IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-10993-P

TONY BARKSDALE,

Petitioner - Appellant,

versus

ATTORNEY GENERAL, STATE OF ALABAMA,
COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,
WARDEN, HOLMAN CORRECTIONAL FACILITY,

Respondents - Appellees.

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

ORDER:

Tony Barksdale, an Alabama death row inmate, seeks to appeal the district court's orders denying his 28 U.S.C. § 2254 petition and his Rule 59(e) motion. He has filed an application for a COA in this Court raising eight issues. Because Barksdale has not made "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), I am denying his application.

I. FACTS

Barksdale fatally shot 19-year Julie Rhodes in December 1995. The trial court described the facts of his crime this way:

> On Thursday night [November 30, 1995], [Tony] Barksdale, [Jonathan David] Garrison, and [Kevin] Hilburn were together in the Guntersville area. Barksdale wanted to go to Alexander City, so very early Friday morning they stole a car in Guntersville and headed for Alexander City. About seven o'clock in the morning they wrecked the car near Sylacauga, but were able to obtain a ride from someone in the neighborhood, who took them to Alexander City. Throughout most of the day, they visited or came in contact with persons with whom Barksdale was acquainted, and asked several of them to take them to Guntersville. No one would. During that afternoon, they made many attempts to flag down vehicles belonging to strangers, but few would stop. Finally one person gave them a ride as far as a local shopping center. They approached several people without success. One acquaintance testified that Barksdale said he would "jack" somebody to get back to Guntersville. Several others testified to seeing him with a gun. Barksdale had the gun when the three left Guntersville, and he was the only one armed. Barksdale told the other two that he would shoot someone in order to get a ride back to Guntersville, and he would rather shoot one than two.
>
> The victim, 19-year-old Julie Rhodes, worked at a store in the shopping center. As she was returning in her old Maxima automobile from her supper break to the parking area, Barksdale flagged her down and the three of them got in the car with the victim. Barksdale was seated in the backseat. He gave Julie directions to drive in the neighborhood, and to turn into a "dead-end" street and stop. Garrison and Hilburn got out and ran behind a nearby shed. The Maxima moved along the street past several houses, turned into a driveway, backed out, and came back down the street. Two shots were fired by Barksdale and the car stopped. Barksdale pushed Julie out of the car and told Garrison and Hilburn to get in. They went to some place in Alexander City and disposed of some things that were in the car and then drove back to Guntersville. Barksdale still had the gun and displayed it to several people. All of

> them were arrested several days later and the automobile and pistol were recovered.
>
> Desperately seeking help and trying to escape, Julie managed to get to some nearby houses. Someone heard her screams and she was discovered lying in the yard of a house, bleeding profusely. Medics were called and she was transported to a local hospital for emergency treatment and then transported by helicopter to Birmingham. She was dead on arrival in Birmingham. She was shot once in the face and once in the back. She was bleeding to death and went into shock. She was fearful and was trying to escape her assailant and expressed several times to various people, including medical personnel, that she was going to die. She was correct.

Barksdale v. State, 788 So. 2d 898, 901–02 (Ala. Crim. App. 2000) (quotation marks omitted).

The police arrested Barksdale, Garrison, and Hilburn several days after Rhodes' death. Id. at 902. They recovered Rhodes' car and Barksdale's gun. Id. At the time he committed the crime, Barksdale was 18 years old. Barksdale v. Dunn, No. 3:08-cv-327, 2018 WL 6731175, at *8 n.57 (M.D. Ala. Dec. 21, 2018).

II. PROCEDURAL HISTORY

A Tallapoosa County grand jury indicted Barksdale on three counts of capital murder. Id. at *3. Count 1 charged him with intentionally causing Rhodes' death by shooting her in the course of stealing her vehicle by force and while armed with a deadly weapon. Id. at *3 n.24. Count 2 charged him with intentionally causing Rhodes' death by using a deadly weapon while she was in a

vehicle. Id. Count 3 charged him with intentionally causing Rhodes' death by using a deadly weapon while within or from a vehicle. Id.[1]

The case went to trial. The prosecution's theory was that Barksdale killed Rhodes in order to steal her car. It called 73 witnesses, including people who were in the area at the time of the shooting, law enforcement officers who responded to or investigated the crime, forensic scientists, a doctor who treated Rhodes, people who were with Barksdale before and after the shooting, and Garrison, who agreed to testify against Barksdale as part of his plea agreement. Id. at *3–7; COA App. at 15 n.6. The defense admitted that Barksdale shot Rhodes, but it argued that the shooting was accidental. Doc. 20-13 at 44. It presented two witnesses: the former owner of the murder weapon who testified about its poor condition, and a firearms expert who also testified about its poor condition. Docs. 20-11 at 177–86; 20-12 at 191–98.[2]

[1] Hilburn, who was with Barksdale at the time of the crime, died before the jury returned the indictment. Doc. 62 at 8; COA App. at 16. Garrison, who was also with Barksdale at the time of the crime, was indicted on the same three counts as Barksdale, but he pleaded guilty to the lesser count of murder shortly before their joint trial was scheduled to begin. Doc. 62 at 8. He received a life sentence with the possibility of parole. Id. at 8–9. As part of his plea deal, he agreed to testify against Barksdale. Id. at 9.

[2] The district court wrongly states that the defense called only one witness, the firearms expert. Barksdale, 2018 WL 6731175, at *7. That error probably occurred because the other defense witness, the former owner of the murder weapon, was called out of turn. Doc. 20-11 at 177.

At the close of evidence Barksdale filed a motion for acquittal on Count 3 of the indictment, which charged him with intentionally causing Rhodes' death by using a deadly weapon while within or from a vehicle. Barksdale, 2018 WL 6731175, at *7. The trial judge granted it. Id.[3] The jury returned a guilty verdict on Counts 1 and 2. Id. at *8. The penalty stage began immediately. Both parties waived opening argument, and other than re-offering all of the same evidence that was already introduced and admitted, the prosecution presented only a redacted version of a certified copy of Barksdale's judgment of conviction from Virginia on a charge of robbery. Id. The defense also offered only a single document: a certified copy of Barksdale's birth certificate. Id. After closing arguments, the jury recommended by an 11-1 vote to impose the death penalty for each count. Id.

The trial court held a sentence hearing where both parties told the court that they had no additional evidence to present and focused their arguments primarily on whether Barksdale's offense qualified as "heinous, atrocious, and cruel." Id. Almost a month later, the trial court issued a sentencing order adopting the jury's sentencing recommendation and imposing a sentence of death. Id. The trial court

[3] It its order denying Barksdale's federal habeas petition, the district court stated: "Given the overwhelming evidence at trial showing Julie Rhodes was shot while she was inside her vehicle by a weapon fired inside her vehicle, there was no logical reason for the state trial court to strike . . . count three." Id. at *7 n.52.

made clear in that order it would have imposed the sentence even if the jury had not recommended death. COA App. at 40.

The Alabama Court of Criminal Appeals affirmed Barksdale's convictions and sentence. Barksdale, 788 So. 2d at 915. The Alabama Supreme Court denied certiorari, Ex parte Barksdale, 788 So. 2d 915 (Ala. 2000), as did the United States Supreme Court, Barksdale v. Alabama, 532 U.S. 1055 (2001).

On May 22, 2002, Barksdale filed a Rule 32 (collateral attack) petition in state court asserting nineteen claims, many of which contained numerous sub-claims. Docs 20-16; 62 at 27. The state collateral trial court summarily dismissed or denied all but two of his claims, finding that they were procedurally barred, insufficiently pleaded, or clearly meritless. Docs 20-26 at 39–91; 62 at 28. The court held an evidentiary hearing on the remaining two claims. Doc. 20-26 at 92. In the first, Barksdale asserted that his trial counsel rendered ineffective assistance by failing to investigate and present mitigating evidence. Id. In the second, he asserted that his counsel rendered ineffective assistance by failing to object to alleged emotional displays by the victim's family in front of the jury. Id. After the evidentiary hearing, the court denied relief on both claims. Id. at 126. It concluded that the first one failed on the merits and that Barksdale had failed to present any evidence in support of the second one. Id. at 93–126. The Court of

Criminal Appeals affirmed the trial court's denial of Barksdale's Rule 32 petition. Id. at 127–203. The Alabama Supreme Court denied certiorari. Id. at 205.

On May 2, 2008, Barksdale filed in the district court a 28 U.S.C. § 2254 petition asserting 32 claims. Doc. 1. More than ten years later, on December 21, 2018, the district court issued a 317-page order denying each of Barksdale's claims on the merits, denying his request for an evidentiary hearing, and denying him a COA. Barksdale, 2018 WL 6731175, at *108–10.

Barksdale then filed a Rule 59(e) motion to alter or amend the judgment. Doc. 64. He focused on two issues: (1) the district court's rejection of his ineffective assistance of trial counsel claims, and (2) the district court's decision to deny him a COA on all of his claims. Id. at 1–2. The district court denied the Rule 59(e) motion. Doc. 74. On March 11, 2010, Barksdale filed an NOA to appeal the district court's orders denying his federal habeas petition and his Rule 59(e) motion. Doc. 75. On April 20, 2020, he filed the application for a COA that is before me.

III. STANDARDS OF REVIEW

A. The COA Standard

This Court may grant an application for a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where the petitioner seeks a COA on a claim that the district court

denied on the merits, he must show "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000). He does not have to show, however, that "he will ultimately succeed on appeal." Lamarca v. Sec'y, Dep't of Corr., 568 F.3d 929, 934 (11th Cir. 2009). As the Supreme Court has put it, "[t]he question is the debatability of the underlying constitutional claim, not the resolution of that debate." Miller-El v. Cockrell, 537 U.S. 322, 342 (2003).

Where the petitioner seeks a COA on a claim that the district court dismissed on procedural grounds, the petitioner must show "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Slack, 529 U.S. at 484. Each component of the required showing "is part of a threshold inquiry, and a court may find that it can dispose of the application in a fair and prompt manner if it proceeds first to resolve the issue whose answer is more apparent from the record and arguments." Id. at 485.

B. The AEDPA Standard

The state courts rejected many of Barksdale's claims on the merits. Those claims are subject to AEDPA. See Nance v. Warden, GDP, 922 F.3d 1298, 1300–01 (11th Cir. 2019). Under AEDPA, federal habeas relief is barred unless the state

court's rejection of the claims was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "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). This court reviews the last reasoned state court decision when conducting its analysis. Wilson v. Sellers, 138 S. Ct. 1188, 1192 (2018). In this case, that is in most instances the Alabama Court of Criminal Appeals' decision affirming the state collateral trial court's denial of Barksdale's Rule 32 petition. Doc. 20-26 at 127–203.

A state court's decision is "contrary to" clearly established federal law only "if the court arrived at a conclusion opposite to the one reached by the Supreme Court on a question of law or the state court confronted facts that are 'materially indistinguishable' from Supreme Court precedent but arrived at a different result." Ferrell v. Hall, 640 F.3d 1199, 1223 (11th Cir. 2011) (quoting Williams v. Taylor, 529 U.S. 362, 405 (2000)). And a state court's decision involves an "unreasonable application" of clearly established federal law only if it is "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Harrington v. Richter, 562 U.S. 86, 102 (2011). In other words, "if some fairminded jurists could agree with the state court's decision, although others might disagree, federal habeas relief

must be denied." Hill v. Humphrey, 662 F.3d 1335, 1346 (11th Cir. 2011) (en banc) (quotation marks omitted).

C. How The COA Standard Combines With The AEDPA Standard

Where the district court has denied habeas relief after the state courts denied a claim on the merits, the COA question is not whether reasonable jurists could find the merits of the claim debatable. Applying that standard to the COA determination in that circumstance would be wrong. It would be wrong because the issue sought to be appealed is not whether the constitutional claim had merit, but instead whether the state court decision that it did not have merit is due to be rejected under the demanding standards of AEDPA deference.

In other words, the COA standard applies to the issue on appeal from the district court's denial of habeas relief, not to the issue that was before the state court for decision in the first place. And the issue before the district court and on appeal from its denial of relief is whether every reasonable jurist would reject the state courts' decision on the claim. Only if no reasonable jurist could agree with the state court decision was the district court wrong to deny federal habeas relief on that claim.

So overlaying the COA standard with the AEDPA deferential standard, the COA question is this: Could a reasonable jurist find debatable the proposition that no reasonable jurist at all could agree with the state courts that the claim lacked

merit? If any reasonable jurist could find the rejection of the claim debatable, the state court judgment rejecting it cannot be disturbed in a federal habeas proceeding. And if a state court judgment rejecting a claim cannot be disturbed in federal habeas, a COA cannot be granted to permit appellate review of the district court's denial of relief.

D. Procedural Bar Standards

The state courts rejected some of Barksdale's claims on procedural grounds. This Court is barred from considering those claims at all unless Barksdale can show one of three things: (1) that the procedural ruling was not an "independent and adequate state ground" for rejecting the claim, (2) cause and prejudice, or (3) that our failure to consider the claim will result in a fundamental miscarriage of justice. See Cone v. Bell, 556 U.S. 449, 465 (2009); Coleman v. Thompson, 501 U.S. 722, 750 (1991).

Barksdale did not raise some of his federal habeas claims in state court at all, and his state court remedies are no longer available.[4] "Procedural default bars

[4] Because his direct appeal proceedings ended 19 years ago, his Rule 32 petition proceedings ended 12 years ago, and none of his claims are of the type that may be permissibly raised in a successive petition under Alabama Rule of Criminal Procedure 32.2(b), any claim he failed to raise in state court is procedurally defaulted. Rule 32.2(b) states: "A successive petition on different grounds shall be denied unless (1) the petitioner is entitled to relief on the ground that the court was without jurisdiction to render a judgment or to impose sentence or (2) the petitioner shows both that good cause exists why the new ground or grounds were not known or could not have been ascertained through reasonable diligence when the first petition was heard, and that failure to entertain the petition will result in a miscarriage of justice."

federal habeas review when a habeas petitioner has failed to exhaust state remedies that are no longer available." Butts v. GDCP Warden, 850 F.3d 1201, 1211 (11th Cir. 2017); see 28 U.S.C. § 2254(b)(1)(A). There are two exceptions to that bar: (1) cause and prejudice or (2) that our failure to consider the claim will result in a fundamental miscarriage of justice. See Butts, 850 F.3d at 1211. This Court may skip over the procedural default issue entirely if it denies (but not if it grants) the claim on the merits. See 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State."); Loggins v. Thomas, 654 F.3d 1204, 1215 (11th Cir. 2011) ("When relief is due to be denied even if claims are not procedurally barred, we can skip over the procedural bar issues, and we have done so in the past."). This Court reviews de novo those claims if it chooses to review them. See Conner v. GDCP Warden, 784 F.3d 752, 767 & n.16 (11th Cir. 2015).

Finally, to the extent Barksdale failed to raise a claim in the district court, this Court may not consider it on appeal. See, e.g., Ferguson v. Sec'y for Dep't of Corr., 580 F.3d 1183, 1193 (11th Cir. 2009) (explaining that in habeas cases we "do not consider issues or arguments raised for the first time on appeal"); Smith v. Sec'y, Dep't of Corr., 572 F.3d 1327, 1352 (11th Cir. 2009) (declining to consider habeas petitioner's argument because it was "not fairly presented" to the district

court); Davis v. Terry, 465 F.3d 1249, 1252 n.3 (11th Cir. 2006) (holding that because the petitioner "did not raise [an] argument in his habeas petition," the "argument was not considered by the district court and will not be considered here"); Wright v. Hopper, 169 F.3d 695, 708 (11th Cir. 1999) ("We will not consider claims not properly presented to the district court and which are raised for the first time on appeal."); Provenzano v. Singletary, 148 F.3d 1327, 1329 n.2 (11th Cir. 1998) ("Because [petitioner] did not raise the claim below, we do not consider it."); Mills v. Singletary, 63 F.3d 999, 1008 n.11 (11th Cir. 1995) ("The law in this circuit is clear that arguments not presented in the district court will not be considered for the first time on appeal."); Waters v. Thomas, 46 F.3d 1506, 1524 n.5 (11th Cir. 1995) (en banc) (declining to consider an argument that the petitioner did not raise in the district court).

IV. DISCUSSION

The claims that Barksdale raises in his application for a COA can be divided into four categories: (1) ineffective assistance of counsel claims, (2) Eighth Amendment claims, (3) Sixth Amendment sentencing claims, and (4) a ghostwriting claim. We address each in turn.

A. The Ineffective Assistance Of Counsel Claims

1. Procedural Issues

Barksdale raised in his Rule 32 petition many, but not all, of the ineffective assistance claims contained in his COA application. Doc. 20-16 at ¶¶ 8–77. The state trial court ruled that all but two of the ineffective assistance claims he raised were procedurally barred or not supported by sufficient factual allegations, so it summarily dismissed or denied them. Doc. 20-26 at 42–76. Later, after holding an evidentiary hearing, the court denied his remaining two claims: (1) that counsel was ineffective for failing to investigate and present mitigating evidence at the penalty stage and (2) that counsel failed to object to alleged emotional displays by the victim's family in front of the jury. Id. at 92–126. The Court of Criminal Appeals affirmed the state trial court's decisions. Doc. 20-26 at 131–89.

The Court of Criminal Appeals' decision affirming the state trial court's summary rejection of many of Barksdale's ineffective assistance claims for failure to plead sufficient facts is considered a ruling on the merits of those claims for purposes of AEDPA. The rejection of a claim for failure to satisfy Alabama Rule of Criminal Procedure 32.6(b), which is what occurred here in many instances, constitutes a ruling on the merits that does not give rise to a procedural default or foreclose federal habeas review of a federal constitutional claim. See Frazier v. Bouchard, 661 F.3d 519, 524–26 (11th Cir. 2011); Borden v. Allen, 646 F.3d 785,

815–16 (11th Cir. 2011). It follows that we examine "the ineffective assistance of counsel allegations that were before the Court of Criminal Appeals under the standards set forth by AEDPA" if they were dismissed for failure to plead sufficient facts. Borden, 646 F.3d at 815.

2. Strickland and AEDPA

A petitioner must show deficiency and prejudice to state a valid ineffective assistance of counsel claim. Strickland v. Washington, 466 U.S. 668, 687 (1984).

To show deficiency, Barksdale must prove that his counsel's representation "fell below an objective standard of reasonableness." Wiggins v. Smith, 539 U.S. 510, 521 (2003) (quotation marks omitted). The petitioner bears the burden of showing this, and he must overcome a strong presumption that the conduct of his trial counsel falls within a wide range of reasonable professional assistance. Strickland, 466 U.S. at 687–91. Courts are extremely deferential in scrutinizing the performance of counsel and make every effort to eliminate the distorting effects of hindsight. See Wiggins, 539 U.S. at 523 (holding that the proper analysis under the first prong of Strickland is an objective review of the reasonableness of counsel's performance under prevailing professional norms, which includes a context-dependent consideration of the challenged conduct as seen from the perspective of counsel at the time). "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." Bobby v. Van Hook, 558 U.S. 4, 7 (2009) (quoting Strickland, 466 U.S. at 688–89). The Supreme Court has instructed us that we must "strongly presume[ ]" that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 690. And it has added to that instruction this one:

> Federal habeas courts must guard against the danger of equating unreasonableness under Strickland with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard." Id. (emphasis added). If so, the petition must be denied. It preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents. It goes no further.

Harrington, 562 U.S. at 102.

To show prejudice, Barksdale must establish that his counsel's errors were so serious that they deprived him of a fair trial or sentence proceeding, or in other words, one whose result is reliable. Strickland, 466 U.S. at 686–87. That occurs only if there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. And "reasonable probability" means "a probability sufficient to undermine confidence in the outcome." Id.

3. Guilt Stage Ineffective Assistance Claims

Barksdale claims that his trial counsel, Thomas M. Goggans, was ineffective during the guilt stage because he: (1) failed to adequately investigate and present exculpatory evidence; (2) failed to adequately cross-examine the State's witnesses, in particular one witness: Garrison; (3) failed to obtain or use Hilburn's police statement to cross-examine Garrison; and (4) botched the direct examination of his own expert witness regarding whether the murder weapon's discharge was accidental. COA App. at 15–16. None of his arguments in support of those claims meet the AEDPA standard for granting a COA.

a. *The Accidental Shooting Theory Ineffectiveness Claim*

In his Rule 32 petition, Barksdale brought what amounts to at least two, and arguably three, claims asserting that his trial counsel failed to adequately investigate and present exculpatory evidence. Doc. 20-16 at ¶¶ 26–33. The first of those claims is that Goggans failed to adequately investigate the accidental shooting theory of defense and settled for hiring a substandard gun expert and having the previous gun's owner testify, which Barksdale says is "tantamount to launching no defense at all." Id. ¶¶ 26–29.

In affirming the trial court's dismissal of this ineffective assistance claim, the Court of Criminal Appeals held that Barksdale "failed to allege how calling those [two defense] witnesses prejudiced his defense." The court pointed out that

Barksdale "included no facts whatsoever in his petition regarding the crime or the State's evidence against him," and did not allege who else could have offered more helpful testimony for the defense, or what that more helpful testimony would have been. Doc. 20-26 at 144–47.

In his federal habeas petition Barksdale raised this ineffective assistance claim. Doc. 1 at ¶¶ 10–21. The district court concluded that the state court did not unreasonably apply federal law when it held that Goggans was not deficient in investigating the accidental shooting theory or when it held that Barksdale was not prejudiced by how that theory was presented, including by his direct examination of the gun expert. Barksdale, 2018 WL 6731175, at *47–52.

The district court was right. There was overwhelming evidence that Barksdale fired the murder weapon. Docs. 20-26 at 57–61; 20-16 at 19–20 (describing how, among other things, Barksdale told the police about how he committed the crime, claiming he "didn't mean to do it"). From his police interviews through his brief to the Court of Criminal Appeals in his Rule 32 appeal, Barksdale never denied being the one who shot the victim to death (as described in his brief to the Court of Criminal Appeals in his Rule 32 appeal):

> From his arrest until today, Tony Barksdale has had a single explanation of what happened in Julie Rhodes's car on December 1, 1995. He said that he took the 9-millimeter pistol from his pocket to empty it, because he did not want to be carrying a loaded gun on the long walk from Charlotte Lane to the Knollwood Apartments. The mechanism jammed. He did not know that there was a live round in the

> chamber. The gun fired as he was trying to retrieve bullets from the magazine manually. The second shot was a knee-jerk reaction to the first. The killing was an accident. That is and has always been Tony Barksdale's explanation of how Julie Rhodes was shot.

Doc. 20-21 at 52–53 (emphasis added).

Given what his client had stated from the beginning, Goggans conducted a reasonable investigation into the best (indeed the only) defense available: an accidental shooting theory.[5] He hired a gun expert to testify about how the gun was in bad condition. Doc. 20-26 at 55–57. He had the former owner of the gun testify about the weapon's poor condition as well. Id. (noting that the former owner talked about how the gun was of "poor quality" and the gun's safety tended to move from safe to fire on its own). Presenting that evidence allowed Goggans to argue in closing, with factual support, that the gun was "junk" and that an accidental discharge was quite possible given its condition and Barksdale's lack of gun safety discipline. Doc. 20-13 at 36–38. Barksdale has not created enough of a doubt about Goggans' performance to justify issuance of a COA on this claim, even if he had shown prejudice, which he hasn't.

[5] The Court of Criminal Appeals addressed only the prejudice prong of Strickland on this issue, so we must look through it to the state trial court's reasoned decision on deficiency in the collateral proceeding. Wilson, 138 S. Ct. at 1192; see also Hammond v. Hall, 586 F.3d 1289, 1330 (11th Cir. 2009). But even if no deference were due the state trial court's deficiency holding in these circumstances, federal habeas relief would still be due to be denied on the deficiency prong under de novo review.

Even assuming performance deficiency, Barksdale's request for a COA on this claim fails for lack of prejudice. The Court of Criminal Appeals' affirmed the denial of state collateral relief for this claim on prejudice grounds, and that decision is due AEDPA deference. Barksdale has never specified anything different that Goggans, given the evidence, could or should have done that would have caused his accidental shooting theory to succeed in getting him acquitted on the murder charge. Except for one thing. In a contention he treats as a separate claim, Barksdale argues that Goggans rendered ineffective assistance by failing to ask his firearms expert one more question. Because Barksdale treated that contention as a claim separate from this one, I will treat it as a separate claim in the next paragraph, below. For present purposes, suffice it to say that he has failed to show that no reasonable jurist could agree with the Court of Criminal Appeals' holding on the prejudice prong of this ineffective assistance of counsel claim, or this part of this ineffective assistance of counsel claim if it is just a part. He is not entitled to a COA.

Turning now to the related claim, Barksdale contends that Goggans failed to adequately examine his own firearms expert, Joe Shirey, who testified that the murder weapon was defective. Barksdale argues that Goggans should have also asked Shirey another question about the firearm jamming, which Barksdale says caused a live round to be left in the firing chamber. COA App. at 16. The specific

question he should have asked, according to Barksdale, is whether when Shirey attempted to withdraw the magazine from the pistol's chamber during his examination of the firearm, it jammed, leaving a live round in the firing chamber.

Barksdale raised this argument in his Rule 32 petition. Doc. 20-16 at ¶¶ 26–29. The state collateral trial court found that Goggans' questioning of Shirey was reasonable because Shirey's testimony was good for Barksdale and established that the weapon was in poor shape and could have accidently discharged. Doc. 20-26 at 56–57. The trial court also ruled that Barksdale did not plead any facts that would establish prejudice. Id. at 55. The Court of Criminal Appeals affirmed the trial court on prejudice grounds, holding that Barksdale did not plead any facts indicating how calling Shirey prejudiced him, or what other specific steps his counsel should have taken in investigating and presenting the accidental discharge defense. Id. at 144–47.

Barksdale does not explain, in either his Rule 32 petition or in his COA application, how the additional question would have significantly changed the defense's accidental discharge presentation given the testimony that was already before the jury that the weapon had many issues, including jamming. Based on the evidence he had presented, Goggans was able to argue in closing that the firearm

"is a piece of junk . . . . This gun is such a piece of junk . . . . There was evidence that when he tested it that it jammed after being fired." Doc. 20-13 at 36.[6]

Barksdale raised this one-more-question claim in his federal habeas petition. Doc. 1 at ¶¶ 11–12. After reviewing it de novo, the district court concluded that Barksdale had "failed to allege any specific facts showing that . . . Shirey . . . would have offered any testimony beneficial to [him]" if he had been examined more thoroughly by [Goggans]." Barksdale, 2018 WL 6731175, at *49–50. Given the record, reasonable jurists would not find the district court's conclusion "debatable or wrong." Slack, 529 U.S. at 484.

b. *The Other Defenses Ineffectiveness Claims*

Barksdale also claims that Goggans rendered ineffective assistance by failing to investigate defenses other than accidental shooting. He asserted in the state collateral trial court proceeding, for example, that Goggans should have obtained Barksdale's medical records or hired a medical expert to testify about his possible mental or neurological condition. Doc. 20-16 at ¶¶ 30–33. The trial court summarily dismissed both of those parts of that claim because they were insufficiently pleaded. Doc. 20-26 at 55–61. Barksdale did not include in his

[6] Recall that it is undisputed Barksdale shot the victim not once but twice, making the accidental shooting defense an extremely long shot in any event, regardless of how much evidence the defense put in about the possibility of the gun jamming.

appeal to the Court of Criminal Appeals the dismissal of either of those two claims. Id. at 187.

In his COA application, Barksdale tries to expand his claims to cover the entire guilt stage investigation. COA App. at 15–16. The attempt to raise in here even more claims that were not contained in his state court Rule 32 petition or in his appeal from its denial fails. All of these new claims are procedurally defaulted, and Barksdale makes no effort to show that any exception applies. So they are barred. See Butts, 850 F.3d at 1211; supra note 4. And to the extent he is trying to raise claims that he did not raise in the district court, we may not consider them. See supra pages 12–13 (citing cases holding that we will not consider an issue the petitioner failed to raise in the district court).

And even if those procedural bars could be put aside, which they can't, and his other lines of defense claims were addressed, Barksdale would fare no better. For example, Barksdale's claim that Goggans should have hired an expert to testify that he had a neurological or mental disorder that causes him to black out is based on the fact that when discussing the murder, Barksdale told the police "[i]t seems like I just keep blacking out." Doc. 20-16 at 19. But as the state collateral trial court noted, Barksdale described to the police not just the crime but the details of it, belying any possibility he had blacked out. See Doc. 20-26 at 59 ("Barksdale's statement to the police contains Barksdale's description of the crime, indicating his

memory of the events that occurred."). And other than his self-serving statement to the police, no evidence of any kind of medical condition causing blackouts existed then or now. Barksdale never told Goggans that he had any medical or mental health conditions, and when Goggans interacted with him Barksdale did not display or indicate in any way that he was suffering from any mental health issues. Id. at 109. And even Barksdale's Rule 32 attorneys could not find any helpful records concerning his mental health. Id. at 108, 167.

For those reasons, the state collateral trial court explained that the trial judge would not have approved funds for a mental health expert to present a black out defense, and as a result, Goggans' decision not to pursue further investigation on that issue was reasonable. Id. at 59. The court also concluded that Barksdale could not show prejudice because he did not adequately allege any facts showing that further investigation would have helped — he did not allege any facts to support his contention that he suffers from a neurological condition. Doc. 20-26 at 57–61. Because no reasonable jurist would doubt that reasonable jurists could agree with the state collateral trial court's decision of this claim, Barksdale is not entitled to a COA on this claim.

c. *Ineffectiveness Regarding Cross-Examinations & the Hilburn Police Statement*

Barksdale next contends that his trial counsel failed to (1) adequately cross examine the State's witnesses, including Garrison, and (2) obtain or use Hilburn's

police statement to impeach Garrison. He did not raise either claim in his Rule 32 petition. He did raise part of this claim in his Rule 32 appeal, arguing that the cross-examination of Garrison was inadequate. Doc. 20-21 at 55–57. But the Court of Criminal Appeals held that this claim was not properly before it because Barksdale had not raised it in his Rule 32 petition. Doc. 20-26 at 155–57, 197; Barksdale, 2018 WL 6731175, at *53. Barksdale offers no reason in his COA application why that procedural bar was not an independent and adequate state ground for rejecting the claim. He does not assert cause or prejudice. And he does not argue that there will be a miscarriage of justice if we do not review the claims. So we are barred from reviewing them. See Cone, 556 U.S. at 465; Coleman, 501 U.S. at 750.[7]

The same is true of his claims about the alleged inadequate cross-examination of other State witnesses and the failure to obtain or use Hilburn's police statement to impeach Garrison. He did not raise those claims in his Rule 32 petition so they are procedurally defaulted. See supra note 4. That means this Court cannot grant habeas relief on any of them unless he can show cause and prejudice or that there would be a fundamental miscarriage of justice if the Court

[7] The district court reached the merits and concluded that this argument failed to satisfy either prong of the Strickland standard. Barksdale, 2018 WL 6731175, at *53–58. If I were to reach the merits, I would find the district court's analysis and conclusion correct.

did not review the claims. See Smith v. Jones, 256 F.3d 1135, 1138 (11th Cir. 2001). But Barksdale doesn't even address the fact that his claims are procedurally defaulted, let alone argue that either of the exceptions to procedural default applies.

4. Penalty Stage Ineffective Assistance Claims

Barksdale argues that Goggans was ineffective at the penalty stage because: (1) he performed "no investigation into his client's past"; (2) he failed to obtain the public records of Barksdale's earlier conviction (which the State introduced) and, as a result, allowed the jury to believe Barksdale had committed an act of violence or threatened the victim of that crime with a weapon; (3) he failed to investigate any potential mitigator beyond age; (4) he failed to investigate any of the aggravators upon which the State intended to rely; (5) his mitigation submission to the jury was inadequate, as it lasted only one minute; and (6) his five-minute closing argument to the jury at the penalty stage was ineffective. COA App. at 16–17.

Barksdale raised arguments (1), (3), (5), and possibly (6) in a section of his Rule 32 petition titled "Trial Counsel Was Ineffective for Failing to Investigate and Present Mitigating Evidence At the Penalty Phase of Mr. Barksdale's Trial." Doc. 20-16 at ¶¶ 35–48 (failure to investigate and present mitigating evidence at the penalty stage, inadequate mitigation submissions and closing arguments), ¶ 45

("Indeed, in the penalty phase, counsel . . . gave a closing argument that takes up less than four pages of trial transcript.").

The state collateral trial court broke that section into two parts: investigation and presentation of mitigating evidence. After holding an evidentiary hearing, it found that Barksdale's ineffective investigation claim failed on both the deficiency prong and the prejudice prong. Doc. 20-26:115–16. And it found that his ineffective presentation claim failed on the prejudice prong. Id. at 125. He raised all of the same issues in his Rule 32 appeal. The Court of Criminal Appeals affirmed. On the investigation claim it held that Barksdale had not shown deficiency or prejudice. Id. at 171. On the presentation claim, it concluded that the trial court was correct that Barksdale did not suffer any prejudice. Id. at 175–77.

Barksdale raised his penalty-stage ineffective assistance arguments in his federal habeas petition. Doc. 1 at ¶¶ 38–57. The district court concluded that the Court of Criminal Appeals' decision that there was no deficiency or prejudice was not contrary to or an unreasonable application of clearly established federal law. Barksdale, 2018 WL 6731175, at *59–77. Reasonable jurists would not find the district court's conclusion "debatable or wrong," Slack, 529 U.S. at 484, especially given the deferential review AEDPA mandates.

a. *Investigation of Barksdale's Past*

Barksdale claims that his trial counsel failed to adequately investigate his past when crafting a mitigation strategy. Barksdale argued in his Rule 32 petition that Goggans should have spoken more to Barksdale's parents; spoken to Barksdale's "godfather" Maxwell Johnson; obtained medical, mental health, and education records; and hired a psychologist to examine him. Doc. 20-16 at 20–24.

But Goggans did contact both of Barksdale's parents multiple times. Doc. 20-26 at 164–66. It is undisputed that his mother was uncooperative. See id. Barksdale has never explained how Goggans could forced her to cooperate. And the information Goggans learned from Barksdale's parents was not helpful (for example, Barksdale's father talked about how Barksdale was a liar who was involved with gangs), which is why Goggans didn't present testimony from them. Doc. 20-26 at 166. Barksdale never explained what Goggans could have done to transform two unfavorable witnesses into favorable ones. Id. at 165–66, 171.

Barksdale never mentioned to Goggans his "godfather" Maxwell Johnson, and Barksdale has not explained how Goggans could have learned about him. Id. at 166–67, 171. As to the medical and other records Goggans supposedly should have looked into, Barksdale did not explain what helpful records Goggans could have found. Id. at 171. Indeed, his Rule 32 counsel themselves did not locate any useful medical or mental health records. Id. at 167.

For all those reasons, reasonable jurists would not doubt that a fairminded jurist could agree with the Court of Criminal Appeals' decision that Goggans conducted a reasonable penalty stage investigation. Id. at 168, 170–71. And the same is true about the Court of Criminal Appeals' decision that Barksdale failed to show prejudice. Id. at 109 n.7, 162–63, 171–72. As a result, he is not entitled to a COA on this claim. Slack, 529 U.S. at 484.

b. *Public Records of Prior Conviction*

Barksdale next alleges that Goggans was ineffective for failing to obtain public records of his earlier robbery conviction (which the State introduced during the penalty stage), and as a result, the jury was allowed to believe Barksdale had committed an act of violence or threatened the victim of that crime with a weapon.

Barksdale did not raise this claim in his Rule 32 petition. On direct appeal of his Rule 32 petition, the Court of Criminal Appeals denied the claim because he had not raised it in his Rule 32 petition. Doc. 20-26 at 155–57. Barksdale argued that it was contained in the section titled "Trial Counsel was Ineffective For Failing to Investigate and Present Mitigation Evidence at the Penalty Phase of Mr. Barksdale's Trial." Id.; Doc. 20-16 at 20 (emphasis added). But the Court of Criminal Appeals correctly pointed out that the section Barksdale relied on concerned only mitigators. Doc. 20-26 at 155–56. Barksdale offers no argument as to why this independent and adequate state ground does not bar his claim. He

does not assert cause or prejudice. And he does not argue that there will be a miscarriage of justice if this Court does not review the claim. So it is barred. See Cone, 556 U.S. at 465; Coleman, 501 U.S. at 750.[8]

c. *Other Mitigating Circumstances*

Barksdale also alleges that his trial counsel was ineffective for failing to investigate other mitigating circumstances. He raised this claim in his Rule 32 petition. Doc. 20-16 at ¶¶ 35–48. The state collateral trial court denied it, and the Court of Criminal Appeals affirmed, concluding that Goggans' performance was neither deficient nor prejudicial. Doc. 20-26 at 168–71. The Court of Criminal Appeals' reasoning was the same for Barksdale's claim about the general investigation into his past. Goggans did conduct an adequate investigation into statutory and nonstatutory mitigators. Id. at 168. He was aware of Barksdale's drug use but made a reasonable strategic decision not to use it and instead to focus on his youth. Id. at 162–63, 168–71. Barksdale said he had no mental health issues and Goggans had no reason to suspect otherwise. Id. at 171. Because Barksdale did not offer sufficient evidence showing that Goggans' investigation was unreasonable or that it prejudiced him, reasonable jurists would not doubt that

[8] The district court reached the merits and concluded that this argument failed to satisfy either prong of the Strickland standard. Barksdale, 2018 WL 6731175, at *81–84. If I were to reach the merits, I would conclude that reasonable jurists would not find the district court's assessment of this claim "debatable or wrong." Slack, 529 U.S. at 484.

reasonable jurists could find the state court decision correct. Slack, 529 U.S. at 484.

d. *Investigating Aggravators*

Barksdale claims that Goggans failed to investigate the aggravating circumstances relied on by the State. He did not include this claim in his Rule 32 petition. As a result, when he tried to raise the claim on appeal, the Court of Criminal Appeals rejected it for that reason. Doc. 20-26 at 155–56. Barksdale argued that it was contained in the section titled "Trial Counsel was Ineffective For Failing to Investigate and Present Mitigation Evidence at the Penalty Phase of Mr. Barksdale's Trial." Id.; Doc. 20-16 at 20 (emphasis added). But the Court of Criminal Appeals correctly pointed out that the section Barksdale relied on concerned only mitigators. Doc. 20-26 at 155–56. Barksdale offers no argument as to why this independent and adequate state ground does not bar his claim. He does not assert cause or prejudice. And he does not argue that there will be a miscarriage of justice if we do not review the claim. So it is barred. See Cone, 556 U.S. at 465; Coleman, 501 U.S. at 750.[9]

[9] It is also debatable if Barksdale even raised this issue in his federal habeas petition, but this order sets that issue aside given his clear failure to show why the procedural bar should be excused. In his federal habeas petition he did argue that the state courts improperly prevented him from presenting his failure to investigate and challenge the state aggravating circumstances claim. Doc. 1 at ¶¶ 119–62. The district court concluded that his argument was not cognizable in a federal habeas proceeding because "[i]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions" and "defects in state collateral proceedings do not provide a basis for federal habeas relief." Barksdale, 2018 WL 6731175 at

e. *Submission of Mitigating Evidence*

Barksdale also alleges that his trial counsel failed to adequately submit mitigating evidence to the jury. He raised this claim in his Rule 32 petition. The trial court denied it. Doc. 20-26 at 116–25. The Court of Criminal Appeals affirmed, concluding that Goggans made a reasonable strategic decision to focus on Barksdale's age given the evidence he had. Id. at 163–64, 170–71. A fairminded jurist could agree with the court's conclusion about Goggans' presentation of mitigating evidence given that Barksdale's youth was the strongest mitigator Goggans had to work with. See Harrington, 562 U.S. at 102. And to the extent Barksdale argues that Goggans should have presented more mitigating evidence and that he was prejudiced by the failure to do so, that argument fails for the same reasons that his argument claiming a failure to investigate mitigating circumstances fails.

f. *Penalty Stage Closing Argument*

Barksdale alleges that his trial counsel was ineffective in presenting closing argument at the penalty stage. It is questionable whether Barksdale adequately raised this issue in his Rule 32 petition because he only briefly referenced it. Doc.

*14. No reasonable jurist could find the district court's assessment of the argument "debatable or wrong." Slack, 529 U.S. at 484; see Estelle v. McGuire, 502 U.S. 62, 67 (1991) ("We have stated many times that federal habeas corpus relief does not lie for errors of state law. Today, we reemphasize that it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.") (quotation marks omitted).

20-16 at 17. The state courts did not explicitly address it. But even if this Court reviews his contention de novo, it fails for the reasons given by the district court:

> [T]he scope and content of Petitioner's trial counsel's closing jury argument at the punishment phase of trial fell within the broad range of professionally reasonable assistance. Petitioner's trial counsel reasonably identified the lone statutory mitigating factor applicable to Petitioner and urged the jury to give great weight to that factor. Petitioner's trial counsel cannot reasonably be faulted for failing to discuss evidence of Petitioner's background that was not in evidence and not properly before the jury at the punishment phase of trial. Counsel's Rule 32 testimony was completely consistent with the record.

Barksdale, 2018 WL 6731175, at *76; see also id. (noting that "the least of us" was a reasonable argument theme given the circumstances because "Petitioner's trial counsel could reasonably have believed the jury would understand his reference to Petitioner as 'the least of us' in precisely the manner he intended it, i.e., as a reminder that Christians are charged by the founder of their faith with caring for the depressed, downtrodden, and rejected members of society, including presumably those abandoned by their own families") (footnotes omitted). For these reasons, this claim fails, and Barksdale is not entitled to a COA on it.

B. The Eighth Amendment Claims

Barksdale raises three Eighth Amendment claims in his application. First, he contends that Alabama's capital sentencing scheme is unconstitutional because it allows the judge to impose the death penalty without a unanimous jury recommendation. COA App. at 32–34. Second, he contends that the trial court

committed constitutional error when it rejected his request to instruct the jury about "what meaning" to assign to age as a mitigating circumstance. Id. at 34–36. And third, he contends that trial court made a Caldwell v. Mississippi, 472 U.S. 320 (1985), error by telling the jurors that they would not make the "ultimate decision" about his sentence. Id. at 36–37. There are three independently adequate reasons to deny Barksdale a COA on these claims.

1. Barksdale Didn't Raise These Claims in His Federal Habeas Petition

First, Barksdale did not raise any of these Eighth Amendment claims in his habeas petition. Because he did not raise any of them in his petition, this Court cannot consider any of them or grant a COA on them. See supra pages 12–13 (citing cases holding that this Court will not consider an issue the petitioner failed to raise in the district court).

2. Barksdale Didn't Raise These Claims in State Court

Second, Barksdale also did not raise any of these Eighth Amendment claims on direct appeal or in his Rule 32 petition. As a result, all three claims are procedurally defaulted. See supra note 4. That means this Court cannot grant federal habeas relief on any of them unless he can show cause and prejudice or that there would be a fundamental miscarriage of justice if this Court did not review the claims. See Smith, 256 F.3d at 1138. But Barksdale doesn't even address the fact

that his claims are procedurally defaulted, let alone argue that either of the exceptions to procedural default applies.

3. Barksdale's Claims Lack Merit

Even aside from the procedural problems with Barksdale's claims, none of them have any arguable merit.

a. *The Non-unanimous Jury Recommendation Claim*

In his first of these claims, Barksdale asserts that Alabama's capital sentencing scheme is unconstitutional because it permits a judge to impose the death penalty without a unanimous jury recommendation. Specifically, he argues that because Alabama is the only state left that permits a non-unanimous jury recommendation, it has failed to keep up with the "evolving standards of decency that mark the progress of a maturing society." COA App. at 33 (quoting Atkins v. Virginia, 536 U.S. 304, 311–12 (2002)). This claim is without merit.

The Supreme Court has repeatedly held that the Constitution does not require a jury, as opposed to a judge, to make the ultimate decision about whether to sentence a defendant to death. See McKinney v. Arizona, 140 S. Ct. 702, 707 (2020) ("[I]mportantly, in a capital sentencing proceeding just as in an ordinary sentencing proceeding, a jury (as opposed to a judge) is not constitutionally required to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision within the relevant sentencing range."); id. ("[A]s

Justice Scalia explained, the 'States that leave the ultimate life-or-death decision to the judge may continue to do so.'") (citation omitted); Spaziano v. Florida, 468 U.S. 447, 460 (1984) (rejecting claim that Florida's capital sentencing scheme violated the Eighth Amendment because it authorized the judge to decide whether to impose death), overruled in non-relevant part by Hurst v. Florida, 136 S. Ct. 616 (2016); Proffitt v. Florida, 428 U.S. 242, 252–53 (1976) (same). If the Constitution does not require the jury to make the ultimate life-or-death decision, the Constitution does not require a unanimous jury recommendation when the State chooses to include the jury in an advisory fashion.

b. *The Meaning of "Age" Jury Instruction Claim*

In his second Eighth Amendment claim, Barksdale argues that the trial court erred by rejecting his request to instruct the jury about "what meaning" to assign to age as a mitigating circumstance. COA App. at 34–36. Although he does not specifically describe the instruction he asked the trial court to give, he discusses the Supreme Court's decisions in Graham v. Florida, 560 U.S. 48 (2010), Roper v. Simmons, 543 U.S. 551 (2005), Thompson v. Oklahoma, 487 U.S. 815 (1988), and Eddings v. Oklahoma, 455 U.S. 104 (1982). And he says that "[i]t has now been a decade and a half since the Supreme Court concluded that, in light of the susceptibility of young people to immature and irresponsible behavior [and because] their irresponsible conduct is not as morally reprehensible as that of an

adult, a capital sentence for a person under the age of 18 at the time of the offense violates the Constitution." COA App. at 35 (citation and quotation marks omitted). This claim is without merit.

To begin, all of the cases that Barksdale cites and the principle that he extracts from them are about juveniles — those under 18 years of age when they committed capital murder. See Graham, 560 U.S. at 53; Roper, 543 U.S. at 556; Thompson, 487 U.S. at 819; Eddings, 455 U.S. at 105. But Barksdale was not a juvenile when he murdered Julie Rhodes. He was 18 years and six months old. COA App. at 35. And the Supreme Court has been clear that its precedent about juveniles does not cover 18-year-olds. See Roper, 543 U.S. at 574 ("Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. . . . [H]owever, a line must be drawn."); see also Graham, 560 U.S. at 74–75 ("Because the age of 18 is the point where society draws the line for many purposes between childhood and adulthood, those who were below that age when the offense was committed may not be sentenced to life without parole for a nonhomicide crime.") (quotation marks omitted) (alteration in original). To the extent that the juvenile age decisions individually or collectively require a special jury instruction, Barksdale was not entitled to it.

When discussing mitigating circumstances, the court told the jury that it could "take into consideration the age of the defendant." Barksdale, 2018 WL

6731175, at *100. Because the trial court told the jury that it could take Barksdale's age into account, there is no likelihood that the instructions prevented the jury from considering Barksdale's age.

c. *The Caldwell Claim*

In his third Eighth Amendment claim, Barksdale contends that the trial court erred under Caldwell v. Mississippi, 472 U.S. 320 (1985), because (1) "the trial judge told the jurors that they would not be the ones making the 'ultimate decision' as to his sentence," (2) "[t]he closing arguments and the trial court's instructions reiterated numerous times that the jury was going to offer only 'a recommendation,' not an actual sentence," and (3) "the State's closing argument explicitly referred to the jury's recommendation as 'advisory.'" COA App. at 36–37. This claim is also utterly without merit.

In Caldwell, the Court held 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. Although the jury in Caldwell had the ultimate authority to impose the defendant's sentence, this Court has held that Caldwell applies to advisory juries too. See Mann v. Dugger, 844 F.2d 1446, 1454–55 (11th Cir. 1988) (en banc) see also Harich v. Dugger, 844 F.2d 1464, 1472–74 (11th Cir. 1988) (en banc). But this Court has also made clear that

"references to and descriptions of the jury's sentencing verdict . . . as an advisory one, as a recommendation to the judge, and of the judge as the final sentencing authority are not error under Caldwell" so long as those references and descriptions are accurate statements of the law. Davis v. Singletary, 119 F.3d 1471, 1482 (11th Cir. 1997).

The statements that Barksdale complains of here were accurate statements of Alabama law. See Ala. Code § 13A-5-46(a), (e) (1975) (stating that the penalty stage jury "shall return an advisory verdict," which it "recommend[s]" to the trial court); id. § 13A-5-47(e) (explaining that "[w]hile the jury's recommendation concerning sentence shall be given consideration, it is not binding upon the court"). For that reason, his claim is clearly foreclosed by binding precedent.

C. The Sixth Amendment Sentencing Claims

Barksdale claims that his death sentence is unconstitutional under the Supreme Court's decisions in Apprendi v. New Jersey, 530 U.S. 466 (2000), Ring v. Arizona, 536 U.S. 584 (2002), and Hurst v. Florida, 136 S. Ct. 616 (2016). He makes two arguments.

1. Aggravating Factors

Barksdale first argues that it is "debatable" whether the jury made any findings on aggravating factors because "[t]he sentencing form merely indicated the jury's non-unanimous recommendation for death" and "did not disclose any

findings regarding the three aggravating factors the State attempted to prove." COA App. at 39. According to him, that means "it is not known whether one or more members were unpersuaded by any of the proffered aggravators." Id.[10]

Barksdale raised this claim in his Rule 32 petition; the state collateral trial court dismissed it as "procedurally barred as it could have been but was not raised at trial or on direct appeal." Docs 20-16 at 68–70; 20-26 at 90. The Court of Criminal Appeals affirmed on an alternative ground. Doc. 20-26 at 193. It concluded that because Barksdale's claim relied on Apprendi and Ring, and "it is well settled that Apprendi and Ring do not apply retroactively on collateral review," the "summary denial of [his] claim was proper." Id. (citing Hall v. State, 979 So.2d 125, 177 (Ala. Crim. App. 2007) (citing Supreme Court and Alabama cases holding that Apprendi and Ring do not apply retroactively under federal and state law)).

In his federal habeas petition, Barksdale argued that the state courts committed error by dismissing his claim. See Barksdale, 2018 WL 6731175, at *11 n.69; Doc. 1 at ¶¶ 194–95. His petition is not clear what that alleged error was, other than that he could not have defaulted on his claim "as Apprendi was

[10] There were three aggravating factors: (1) Barksdale was previously convicted of a felony involving the use or threat of violence to the person; (2) the capital offense was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, robbery; and (3) the murder was especially heinous, atrocious or cruel. The prosecution and defense stipulated to the prior felony conviction that established the first of those. Doc. 20-26 at 7–8.

decided five years after his sentence." Id. ¶ 194. There are three possibilities. First, Barksdale might have been saying that the Court of Criminal Appeals misinterpreted state procedural bar law. The district court concluded that such an argument was not cognizable in a federal habeas proceeding because "[i]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." Barksdale, 2018 WL 6731175, at *14. Second, Barksdale might have been saying that the state collateral proceedings were defective for permitting his claim to be procedurally barred. The district court concluded that such an argument was not cognizable in a federal habeas proceeding because "defects in state collateral proceedings do not provide a basis for federal habeas relief." Id. Finally, Barksdale might have been arguing that the Court of Criminal Appeals misinterpreted federal law regarding the retroactive application of Ring and Apprendi. But that argument fails because Ring and Apprendi do not apply retroactively under federal law. See Schriro v. Summerlin, 542 U.S. 348 (2004).

In his COA application, Barksdale fails to explain how reasonable jurists could conclude that the district court's holding was debatable or wrong. See Slack, 529 U.S. at 484. Nor can he do so. See Estelle, 502 U.S. at 67 ("We have stated many times that federal habeas corpus relief does not lie for errors of state law. Today, we reemphasize that it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.") (quotation marks

omitted); Gissendaner v. Comm'r, Ga. Dep't of Corr., 794 F.3d 1327, 1333 (11th Cir. 2015) (explaining that there is "a long line of Supreme Court decisions holding that a violation of state procedural law does not itself give rise to a due process claim"); Jamerson v. Sec'y for Dep't of Corr., 410 F.3d 682, 688 (11th Cir. 2005) ("Federal habeas relief is unavailable for errors of state law.") (quotation marks omitted); Williams v. Turpin, 87 F.3d 1204, 1206 n.1 (11th Cir. 1996) ("[A] federal habeas court cannot review perceived errors of state law.").

And, in any event, after concluding that Barksdale's claim was procedurally barred, the state collateral trial court stated "solely as a secondary ground" that his claim would fail on the merits. Doc. 20-26 at 91. The court explained that "[i]n Alabama, at least one statutory aggravating circumstance must be proven in order for death to be the maximum punishment authorized by law," and "[b]y finding Barksdale guilty of a murder during the course of a robbery, the jury found the necessary fact required to authorize death under Alabama law." Id.; see Ala. Code § 13A-5-45(e) ("[A]ny aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentence hearing.").

This Court's decision in Lee v. Commissioner, Alabama Department of Corrections, 726 F.3d 1172 (11th Cir. 2013), is dispositive. In that Alabama

capital case, the jury convicted the defendant of capital murder "during a robbery in the first degree." Id. at 1197–98 (quotation marks omitted). Because of that verdict, this Court concluded that the jury also "necessarily" found the statutory aggravating factor of committing capital murder while "engaged in the commission of . . . robbery." Id. (quotation marks omitted). And because the jury's guilt-stage finding of conviction necessarily included a finding of an aggravating circumstance, we held that the state court's decision rejecting the claim was not contrary to or an unreasonable application of Ring or any other Sixth Amendment case. Id. at 1198. In doing so, we explained that "nothing in Ring — or any other Supreme Court decision — forbids the use of an aggravating circumstance implicit in a jury's verdict." Id.

So even if this Court were to overlook the procedural problem with Barksdale's claim, address the merits under a de novo standard of review, and pretend that Ring and the other Sixth Amendment cases that he relies on do apply retroactively to him, he still would not be entitled to a COA on this claim.

2. Trial Court's Treatment of the Jury Recommendation

In his second Sixth Amendment sentencing argument, Barksdale claims that "the trial court wholly disregarded the jury's sentencing recommendation and made independent sentencing-related findings of fact." COA App. at 40. Specifically, the trial court stated:

> The Court has considered the recommendation of the jury, but has not given it great weight. In fact, if the Court has found that it did not meet the criteria described by law, it would not hesitate to decide otherwise. This Court is not the least concerned with public opinion or what a jury might determine without the benefit of the various factors which this Court must consider in sentencing, including matters which the jury did not hear, and the reports of other decisions in like cases.

Id.

This claim, like so many of the others, has procedural problems. First, Barksdale did not raise it on direct appeal or in his Rule 32 petition. Doc. 20-16. And because his direct appeal and Rule 32 proceedings ended years ago, and this claim cannot be raised in a second or successive Rule 32 petition under Alabama law, it is procedurally defaulted. See supra note 4. That means this Court cannot address it unless he shows cause and prejudice or that there would be a fundamental miscarriage of justice if we did not decide the claim. See Smith, 256 F.3d at 1138. But once again, Barksdale does not acknowledge this procedural bar problem or argue that any exception to the bar applies.

Second, Barksdale did not raise this claim in his habeas petition. Doc. 1. That means this Court may not consider it. See supra pages 12–13.

Even if this claim were properly before this Court, it still would not merit a COA. Just this term, the Supreme Court reiterated that nothing in its Sixth Amendment precedent requires a jury to weigh the aggravating and mitigating circumstances at all, let alone requires a judge to give weight or deference to the

jury's recommendation. See McKinney, 140 S. Ct. at 707 (explaining "in a capital sentencing proceeding just as in an ordinary sentencing proceeding, a jury (as opposed to a judge) is not constitutionally required to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision"). And the Supreme Court also made clear that it has "carefully avoided any suggestion that it is impermissible for judges to exercise discretion — taking into consideration various factors relating both to offense and offender — in imposing a judgment within the range prescribed by the statute." Id. (emphasis and quotation marks omitted). McKinney disentitles Barksdale to a COA on this claim.

D. The Ghostwriting Claim

In Barksdale's Rule 32 proceedings, the state trial judge adopted verbatim two dispositive orders drafted by attorneys for the State. The first order dismissed all of the counts of the original Rule 32 petition but two, for which it scheduled an evidentiary hearing. Doc. 20-26 at 39–91. The second order, entered after the hearing, denied those two claims. Id. at 92–126. Barksdale argues that the state trial judge's wholesale adoption of the prosecution's proposed findings of fact and conclusions of law proffered by attorneys for the State violated his rights under the Due Process Clause. COA App. at 41–47.

Barksdale raised part of this claim when appealing the denial of his Rule 32 petition: he challenged the trial court's adoption of the state's proposed order

denying his two claims after the evidentiary hearing, but not the first order dismissing most of his claims. Docs. 20-21 at 80–82; 20-26:202 n.14. And his Rule 32 claim did not mention the Due Process Clause. The Court of Criminal Appeals denied Barksdale's claim on the merits, holding that courts are allowed to adopt the State's proposed order when denying a Rule 32 petition and such an order will not be reversed as long as its findings of fact and conclusions of law are not clearly erroneous. Doc. 20-26:202.

Barksdale raised in his federal habeas petition the argument that adopting both orders verbatim denied him "a fair opportunity to have his State habeas petition heard by a neutral tribunal." Doc. 1:47–48. The district court ruled that he was alleging an error of state law, and that it was "not the province of a federal habeas court to reexamine state-court determinations on state-law questions." Barksdale, 2018 WL 6731175, at *14.

One could interpret Barksdale's argument to the district court as raising a Due Process Clause argument about ghostwriting (he explicitly makes it a due process argument in his COA application). To the extent he raised a federal issue, and setting aside for now the procedural default problems, his claim would fail even under de novo review. We have already stated that a state court's verbatim adoption of the prosecution's proposed order does not give rise to a constitutional violation. See Rhode v. Hall, 582 F.3d 1273, 1281 n.4 (11th Cir. 2009) (explaining

that had the petitioner asked for a COA on the argument that the district court should have granted habeas relief "because the state habeas court adopted the State's proposed order verbatim," we would have denied his request because "[t]he state habeas court's verbatim adoption of the State's facts would not rise to 'a substantial showing of the denial of a constitutional right'") (emphasis omitted).

Our precedent also forecloses any argument that every ghostwritten state court decision is not entitled to AEDPA deference. We have held that a state court's verbatim adoption of the prosecution's proposed order is entitled to AEDPA deference as long as (1) both parties "had the opportunity to present the state habeas court with their version of the facts" and (2) the adopted findings of fact are not "clearly erroneous." Id. at 1282; see also Jones v. GDCP Warden, 753 F.3d 1171, 1183 (11th Cir. 2014) (rejecting petitioner's ghostwriting argument because the state court "requested that both [petitioner] and the State prepare proposed orders").

Both of those conditions are met in this case. Here, as in Rhode, "the record clearly reflects that both [petitioner] and the State had the opportunity to present the state habeas court with their version of the facts." 582 F.3d at 1282. The state court permitted both parties to submit their own proposed orders and respond to the other side's proposed orders. See Docs. 20-21 at 81–82 (discussing how both parties presented their own proposed orders on evidentiary hearing claims); 20-16

at 138–42 (Barksdale arguing to the state court that the State's proposed order dismissing most claims should be rejected). So the state court's "findings of fact are still entitled to deference" unless Barksdale can show those facts to be clearly erroneous. Rhode, 582 F.3d at 1282. And in the six-and-a-half pages Barksdale spends on this issue in his COA application, he does not point to a single incorrect factfinding contained in either Rule 32 order. Nor does he point to a case contradicting Rhode or Jones.

For all of those reasons he is not entitled to a COA on this issue.

V. CONCLUSION

Because Barksdale has failed to identify any claim that meets the standard for granting a COA, his motion for certificate of appealability is DENIED.

CIRCUIT JUDGE