[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-11630

D.C. Docket No. 2:13-cv-00154-KOB

ALAN EUGENE MILLER,

Petitioner - Appellant,

versus

COMMISSIONER, ALABAMA
DEPARTMENT OF CORRECTIONS,

Respondent - Appellee.

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

(August 27, 2020)

Before JORDAN, ROSENBAUM, and LUCK, Circuit Judges.

PER CURIAM:

An Alabama jury found Alan Miller guilty of murdering three men and, following a sentencing hearing, recommended by a vote of 10-2 that he be sentenced to death. The trial court agreed with the jury's recommendation and sentenced Mr. Miller to death. The Alabama Court of Criminal Appeals, after a remand to the trial court, affirmed his conviction and sentence on direct appeal, and later affirmed the trial court's denial of his motion for post-conviction relief. *See Miller v. State*, 913 So. 2d 1148 (Ala. Crim. App. 2004) (*Miller I*); *Miller v. State*, 99 So. 3d 349 (Ala. Crim. App. 2011) (*Miller II*).

Mr. Miller then filed a federal habeas corpus petition. The district court denied relief, and we granted a certificate of appealability on a number of claims. With the benefit of oral argument, and following a review of the record, we affirm the district court's denial of habeas relief.

I

The facts set out below are taken from the opinion of the Alabama Court of Criminal Appeals in *Miller I*, 913 So. 2d at 1154–56.[1]

Mr. Miller worked as a delivery truck driver at Ferguson Enterprises in Pelham, Alabama. Around 7:00 a.m. on August 5, 1999, Johnny Cobb, Ferguson's vice president of operations, was about to enter the company building when he heard

[1] We provide more details later in our discussion of Mr. Miller's ineffective assistance of counsel claim.

some loud noises and what sounded like someone screaming. As he opened the door, Mr. Cobb saw Mr. Miller—armed with a pistol—walk towards him and say, "I'm tired of people starting rumors on me." Mr. Cobb tried to get Mr. Miller to put the pistol down, but Mr. Miller told him to get out of the way. Mr. Cobb ran out the front door and around the side of the building. Mr. Miller then left the building, got into his personal truck, and drove away.

When Mr. Cobb went back into the building, he found Christopher Yancy underneath a desk in the sales office and Lee Holdbrooks on the floor in the hallway. Both men were dead; they had been shot several times and were covered in blood. Mr. Holdbrooks had crawled 20-25 feet in an attempt to escape his assailant, as evidenced by the trail of blood he had left behind. Evidence technicians recovered nine .40-caliber shell casings from the scene. Mr. Cobb, who had called the police, gave officers a description of Mr. Miller's clothing and truck.

While officers conducted their investigation at Ferguson Enterprises, Andy Adderhold and Terry Jarvis were beginning their day at work at Post Airgas in Pelham. Mr. Adderhold noticed Mr. Miller, a former Post Airgas employee, enter the building. Mr. Miller walked toward the sales counter and called out to Mr. Jarvis: "Hey, I hear you've been spreading rumors about me." Mr. Jarvis walked out to the sales counter and replied, "I have not."

Mr. Miller then shot Mr. Jarvis a number of times, and pointed the pistol at Mr. Adderhold, who had crouched behind the counter. Mr. Adderhold begged for his life, and Mr. Miller paused, pointed at a door, and told him to get out. As Mr. Adderhold was leaving, he heard a sound from Mr. Jarvis and looked back. Mr. Miller, however, repeated his order to Mr. Adderhold and told him to "get out—right now." When exiting the building, Mr. Adderhold heard another gunshot. He climbed a fence to a neighboring building and called the police. When the authorities arrived, Mr. Adderhold told them what had happened and provided a description of Mr. Miller.

Officers later stopped Mr. Miller on the highway. In his truck they found a Glock pistol with one round in the chamber and 11 rounds in the ammunition magazine. They also located an empty ammunition magazine on the passenger seat.

At trial, a medical examiner testified that Mr. Holdbrooks was shot six times in the head and chest, with one of the shots to the head being fired at very close range. The medical examiner opined that Mr. Holdbrooks was turning his head and looking up when he was hit with the fatal shot to the head. Mr. Yancy was shot three times. One of the shots caused paralysis and another struck the aorta, resulting in Mr. Yancy dying from loss of blood within 15-20 minutes. Mr. Jarvis was shot five times, with one shot striking his heart. According to the medical examiner, Mr.

Miller was standing over Mr. Jarvis as he shot him in the heart. Mr. Jarvis could have lived anywhere from several minutes to 15 minutes after being shot.

II

The district court's denial of Mr. Miller's habeas corpus petition is subject to plenary review. *See Fults v. GDCP Warden*, 764 F.3d 1311, 1313 (11th Cir. 2014). But because his habeas corpus petition is governed by the provisions of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104–132, 110 Stat. 1214 (1996), Mr. Miller can obtain relief only if the state court's adjudication of a claim was "contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court," or was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)–(2). AEDPA "imposes a highly deferential standard for evaluating state-court rulings and demands that state-court decisions be given the benefit of the doubt." *Trepal v. Sec'y, Fla. Dep't of Corr.*, 684 F.3d 1088, 1107 (11th Cir. 2012) (quoting *Hardy v. Cross*, 565 U.S. 65, 66 (2011)). This standard is "difficult to meet." *Harrington v. Richter*, 562 U.S. 86, 102 (2011).

A state court decision is "contrary to" clearly established federal law when "it arrives at an opposite result from the Supreme Court on a question of law, or when it arrives at a different result from the Supreme Court on 'materially

indistinguishable' facts." *Owens v. McLaughlin*, 733 F.3d 320, 324 (11th Cir. 2013) (quoting *Williams v. Taylor*, 529 U.S. 362, 405 (2000)). *See, e.g.*, *Premo v. Moore*, 562 U.S. 115, 128 (2011) ("A state-court adjudication of the performance of counsel under the Sixth Amendment cannot be 'contrary to' *Fulminante*, for *Fulminante*—which involved the admission of an involuntary confession in violation of the Fifth Amendment—says nothing about the *Strickland* standard of effectiveness."). A state court decision cannot be contrary to clearly established federal law "where no Supreme Court precedent is on point." *Washington v. Crosby*, 324 F.3d 1263, 1265 (11th Cir. 2003).

"[A]n *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Richter*, 562 U.S. at 101 (emphasis in original and internal quotation marks and citation omitted). As the Supreme Court has put it:

> An unreasonable application [of clearly established federal law] must be objectively unreasonable, not merely wrong; even clear error will not suffice. Rather, as a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim . . . was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.

White v. Woodall, 572 U.S. 415, 419–20 (2014) (internal quotation marks and citations omitted).

With these standards in mind, we address Mr. Miller's claims.

III

Mr. Miller argues that his death sentence is unconstitutional under *Ring v. Arizona*, 536 U.S. 584 (2002), and *Hurst v. Florida*, 136 S. Ct. 616 (2016), because the jury did not find the facts that made him eligible for the death penalty. Because the Alabama Court of Criminal Appeals reasonably concluded that the jury did find the statutory aggravating circumstance necessary to make Mr. Miller death-eligible, we reject his argument.

Ring, which applies here because it was decided while Mr. Miller's direct appeal was pending in the Court of Criminal Appeals, holds that the Sixth Amendment requires a jury to find an aggravating circumstance that makes a defendant eligible for the death penalty. *See Ring*, 536 U.S. at 609. The only statutory aggravating circumstance submitted to Mr. Miller's jury was that the offense was "especially heinous, atrocious, or cruel compared to other capital offenses." Ala. Code § 13A-5-49(8). The trial court instructed the jury that it could not vote on the death penalty unless it first found beyond a reasonable doubt the existence of at least one aggravating circumstance.

Because the jury recommended a death sentence by a vote of 10-2, the Court of Criminal Appeals found that the jury must have determined the existence of the "heinous, atrocious, or cruel" aggravating circumstance—the only one submitted to it for consideration. *See Miller I*, 913 So. 2d at 1169. Given our general presumption

that juries follow the instructions given to them, *see Penry v. Johnson*, 532 U.S. 782, 799 (2001), and applying AEDPA deference, we cannot say that the factual finding of the Court of Criminal Appeals was unreasonable. *Cf. Nichols v. Heidle*, 725 F.3d 516, 546–49 (6th Cir. 2013) (holding that the finding of the Tennessee Supreme Court—that jurors in a capital case had found the existence of the two aggravating factors submitted to them even though they listed aggravating factors of their own creation on the verdict form—was not an unreasonable finding of fact because the jurors never rejected the two relevant aggravating factors and, when polled, said that they had found the existence of the two aggravating factors).

We also reject Mr. Miller's argument that the remand by the Court of Criminal Appeals demonstrated that the trial court had exclusive authority to make the findings of fact necessary to make Mr. Miller death-eligible. *See* Br. for Appellant at 25–26 (citing and quoting *Miller I*, 913 So. 2d at 1152, 1167). We do so for two reasons.

To begin, Mr. Miller did not raise this argument in the district court until he filed his motion to alter the judgment under Rule 59(e). *See* Reply Br. for Appellant at 3. We review a district court's denial of a Rule 59(e) motion for an abuse of discretion. *See Drago v. Jenne*, 453 F.3d 1301, 1305 (11th Cir. 2006). In denying Mr. Miller's Rule 59(e) motion, the district court did not address the remand argument or whether it had been forfeited. *See generally* D.E. 63. But the district

court's denial of the motion was not an abuse of discretion in any event because a motion to alter a judgment cannot be used to raise new arguments that could have been raised prior to entry of the judgment. *See, e.g.*, *Wilchombe v. TeeVee Toons, Inc.*, 555 F.3d 949, 957 (11th Cir. 2009).

Mr. Miller's argument also fails on the merits. When the Court of Criminal Appeals remanded to the trial court, it did so to ensure compliance with *Ex parte Kyzer*, 399 So. 2d 330, 334 (Ala. 1981), *abrogated by Ex parte Stephens*, 982 So. 2d 1148 (Ala. 2006), which had held that for capital offenses to be "especially heinous, atrocious or cruel," there must be a more specific finding that they were "conscienceless or pitiless homicides which [were] unnecessarily torturous to the victim." *Miller I*, 913 So. 2d at 1152. The trial court's original order failed to comply with *Kyzer* because it merely recited the "especially heinous, atrocious or cruel" language from the Alabama statute. *See id.* But the sentencing jury had been properly instructed under the *Kyzer* standard. *See Miller II*, 99 So. 3d at 422 (quoting the jury instructions). As explained above, the Court of Criminal Appeals could have reasonably concluded that the jury, by recommending death in a 10-2 vote, found that the offenses were "especially heinous, atrocious or cruel," as well as the more specific requirement necessary under *Kyzer* that the offenses were "conscienceless or pitiless homicides which [were] unnecessarily torturous to the

victim[s]." Because the jury made this finding, Mr. Miller's sentence does not violate *Ring*.

Mr. Miller also makes a broader argument. He contends that under Alabama law at the time, the jury performed only an advisory role in the sentencing process, *see* Ala. Code §§ 13A-5-46(a) & 13A-5-47(e) (2000), and as a result, the trial court had to make the necessary factual finding about the existence of the "heinous, atrocious, or cruel" aggravating circumstance. And that, he says, renders his situation indistinguishable from the Florida system the Supreme Court held unconstitutional in *Hurst*. *See* Br. for Appellant at 23–26 (comparing, in a chart, the similarities between the Florida scheme at issue in *Hurst* and the Alabama scheme under which he was sentenced). *See also Brooks v. Alabama*, 136 S. Ct. 708 (2016) (Sotomayor & Ginsburg, J.J., concurring in the denial of certiorari and Breyer, J., dissenting from the denial of a stay of execution and of certiorari).

We understand Mr. Miller's comparison of the Florida and Alabama schemes. For several reasons, however, we cannot grant Mr. Miller habeas relief.

First, the Supreme Court has upheld the Alabama capital scheme under which Mr. Miller was sentenced, including its use of a purely advisory jury. *See Harris v. Alabama*, 513 U.S. 504, 515 (1995) ("The Constitution permits the trial judge, acting alone, to impose a capital sentence. It is thus not offended when a State further requires the sentencing judge to consider a jury's recommendation and trusts the

judge to give it the proper weight."). Some of the cases *Harris* relied on, such as *Spaziano v. Florida*, 468 U.S. 447, 465 (1984), were overruled in *Hurst*. But as a lower court we must follow an on-point Supreme Court decision even if we believe that later cases have eroded or even abrogated it. *See, e.g.*, *Hohn v. United States*, 524 U.S. 236, 252–53 (1998) (explaining that the Supreme Court's "decisions remain binding precedent until [the Court] see[s] fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continued vitality"). Given *Harris*, which remains binding precedent, we cannot hold that Alabama's use of an advisory jury to recommend punishment in Mr. Miller's case was unconstitutional.

Second, Mr. Miller's argument relies heavily on the holding and rationale of *Hurst*. But we have held that *Hurst* announced a new rule of constitutional law that is not retroactive on collateral review. *See Knight v. Fla. Dep't of Corr.*, 936 F.3d 1322, 1335–37 (11th Cir. 2019) (applying retroactivity analysis of *Teague v. Lane*, 489 U.S. 288 (1989)). And the Supreme Court has come to the same conclusion. *See McKinney v. Arizona*, 140 S. Ct. 702, 708 (2020). We are therefore unable to apply *Hurst* in Mr. Miller's case. *See id.* Furthermore, because the sentencing jury made the necessary death-eligibility finding, it would not matter whether the trial court had ultimate sentencing authority. *See id.* (holding that, under *Ring*, any states

"'that leave the ultimate life-or-death decision to the judge may continue to do so'") (quoting *Ring*, 536 U.S. at 612 (Scalia, J., concurring)).

IV

Mr. Miller contends that the trial court's jury instructions violated *Caldwell v. Mississippi*, 472 U.S. 320 (1985). We disagree.

The trial court instructed the jury that it had to unanimously find a statutory aggravating circumstance before it could consider the death penalty. It also instructed the jury that its role at sentencing was to make a "recommendation" as to the appropriate punishment.

Caldwell requires that a jury in a capital case be correctly instructed as to its role under state law. "Thus, '[t]o establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law.'" *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994) (quoting *Dugger v. Adams*, 489 U.S. 401, 407 (1989)). The jury instructions here accurately described the jury's advisory role in Alabama's capital sentencing scheme. Indeed, Mr. Miller does not claim otherwise. His argument, instead, is that the jury instructions violated *Caldwell* because—as a matter of federal constitutional law under *Ring* and its progeny, including *Hurst*—the jury's finding of an aggravating circumstance had to be binding on the trial court.

The argument is an interesting one, but at the end of the day it fails because the jury instructions accurately characterized the jury's role under Alabama law. Mr. Miller cannot use *Caldwell* as an end run around federal retroactivity law to apply *Hurst* to the Alabama capital sentencing scheme and then argue that, because of *Hurst*, the instructions were incorrect. *See Carr v. Schofield*, 364 F.3d 1246, 1258 (11th Cir. 2004) ("We have . . . held that 'references to and descriptions of the jury's sentencing verdict as an advisory one [or] as a recommendation to the judge' . . . do not constitute *Caldwell* violations where they 'accurately characterize the jury's and judge's sentencing roles under [state] law.'") (quoting *Davis v. Singletary*, 119 F.3d 1471, 1482 (11th Cir. 1997)).

V

Mr. Miller asserts that his trial counsel rendered ineffective assistance of counsel, in violation of the Sixth Amendment, when he "sabotaged" the evaluation of his sanity by his medical expert and then withdrew his insanity defense. We are not persuaded.[2]

[2] The district court concluded that because Mr. Miller did not argue on direct appeal that trial counsel was ineffective for failing to provide documents to Dr. Scott, that this part of his ineffective assistance of trial counsel claim was procedurally defaulted. *See* D.E. 53 at 43. Because we are denying relief on the merits, we need not address procedural bar issues. *See* 28 U.S.C. § 2254(b)(2); *Loggins v. Thomas*, 654 F.3d 1204, 1215 (11th Cir. 2011).

A

Through counsel, Mr. Miller initially entered a plea of not guilty by reason of mental disease or defect. Two medical professionals employed by the state, Drs. James Hooper and Harry McClaren—one a psychologist and the other a psychiatrist—evaluated Mr. Miller. Dr. Hooper, who spent only 30 minutes with Mr. Miller and did not conduct any psychological tests, concluded that he did not find any mental illness that would rise to the level of an insanity defense. Dr. McClaren concluded that Mr. Miller gave the impression of suffering from a personality disorder with schizoid and paranoid features, and he could not rule out the possibility of a brief period of dissociation because Mr. Miller reported experiencing a sort of "tunnel vision" near the time of his arrest.

Counsel retained a forensic psychiatrist, Dr. Charles Scott, to evaluate Mr. Miller and determine whether he had been insane at the time of the murders. Dr. Scott requested that he be provided all of Mr. Miller's psychological evaluations, including reports, tests, notes, and raw data. But counsel failed to give Dr. Scott (a) the work file of Dr. Hooper (which included notes of his interview with Mr. Miller shortly after the shooting and which stated that Mr. Miller denied "any memory" of the offense); (b) Dr. McClaren's report and file, which suggested at times that Mr. Miller was not aware of his actions; (c) the recordings of the questioning of Mr. Miller on the day of his arrest, in which he asked, "I'm being charged with

something?"; and (d) a form prepared by counsel shortly after the murders indicating that Mr. Miller was suffering from the "apparent loss of some memory surrounding the events."

Despite not having these materials, Dr. Scott concluded in his preliminary assessment that Mr. Miller suffered from a severe mental illness, and that there was evidence both for and against a determination of insanity. But as things stood, Dr. Scott opined that Mr. Miller did not meet the definition of insanity under Alabama law. In reaching his conclusion, Dr. Scott consulted with Dr. Barbara McDermott, a psychologist who had administered certain tests to Mr. Miller.

At trial, counsel withdrew Mr. Miller's insanity defense, entered a plea of not guilty, and presented no defense during the guilt phase. Counsel later explained that he believed that jurors in Shelby County were "solid" and "hard working" people who "don't believe a lot of hullabaloo about these things they can't see," and they would have regarded the assertion of an insanity defense as "whiny." Counsel told the jury that he was not proud of representing Mr. Miller and that there was "fairly convincing" evidence that he had done what he was charged with. The jury returned a guilty verdict after 20 minutes of deliberation.

In the penalty phase, counsel put on Dr. Scott as Mr. Miller's only witness. Dr. Scott testified that Mr. Miller was mentally ill at the time of the murders because he suffered from a "delusional disorder that substantially impaired his rational

ability," and that the disorder, together with his history as a loner, resulted in his belief that his co-workers were spreading rumors that he was homosexual. Dr. Scott also testified, however, that the mental illness did not rise to the level of insanity under Alabama law because Mr. Miller was able to appreciate the nature and consequences of his actions. *See* Ala. Code § 13A-3-1(a) (defining insanity as when, as a "result of a severe mental disease or defect," the defendant "was unable to appreciate the nature and quality or wrongfulness of his acts"). For example, Mr. Miller returned to shoot Mr. Holdbrooks before driving to another location and shooting Mr. Jarvis.

B

On direct appeal, the Alabama Court of Criminal Appeals stated that counsel's withdrawal of the insanity defense was a "well-reasoned decision," which was a part of a strategy to try to save Mr. Miller's life given the overwhelming evidence of guilt. *See Miller I*, 913 So. 2d at 1159–61. On post-conviction review, the Court of Criminal Appeals concluded that counsel's withdrawal of the insanity defense was a reasonable strategic decision, explaining that all of the medical professionals who had evaluated Mr. Miller had concluded that he did not meet Alabama's definition of insanity at the time of the murders. *See Miller II*, 99 So. 3d at 377.

The district court, applying AEDPA deference, ruled that Mr. Miller had not carried his heavy burden of demonstrating that counsel "performed unreasonably"

in withdrawing the insanity defense. *See* D.E. 53 at 45. First, Dr. Scott had concluded that Mr. Miller did not meet the definition of insanity under Alabama law. Second, Drs. Hooper and McClaren had agreed with Dr. Scott's conclusion. *See id.* at 46.[3]

Mr. Miller argues that the Court of Criminal Appeals and the district court erred with respect to the matter of performance. He points out that insanity was his only defense, and he contends that, in such a circumstance, counsel's decision cannot be presumed to be a reasonable strategic choice. *See, e.g.*, *Profitt v. Waldron*, 831 F.2d 1245, 1248–49 (5th Cir. 1987). He also asserts that, under Alabama law, an expert opinion is not required to send the question of insanity to the jury. *See*, *e.g.*, *Harkey v. State*, 549 So. 2d 631, 634–35 (Ala. Crim. App. 1989) (concluding that the insanity defense was properly presented to the jury even though counsel did not proffer expert evidence, and quoting *Young v. State*, 428 So. 2d 155, 161 (Ala. Crim. App. 1982), for the general rule that "only slight evidence of insanity at the time of the commission of the crime is required to raise the issue for submission to the jury"). And he cites to *Wheeler v. State*, 659 So. 2d 1032, 1035 (Ala. Crim. App. 1995), in which the Court of Criminal Appeals said that the matter of insanity was for the jury, even though in that case the defense expert testified only that the defendant had

[3] Given its ruling on performance, the district court did not address prejudice. *See* D.E. 53 at 45–46.

major depression with psychotic features and experienced some depersonalization at the time of the murder.

We need not address the performance prong of *Strickland*. Assuming without deciding that counsel's performance as to the insanity defense was constitutionally deficient, Mr. Miller has not demonstrated prejudice.

C

Under *Strickland v. Washington*, 466 U.S. 668, 696 (1984), Mr. Miller has the burden of showing that, but for counsel's errors concerning the insanity defense (i.e., the failure to provide Dr. Scott with all of the information he requested and the withdrawal of the insanity defense), there is a "reasonable probability" of a different outcome, i.e., a reasonable probability that the jury would have found him to be insane under Alabama law at the time of the murders. *See Roberts v. Comm'r, Ala. Dep't of Corr.*, 677 F.3d 1086, 1092 (11th Cir. 2012) (per curiam) ("The appropriate prejudice analysis for this [ineffectiveness] claim would require . . . consider[ing] whether there is a reasonable probability that Roberts' trial would have resulted in his being found not guilty by reason of insanity had his trial counsel properly investigated and presented an insanity defense."); *Weeks v. Jones*, 26 F.3d 1030, 1038 (11th Cir. 1994) ("Weeks would have to establish a reasonable probability that his trial counsel's failure to discover and review his mental history . . . and, thus, to

present an insanity defense, would have resulted in his being found not guilty by reason of insanity.").

The reasonable probability standard does not impose a "more likely than not" burden, but instead requires a defendant to demonstrate a probability "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 693, 694. Nevertheless, the likelihood of a different result must be "substantial, not just conceivable." *Richter*, 562 U.S. at 112.

On post-conviction review, the Alabama Court of Criminal Appeals affirmed the trial court's ruling that Mr. Miller had not shown prejudice from his counsel's alleged errors. It separately analyzed the two purported errors—the failure to provide Dr. Scott with all the information and materials he needed, and the withdrawal of the insanity defense. *See Miller II*, 99 So. 3d at 384–86, 389–90.

With respect to counsel's failure to give Dr. Scott what he had requested, the Court of Criminal Appeals explained that none of the experts who evaluated Mr. Miller—either at trial or in the post-conviction proceedings—concluded that he was legally insane at the time of the murders. For example, Dr. Catherine Boyer, a psychologist retained by Mr. Miller for the post-conviction proceedings, reviewed all of the materials which Mr. Miller says should have been provided to Dr. Scott and also administered several other tests. Although she concluded that Mr. Miller suffered from post-traumatic stress disorder with dissociative features, and believed

that he had experienced a dissociative episode during the shootings that "impaired his ability to appreciate the nature and quality or wrongfulness of his acts," she never testified that he was legally insane at the time of the murders. *See id.* at 385. When asked if she had an opinion about Mr. Miller's sanity, Dr. Boyer said she had none. *See id.* Furthermore, at the post-conviction hearing Dr. Scott did not say that his opinion about Mr. Miller being legally sane had changed since the time of trial and after he had been informed of the previously omitted materials. *See id.*

Turning to counsel's withdrawal of the insanity defense, the Court of Criminal Appeals similarly affirmed the trial court's ruling that Mr. Miller had not shown prejudice. *See id.* at 389–90. First, Dr. Scott testified that Mr. Miller was not unable to appreciate the wrongfulness of his actions, and therefore did not meet the legal definition of insanity under Alabama law. Second, any attempt by counsel to argue lack of intent would have "run contrary to the overwhelming evidence" of Mr. Miller's intent to commit murder (e.g., the number of times Mr. Yancy and Mr. Holdbrooks were shot, the fact that Mr. Miller—after killing those two men—drove to another location to find and shoot Mr. Jarvis multiple times). *See id.* at 389. Third, the failure to introduce mental health evidence during the guilt phase did not prejudice Mr. Miller because Alabama does not recognize a diminished capacity defense. *See id.* at 390.

Applying AEDPA deference, we conclude that the Court of Criminal Appeals' prejudice determination was not unreasonable. Mr. Miller shot and killed two men, and then got in his vehicle and drove to another location where he shot and killed a third man. Given that no medical expert could say that Mr. Miller was legally insane under Alabama law at the time of the murders, the Court of Criminal Appeals did not unreasonably conclude that his counsel's alleged errors with respect to the insanity defense did not prejudice him under *Strickland*.

Our decision in *Roberts* is instructive. In that case the defendant, who had been convicted of capital murder in Alabama and sentenced to death, alleged in part that his trial counsel rendered ineffective assistance by not investigating and pursuing an insanity defense. We declined to address counsel's performance and analyzed the matter of *Strickland* prejudice without AEDPA deference because the Alabama courts had not ruled on prejudice. *See Roberts*, 677 F.3d at 1092. We held that the defendant had failed to show prejudice resulting from his counsel's allegedly deficient performance even though there was evidence that he had a personality disorder, suffered from alcohol abuse and was intoxicated at the time of the murder, may have had memory lapses around the time of the murder, and may not have remembered what happened at the time of the murder. *See id.* at 1092–93. Two facts were critical to our holding on prejudice. First, we understood Alabama law to require a mental disease, and the defendant had no history of a "major debilitating

mental illness." *Id.* at 1093. Second, no medical expert could testify that the defendant was legally insane under Alabama law at the time of the murder. *Id.* There was therefore no basis to conclude that, as a result of a severe mental illness, the defendant could not appreciate the wrongfulness of his actions. *See id.* at 1093–94.

A similar result is appropriate here. As in *Roberts*, no medical professional has ever concluded that Mr. Miller was legally insane under Alabama law at the time of the murders. *See also Smith v. Mullin*, 379 F.3d 919, 935 (10th Cir. 2004) (holding that the defendant, who had been convicted of murdering his wife and stepchildren, was not prejudiced by his counsel's failure to present an insanity defense under Oklahoma law: "Even on the [mental health] evidence available to [counsel], should he have obtained it and presented it, an acquittal [on insanity grounds] was highly unlikely."); *Sandgathe v. Maass*, 314 F.3d 371, 382 (9th Cir. 2002) (holding that counsel's failure to investigate and present an insanity defense did not prejudice the defendant because there was "no evidence anywhere in the record . . . establishing that if counsel had properly investigated, he could have shown that [the defendant's] mental state at the time of the crime met the [Oregon insanity] standard").

VI

Mr. Miller argues that his trial counsel also rendered ineffective assistance of counsel during the penalty phase by failing to present compelling and readily

available mitigating evidence. And he says that his appellate counsel also performed deficiently (at the new trial stage and on appeal) by failing to investigate and preserve trial counsel's errors with respect to mitigating evidence. We conclude that the Alabama Court of Criminal Appeals reasonably determined that Mr. Miller failed to show prejudice resulting from these alleged errors.[4]

A

During the penalty phase, counsel called only one witness—Dr. Scott. As explained earlier, Dr. Scott was a psychiatrist who had been retained to evaluate Mr. Miller's sanity. He testified about Mr. Miller's mental disorder, but he was not a mitigation expert or specialist, and had only obtained limited information about Mr. Miller's background, family life, and employment.

According to Mr. Miller, his counsel could have and should have obtained and presented the following mitigating evidence: (1) Mr. Miller's parents were poor and frequently unemployed, and lived in a rat- and rodent-infested home; (2) Mr. Miller's father used the money the family had to buy drugs; (3) three generations of the Miller family suffered from severe and well-documented mental illnesses (e.g., his paternal great-grandmother suffered from insanity and was hospitalized and his father and uncles had severe mental illnesses); (4) Mr. Miller's father physically

[4] The district court found the ineffective assistance of trial counsel claim to be procedurally barred, but we choose to deny relief on the merits, as AEDPA allows us to do. *See Loggins*, 654 F.3d at 1215.

abused and threatened Mr. Miller on a regular basis, treated him harshly (e.g., calling him names like "little bastard," "retarded," and "moron"), and told him he was a homosexual; (5) Mr. Miller was an excellent employee; (6) Mr. Miller had a close and loving relationship with his siblings, was a great uncle to his nieces and nephews, and provided financial support to them; and (7) Mr. Miller had behaved strangely in the weeks before the shootings. *See* Br. for Appellant at 11–13.

After he was sentenced to death, Mr. Miller (now represented by new appellate counsel) filed a motion for a new trial alleging in part that trial counsel had rendered ineffective assistance. The trial court held an evidentiary hearing, and then summarily denied the motion. *See Miller I*, 913 So. 2d at 1151.

On direct appeal, the Court of Criminal Appeals rejected Mr. Miller's argument that trial counsel had failed to "adequately explore all possible mitigating routes," which left him "unable to make well-informed decisions on the question of mitigation." *Id.* at 1163. It recounted that trial counsel had testified about why he chose to present Mr. Miller's family and social history through Dr. Scott instead of through relatives, and held that it "fail[ed] to see what other mitigating evidence counsel could have offered. Moreover, despite [Mr.] Miller's allegations, he offers

no additional mitigating evidence that counsel did not discover during his investigation or that counsel failed to consider in formulating his trial strategy." *Id.*[5]

On Mr. Miller's post-conviction appeal, the Court of Criminal Appeals again addressed the claims that trial counsel and appellate counsel were ineffective with respect to the investigation and presentation of mitigating evidence at sentencing. It rejected both claims.

The Court of Criminal Appeals affirmed the trial court's conclusions that trial counsel had performed adequately: trial counsel had presented a "competent mitigating case" (including Mr. Miller's mental health and background) through Dr. Scott; "the fact that . . . trial counsel could have presented more mitigation evidence . . . does not establish deficient performance under *Strickland*"; and Mr. Miller had failed to ask trial counsel during the post-conviction hearing why he did not present other witnesses or evidence at the post-conviction hearing (and therefore trial counsel's performance was "presumed to be reasonable"). *See Miller II*, 99 So. 3d at 424.

With respect to prejudice, the Court of Criminal Appeals agreed with the trial court that Mr. Miller had failed to carry his burden. First, Mr. Miller had failed to establish what additional mitigating evidence could have been presented. Second,

[5] At the penalty phase, Dr. Scott testified to the jury about Mr. Miller's father's verbal abuse, his impoverished childhood, and the history of mental illness in his family. *See* D.E. 53 at 104– 07 (citing R. Vol. 8, Tab 22, at 1349, 1350-51, 1362).

the substance of the reports of Dr. Scott and Dr. McDermott were presented during the penalty phase. Third, the trial court found three statutory mitigating circumstances—that Mr. Miller had no significant history of prior criminal activity, that Mr. Miller committed the murders while "under the influence of extreme mental or emotional disturbance," and that Mr. Miller's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law "was substantially impaired"—and Mr. Miller failed to show what additional mitigating circumstances could have been proven. *See id.* at 411, 424. The Court of Criminal Appeals was "confident that there would be no change in the result in this case." *Id.* at 415.

The district court addressed only the matter of prejudice. *See* D.E. 53 at 102. It recounted the additional mitigating evidence Mr. Miller claimed should have been presented, *see id.* at 103–09, and compared that evidence to what was actually presented at the sentencing hearing. Applying AEDPA deference, it determined that a reasonable jurist could conclude that there was no reasonable probability of a different outcome had the additional mitigating evidence been presented. *See id.* at 109. The district court noted that some of Mr. Miller's new evidence was cumulative of the information presented by Dr. Scott and explained that "the value of the additional mitigating evidence . . . is minimal when weighed against the brutal nature" of Mr. Miller's crimes. *See id.* at 111.

B

As explained above, the reasonable probability standard requires a defendant to demonstrate a probability "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The likelihood of a different result must be "substantial, not just conceivable." *Richter*, 562 U.S. at 112. The question is "whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Evans v. Sec'y, Dep't of Corr.*, 703 F.3d 1316, 1326 (11th Cir. 2013) (en banc) (internal quotation marks and citation omitted). In answering this question, we must reweigh the aggravating evidence against the totality of the available mitigating evidence. *See Ferrell v. Hall*, 640 F.3d 1199, 1234 (11th Cir. 2011).

But because we must apply AEDPA deference, we do not analyze the prejudice issue de novo. Instead, we ask whether the prejudice ruling of the Court of Criminal Appeals was reasonable. *See Pittman v. Sec'y, Fla. Dep't of Corr.*, 871 F.3d 1231, 1253 (11th Cir. 2017). Like the district court, we conclude that the Court of Criminal Appeals reasonably held that Mr. Miller failed to show prejudice from his trial counsel's failure to present additional mitigating evidence and his appellate counsel's failure to investigate and preserve the issue of trial counsel's alleged ineffectiveness. *See id.* at 1252–54 (holding that state court reasonably concluded

that defendant—who had committed a violent triple murder with indicia of premeditation—failed to show prejudice resulting from his counsel's alleged failure to present additional mitigating evidence of sexual abuse, drug use, and mental health at sentencing).

Based on the testimony that Dr. Scott provided at the sentencing hearing, the trial court found three statutory mitigating factors. Applying AEDPA deference, the additional mitigating evidence that Mr. Miller presented in post-conviction proceedings (some of which was cumulative) is not strong enough to overcome the three murders he committed and the way in which he carried them out. *See* D.E. 53 at 111–12 (recounting the trial court's factual findings about the murders).

At the first location, Mr. Miller first shot Mr. Yancy in the leg, and the bullet entered his spine and paralyzed him. Mr. Yancy, unable to move, tried to hide from Mr. Miller under a desk but could not reach a cell phone that was inches away from his hand. He must have been afraid he was going to be killed before Mr. Miller fired the final two shots into him. Mr. Miller shot Mr. Holdbrooks several times, and Mr. Holdbrooks crawled down a hallway for about 25 feet before Mr. Miller put the gun to his head and fired the final bullet that killed him. At the second location, Mr. Miller shot Mr. Jarvis five times after he denied spreading rumors about Mr. Miller's sexuality. In the words of the trial court, "[i]t appears all three of [Mr. Miller's] victims suffered for a while not only physically, but psychologically. In each

instance, there appeared to have been hope for life while they were hurting, only to have their fate sealed by a final shot, execution style." *Id.* at 112 (quoting Rule 32 C.R. Vol. 43, Tab 72 at 1–3). On this record, we cannot say that the Court of Criminal Appeals' prejudice determination was unreasonable. *Cf. Brooks v. Comm'r, Ala. Dep't of Corr.*, 719 F.3d 1292, 1302 (11th Cir. 2013) ("In light of the extensive evidence regarding the horrific nature of the crime, it was reasonable for the Alabama Court of Criminal Appeals to conclude that the penalty phase outcome would not be affected by Brooks's acquaintances' and relatives' impression of him as a nice and polite young man[.]").

VII

The district court's denial of Mr. Miller's habeas corpus petition is affirmed.

AFFIRMED.