ECF 18
Single-Judge Order

In the

United States Court of Appeals

For the Eleventh Circuit

No. 22-13328

ULYSSES CHARLES SNEED,

Petitioner-Appellant,

versus

WARDEN, HOLMAN CORRECTIONAL FACILITY,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Alabama
D.C. Docket No. 5:16-cv-01442-LCB

ORDER:

Ulysses Sneed is an Alabama prisoner on death row for the 1993 robbery-murder of a convenience store clerk. *Sneed v. State*, 1 So. 3d 104, 112 (Ala. Crim. App. 2007). He seeks a certificate of appealability ("COA"), in order to appeal the denial of three claims in his 28 U.S.C. § 2254 federal habeas petition.

In order to obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The movant satisfies this requirement by demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," or that the issues "deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotations omitted). He has failed to make that showing here.

Reasonable jurists would not find debatable the denial of Sneed's claim that his trial counsel was ineffective during the penalty phase for prematurely ending the mitigation investigation and failing to call lay witnesses to testify to Sneed's abusive and troubled childhood and background. All of the information Sneed argues the lay witnesses would have provided concerning his childhood and background was introduced at the penalty phase through the testimony of his two experts. Although he argues that lay witnesses who actually knew him would have been viewed as more credible and their testimony more powerful, he cites no authority for this proposition. Counsel is not constitutionally ineffective for failing to present cumulative evidence. *See Van Poyck v. Fla. Dep't. of Corrs.*, 290 F.3d 1318, 1324 n.7 (11th Cir. 2002) ("A

petitioner cannot establish ineffective assistance by identifying additional evidence that could have been presented when that evidence is merely cumulative."); *Wong v. Belmontes*, 558 U.S. 15, 22–23 (2009) (holding habeas petitioner was not prejudiced by counsel's failure to call more witnesses to testify about the petitioner's troubled childhood because it was cumulative to that already presented and "adding it to what was already there would have made little difference"); *Rhode v. Hall*, 582 F.3d 1273, 1287 (11th Cir. 2009) (holding that habeas petitioner failed to establish prejudice because "[c]ounsel is not required to present cumulative evidence").

Similarly, reasonable jurists would not debate the denial of Sneed's claim that trial counsel was ineffective at the penalty phase for failing to secure mental health expert, Stanley Brodsky. The record shows counsel requested funding for Dr. Brodsky multiple times, but the request was denied. As such, counsel's performance was not deficient. Although Sneed argues that counsel's funding requests were insufficient, the record refutes this contention.

Finally, reasonable jurists would not debate the denial of Sneed's claim that Alabama's then-in-place jury override scheme[1] violated his Sixth Amendment right to have a jury and not a judge make the relevant factual findings for a sentence of death, citing

[1] Sneed's jury returned a 7 to 5 advisory sentencing recommendation of a life sentence. *Sneed*, 1 So. 3d at 112. The trial court, however, overrode that recommendation and sentenced Sneed to death under Alabama's then-existent judicial override statute. *Id.* That statute is no longer in place.

Ring v. Arizona, 536 U.S. 584 (2002), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Sneed failed to point to any United States Supreme Court case in existence at the time of his 2007 direct appeal establishing that Alabama's capital sentencing scheme or its jury override statute was invalid post-*Ring*.

Furthermore, Sneed was convicted of the capital offense of robbery-murder, in violation of Ala. Code § 13A-5-40(a)(2) (1975). *See Sneed*, 1 So. 3d at 112. In Alabama, it is a statutory aggravating circumstance if "[t]he capital offense was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit . . . robbery." Ala. Code § 13A–5–49(4). Accordingly, "[a] jury's guilt-phase finding of conviction under § 13A-5-40(a)(2) necessarily includes a finding that the aggravating circumstance in § 13A–5–49(4) is present." *Lee v. Comm'r, Ala. Dep't of Corr.*, 726 F.3d 1172, 1198 (11th Cir. 2013); *See* Ala. Code § 13A–5–45(e). Thus, the findings reflected in the jury's verdict alone exposed Sneed to a range of punishment that had as its maximum the death penalty, and that is all that *Ring* and *Apprendi* require.[2]

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[2] To the extent that Sneed's argument also encompasses the position that the jury—not the judge—is required to weigh the aggravating and mitigating circumstances, reasonable jurists would not debate the denial of this claim. Nothing in *Ring* or *Apprendi* require the jury to weigh the aggravating and mitigating circumstances, and Sneed has not pointed to any other Supreme Court case to support this position. *See Lee*, 726 F.3d at 1198 (explaining that nothing in *Ring* requires a jury as opposed to a judge to weigh the aggravating and mitigating circumstances). Furthermore, the Supreme Court has since rejected this argument. *See McKinney v. Arizona*, 589 U.S. 139, 145 (2020) ("*Ring*

Because Sneed failed to show that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," or that the issues "deserve encouragement to proceed further," his request for a COA is DENIED. *Slack*, 529 U.S. at 484.

/s/ Elizabeth L. Branch
UNITED STATES CIRCUIT JUDGE

. . . did not require jury weighing of aggravating and mitigating circumstances.").

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
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July 08, 2024

James Christopher Martin
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225 5TH AVE STE 1200
PITTSBURGH, PA 15222

Appeal Number: 22-13328-P
Case Style: Ulysses Charles Sneed v. Warden Holman CF
District Court Docket No: 5:16-cv-01442-LCB

The enclosed copy of this Court's order denying the application for a Certificate of Appealability is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

Any pending motions are now rendered moot in light of the attached order.

Clerk's Office Phone Numbers

General Information:	404-335-6100	Attorney Admissions:	404-335-6122
Case Administration:	404-335-6135	Capital Cases:	404-335-6200
CM/ECF Help Desk:	404-335-6125	Cases Set for Oral Argument:	404-335-6141

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

ECF 22
Reconsideration Order

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
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November 26, 2024

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 22-13328-P
Case Style: Ulysses Charles Sneed v. Warden Holman CF
District Court Docket No: 5:16-cv-01442-LCB

The enclosed order has been ENTERED.

Electronic Filing
All counsel must file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Although not required, non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing are available on the Court's website.

Clerk's Office Phone Numbers

General Information:	404-335-6100	Attorney Admissions:	404-335-6122
Case Administration:	404-335-6135	Capital Cases:	404-335-6200
CM/ECF Help Desk:	404-335-6125	Cases Set for Oral Argument:	404-335-6141

MOT-2 Notice of Court Action

In the

United States Court of Appeals

For the Eleventh Circuit

No. 22-13328

ULYSSES CHARLES SNEED,

Petitioner-Appellant,

versus

WARDEN, HOLMAN CORRECTIONAL FACILITY,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Alabama
D.C. Docket No. 5:16-cv-01442-LCB

Before JORDAN, BRANCH, and LAGOA, Circuit Judges.

BY THE COURT:

Appellant's motion for reconsideration of the July 8, 2024, single judge order denying motion for a certificate of appealability is DENIED.

In relation to Sneed's claim that trial counsel was ineffective for failing to call lay witnesses during the penalty phase, we note that Sneed does not dispute that the jury heard testimony from his expert witnesses that Sneed's father abandoned the family when Sneed was 9, that Sneed's father was abusive, that Sneed grew up in extreme poverty, and that he had multiple alleged suicide attempts. Although Sneed argues that lay witnesses who actually knew him would have been viewed as more credible and their testimony more powerful, he cites no authority for the proposition that testimony from lay witnesses who personally knew him is necessarily more credible or compelling than the same testimony offered by expert witnesses. Accordingly, this claim does not warrant encouragement to proceed further.

As for Sneed's second claim (upon which the dissent would grant a certificate of appealability), the dissent asserts that Sneed had a right under *Ake v. Oklahoma*, 470 U.S. 68 (1985), to a mental health evaluation, but the dissent brushes past the fact that counsel requested and obtained over $10,000 for mitigation expert assistance, which counsel used to hire Dr. Rosenzwaig, an expert in clinical and forensic psychology; a social worker who conducted a full social history workup; and a mitigation specialist. Dr. Rosenzwaig evaluated Sneed and performed a battery of

psychological tests and testified regarding those results at trial.[1] The social worker also testified at length at trial regarding her findings. As for Dr. Brodsky, Sneed's counsel requested an additional $7,500 in funding—via multiple motions with supporting affidavits from the mitigation specialist as to the need for the assistance. That request, however, was denied in part—the trial court granted an additional $3,500, which was unfortunately insufficient to retain Dr. Brodsky's services.

While counsel may not have incanted the desired language or arguments in the requests for funding that the dissent desires, counsel's motions were thorough and detailed, drew the court's attention to *Ake v. Oklahoma*, 470 U.S. 68 (1985), and were supported by an affidavit from the defense's mitigation specialist. There is no indication that had counsel simply done more in his motions, the additional funding would have been secured. Rather, the trial court made clear that it had already approved over $10,000 in funding for mitigation assistance, additional amounts were unreasonable in the court's view, and it would not approve more.[2]

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[1] The dissent notes that Dr. Rosenzwaig only spent 15 minutes with Sneed, implying that her testimony was based on that lone 15-minute interaction. It was not. Sneed completed a battery of psychological tests, and Rosenzwaig interpreted those results.

[2] Nevertheless, the trial court explained that if the defense felt "the need for further psychological examination," then it should notify the court, and the court would "enter an order for mental evaluation to be performed by the State." The defense declined to exercise this option, however, and Sneed does not challenge that decision.

Accordingly, reasonable jurists would not debate the denial of this claim.

JORDAN, Circuit Judge, Dissenting.

With respect, I dissent. I would grant Mr. Sneed a certificate of appealability on his two Sixth Amendment ineffective assistance of counsel claims: (1) that his counsel were ineffective in failing to conduct an adequate mitigation investigation or call lay witnesses at the sentencing phase; and (2) that his counsel were ineffective in failing to retain Dr. Stanley Brodsky, a forensic psychologist.

Every capital case, in its own way, involves a tragedy—the unlawful taking of an innocent life. But every capital case is also unique, and Mr. Sneed is not the typical capital defendant. First, Mr. Sneed (who was unarmed during the convenience store robbery) was not the shooter. He was convicted of felony murder and sentenced to death based on the killing of the store clerk by his co-defendant, John Hardy. Second, the jury recommended a life sentence by a vote of 7-5, only to have that recommendation overridden by the trial court. *See Sneed v. State*, 1 So.3d 104, 112–113 (Ala. Crim. App. 2007). These facts are relevant in assessing whether Mr. Sneed's ineffective assistance of counsel claims merit a COA.

I fear that the court, in denying a COA, has essentially conducted a merits review and determined conclusively that Mr. Sneed would not succeed on his ineffective assistance of counsel claims. That sort of review, as the Supreme Court has told us, is improper at this point in the proceedings. "At the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his

constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.' This threshold question should be decided without 'full consideration of the factual or legal bases adduced in support of the claims.' 'When a court of appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.'" *Buck v. Davis*, 580 U.S. 100, 115 (2017) (citations omitted).

With respect to the first ineffective assistance of counsel claim, the court concludes that the testimony of the uncalled lay witnesses would have been cumulative of the testimony provided by Mr. Sneed's two experts. *See* COA Denial Order at 2–3. It's true, as the court points out, that many of the facts that the uncalled lay witnesses would have testified to were covered by Mr. Sneed's experts. The lay witnesses who were not called would have testified that Mr. Sneed lived in "grinding poverty"; that his father abandoned the family when he was 9 and that his mother was emotionally unavailable; that his father started physically abusing him when he was a baby; and that he tried to kill himself after graduating from high school. *See id.* at 10–13. I agree with Mr. Sneed that there is an argument to be made—though perhaps not a winning one in the end—that certain facts would have resonated more with the jury or the trial court if presented by family

members and friends who knew him (as opposed to a dispassionate social worker merely relaying what others had told her). [3]

We have granted habeas relief, and rejected the state's argument about the cumulative nature of evidence, when the testimony actually presented at trial was only a part of the mitigation mosaic that could have been but was not offered. *See, e.g., Collier v. Turpin*, 177 F.3d 1184, 1201–02 (11th Cir. 1999); *Cooper v. Secretary, Department of Corrections*, 646 F.3d 1328, 1355 (11th Cir. 2011); *Johnson v. Sec'y, DOC*, 643 F.3d 907, 936 (11th Cir. 2011); *DeBruce v. Comm'r, Ala. Dep't of Corr.*, 758 F.3d 1263, 1276 (11th Cir. 2014); *Maples v. Comm'r, Ala. Dep't of Corr.*, 729 F. App'x 817, 826–27 (11th Cir. 2018). Though the ultimate merits here may be a close call, surely these cases are enough to demonstrate that jurists of reason could disagree with the denial of the ineffectiveness claim relating to mitigation evidence. Again, Mr. Sneed was not the shooter, and in a capital case where the death penalty was imposed on a felony-murder theory and the jury recommended a life sentence by a vote of 7-5, the testimony of the lay witnesses could

[3] I agree with the court that Mr. Sneed abandoned the portion of his ineffective assistance claim regarding lay witness testimony about his personality/positive characteristics, learning abilities, and remorse. He failed to challenge the omission of this testimony in his appeal before the Alabama Court of Criminal Appeals, as well as in his federal habeas petition. And we "will not consider claims not properly presented to the district court." *Wright v. Hopper*, 169 F.3d 695, 708 (11th Cir. 1999). The other aspects of his claim, however, were properly preserved.

have made a difference. At the very least this claim deserves "encouragement to proceed further." *Buck*, 580 U.S. at 115.

Turning to the ineffectiveness claim relating to Dr. Brodsky, the court concludes that the record refutes Mr. Sneed's contention that counsel's funding requests were insufficient. That too is at least debatable.

Counsel's motion failed to point out that under *Ake v. Oklahoma*, 470 U.S. 68 (1985), a capital defendant has a Fourteenth Amendment right to an independent mental-health evaluation. The motion also failed to explain that a mental-health diagnosis was critical because under Alabama law two mitigating factors could only be shown by proper medical evidence. *See* Ala. Code § 13A-5-51(2) (defendant acted under the influence of extreme mental or emotional disturbance); Ala. Code § 13A-5-51(6) (defendant suffered from a substantial impairment of the capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law). Finally, counsel delayed the funding request; they made it only shortly before trial, and they used the limited funds they did have on non-critical experts.

Dr. Rosenzweig may have performed some psychological testing on Mr. Sneed and testified to that effect, but she did not evaluate his medical records as required by *Ake*. *See McWilliams v. Dunn*, 582 U.S. 183, 198–99 (2017). Indeed, Dr. Rosenzweig spent no more than 15 minutes total with Mr. Sneed. Dr. Brodsky would have testified that Mr. Sneed "hear[d] voices" and suffered from Depressive Disorder and PTSD. *See* Mr. Sneed's Motion for COA

at 32. Given that the trial court found that neither of the statutory mental-health mitigating factors existed, Dr. Brodsky's fuller evaluation certainly could have had an impact. This is particularly so given Mr. Sneed's less culpable role in the murder. This ineffective assistance of counsel claim also warrants a COA. *See Tennard v. Dretke*, 542 U.S. 274, 287 (2004) ("impaired intellectual functioning is inherently mitigating" in a capital case even if the defendant cannot "establish[ ] a nexus to the crime").

It may be that Mr. Sneed's claims will fail in the end, but at this stage they deserve "encouragement to proceed further." *Buck*, 580 U.S. at 115. I dissent from the court's wholesale denial of a COA to Mr. Sneed.[4]

[4] *See also Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (a COA analysis "forbids" a "full consideration of the factual or legal bases adduced in support of the claims").

ECF 24
Suspension of Rules Order

In the

United States Court of Appeals

For the Eleventh Circuit

No. 22-13328

ULYSSES CHARLES SNEED,

Petitioner-Appellant,

versus

WARDEN, HOLMAN CORRECTIONAL FACILITY,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Alabama
D.C. Docket No. 5:16-cv-01442-LCB

Before JORDAN, BRANCH, and LAGOA, Circuit Judges.

BY THE COURT:

Appellant's "Motion to Suspend Circuit Rule 22-1(C) and Permit Petitioner-Appellant to Petition the Court for Rehearing En Banc" is DENIED.[1]

[1] Judge Jordan dissents and would grant the motion.