exhibit A to the State's Motion to Dismiss. The State of Alabama attached Price's brief to the Alabama Supreme Court as Exhibit B of the motion to dismiss. A review of those documents establishes that appellate counsel did enough. *See, e.g., Atkins v. Singletary*, 965 F.2d 952, 959 (11th Cir. 1992) ("At some point, a trial lawyer has done enough."); *Chandler*, 218 F.3d at 1315 n.16

(Noting that so long as the course taken by counsel was reasonable, it is immaterial that other reasonable courses of action existed).

Furthermore, the claim in paragraph 77 of Price's petition—that appellate counsel did not raise as an issue the prosecutions argument “that the jury should convict Mr. Price because of the time and effort expended by law enforcement on the case” (Price's Pet at 27)—is flatly contradicted by pages 33-34 of the brief filed in the Alabama Court of Criminal Appeals. Because appellate counsel raised this precise issue, Price cannot establish deficient performance. Thus, this claim is properly dismissed. A.R.Cr.P., 32.7(d).

In paragraph 78, Price alleges IAC based on the failure to challenge, on appeal, the method employed by the State of Alabama in presenting Price's statement to the jury. As noted above, this claim poses no legal merit. *Griffin*, 790 So. 2d at 306, rev'd on other grounds, 790 So. 2d 351. Thus, appellate counsel cannot be found ineffective for failing to raise this issue. *Card*, 911 F.2d at 1520 (“Counsel cannot be labeled ineffective for failing to raise issues which have no merit.”). Furthermore, Price cannot establish prejudice.

As noted above, the consideration of Dr. Kirkland's report by the Court was beneficial to Price, as it was the basis for finding the existence of a mitigating factor. Price cannot establish prejudice as to this claim, because he cannot show that Dr. Kirkland's report adversely affected the outcome of his trial. Thus, appellate counsel could not be ineffective for failing to raise this claim.

Because the contention that death by electrocution is frivolous, as discussed-previously in this order, appellate counsel was not ineffective in

failing to raise this issue on appeal.

Because there was no evidence in the record to support a claim that Price's death sentence was imposed pursuant to a pattern of racial bias, appellate counsel was not ineffective in failing to raise this issue on appeal. *See, McCoy v. Lynaugh*, 874 F.2d 954, 965-966 (5th Cir. 1989) ("Strickland does not require appellate counsel to raise every conceivable issue in order to be effective, especially where appellate counsel must consider their credibility before the appellate court."). Raising claims such as these, without 'any supporting evidence, destroys one's credibility. Collateral counsel, in this case, would have been better off omitting this claim based on the complete lack of evidence supporting this assertion, and what it suggests about their motivations.

Not one of the issues Price now contends should have been raised on direct appeal constitutes grounds for finding a reasonable probability that, had they been pursued on appeal, the outcome of the direct appeal would have been different. Price acknowledges that such an appeal of these issues would have been under the "plain error" standard. The "plain error" standard exists on a sliding scale, so that the existence of overwhelming evidence will act as a bar to obtaining relief under "plain error" review. *See, e.g., Ivery v. State*, 686 So. 2d 495, 507 (Ala. Crim. App. 1996) ("Based upon the facts of this case-- notably, the overwhelming and unchallenged evidence regarding Ivery's use of the hatchet in concert with the hollow state of the record on this issue--we cannot say that this display, although improper, rises to the level of plain error."); *Bankhead v. State*, 585 So. 2d 97, 109 (Ala. Crim. App. 1989) ("In view of the overwhelming evidence in favor of a death sentence, when combined

with the brief and isolated nature of this remark, we do not find this remark sufficiently egregious to constitute plain error. Thus, no basis for reversal exists.”). Based on the overwhelming evidence of guilt in this case, “plain error” review of these issues does not create a reasonable probability that, had these issues been pursued on appeal, the outcome of Price’s appeal would have been different.

This claim is denied and dismissed. A.R.Cr.P., 32.7(d).

B. THE ALLEGATION THAT PRICE WAS DEPRIVED OF HIS RIGHTS UNDER STATE AND FEDERAL LAW BY THE IMPROPER CONDUCT OF MEMBERS OF THE JURY.

The Court finds that this claim is procedurally barred as it could have been but was not raised in a motion for a new trial or, thereafter, on direct appeal. A.R.Cr.P., 32.2(a)(3) and (5). The Court did nothing to prevent either side from interviewing the jurors following their service in this case. Indeed, the record contains information detailing where each juror could have been found by Price’s trial counsel. According to the Alabama Rules of Criminal Procedure, Price had 30 days following the pronouncement of sentence to interview jurors and include misconduct claims in a motion for a new trial. A.R.Cr.P., 24.1.

The State pleaded Rule 32.2(a)(3) and (5) as grounds of preclusion in its answer filed on June 22, 2000. Since this time, Price has not demonstrated by a preponderance of the evidence that this procedural ground does not exist. Thus, Price’s Claim B is procedurally barred. A.R.Cr.P., 32.2(a)(3) and (5). This claim is dismissed. A.R.Cr.P., 32.7(d).

C. THE ALLEGATION THAT THE STATE VIOLATED *BRADY V. MARYLAND* BY FAILING TO TURN OVER TO THE DEFENSE POTENTIALLY EXCULPATORY EVIDENCE AND INFORMATION.

This claim is due to be dismissed for lack of specificity. According to Rule 32.3, “The petitioner shall have the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief.” A.R.Cr.P., 32.3 (emphasis added). In addition, Rule 32.6(b) requires more than “bare allegations and “conclusions of law.” A.R.Cr.P., 32.6(b).

This claim does not specifically identify one piece of evidence allegedly suppressed by the State of Alabama. For this reason, the Court dismisses Claim C pursuant to Rule 32.7(d).

D. THE ALLEGATION THAT PROSECUTORIAL MISCONDUCT WAS IMPERMISSIBLY ALLOWED BY THE COURT.

The claim in paragraph 89 is denied as it could have been but was not raised at trial or on direct appeal. A.R.Cr.P., 32.2(a)(3) and (5).

The Claim in paragraph 90 is denied as it could have been but was not raised at trial. A.R.Cr.P., 32.2(a)(3). In addition, this claim is procedurally barred because it was raised and addressed on direct appeal. A.R.Cr.P., 32.2(a)(5).

The claim in paragraphs 91-94 is procedurally barred as it could have been but was not raised at trial or on direct appeal. A.R.Cr.P., 32.2(a)(3) and (5).

The sub-claims making up this claim are procedurally barred from review.”

E. THE ALLEGATION THAT THE ADMISSION OF DR. KIRKLAND'S REPORT INTO EVIDENCE WAS ERROR.

This claim is procedurally barred as it could have been but was not raised at trial or on direct appeal A.R.Cr.P., 32.2(a)(3) and (5).

G. THE ALLEGATION THAT DEATH BY ELECTROCUTION IS UNCONSTITUTIONAL BECAUSE IT IS A CRUEL AND UNUSUAL MEANS OF PUNISHMENT.

This claim is procedurally barred as it could have been but was not raised at trial or on direct appeal. A.R.Cr.P., 32.2(a)(3) and (5).

H. THE ALLEGATION THAT PRICE'S DEATH SENTENCE IS UNCONSTITUTIONAL BECAUSE IT WAS SOUGHT AND IMPOSED PURSUANT TO A PATTERN OF RACIAL BIAS IN THE IMPOSITION OF THE DEATH PENALTY.

This claim is procedurally barred as it could have been but was not raised at trial or on direct appeal. A.R.Cr.P., 32.2(a)(3) and (5).

Based on the foregoing findings of fact and conclusions of law, the Rule 32 petition in the above-

406a

styled cause is HEREBY SUMMARILYDISMISSED
and DENIED with prejudice.

DONE on this 1st day of April, 2002

Clatus K. Junkin,
Circuit Judge

APPENDIX F

**JUNE 20, 1997 OPINION OF THE ALABAMA
COURT OF CRIMINAL APPEALS**

Christopher Lee Price v. State, CR-92-0882

COURT OF CRIMINAL APPEALS OF ALABAMA

June 20, 1997, RELEASED

McMILLAN, JUDGE

The appellant was convicted of capital murder, see § 13A-5-40(a)(2), *Code of Alabama 1975*, for the intentional murder of Bill Lynn during a robbery in the first degree. He was also convicted of robbery in the first degree, a violation of § 13A-8-41, *Code of Alabama 1975*, for the robbery of Bessie Lynn, Bill Lynn's wife.¹ Following the guilt phase of the appellant's trial, a sentencing hearing was held before the jury. The jury returned an advisory verdict on the capital murder conviction recommending that he be put to death by electrocution. Thereafter, a separate sentencing hearing was held before the trial court, wherein the trial court initially sentenced the appellant to life

¹ Robbery in the first degree is not subject to review under the plain error rule, Rule 45A, Ala.R.App.P.; our review pursuant to the plain error rule will address only the conviction of capital murder for the killing of Bill Lynn.

imprisonment without parole² as to the robbery in the first degree conviction and to death by electrocution as to the capital murder conviction.

Through the testimony of Bessie Lynn and through the admission of a statement the appellant gave to authorities in Chattanooga, Tennessee, approximately one week after the offense, the State established evidence tending to show the following:

On the evening of December 22, 1991, Bill and Bessie Lynn returned to their home following a church service at the Natural Springs Church of Christ, where Bill Lynn had served as minister. The victims' home was located in the Bazemore community of north Fayette County. Bill Lynn had begun assembling Christmas toys for his grandchildren, while Bessie Lynn had dressed for bed and was upstairs in her bedroom watching television. The electricity suddenly failed and, because the security lights outside remained on, and because the electricity was still on in a neighbor's home, Bill Lynn told his wife to call the power company to report the outage. He then walked outside to check the power box. Bessie Lynn heard a noise outside and, upon looking out of her window, saw an individual in what she called a "karate stance," holding what appeared to be a sword in his right hand, high above his head in a striking position. Bessie Lynn testified that the individual was dressed completely in

² Although the trial court orally sentenced the appellant to life imprisonment as to the robbery conviction, the case action summary reflects that the trial court in fact sentenced the appellant to life imprisonment without parole as to this conviction.

black. Bill Lynn yelled for his wife to telephone the police, and upon discovering that the telephone lines had been cut, she hurried downstairs, where she picked up a candle and armed herself with a pistol that the Lynns kept in a kitchen drawer by a bank deposit bag. The bank deposit bag contained cash and checks received from an automobile parts business operated by Bill Lynn. Bessie Lynn testified that she then hurried outside and that when she did someone struck her and knocked her to the ground. She testified that she got up and fired a gunshot into the air and began calling for her husband. She found him in the yard and tried to give him the gun, telling him to shoot the people, but Bill Lynn, who had been severely wounded told her there were no bullets left in the gun. She then told her husband that she was going for help; he told her to give the culprits anything that they wanted. Bill Lynn had told his wife at that point that he knew he was going to die. Bessie Lynn, who was in their van and attempting to insert the key into the ignition, became aware of two men, one on each side of the van. They ordered her out of the van, and when she got out she was beaten with an object. One of the individuals was demanding money. They ordered her back into the house, where the two individuals, both dressed in black, demanded her money and jewelry. They took a rifle and shotgun from the house, the pistol that Bill Lynn still had, and the checks and cash from the bank deposit bag. They also ordered Bessie Lynn to give them her jewelry. She responded that she did not wear jewelry other than her two rings and asked if she might keep her wedding ring. She was instructed to take her rings off and to drop them in a bag, which they took. The culprits instructed Mrs. Lynn to remain where she was and they searched for something in the

kitchen and then outside the house. Bessie Lynn testified that when the two men came back in the house, a vehicle apparently drove by the house. The two men then went out of the back door, and Bessie Lynn testified that she then ran out the front door. She ran back to her husband to tell him that she was going to go for help. He asked her to hurry, and she ran to her father's house, which was located nearby. From her father's house she telephoned for help. Bill Lynn died before he reached the hospital. Bessie Lynn was treated for wounds to her head, her hands, her chest, and her thighs.

Several days later, the appellant was arrested in Chattanooga, Tennessee, where he had been visiting friends. He gave a statement to the authorities in Tennessee, admitting his participation in the offenses, but claiming that his accomplice had actually killed Bill Lynn and wounded Bessie Lynn. He subsequently gave another statement to Alabama authorities.

I.

The appellant argues that the trial court improperly failed to ask each prospective juror whether the juror had heard or was influenced by allegedly improper discussions that took place outside the courtroom during jury selection. The appellant argues that the trial court's failure violated his constitutional rights. The portion of the record containing a potential juror's testimony which alluded to the conversation, as well as the action taken by the court in response, is as follows:

“THE COURT: Do you [the prospective juror,] have any knowledge about the facts of this case?”

“PROSPECTIVE JUROR: No, sir.

“THE COURT: Do you not know anything at all about it? Have you heard or read or has anything been communicated to you about it?

“PROSPECTIVE JUROR: Pardon me, but I work an owl shift. My life is different from yours. I don't mean to be impolite. It's just --

“THE COURT: Well, I figured -- They talk on the owl shift?

“PROSPECTIVE JUROR: I didn't see it on the news. I'm sorry.

“THE COURT: Are you saying to the Court that you know absolutely nothing about this case?

“PROSPECTIVE JUROR: The only thing I heard was that he killed a man. That's all I've heard.

“THE COURT: That's somewhat important. Mr. S., do you feel that you would be able to sit and listen to the evidence as it comes from the witness stand and base your verdict solely upon the evidence that you hear in the courtroom and disregard any knowledge or information that you might have about the trial prior to this time and render a fair and impartial verdict both for the State of Alabama and the defendant?

“PROSPECTIVE JUROR: May I answer it this way? I believe in being honest. I'm an honest person. The United States Government -- I got a greetings letter that said that I was to join the Army. They didn't care whether I was killed or not. I hold no partiality in any way toward

anybody. I don't believe in stealing. If that answers your question, I'm trying to be nice.

“THE COURT: Well, it doesn't because I would have to unravel that and try to assume what your answer is. I would like for you to give me a yes or no answer. Would you sit as a member of the jury, if you were selected to do so, and listen to the evidence in this case, base your verdict solely upon that evidence and render a fair and impartial verdict in this case both for the State of Alabama and for the defendant?”

“PROSPECTIVE JUROR: I would.

“[DEFENSE COUNSEL]: Do you have a fixed opinion as to Mr. Price's guilt or innocence?”

“PROSPECTIVE JUROR: I don't even know Mr. Price. I'm sorry.

“[DEFENSE COUNSEL]: But you said that you heard something in the street that he had --

“PROSPECTIVE JUROR: I heard it right out here just a while ago, that he might have killed him with an axe is all I've heard. I'm being polite now.

“[DEFENSE COUNSEL]: [Prospective juror], where did you hear that?”

“PROSPECTIVE JUROR: Sitting out there in the courtroom.

“[DEFENSE COUNSEL]: Who did you hear it from?”

“PROSPECTIVE JUROR: I don't know. Just somebody said that -- I said -- My question was to a friend of mine. 'If it's a murder trial, who

killed him -- the gun, the bullet or the man?' He laughed and said, well, I guess it's an axe because I understood he was killed with an ax. That's all that was said.

"[DEFENSE COUNSEL]: Would that have been another juror that you were talking with?

"PROSPECTIVE JUROR: Yes. That's all that I'm sitting with.

"[DEFENSE COUNSEL]: Do you remember who that person was?

"PROSPECTIVE JUROR: I'm sorry. I don't

"[DEFENSE COUNSEL]: White man or black man?

"PROSPECTIVE JUROR: White man.

"[DEFENSE COUNSEL]: What did he have on?

"PROSPECTIVE JUROR: Had on britches and a shirt, I guess.

"[DEFENSE COUNSEL]: Any idea what his name was?

"PROSPECTIVE JUROR: No, ma'am.

"THE COURT: Is he still sitting out there?

"PROSPECTIVE JUROR: I don't know. There was about eight of us talking.

"[DEFENSE COUNSEL]: What else did you talk about?

"PROSPECTIVE JUROR: What else did we talk about?

"[DEFENSE COUNSEL]: Uh-huh.

“PROSPECTIVE JUROR: About we were worried about the judge. He came in to eat late out there. And I just kidded them and told them some of us ought to tell him that we had just a little while to get back to eat. I’m trying to be polite now.

“[DEFENSE COUNSEL]: [Prospective juror], did you and those other eight jurors that were sitting there talking discuss anything else about this case?

“PROSPECTIVE JUROR: Not that I know of. The only thing I’ve been doing is joking about whatever I was saying anyway. I mean --

“[DEFENSE COUNSEL]: Were there any other jokes made about anything to do with this case?

“PROSPECTIVE JUROR: Not that I know of.

“[DEFENSE COUNSEL]: But you and another juror did discuss what the murder weapon may be and someone told you it may be an ax; is that correct?

“PROSPECTIVE JUROR: Yes, ma’am.

“[DEFENSE COUNSEL]: And there were probably six other people who heard that?

“PROSPECTIVE JUROR: Oh, yeah. There was a bunch of them sitting around there.

“[DEFENSE COUNSEL]: Did they have any comment about what the weapon was?

“PROSPECTIVE JUROR: Huh-uh. No. I was running my mouth. I’m sorry.

“[DEFENSE COUNSEL]: Where do you work, [Prospective juror]?”

“PROSPECTIVE JUROR: P & M Mines in Berry.

“[DEFENSE COUNSEL]: That’s all I have, Your Honor.

“[PROSECUTOR]: [Prospective Juror], did you consider what was said to be serious?”

“PROSPECTIVE JUROR: No, sir.

“[PROSECUTOR]: Do you think at this point that the victim was killed with an ax? Do you believe that?”

“PROSPECTIVE JUROR: I’m sorry. I don’t even know how he was killed.

“[PROSECUTOR]: You just assume that because it’s a murder case, there had to be a murder weapon?”

“PROSPECTIVE JUROR: You usually don’t kill anybody without using some kind of weapon.

“[PROSECUTOR]: That’s the only basis of your comments or anybody else’s?”

“PROSPECTIVE JUROR: Yes, sir. I had nothing -- I don’t even know the man. I hadn’t got anything against the man.

“[PROSECUTOR]: All right. That’s all. Thank you.

“THE DEFENDANT: [Prospective juror], based on what you’ve heard here today in this court, do you think you could give me a fair trial in this case?”

“PROSPECTIVE JUROR: I feel -- I feel like a lot of things [don't] always come out. You don't really know what makes a man do what he does. Yes, I'll render my opinion by the evidence that's given. Do you understand what I'm saying?”

“THE DEFENDANT: Yes, sir.

“PROSPECTIVE JUROR: I'm saying that a lot of times things are not anywhere near like what they look like they are.

“THE DEFENDANT: But based on what you've heard, you think you could give me a fair trial in this situation?”

“PROSPECTIVE JUROR: Yes. I believe in being fair to everybody.

“THE DEFENDANT: Thank you, sir.

“... ”

“[DEFENSE COUNSEL]: I'm going to move for a mistrial, Your Honor, based on the fact that we've got a tainted jury pool if they're sitting out there discussing murder weapons after you have admonished them to discuss nothing about this case. I don't even know who the other people were. He's indicated there was a group of people.

“[PROSECUTOR]: I think he could identify who was there, Judge. He got to be evasive. He said it was a friend of his. Surely he knows his friend.

“[DEFENSE COUNSEL]: And then he indicated there were six to eight other people all sitting around. If they were participating in the

conversation, who else was still around them to hear that was not even participating?

“[PROSECUTOR]: Well, I think before the court would rule on that, he would need to inquire of any jurors that had heard any conversations. He’s assuming that other people heard it, but he doesn’t really know that.

“[DEFENSE COUNSEL]: He was pretty clear that they were all talking about it.

“[PROSECUTOR]: I didn’t think so.

“THE COURT: Well, as I say, I think the voir dire up to this point has been extensive. I think it has been fair. You’ve had the opportunity -- from the various jurors who have been in here, they have heard, whether they heard it today or this morning or the times past, some discussion of the case. It was that type of case. And I don’t think any possible remarks as he has presented [them] would be sufficient to taint a jury venire to the point of a mistrial. So I’ll deny your motion.

“[PROSECUTOR]: I might say this, Your Honor. We would agree that he could be removed at this point. He seems to have a penchant for kind of lecturing everybody that asks him a question.

“THE COURT: Well, I think it’s kind of obvious that if we didn’t want to ‘be nice,’ as he kept saying, that we could designate his personality in a very unfavorable light. I think he’s shown through real clear as to who and what he is.

“[DEFENSE COUNSEL]: I would have no problems with him being removed. I would except to your denial of a mistrial for the record.

“THE COURT: Would you let this man be removed?

“[DEFENSE COUNSEL]: In a New York second.

“(Off-the-record discussion.)

“[PROSECUTOR]: Would the Court instruct him that he’s to leave and not have any further contact with any other jurors?

“THE COURT: Ask him to come back in, please.

“(Prospective juror ... entered the law library.)

“THE COURT: [Prospective juror], you will be excused from further service on the jury. And we would ask you, please, to leave the courthouse and not communicate with anyone else.

“PROSPECTIVE JUROR: All right, sir.”

The prospective juror clearly informed the court that the conversation he had with the other prospective jurors was in jest. Moreover, the only subject matter concerned the possibility that the victim had been killed with an ax. In the present case, the evidence at trial was clear that a knife and a sword had been used either separately or together as the murder weapon or weapons. There was no issue raised concerning the murder weapon; thus, any initial speculation that an ax may have been the murder weapon could not have prejudiced the appellant.

In *Riddle v. State*, 661 So. 2d 274 (Ala.Cr.App. 1994), the bailiff had informed the trial court that a juror had told him that another juror had discussed the case with seven to eight people in the jury room. The juror who had conducted the discussion was identified and it was determined that the discussion occurred following voir dire but before the selection of the jury. The trial court questioned the juror concerning what she had reportedly said to the other potential jurors, i.e., that she had heard that the appellant had beaten his stepdaughter. The empaneled jurors and the remaining venire members were questioned by the trial court as to whether any of them had heard the facts of the case being discussed; however, before any responses could be made, defense counsel moved for a mistrial. Four venire members, who were not empaneled to sit on the jury, responded that they had heard the facts of the case being discussed; the trial court excused these venire members. Defense counsel thereafter renewed his motion for a mistrial, alleging that only four venire members had been identified while the bailiff had reported that six to seven people were involved in the conversation. The trial court again denied the motion for mistrial. This Court found that the trial court's denial was proper because the "damage was controlled" and the jury that ultimately sat on the appellant's case was not influenced by the comments. This Court, quoting *Holland v. State*, 588 So. 2d 543, 546, 548-49 (Ala.Crim.App. 1991), wrote:

"A motion for mistrial is addressed to the sound discretion of the trial court, and its ruling will not be reversed in the absence of a clear showing of abuse of discretion." *Ex parte Jefferson*, 473 So. 2d 1110, 1114 (Ala. 1985), cert. denied, 479 U.S. 922, 107 S. Ct. 328, 93 L. Ed. 2d

300 (1986). In cases involving juror misconduct, a trial court generally will not be held to have abused its discretion “where the trial court investigates the circumstances under which the remark was made, its substance, and determines that the rights of the appellant were not prejudiced by the remark.” *Bascom v. State*, 344 So. 2d 218, 222 (Ala.Cr.App. 1977). However, the trial judge has a duty to conduct a “reasonable investigation of irregularities claimed to have been committed” before he concludes that the rights of the accused have not been compromised. *Phillips v. State*, 462 So. 2d 981, 990 (Ala.Cr.App. 1984). His investigation should include a “painstaking and careful” inquiry into the alleged juror misconduct. *Lauderdale v. State*, 22 Ala. App. 52, 54, 112 So. 92, 93 (1927).

“....

“... When the trial judge acts promptly to investigate the circumstances surrounding the making of an inherently prejudicial remark by a venire member, determining specifically whether the remark was made and whether the remark had a prejudicial effect on those who, ultimately selected to serve as jurors, heard it, there is no error in the denial of a motion for mistrial based on jury contamination.

“....

“““The standard for determining whether juror misconduct requires a new trial is set forth in *Roan v. State*, 225 Ala. 428, 435, 143 So. 454, 460 (1932) [citing *Lauderdale* with approval].”=

“““The test of vitiating influence is not that it did influence a member of the jury to act without the evidence, but that it might have unlawfully influenced that juror and others with whom he deliberated, and might have unlawfully influenced the verdict rendered.”““ *Ex parte Lasley*, 505 So. 2d 1263, 1264 (Ala.1987).””

Riddle v. State, 661 So. 2d at 276. (material in brackets added in *Holland*) (emphasis added in *Lasley* omitted). See also *Burrell v. State*, 680 So. 2d 975, 979 (Ala.Crim.App. 1996) (juror’s undisclosed acquaintance with the appellant’s brother did not require a mistrial).

In the present case, the potential juror who had been privy to the conversation was removed for cause. Thereafter, defense counsel asked a number of potential jurors whether they had heard such a conversation taking place; however, none indicated that they had and defense counsel refrained from asking any other potential jurors whether they too had heard the conversation. Although a reversal may be mandated when juror misconduct “might have influenced the verdict,” which “casts a ‘light burden’ on the defendant,” *Ex parte Lasley*, 505 So. 2d 1263, 1264 (Ala. 1987), in the present case the appellant has not met even this burden. In *Riddle v. State*, 661 So. 2d at 276-77, this Court noted that, as in the present case, “the defense did not request individual voir dire of the empaneled jury. There is no indication in the record that individual voir dire was necessary.” *Id.*, citing *Brown v. State*, 571 So. 2d 345, 350-52 (Ala.Cr.App.), cert. quashed, 571 So. 2d 353 (Ala. 1990), vacated, 501 U.S. 1201 (1991). Thus, in the present case, where the potential jurors who were not struck for cause all indicated that they could eliminate the influence of any previous feelings and could render a verdict according

to the evidence, *Rowell v. State*, 570 So. 2d 848, 855 (Ala.Cr.App. 1990), and the subject matter of the conversation concerned an aspect of the case that was not contested by either party, the trial court's decision to deny the motion for a mistrial and his failure to *sua sponte* question the venire panel was not erroneous.

II.

The appellant argues that comments made by the prosecutor and the trial court allowed the jury to convict him of capital murder without finding that he intended to kill the victim, in violation of the state and federal Constitutions, as well as Alabama caselaw. Specifically, the appellant refers to portions of the trial court's charge wherein he explains the intent element of capital murder, the relationship between the intent element and accomplice liability, and the definition of "intent" as it applies to the lesser included offense of felony murder. The appellant seems to argue, not that the trial judge's charges were legally incorrect, but rather that distinguishing between the legal concepts would necessarily be confusing and misleading to a jury. The appellant alludes to a portion of the trial judge's charge where he discusses the element of intent in a case involving an accomplice to capital murder, stating,

"He has to have actually formed the intent to murder as opposed to being surprised by the act of some fellow actor in a robbery or other crime. ... It is not enough that he was merely a bystander who was surprised by the acts of another person or something of that nature." The appellant further argues that the confusion arises from the trial judge's subsequent charge to the jury on the lesser included offense of

felony murder, wherein he stated that “in a felony murder a person can be guilty of a felony murder even if they had no intent that anyone would be killed and that just to that individual’s total surprise another participant killed a person without their participation, without their intent, without their plan to do so, but they did plan to commit the underlying crime.”

The appellant argues that this confusion was finally compounded by the prosecutor’s closing argument to the jury that:

“He was in it up to his eyeballs from the very beginning to the very end. ... Under either theory of capital murder, either that Chris Price himself wielded this weapon which inflicted wounds on Bill Lynn and killed him, which we feel the evidence sustains, either that way, if you should decide in your deliberations under the judge’s charge that he merely was there and only intended to kill although he did not wield this weapon, there is still evidence to support that he knew what was going to happen, that he supported what was going to happen, and in no way was that any surprise to Chris Price of the outcome. Nothing surprised him.”

Although the appellant makes this argument on appeal, he never objected to any of the comments at the trial court level; therefore, his claim of error must rise to the level of plain error under Rule 45A, Ala.R.App.P. Although his failure to object previously does not preclude his raising this matter on appeal, it does weigh against a finding of prejudice. *Kuenzel v. State*, 577 So. 2d 474, 489 (Ala.Cr.App. 1990), *aff’d*, 577 So. 2d

531 (Ala.), cert. denied, 502 U.S. 886, 116 L. Ed. 2d 197, 112 S. Ct. 242 (1991).

The record indicates that the trial court charged the jury as follows:

“In order to be guilty of capital murder, the person on trial, whether that person physically committed the act which proved fatal or not, must have formed an intent in his mind to participate in the capital murder, the actual killing of that person, whether the person on trial physically committed the act or not or whether he merely stood by ready to take up the killing if necessary or to assist in the killing, which, in fact, was perpetrated by another. He has to have actually formed the intent to murder as opposed to being surprised by the act of some fellow actor in a robbery or other crime. That requires that an individual specifically have informed an intent to commit a murder, distinguishes capital murder from the other types of homicide, specifically felony murder.

“In this case the defendant is charged with capital murder. He is charged with participating in the death of Bill Lynn intentionally while engaged in robbery in the first degree. Whether or not he physically committed the act which proved to be fatal, he had to be a participant in the act of killing Bill Lynn either by intentionally killing himself or participating in the events with complicity by assisting or standing by to assist or encouraging or aiding or being a part in the actual, intentional murder of Bill Lynn. It is not enough that he was merely a

bystander who was surprised by the acts of another person or something of that nature.

“A person commits the crime of intentional murder if, with the intent to cause the death of another person, he causes the death of that person or yet another person. A person acts intentionally then when, with respect to a result or to conduct, his purpose is to cause that result or to engage in that conduct. So then when we speak of someone acting intentionally, we’re speaking of someone acting with respect to a result with a purpose to cause that result, what many of us in Alabama would say, that a person meant to do that which they did. If they meant to do it, if their purpose was to do it and they carried it out, then that’s the type of intent that we’re speaking of. So a person accused of an intentional homicide must intentionally, as opposed to negligently, accidentally, or recklessly cause the death of the deceased in order to invoke the capital statute.

“Now, in this case, as I say, if the defendant, during the commission of a robbery, intentionally killed Bill Lynn himself, then under the laws of the State of Alabama, he would be guilty of capital murder if he was engaged in committing robbery in the first degree.

“Now, the fact that someone died or is killed during the commission of a robbery does not automatically provide the intent in the instance of capital murder. The intent to kill must be real and specific in order to invoke the capital statute. In determining whether or not a person acted intentionally, of course, the jury has a

right to look at all of the facts and circumstances surrounding the death of the person who is now deceased with a view of determining how that individual met his or her death and what might have been the intention of anyone who inflicted the wound or wounds or participated in the acts which caused the death of that person.

“It is also a fundamental point in the state of Alabama that, when, by pre-arrangement or even on the spur of the moment, two or more persons intentionally determine to enter upon a common enterprise or adventure and a capital offense is contemplated in their mind, then if that purpose and collusion to kill is carried out, each would be guilty of the offense committed, whether that individual did any overt act or not. This rests upon the principle that anyone who, with the intent to participate in the intentional killing, is then present and encouraging, aiding, abetting or assisting the active perpetrator in the commission of that offense, is a guilty participant and in the eyes of the law is equally guilty as the one who actually did the physical act.

“This community of purpose or collusion in the killing need not be established by direct, positive testimony due to its inherent nature, but a jury must determine whether or not there has been such a collusion and intent on the part of the defendant and its extent, if any, from all of the evidence and the testimony in the case.

“Now, if a person actively participates in the robbery or intending to assist and encourage, aid, abet or in any way carry out or help

perpetrate an intentional murder during the commission of that robbery, then that individual would be guilty whether or not he personally committed the fatal act, but he could not be guilty of capital murder if he did not take some part in and form the intent to participate in the killing.”

(Underlined portions are those cited by the appellant.)

There was no error in the trial court’s charge on intent as it relates accomplice liability for a capital offense or for the offense of felony murder. These charges were clearly necessary to distinguish that element as it relates to the charged capital offense and the lesser included offense of felony murder. *Starks v. State*, 594 So. 2d 187, 193-94 (Ala.Cr.App. 1991) (the trial court failed to properly instruct the jury as to the intent element of capital murder, thereby failing to clearly distinguish that offense from the lesser included offense of felony murder). *Davis v. State*, 440 So. 2d 1191, 1194 (Ala.Cr.App. 1983), cert. denied, 465 U.S. 1080 (1984) (the trial court had properly charged the jury as to the intent necessary for capital murder, the felony murder doctrine, and as to the distinction between the intent required for a capital felony and that required for the lesser included offense of non-capital murder); *Womack v. State*, 435 So. 2d 754, 753 (Ala.Cr.App.), aff’d, 435 So. 2d 766 (Ala.), cert. denied, 464 U.S. 986, 78 L. Ed. 2d 367, 104 S. Ct. 436 (1983) (the trial court properly instructed the jury as to the “intent to kill requirement” by instructing the jury that the felony murder doctrine was relevant only as a lesser included offense of noncapital murder, and that the jury could not convict the defendant for capital murder without finding beyond a reasonable doubt that he had possessed the intent to kill). See also *Ex parte Brown*,

686 So. 2d 409 (Ala. 1996), cert. denied, ___ U.S. ___, 117 S. Ct. 1558 (1997).

This charge was also proper given the evidence presented at trial; the State's theory of the case was that the appellant and his accomplice committed the capital murder of Bill Lynn, while the appellant's theory of the case was that he merely intended to commit a robbery but never intended to, and never actually participated in, the murder of Bill Lynn. Moreover, it was permissible for the prosecutor to argue the State's theory of the case as supported by the evidence to the jury. The State had presented sufficient evidence to provide a foundation for the jury to consider the offense of capital murder. "[A] defendant is entitled to a charge on a lesser included offense if there is any reasonable theory from the evidence that would support the position." *Oliver*, 518 So. 2d 705, 706 (Ala. 1987). This is true regardless of 'however weak, insufficient, or doubtful in credibility' the evidence is concerning that offense. *Chavers v. State*, 361 So. 2d 1106, 1107 (Ala. 1978)." *Fletcher v. State*, 621 So. 2d 1010, 1019 (Ala.Cr.App. 1993). A trial court should also give a charge as to a lesser included offense even when "the evidence supporting the defendant's position is offered by the State." *Silvey v. State*, 485 So. 2d 790, 792 (Ala.Cr.App. 1986)." *Fletcher v. State, supra*, quoting *Starks v. State*, 594 So. 2d 187, 195 (Ala.Cr.App. 1991). Furthermore, the prosecution may properly argue to the jury its version of the facts and evidence that support the State's theory of the case. "When these comments are examined in light of the entire record, it is clear that the prosecutor's purpose in making these statements was to comment on evidence in this case and to draw legitimate inferences therefrom; specifically, to point out the

weaknesses in the appellant's theory of the case, as established by the appellant's testimony." *Gaddy v. State*, [CR-90-1429, May 26, 1995] ___ So. 2d ___, ___ (Ala.Cr.App. 1995), aff'd, [Ms. 1950925, Apr. 18, 1997 So. 2d ___ (Ala. 1997)]. Thus, there was no error as to this claim.

III.

The appellant alleges that the trial court erred in its instructions to the jury during the guilt phase of the trial concerning statements he made to the police, because, he says, the trial court failed to inform the jury that it could find the statement involuntary and, therefore, disregard it. The record indicates that the appellant failed to raise this issue at the trial court level; therefore, this claim must amount to plain error in order to be reviewable on appeal. Rule 45A, Ala.R.App.P.

The trial court's instructions to the jury concerning the statements made by the appellant, are as follows:

"Of course, there has been some testimony with regard to statements alleged to have been made by the defendant. And with regard to any of those statements and the weight or credibility that you would give to such statements, you may consider all of the facts and circumstances which surround the taking of such a statement in deciding the weight or credibility which you would give to that statement, including the totality of the circumstances, both in the statement itself and of the presentation of that statement before you through the evidence.

“The weight and credibility to be given to any statements alleged to have been made by a defendant is for the consideration of the jury.”

Despite the appellant’s contention that this charge was erroneous because it failed to inform the jurors of their duty to determine the voluntariness of the statements, the instructions properly informed the jury it was to consider any pertinent facts and circumstances in determining the weight and credibility to be given to the statements. The trial court’s instructions did not inform the jury that the court had already determined the voluntariness of the confession, see *Ex parte Singleton*, 465 So. 2d 443 (Ala. 1985), but rather explained to the jury that it was the trier of facts as to this evidence. See also *Bush v. State*, 523 So. 2d 538 (Ala.Cr.App. 1988). The trial court did not insinuate that the jury should accept the appellant’s statement as credible based on the trial court’s prior ruling that the statement was voluntary. See *Gaddy v. State*, ___ So. 2d at ___, ___ quoting *Jackson v. State*, 674 So. 2d 1318, ___ (Ala.Cr.App. 1993), aff’d as to conviction, reversed and remanded as to sentencing, 674 So. 2d 1365 (Ala. 1994). “Correctly stated, whether a confession was voluntary rests *initially* with the trial court; once the trial court makes the preliminary determination that the confession was voluntary, it then becomes admissible into evidence. Thereafter, the jury makes a determination of voluntariness as affecting the weight and credibility to be given the confession. *Lewis v. State*, 295 Ala. 350, 329 So. 2d 599 (1976).” *Jackson v. State*, supra, at ___, quoting *Ex parte Singleton*, 465 So. 2d at 446 (emphasis original).

In the present case, the trial court’s charge to the jury “did not misinform the jury of the law, did not

affect the appellant's substantial rights, did not constitute prejudicial error, and, therefore, did not rise to the level of plain error." *Gaddy v. State*, ___ So. 2d at ___ .

IV.

The appellant argues that the trial court's charge as to the State's burden of proof at both stages of trial violated the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the Alabama Constitution. Specifically, the appellant argues that during the guilt phase the trial court instructed the jury on the wrong standard, and that thereafter at the penalty phase the trial court compounded the error by referring again to the charge given during the guilt phase rather than giving a full charge on reasonable doubt.

The appellant argues that, during the penalty phase, one of the comments the trial court made concerning the reasonable doubt standard was "wholly improper." The record indicates that, following the trial court's charge to the jury during the guilt phase, defense counsel objected to the court's use of the phrase "to a moral certainty," on the basis that it violated *Cage v. Louisiana*, 498 U.S. 39, 112 L. Ed. 2d 339, 111 S. Ct. 328 (1990). The trial court thereafter gave curative instructions to the jury and polled the jurors. As to the trial court's charges to the jury concerning reasonable doubt, the appellant argues that, as the charges referred to the original definition and were phrased in an abbreviated fashion, the importance of that standard was diminished; furthermore, the appellant argues that this error was aggravated by the trial court's reference again during this charge to the phrase "to a moral certainty."

The record indicates that the trial court charged the jury that the State was required to prove the appellant's guilt beyond a reasonable doubt. He repeated this standard on a number of occasions in connection with various legal concepts, such as presumption of innocence, the charges contained in an indictment, and the defendant's basic rights. Thereafter, he defined the term "reasonable doubt" for the jury as follows:

"Now, all of us from the outset have continued to use the term 'reasonable doubt.' What is reasonable doubt or beyond reasonable doubt? First, a reasonable doubt is rather self-explanatory. It's a doubt for which a reason can be given.

"Beyond a reasonable doubt is such a simple term it does not always help to try to explain it any further. It's rather self-explanatory. However, it might help some to say that the doubt which would justify an acquittal must be a doubt which arises from the evidence or from a lack of evidence or from contradictory evidence, and it would be a doubt which remains after a careful consideration of all the evidence in the case. The doubt would justify an acquittal. The doubt which would justify an acquittal cannot be a mere fanciful or vague or conjectural or speculative, but it must be a reasonable doubt which comes from the evidence or comes from a lack of evidence.

"If, after considering all of the evidence in this case, you have an abiding conviction of the truth of the charge and you're convinced beyond a reasonable doubt, then it would be your duty to

convict the defendant. On the other hand, if, after reviewing all of the evidence, you do not have an abiding conviction of the truth beyond a reasonable doubt, then in that event you cannot convict the defendant.

“So you will observe, ladies and gentlemen, that the law does not require the State to prove a person guilty beyond all doubt, but simply beyond a reasonable doubt.

“Of course evidence which gives rise to a guess or conjecture or suspicion of guilt would be insufficient. The law simply does not allow a person to be guessed guilty or guessed not guilty. The law requires a jury to take the body of evidence and to study it and to scrutinize it and to impartially consider it and ask themselves the question: Did the State of Alabama by the evidence in this case prove the defendant guilty beyond a reasonable doubt? If they did, they’re entitled to a verdict of guilty, and if they did not, they should not have a verdict of guilty.”

Later in the trial court’s oral charge during the guilt phase, and just before the end of these charges, the trial court explained to the jury that it was not to consider any sentencing matter during those deliberations. The trial court stated as follows:

“Let me admonish you that at this time you must remember the question before you is this: Did the State by the evidence in this case prove beyond a reasonable doubt and *to a moral certainty* that the defendant in this case, Christopher Price, capitally murder, as I have defined that term to you, Bill Lynn? Yes or no.

Did the State prove that beyond a reasonable doubt.”

(Emphasis added.)

During the trial court’s oral charge to the jury at the sentencing phase, the trial court incorporated by reference the charges given to the jury earlier during the guilt phase on the reasonable doubt standard. The reference by the trial court to the phrase “to a moral certainty” was made during his charge in relation to the burden of proof of aggravating circumstances. The trial court charged the jury:

“In order to consider an aggravating circumstance, it is necessary that the jury unanimously agree upon its existence. All twelve jurors must be convinced beyond a reasonable doubt and to a moral certainty that an aggravating circumstance exists in order for you to consider that aggravating circumstance in determining what the sentence should be.”

The record further indicates that, following the charge to the jury at the guilt phase, the prosecutor approached the bench and an off-the-record discussion ensued. The trial court then gave curative instructions to the jury, following which defense counsel made a motion for a mistrial based on the trial court’s use of the phrase “to a moral certainty,” and the trial court individually polled the jurors as to whether they could disregard the initial definition of the term and follow the corrected instructions. Each juror replied that he or she could do so. No objection was made by the appellant or defense counsel to the use of the phrase “to a moral certainty” during the charge to the jury at the sentencing phrase.

The use of the term “moral certainty” alone in defining reasonable doubt did not create the error defined and discussed in *Cage v. Louisiana, supra*; rather, it was the use of this term in conjunction with other terms, such as “grave uncertainty” and “actual substantial doubt,” that served to lessen the burden of proof. Moreover, the rule of law expounded in *Cage v. Louisiana, supra*, has been subsequently analyzed by the United States Supreme Court in *Victor v. Nebraska*, 511 U.S. 1, 127 L. Ed. 2d 583, 114 S. Ct. 1239 (1994). This court discussed *Victor* in *Arthur v. State*, [Ms. CR-91-718, Mar. 8, 1997], ___ So. 2d ___, ___ (Ala.Crim.App. 1996):

“In *Cage v. Louisiana*, [498 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990)], the United States Supreme Court found that if the instruction equated “reasonable doubt” to “grave uncertainty,” and “actual substantial doubt” and stated that what was required was “moral certainty” a reasonable jury could interpret the instruction to allow a lesser degree of proof to convict than that required by the Due Process Clause. It was the use of all three phrases in conjunction with each other that the Supreme Court determined was unconstitutional in *Cage. Gaskins v. McKellar*, 500 U.S. 961, 111 S. Ct. 2277, 114 L. Ed. 2d 728 (1991).” *Sockwell v. State*, [Ms. CR-89-225, Dec. 30, 1993] ___ So. 2d ___, ___ (Ala.Cr.App. 1993). However, where some of the terminology found offensive in *Cage v. Louisiana, supra*, is used in a reasonable doubt instruction, reversible error does not automatically result. *Stewart v. State*, 601 So. 2d 491 (Ala.Cr.App. 1992), reversed in part and remanded on other grounds, [Ms. 1920509, Sept.

3, 1993] ___ So. 2d ___ (Ala. 1992); *Smith v. State*, 588 So. 2d 561, 562 (Ala.Cr.App. 1991); *Williams v. State*, 601 So. 2d 1062 (Ala.Cr.App. 1991), affirmed without opinion, [Ms. 1901682, Mar. 16, 1992].

“Following the decision in *Cage v. Louisiana*, *supra*, the United States Supreme Court re-examined the propriety of a jury instruction concerning the reasonable doubt standard in *Victor v. Nebraska*, 511 U.S. 1, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994).

“In *Victor v. Nebraska*, the Supreme Court accepted ... [the] premise that “moral certainty,” standing alone, might not be recognized by modern jurors as a synonym for “proof beyond a reasonable doubt.” ___ U.S. at ___, 114 S. Ct. at 1247. However, the Court determined that when the phrase “moral certainty” was used in conjunction with the other language explanatory of the standard of proof required to convict, it was not unconstitutional.

“The moral certainty language cannot be sequestered from its surroundings. In the *Cage* ... instruction, the jurors were simply told that they had to be morally certain of the defendant’s guilt; there was nothing else in the instruction to lend meaning to the phrase. Not so here. The jury ... was told that a reasonable doubt is “that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.” The instruction thus explicitly told

the jurors that their conclusion had to be based on the evidence in the case.’ “*Victor v. Nebraska*, ___ U.S. at ___, 114 S. Ct. at 1248 (emphasis in original) (citation omitted).” *Gaddy v. State*, ___ So. 2d ___.”

Arthur v. State, ___ So. 2d at ___.

Thus, the United States Supreme Court in *Victor v. Nebraska* held that the inclusion in a charge of the term “moral certainty” did not, without more, render a reasonable doubt instruction unconstitutional.

“The Court in *Victor* also stated, ‘The Constitution does not dictate that any particular form of words be used in advising the jury of the government’s burden of proof, so long as “taken as a whole, the instructions correctly conveyed the concept of reasonable doubt.” *Holland v. United States*, 348 U.S. 121, 140, 99 L. Ed. 150, 75 S. Ct. 127.’ ___ U.S. at ___, 114 S. Ct. at 1251. The Court thereby reviewed the jury instruction under attack in the context of the entire charge and held that the inclusion of the ‘moral certainty’ phrase did not render the instruction unconstitutional. 511 U.S. ___, 114 S. Ct. at 251.”

Williams v. State, [Ms. CR-92-0382, Aug. 23, 1996] ___ So. 2d ___ (Ala.Cr.App. 1996).

A review of the trial court’s entire charge in the present case reveals that the jury was properly instructed as to the reasonable doubt standard and as to the State’s burden of proof in establishing a prima facie case. These instructions “provided a sufficient context to lend meaning to the term ‘moral certainty’ by relating this phrase to a conclusion based only upon

a fair and impartial consideration of all of the evidence [, and] there is no reasonable likelihood that the jurors applied the instruction concerning reasonable doubt in an improper manner.” *Williams v. State*, supra, at _____. See also *Ex parte Slaton*, 680 So. 2d 909, 920-21 (Ala. 1996), cert. denied, ___ U.S. ___, 117 S. Ct. 742, 136 L. Ed. 2d 680 (1997) (the Alabama Supreme Court found no error in the appellant’s claim that the trial court’s reference to the term “moral certainty” during the guilt phase and then again subsequently during the sentencing phase constituted reversible error).

V.

The appellant argues that the trial court’s refusal to exclude three prospective jurors, as well as its exclusion of five other prospective jurors, all based on allegedly erroneous applications of *Witherspoon v. Illinois*, 391 U.S. 510, 20 L. Ed. 2d 776, 88 S. Ct. 1770 (1968), violated his constitutional rights to a fair trial, due process, and to a fair and impartial jury.

A.

The appellant first argues that a particular potential juror, who he claims indicated through her voir dire questioning that she would be unable to consider life without parole in determining sentencing, should have been excluded on a challenge for cause. However, a review of the record as to this juror’s statements on voir dire examination indicates that she stated that she could consider life imprisonment without parole, although her personal preference was toward the death penalty. This potential juror was questioned during voir dire as follows:

“THE COURT: The defendant in this case is charged with what is known as a capital offense.

This means that if, after a jury has been empaneled and held the evidence in this case, they return a verdict of guilty at a sentencing phase of the case, they would be called upon to then recommend to the Court one of two punishments, either life without parole or death. If you were a member of this jury and it reached that phase, would you be able to consider both of those options?

“PROSPECTIVE JUROR: I would consider it, but then I’d think about the death penalty because I think eye for an eye and [a] tooth for a tooth.

“THE COURT: You’re saying that you would consider life without parole, but that you would be inclined to assess the death penalty?

“PROSPECTIVE JUROR: (Nodding head.)

“THE COURT: Have you heard anything about the facts of this case? Do you have any knowledge about the case at all?

“PROSPECTIVE JUROR: No.

“THE COURT: Have you read about it, heard it on the news?

“PROSPECTIVE JUROR: Well, that’s the only thing I’ve heard.

“THE COURT: But you do have some general knowledge about the case?

“PROSPECTIVE JUROR: Uh-huh.

“THE COURT: If you were selected to sit as a member of the jury, would you be able to disregard what you now know and have heard

about the case and listen to the evidence as it comes from the witness stand and base your verdict solely upon the evidence that you hear here in the courtroom and the law that will be charged to you that applies to this case and render a fair and impartial verdict both for the State of Alabama and the defendant based solely upon the evidence?

“PROSPECTIVE JUROR: I think I would, but I’d still -- if it come down to that, I think that I would. You know, I’d probably go with the death rather than just the life because I mean it wouldn’t be anything to just life, you know, without parole.

“THE COURT: All right.

“[DEFENSE COUNSEL]: [Prospective juror], let me make sure I understand what you’re saying. If, upon conviction for a murder, specifically a murder during robbery, that you would feel the only appropriate punishment was the death penalty?

“PROSPECTIVE JUROR: No. I would consider, you know, all of the -- that y’all brought forth and all, but I would still keep that in mind.

“[DEFENSE COUNSEL]: The criteria would be that you would consider one or the other, but what I need to know is would you -- do you think that a conviction in a murder case by robbery, that the appropriate punishment would only be the death penalty?

“PROSPECTIVE JUROR: I still think that because he didn’t have to kill the man.

“[DEFENSE COUNSEL]: When you say an eye for an eye and a tooth for a tooth, you feel like you take a life, your life should be taken?”

“PROSPECTIVE JUROR: That’s what the Bible says.

“[DEFENSE COUNSEL]: That’s a strong religious conviction that you hold?”

“PROSPECTIVE JUROR: That’s what I’ve always been taught.

“[DEFENSE COUNSEL]: That is something that you would carry with you into the jury box if you were selected?”

“PROSPECTIVE JUROR: I don’t know that I would, but like I said, that is still in the back of my mind.

“[DEFENSE COUNSEL]: Okay. Thank you.

“... ”

“[PROSECUTOR]: [Prosecutor juror]?”

“PROSPECTIVE JUROR: Uh-huh.

“[PROSECUTOR]: ... If the judge says that you should consider both sentences in recommending what he should impose of a sentence, that you should consider a sentence of death or -- and also consider a sentence of life without parole and that would depend on what the circumstances were, could you do that?”

“PROSPECTIVE JUROR: Yeah.

“[DEFENSE COUNSEL]: But it’s your belief that an eye for an eye and a tooth for a tooth would shadow -- ”

“PROSPECTIVE JUROR: Well, I can still -- You know, I can still go along with the judge on everything that’s been brought out.

“[DEFENSE COUNSEL]: You could listen?

“PROSPECTIVE JUROR: Yeah.

“[DEFENSE COUNSEL]: But when it comes to a conviction, if you’re asked in the second phase to make a choice, to you the only appropriate punishment would be the death penalty. Is that what you’re saying?

“PROSPECTIVE JUROR: That’s what I believe.

“[DEFENSE COUNSEL]: Thank you.

“THE COURT: You may be excused.

“(Prospective juror ... exited the law library.)

“[DEFENSE COUNSEL]: I’d move to challenge [prospective juror] for cause, Your Honor, based on the fact that in her mind the only appropriate punishment for a murder conviction upon robbery would be the death penalty.

“[PROSECUTOR]: I think what the criteria is, judge, would she consider both and she said that she would.

“[DEFENSE COUNSEL]: She also said it would impair it; it would color how she viewed what you said.

“THE COURT: I think she says that she has a strong belief that in certain instances the death punishment is appropriate, but I think she in each instance always qualified it and said that

she would consider life without parole. So your challenge will be denied.

“[DEFENSE COUNSEL]: We except.”

This prospective juror merely indicated a personal preference and tendency toward imposing the death penalty in a capital murder conviction. Such a preference, where the potential juror indicates that he or she could nonetheless consider life imprisonment without parole is not improper and it does not indicate that the juror is biased.

“[A] venire member’s personal feelings as to the law are immaterial unless those feelings are so unyielding as to preclude the venire member from following the law as given in the court’s instructions. ‘A venire member who believes that the death penalty should automatically be imposed in every capital case should be excused.’ *Martin v. State*, 548 So. 2d 488, 491 (Ala.Cr.App. 1988), *aff’d*, 548 So. 2d 496 (Ala.), *cert. denied*, 493 950 (Ala. 1989). However, venire members who favor the death penalty should not be excused for cause where they indicate they can follow the court’s instructions. *Id.*”

Smith v. State, [Ms. CR-91-1733, Mar. 8, 1996] ___ So. 2d ___ (Ala.Cr. App. 1996), *aff’d*, [Ms. 1951688, Ap. 18, 1997] ___ So. 2d ___ (Ala 1997).

B.

In the course of arguing that this potential juror’s preference for the death penalty was so strong as to support a challenge for cause, the appellant also refers to two other potential jurors who also allegedly expressed an inability to consider the sentence of life

imprisonment without parole. One of these prospective jurors had been excused from the venire before the striking process and was not included in the strike list. However, that prospective juror's granddaughter was also a member of the venire and it is apparently the granddaughter to whom the appellant refers. This prospective juror was examined in combination with the other potential juror who the appellant complains also expressed an inability to consider life imprisonment without parole as a penalty and echoed her sentiments as to the punishment for capital murder. The appellant failed to challenge either of these prospective jurors for cause. See Rule 45A, Ala.R.App.P. Moreover, he entered no peremptory strike against one, and the other served on the jury as an alternate but did not take part in the jury's deliberations. Both jurors indicated that they would consider all the evidence and mitigating circumstances in determining which sentence would be the most appropriate in the present case. The appellant complains because one of the potential jurors, in response to one of his questions, indicated her preference for the death penalty and stated that, if that penalty was appropriate, she would automatically vote for that sentence. However, a review of the questioning in its entirety and her explanation of the manner in which she would consider the evidence reveals that she was not so biased in favor of the death penalty that she could not consider the sentence of life imprisonment without parole. See *Pierce v. State*, 576 So. 2d 236, 245-46 (Ala.Cr.App. 1990), cert. denied, 576 So. 2d 258 (Ala. 1991), remanded, 586 So. 2d 1005 (Ala.Cr.App. 1991), aff'd on return to remand, 612 So. 2d 514 (Ala.Cr.App.), aff'd, 612 So. 2d 514 (Ala.Cr.App.), aff'd 612 So. 2d 516 (Ala. 1992), cert.

denied, 510 U.S. 873, 114 S. Ct. 301 (1992) (prospective jurors who indicated on individual questioning that they would automatically vote for the death penalty were subsequently questioned and indicated that they could consider all the evidence presented at the sentencing hearing and follow the trial court's instructions; defense counsel's challenge for cause as to these jurors was properly denied). In the present case, a review of the entire questioning indicates that the failure of the trial court to remove these jurors *sua sponte* was not plain error.

C.

The appellant also argues that the trial court erred by granting five of the prosecutor's challenges for cause of prospective jurors, based on their views concerning the death penalty. One of these five potential jurors was challenged without exception, the removal of another was specifically objected to as the removal of a black potential juror, while the grounds for the objections to the challenges of the remaining three are unclear.

Three of the potential jurors indicated clearly that they would never return an advisory verdict of the death penalty and that they could not consider that option. Although the appellant argues that their removal was improper because, he says, they were never specifically asked whether they could obey their oath, notwithstanding their views on capital punishment, the record indicate that these potential jurors were fully informed of what their duties as jurors would be in considering all of the evidence, following the trial court's instructions, and arriving at an advisory verdict.

Another of these prospective jurors, during her questioning, gave one possibly equivocal response concerning whether she could look at both sentencing options; however, she subsequently reaffirmed her firm stand against the imposition of the death penalty.

The last of these prospective jurors was extensively questioned because, on follow-up questioning by defense counsel, he stated that the option of the death penalty “could pass through [his] mind.” Defense counsel then echoed the potential juror’s statement, acknowledging that he could then consider that option, to which the potential juror responded, “Yes.” The trial court then questioned the potential juror in order to clarify his responses and explain his duty to consider the death penalty. The potential juror then responded that he could never consider imposing or recommending the death penalty, but apparently he could consider only the abstract concept of the death penalty.

Each of these potential jurors was fully informed as to their perspective duties and questioned as to the effect the consideration of the imposition of the death penalty might have on their ability to serve as a fair juror. These five jurors explained that they could not, under any circumstance, consider the death penalty as a possible sentence and were properly excluded. *Witherspoon v. Illinois, supra*. In *Wainwright v. Witt*, 469 U.S. 412 (1985), the United States Supreme Court held that the determination of whether a prospective juror in a capital murder case is properly excluded based on the juror’s views concerning the death penalty involves a question of fact. Therefore, a proper review of this determination requires that we give great deference to the trial judge’s discretion, because the judge was present and

capable of observing the potential jurors and their responses.

“Last Term, in *Patton [v. Yount]*, 467 U.S. 1025, 81 L. Ed. 2d 847, 104 S. Ct. 2885 (1984)], we held that a trial judge’s finding that a particular venireman was not biased and therefore was properly seated was a finding of fact We noted that the question whether a venireman is biased has traditionally been determined through *voir dire* culminating in a finding by the trial judge concerning the venireman’s state of mind. We also noted that such a finding is based upon determinations of demeanor and credibility that are peculiarly within a trial judge’s province. Such determinations were entitled to deference even on direct review

“*Patton’s* holding applies equally well to a trial court’s determination that a prospective capital sentencing juror was properly excluded for cause. ...

“... The trial judge is of course applying some kind of legal standard to what he sees and hears, but his predominate function in determining juror bias involves credibility findings whose basis cannot be easily discerned from an appellate record. ...”

469 U.S. at 428-29. See also *Reynolds v. United States*, 98 U.S. 145, 156-57, 25 L. Ed. 244 (1879) (“The manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words. That is seen below, but cannot always be spread upon the record. Care should, therefore, be taken in the reviewing court not to reverse the ruling below upon such a question of fact, except in a clear case.”). See

also *Stewart v. State*, 405 So. 2d 402, 407-08 (Ala.Cr.App. 1981), overruled on other grounds, *Ex parte Cobb*, [Ms. 1941500, Aug. 2, 1996] ___ So. 2d ___ (Ala. 1996); *Nobis v. State*, 401 So. 2d 191, 198 (Ala.Cr.App. 1981), cert. denied, 401 So. 2d 204 (Ala., 1981).

In the present case, there is no indication that the trial court abused its discretion in determining that these potential jurors should properly be excused for cause based on their views concerning the imposition of the death penalty.

VI.

The appellant argues that the comments made to the jurors during a number of stages of the proceedings “repeatedly and systematically undermined” their sense of the importance of their determination concerning sentencing. Specifically, the appellant refers to the characterization of the jury’s determination at the penalty phase of his trial as a “recommendation,” which he argues was done without emphasizing that the trial court was required to consider this determination in imposing sentence. The appellant argues that these references by the trial court and prosecutor diminished the jury’s sense of responsibility in sentencing, in violation of *Caldwell v. Mississippi*, 472 U.S. 320, 86 L. Ed. 2d 231, 105 S. Ct. 2633 (1985). The record indicates that the appellant failed to object; therefore, this claim must be analyzed pursuant to the plain error rule. Rule 45A, Ala.R.App.P. Although an appellant’s failure to object in a case involving the death sentence does not preclude the matter’s consideration, it does weigh against his or her claim of prejudice. *Kuenzel v. State*, 577 So. 2d 474 (Ala.Cr.App. 1990), *aff’d*, 577 So. 2d 531

(Ala. 1991), cert. denied, 502 U.S. 886, 112 S. Ct. 242, 116 L. Ed. 2d 197 (1991).

“The condemnation in *Caldwell v. Mississippi*, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985), is that ‘it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant’s death rests elsewhere.’ 472 U.S. at 328-29, 105 S. Ct. at 2639. We fully support that principle, yet under Alabama law, the trial judge -- not the jury -- is the ‘sentencer.’ ‘We affirm the principle that, in Alabama, the “judge, and not the jury, is the final sentencing authority in criminal proceedings.” *Ex parte Hays*, 518 So. 2d 768, 774 (Ala. 1986); *Beck v. State*, 396 So. 2d [645] at 659 [(Ala. 1980)]; *Jacobs v. State*, 361 So. 2d 640, 644 (Ala. 1978), cert. denied, 439 U.S. 1122, 99 S. Ct. 1034, 59 L. Ed. 2d 83 (1979).’ *Ex parte Giles*, 632 So. 2d 577, 583 (Ala. 1993), cert. denied, 512 U.S. 1213, 114 S. Ct. 2694, 129 L. Ed. 2d 825 (1994). ‘The jury’s verdict whether to sentence a defendant to death or to life without parole is advisory only.’ *Bush v. State*, 431 So. 2d 555, 559 (Ala.Crim.App. 1982), aff’d, 431 So. 2d 563 (Ala. 1983), cert. denied, 464 U.S. 865, 104 S. Ct. 200, 78 L. Ed. 2d 175 (1983). See also *Sockwell v. State*, [Ms. CR-89-225, December 30, 1993] ___ So. 2d ___ (Ala.Cr.App. 1983). ‘We have previously held that the trial court does not diminish the jury’s role or commit error when it states during the jury charge in the penalty phase of a death case that the jury’s verdict is a recommendation or an ‘advisory

verdict.’ *White v. State*, 587 So. 2d 1218 (Ala.Cr.App. 1990), aff’d, 587 So. 2d 1236 (Ala. 1991), cert. denied, 502 U.S. 1076, 112 S. Ct. 979, 117 L. Ed. 2d 142 (1992).’ *Burton v. State*, 651 So. 2d 641 (Ala.Cr.App. 1993).”

Taylor v. State, 666 So. 2d 36, 50-51 (Ala.Cr.App. 1994). See also *Kuenzel v. State*, 577 So. 2d at 502 (when a trial court informs a jury that its verdict is advisory or a recommendation and that the trial court makes the final decision concerning sentencing, there is no automatic violation of *Caldwell v. Mississippi*).

A review of the comments by the trial court referring to the jury’s verdict as a recommendation, in light of the instructions and the trial, taken as a whole, as well as in the context in which they were made, indicates that there is “no reasonable possibility that the jury was misled, misinformed, or confused as to its critical role in sentencing under Alabama law.” *Taylor v. State*, 666 So. 2d at 51, citing *Martin v. State*, 548 So. 2d 488, 494 (Ala.Cr.App. 1988), aff’d, 548 So. 2d 496 (Ala.), cert. denied, 493 U.S. 970 (1989).

“Comments which accurately explain the respective functions of the Judge and the jury are permissible under *Caldwell* “as long as the significance of [the jury’s] recommendation is adequately stressed.” *Harich v. Wainwright*, 813 F.2d 1082, 110 (11th Cir. 1987). Here, neither the prosecutor nor the trial court misrepresented the effect of the jury’s sentencing recommendation. The cases of *Caldwell, supra. Mann v. Dugger*, 817 F.2d 1471 (11th Cir.), vacated, 828 F.2d 1498 (1987); *Adams v. Wainwright*, 804 F.2d 1526 (11th Cir. 1986), modified, *Adams v. Dugger*, 816 F.2d 1493

(11th Cir. 1987); and *Harich, supra*, each involved a situation where the prosecutor and the trial court misled the jury as to its critical role in sentencing under state law. In *Hooks v. State*, 534 So. 2d 329 (Ala.Cr.App. 1987), this Court reviewed the decisions of other jurisdictions which have confronted this issue and concluded: “The trial judge’s and the prosecutor’s remarks clearly defined the jury’s role in the sentencing scheme. Thus, the jury could not have been confused as to its responsibility in the sentencing process. The remarks made here were a correct statement of the law and did not tend to mislead or misinform the jury. Therefore, we conclude the remarks were not improper under *Caldwell, supra*.”

Martin v. State, supra, at 494.

In the present case, there was no impropriety in the trial court’s reference to the jury that its sentencing verdict was a recommendation.

VII.

The appellant argues that this case is due to be reversed because of the prosecutor’s alleged “pervasive misconduct” during his closing argument, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and in violation of Alabama law. Specifically, the appellant refers to a number of comments made by the prosecutor in his arguments to the jury during his closing and rebuttal arguments at the guilt phase, which the appellant argues individually and collectively denied him the right to a fair trial. The arguments cited by the appellant as improper will be addressed categorically; however, it should be noted that the

appellant failed to object at to any of these arguments. Rule 45A, Ala.R.App.P. While it does not preclude his right to present these issues on appeal, his failure to object at trial weighs against a finding of prejudice. *Kuenzel v. State, supra*.

A. Improper Exhortation to Convict

During his closing argument, the prosecutor made the following comments to the jury:

“Now, the Sheriff’s Department and the -- his people and the detectives in Chattanooga, the friends in Chattanooga, all these people have come here to testify. They have gathered all the evidence that they know about in this case. And we’ve done our best to trace it all the way through and bring it into the courtroom for your consideration. But, of course, the jury has the authority to decide this case, whether Chris Price is guilty or innocent. Whatever the police officers have done, whatever the detectives have done, whatever all these witnesses have done, whatever the laboratory people have done, is without any result unless the jury will seriously consider these facts and this evidence.”

The appellant argues that these comments served to pressure the jury to convict the appellant because of the prosecutor’s exhortations that all of the prosecution personnel had put a great deal of work into obtaining this conviction; thus, the inference to be drawn was that it was the jury’s duty to convict the appellant and that justice could be done only by returning a conviction. The appellant cites *Arthur v. State*, 575 So. 2d 1165, 1185 (Ala.Cr.App. 1990), cert. denied, 575 So. 2d 1191 (Ala. 1991), in support of his argument. However, this case is distinguishable from

Arthur. In *Arthur* the prosecutor erroneously argued to the jury that it could do its job only by convicting the appellant, “regardless of its duty to weigh the evidence and to follow the court’s instructions on the law.”³In the present case, however, the prosecutor clearly stated that the work done by the prosecution would be “without any result unless the jury will seriously consider the facts and this evidence.” Thus, the prosecutor did not argue that the jury should convict the appellant, despite the evidence and law. Rather, his argument was that, a consideration of the facts and evidence presented by the prosecution should persuade the jury that a prima facie case had been presented to support a conviction.

““Certainly the State’s attorney should be permitted to comment on the character of the evidence presented by the State and its strength. That certain evidence is uncontradicted tends to show its strength. Our statute does not abrogate the right of the State’s counsel to comment on legitimate inferences in this regard.”“ *Taylor v. State*, 279 Ala. 390, 391, 185 So. 2d 414, 415, (1966), quoting *Welch v.*

³ It should be noted that this language from *Arthur* was not the basis for reversal in that opinion, but was quoted to “draw [] attention to statements made by the prosecutor, which should be avoided. In finding these comments were inappropriate and improper, this court did not hold that they constituted reversible error. This Court continued, in dicta, to make mention of other possible and potential problems to be addressed on retrial.” *Arthur v. State*, 711 So. 2d 1031, 1073 (Ala.Cr.App. 1996).

State, 263 Ala. 57, 81 So. 2d 901 (1955). “A prosecutor has the latitude to comment on the fact that the State’s evidence is uncontradicted or has no been denied.” *Ex parte Williams*, 461 So. 2d 852, 853 (Ala. 1984), citing *Beecher v. State*, 294 Ala. 674, 320 So. 2d 727, 734 (1975).

In *Hunt v. State*, 659 So. 2d 933 (Ala.Cr.App. 1994), *aff’d*, 659 So. 2d 960 (Ala. 1995), cert. denied, ___ U.S. ___, 116 S. Ct. 215, 133 L. Ed. 2d 146 (1995), Hunt objected to a number of arguments made to the jury by the prosecutor, including one wherein the prosecutor stated that the State did not intend to ask the jury to convict the appellant on “flimsy evidence,” because the evidence presented was “overwhelming,” and that “at the conclusion of this trial that you will agree with the State of Alabama that the defendant is guilty of capital murder.” *Id.* at 940-41. Hunt also complained that the prosecutor argued to the jury that the evidence as to the defendant’s guilt was overwhelming and that Hunt’s guilt had been proven beyond a reasonable doubt, and stated that “if this isn’t capital murder, then there has never been capital murder in Walker County.” This Court found no error in the prosecutor’s arguments to the jury, stating:

““The rule on which the weight of authority is in agreement is that it is improper for the prosecuting attorney so as to express his personal opinion or belief in guilt of accused as to permit an inference by the jury that such opinion or belief is based on reasons or information outside the evidence, but that it is not improper for him to argue or to express his opinion that accused is guilty, where he states, or it is apparent, that such opinion, is based solely on the evidence.” 23A C.J.S. *Criminal*

Law § 1104, p. 194-95 (1961). See *Crenshaw v. State*, 153 Ala. 5, 7, 45 So. 631, 632 (1908) (prosecutor argued to the effect that the evidence showed a clear case); *Cranmore v. State*, 41 Ala. App. 276, 279, 129 So. 2d 121, 123 (1961) (prosecutor's statement, "I never did ask you to convict a man I believe to be innocent" found to be "a mere expression of opinion by the solicitor that the defendant was guilty, and ... not a cause for reversal"); *Handley v. State*, 214 Ala. 172, 175, 106 So. 692, 695 (1925) (argument, "She is a murderer; she is a murderer. She is not someone who has committed some of the lower offenses of homicide" did "not transcend the bounds of legitimate argument"); *Gardner v. State*, 17 Ala. App. 589, 590-91, 87 So. 885, 886, cert. denied, 205 Ala. 60, 87 So. 888 (1920) (prosecutor's argument that the defendant 'is a pickpocket' in prosecution for grand larceny 'was the expression of an opinion' by the prosecutor, 'and from the state's contention was supported by one phase of the evidence.' Presiding Judge Bricken dissented, arguing that 'it did not lie in the mouth of the solicitor to decide these vital questions'); *McColston v. State*, 20 Ala. App. 591, 593, 104 So. 347, 348-49 (1925) (prosecutor's argument, 'He is guilty of the crime of highway robbery,' should be refrained from but did not constitute error); *Dunn v. State*, 19 Ala. App. 576, 577, 99 So. 154, 155 (1924) (prosecutor's comment, 'I tell you that this defendant is guilty,' was merely an argument of the inference drawn by the solicitor and was not improper); *Griggs v. State*, 21 Ala. App. 530, 531, 109 So.611 (1926) (prosecutor

stated that from the evidence he believed the defendant was guilty, and that, if he did not believe the defendant was guilty, he would not ask the jury to convict him. Held: The opinion was based upon the evidence. ‘Where this is the case, such expression of opinion will not be sufficient upon which to predicate a reversal.’); *Tucker v. State*, 28 Ala. App. 492, 494, 188 So. 276, 277 (1939) (prosecutor’s statement, ‘I believe he [defendant] is guilty’ was a ‘mere expression of opinion by the solicitor’ and not improper remark); *Gilbert v. State*, 19 Ala. App. 104, 106-07, 95 So. 502, 504 (1923) (prosecutor’s closing argument, ‘He is guilty as hell itself under this testimony, and you know it’ though not approved was ‘but the mere expression of counsel made in argument’).” *Galloway v. State*, 484 So. 2d 1199, 1201 (Ala.Cr.App. 1986).”

Hunt v. State, supra, at 941-42.

In the present case, there is no error in this argument by the prosecutor, which concerned the strength of the State’s case and implored the jurors to consider the acts and evidence presented.

B. Vouching for a Witness’s Credibility

The appellant argues that the prosecutor improperly vouched for the credibility of State’s witness Micah Donaldson, the appellant’s friend in Chattanooga with whom he stayed following the offense and in whose home he was eventually apprehended. Donaldson testified that the appellant told him that he had murdered Bill Lynn and that he planned to deny having killed Lynn. The prosecutor, in his rebuttal argument at the guilt phase, commented on this evidence, stating:

“All right. What about some other evidence, testimony to identify who that person was? What was said from the witness stand? When you listen and look at the evidence that applies, you remember to take into account who has a self interest in this thing. Who is going to say something to cover themselves up? He told Micah Donaldson in Chattanooga, ‘I did it. It’s true.’ That’s the words he said. ‘It’s true. I did it.’ I killed the man. That’s exactly what I said. It wasn’t the police. Micah Donaldson, there wasn’t any reason in the world for him to lie about that, none. He has no interest in this whatsoever.”

The appellant argues that this error was further compounded by the prosecutor’s statement previously made in his closing argument at the guilt phase, which was as follows:

“The other statement that you have before you was an admission he made to his friend Micah Donaldson in Chattanooga. He had told Micah that he was the one really that did stab him. And of course that’s a true statement under the evidence. That’s the really true statement. He did this stabbing and he admitted to his friend. Not only that, but he told Micah Donaldson he was going to lie about it. That’s exactly what he did later to the detective about his part in this murder.”

There was no impropriety by the prosecutor in making these comments because they were grounded in the evidence and were proper inferences from the evidence; moreover, the credibility of witnesses is proper subject matter for arguments to the jury. In

Cross v. State, 536 So. 2d 155 (Ala.Cr.App. 1988), the district attorney, in closing argument to the jury, stated that the defendant's son had lied and that a deputy sheriff had told the truth, further commenting that the deputy sheriff had no reason to lie. This Court noted that the testimonies of defense witnesses and the deputy sheriff, who was a State's witness, were in conflict and were properly opened to comment during closing argument. This Court stated:

“The testimony was in evidence and the prosecutor could comment on this, since her comments were supported by the evidence. Moreover, the credibility of a witness is a legitimate subject of comment during closing arguments. In *Milton v. State*, 417 So. 2d 620 (Ala.Cr.App. 1982), the prosecution called the appellant's witness a ‘blatant liar’; we held that the prosecutor's argument or comment was within the scope and limit of argument, because the argument went to the credibility of the witness. 417 So. 2d at 623. In *Clark v. State*, 462 So. 2d 743, 747 (Ala.Cr.App. 1984), we held that when a party places a witness on the stand, he vouches for his credibility, but does not personally vouch for the witness. In the case at bar, the prosecutor was arguing to the jury as to the effect of the witness's testimony, but was not personally vouching for [the witness's] credibility.

“Therefore, the trial court did not err in allowing the prosecution to attack the credibility of the appellant's witness, nor did the prosecutor personally vouch for the credibility of the State's witness.”

536 So. 2d at 159-60. See also *Ex parte Rieber*, 663 So. 2d 999 (Ala. 1995), cert. denied, ___ U.S. ___, 116 S. Ct. 531, 133 L. Ed. 2d 437 (1995).

Similarly, in *DeBruce v. State*, 651 So. 2d 599 (Ala.Cr.App. 1993), aff'd, 651 So. 2d 624 (Ala. 1994), the prosecutor argued to the jury that a State's witness was telling the truth and that the robbery/murder occurred just as the witness had testified. The prosecutor further argued that a defense witness was not telling the truth, but had presented "a baldfaced lie." *Id.* at 610. This Court found no impropriety by the prosecutor's comments, stating:

"A distinction must be made between an argument by the prosecutor personally vouching for a witness, thereby bolstering the credibility of the witness, and an argument concerning the credibility of a witness based upon the testimony presented at trial. 'Prosecutors must avoid making personal guarantees as to the credibility of the state's witnesses.' *Ex parte Parker*, 610 So. 2d 1181 (Ala. 1992). See *Ex parte Waldrop*, 459 So. 2d 959, 961 (Ala. 1984), cert. denied, 471 U.S. 1030, 105 S. Ct. 2050, 85 L. Ed. 2d 323 (1985).

""Attempts to bolster a witness by vouching for his credibility are normally improper and error.'... The test for improper vouching is whether the jury could reasonably believe that the prosecutor was indicating a personal belief in the witness' credibility.... This test may be satisfied in two ways. First, the prosecution may place the prestige of the government behind the witness, by making explicit personal assurances of the witness' veracity.... Secondly, a prosecutor

may implicitly vouch for the witness' veracity by indicating that information not presented to the jury supports the testimony." *United States v. Sims*, 719 F.2d 375, 377 (11th Cir. 1983), cert. denied, 465 U.S. 1034, 104 S. Ct. 1304, 79 L. Ed. 2d 703 (1984).

"Here, the district attorney did not give any personal assurance of McCant's veracity and did not imply that he had information that had not been presented to the jury that supported McCant's testimony. 'The credibility of a witness is a legitimate subject of criticism and discussion.' *Flint v. State*, 370 So. 2d 332, 335 (Ala.Cr.App. 1979). Here, as in *Smith v. State*, 344 So. 2d 1239, 1242 (Ala.Cr.App.), cert. denied, 344 So. 2d 1243 (Ala. 1977), 'the prosecutor's remarks were grounded on some testimony given by the witness himself.' See also *Watson v. State*, 398 So. 2d 320, 328 (Ala.Cr.App. 1980), cert. denied, 398 So. 2d 332 (Ala.), cert. denied, 452 U.S. 941, 101 S. Ct. 3085, 69 L. Ed. 2d 955 (1981) (reference in closing argument to defendant as a 'bald face liar' was 'a hard blow but it was not foul')."

DeBruce v. State, 651 So. 2d at 610-611. See also *Hunt v. State*, *supra*, at 942-943.

In the present case, there was no impropriety in the prosecutor commenting on an inference from the evidence that the witness's statements were credible.

C. Injection of Prosecutor's Own Views

The appellant argues that the prosecutor wrongfully injected his own views into the jury's determination by making the following argument:

“I tell myself, you know, this is easy, you know, an easy case. You have an eyewitness. You have a confession. You have all this evidence. Billy Law and Butch and the sheriff and all of them found it exactly where he said it was, right out there, all of it. The pistol, Barry Corkeren went right to it. You know, locked case.”

However, this comment did not constitute plain error.

“The remark of the State’s attorney was no more than a comment that a certain phase of the State’s evidence was uncontradicted. Certainly, the State’s attorney should be permitted to comment on the character of the evidence presented by the State and its strength. That certain evidence is uncontradicted tends to show its strength. Our statute does not abrogate the right of the State’ counsel to comment on legitimate inferences in this regard.”

Welch v. State, 263 Ala. 57, 58, 81 So. 2d 901, 902 (1955), quoting *Littlefield v. State*, 36 Ala. App. 507, 512-13, 63 So. 2d 565, 570, cert. denied, 258 Ala. 532, 63 So. 2d 573 (1952). See also *Taylor v. State*, 279 Ala. 390, 185 So. 2d 414 (1966); *George v. State*, 54 Ala. App. 90, 92, 304 So. 2d 908 (1974).

The prosecutor had a right to comment on the strength of the evidence the State had presented and to draw any reasonable inferences from it. There was no impropriety in these comments.

D. Inflammatory Arguments

The appellant argues that the prosecutor made several statements that had a basis in emotions rather

than in facts or inferences taken from the evidence and that, therefore, affected the reliability of the jury's verdict. The appellant cites the following argument made by the prosecutor to the jury.

“You know what's hard about this case? It's to make y'all realize that this really happened. This ain't a T.V. show. This is not a book. It's not a movie. Bazemore, not New York City. Ten or so miles, as the crow flies, from here. It happened. That's why we show you these pictures, not to shock you or anything like that, but to let you know this happened. It's real. I got to make you face the horror of this thing to realize what happened. That's the hardest part.”

However, a review of the evidence presented at trial concerning the facts and circumstances of the present offenses indicates that the prosecutor was drawing reasonable inferences from the evidence by calling what transpired a “horror.”

“The prosecutor's comment was a reasonable inference from the evidence. “The test of a legitimate argument is that whatever is based on facts in evidence is within the scope of proper comment and argument to the jury.” *Ward v. State*, 440 So. 2d 1227, 1230 (Ala.Cr.App. 1983). “Counsel for both the State and [the] defendant are allowed wide latitude in drawing reasonable inferences from the evidence in their closing arguments. A prosecutor as well as defense counsel has a right to present [her] impression from the evidence, if reasonable, and may argue every legitimate inference.” *Manigan v. State*, 402 So. 2d 1063, 1072 (Ala.Cr.App.), citations omitted, cert. denied, 402 So. 2d 1072 (Ala. 1981).

“A prosecutor may express her opinion concerning reasonable inferences, deductions, and conclusions to be drawn from the facts and evidence, as long as she does not express an opinion as to the defendant’s guilt. *Sams v. State*, 506 So. 2d 1027, 1029 (Ala.Cr.App. 1986).” *Cross v. State*, 536 So. 2d 155, 160 (Ala.Cr.App. 1988).”

Wilkerson v. State, 686 So. 2d 1266 (Ala.Cr.App. 1996), quoting *Wright v. State*, 641 So. 2d 1274, 1282 (Ala.Cr.App. 1993). See also *Arthur v. State*, *supra* (prosecutor’s comment that the appellant had a “big ego” and was a manipulator of people was a reasonable inference from the facts in evidence;) *Taylor v. State*, 666 So. 2d 36, 65 (Ala.Cr.App. 1994) (prosecutor’s characterizations of the crime as a “massacre” and the crime scene as a “slaughterhouse” were not improper under the facts of the case).

E. Prosecutor’s Attempt to Pull the Jurors into a Prosecutorial Role

The appellant argues that the prosecutor sought to make the jurors identify with the State’s position by using the term “we” to refer to both the prosecution and the jury as a single group, as well as by certain other of his comments. The appellant refers to the following portion of the prosecutor’s closing argument to the jury during the guilt phase:

“I told you at the outset that you would be the sole and exclusive judges of the facts of this case, that it would be up to you to look to the evidence with a view of determining what the true facts are. I’m not going to belabor it, but I do have to remind you of certain facts. You’re the sole and exclusive judges of the facts. It’s

not my role in the case and it's not up to me to decide whether or not the State has proved the charges in this case. That's entirely up to you.

“Now, what is this evidence that's been before you? First, various witnesses have testified. Some of them were lay witnesses; that is, they are just people who come in and testify about the things that they have seen, heard, felt and so forth. Then there are some that we will call expert witnesses. An expert is simply one who, because of their education, training or experience, has attained some skill or knowledge or experience of some science, profession, business or occupation which is not of common knowledge to the average lay person.

“Now, whether a witness is an expert or whether a witness is a lay witness, if a witness, during the trial of the case, during the time they are testifying up here sitting on the stand if they testify and during their testimony they express an opinion, draw a conclusion, the jury is not required to accept the conclusions or expressed opinions of those witnesses, but rather, the jury must determine for yourselves the weight to be given to that testimony and evidence when considered in connection with all of the evidence in the case.

“I told you at the outset that you are the sole and exclusive judges of the evidence. You are likewise the exclusive judges of the weight of the evidence, its believability, its credibility, what weight you will accord to that evidence

“When you take your place in the jury box, you do not have to blindly accept anything and

everything that comes before you. You have the right to weigh the evidence and in weighing that evidence you have the right to consider anything which you in your everyday affairs would consider in passing upon the truthfulness and the accuracy of statements made to you. For instance, when witnesses testify before you, those witnesses present themselves in front of you. You have the right to observe their demeanor; that is, how they appear while they testify. Thus, you may consider whether they testified frankly and straightforwardly or did they testify evasively. Were they testifying about facts which were within their knowledge or were they guessing.

“You may consider those things which you in your every-day affairs would consider in passing upon the accuracy of statement made to you. You also have the right to consider any item of impeachment that is against the witness; for instance, whether or not a witness might be biased, if a witness is sympathetic to one side or prejudiced against another side, if they are connected with a party in the case, if they are kin to someone, if they’re friends with someone or if they’re enemies of someone. You as a jury have right to consider those types of things in passing upon the witness’ testimony because in that instance it would be human nature that they might be more favorable to one side or prejudiced against the other side, if there is evidence of ill feelings or friendship or kinship, or if they’re connected by their stations in life or something of that nature.

“Any connection that they might have to one side or the other can be considered in determining whether or not the witness might be biased in favor of one side or against the other side.

“You should attempt in every way that you can to reconcile all of the testimony in this case so that, if possible, to make all the witnesses speak the truth. But if you cannot do that and you find that the evidence is in conflict on material points, then it’s up to you to decide what are the true facts. In other words, you must weigh the evidence and decide what is believable and what is not believable, but in passing upon the evidence, you cannot capriciously disregard the testimony of a single witness. You should look at all of the evidence in the case with a view of determining what the true facts are and then make your decision from the evidence. If you find that some of the evidence is unworthy of belief, then you have the right not to consider that evidence, but you first start out with all of the evidence with a view of determining what the true facts are and then sort through out, always remembering that your job is to determine the truth.”

There is no impropriety in a prosecutor’s appeal to the jury for justice and to properly perform its duty. “We view the comments as a call for justice, not sympathy, and, thus, conclude that they are within the latitude allowed prosecutors in their exhortation to the jury to discharge its duty.’ *Ex parte Waldrop*, 459 So. 2d 959 (Ala. 1984), cert. denied, 471 U.S. 1030, 85 L. Ed. 2d 323, 105 S. Ct. 2050 (1985); *Rutledge v. State*.”

Gentry v. State, 689 So. 2d 894, 906 (Ala.Cr.App. 1994), reversed on other grounds, 689 So. 2d 916 (Ala. 1996).

“The fact that an argument has emotional overtones does not independently indict it as improper, and the propriety of argument rests primarily in the relation of its content to issues relevant to the sentencing jury’s concern. *Brooks v. Kemp*, [762 F.2d 1383 (11th Cir. 1985), cert. denied, 478 U.S. 1022, 92 L. Ed. 2d 742, 106 S. Ct. 3337 (1986)]. We view the above arguments as being a general appeal for law enforcement and justice, and an appeal to the jury to discharge its duties in such a manner as to punish for the commission of crime and to deter others from committing like offenses. *Ex parte Waldrop*, [459 So. 2d 959 (Ala. 1984)]. The arguments were directed to a relevant sentencing concern of the jury, they were not delivered in an excessive and intolerable manner, and they did not divert the jury’s attention from its proper function. *Brooks v. Kemp*.”

Rutledge v. State, 523 So. 2d 1087, 1101 (Ala.Cr.App. 1987), reversed on other grounds, 523 So. 2d 1118 (Ala. 1988). There was no impropriety by the prosecutor in his appeal to the jury for justice, even if this appeal had emotional overtones.

F. Improper Allusion to Suffering of Victim’s Family

The appellant argues that the prosecutor, in his rebuttal argument, improperly commented on the suffering of Bill Lynn’s family members, specifically, his grandson. The record indicates that as a final comment of his rebuttal argument, the prosecutor

posed the rhetorical question, “Who finished putting that tricycle together?” The appellant argues that this comment heightened the risk that the jury would render a biased, passion-driven, and unreliable verdict. The appellant argues that by drawing attention to the suffering the victim’s family members, the prosecutor may have caused the jury to impose the death penalty based on irrelevant and prejudicial references.

The record indicates that this comment was made by the prosecutor in his rebuttal argument at the close of the guilt phase, rather than at sentencing. However, a review of the entire argument indicates that this comment was based on the facts in evidence as to what occurred on the night of the offense, and referred only to the loss of the victim and the importance of this case to his family. In *Slaton v. State*, *supra*, the defendant challenged similar comments by the district attorney made at the opening and closing of the guilt phase, arguing that *Booth v. Maryland*, 482 U.S. 496, 96 L. Ed. 2d 440, 107 S. Ct. 2529 (1987), and *South Carolina v. Gathers*, 490 U.S. 805, 104 L. Ed. 2d 876, 109 S. Ct. 2207 (1989), still applied to such comments made during the guilt phase, because they were irrelevant and highly prejudicial. However, this Court found no error in those comments, stating that they “merely thanked the jury for its service on behalf of the family, and pointed out the importance of this case to the family. This Court has held that there is nothing wrong with introducing family members to the jury, nor is it reversible error when the prosecutor briefly suggests that he is speaking on behalf of the victim’s family.” *Slaton v. State*, 680 So. 2d at ___, citing *Henderson v. State*, 583 So. 2d 276, 286 (Ala.Cr.App. 1990), affirmed, 583 So. 2d 305 (Ala.1991),

cert. denied, 503 U.S. 908, 112 S. Ct. 1268, 117 L. Ed. 2d 496 (1992).

Moreover, these comments, which were made during the guilt phase did not result in error as to sentencing. In *Payne v. Tennessee*, 501 U.S. 808, 115 L. Ed. 2d 720, 111 S. Ct. 2597 (1991), the United States Supreme Court determined that victim impact evidence was admissible for consideration by the jury during the sentencing phase of a capital case. “[A] prosecutor may present and argue evidence relating to the victim and the impact of the victim’s death on the victim’s family in the penalty phase of a capital trial.” *McNair v. State*, 653 So. 2d 320, 331 (Ala.Cr.App. 1992). The United States Supreme Court’s holding in *Payne v. Tennessee*, “was based in large measure on the premise that this type of evidence related to the harm done by the defendant and, consequently, was a valid consideration in determining punishment to be imposed.” *Id.* Moreover, “even before *Payne*, this Court had indicated that ‘*Booth* and *Gathers* pertain *only* to evidence or argument presented at the sentence phase of a capital trial... and have no bearing on ... remarks [made at the guilt phase].” 653 So. 2d at 331, quoting *Henderson v. State*, 583 So. 2d 276, 287 (Ala.Cr.App. 1990), affirmed, 583 So. 2d 305 (Ala. 1991), cert. denied, 503 U.S. 908, 117 L. Ed. 2d 496, 112 S. Ct. 1268 (1992) (emphasis added); *Pierce v. State*, 576 So. 2d 236, 251 (Ala.Cr.App. 1990), cert. denied, 576 So. 2d 258 (Ala. 1991); *Williams v. State*, 601 So. 2d 1062 (Ala.Cr.App. 1991), aff’d, 662 So. 2d 929 (Ala., 1992), cert. denied, 506 U.S. 957, 121 L. Ed. 2d 340, 113 S. Ct. 417 (1992).

In the present case, the evidence to which the prosecutor alluded -- the fact that the victim was in the course of assembling a tricycle for his grandson when

he was killed -- was part of the *res gestae* of the offense. The facts in evidence established that these were the victim's actions immediately prior to the fatal attack upon him.

“The District Attorney's argument in this case, though flamboyant, did not venture outside the circumstances of the offense to inflame the jury with irrelevant emotional considerations. At worst, it over-dramatized a *relevant* piece of evidence whose emotional content was already obvious and whose capacity to elicit an emotional response could not have been eliminated from the case.”

McNair v. State, supra, at 336.

VIII.

The appellant argues that the trial court misapplied the capital sentencing scheme and thereby deprived him of his rights to due process and to a reliable sentencing determination. Specifically, the appellant argues that the trial court's failure to find the “relatively minor participation” statutory mitigating circumstance and his finding of the especially “heinous, atrocious, or cruel” aggravating circumstance resulted from a misinterpretation of the facts in evidence and a misapplication of the relevant legal standards.

A.

The appellant argues that the trial court improperly found the existence of the aggravating circumstance that the offense was “especially heinous, atrocious, or cruel” when compared to other capital offenses because, he says, the evidence did not support this finding. He argues that the evidence indicated that the attack on Bill Lynn was over a relatively short

period of time and did not involve any physical or psychological torture. He further argues that it did not affect any “especially vulnerable persons such as children or the infirmed.” Thus, the appellant argues that this murder against “a single, adult male individual” did not meet the standard required to distinguish this case from the general capital murder case, citing *Godfrey v. Georgia*, 446 U.S. 420, 433, 64 L. Ed. 2d 398, 100 S. Ct. 1759 (1980).

However, a review of the record clearly indicates that the victim suffered horrible physical and psychological torture. The autopsy indicated that he suffered a total of 39 cuts, lacerations, and stab wounds, indicating that he was repeatedly stabbed and cut with a knife and/or sword. Moreover, the victim survived the initial attack and was able to converse with his spouse, telling her that he knew he was going to die. He also apparently witnessed the attack on her or the results of that attack. Moreover, the dramatic staging of the offense, by cutting the telephone lines and the electrical wires and dressing in black, hooded clothing, added to the atmosphere of this murder. This evidence clearly established that the present offense was “especially heinous, atrocious, or cruel.” *Bankhead v. State*, 585 So. 2d 97, 111 (Ala.Cr.App. 1989), remanded on other grounds, 585 So. 2d 112 (Ala. 1991).

B.

The appellant argues that the State failed to disprove by a preponderance of the evidence the existence of the mitigating circumstance that his participation in the capital murder was “relatively minor;” therefore, he says, the trial court erred in failing to find the existence of this mitigating circumstance. See § 13A-5-51(4) Code of Alabama 1975.

However, a review of the evidence clearly indicates that the appellant's participation in this offense was not relatively minor. The trial court made the following findings as to this matter:

“The evidence was that the defendant participated in every phase of the crime. The gloves, mask, and weapons that were used belonged to him and he drove the vehicle that was used. In his confession he tried to minimize his participation but he told his friend in Tennessee that he had committed a murder in Alabama. He helped to dispose of the weapons that were used in the crime and also spent some of the money that was stolen. The evidence proves beyond a reasonable doubt that the defendant was more than a minor actor in the robbery and the murder of Bill Lynn.”

This finding by the trial court properly indicated that he considered the evidence presented in arriving at his determination that the mitigating circumstance did not exist. Although the appellant argues that the evidence was in conflict, this determination is factual and rests within the sound discretion of the trial judge.

““The trial judges carefully articulated the reasons why he found that those mitigating factors were not present in this case. The written order of the trial judge demonstrates that the trial judge considered all of the evidence offered to establish these statutory mitigating circumstances and then rejected that evidence as not only insufficient, but as ‘disproven’ by other evidence. The factual determination of the existence or nonexistence of a mitigating circumstance is within the sound

discretion of the trial judge where the evidence in that regard is in conflict. See *Ex parte Jones*, 520 So. 2d 553, 555 (Ala.), cert. denied, 488 U.S. 871, 109 S. Ct. 182, 102 L. Ed. 2d 151 (1988) ('although ... a victim to the crime ... testified that he thought Jones was intoxicated and that he heard Arthur Giles tell Jones what to do, we find that it was not improper for the trial court to conclude that these did not constitute mitigating factors under the circumstances'). See also *Puiatti v. State*, 495 So. 2d 128, 132 (Fla. 1986) ('the trial court considered the mitigating factors ... but concluded they failed to rise to a sufficient level to be weighed as mitigating circumstances'). Cf. *Ex parte Cochran*, 500 So. 2d 1179, 1187 (Ala. 1985), cert. denied, 481 U.S. 1033, 107 S. Ct. 1965, 95 L. Ed. 2d 537 (1986) ('the trial judge's order does not state whether he *considered* the evidence offered by defendant and *then* determined that it was insufficient or whether he merely precluded it without consideration'); *Clisby v. State*, 456 So. 2d 99, 102 (Ala.Cr.App.), affirmed after remand, 456 So. 2d 102 (Ala.Cr.App. 1983); affirmed, 456 So. 2d 105 (Ala. 1984); cert. denied, 470 U.S. 1009, 105 S. Ct. 1372, 84 L. Ed. 2d 391 (1985) ('from the trial judge's written findings, we cannot determine whether he *considered* the defendant's mental deficiency as a mitigating circumstance and *then* determined that the *degree* of mental disability was simply insufficient to support those mitigating circumstances defined in Section 13-11-7(2) and (6), or whether he merely decided that the defendant's mental disability could not be considered as a mitigating circumstance as a

matter of law because it did not measure up to the statutory standard’).”

Wesley v. State, 575 So. 2d 108, 121 (Ala.Cr.App. 1989), reversed on other grounds, 575 So. 2d 127 (Ala. 1990).

IX.

A.

The appellant argues that the trial court’s charge on evaluating the credibility of witnesses erroneously created a presumption that witnesses were truthful, thereby diluting the State’s burden of proof. The appellant cites the following charge as erroneous on this ground:

“You should attempt in every way that you can to reconcile all of the testimony in this case so that, if possible, to make all the witnesses speak the truth. But if you cannot do that and you find that the evidence is in conflict on material points, then it’s up to you to decide what are the true facts. In other words, you must weigh the evidence and decide what is believable and what is not believable, but in passing upon the evidence, you cannot capriciously disregard the testimony of a single witness. You should look at all of the evidence in the case with a view of determining what the true facts are and then make your decision from the evidence. If you find that some of the evidence is unworthy of belief, then you have the right not to consider that evidence, but you first start out with all of the evidence with a view of determining what the true facts are and then sort through it, always remembering that your job is to determine the truth.”

The appellant argues that this charge violates the rule of evidence in Alabama that “there is no presumption that a witness is telling the truth.” *Williams v. State*, 520 So. 2d 179, 181 (Ala.Cr.App. 1987). He further argues that the trial court’s instructions to the jury that it should seek to reconcile the testimony of the witnesses suggests that the jury should initially take this testimony as true and thereby effectively charges the jury to believe all of the State’s witnesses. He also argues that the latter part of this charge encourages the jury to sort the good testimony from the bad but gave no guidelines for applying the reasonable doubt standard.

The record indicates that the appellant failed to object to this instruction at trial; therefore, this matter must be analyzed pursuant to the plain error rule, Rule 45A, Ala.R.App.P.

The trial court’s instructions to the jury that it should attempt to reconcile all of the testimony, if possible, in order to make the witnesses speak the truth, neither invaded the jury’s exclusive right to determine credibility of witnesses nor raised a presumption that all witnesses testified truthfully. In light of the entire charge, there was no plain error resulting from this isolated statement. *Ex parte Musgrove*, 638 So. 2d 1360 (Ala. 1993), cert. denied, 513 U.S. 845, 115 S. Ct. 136 (1994).

In the present case, the trial court gave the following entire charge to the jury concerning its role as the trier of fact in examining the credibility of witness testimony:

“Now, whether a witness is an expert or whether a witness is a lay witness, if a witness, during the trial of the case, during the time they

are testifying up here sitting on the stand, if they testify and during their testimony they express an opinion, draw a conclusion, the jury is not required to accept the conclusions or expressed opinions of those witnesses, but rather, the jury must determine for yourselves the weight to be given to that testimony and evidence when considered in connection with all of the evidence in the case.

“I told you at the outset that you are the sole and exclusive judges of the evidence. You are likewise the exclusive judges of the weight of the evidence, its believability, its credibility, what weight you will accord that evidence.

“When you take your place in the jury box, you do not have to blindly accept anything and everything that comes before you. You have the right to weigh the evidence and in weighing that evidence you have the right to consider anything which you in your everyday affairs would consider in passing upon the truthfulness and the accuracy of statements made to you. For instance, when witnesses testify before you, those witnesses present themselves in front of you. You have the right to observe their demeanor; that is, how they appear while they testify. Thus, you may consider whether they testified frankly and straightforwardly or did they testify evasively. Were they testifying about facts which were within their knowledge or were they guessing?

“You may consider those things which you in your everyday affairs would consider in passing upon the accuracy of statements made to you.

You also have the right to consider any item of impeachment that is against the witness; for instance, whether or not a witness might be biased, if a witness is sympathetic to one side or prejudiced against another side, if they are connected with a party in the case, if they are kin to someone, if they're friends with someone or if they're enemies of someone. You, as a jury, have a right to consider those types of things in passing upon the witness's testimony because in that instance it would be human nature that they might be more favorable to one side or prejudiced against the other side, if there is evidence of ill feelings or friendship or kinship, or if they're connected by their stations in life or something of that nature.

“Any connection that they might have to one side or the other can be considered in determining whether or not the witness might be biased in favor of one side or against the other side.”

“You should attempt in every way that you can to reconcile all of the testimony in this case so that, if possible, to make all the witnesses speak the truth. But if you cannot do that and you find that the evidence is in conflict on material points, then it's up to you to decide what are the true facts. In other words, you must weigh the evidence and decide what is believable and what is not believable, but in passing upon the evidence, you cannot capriciously disregard the testimony of a single witness. You should look at all of the evidence in the case with a view of determining what the true facts are and then make your decision from the evidence. If you

find that some of the evidence is unworthy of belief, then you have the right not to consider that evidence, but you first start out with all of the evidence with a view of determining what the true facts are and then sort through it, always remembering that your job is to determine the truth.”

Even if a particular statement in an instruction may be misleading, confusing, or erroneous, it does not rise to the level of plain error if the instruction, when reviewed completely, properly presents the law. *Williams v. State*, 538 So. 2d 1250, 1253 (Ala.Cr.App. 1988). There was no plain error in these instructions.

B.

The appellant argues that the trial court diluted the State’s burden of proof by instructing the jurors to sort the bad testimony from the good testimony, without providing any guidelines as to the reasonable doubt standard. The cited instruction by the trial court informed the jury that it should determine the credibility of the evidence. This is one of the required tasks of examination by a jury in determining whether the evidence presented by the State has proved that the defendant is guilty beyond a reasonable doubt. This was a proper charge by the trial court and was not plain error.

X.

The appellant argues that the trial court’s instructions defining robbery as an underlying offense to a capital murder charge was broader than the definition set forth in the indictment, thereby violating his rights to due process and a fair trial. He further argues that by “broadening the charge,” by adding an

alternative theory for the robbery element of capital murder, the trial court also created a risk of a nonunanimous verdict.

The record indicates that the appellant was originally charged in four indictments; two of which were dismissed upon the motion of the State. The appellant was then charged with the two remaining indictments, both containing two counts. The first indictment charged the appellant with intentional murder committed during the course of a robbery in the first degree, a violation of § 13A-5-40(a)(2), Code of Alabama 1975, both counts alleging that the appellant had killed the victim by cutting and stabbing with a sword or knife in the course of committing a theft of jewelry and money belonging to the victim, Bessie Lynn. The first count alleged the use of force against both victims while the appellant was armed with a deadly weapon or dangerous instrument, specifically a sword or knife. The second count alleged the use of force against the person of Bill Lynn, while the appellant was armed with a deadly weapon or instrument, specifically a sword or knife. The appellant was also charged in a second indictment with robbery in the first degree. The first count charged that, in committing a theft of jewelry, money, and a bank deposit bag, he used or threatened force against Bessie Lynn with the intent to overcome her physical resistance while he was armed with a deadly weapon or dangerous instrument, specifically a sword or knife. The other count charged that, in the course of committing a theft of the same property, the appellant used force against Bill Lynn in order to take or escape with the property, while the appellant was armed with a deadly weapon or dangerous instrument, specifically a sword or knife.

The first count of the capital murder indictment and the second count of the first degree robbery indictment were subsequently dismissed upon motion of the State.

The record indicates that the trial court charged the jury, as to robbery in the first degree as an element of capital murder and again as a separate charge, that the State must prove that the appellant caused serious physical injury or death to another person in committing, or attempting to commit, a theft and, in doing so, was armed with a deadly weapon. The appellant argues that because he was indicted for committing robbery in the first degree by having been armed with a deadly weapon or dangerous instrument, the trial court improperly charged the jury as to the alternate method of proving robbery in the first degree, i.e., by causing serious physical injury or death to another person.

In his brief on appeal, the appellant acknowledges that this Court has previously rejected a claim that a variance existed between the indictment and the proof where the alternate methods of proving robbery in the first degree were charged and proved; however, the appellant argues that, because that case did not involve the death penalty, it should not be applicable to the present case. *Hamilton v. State*, 455 So. 2d 170 (Ala.Cr.App. 1984). In *Hamilton v. State*, *supra*, the jury charge included language from § 13A-8-41(a)(1) and (2), Code of Alabama 1975, while the indictment included only the language of § 13A-8-41(a)(1), Code of Alabama 1975. Thus, the alleged variance was identical to the present case. In that case, this Court held that this alleged variance was not material because the allegations in the indictment and the proof at trial substantially corresponded, and the

defendant could not have been misled at trial. *Id.*, at 172-73. This Court distinguished a situation, such as is found in the present case, where the jury is charged on both subsections of robbery in the first degree from other situations in which the jury is charged on an uncharged subsection. E.g., *Ex parte Hightower*, 443 So. 2d 1272 (Ala. 1983) (charging sexual intercourse without consent for offense of rape, but proving that the defendant obtained the victim's consent by artifice). The trial court explained that the means of committing robbery in the first degree are alternative methods of committing the same offense, that they are not contradictory, and that they do not contain separate and distinct elements of proof. Thus, although an individual can cause serious physical injury to another while armed with a deadly weapon or a dangerous instrument in conjunction in one course of conduct towards the commission of a robbery, a person cannot have sexual relations with a person without her consent and simultaneously with her consent by artifice.

In the present case, the proof at trial established that the appellant used force to overcome the victims' physical resistance in order to take certain property from them and, in so doing, caused serious physical injury to his victims while armed with a deadly weapon, specifically, a sword or knife. The Alabama statute for robbery in the first degree "contains alternative methods of committing the offense ... where the alternative methods are not contradictory and do not contain separate and distinct elements of proof." *Gibson v. State*, 488 So. 2d 38, 40 (Ala.Cr.App. 1986).

XI.

The appellant argues that the arresting officer improperly seized his suitcase without a warrant, and that it was not seized incident to his arrest. He argues, therefore, that the evidence gained as a result of that seizure was inadmissible. The record indicates that the appellant was apprehended in Chattanooga, Tennessee, at April and Micah Donaldsons', where he was staying. He argues that the Chattanooga police officer who made the arrest had been to that apartment on three occasions and, on the second time, April Donaldson gave him permission to look in the appellant's suitcase. On the officer's third visit, when the appellant was arrested, the appellant was allowed to get dressed, but the officer first checked his suitcase, purportedly to ensure that there was no weapon there. He argues that the black pants that the officer secured from his suitcase were not seized as an incident of his arrest, because the officer already knew that there was no weapon in the suitcase as a result of his previous examination of the suitcase. He further submits that April Donaldson improperly consented to the original search of the suitcase.

The appellant raises this argument for the first time on appeal; therefore, it must be analyzed pursuant to the plain error rule. Rule 45A, Ala.R.App.P.

The arresting officer, an officer with the Chattanooga Police Department, testified at trial that the dispatcher with the sheriff's department had received a warrant for the appellant's arrest and had gained information as to where the appellant might be staying. The arresting officer was made aware of these facts and received further information indicating that the appellant might have left that location, which was the Donaldsons' apartment. In an attempt to determine the appellant's whereabouts, he visited the apartment

on three occasions on December 29, 1991 -- at approximately 12:00 a.m.; at around 2:00 a.m.; and at between approximately 3:45 a.m. to 4:15 a.m. the same morning. He testified that on the first occasion, he spoke to a third party who was also living there. That individual indicated that he believed that someone other than the appellant was staying with the Donaldsons, thereby indicating that the appellant had left the apartment. The officer testified that he returned soon afterwards in hopes of determining from the Donaldsons where the appellant might have gone. April Donaldson was at home on the second occasion and told the officer that the appellant and her husband were out for the evening, but that they would return soon. She then gave the officer permission to look through the house. The officer testified as follows:

“I asked if I could check -- if she minded if I checked the apartment because, as I stated, we had been informed by the sheriff’s department that Mr. Price might be armed with I believe a large caliber pistol and some other weapons. And I felt that we might have to come back in there to get Mr. Price at some time. And I needed to check the apartment to make sure there was no weapons in there where any other officers or anybody would get hurt. And she agreed to let me in, so I checked the bedroom, the kitchen area a little bit, the living room where she said he had been sleeping, the couch area. In her bedroom, I believe Mr. Price’s suitcase was in her bedroom. It was opened and there were some items of clothing in there.

“Q [Prosecutor]: All right. After you took possession of his suitcase, did you alter it or open it again or change anything?

“A [Officer]: At that time all I did, I left the suitcase on the floor. I went and bent over it. I separated -- there was just a few items of clothing. I separated them, just ran my hand through the clothing to make sure there was no weapon, pistol, no weapon in the suitcase, and I left it at that.”

The officer returned to the apartment a final time around 4:00 a.m., accompanied by four or five other officers, and arrested the appellant. He testified that, when he entered the apartment, he found the appellant lying on the couch in the living room in front of a television set. The officer testified that the appellant had apparently prepared to go to sleep and was not wearing “much clothing.” He testified that the appellant had to get dressed and so he walked to the bedroom of the apartment, where his suitcase was located. The officer testified that he accompanied the appellant and “did a quick look through the suitcase to make sure there was no weapon.” He testified, “it was our understanding that he might be armed with a weapon. So, for our own safety we did look through the suitcase, got his clothing, closed the suitcase, let him get dressed. He put on a shirt and some pants and shoes and [we] took the suitcase and Mr. Price to the service center.” Subsequently, the officer was asked if he saw April Donaldson put anything into the suitcase or take anything out of it while he was present arresting the appellant. The officer testified, “I believe -- I’m not positive, but I believe that after we arrested him that she gathered up the rest of his stuff that she had cleaned and put it in his suitcase. We told her that we were going to take him with us.” The officer testified that he then put the suitcase in the trunk of the patrol car and placed the appellant in the backseat.

He testified that, after they arrived at the service center, Detective Mathis of the Chattanooga Police Department called for the appellant to be brought to his office and the officer testified that he took the appellant and the suitcase to Detective Mathis's office.

When on his second visit to the apartment the officer ran his hand through the appellant's belongings in his suitcase, the search was proper as incident to a valid arrest, even though the search took place before the arrest, because the officer already had probable cause for the arrest at the time of that search. Moreover, the subsequent search of the appellant's suitcase was proper because it was in the suspect's immediate control upon his arrest as he changed his clothing; and it was legal and proper to search the suitcase at the station pursuant to an inventory search.

“After making a valid custodial arrest, the police may conduct a warrantless search of the suspect without probable cause or reasonable articulable suspicion to believe that the suspect possesses either weapons or evidence. The police officer's general need to disarm a suspect or to preserve evidence justifies this search, and its validity depends only on the legality of the arrest.

“The timing of a search incident to arrest must be reasonable under the circumstances. A search conducted immediately prior to an arrest may be justified as incident to arrest if the police had probable cause to arrest the suspect before conducting the search.

“...

“... The police may make a full search of the suspect for both weapons and evidence during a

search incident to arrest. The scope of the search is not limited to the suspect's person; the police officer may also search the area within the suspect's immediate control. Although searches of containers found on the suspect or within her reach are valid, once police gain exclusive control over the arrestee's personal property a later search of that property cannot be justified as incident to arrest.

See *U.S. v. Donaldson*, 793 F.2d 498, 502-03 (2d Cir. 1986) (warrantless search of defendant's apartment before formal arrest valid as search incident to arrest when probable cause for arrest existed at time of search), cert. denied, 479 U.S. 1056, 93 L. Ed. 2d 983, 107 S. Ct. 932 (1987); *U.S. v. Miller*, 925 F.2d 695, 698 (4th Cir.) (warrantless search of defendant's belongings immediately before formal arrest valid as search incident to arrest when probable cause existed for arrest at time of search), cert. denied, 502 U.S. 833, 116 L. Ed. 2d 80, 112 S. Ct. 111 (1991); *U.S. v. Hernandez*, 825 F.2d 846, 852 (5th Cir. 1987) (warrantless search before formal arrest valid as search incident to arrest when arrest followed quickly on heels of search and probable cause for arrest existed before search), cert. denied, 484 U.S. 1068, 98 L. Ed. 2d 996, 108 S. Ct. 1032 (1988); *U.S. v. Armstrong*, 16 F.3d 289, 294 (8th Cir. 1994) (warrantless search before formal arrest valid as search incident to arrest when probable cause for arrest existed before search); ... *U.S. v. Allen*, 986 F.2d 1354, 1357 (10th Cir. 1993) (warrantless search before formal arrest valid search incident to arrest when probable cause for arrest existed before

search); *U.S. v. Taylor*, 302 U.S. App. D.C. 349, 997 F.2d 1551, 1554 (*D.C. Cir. 1993*) (same).”

Chimel v. California, 395 U.S. 752, 763, 23 L. Ed. 2d 685, 89 S. Ct. 2034 (1969).

In *Chimel*, the court construed ‘immediate control’ to mean ‘the area from within which [the arrestee] might gain possession of a weapon or destructible evidence.’ *Id.*; *U.S. v. Morales*, 923 F.2d 621, 626-27 (8th Cir. 1991) (warrantless search of bags valid as incident to arrest when contemporaneous with arrest, arrestee held bags as officers approached, and was approximately three feet away and not handcuffed during search), and *U.S. v. Nohara*, 3 F.3d 1239, 1243 (9th Cir. 1993) (warrantless search of bag valid as incident to arrest when contemporaneous with arrest and arrestee held bag as officers approached, even though arrestee handcuffed during search).

“The circuit courts have allowed searches of the room where the arrest occurred, of containers, and of vehicles, even after the arrestee has been immobilized. *U.S. v. Bennett*, 908 F.2d 189, 193 (7th Cir.) (warrantless search of luggage valid as incident to arrest even though defendants handcuffed and placed against wall of hotel room when officers knew that defendants used several different weapons during robberies and only one weapon in plain view), *cert. denied*, 498 U.S. 991, 112 L. Ed. 2d 544, 111 S. Ct. 534 (1990)... . *U.S. v. Ivy*, 973 F.2d 1184, 1187 (5th Cir. 1991) (search of defendant’s briefcase valid as incident to arrest because within defendant’s immediate control), *cert. denied*, 507 U.S. 1022, 113 S. Ct. 1826, 123 L. Ed. 2d 455 (1993); ... *U.S. v. Herrera*, 810 F.2d 989, 990-91 (10th Cir. 1987)

(search of briefcase valid as incident to arrest because within defendant's control); [Compare] *U.S. v. Rosenthal*, 793 F.2d 1214, 1232 (11th Cir. 1986) (search of bag out of defendant's reach valid as incident to arrest because defendant moved toward it and would have taken it to jail with him), cert. denied, 480 U.S. 919, 94 L. Ed. 2d 692, 107 S. Ct. 1377 (1987) and *U.S. v. Tivolacci*, 283 U.S. App. D.C. 1, 895 F.2d 1423, 1428-29 (D.C. Cir. 1990) (search of locked suitcase valid as incident to arrest because within defendant's reach) with *U.S. v. Johnson*, 18 F.3d 293, 295 (5th Cir. 1994) (warrantless search of briefcase invalid when briefcase five or six feet away and out of defendant's reach)."

Twenty-Fourth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeal 1993-1994, 83 Ge.L.J., 710-713 (March-April 1995).

"Other exceptions to the warrant requirement apply after a lawful seizure of either a container or an individual. For example, contemporaneous with a custodial arrest, the police may open any container within the arrestee's reach. Based on reasonable suspicion, the police may detain luggage for a brief inspection, such as a dog sniff. Finally, the police do not need a warrant to conduct an inventory search of a lawfully seized container.

"... After lawfully taking custody of property, the police may conduct a warrantless search of the property to satisfy three distinct purposes: (1) protection of the owner's property while it is in police custody, (2) protection of the police against claims of lost or stolen property, and (3)

protection of the police from potential danger. Because the policy governing the search is production of an inventory, the police may not conduct an inventory search if acting in bad faith or if done solely for investigatory purposes. To prevent the police from conducting a general rummaging for incriminating evidence, the Supreme Court has required that an inventory search be conducted according to standardized criteria. Within the framework of these criteria, however, police officers may use their discretion to determine both the scope and propriety of the inventory search, and are not required to use the least intrusive means to secure property lawfully in their possession. Further, noninvestigatory motives will validate an inventory search, even when an officer suspects that contraband or evidence will be found. Because inventory searches are not investigatory in nature, the absence of a warrant and probable cause is immaterial to the reasonableness of the search under the Fourth Amendment.

“... Containers and items in the possession of an individual lawfully detained by the police may also be the subject of an inventory search. ...” See *New York v. Belton*, 453 U.S. 454, 460, 69 L. Ed. 2d 768, 101 S. Ct. 2860 (1981) ... A search incident to a lawful arrest requires no justification and can be made of the person arrested and the area within his or her control. See *U.S. v. Judge*, 864 F.2d 1144, 1145-47 (5th Cir. 1989) (inventory search of closed backpack in car trunk valid when backpack impounded according to standard DEA procedures

regarding the safekeeping of arrestee's personal belongings), cert. denied, 495 U.S. 918, 109 L. Ed. 2d 309, 110 S. Ct. 1946 (1990); *U.S. v. Porter*, 859 F.2d 83-84 (8th Cir. 1988) (per curiam) (inventory search of locked briefcase within car trunk valid based on lawful seizure of car used in drug transaction); *U.S. v. Bowhay*, 992 F.2d 229, 231 (9th Cir. 1993) (inventory search of satchel valid when satchel seized during arrest and inventoried pursuant to mandatory departmental procedure)." *Wells*, 495 U.S. at 4. The *Wells* Court did not delineate any particular set of procedures

"The police department is allowed to develop its own standardized inventory procedures, as long as they are reasonable and administered in good faith compliance with the Fourth Amendment, *Bertine*, 479 U.S. at 374. The courts of appeals have permitted minor record-keeping deviations from the prescribed procedures, but not deviations involving the manner or predicate for the search. ...

"The Third, Fourth, and Ninth Circuits have upheld unwritten standardized inventory procedures. *U.S. v. Frank*, 864 F.2d 992, 1002 (3d Cir. 1988) (standard procedure requirement met when unwritten procedures require impounding officer to conduct inventory search of impounded vehicle), cert. denied, 490 U.S. 1095, 104 L. Ed. 2d 998, 109 S. Ct. 2442 (1989); *U.S. v. Ford*, 986 F.2d 57, 60 (4th Cir. 1993) (inventory search valid when department had standardized, unwritten procedures); *U.S. v. Mancera-Londono*, 912 F.2d 373, 375 (9th Cir. 1990) (same)." *Wells*, 495 U.S. at 6. ... *U.S. v.*

Williams, 936 F.2d 1243, 1248-49 (11th Cir. 1991) (on-site inventory search, rather than search at impound lot, permissible because officer had authority to impound vehicle), cert. denied, 503 U.S. 912, 112 S. Ct. 1279, 117 L. Ed. 2d 504 (1992).

“*See Bertine*, 479 U.S. at 375 (police not required to allow drive option to avoid impoundment and subsequent inventory search by leaving car in public parking lot); *Lafayette*, 462 U.S. at 647 (police not required to avoid inventory search by securing bag by placing it in sealed bag or locker); ... *U.S. v. Caves*, 890 F.2d 87, 95 (8th Cir. 1989) (police not required to avoid inventory search by securing purse in locker).

“*See U.S. v. Rodriguez-Morales*, 929 F.2d 780, 788 (1st Cir. 1991) (inventory search not invalid when caretaking motive not mere subterfuge for coexisting investigatory motive), cert. denied, 502 U.S. 1030 (1992); *U.S. v. Frank*, 864 F.2d 992, 1001 (3d Cir. 1988) (inventory search not invalid when noninvestigatory motive present in addition to motive to investigate known fugitive), cert. denied, 490 U.S. 1095, 104 L. Ed. 2d 998, 109 S. Ct. 2442 (1989); *U.S. v. Gallo*, 927 F.2d 815 819 (5th Cir. 1991) (inventory search by local police officer not invalid when allowed by standard procedures, despite additional investigatory motive of DEA officer present); *Wagner v. Higgins*, 754 F.2d 186, 189-90 (6th Cir. 1985) (inventory search not invalid when legitimate desire to protect against claims of conversion [present in addition to motive to discover evidence of crime]; *U.S. v. Lewis*, 3 F.3d 252, 254 (8th Cir. 1993) (per curiam)

(inventory search not invalid even when police officers testified vehicle searched for ‘things of value’ or any other type [of] contraband’), cert. denied, 511 U.S. 1111, 114 S. Ct. 2111, 128 L. Ed. 2d 671 (1994); *U.S. v. Bowhay*, 992 F.2d 229, 231 (9th Cir. 1993) (inventory search of satchel not invalid even if officer had additional investigative motive); *U.S. v. Roberson*, 897 F.2d 1092, 1096 (11th Cir. 1990) (same).

“*Lafayette*, 462 U.S. at 648 (inventory search of arrestee’s bag valid); *U.S. v. Loaiza-Marin*, 832 F.2d 867, 868 (5th Cir. 1987) (per curiam) (same); *U.S. v. Woolbright*, 831 F.2d 1390, 1394-95 (8th Cir. 1987) (same); *U.S. v. Nohara*, 3 F.3 1239, 1243 (9th Cir. 1993) (same).”

Twenty-Fourth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeal 1993-1994, 83 *Geo.L.J.*, 743-47 (March-April 1995).

In *Jones v. State*, 680 So. 2d 964, 967 (Ala.Cr.App. 1996), the defendant was taken into custody by a police officer at a fire station shelter. When asked if he wished to bring any personal belongings with him, the defendant stated that he had a suitcase. The suitcase was subsequently searched and, although a warrant was obtained before the search, this Court held that the evidence contained in the briefcase was obtained as a result of a valid inventory search.

“A police inventory of some possession of the arrestee, such as a suitcase, presupposes that the police had some valid reason for taking custody of that object, or it is only because of such taking of custody that the police can be said to have some obligation to safeguard the

contents. This presents no problem when a person is arrested in some public place while carrying a suitcase or like object for it would be clearly improper for police to simply leave the container unattended at the scene of the arrest. As noted by Justice Blackmon in *United States v. Chadwick*[], 433 U.S. 1, 97 S. Ct. 2476, 53 L. Ed. 2d 538 (1977)]:

““A person arrested in a public place is likely to have various kinds of property with him: items inside his clothing, a briefcase or suitcase, packages or a vehicle. In such instances the police cannot very well leave the property on the sidewalk or street.... I think it is surely reasonable for the police to take the items along to the station with the arrested person.”

“Likewise, if a person is arrested in a public place and it is known that he will thereby be prevented from retrieving a suitcase belonging to him which is in the vicinity, perhaps checked aboard a soon-to-depart aircraft, it is again appropriate for the police of take custody of it.”
W.LaFave, 3 Search and Seizure, § 5.5(b), 180-181 (3d Ed. 1996).”

Jones v. State, supra, at 967-68.

In the present case, there is little evidence concerning the seizure of the black pants from the appellant’s suitcase, because the appellant did not challenge this search and seizure at trial. Although there is no indication that a warrant was obtained before the search, there is also no direct evidence that

the search was warrantless.⁴ Moreover, the standard operating procedures of the Fayette County, Tennessee, Sheriff's Office, concerning the method of inventorying personal property of persons in custody, does not appear in the record. However, the record establishes that there was no plain error committed by the admission into evidence of the black pants.

XII.

The appellant argues that during his closing argument at the sentencing phase of the trial the prosecutor impermissibly commented that the appellant would probably kill again unless he was put to death; the appellant argues that this comment "sullied" the trial with inflammatory and unsupported speculation. The record indicates that the appellant failed to object to this comment at trial; therefore, any error in the prosecutor's argument to the jury must be analyzed pursuant to the plain error standard. Rule 45A, Ala.R.App.P. The comment made by the prosecutor during his closing argument at the sentencing phase was as follows:

"One of the most vivid descriptions of what happened to Bill Lynn, on the stand that came forth in my listening to the testimony, was what the little EMT girl said about trying to move his head. Do you remember that? He was cut so severely that she put her hand entirely, all four fingers, inside the wounds on his head and tried to move it and couldn't even turn his head. His entire scalp moved around his head and, that is,

⁴ The burden of proof as to the propriety of the search falls on the state.

the bone structure would not move. If there has ever been a more heinous, cruel, or atrocious infliction of death on any individual in Fayette County, I haven't heard about it.

“Now, the only way that I know of to assure that Chris Price is not a threat, doesn't have an opportunity to inflict this kind of injury on anyone else in Fayette County, is to have the jury recommend a sentence of death on him. That sentence recommendation to the Court will demonstrate to any individual in this county contemplating a similar action, will demonstrate the conscience of this community that it will not be tolerated. I seriously ask you to make that recommendation to the Court. And in asking you to do that, I realize that this is not a duty you would have chosen.”

The appellant argues that this argument by the prosecutor was reversible error, based on the Alabama Supreme Court's holding in *Ex parte Smith*, 581 So. 2d 531 (Ala., 1991). See also *Ex parte Washington*, 507 So. 2d 1360 (Ala. 1986). However, the comment in *Ex parte Smith*, 581 So. 2d at 532, was made by the prosecutor during the guilt phase of the defendant's trial and, in holding that the comment constituted plain error, the Court determined that the prosecutor had attempted to prove guilt by arguing that the defendant would commit future illegal acts.⁵ However, a review

⁵ The comment made by the prosecutor during the guilt phase in *Ex parte Smith*, 581 So. 2d at 532, was as follows:

“Now, ladies and gentlemen, if this defendant ever gets loose again, he's going to do it again

of the entire argument by the prosecutor in the present case reveals that the prosecutor was not arguing that the appellant would kill again if he was not sentenced to death, but that such a sentence would act as a deterrent to other possible offenders. Similarly, in *Carroll v. State*, 599 So. 2d 1253, 1270 (Ala.Cr.App. 1992), aff'd, 627 So. 2d 874 (Ala. 1993), cert. denied, 510 U.S. 1171, 127 L. Ed. 2d 554, 114 S. Ct. 1207 (1994), the prosecutor stated during his argument at the penalty phase, "How many people does [the defendant] get to kill?" In construing the prosecutor's argument to be a plea for law enforcement, this Court stated:

"Although we do not approve of [this argument], we do not consider it to constitute reversible error. [It] can be interpreted as merely an argument for law enforcement and society's right of self-protection, *Kuenzel v. State*, 577 So. 2d 474, 503-04 (Ala.Cr.App.), affirmed, 577 So. 2d 531 (Ala.), cert. denied, 502 U.S. 886, 112 S. Ct. 242, 116 L. Ed. 2d 197 (1991), rather than an improper comment on the possibility that the appellant will commit future illegal acts, *Ex parte Smith*, 581 So. 2d 531, 533 (Ala. 1991)." 599 So. 2d at 1270.

In *Williams v. State*, 601 So. 2d 1062, 1072-73 (Ala.Cr.App. 1991), aff'd, 662 So. 2d 929 (Ala. 1992), cert. denied, 506 U.S. 957, 121 L. Ed. 2d 340, 113 S. Ct. 417 (1992), the prosecutor, during his closing argument

he's going to kill, and he's going to kill again. And I would ask you to consider that, because, ladies and gentlemen, only you can stop him for sure."

at the guilt phase of the defendant's trial, argued that the defendant admitted the murder by the allegorical statement "I ate the mouse." The prosecutor then stated that the defendant had also stated, "I ate the little mouse and I will eat another little mouse if you give me a chance." Although the defendant in *Williams v. State* claimed that this argument was a comment by the prosecutor that he would kill again, this Court held that the statement was a legitimate argument in response to a statement made by the defendant to third parties and admitted earlier at trial. This Court stated, "Furthermore, 'statements of counsel in arguments to the jury must be viewed as having been made in the heat of debate, and such statements are usually valued by the jury at their true worth.'" *Williams v. State, supra*, at 1073, quoting *Stephens v. State*, 580 So. 2d 11 (Ala.Cr.App. 1990), affirmed, 580 So. 2d 26 (Ala. 1991), cert. denied, 502 U.S. 859, 116 L. Ed. 2d 138, 112 S. Ct. 176 (1991).

This comment made by the prosecutor did not constitute plain error.

XIII.

The appellant argues that the State failed to prove that he had waived his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966), before giving statements to the Tennessee authorities and to the Alabama officials. Therefore, he argues that the trial court erred in failing to suppress the statements. The appellant specifically bases this argument on two grounds: that the State failed to lay a sufficient voluntariness predicate in order for his statements to be properly admitted; and that he was improperly induced into making the statement by a Tennessee official's comment that, if the

appellant would give a statement, he would make the appellant's cooperation known to others.

A.

The appellant argues that, when he gave his statements, he was young, and he had little education and a history of emotional turbulence and family violence. He argues that the record fails to indicate that he was adequately advised of his rights, in that there is a blanket assertion by the Tennessee authorities that he was advised of his rights and a Tennessee official testified that he reviewed a waiver of rights form with the appellant twice before the statements were made. However, the appellant argues that the record fails to enumerate the rights that were given. As to the subsequent statement given by the appellant when he was returned to Alabama, the appellant alleges that the record indicates that the sheriff of Fayette County testified that a deputy read the appellant's constitutional rights to him before taking a statement, but the appellant argues that, as no further predicate was laid, this testimony was insufficient.

However, a review of the record concerning the suppression hearing, as well as the testimony presented at trial before the statements were admitted, indicates that the appellant's claims are unfounded. The State provided ample evidence that the appellant had been properly advised of his constitutional rights and had knowingly, intelligently, and voluntarily waived them. The appellant was originally arrested in Chattanooga, Tennessee, and taken to the Chattanooga Police Department. There, he was taken to Detective Mathis who later testified at the suppression hearing and at trial. Detective Mathis

testified that he advised the appellant of his constitutional rights using a written rights form that was explained to the appellant and that he signed. He was then shown a waiver form and he signed that form as well. Thereafter, the appellant's statement was to be tape-recorded and, Detective Mathis testified that, after the recorder was turned on, his rights were again explained to the appellant in detail from the form and the nature of the waiver form was also again explained, following which the appellant agreed to give a statement. At trial, Detective Mathis also testified that the appellant was asked about his education level and asked to whether he understood each part of the form; and the appellant acknowledged that he did. Moreover, during the trial, Detective Mathis testified by summarizing the content of the form and enumerated the appellant's constitutional rights. He testified that the appellant replied, "Yes, sir," when asked if he understood these rights. Detective Mathis also testified that the appellant was neither threatened nor offered any promise or hope of reward in return for his statement. He testified that the appellant was given breakfast and was allowed to smoke, drink soft drinks, and use the restroom at will. A transcribed copy of the appellant's statement was authenticated and admitted at trial.

Sheriff Turner of Fayette County, Alabama, testified that the appellant was transported back to Alabama from Tennessee. He testified that his secretary transcribed the Tennessee tapes. He further stated that the appellant gave a statement to him in the presence of two other deputies. He testified that one of these deputies advised the appellant of his constitutional rights before taking his statement. This fact was also noted on the tape of this subsequent

statement taken in Alabama. Sheriff Turner also testified that the appellant was not threatened and that no promise or inducement was made in order to obtain his statement.

“The oft-stated rule is that a confession is prima facie involuntary and inadmissible, and the state must show voluntariness and a *Miranda* predicate in order for it to be admitted. *Thomas v. State*, 373 So. 2d 1167 (Ala. 1979), vacated on other grounds, 448 U.S. 903, 100 S. Ct. 3042, 65 L. Ed. 2d 1133 (1980); *Lewis v. State*, 295 Ala. 350, 329 So. 2d 599 (1976); *Magwood v. State*, 494 So. 2d 124 (Ala.Cr.App. 1985), aff’d, 494 So. 2d 154 (Ala.), cert. denied, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986). Whether there was a waiver of the right to remain silent and the right to counsel and whether it was knowingly, voluntarily, and intelligently made must be decided from the particular facts and circumstances of each case, including the background, experience, and conduct of accused -- the totality of the circumstances. *Thomas v. State*; *Magwood v. State*; *Chandler v. State*, 426 So. 2d 477 (Ala.Cr.App. 1982) (citing *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981)). The question of whether a confession was voluntary is initially to be determined by the trial court. *Ex parte Singleton*, 465 So. 2d 443 (Ala. 1985). Thereafter, the voluntariness as affecting the credibility and weight to be given any statement that an accused has made is a determination for the jury. *Id.* The finding of the trial court will not be disturbed on appeal unless it appears contrary to the great weight of the evidence or is

manifestly wrong. *Magwood v. State; Marschke v. State*, 450 So. 2d 177 (Ala.Cr.App. 1984). Even where there is credible testimony to the contrary, if the evidence is fairly capable of supporting the inference that the rules of freedom and voluntariness were observed, the ruling of the trial judge need only be supported by substantial evidence and not to a moral certainty. *Chambers v. State*, 455 So. 2d 1008 (Ala.Cr.App. 1984); *Bennett v. State*, 409 So. 2d 936 (Ala.Cr.App. 1981), cert. denied, 457 U.S. 1137, 102 S. Ct. 2968, 73 L. Ed. 2d 1356 (1982). The trial court need only be convinced from a preponderance of the evidence to find a confession to have been voluntarily made. *Ex parte McCary*, 528 So. 2d 1133 (Ala. 1988); *Ex parte Singleton*. The fundamental requirements for voluntariness are that the court must conclude, in order to find a defendant's confession voluntary, that he made an independent and informed choice of his own free will, that he possessed the capability to do so, and that his will was not overborne by pressures and circumstances swirling around him. *Jurek v. Estelle*, 623 F.2d 929 (5th Cir. 1980) (en banc), cert. denied, 450 U.S. 1001, 101 S. Ct. 1709, 68 L. Ed. 2d 203 (1981); *Magwood v. State; Harris v. State*, 420 So. 2d 812 (Ala.Cr.App. 1982). It is well settled that the mere fact that a defendant is functionally illiterate or simple-minded will not vitiate the voluntariness of his confession. *Cliff v. State*, 518 So. 2d 786 (Ala.Cr.App. 1987). The low mentality of a defendant should go to the weight and credibility of the confession rather than to its admissibility. *Elrod v. State*,

281 Ala. 331, 202 So. 2d 539 (1967). A defendant's mental impairment, even if it exists, is merely one factor affecting the validity of his waiver of rights and the voluntariness of his confession. *Whittle v. State*, 518 So. 2d 793 (Ala.Cr.App. 1987); *Sasser v. State*, 497 So. 2d 1131 (Ala.Cr.App. 1986). See generally, *Annot.* 8 A.L.R.4th 16 (1981). We, therefore, look to the totality of the circumstances surrounding appellant's statements to determine whether the record supports the finding of the trial court and the admission of the statements into evidence."

Lewis v. State, 535 So. 2d 228, 234-35 (Ala.Cr.App. 1988). See also *Holliday v. State*, 641 So. 2d 325, 327 (Ala.Cr.App. 1994).

In the present case, the totality of the circumstances indicates that the State laid a proper predicate to allow the admission into the evidence of the appellant's statements.

B.

The appellant argues that his statement, which was given while he was in Chattanooga, Tennessee, was involuntary because it was improperly induced by an officer's comment that he would make the appellant's cooperation known to others. The record indicates that, during the suppression hearing, Detective Mathis testified that, although he did not tell the appellant that "it would go easier on him," he "very possibly could have said that [he] would be willing to say that [the appellant] cooperated." He further testified as follows: "That's something that I frequently will say that I do tell people. You know, if they cooperate, then I will be the first to say that, 'Yes, they did.'" Defense counsel then asked the witness if the

appellant had cooperated with him and the officer stated, "Very much so." Defense counsel then asked, "But you made no promise of reward or hope of reward for anything that he would tell you?" The witness responded, "No, ma'am. I would have asked him on tape if I did. No, I did not. He also acknowledged how he was treated while in the custody of the Chattanooga Police Department on tape when he was in there." There is no indication in the record that the officer actually made a statement that he would make the appellant's cooperation known to others, only the possibility that he may have done so. There is no indication in the record that the appellant's statement was "bargained for," i.e., that it was conditioned upon the officer's relating to officials that the appellant was cooperative.

In *Gaddy v. State*, [Ms. CR-90-1429, May 26, 1995] ___ So. 2d ___ (Ala.Cr.App. 1995), aff'd, [Ms. 1950925, Apr. 18, 1997] ___ So. 2d ___ (Ala. 1997), the interrogating officer stated that, before he took the defendant's statement, he told him that, "if this case came to court, that I would not have any problems stating to the Judge or a jury that [the defendant] was cooperative, and [I] found him to be truthful." However, a review of the totality of the circumstances surrounding the defendant's statement, including this remark by the officer, indicated that the statement was voluntary and was not given pursuant to an improper promise or inducement. This Court stated:

"The situation in *Ex parte Weeks*, supra, is distinguishable from that in the instant case. The officer in *Ex parte Weeks* actually bargained with the defendant, by stating that if the defendant confessed, he would make his cooperation known to the district attorney. In

this case, the officer informed the defendant that he was going to make his cooperation known to the court unconditionally; thus, the confession was not actually ‘bargained for’ or directly induced. Moreover, in *Ex parte Weeks*, supra, at 644, the officer acknowledged on cross-examination that he would “‘give something favorable to [the defendant] if he would help.’” In the present case, the interrogating officer consistently stated that he made the appellant no promises and offered no hope for rewards. The officer simply told the appellant that he would make his cooperation known to the court and, subsequently, stated that he in fact did so.

“Generally, the line to be drawn between permissible police conduct and conduct deemed to induce or to tend to induce an involuntary statement does not depend upon the bare language of inducement but rather upon the nature of the benefit to be derived by a defendant if he speaks the truth, as represented by the police.

“... The cases indicate that government agents may validly make some representations to defendant or may discuss cooperation without rendering the resulting confession involuntary. Thus, government agents may initiate conversations on cooperation, and may promise to make defendant’s cooperation known to the prosecutor or the court, so long as the interrogators make it clear that they have no power to grant immunity or confer other benefits.” *Jackson v. State*, 562 So. 2d 1373, 1383 (Ala. Cr. App. 1990), quoting 23 C.J.S. Criminal Law § 907 (1989) (footnotes omitted).

““[A] representation that the fact of cooperation will be made known to prosecuting authorities is insufficient to make a confession involuntary. *United States v. Curtis*, 562 F.2d 1153 (9th Cir.), cert. denied, 439 U.S. 910, 99 S. Ct. 279, 58 L. Ed. 2d 256 (1978).” *United States v. Prescott*, 480 F. Supp. 554, 559 (W.D.Penn. 1979) (The defendant alleged that his oral statements were involuntary because his cooperation was induced by a promise that if he cooperated the F.B.I. Agents would tell the United States Attorney and it would go easier on him.) “Telling the [defendant] in a noncoercive manner of the realistically expected penalties and encouraging [him] to tell the truth is no more than affording [him] the chance to make an informed decision with respect to [his] cooperation with the government.” *United States v. Ballard*, 586 F.2d 1060, 1063 (5th Cir. 1978) (Defendant told that in return for her cooperation the government would make a recommendation and inform the court of her cooperation); *United States v. Morris*, 491 F. Supp. 226 (S.D.Ga. 1980) (F.B.I. agents told defendant: “If you cooperate, it will go easy on you,” and further told him the possible penalties for armed robbery.) See also *United States v. Hart*, 619 F.2d 325 (4th Cir. 1980); *United States v. Jacks*, 634 F.2d 390 (8th Cir. 1980); *United States v. Grant*, 622 F.2d 308 (8th Cir. 1980); *Wallace v. State*, 290 Ala. 201, 275 So. 2d 634 (1973); *Moss v. State*, 347 So. 2d 569 (Ala. Cr. App. 1977); *Tanner v. State*, 57 Ala. App. 254, 327 So. 2d 749 (1976).” *Bennett v. State*, 409 So. 2d 936, 940 (Ala. Cr. App. 1981),

cert. denied, 457 U.S. 1137, 73 L. Ed. 2d 1356, 102 S. Ct. 2968 (1982).

“In determining whether a statement was obtained by coercion or by improper inducement, all surrounding circumstances of the statement and the defendant must be examined in a totality of the circumstances analysis. *Boulden v. Holman*, 394 U.S. 478, 22 L. Ed. 2d 433, 89 S. Ct. 1138 (1969); *Beecher v. Alabama*, 389 U.S. 35, 19 L. Ed. 2d 35, 88 S. Ct. 189 (1967); *Eakes v. State*, 387 So. 2d 855 (Ala. Cr. App. 1978). ‘The true test of determining whether extrajudicial confessions are voluntary is whether the defendant’s will was overborne at the time he confessed and therefore not the product of a rational intellect and a free will. *Townsend v. Sain*, 372 U.S. 293, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963); *Elliott v. State*, 338 So. 2d 483 (Ala. Cr. App. 1976).’ *Eakes v. State*, *supra* at 859.”

Gaddy v. State, ___ So.,2d at ___. Cf. *McLeod v. State*, [Ms. CR-95-1280, October 11, 1996], ___ So. 2d ___ (Ala.Cr.App. 1996) (officer’s conduct was found to be similar to that of the officer in *Ex parte Weeks*, so that the statement was a bargained-for confession).

A totality-of-the-circumstances review of a claim of improper inducement must include both the circumstances surrounding the confession and the characteristics of the individual defendant. *Gaddy v. State*, ___ So. 2d at ___. In the present case, the officer stated consistently that he did not improperly induce the appellant or make any promises in return for the appellant’s statement. He further concluded that the appellant’s statement was voluntarily given. He also

testified that he was uncertain as to whether he had made a statement concerning the effect of the appellant's cooperation, but that he tended to make that statement to those individuals who did cooperate, thus indicating that the promise was made after the cooperation was received and that it was, therefore, not conditional. Moreover, as the Court noted in *Gaddy v. State*, while the interrogating officer clearly did not view the remark as a bargained-for condition of the appellant's statement, the appellant apparently did not previously consider it an improper inducement in that he did not raise this claim at trial, which weighs heavily against any claim of prejudice.⁶ *Kuenzel v. State*, 577 So. 2d 474, 489 (Ala.Cr.App. 1990), affirmed, 577 So. 2d 531 (Ala.), cert. denied, 502 U.S. 886, 116 L. Ed. 2d 197, 112 S. Ct. 242 (1991). There is no support in the record for the appellant's claim that any such remark by the officer induced his statement.

As to the personal characteristics of this appellant, the record indicates that the appellant was 19 years old at the time of the offense and that he had dropped out of school after finishing the eleventh grade. He was found to have been of average intelligence and the pre-sentence report stated he had gone back to the school, after completing boot camp. A review of this presentence investigative report indicates the following concerning the appellant's reputation and community activities:

⁶ The appellant did make a pretrial motion to suppress his statements, but the ground of improper inducement raised on appeal was not cited as a specific ground for that motion.

“According to the Preliminary Report from Walker County[,] Price has a bad reputation in Walker County. Juvenile authorities reported that Price had not benefitted from the services of the Juvenile Court while he was under Juvenile Supervision. They report, ‘Chris has not made use of the counseling, and direction offered by this office.’ ...

“Price was subsequently transferred to Walker County Adult Court on ... Burglary and Receiving Stolen Property charges. He was sentenced in Adult Court and ordered to attend the 180-Day Boot Camp Program within the State System. He finished the Boot Camp Program and his probation period was made active.”

Although the trial court found as a statutory mitigating circumstance that the appellant had no significant history of prior criminal activity, the Court noted that the certified records of the circuit clerk’s office indicated that the appellant had previously pleaded guilty to charges of criminal trespass, auto burglary, criminal mischief, and receiving stolen property, all in September 1990. The trial court noted that all of these crimes appeared to be related to and to have arisen out of the same series of events. The trial court concluded that the prior offenses showed a “history of criminal activity to some degree,” but the trial court concluded that they were insufficient to indicate a significant history of prior criminal activity. However, for the purposes of determining whether the appellant had been improperly coerced into giving his statement, his exposure to the criminal justice system indicates that “he was no stranger to the criminal justice system.” *Gaddy v. State*, ___ So. 2d at ___.

Similarly, this court has concluded that a defendant was sufficiently “familiar with the workings of the criminal justice system” for purposes of determining that his will was not overborne by improper inducement in making his statement, in *Clemons v. State*, [CR-94-270, December 20, 1996] ___ So. 2d ___ (Ala.Cr.App. 1996). In that case the defendant had been previously convicted of carjacking and had been sentenced to three years as a youthful offender.

A trial court’s determination that a defendant’s statement was voluntarily given need be supported by only substantial evidence, and great weight is to be given to this decision; moreover, this determination will not be disturbed on appeal unless this Court is convinced that the judgment is palpably contrary to the weight of the evidence. *Bennett v. State*, 409 So. 2d 936, 939 (Ala.Cr.App. 1981), cert. denied, 457 U.S. 1137, 73 L. Ed. 2d 1356, 102 S. Ct. 2968 (1982), citing *Thompson v. State*, 347 So. 2d 1371 (Ala.Cr.App.), cert. denied, 347 So. 2d 1377 (Ala. 1977), cert. denied, 434 U.S. 1018, 54 L. Ed. 2d 765, 98 S. Ct. 740 (1978). In the present case, the trial court’s conclusion that the statement was voluntary is not contrary to the weight of the evidence.

XIV.

The appellant argues that the trial court’s failure to instruct the jury that it could convict him of capital murder only if it found that he had formed the intent to commit robbery before or during the killing violated his constitutional rights. The record indicates that the appellant failed to object on this ground at trial; thus, any error must be analyzed pursuant to the plain error doctrine. Rule 45A, Ala.R.App.P. However, a review of the entire charge given by the trial court

indicates that the jury was properly informed that the appellant's intent to commit the robbery must have been formed before or at the time of the killing. The trial court instructed the jury on several occasions, in order to constitute capital murder, that the intentional murder must be committed during the robbery in the first degree and that the appellant must have intended to commit the robbery.

Moreover, the evidence at trial clearly established that the intent to commit the robbery was formed before the killing. The appellant's theory of defense was that, while he intended to rob the victims, he did not intend to commit the murder. He argues that all of the preparation undertaken before the offense was done with the belief that he would be committing a robbery. There was no evidence that the intent to rob was an afterthought, nor was there any evidence from which the jury could properly so conclude in arriving at its verdict of guilty of capital murder.

XV.

The appellant argues that the trial court improperly denied his motion for a change of venue, because, he says, he made a clear showing of media saturation and because of the potential jurors' familiarity with the facts of the offense. In his brief on appeal, the appellant cites language by defense counsel in his motion for a change of venue specifically alluding to the fact that the victim was well known in the community, and that the crime was very sensational based on the fact that the victim was a preacher and it was committed during the Christmas season.

In *Smith v. State*, 646 So. 2d 704 (Ala.Cr.App. 1994), the defendant had filed a motion for change of venue, arguing that "the alleged [murder] victim,

Milton R. Russell, was a well-known citizen and business owner in this county for many years. He had high public visibility and his alleged murder evokes great passion and prejudice in this community.” *Id.* at 705. During the voir dire questioning of the venire, the panel was asked how many of them had heard of the murder “from any source whatsoever,” and every venire member stood. *Id.* at 706. However, this Court concluded that the defendant failed to show that the publicity had prejudiced the venire against him; as 19 of the 25 venire members challenged for cause by the appellant were removed and each of the remaining venire members stated that he or she could be fair and impartial, and base a decision on the evidence presented at trial. This Court stated:

“It is well established in Alabama ... that the existence of pretrial publicity, even if extensive, does not in and of itself constitute a ground for changing venue and thereby divesting the trial court of jurisdiction of an offense.’ *Ex parte Fowler*, 574 So. 2d 745, 747 (Ala. 1990).

“The defendant has failed to satisfy the test set out in *Ex parte Grayson*, 479 So. 2d 76, 80 (Ala.), cert. denied, 474 U.S. 865, 106 S. Ct. 189, 88 L. Ed. 2d 157 (1985), because he has not proved that “there existed actual prejudice against the defendant or that the community was saturated with prejudicial publicity.” “Newspaper articles or widespread publicity, without more, are insufficient to grant a motion for change of venue.” *Id.* “The standard of fairness does not require jurors to be totally ignorant of the facts and issues involved.” *Id.* “The relevant question is not whether the community remembered the case, but whether the jurors at [the defendant’s]

trial had such fixed opinions that they could not judge impartially the guilt of the defendant.” *Patton v. Yount*, 467 U.S. 1025, 1035, 104 S. Ct. 2885, 2891, 81 L. Ed. 2d 847 (1984).

““To ensure that the defendant has a fair and impartial jury, it is not necessary that the venire members be totally ignorant of the facts surrounding the case. *Murphy v. Florida*, 421 U.S. 794, 799, 95 S. Ct. 2031, 2035, 44 L. Ed. 2d 589 (1975). ‘It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.’ *Irvin v. Dowd*, 366 U.S. 717, 724, 81 S. Ct. 1639, 1643, 6 L. Ed. 2d 751 (1961).”“*Ex parte Whisenhant*, 555 So. 2d 235, 238 (Ala. 989).’

“*Kuenzel v. State*, 577 So. 2d 474, 483-84 (Ala.Cr.App. 1990), affirmed, 577 So. 2d 531 (Ala.), cert. denied, 502 U.S. 886, 112 S. Ct. 242, 116 L. Ed. 2d 197 (1991).

“It is not required ... that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is

sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.” *Irvin v. Dowd*, 366 U.S. 717, 722-23, 81 S. Ct. 1639, 1642-43, 6 L. Ed. 2d 751 (1961).

“A criminal defendant is not constitutionally entitled to trial by jurors ignorant about relevant issues and events.... “The relevant question is not whether the community remembered the case, but whether the jurors... had such fixed opinions that they could not judge impartially the guilt of the defendant.” ... In determining the existence of presumptive prejudice, a court must consider the totality of the circumstances, including the type of pretrial publicity, the time lapse between peak publicity and the trial, and the credibility of prospective jurors who indicate during voir dire that they could be impartial despite having been exposed to pretrial publicity about the case.... We note that “the presumptive prejudice standard ... is only ‘rarely’ applicable... and is reserved for an ‘extreme situation.’”... “In short, the burden placed upon the petitioner to show that pretrial publicity deprived him of his right to a fair trial before an impartial jury is an extremely heavy one.”“

“*United States v. Lehder-Rivas*, 955 F.2d 1510, 1524 (11th Cir.), cert. denied, ___ U.S. ___, 113 S. Ct. 347, 121 L. Ed. 2d 262 (1992).

“Our review convinces this Court that the trial judge did not abuse his discretion in denying the motion for a change of venue.

““The trial court’s findings of impartiality should be overturned only for ‘manifest error.’ *Irvin v. Dowd*, 366 U.S. 717, 724, 81 S. Ct. 1639, 1643, 6 L. Ed. 2d 751 (1961).” *Fortenberry v. State*, [545 So. 2d 129 (Ala.Cr.App. 1988), affirmed, 545 So. 2d 145 (Ala. 1989), cert. denied, 495 U.S. 911, 110 S. Ct. 1937, 109 L. Ed. 2d 300 (1990)]. “Absent a showing of abuse of discretion, a trial court’s ruling on a motion for change of venue will not be overturned. *Ex parte Magwood*, 426 So. 2d 929, 931 (Ala.), cert. denied, 462 U.S. 1124, 103 S. Ct. 3097, 77 L. Ed. 2d 1355 (1983).” *Ex parte Grayson*, 479 So. 2d [76, 80 (Ala. 1985), cert. denied, 474 U.S. 865, 106 S. Ct. 189, 88 L. Ed. 2d 157 (1985)]. We find no abuse of discretion by the trial court or manifest error in his finding of impartiality.’

“*Oryang v. State*, 642 So. 2d 979 (Ala.Cr.App. 1993) (every member of venire indicated that they had been exposed to pretrial publicity). See also *Thomas v. State*, 539 So. 2d 375, 394 (Ala.Cr.App.) (‘at the beginning of voir dire, every member of the venire stated he or she had read or heard about this case’), affirmed, 539 So. 2d 399 (Ala. 1988), cert. denied, 491 U.S. 910, 109

S. Ct. 3201, 105 L. Ed. 2d 709 (1989). Here, as in *Thomas*, 539 So. 2d at 395, the appellant has “failed to show a connection between the pre-trial publicity and the existence of actual jury prejudice.”

Smith v. State, 646 So. 2d at 706-07.

Similarly, in *Grayson v. State*, 479 So. 2d 69, 73-74 (Ala.Cr.App. 1984), *aff’d*, 479 So. 2d 76 (Ala. 1985), *cert. denied*, 474 U.S. 865, 88 L. Ed. 2d 157, 106 S. Ct. 189 (1985), the defendant made a motion for a change of venue because “pretrial publicity coupled with the nature of the crime and the fact that the deceased was well-known in the small community created such an air of prejudice in the county’ as to deny him a fair trial.” *Id.* at 73. In support of his motion, the appellant introduced the results of a poll conducted in the community and newspaper articles. However, during the voir dire questioning, the trial court asked if any venire members had a fixed opinion concerning the defendant’s guilt and whether they knew anything of the facts of the case. The record indicated that no venire member responded to either question. This Court held that a juror need not be ignorant of the facts or issues involved in a case in order to satisfy the requirements of impartiality.

In *Williams v. State*, 565 So. 2d 1233, 1237-38 (Ala.Cr.App. 1990), the defendant argued that the trial court improperly denied his motion for a change of venue based on alleged prejudicial pretrial publicity and biased community atmosphere. Moreover, “the defendant contends that the prejudicial publicity was heightened by the fact that Mrs. Sennett, the victim, was the wife of a prominent minister and pastor of the Westside Church of Christ in Sheffield; by the brutal

and horrifying manner in which Mrs. Sennett was beaten and stabbed to death; and by the subsequent suicide of Mr. Sennett. The record in that case indicated that most of the publicity occurred immediately after the offense and that the trial did not follow for another year. Furthermore, 16 members of the venire indicated that they were familiar with the facts and circumstances of the offense; 8 of those stated that the publicity had affected their opinion. All 8 of these venire members were removed for cause. Thus, this Court concluded that the defendant failed to properly prove impartiality by the jurors.

In the present case, in support of his motion for a change of venue, the appellant introduced a number of newspaper articles from the Fayette County *Times-Record* and the *Tuscaloosa News*. The articles introduced by the appellant were released approximately a year before the appellant was brought to trial. They were neither inflammatory nor prejudicial to the appellant. There was no showing that the pretrial publicity had so saturated the community as to have a probable impact on the prospective jurors.

The appellant also failed to prove actual prejudice by the jury. An extensive and thorough voir dire examination was conducted wherein 6 venire members indicated that they had not heard or read about the offense. Of the remaining venire members, 8 prospective jurors who indicated that they may have been impartial were struck for cause. The remaining venire members were individually questioned; 4 of these potential jurors were thereafter excused as the questioning revealed possible impartiality. The others all stated that they could disregard any pretrial publicity and render a fair and impartial verdict based

solely on the evidence presented at trial. Thus, the appellant has also failed to show the existence of any actual jury prejudice.

There has been no showing of “manifest error” by the trial court concerning the findings of impartiality of the jury and there has been no showing of abuse of discretion by the trial court in overruling the appellant’s motion for a change of venue.

XVI.

The appellant argues that the introduction of allegedly cumulative and inflammatory photographs of the decedent’s body vitiated the fairness of the trial and deprived him of reliable verdict. However, the location and condition of the wounds to the victim were relevant in the present case, because the appellant’s defense was that he had not committed the murder and he argued that he did not have the sword. There was evidence that both a sword and knife had been used in the attack on the deceased; thus, as the prosecutor argued at trial, whether the wounds could have been caused by either or both of these weapons, and which weapon caused the death, became relevant. Moreover, the condition of the body was relevant because the appellant argued that he did not intend to murder the deceased, rather he intended to commit a robbery.

“As a general rule, photographs are admissible in evidence if they tend to prove or disprove some disputed or material issue, to illustrate or elucidate some other relevant fact or evidence, or to corroborate or disprove some other evidence offered or to be offered, and their admission is within the sound discretion of the trial judge. *Fletcher v. State*, 291 Ala. 67, 277 So. 2d 882 (1973); *Hopkins v. State*, 429 So. 2d 1146

(Ala.Crim.App.), cert. denied, 429 So. 2d 1146 (Ala. 1983); *Godbolt v. State*, 429 So. 2d 1131 (Ala.Crim.App. 1983); *Carpenter v. State*, 400 So. 2d 417 (Ala.Crim.App.), cert. denied, 400 So. 2d 427 (Ala. 1981). Photographs which depict the character and location of external wounds on the body of a deceased are admissible even though they are cumulative and based upon undisputed matters. *Wicker v. State*, 433 So. 2d 1190 (Ala.Crim.App. 1983); *Hopkins v. State*; *Hines v. State*, 365 So. 2d 320 (Ala.Crim.App.), cert. denied, 365 So. 2d 322 (Ala. 1978). The fact that a photograph is gruesome and ghastly is no reason to exclude its admission into evidence, if it has some relevancy to the proceedings, even if the photographs may tend to inflame the jury. *Warrick v. State*, 460 So. 2d 320 (Ala.Crim.App. 1984); *Carpenter v. State*; *Richards v. State*, 337 So. 2d 171 (Ala.Crim.App.), cert. denied, 337 So. 2d 173 (Ala. 1976).”

Magwood v. State, 494 So. 2d 124, 141 (Ala.Cr.App. 1985), affirmed, 494 So. 2d 154 (Ala. 1986), 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986). “There is irony in a convicted murder’s contending on appeal that pictures of the corpse of his victim might have inflamed the jury. That risk ‘comes with the territory.’” *Grice v. State*, 527 So. 2d 784, 787 (Ala.Cr.App., 1988).

Although he appellant also argues that the trial court erred in allowing into evidence photographs depicting the crime scene, he failed to object to these photographs at trial; therefore, his objection as to these photographs is subject to the plain error doctrine. Rule

45A, Ala.R.App.P.⁷ These photographs were relevant to show the location and exact details of the offense and were illustrative of a number of witnesses' testimony. "Perpetrators of crimes that result in gruesome scenes have reason to expect that photographs of those gruesome scenes will be taken and admitted into evidence." *Jenkins v. State*, 627 So. 2d 1034, 1045 (Ala.Cr.App. 1992), affirmed, 627 So. 2d 1054 (Ala. 1993), cert. denied, 511 U.S. 1012, 114 S. Ct. 1388, 128 L. Ed. 2d 63 (1994). In the present case, although these photographs may have tended to inflame the jury, they had some relevancy and therefore were properly admitted into evidence.

XVII.

The appellant argues that the trial court repeatedly failed to question prospective jurors concerning their ability to set aside bias arising from publicity, personal relationships, or past events, and that its failure to do so violated his rights to due process, a fair trial, an impartial jury, and hampered his ability to exercise his peremptory challenges freely. Specifically, the appellant alleges that certain venire members made statements indicating that they may have had biases concerning the present case, but the trial court failed to further inquire into the possible biases. He refers to five specific potential jurors.

The appellant first refers to a potential juror who indicated that he had been an acquaintance of the decedent for a long time; he further indicated that he "would try" to follow the trial court's instructions in

⁷ Thus, this claim is waived as to the robbery conviction. See n.1 above.

considering only the evidence in the case in arriving at a verdict. The appellant also submits that, during individual questioning, this potential juror was equivocal as to his ability to fairly consider the evidence because of his acquaintance with the victim's family. Thus, the appellant argues that the trial court should have further questioned this potential juror, *sua sponte* based on these responses. However, the record indicates that the appellant neither objected to the lack of questioning nor challenged this potential juror for cause. The potential juror was thoroughly questioned, and the appellant was in no way limited as to his ability to question him. This potential juror indicated that he would try "to the best of [his] knowledge" to render a fair and impartial verdict based on the evidence. He also responded that he thought he could disregard his prior general knowledge concerning the case. At the close of his questioning, the defendant himself asked this potential juror if he would be able to give him a fair trial if he were to sit on the jury, and the potential juror stated that he believed that he could. Although the record is silent as to which party exercised the peremptory challenge as to this juror, this potential juror did not sit on the jury.

Thus, the appellant has failed to show any prejudice that he might have suffered based on the trial court's failure to further question this potential juror. Moreover, as the potential juror's responses were consistent and straightforward, there is no indication that further questioning was necessary.

"The defendant is not entitled to jurors who are totally ignorant of the facts and issues involved in the case or to jurors who never entertained a preconceived notion as to the defendant's guilt or innocence. *Ex parte Grayson*, 479 So. 2d 76,

80 (Ala.), cert. denied, 474 U.S. 865, 106 S. Ct. 189, 88 L. Ed. 2d 157 (1985). A defendant is entitled to a trial by jurors who can lay aside any preconceived impressions or opinions and render a verdict based on the evidence which is presented at trial, *id.*”

Oryang v. State, 642 So. 2d 989, 993 (Ala.Cr.App. 1994). Cf. *Williams v. State*, [Ms. CR-92-0382, August 23, 1996] ___ So. 2d ___ (Ala.Cr.App. 1996) (the trial court’s failure to *sua sponte* excuse a venire member who had indicated that she had “one foot already over” on a verdict of guilt and a sentence of death was not error where the defendant allowed the venire member to remain as an alternate on the jury; moreover, the defendant’s reliance on *Hunter v. State*, 585 So. 2d 220 (Ala.Cr.App. 1991) was distinguishable in that the *Hunter* case “involved an erroneous denial by the trial court of a challenge for cause, which forced the defendant in that case to use a peremptory strike to correct the court’s error.”⁸)

The appellant also argues that the trial court erred in failing, *sua sponte*, to further question a potential juror who indicated that her husband had been the victim of a stabbing a year before trial. The record indicates that the appellant did not object to the

⁸ The appellant in the present case also relies on *Hunter v. State*; however, that case is also distinguishable from the present case in that the appellant failed to make a challenge for cause of the venire member, nor is there an indication in the record that he used a peremptory strike against this potential juror.

trial court's failure to question this potential juror; he also did not challenge this venire member for cause. This failure to object weighs against any finding of prejudice. *Kuenzel v. State, supra*. The record indicates that, during individual questioning of this potential juror, the appellant determined that the venire member's husband had been wounded in a previous stabbing. His ability to further question the potential juror concerning this matter was in no way limited, and there was no indication that further questioning was required. The potential juror stated that, if she were to be selected as a juror, she would base her judgment on the evidence presented at trial and the law as instructed by the trial court. Moreover, this record contains no jury strike list from which to determine which party struck this potential juror. Therefore, the appellant has failed to demonstrate any possible prejudice, *Williams v. State*, ___ So. 2d at ___, and his reliance on *Hunter v. State* is again misplaced. See footnote 8.

The appellant also argues that the trial court should have, *sua sponte*, further questioned a potential juror who indicated that her father had been murdered. The appellant neither objected to this failure to question at trial, nor did he raise a challenge for cause against this potential juror. This failure to object weighs against any finding of prejudice. *Kuenzel v. State, supra*. A review of the individual questioning of this potential witness indicates that she stated that, if she were to be selected as a juror, she would listen to the evidence and render a fair and impartial verdict based only on the evidence and the law as instructed by the trial court. This questioning does not demonstrate any need for further questioning concerning any possible bias. Moreover, this potential juror did not

serve on the jury, and there is no indication in the record as to which party struck her from service. Thus, the trial court's failure to further question this venire member was not error.

The appellant further complains of the trial court's failure to *sua sponte* further question two potential jurors concerning their biases: one who indicated that she had heard the decedent preach and another who had indicated that his nephew had been murdered. Following questioning by defense counsel of each of these venire members, the appellant challenged them for cause. The trial court granted both challenges; therefore, the appellant suffered no prejudice by the trial court's failure to further question them. Moreover, the appellant did not request further questioning and did not object to the trial court's failure to do so. There was no plain error on this ground.

XVIII.

The appellant argues that the trial court's failure to instruct the jury on the lesser included offense of intentional murder violated his rights to due process, a fair trial, and a reliable verdict. Specifically, the appellant alludes to the trial court's failure to give a charge on intentional murder as a lesser included offense of capital murder. The trial court charged the jury only as to felony murder as a lesser included offense. The appellant argues on appeal that the court's doing so "left the jurors with 'no where to go,' except for the verdict of guilty on the capital murder charge, if they believed that Mr. Price shared an intent to kill but had not participated in a homicide during the charged robbery." The record indicates that the appellant failed to object on this ground at trial;

therefore, any error must be analyzed pursuant to the plain error doctrine. Rule 45A, Ala.R.App.P.

There is no reasonable theory presented by the evidence to support a charge on intentional murder. The appellant appears to believe that, if he intended to kill the victim, but did not actually participate in the killing, remaining only an observer who was there to render aid if the need arose, and actively participated in only the robbery, he would be guilty of intentional murder rather than capital murder. However, in Alabama, an individual who is present with the intent to aid and abet in the commission of an offense is as guilty as the principle wrongdoer. § 13A-2-20, -23, Code of Alabama 1975. See *Stokley v. State*, 254 Ala. 534, 49 So. 2d 284 (1950); *Robinson v. State*, 335 So. 2d 420 (Ala.Cr.App. 1976), cert. denied, 335 So. 2d 426 (Ala. 1976); *Heard v. State*, 351 So. 2d 686 (Ala.Cr.App. 1977); *Hill v. State*, 348 So. 2d 848 (Ala.Cr.App. 1977), cert. denied, 348 So. 2d 857 (Ala. 1977). “A conviction of one charged in the indictment with having been the actual perpetrator of a crime is authorized on proof of a conspiracy or that the accused aided and abetted in the commission of the crime. *Stokley v. State*, 254 Ala. 534, 49 So. 2d 284 (1950). An aider and abettor would be indicted directly with the commission of the substantive crime and the charge may be supported by proof that he only aided and abetted in its commission. *Pope v. State*, 365 So. 2d 369 (Ala.Cr.App. 1978).” *Killough v. State*, 438 So. 2d 311 (Ala.Cr.App. 1982), reversed on other grounds, 438 So. 2d 333 (Ala. 1983). As long as the appellant intentionally promoted or aided in the commission of the killing itself, whether he actually committed the murder does not affect his liability or his guilt. *Lewis v. State*, 456 So. 2d 413 (Ala.Cr.App. 1984). The trial court instructed the jury

as to the laws of complicity and accomplice liability in the present case.

Moreover, the evidence presented is uncontradicted that the robbery occurred and that the appellant intended that the robbery occur. Thus, the robbery element of the offense was established. The jury was therefore given an alternative lesser included charge of felony murder, based on the theory that the appellant, although he intended to commit the robbery, did not intend to kill the decedent.

“The trial judge did not err in refusing to give the jury a charge on the lesser included offense of intentional murder. A trial judge may refuse to charge on a lesser included offense when it is clear to the judicial mind that there is no evidence to support the jury’s being charged on the lesser included offense. *Greer v. State*, 475 So. 2d 885, 890 (Ala.Cr.App. 1985); *Wesley v. State*, 424 So. 2d 648 (Ala.Cr.App. 1982).” *Gurganus v. State*, 520 So. 2d 170, 174 (Ala.Cr.App. 1987). “Here, neither the evidence presented by the prosecution nor that presented by the defense provides a rational basis for a verdict of murder.” *Parker v. State*, 587 So. 2d 1072, 1083 (Ala.Cr.App. 1991). Applying the logic set forth in *Holladay v. State*, 549 So. 2d 122, 129-130 (Ala.Cr.App. 1988), *aff’d*, 549 So. 2d 135 (Ala. 1989), *cert. denied*, 493 U.S. 1012, 107 L. Ed. 2d 569, 110 S. Ct. 575 (1989), and substituting the present offense and pertinent facts for those set out in that case, it is clear that the evidence that makes the present case a capital offense, i.e., murder committed during a robbery in the first degree, is undisputed. The appellant acknowledges that the perpetrators intended to rob the victims and that the murder occurred during that robbery. There was no evidence presented that the victims were not robbed during the murder. The

crime of intentional murder is automatically elevated to capital murder when it is committed during a robbery in the first degree. Therefore, if the evidence in this case showed that the appellant intentionally killed the victim during the commission of a first degree robbery, then the jury should convict the appellant of capital murder. If, as the appellant argued at trial, the evidence showed that the murder occurred unintentionally during the commission of a robbery in the first degree, then the jury should convict the appellant of felony murder. In the present case, there was no reasonable theory under the evidence presented at trial by the State or the appellant that could have supported a conviction of intentional murder. Therefore, the trial court was not required to give a charge on the lesser included offense of intentional murder.

XIX.

The appellant argues that considering robbery in the first degree both as an element of the capital offense and as an aggravating circumstance violated his rights to an individualized sentence and his protection against double jeopardy. The record indicates that the appellant failed to raise this issue until appeal; therefore, it is subject to the plain error standard of review. Rule 45A, Ala.R.App.P.

The consideration of robbery in the first degree as an aggravating circumstance in the present case, in which the appellant was convicted of capital murder for a murder committed during robbery in the first degree, did not result in an unconstitutional sentencing. This claim was raised in *Ex parte Windsor*, 683 So. 2d 1042, 1060 (Ala. 1996), cert. denied, ___ U.S. ___, 117 S. Ct. 1438 (1997), and the Alabama Supreme Court state:

“The practice of permitting the use of an element of the underlying crime as an aggravating circumstance is referred to as “double-counting” or “overlap” and is constitutionally permissible. *Lowenfield v. Phelps*, 484 U.S. 231, 108 S. Ct. 546, 98 L. Ed. 2d 568 (1988); *Ritter v. Thigpen*, 828 F.2d 662 (11th Cir. 1987); *Ex parte Ford*, 515 So. 2d 48 (Ala. 1987), cert. denied, 484 U.S. 1079, 108 S. Ct. 1061, 98 L. Ed. 2d 1023 (1988); *Kuenzel v. State*, 577 So. 2d 474 (Ala.Cr.App.), aff’d, 577 So. 2d 531 (Ala.), cert. denied, 502 U.S. 886, 112 S. Ct. 242, 116 L. Ed. 2d 197 (1991).

“Moreover, our statutes allow “double-counting” or “overlap” and provide that the jury, by its verdict of guilty of the capital offense, finds the aggravating circumstance encompassed in the indictment to exist beyond a reasonable doubt. See §§ 13A-5-45(e) and -50. “The fact that a particular capital offense as defined in section 13A-5-40(a) necessarily includes one or more aggravating circumstances as specified in section 13A-5-49 shall not be construed to preclude the finding and consideration of that relevant circumstance or circumstances in determining sentence.” § 13A-5-50.’

“*Coral v. State*, 628 So. 2d 954, 955-56 (Ala.Cr.App. 1992). See also *Burton v. State*, 651 So. 2d 641 (Ala.Cr.App. 1993).”

“Moreover, the fact that the evidence relating to the robbery offense served as an element of the offense as well as an aggravating circumstance

for sentencing the appellant did not violate the appellant's rights against double jeopardy.

“Section 13A-5-50, Code of Alabama 1975, states, in part, as follows:

““The fact that a particular capital offense as defined in section 13A-5-40(a) necessarily includes one or more aggravating circumstances as specified in section 13A-5-49 shall not be construed to preclude the finding and consideration of that relevant circumstance or circumstances in determining sentence.”

“Clearly, § 13A-5-50 provides that a jury may consider an element of capital murder as an aggravating circumstance if that element is listed in § 13A-5-49. Further, this court has repeatedly held that the use of an element of capital murder in such a way does not, as the appellant argues, punish a defendant twice for the same offense. *Kuenzel, supra*; see also *Ex parte Kennedy*, 472 So. 2d 1106 (Ala.), cert. denied, 474 U.S. 975, 106 S. Ct. 340, 88 L. Ed. 2d 325 (1985).

““A capital punishment scheme, under which the same felony may form the basis of an essential element of the crime and an aggravating circumstance for consideration by the jury in recommending a sentence, does not constitute a denial of the guarantee against double jeopardy.”

“*Kuenzel*, 577 So. 2d at 488, quoting *Fortenberry v. State*, 545 So. 2d 129, 142

(Ala.Cr.App. 1988), aff'd, 545 So. 2d 145 (Ala. 1989), cert. denied, 495 U.S. 911, 110 S. Ct. 1937, 109 L. Ed. 2d 300 (1990).” *Burton v. State*, 651 So. 2d 641, 657-58 (Ala.Cr.App. 1993), aff'd, 651 So. 2d 659 (Ala. 1998), cert. denied, ___ U.S. ___, 115 S. Ct. 1973, 131 L. Ed. 2d 62 (1995).”

Boyd v. State, [Ms. CR-94-1523, January 17, 1997] ___ So. 2d ___ (Ala.Cr.App. 1997).

Thus, this claim by the appellant did not constitute plain error.

XX.

The appellant argues that the aggravating circumstance that the offense was especially heinous, atrocious, or cruel when compared to other capital offenses was applied to his sentencing with insufficient limiting instructions and was, therefore, unconstitutionally vague. The record indicates that the appellant failed to object on this ground until this appeal; therefore, this claim must be reviewed pursuant to the plain error doctrine. Rule 45A, Ala.R.App.P. In the present case, the appellant relies on *Maynard v. Cartwright*, 486 U.S. 356, 100 L. Ed. 2d 372, 108 S. Ct. 1853 (1988), in arguing that the trial court’s jury instructions concerning the “especially heinous, atrocious, and cruel” statutory aggravating circumstance was unconstitutionally vague. However, the jury was extensively instructed as to the meaning of these terms and how they are to be applied in the context of capital sentencing. Similarly, in *Haney v. State*, 603 So. 2d 368, 387 (Ala.Cr.App. 1991), aff'd, 603 So. 2d 412 (Ala. 1992), cert. denied, 507 U.S. 925, 122 L. Ed. 2d 687, 113 S. Ct. 1297 (1993), the defendant relied on *Maynard v. Cartwright*, *supra*, in claiming that the trial court’s instructions on this aggravating

circumstance in her case were too vague to adequately guide the jury. This Court held that the instructions in *Haney v. State*, *supra*, at 385-86, were distinguishable from those in *Maynard v. Cartwright*, *supra*. This Court held:

“Unlike *Maynard*, the jury here was instructed on the meaning of the words of the aggravating circumstances in the context of capital sentencing. These instructions correctly followed the previously recognized limiting construction of the aggravating circumstance established by the Alabama Supreme Court in *Ex parte Kyzer*, 399 So. 2d 330, 334 (Ala. 1981), wherein the court sated: ‘The aggravating circumstance listed in § 13-1-6(8) [now § 13A-5-49(8)] was intended to apply to only those conscienceless or pitiless homicides which are unnecessarily torturous to the victim.’ For other cases in which we applied the rule established in *Ex parte Kyzer*, see *Hallford v. State*, 548 So. 2d 526 (Ala.Cr.App. 1988), *aff’d*, 548 So. 2d 547 (Ala.), cert. denied, 493 U.S. 945, 110 S. Ct. 354, 107 L. Ed. 2d 342 (1989); *Bui v. State*, 551 So. 2d 1094 (Ala.Cr.App. 1988), *aff’d*, 551 So. 2d 1125 (Ala. 1989). See also *Ex parte Bankhead; Bush v. State*, 431 So. 2d 555 (Ala.Cr.App. 1982), *aff’d*, 431 So. 2d 563 (Ala.), cert. denied, 464 U.S. 865, 104 S. Ct. 200, 78 L. Ed. 2d 175 (1983).”

Id., at 387.

In the present case, the trial court instructed the jury concerning this aggravating circumstance as follows:

“The other aggravating circumstance which you may consider in this case is, if you find from the

evidence that it has been proved beyond a reasonable doubt, you may consider whether the capital offense was especially heinous, atrocious or cruel when compared to other capital offenses. The State asserts in this case the killing of Bill Lynn was especially heinous, atrocious, and cruel when compared to other capital murders. You will have to determine whether or not the evidence in this case, in fact, has proved beyond a reasonable doubt that, in fact, the killing of Bill Lynn was especially heinous, atrocious and cruel when compared to other capital murders.

“The term ‘heinous’ means extremely wicked or shockingly evil. The term ‘atrocious’ means outrageously wicked and violent. The term ‘cruel’ means designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others. What is intended to be included in this aggravating circumstance is only those cases where the actual commission of the capital offense is accompanied by such additional acts as to set the crime apart from the norm of capital offenses.

“For a capital offense to be especially heinous, atrocious or cruel, it must be a conscienceless or pitiless crime which is unnecessarily tortuous to the victim. All capital offense are heinous, atrocious, and cruel to some extent, but not all capital offenses are especially heinous, atrocious, cruel compared to other capital offenses.

“You should not find or consider this aggravating circumstance unless you find that this particular capital offense involved a

conscienceless or pitiless crime which was unnecessarily torturous to the victim

“Now, the fact that death has occurred or that a death scene may appear gruesome does not prove that the crime was especially heinous, atrocious, and cruel. Instead, the jury must determine if these elements are present based upon a careful and rational review of all the evidence that has been submitted to you during the trial of this case, both in the guilt/innocence phase and in the sentence phase of the case.

“As I stated to you before, the burden of proof is on the State to convince you beyond a reasonable doubt as to the existence of the aggravating circumstance asserted that the capital offense in this case was especially heinous, atrocious, or cruel when compared to other capital offenses.”

These instructions are substantially the same as the relevant instruction in the “Proposed Pattern Jury Instructions Use in the Sentence Phase of Capital Cases Tried Under Act No. 81-178.” A trial court’s following of an accepted pattern jury instruction weighs heavily against any finding of plain error. *Ex parte Harrell*, 470 So. 2d 1309, 1315 (Ala. 1985), cert. denied, 474 U.S. 935, 88 L. Ed. 2d 276, 106 S. Ct. 269 (1985).

In the present case, there was no plain error as to the trial court’s charge to the jury.

XXI.

The appellant argues that the trial court’s finding that the defense failed to present a prima facie case of racial discrimination in the exercise of the

State's peremptory challenges to prospective jurors was erroneous. The record indicates that, following the striking of the jury and before it was seated, the following transpired:

"[Defense counsel]: At this time, Your Honor, I would like to place on the record the information that during the selection process there were five black jurors who were available to us. The State struck three, number 59, number 66 and number 5, all being black females. ... I ask that the race of each of those jurors be noted on the record and I would like the State to justify each of their strikes.

"THE COURT: Is that all you have?

"[Defense counsel]: Well, no sir. Based on the Sixth and the Fourteenth Amendments and my client's right to a fair cross-section, I would argue that by the elimination of those jurors, we no longer have a fair cross-section of his peers because the number has been diminished, ... leaving us with 2 black jurors out of 14 with 2 alternates not being the black ones. He has a right to a fair cross-section and I would argue that by their elimination he no longer has any fair cross-section. In cases as important as this, he is entitled.

"[Prosecutor]: I'd like to point out, Your Honor, that the venire that we began with was 10% black. We had 49 to strike from, of whom 5 were black. The number seated is -- of the jurors seated is 1/6 or 16% -- 16 2/3 black, and of those, including alternates, is 14% black, so based strictly on the number, it is a fair cross-section of the racial continuity of the venire itself.

“THE COURT: Do you have anything else to offer in support of your motion?”

“[Defense Counsel]: No, nothing more than I’ve already argued. I just wanted to note it for the record.

“THE COURT: Then your motion will be denied.

“[Prosecutor]: Your Honor, could I ask you to include on the record whether or not the basis for your denial is that they have not made a prima facie showing of a racial discriminatory jury strike pattern?”

“THE COURT: I think the record would reflect that

“[Prosecutor]: Is that the basis of your ruling, sir?”

“THE COURT: Yes.”

Thus, the trial court held that the appellant failed to establish a prima facie case of racial discrimination. In support of the appellant’s motion, the only assertion made by defense counsel was that there were five black potential jurors and the State struck 3 of them. Two blacks served on the appellant’s jury, neither of whom were alternates. Defense counsel also made a blanket allegation that the appellant was deprived of a fair cross-section of his peers because the number of blacks on the venire panel had been diminished in arriving at the number of blacks actually serving on the appellant’s jury.

“A defendant claiming a *Batson* violation must make a prima facie showing that the prosecution

used its peremptory strikes in a discriminatory manner. *Jackson v. State*, 594 So. 2d 1289 (Ala.Cr.App. 1991). Only when the defendant establishes facts and circumstances that raise an inference of discrimination must the state give its reasons for its peremptory strikes. *Carter v. State*, 603 So. 2d 1137 (Ala.Cr.App. 1992).’

“*Stokes v. State*, 648 So. 2d 1179, 1180 (Ala.Cr.App. 1994). We will reverse a trial court’s ruling on a *Batson* motion only when that ruling is clearly erroneous. *Ex parte Branch*, 526 So. 2d 609 (Ala. 1987).”

Clemons v. State, [Ms. CR-94-270, December 20, 1996] ___ So. 2d ___, ___ (Ala.Cr.App. 1996).

In *Edwards v. State*, 628 So. 2d 1021, 1024 (Ala.Cr.App. 1993), the trial court found that the defendant had failed to establish a prima facie case of racial discrimination where there had been 6 black members on a 35-40 member venire, i.e., the venire was 15%-17% black. One black venire member was removed for cause, and the State struck two blacks, apparently leaving three on the jury, so that blacks comprised 25% of the jury. The defendant objected based only on the fact that the State struck two blacks who had never answered any questions during voir dire questioning. The trial court held that the defendant had failed to make a prima facie showing of racial discrimination, stating:

“*Batson, Ex parte Branch*, 526 So. 2d 609 (Ala. 1987), and their progeny make it very clear that “the burden of persuasion is initially on the party alleging discriminatory use of peremptory challenges to establish a prima facie case of discrimination.”“ *Ex parte Bird*, 594 So. 2d 676,

679 (Ala. 1991) (quoting *Ex parte Branch*, 526 So. 2d at 622). Until this burden is met, the challenged party 'is under no obligation to offer explanations for its peremptory strikes.' *Jackson v. State*, 594 So. 2d 1289, 1292 (Ala.Cr.App. 1991). See also *Huntley v. State*, 627 So. 2d 1013 (Ala. 1992). Merely showing that the challenged party struck one or more members of a particular race is not sufficient to establish a prima facie case. *Harrell v. State*, 571 So. 2d 1270, 1271 (Ala. 1990), cert. denied, 499 U.S. 984, 111 S. Ct. 1641, 113 L. Ed. 2d 736 (1991); *Ashley v. State*, 606 So. 2d 187, 192 (Ala.Cr.App. 1992); *Jones v. State*, 603 So. 2d 419, 420-21 (Ala.Cr.App. 1992). See also *Hood v. State*, 598 So. 2d 1022, 1023 (Ala.Cr.App. 1991). 'When the evidence shows only that blacks were struck and that a greater percentage of blacks sat on the jury than sat on the lawfully established venire, an inference of discrimination has not been created.' *Harrell v. State*, 571 So. 2d at 1271. The trial court properly denied the appellant's *Batson* motion." *Edwards v. State, supra*, at 1024.

"In *Ashley v. State*, 606 So. 2d 187 (Ala.Cr.App. 1992), the prosecution used three of its seven strikes to remove blacks from the pool of potential jurors. This court held that the "appellant failed to establish a prima facie case under *Batson and Ex parte Branch* [526 So. 2d 609 (Ala. 1987)] because the appellant failed to show any evidence of discrimination other than the number of blacks struck." *Ashley*, 606 So. 2d at 192. Similarly in the present case, the only evidence presented to the trial court by the

appellant was the fact that three out of the seven potential black jurors were struck by the prosecution. There was no evidence presented that any of the factors set out in *Ex parte Branch*, 526 So. 2d 609 (Ala. 1987), which may be used to establish a prima facie case, existed. The evidence presented at trial was not sufficient to prove a prima facie case of a *Batson* violation. The trial court did not err in denying the appellant's *Batson* motion." *Moore v. State*, 677 So. 2d 828, 829 (Ala.Cr.App. 1996).

"When determining whether a challenging party has shown a prima facie case of racial discrimination in the use of peremptory strikes, "the court is to consider 'all relevant circumstances' which could lead to an inference of [such] discrimination." *Ex parte Branch*, 526 So. 2d 609, 622 (Ala. 1987). The challenging party "may establish a prima facie case of *purposeful* discrimination in selection of the petit jury *solely* on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial." *Batson*, 476 U.S. at 96, 106 S. Ct. at 1723 (emphasis added). Normally, the challenging party has not shown that the prosecution used its peremptory strikes in a racially discriminatory manner where the *only* evidence presented in support of a prima facie case of discrimination is the fact that blacks were struck by the prosecution. *Ex parte Branch*, 526 So. 2d 609, 622-23 (Ala. 1987), contains nonexclusive list of factors that a challenging party might use to establish a prima facie case of discrimination. This list includes, "[a] *pattern of strikes* against [jurors of a certain

gender or race] on a particular venire; e.g., 4 of 6 peremptory challenges were used to strike black jurors.” *Branch*, 526 So. 2d at 623 (emphasis added). A pattern “implies that the action at least in part “because of,” not merely “in spite of,” its adverse effects upon an identifiable group,’ *Hernandez [v. New York]*, 500 U.S. 352, 360, 111 S. Ct. [1859] at 1866 [(1991)] (quoting *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279, 99 S. Ct. 2282, 60 L. Ed. 2d 870 (1979) (footnote and citation omitted in *Hernandez*.)” *Freeman v. State*, 651 So. 2d 576, 583 (Ala.Cr.App. 1994). When determining whether peremptory strikes were used in a manner to suggest discriminatory “pattern of strikes,” “merely showing that the challenged party struck one of more members of a particular race is not sufficient to establish a prima facie case [of discrimination].” *Edwards v. State*, 628 So. 2d 1021, 1024 (Ala.Cr.App. 1993).” *Bell v. State*, 676 So. 2d 1349, 1350 (Ala.Cr.App. 1995) (Emphasis in original.)”

Clemons v. State, ___ So. 2d at ___.

In the present case, the appellant relied solely on the number of strikes against blacks made by the State, without any supporting evidence indicating a discriminatory intent or purpose. Thus, the appellant has failed to make a prima facie showing of racial discrimination by the State in removing blacks from the jury.

XXII.

The appellant argues that the trial court’s denial of his motion to quash the indictment, which was based on the composition of the grand jury, without affording

him an adequate opportunity to conduct discovery, denied him of his rights to due process, a fair trial, equal protection, and a jury comprised of a fair cross-section of the community. Specifically, the appellant refers to the motion hearing held pursuant to his motion to quash the indictment, at which the trial court stated that the defense had not shown the necessary statistics and evidence in support of its claim and denied the motion. The appellant complains that the trial court denied the motion without providing him the time to conduct discovery or otherwise to gather the relevant facts. However, the record indicates that the appellant failed to request any additional time. Therefore, he raises this issue for the first time on appeal, and this issue must be analyzed pursuant to the plain error doctrine. Rule 45A, Ala.R.App.P.

“The guidelines for determining whether a trial court has abused its discretion in denying a continuance are set out in *Ex parte Saranthus*, 501 So. 2d 1256, 1257 (Ala. 1986):

“A motion for a continuance is addressed to the discretion of the court and the court’s ruling on it will not be disturbed unless there is an abuse of discretion. *Fletcher v. State*, 291 Ala. 67, 277 So. 2d 882 (1973). If the following principles are satisfied, a trial court should grant a motion for continuance on the ground that a witness or evidence is absent: (1) the expected evidence must be material and competent; (2) there must be a probability that the evidence will be forthcoming if the case is continued; and (3) the moving party must have exercised due diligence to secure the evidence.

Knowles v. Blue, 209 Ala. 27, 32, 95 So. 481, 485-86 (1923).’

Fortenberry v. State, 545 So. 2d 129, 138 (Ala.Cr.App. 1988), affirmed, 545 So. 2d 145 (Ala. 1989), cert. denied, 495 U.S. 911, 109 L. Ed. 2d 300, 110 S. Ct. 1937 (1990).

In the present case, the appellant has failed to make a showing of good cause as to any of the three principles required to support the granting of a motion for a continuance. The appellant has failed to show that the expected evidence was material or competent, that there was a probability that the evidence would be forthcoming (especially as the appellant has yet to produce any evidence in support of this motion), and that the party exercised due diligence in securing the evidence, because the motion was filed on September 18, 1992, and the hearing was ultimately held on December 15, 1992.

“Trial judges necessarily require a great deal of latitude in scheduling trials. Not the least of their problems is that of assembling the witnesses, lawyers, and jurors at the same place at the same time, and this burdens counsels against continuances except for compelling reasons. Consequently, broad discretion must be granted trial courts on matters of continuances.” *Morris v. Slappy*, 461 U.S. 1, 11-12, 75 L. Ed. 2d 610, 103 S. Ct. 1610 (1983) (discussing a defendant’s claim that his Sixth Amendment right to counsel was violated by a trial court’s failure to grant his counsel additional time to investigate.) See also *Ex parte Hays*, 518 So. 2d 768, 771-72 (Ala. 1986).

In the present case, especially in light of the evidence presented at the motion hearing, it is clear that the trial court did not abuse its discretion in denying the appellant’s motion. The appellant

presented no evidence to support this motion as required by *Duren v. Missouri*, 439 U.S. 357, 58 L. Ed. 2d 579, 99 S. Ct. 664 (1979), and absent any proof, such a claim must be rejected. *White v. State*, 587 So. 2d 1218, 1222 (Ala.Cr.App. 1990), affirmed, 587 So. 2d 1236 (Ala. 1991), 502 U.S. 1076, 112 S. Ct. 979, 117 L. Ed. 2d 142 (1992). Moreover, the trial court's failure to *sua sponte* grant the appellant additional time to investigate this claim did not constitute plain error. "We find it extremely improbable that the additional time for preparation requested by the defendant would have changed the result of the trial and that the defendant has not met his burden of showing actual prejudice in the defense of the charge for which he was convicted." *Fortenberry v. State, supra*, at 139.

XXIII.

The appellant argues that the limitation placed on the amount of compensation receivable by counsels representing indigent defendant in Alabama violates the United States Constitution and Alabama law. Specifically, the appellant argues that this limitation deprives him of his Sixth Amendment right to the effective assistance of counsel and also violates the separation of powers doctrine, as well as his rights to due process and equal protection of the law. However, this claim has previously been decided adversely to the appellant. See *Ex parte Grayson*, 479 So. 2d 76, 80-81 (Ala. 1985), cert. denied, 474 U.S. 865, 88 L. Ed. 2d 157, 106 S. Ct. 189 (1985); *Smith v. State*, 581 So. 2d 497, 526-29 (Ala.Cr.App. 1990), reversed on other grounds, 581 So. 2d 531 (Ala. 1991). Moreover, the appellant's argument that the statute limiting counsel's compensation constitutes a "taking" of his attorney's property without providing just compensation has similarly been resolved adversely to the appellant.

Smith v. State, [Ms. CR-91-1733, March 8, 1996] ___ So. 2d ___ (Ala.Cr.App. 1996), *aff'd*, [Ms. 1951688, Apr. 18, 1997] ___ So. 2d ___ (Ala. 1997). Similarly, in *Smith v. State*, *supra*, this Court also held that the compensation limitations on out-of-court time do not constitute an unconstitutional denial of the effective assistance of counsel.

XXIV.

As required by § 13A-5-53, Code of Alabama 1975, we address the propriety of the appellant's conviction and sentence of death. The appellant was indicted and convicted of capital murder, see § 13A-5-40(a)(2), Code of Alabama 1975, for intentionally causing the death of Bill Lynn during a robbery in the first degree.

The record reflects that the appellant's sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor. See § 13A-5-53(b)(1), Code of Alabama 1975.

A review of the record shows that the trial court correctly found the existence of two aggravating circumstances: that the capital offense was committed during a robbery, and that the capital offense was especially heinous, atrocious, and cruel when compared to other capital cases. Considering the evidence of the circumstances surrounding the victim's murder, it is clear that it was unnecessarily torturous, pitiless, conscienceless, extremely wicked, and shockingly evil. The trial court correctly found the existence of two statutory mitigating circumstances: that the defendant had no significant history of prior criminal activity and that the defendant was 19 years old at the time of the offense. The trial court also correctly found the existence of three non-statutory mitigating

circumstances: that the defendant's father was murdered when the defendant was a small child; that the defendant had been verbally, physically, and possibly sexually abused by a number of his mother's live-in companions; and that the defendant had been diagnosed as having an antisocial personality and as having been emotionally disturbed from an early age. The trial court also took into consideration the instability of his home life and the traumatic events during his early years. The trial court weighed the mitigating and aggravating circumstances and properly determined that the aggravating circumstances outweighed the statutory mitigating circumstances and nonstatutory mitigating circumstances. We agree with the trial court's findings.

As required by § 13A-5-53(b)(2), Code of Alabama 1975, this Court must independently weigh the aggravating and mitigating circumstances to determine the propriety of the appellant's death sentence. After an independent weighing this Court is convinced that the appellant's sentence of death is the appropriate sentence.

As § 13A-5-53(b)(3), Code of Alabama 1975, provides, we must also address whether the appellant's sentence was disproportionate or excessive when compared to sentences imposed in similar cases. The appellant's sentence was neither. See *Kuenzel v. State*, 577 So. 2d 474 (Ala.Cr.App.), affirmed, 577 So. 2d 531 (Ala. 1991), cert. denied, 502 U.S. 886, 116 L. Ed. 2d 197, 112 S. Ct. 242 (1991); *Brown v. State*, 545 So. 2d 106 (Ala.Cr.App.), affirmed, 545 So. 2d 122 (Ala. 1989), cert. denied, 493 U.S. 900, 107 L. Ed. 2d 206, 110 S. Ct. 257 (1989); *Hallford v. State*, 548 So. 2d 526 (Ala.Cr.App. 1988), affirmed, 548 So. 2d 547 (Ala.), cert. denied, 493 U.S. 945, 107 L. Ed. 2d 342, 110 S. Ct. 354 (1989). Two-

thirds of the death sentences imposed in Alabama involve cases of robbery-murder. *Beck v. State*, 396 So. 2d 645, 654 n.5 (Ala. 1980).

We have searched the entire record for any error that might have adversely affected the appellant's substantial rights and have found none. Rule 45A, Ala.R.App.P.

545a

APPENDIX G

**JUNE 23, 2006 DENIAL OF CERTIORARI BY
THE ALABAMA SUPREME COURT**

Ex parte Christopher Lee Price

1021742

SUPREME COURT OF
ALABAMA

June 23, 2006, Decided

OPINION:

Cert denied.

546a

APPENDIX H

**SEPTEMBER 4, 1998 DENIAL OF DENIAL OF
CERTIORARI BY THE ALABAMA SUPREME
COURT**

Ex parte Christopher Lee Price
(Christopher Lee Price v. State)

1970372

SUPREME COURT OF
ALABAMA

September 4, 1998, Released

DISPOSITION:

Affirmed.

APPENDIX I

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution 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.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. 2254(d)(1) provides:

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 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;

28 U.S.C. 2254(e)(2) 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 have found the applicant guilty of the underlying offense.

FEDERAL RULES INVOLVED

Rule 2(c) of the Rules Governing Section 2254 Cases provides:

The petition must: (1) specify all the grounds for relief available to the petitioner; (2) state the facts supporting each ground; (3) state the relief requested; (4) be printed, typewritten, or legibly handwritten; and (5) be signed under penalty of perjury by the petitioner or by a person authorized to sign it for the petitioner under 28 U.S.C. § 2242.