APPENDIX

REL: 09/01/2017
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Court of Criminal Appeals

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MEMORANDUM

CR-15-0355 Madison Circuit Court CC-90-2177.60

Jeffery Day Rieber v. State of Alabama

JOINER, Judge.

Jeffery Day Rieber, an inmate on death row at Holman Correctional Facility, appeals the Madison Circuit Court's denial of his petition for postconviction relief filed pursuant to Rule 32, Ala. R. Crim. P.

Statement of Facts and Procedural History

In 1992, Rieber was convicted of capital murder during a robbery, see § 13A-5-40(a)(2), Ala. Code 1975, for the 1990 killing of 25-year-old Glenda Phillips Craig and was ultimately sentenced to death. The circuit court, in its sentencing order, summarized the facts underlying Rieber's

conviction as follows:

> "Glenda Phillips Craig was twenty-five years old at the time of her death. She was married, and the mother of two small girls ages five and seven. She was murdered October 9, 1990, while working as a convenience store clerk in Mobil-Mart #1 at the intersection of Bradford Lane and Winchester Road in Huntsville, Madison County, Alabama.
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> "Approximately seven to ten days before the murder, the defendant Jeffery Rieber purchased a twenty-two caliber revolver from a man named David Hill for thirty ($30.00) dollars.
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> "There is testimony from at least two witnesses to the effect that the defendant had been in or about the store several times before the murder occurred.
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> "One of the witnesses, Mr. [Tommy] Erskine, was in the store a few days before the shooting, 'three to four days, maybe a little longer.' Although what the deceased stated to this witness was not admitted as evidence, it can certainly be inferred from his testimony that she was afraid and very nervous in the presence of the defendant, that he had driven up to the store on more than one occasion, and that the victim acted fearful in his presence. Mr. Erskine himself testified that he feared a robbery was about to take place at the hands of the defendant, and that he advised the victim to call the police. Just a few hours before her death, she inquired of the defendant's identity from a witness named Wayne Gentle, who knew the defendant and who identified the defendant for the victim.
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> "The evidence allows the Court to clearly conclude that the defendant, for at least three to four days, had stalked the victim, had targeted the store and her for his crime; that she was nervous, apprehensive, and afraid when he appeared. She had also inquired as to his identity from another witness and made some inquiry, the answer to which

from the victim was, 'I don't think he would do nothing like that.'

"The murder of Glenda Craig is on video tape, taken from a surveillance camera which had been installed as a security measure in the store. Mr. Gentle reviewed this tape and testified that the defendant appeared on the film at a time consistent when he himself was in the store to transact business and when the victim inquired of the defendant's identity. This was a few minutes after five o'clock P.M. on October 9, 1990.

"Just before eight o'clock P.M. on that same evening, the surveillance tape reflects that the defendant returned to the store. Mrs. Craig was alone in the store, standing behind the checkout counter to the defendant's left. The defendant passed outside the eye of the camera for a few moments and then returned to stand facing the victim across the counter. The defendant immediately withdrew the twenty-two caliber revolver from his clothing and fired a shot at Mrs. Craig. Her left arm went up in a defensive posture, and she fell to the floor behind the counter.

"The defendant proceeded to open the cash register at the counter, stuffing the contents into his pockets. The defendant then leaned over the counter in such a fashion that the victim was within his view. He extended his arm and shot Mrs. Craig a second time.

"He then fled the store. The expert testimony reflects that Mrs. Craig was shot at very close range, that the first bullet pierced her left wrist completely, and then lodged about one inch under her scalp in the back of her head. The second bullet entered her brain just behind her left ear, and according to the testimony, was the eventual cause of death.

"Glenda Craig remained alive for some minutes until a store patron found her and until her husband

came in to find her lying helpless, bleeding from the nose and mouth. She was transported to a hospital, where she underwent resuscitative effects and eventually died.

"The defendant was taken into custody at his home by law enforcement officials at 3:15 o'clock A.M. on October 10, 1990."

(C. 4404-07.)

On December 7, 1990, Rieber was indicted for capital murder during a robbery, see § 13A-5-40(a)(2), Ala. Code 1975.

Concerned that the evidence against Rieber was strong, Rieber's trial counsel, Richard Kempener, went to the district attorney to see if he could get him to "lift the death penalty off the table." According to Kempener, the district attorney agreed that Rieber could plead guilty in exchange for a sentence of life imprisonment without the possibility of parole. Kempener told Rieber about this plea deal, but Rieber decided not to take it.

Rieber's jury trial began on April 8, 1992, and on April 11, 1992, Rieber was convicted. The jury recommended, by a vote of 7 to 5, that Rieber be sentenced to life-imprisonment without the possibility of parole. The circuit court overrode the jury's recommendation and sentenced Rieber to death.[1]

This Court affirmed Rieber's conviction and death sentence. See Rieber v. State, 663 So. 2d 985 (Ala. Crim. App. 1994). The Alabama Supreme Court later affirmed this Court's ruling. See Ex parte Rieber, 663 So. 2d 999, 1002 (Ala. 1995),

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[1]Effective April 11, 2017, §§ 13A-5-45, 13A-5-46, and 13A-5-47, Ala. Code 1975, were amended to prohibit a court from overriding a jury's sentencing verdict in a capital case. Section 13A-5-47 states: "This act shall apply to any defendant who is charged with capital murder after the effective date of this act and shall not apply retroactively to any defendant who has previously been convicted of capital murder and sentenced to death prior to the effective date of this act." Accordingly, those amendments do not apply here.

cert. denied, 516 U.S. 995, 116 S. Ct. 531 (1995).

On February 24, 1997, Rieber filed his first Rule 32 petition alleging (1) that he received ineffective assistance of counsel at both the guilt phase and penalty phase of his capital-murder trial; (2) that his appellate counsel failed to raise and properly argue numerous issues before this Court; (3) that he was illegally arrested in his home and subjected to a search, without a warrant and absent exigent circumstances in violation of his Fourth and Fourteenth Amendment rights; (4) that the State suppressed evidence favorable to the defense in violation of Brady v. Maryland, 373 U.S. 83 (1963); (5) that the trial court's failure to grant a change of venue prior to trial violated his rights to due process and a fair trial by an impartial jury; (6) that execution by electrocution in Alabama's electric chair constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution; (7) that the circuit court's override of the jury's life-imprisonment-without-parole recommendation violated his Eighth and Fourteenth Amendment rights; (8) that he was deprived of effective assistance of counsel by Alabama's "unreasonably low" compensation of appointed counsel in capital cases; (9) that the trial court's failure to grant him funds for expert assistance prior to trial violated his Fifth, Sixth, Eighth, and Fourteenth Amendment Rights and Alabama law; (10) that he was arrested without probable cause and in violation of the Fourth and Fourteenth Amendments; (11) that he was denied his Fifth, Sixth, Eighth, and Fourteenth Amendment rights by the circuit court's reinstatement of a juror who had been struck by the defense; (12) that the pool from which his grand and petit juries were selected "unconstitutionally excluded women, people of color and other cognizable groups in violation of the Fifth, Sixth, Eight, and Fourteenth Amendments and Alabama law" (C. 50); and (13) that the circuit judge committed reversible error by failing to recuse herself from his capital trial.

On March 29, 1997, the State filed its answer to Rieber's Rule 32 petition. Later, in February 1998, the State filed two motions for partial dismissal in which it argued that all of Rieber's claims should be dismissed except for his claims that he received ineffective assistance of counsel during the guilt phase and penalty phase of his capital trial.

In 1999, the Honorable Laura Jo Hamilton was appointed to the Madison County Circuit Court and was assigned Rieber's case.

On June 22, 2000, the circuit court granted the State's motion for partial dismissal after finding that all of Rieber's claims, except for his claims that he received ineffective assistance of counsel during the guilty phase and penalty phase of his capital trial, were procedurally barred.

After over a year of inactivity in the case, both the State and Rieber filed motions to set a status conference for September 20, 2001. For the next two years, the parties continued to file requests for additional status conferences.

On January 26, 2004, Rieber filed an amended Rule 32 petition in which he re-alleged some of his claims from his original Rule 32 petition but also alleged (1) that Alabama's death-penalty scheme was unconstitutionally vague and arbitrary as applied in this case; (2) that the jury's recommended sentence was impermissibly overruled because elected judges cannot override juries; (3) that Alabama presently permits a person who has been sentenced to death to opt between either the electric chair or death by lethal injection--an option that violates his right not to be subject to cruel and unusual punishment and his right to due process and equal protection under the law; (4) that Alabama's procedures limiting the fees for representation of an indigent charged with a capital offense to $1,000.00, or to two attorneys, each with a $1,000.00 cap, resulted in him being deprived of his rights to due process and equal protection under the Alabama and United States Constitutions;[2] and (5)

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[2]At the time of Rieber's trial and direct appeal, §§ 15-12-21 and 15-12-22, Ala. Code 1975 limited an attorney's fee in a capital case involving an indigent defendant as follows: "The total fees to any one attorney in any one case, from the time of appointment through the trial of the case, including motions for new trial, shall not ... exceed $1,000.00, except as follows: In cases where the original case involves a capital offense or charge which carries a possible sentence of life without parole, the limits shall be $1,000.00 for out-of-court work, plus payment for all in-court work, said work to

that, by keeping him in custody for two weeks after his arrest without either appointing an attorney or conducting blood and urine examinations, Alabama permitted the spoilation of exculpatory evidence resulting in Rieber being deprived of his rights to due process and equal protection under the law.

On March 19, 2004, the State filed an answer to Rieber's amended petition and moved to dismiss it on the grounds that the allegations in his petition were either untimely, procedurally barred, failed to meet the specificity and pleading requirements of Rule 32.6(b), Ala. R. Crim. P., or failed to state a claim or establish that a material issue of fact or law existed as required by Rule 32.7(d), Ala. R. Crim. P.

On March 1, 2006, nearly two years after answering the amended petition, the State moved for a timely ruling. After four months of no response, the State filed a second motion for a timely ruling on July 19, 2006. In February 2007, the State filed a notice of intent to seek a writ of mandamus if the circuit court failed to either dismiss the amended petition or schedule an evidentiary hearing.

After the circuit court failed to take any action, the State filed a petition for a writ of mandamus on August 29, 2007, which this Court granted on October 18, 2007, and ordered the circuit court to take some action on Rieber's petition within a reasonable amount of time. On January 18, 2008, the circuit court denied the State's motion to dismiss Rieber's petition.

In 2008 and 2009, the parties continued to request status conferences. No action was taken, however, until October 2009, when a status conference was finally held.

In February 2011, the State moved the court to schedule an evidentiary hearing on the petition. Between October 3 and 5, 2011, an evidentiary hearing was held.

In November 2014, the case was reassigned to another

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be billed at the aforementioned rates." § 15-12-21(d), Ala. Code 1975. This limit was removed in 1999.

circuit judge. On November 13, 2015--almost 19 years after Rieber filed his original Rule 32 petition--the circuit court denied Rieber's amended Rule 32 petition. Rieber appealed to this Court.

Standard of Review

> "[Rieber] has the burden of pleading and proving his claims. As Rule 32.3, Ala. R. Crim. P., provides:
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> > "'The petitioner shall have the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief. The state shall have the burden of pleading any ground of preclusion, but once a ground of preclusion has been pleaded, the petitioner shall have the burden of disproving its existence by a preponderance of the evidence.'
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> "'The standard of review this Court uses in evaluating the rulings made by the trial court [in a postconviction proceeding] is whether the trial court abused its discretion.' Hunt v. State, 940 So. 2d 1041, 1049 (Ala. Crim. App. 2005). However, 'when the facts are undisputed and an appellate court is presented with pure questions of law, [our] review in a Rule 32 proceeding is de novo.' Ex parte White, 792 So. 2d 1097, 1098 (Ala. 2001). '[W]e may affirm a circuit court's ruling on a postconviction petition if it is correct for any reason.' Smith v. State, [122] So. 3d [224], [227] (Ala. Crim. App. 2011).
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> "As stated above, [some] of the claims raised by [Rieber] were summarily dismissed based on defects in the pleadings and the application of the procedural bars in Rule 32.2, Ala. R. Crim. P. When discussing the pleading requirements for postconviction petitions, we have stated:
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> > "'The burden of pleading under Rule

> 32.3 and Rule 32.6(b) is a heavy one. Conclusions unsupported by specific facts will not satisfy the requirements of Rule 32.3 and Rule 32.6(b). The full factual basis for the claim must be included in the petition itself. If, assuming every factual allegation in a Rule 32 petition to be true, a court cannot determine whether the petitioner is entitled to relief, the petitioner has not satisfied the burden of pleading under Rule 32.3 and Rule 32.6(b). See Bracknell v. State, 883 So. 2d 724 (Ala. Crim. App. 2003).'

"Hyde v. State, 950 So. 2d 344, 356 (Ala. Crim. App. 2006).

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

"Boyd v. State, 913 So. 2d 1113, 1125 (Ala. Crim. App. 2003). '[T]he procedural bars of Rule 32[.2, Ala. R. Crim. P.,] apply with equal force to all cases, including those in which the death penalty has been imposed.' Burgess v. State, 962 So. 2d 272, 277 (Ala. Crim. App. 2005).

"Some of [Rieber's] claims were also dismissed based on his failure to comply with Rule 32.7(d),

Ala. R. Crim. P. In discussing the application of this rule we have stated:

> "'[A] circuit court may, in some circumstances, summarily dismiss a postconviction petition based on the merits of the claims raised therein. Rule 32.7(d), Ala. R. Crim. P., provides:
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> > "'"If the court determines that the petition is not sufficiently specific, or is precluded, or fails to state a claim, or that no material issue of fact or law exists which would entitle the petitioner to relief under this rule and that no purpose would be served by any further proceedings, the court may either dismiss the petition or grant leave to file an amended petition. Leave to amend shall be freely granted. Otherwise, the court shall direct that the proceedings continue and set a date for hearing."
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> "'"'Where a simple reading of the petition for post-conviction relief shows that, assuming every allegation of the petition to be true, it is obviously without merit or is precluded, the circuit court [may] summarily dismiss that petition.'" Bishop v. State, 608 So. 2d 345, 347-48 (Ala. 1992) (emphasis added) (quoting Bishop v. State, 592 So. 2d 664, 667 (Ala. Crim. App. 1991) (Bowen, J., dissenting)). See also Hodges v. State, [Ms. CR-04-1226, March 23, 2007] ___ So. 3d ___, ___ (Ala. Crim. App. 2007) (a postconviction claim is 'due to be summarily dismissed [when] it is meritless on its face')[, rev'd on other grounds, ___ So. 3d ___ (Ala. 2011)].'

"Bryant v. State, [Ms. CR-08-0405, February 4, 2011] ___ So. 3d ___, ___ (Ala. Crim. App. 2011)."

Washington v. State, 95 So. 3d 26, 38-39 (Ala. Crim. App. 2012). Rieber's remaining claims were denied by the circuit court after he was afforded the opportunity to prove those claims at an evidentiary hearing. See Rule 32.9(a), Ala. R. Crim. P.

When the circuit court conducts an evidentiary hearing, "[t]he burden of proof in a Rule 32 proceeding rests solely with the petitioner, not the State." Davis v. State, 9 So. 3d 514, 519 (Ala. Crim. App. 2006), rev'd on other grounds, 9 So. 3d 537 (Ala. 2007). "[I]n a Rule 32, Ala. R. Crim. P., proceeding, the burden of proof is upon the petitioner seeking post-conviction relief to establish his grounds for relief by a preponderance of the evidence." Wilson v. State, 644 So. 2d 1326, 1328 (Ala. Crim. App. 1994). Rule 32.3, Ala. R. Crim. P., specifically provides that "[t]he petitioner shall have the burden of ... proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief." "[W]hen the facts are undisputed and an appellate court is presented with pure questions of law, that court's review in a Rule 32 proceeding is de novo." Ex parte White, 792 So. 2d 1097, 1098 (Ala. 2001). "However, where there are disputed facts in a postconviction proceeding and the circuit court resolves those disputed facts, '[t]he standard of review on appeal ... is whether the trial judge abused his discretion when he denied the petition.'" Boyd v. State, 913 So. 2d 1113, 1122 (Ala. Crim. App. 2003) (quoting Elliott v. State, 601 So. 2d 1118, 1119 (Ala. Crim. App. 1992)).

Finally, "[a]lthough on direct appeal we reviewed [Rieber's] capital-murder conviction for plain error, the plain-error standard of review does not apply when an appellate court is reviewing the denial of a postconviction petition attacking a death sentence." James v. State, 61 So. 3d 357, 362 (Ala. Crim. App. 2010) (citing Ex parte Dobyne, 805 So. 2d 763 (Ala. 2001)). With these principles in mind, we review the claims raised by Rieber on appeal.

Discussion

I.[3]

First, Rieber argues that his trial counsel was ineffective during both the guilt phase and penalty phase of his capital-murder trial. Generally, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Strickland v. Washington, 466 U.S. 668, 689 (1984). In Marshall v. State, 182 So. 3d 573 (Ala. Crim. App. 2014), this Court stated:

> "To prevail on a claim of ineffective assistance of counsel, the petitioner must show (1) that counsel's performance was deficient and (2) that the petitioner was prejudiced by the deficient performance. See Strickland, [supra].
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> > "'Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable

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[3]Because Rieber relies on the same principles of law to support his arguments in both Sections I and II of his brief, we will address both of those arguments here.

> professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.'

"Strickland, 466 U.S. at 689.

> "'[T]he purpose of ineffectiveness review is not to grade counsel's performance. See Strickland [v. Washington], [466 U.S. 668,] 104 S. Ct. [2052] at 2065 [(1984)]; see also White v. Singletary, 972 F.2d 1218, 1221 (11th Cir. 1992) ("We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately."). We recognize that "[r]epresentation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Strickland, 104 S. Ct. at 2067. Different lawyers have different gifts; this fact, as well as differing circumstances from case to case, means the range of what might be a reasonable approach at trial must be broad. To state the obvious: the trial lawyers, in every case, could have done something more or something different. So, omissions are inevitable. But, the issue is not what is possible or "what is prudent or appropriate, but only what is constitutionally compelled." Burger v. Kemp, 483 U.S. 776, 107 S. Ct. 3114, 3126, 97 L. Ed. 2d 638 (1987).'

"Chandler v. United States, 218 F.3d 1305, 1313-14 (11th Cir. 2000) (footnotes omitted).

"An appellant is not entitled to 'perfect representation.' Denton v. State, 945 S.W.2d 793, 796 (Tenn. Crim. App. 1996). '[I]n considering claims of ineffective assistance of counsel, "we address not what is prudent or appropriate, but only what is constitutionally compelled."' Burger v. Kemp, 483 U.S. 776, 794 (1987)."

Yeomans v. State, 195 So. 3d 1018, 1025-26 (Ala. Crim. App. 2013). Additionally, "'[w]hen courts are examining the performance of an experienced trial counsel, the presumption that his conduct was reasonable is even stronger.'" Ray v. State, 80 So. 3d 965, 977 n.2 (Ala. Crim. App. 2011) (quoting Chandler v. United States, 218 F.3d 1305, 1316 (11th Cir. 2000)).

Rieber was represented at trial by Richard Kempaner. Kempaner later obtained the assistance of Daniel Moran during the penalty phase of Rieber's trial. Both men also represented Rieber on direct appeal. Only Kempener testified at Rieber's postconviction evidentiary hearing.

A. Guilt-Phase Ineffective-Assistance Claim

Rieber argues that his trial counsel, Richard Kempener, was ineffective during the guilt phase of his capital murder trial for failing to pursue the defense that he was voluntarily intoxicated and that he had "blacked out" at the time of the murder. (Rieber's brief, pp. 29-39.) Rieber also argues that Kempener should have followed up on a report created by Dr. Kathy Rogers, from the Taylor Hardin Secure Medical Facility, because this report, Rieber says, indicated that he "had no recollection of the events of the evening because of heavy drug consumption in the period before the robbery/shooting." (Rieber's brief, p. 31.) According to Rieber, this finding provided reasonable doubt as to his intent to kill Craig and, thus, could have been used as a basis for requesting a jury instruction on the lesser-included offense of manslaughter. (Rieber's brief, p. 37.)

During the evidentiary hearing on Rieber's petition, Kempener was questioned about his defense strategy. Kepmener testified that, after Rieber rejected the plea deal offered to him, the strategy he chose to pursue for Rieber's defense was

mistaken identity and that he hired a private investigator to locate witnesses who could place Rieber at a different location at the time of the offense. (Ev. R. 304, 329.)[4] When explicitly asked why he did not pursue an intoxication defense during Rieber's trial, Kempener stated that he did not do so because Rieber never brought it up. (Ev. R. 328-29.) Additionally, when asked why he did not rely more heavily on Dr. Rogers' report, Kempener gave the following response:

> "MR. KEMPENER: I discussed it with co-counsel and we both agreed that at the time it didn't make any difference, our position was it wasn't him that did the shooting, so it didn't make any difference what his mental state was. He was not the one that did the shooting."

(Ev. R. 303-04.)

Generally, "trial counsel's decisions regarding what theory of the case to pursue represent the epitome of trial strategy." Clark v. State, 196 So. 3d 285, 306 (Ala. Crim. App. 2015) (internal quotations and citation omitted). "What defense to carry to the jury, what witnesses to call, and what method of presentation to use is [something] ... that we will seldom, if ever, second guess." Id. Importantly,

> "'"the mere existence of a potential alternative defense theory is not enough to establish ineffective assistance based on counsel's failure to present that theory."' Hunt v. State, 940 So. 2d 1041, 1067 (Ala. Crim. App. 2005), quoting Rosario-Dominguez v. United States, 353 F. Supp. 2d 500, 513 (S.D.N.Y. 2005). 'Hindsight does not elevate unsuccessful trial tactics into ineffective assistance of counsel.' People v. Eisemann, 248 A.D.2d 484, 484, 670 N.Y.S.2d 39, 40-41 (1998)."

Davis v. State, 44 So. 3d 1118, 1132 (Ala. Crim. App. 2009). "'The fact that [a] defense strategy was ultimately unsuccessful with the jury does not render counsel's

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[4]References to the transcript of the evidentiary hearing will be cited as "Ev. R."

performance deficient.'" Bush v. State, 92 So. 3d 121, 160-61 (Ala. Crim. App. 2009) (internal quotations and citations omitted).

According to Rieber, because Kemapner was aware of Dr. Rogers' report and the "reasonable doubt" that, he says, it contained concerning his level of intoxication on the night of the offense, he should have pursued an intoxication defense and should have requested a jury instruction on manslaughter. The circuit court disagreed with Rieber's argument, however, and found as follows:

> "Mr. Kempener explained at the evidentiary hearing that he did not request a jury instruction on manslaughter because the defense strategy was mistaken identity. Mr. Kempener also testified that he discussed the guilt phase with Rieber, that Rieber understood the strategy, and that Rieber never suggested presenting another defense, such as intoxication. Rieber did not testify at the evidentiary hearing, so there is no evidence before this Court refuting Mr. Kempener's testimony."

(C. 2873-74.)

The circuit court also concluded that even if Kempener had requested a manslaughter instruction, Rieber would not have been entitled to it. (C. 2874.) In its order denying Rieber's amended Rule 32 petition, the circuit court acknowledged that while Rieber presented witnesses who gave testimony concerning his history of drug and alcohol abuse,[5] such testimony would not necessarily have been admissible during the guilt phase of his trial because evidence that Rieber had been using drugs at some time during the day of the offense would not necessarily have proven that he was intoxicated at the time of the offense. (C. 2872 (citing Windsor v. State, 683 So. 2d 1027 (Ala. Crim. App. 1994)).) Specifically, the circuit court found that "[e]vidence that someone was a habitual drug user is not evidence that that

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[5]All seven of those fact witnesses testified that none of them had ever seen Rieber become violent or "black out" while under the influence of drugs or alcohol.

person was intoxicated at the time of the murder." (C. 2871-72 (quoting Whitehead v. State, 777 So. 2d 781, 833 (Ala. Crim. App. 1999)).) Based on these findings, the circuit court denied this claim on the ground that, under Rule 32.3, Ala. R. Crim. P., Rieber failed to prove that Kempener was ineffective during the guilt phase of his capital murder trial.

Rieber has not demonstrated that the circuit court erred in denying this claim. Here, Kempener's decision not to pursue an intoxication defense was a reasonable strategic decision under the circumstances. From the time of his arrest within hours of the offense, Rieber denied any involvement in the crime. Thus, a theory of voluntary intoxication would have been inconsistent with Rieber's own statements. Furthermore, the evidence Rieber offered at the Rule 32 hearing in support of a voluntary-intoxication theory did not establish that he would have been entitled to a lesser-included-offense manslaughter instruction. See Ex parte McWhorter, 781 So. 2d 330, 342-43 (Ala. 2000) (holding that because there was no substantial evidence indicating that at the time of the crime defendant was intoxicated to such a degree that the intoxication amounted to insanity, as required to negate specific intent element of murder and reduce the charge to manslaughter, the trial court's giving a voluntary-intoxication charge at guilt phase of capital murder prosecution was neither prejudicial nor necessary). Therefore, Rieber is not entitled to relief on this claim.

B. Penalty-Phase Ineffective-Assistance Claims

1.

Next, Rieber argues that attorney Daniel Moran, who was retained to assist with the penalty phase of Rieber's capital trial, was expected to bring the circuit court's attention to other capital cases with "worse" facts in which the defendant was sentenced to life without parole rather than death and that he failed to fulfill this obligation. (Rieber's brief, p. 25.) According to Rieber, this was an "essential component of defense work ... to assure that the imposition of the death penalty [was] not arbitrary or capricious" and, because Moran failed to do this, he rendered ineffective assistance during the penalty phase of Rieber's capital-murder trial. Id.

This specific claim was not presented to the circuit court in either the original or amended versions of Rieber's Rule 32 petition below; therefore, it has not been properly preserved for our review. "The general rules of preservation apply to Rule 32 proceedings." Boyd v. State, 913 So. 2d 1113, 1123 (Ala. Crim. App. 2003). A Rule 32 petitioner cannot raise on appeal a postconviction claim that was not included in his or her petition or amendments. See Arrington v. State, 716 So. 2d 237, 239 (Ala. Crim. App. 1997) ("An appellant cannot raise an issue on appeal from the denial of a Rule 32 petition which was not raised in the Rule 32 petition."). Because this claim was not properly preserved for review, it will not be considered by this Court.

2.[6]

Rieber also contends that Moran's assistance was ineffective for two additional reasons. First, he argues that Moran was ineffective for failing to find evidence between the penalty phase and the sentencing phase to corroborate Dr. Kathy Rogers's evaluation report. (Rieber's brief, pp. 43-46.) According to Rieber, after Moran placed Dr. Rogers's report into evidence at the sentencing hearing, Rieber says that Moran should have taken more time to search for and obtain evidence to corroborate the findings in Dr. Rogers's report. (Rieber's brief, p. 44.) Second, Rieber argues that Moran's assistance was ineffective because he failed to present evidence of Rieber's drug-laced and unstable background during the penalty phase of his capital-murder trial. (Rieber's brief, p. 46.) Relying on the United States Supreme Court's decision, Wiggins v. Smith, 539 U.S. 510 (2003), Rieber specifically argues that Moran was required to "explore [his] background fully and bring to the attention of the sentencing body--in Alabama's case both the jury and the court--any mitigating evidence that could outweigh a determination that aggravating factors were present." Id. According to Rieber, had Moran done so, "he would have been able to prove through numerous witnesses ... that Mr. Rieber's life was laced with drug use starting at an early age, and that his home life was

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[6]Because Rieber's arguments in Sections II.B. and II.C. of his appellate brief rely on the same principles of law, both arguments are addressed here.

volatile and colossally unstable." (Rieber's brief, pp. 46-47.) For the reasons provided herein, Rieber's argument is without merit.

When reviewing claims of ineffective assistance of counsel during the penalty phase of a capital trial, this Court applies the following legal standard:

> "'When the ineffective assistance claim relates to the sentencing phase of the trial, the standard is whether there is "a reasonable probability that, absent the errors, the sentencer--including an appellate court, to the extent it independently reweighs the evidence--would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Strickland [v. Washington], 466 U.S. [668,] at 695, 104 S.Ct. [2052,] at 2069 (1984).'"

Davis v. State, 44 So. 3d 1118, 1137 (Ala. Crim. App. 2009) (internal citations omitted). In Wiggins v. Smith, 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003), the United States Supreme Court in reviewing a claim of ineffective assistance of counsel at the penalty phase of a capital trial, stated:

> "In Strickland [v. Washington, 466 U.S. 668 (1984)], we made clear that, to establish prejudice, a 'defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' Id., at 694. In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence."

539 U.S. at 534, 123 S. Ct. 2527.

Additionally, this Court has previously recognized that:

> "'The reasonableness of counsel's investigation and preparation for the penalty phase, of course, often depends critically upon the information

> supplied by the defendant. E.g., Commonwealth v. Uderra, 550 Pa. 389, 706 A.2d 334, 340-41 (1998) (collecting cases). Counsel cannot be found ineffective for failing to introduce information uniquely within the knowledge of the defendant and his family which is not provided to counsel.'"

Waldrop v. State, 987 So. 2d 1186, 1195 (Ala. Crim. App. 2007)(internal citation omitted). This Court has also previously recognized that:

> "'A defense attorney is not required to investigate all leads ... and "there is no per se rule that evidence of a criminal defendant's troubled childhood must always be presented as mitigating evidence in the penalty phase of a capital case."' Bolender [v. Singletary], 16 F.3d [1547,] at 1557 [(11th Cir. 1994)] (footnote omitted) (quoting Devier v. Zant, 3 F.3d 1445, 1453 (11th Cir. 1993), cert. denied, [513] U.S. [1161], 115 S. Ct. 1125, 130 L. Ed. 2d 1087 (1995)). 'Indeed, "[c]ounsel has no absolute duty to present mitigating character evidence at all, and trial counsel's failure to present mitigating evidence is not per se ineffective assistance of counsel."' Bolender, 16 F.3d at 1557 (citations omitted)."

Davis v. State, 44 So. 3d 1118, 1137-38 (Ala. Crim. App. 2009) (citation omitted).

In the present case, Rieber contends that Moran provided ineffective assistance during the sentencing phase of his capital-murder trial because he failed to provide evidence corroborating the findings located in Dr. Rogers's report. (Rieber's brief, pp. 43-46.) He also contends that Moran failed to provide effective assistance because he failed to present evidence of Rieber's drug-laced and unstable background during the sentencing phase. (Rieber's brief, p. 46.) The circuit court disagreed with Rieber's argument and made the following findings on this claim:

"Mr. Moran called seven witnesses to testify in mitigation at the penalty phase of Rieber's trial. These witnesses included a former employer, former neighbors, friends, and Rieber's sister, Shauna .... Mr. Moran's focus was to [elicit] testimony in order to humanize Rieber to the jurors in hope[s] of securing a favorable sentencing recommendation. Mr. Moran elicited testimony from these witnesses focusing on Rieber's good character, his gentle nature, his lack of violence, and his willingness to help others. For example, Rieber's sister, Shauna, told the jury that, since Rieber's arrest for capital murder, he had had a religious conversion, was helping other inmates learn to read, and had joined Alcoholics anonymous.

"In addition to the witness testimony, Mr. Moran submitted a pretrial mental evaluation and report prepared by Dr. Kathy Rogers from Taylor-Hardin Secured Mental Facility into evidence for the juror's consideration .... Dr. [Rogers] stated in her report that '[Rieber] reported a very significant history of abuse, dating back to when he was very young, about age 9.' (C.R. 207.) Dr. [Rogers's] report also stated that Rieber had informed her that on the day of the murder 'he had been drinking alcoholic beverages prior to the alleged offense, and had also smoked marijuana and used three hits of "acid".' (C.R. 213.) Referring to Dr. [Rogers's] report, Mr. Moran argued in his penalty phase closing that Rieber did not remember what happened because of the drugs he had taken the day of the murder. (R. 1003.) The jury voted seven to five that Rieber be sentenced to life in prison without the possibility of parole.

"The testimony presented by Rieber at the evidentiary hearing from his siblings, friends, and acquaintances, and Dr. Stalcup focused on Rieber's history of drug abuse. Much of this same evidence was presented to the jury by way of Dr. [Rogers's] report and does not support Rieber's assertion that Mr. Moran's performance was deficient.

" ....

"The fact that Mr. Moran did not present evidence about Rieber's history of drug abuse during the penalty phase in the manner that Rieber believes he should have does not establish that Mr. Moran was ineffective."

(C. 2894-96.) Based on these findings, the circuit court denied Rieber's claim pursuant to Rule 32.3, Ala. R. Crim. P., on the basis that he failed to prove that Moran's performance was deficient and prejudiced his case. (C. 2896.) We agree with the circuit court's findings on this claim.

The record indicates that Moran introduced as much mitigating evidence concerning Rieber's background as was available to him. Rieber has failed to point to specific examples in the record demonstrating that the evidence and testimony above rendered Moran's assistance deficient and ultimately prejudiced him during the penalty phase of his capital murder trial. As such, Rieber is not entitled to relief on this claim. Thus, the circuit court properly denied this claim.

3.

Finally, although not a model of clarity, Rieber appears to argue that both Kempener and Moran were ineffective for arguing that Rieber was entitled to a new trial[7] solely on the basis that Kempener had improperly struck a juror based on his Taiwanese nationality. (Rieber's brief, pp. 51-52.) Specifically, he argues that their motion should have been based on evidence corroborating Dr. Rogers's report and not on a claim that "went nowhere." Id.

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[7]Although Rieber contends that Kempener and Moran were ineffective for raising this ground in a "motion for reconsideration," the portions of the record to which he cites contain both his original and amended motion for a new trial. Both of these motions recite the grounds discussed in this section of Rieber's brief. Thus, we refer only to the motion for a new trial.

This specific claim was not presented to the circuit court in Rieber's amended Rule 32 petition below; therefore, it has not been properly preserved for our review. Once again, "the general rules of preservation apply to Rule 32 proceedings." Boyd v. State, 913 So. 2d 1113, 1123 (Ala. Crim. App. 2003). A Rule 32 petitioner cannot raise on appeal a postconviction claim that was not included in his or her petition or amendments. See Arrington v. State, 716 So. 2d 237, 239 (Ala. Crim. App. 1997) ("An appellant cannot raise an issue on appeal from the denial of a Rule 32 petition which was not raised in the Rule 32 petition."). Because this claim was not properly preserved for review, it will not be considered by this Court.

II.

Next, Rieber argues that both Kempener and Moran were ineffective on direct appeal because they "chose to press a plainly meritless position, instead of developing readily-available arguments and facts that, if presented, would have resulted in reversal and a lesser sentence." (Rieber's brief, p. 52.) According to Rieber, his appellate counsel's argument that the exclusion of a specific juror prior to the commencement of his capital murder trial "constituted racial discrimination by the State, rendering [Rieber's] trial unconstitutional" is a "preposterous" argument. Id. Rieber also contends that there were several other arguments that could have and should have been made on direct appeal that, he says, would have caused the Alabama Court of Criminal Appeals or the Alabama Supreme Court to reverse his conviction or sentence. (Rieber's brief, p. 54.) We disagree.

"The standards for determining whether appellate counsel was ineffective are the same as those for determining whether trial counsel was ineffective." Jones v. State, 816 So. 2d 1067, 1071 (Ala. Crim. App. 2000), overruled on other grounds by Brown v. State, 903 So. 2d 159 (Ala. Crim. App. 2004). As this Court explained in Thomas v. State, 766 So. 2d 860 (Ala. Crim. App. 1998):

> "As to claims of ineffective appellate counsel, an appellant has a clear right to effective assistance of counsel on first appeal. Evitts v. Lucey, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985).

> However, appellate counsel has no constitutional obligation to raise every nonfrivolous issue. Jones v. Barnes, 463 U.S. 745, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983). The United States Supreme Court has recognized that '[e]xperienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues.' Jones v. Barnes, 463 U.S. at 751-52, 103 S. Ct. 3308. Such a winnowing process 'far from being evidence of incompetence, is the hallmark of effective advocacy.' Smith v. Murray, 477 U.S. 527, 536, 106 S. Ct. 2661, 91 L. Ed. 2d 434 (1986). Appellate counsel is presumed to exercise sound strategy in the selection of issues most likely to afford relief on appeal. Pruett v. Thompson, 996 F.2d 1560, 1568 (4th Cir. 1993), cert. denied, 510 U.S. 984, 114 S.Ct. 487, 126 L. Ed. 2d 437 (1993). One claiming ineffective appellate counsel must show prejudice, i.e., the reasonable probability that, but for counsel's errors, the petitioner would have prevailed on appeal. Miller v. Keeney, 882 F.2d 1428, 1434 and n. 9 (9th Cir. 1989)."

766 So. 2d at 876. Generally, "[a]ppellate counsel is presumed to exercise sound strategy in the selection of issues most likely to afford relief on appeal. One claiming ineffective appellate counsel must show prejudice, i.e., the reasonable probability that, but for counsel's errors, the petitioner would have prevailed on appeal." Whitson v. State, 109 So. 3d 665, 672 (Ala. Crim. App. 2012). With these principles in mind, we will first address the merits of Rieber's argument that Kempener and Moran were ineffective for raising a Batson[8] challenge on appeal. We will then address the merits of Rieber's argument that Kempener and Moran were ineffective for failing to raise six claims that he later raised in his amended Rule 32 petition.

A.

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[8] Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

First, Rieber claims that his appellate counsel were ineffective for raising a "preposterous" Batson challenge instead of arguing other claims on direct appeal. (Rieber's brief, pp. 52-54.)

As an initial matter, the record shows that Kempener, Rieber's lead counsel, tried to inject error into the record by striking a venire member of Asian heritage from the jury on the basis of race. (R. 324.) When questioned about this decision during the evidentiary hearing, Kempener explained that he did this because

> "the law at that time was that if you struck a person because of racial reasons, that was reversible error and it wasn't something against the defendant, it was something--it was against the potential juror.
>
> "So the potential juror's right to be on a jury [was] violated by me, and I thought that would get the case reversed. And that's why I did that."

(R. 324.) On direct appeal, this Court found this argument to be without merit and stated as follows:

> "This court has recognized that the logic of Batson applies to the striking of Asian-American jurors. Wilsher v. State, 611 So. 2d 1175 (Ala. Crim. App. 1992). Defense counsel in this case admitted that he struck the Asian-American juror for racial reasons. The juror in question was clearly a member of a racially cognizable group and was struck for racial reasons. While the striking of this juror may have been improper and may have violated this juror's right to serve, we cannot hold that it was 'plain error' because we fail to see how the striking of this juror affected the substantial right of this appellant. The appellant has not shown us nor can we see how the appellant was prejudiced by his defense counsel's striking this particular venire member. Defense counsel struck this juror because he believed this juror would be more in favor of the prosecution and it was in his client's best interest to strike this juror. Further, not

only is there no 'plain error' in this situation, but also any error that may have occurred by defense counsel's actions in striking the Asian-American juror was invited error.

"....

> "'A defendant cannot by his own voluntary conduct invite error and then seek to profit thereby. Boutwell v. State, 279 Ala. 176, 183 So. 2d 774 (1966); Aldridge v. State, 278 Ala. 470, 179 So. 2d 51 (1965); Buford v. State, 214 Ala. 457, 108 So. 74 (1926); Barber v. State, 151 Ala. 56, 43 So. 808 (1907). "It would be a sad commentary upon the vitality of the judicial process if an accused could render it improper by his own choice." Aldridge, 278 Ala. at 474, 179 So. 2d at 54; Jackson v. State, 38 Ala. App. 114, 116, 78 So. 2d 665, cert. denied, 262 Ala. 702, 78 So. 2d 667 (1955). This is not a situation where a defendant merely remained silent and permitted error to occur. Turner v. State, 54 Ala. App. 467, 309 So. 2d 503 (1975).'

"Rowe v. State, 625 So. 2d 1210, 1213 (Ala. Crim. App. 1993). See also Dixon v. State, 481 So. 2d 434 (Ala. Crim. App. 1985); Murrell v. State, 377 So. 2d 1102 (Ala. Crim. App. 1979), writ. denied, 377 So. 2d 1108 (1977).

"Batson and its progeny 'permit any party in any case to challenge the opposing party's use of peremptory challenges in a racially discriminatory manner.' Williams v. State, 634 So. 2d 1034 (Ala. Crim. App. 1993) (Bowen, P.J., dissenting). Thus, as a general rule, a party may object only to the

> opposing party's use of its peremptory strikes and not to its own. However, in this case, defense counsel could have alerted the trial court that he struck a juror for racial purposes before the swearing of the jury and the trial court could have fashioned some type of remedy for defense counsel's action, such as placing the removed juror back on the jury panel. However, by waiting until after the trial to object, defense counsel has taken inconsistent positions. Defense counsel obviously felt that it was advantageous to strike this juror. Defense counsel is now arguing that the trial court should protect the juror's right to serve and that the appellant was somehow harmed by being denied this particular juror's service. Defense counsel argues that because he struck this juror for racial reasons, his client should be granted a new trial. We fail to see how this would remedy the injustice suffered by the juror who was excluded from jury service."

Rieber v. State, 663 So. 2d 985, 991-92 (Ala. Crim. App. 1994), aff'd, 663 So. 2d 999 (Ala. 1995).

In his amended Rule 32 petition, Rieber argued that his counsel were ineffective for raising this issue as the first ground for appeal. (C. 661.) The circuit court denied Rieber's claim for the following reason:

> "Rieber presented no evidence demonstrating what issues Mr. Kempener and Mr. Moran could have raised on direct appeal that would have caused the Alabama Court of Criminal Appeals or the Alabama Supreme Court to reverse his conviction or sentence. This Court finds that Rieber failed to prove that Mr. Kempener's and Mr. Moran's performance on direct appeal was deficient and caused him to be prejudiced. Rule 32.3, Ala. R. Crim. P."

(C. 2901.) After reviewing the record on appeal, we find that Rieber's claim is without merit for the reasons stated by the trial court. The circuit court did not err in denying it.

B.

Next, according to Rieber, instead of raising a Batson challenge, Kempener and Moran should have argued that the circuit court erred in its analysis of the aggravating and mitigating circumstances. (Rieber's brief, pp. 54-58.) Specifically, Rieber contends that the circuit court's finding that Rieber stalked his victim served as a basis for the court's application of the "heinous, atrocious, or cruel" aggravating circumstance standard and constituted reversible error. Id. In its order, the circuit court found, in relevant part, that Rieber failed to prove this claim because he failed to question his appellate counsel about this claim at his Rule 32 evidentiary hearing. (C. 2902.) We agree.

Rieber's appellate counsel, Richard Kempener, testified at Rieber's evidentiary hearing. Rieber, however, never questioned Kempener about why he did not raise the stalking issue on direct appeal. (R. 290-342.) This Court has previously reasoned:

> "'It is extremely difficult, if not impossible, to prove a claim of ineffective assistance of counsel without questioning counsel about the specific claim.' Broadnax v. State, 130 So. 3d 1232, 1255 (Ala. Crim. App. 2013). '[T]o overcome the strong presumption of effectiveness, a Rule 32 petitioner must, at his evidentiary hearing, question ... counsel regarding his or her actions or reasoning.' Stallworth v. State, 171 So. 3d 53, 92 (Ala. Crim. App. 2014). 'When a record is silent as to the reasons for an attorney's actions we must presume that counsel's conduct was reasonable.' Hooks v. State, 21 So. 3d 772, 793 (Ala. Crim. App. 2008). '"If the record is silent as to the reasoning behind counsel's actions, the presumption of effectiveness is sufficient to deny relief on [an] ineffective assistance of counsel claim."' Davis v. State, 9 So. 3d 539, 546 (Ala. Crim. App. 2008) (quoting Howard v. State, 239 S.W.3d 359, 367 (Tex. Crim. App. 2007))."

Clark v. State, 196 So. 3d 285, 312 (Ala. Crim. App. 2015).

In the present case, because Rieber failed to question Kempener about why he chose not to raise the stalking issue on

direct appeal, the record is silent as to whether Kepmaner's decision not to make that argument was strategic. For this reason, Rieber failed to satisfy his burden of proving that Kempener's performance was deficient or that his performance prejudiced Rieber pursuant to Rule 32.3, Ala. R. Crim. P. Thus, the circuit court properly denied this claim.

C.

Rieber argues that Kempener and Moran were ineffective for failing to argue on appeal that the circuit court did not treat the jury's recommendation of life imprisonment without the possibility of parole as a mitigating circumstance. (Rieber's brief, pp. 58-59.) Relying on the Alabama Supreme Court's decision in Ex parte Carroll, 852 So. 2d 833, 835 (Ala. 2002), Rieber argues that the circuit court was required to treat the jury's recommendation as a mitigating circumstance and its failure to do so mandates that his death sentence be set aside. (Rieber's brief, p. 59.) Even though Carroll was decided more than 10 years after Rieber was convicted and sentenced, Rieber appears to argue that the Alabama Supreme Court's holding in that case should apply retroactively to his case.

In denying Rieber's claim, the circuit court found that the Alabama Supreme Court's decision in Ex parte Carroll, supra, requiring a sentencing court to consider a jury's life without parole recommendation as a mitigating circumstance did not apply to Rieber's case. (C. 2904.) Specifically, the circuit court found that this decision was not issued until 10 years after Rieber was convicted and sentenced and that its holding could not be applied retroactively. Id. We agree.

This Court has previously stated that, in Carroll, the Alabama Supreme Court never gave any indication that its decision was to be "applied retroactively to all cases, even those cases that were final" when Carroll was announced. See Ferguson v. State, 13 So. 3d 418, 429 (Ala. Crim. App. 2008). Furthermore, we note that, on direct appeal, both this Court and the Alabama Supreme Court found that Rieber's conviction and sentence were proper and that, even after independently weighing the aggravating and mitigating circumstances, both courts still concluded that Rieber's death sentence was appropriate. See Ex parte Rieber, 663 So. 2d 999, 1015 (Ala.

1995) (holding that the "guilty verdict and the sentence are supported by the record"); Rieber v. State, 663 So. 2d 985, 998 (Ala. Crim. App. 1994) (holding that "[o]ur review of the record leads us to conclude that the trial court's findings [concerning the aggravating and mitigating circumstances] are supported by the record").

For these reasons, we agree with the circuit court's conclusion that Rieber failed to prove that Kempener's and Moran's performance in representing him on direct appeal was deficient and caused him prejudice. Rule 32.3, Ala. R. Crim. P. Thus, the circuit court properly denied this claim.

D.

Finally, Rieber argues that his appellate counsel were ineffective for failing to raise on direct appeal the first six claims in his amended Rule 32 petition. (Rieber's brief, pp. 60.) Noting that "appellate counsel is presumed to exercise sound strategy in the selection of issues most likely to afford relief on appeal,"[9] the circuit court denied Rieber's claim on the basis that he had failed to prove that he was prejudiced by Kempener's and Moran's failure to raise these six issues on appeal. (C. 2906-07.) We agree with the circuit court's findings here.

In his brief on appeal, Rieber provides no factual support or legal authority for this claim, nor has he presented any analysis on this issue. Thus, he has failed to satisfy his duty to provide this Court with a sufficient argument under Rule 28(a)(10), Ala. R. App. P. Furthermore, we note that claims 1 through 6 from Rieber's amended Rule 32 petition challenge the constitutionality of Alabama's death-penalty scheme, which Alabama courts have addressed and repeatedly rejected. See, e.g., Largin v. State, [Ms. CR-09-0439, Dec. 18, 2015] ____ So. 3d ____, ____ (Ala. Crim. App. 2015). Thus, under these circumstances, the circuit court properly denied Rieber's claim.

III.

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[9]Thomas v. State, 766 So. 2d 860, 876 (Ala. Crim. App. 1998).

Next, Rieber contends that the circuit court erred by limiting or excluding certain pieces of evidence that Rieber sought to have admitted during the October 2011 evidentiary hearing on his Rule 32 petition. (Rieber's brief, p. 61.) We will address each of these claims individually below.

A.

First, Rieber argues that the circuit court erred by ruling that evidence that he attended drug parties both on a regular basis and on the night of the murder was "admissible only on the question of penalty and not on the question of whether Mr. Rieber was guilty of an offense requiring intent." (Rieber's brief, p. 61-62.) Specifically, Rieber argues that this ruling was "wrong and violated the Alabama Rules of Evidence" because, according to Rieber, this evidence was admissible under Rule 404(b), Ala. R. Evid., as proof of a "general plan among Mr. Rieber and his friends to meet ... [and] consume whatever drugs were available." (Rieber's brief, p. 62.) This argument is without merit.

This Court has previously held that the circuit court "at a Rule 32 hearing has the authority to ensure presentation of testimony and evidence relevant to the petitioner's claims and to the State's defenses" and the court is under no obligation to allow testimony or evidence that is irrelevant or cumulative. McGahee v. State, 885 So. 2d 191, 229 (Ala. Crim. App. 2003). Rieber's defense theory during the guilt phase of his capital-murder trial was that someone other than him killed Craig on October 9, 1990; his defense theory was not that he committed the offense while he was intoxicated that night. Under these circumstances, evidence that he was intoxicated would have been irrelevant to the guilt phase because it would have been inconsistent with his defense theory.

Moreover, even if Rieber had presented an intoxication defense during the guilt phase of his trial, this evidence still would have been inadmissible under Rule 404(b), Ala. R. Evid., for the reasons given by Rieber in his brief. During the evidentiary hearing on his Rule 32 petition, Rieber presented several fact witnesses to testify about his habitual

drug use and his drug use on the day of the murder.[10] Before Rieber presented his first witness, however, the State objected and reminded the circuit court that evidence of prior or habitual drug use is not admissible as guilt-phase evidence to prove intoxication or diminished capacity at the time of a capital crime. (Ev. R. 182.) The circuit court agreed with the State's argument and chose to limit all testimony concerning drug use prior to the day of the murder to the penalty phase. (Ev. R. 184, 197-198.) Rieber now contends, however, that this limitation was incorrect because, he says, evidence that he attended drug parties on a regular basis and on the night of the murder are admissible under Rule 404(b), Ala. R. Evid., as proof of a general plan between himself and others to attend drug parties that night. (Rieber's brief, p. 62.) We disagree.

Under Alabama law, evidence of any offense other than that specifically charged is prima facie inadmissible. Allen v. State, 380 So. 2d 313 (Ala. Crim. App. 1979). Alabama law, however, provides for the admissibility of evidence of collateral crimes or acts as a part of the prosecution's case-in-chief if the defendant's collateral misconduct is relevant to show his guilt other than by suggesting that he is more likely to be guilty because of his past misdeeds. See Nicks v. State, 521 So. 2d 1018, 1025 (Ala. Crim. App. 1987), aff'd, 521 So. 2d 1035 (Ala. 1988) (emphasis added). Rule 404(b), Ala. R. Evid., provides, in pertinent part:

> "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case

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[10] These fact witnesses were: Teresa Hill (Ev. R. 184-98), Warren "Lenny" Rieber (Ev. R. 198-216), Shauna Jenkins (Ev. R. 218-37), John Walls (Ev. R. 237-53), Beth Piraino (Ev. R. 253-63), Charity Hubert (Ev. R. 263-90), Tim Hubert (Ev. R. 342-51), Jo Duffy (Ev. R. 351-61), Sonya Williamson (Ev. R. 361-69), Melissa Smallwood (Ev. R. 369-75), Dennis Howell (Ev. R. 375-85), and Dwayne Maroney (Ev. R. 385-87.).

> shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial."

Rule 404(b), Ala. R. Evid. (emphasis added).[11]

"[T]he common plan, scheme, or design exception is 'essentially coextensive with the identity exception,' and 'applies only when identity is actually at issue.'" Lewis v. State, 889 So. 2d 623, 661 (Ala. Crim. App. 2003) (quoting Ex parte Darby, 516 So. 2d 786, 789 (Ala. 1987), and Campbell v. State, 718 So. 2d 123, 128-29 (Ala. Crim. App. 1997)). Concerning the identity exception to the general exclusionary rule, this Court has stated:

> "Collateral-act evidence is admissible to prove identity only when the identity of the person who committed the charged offense is in issue and the charged offense is committed in a novel or peculiar manner. 1 Charles W. Gamble, McElroy's Alabama

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[11]Although Rule 404(b), Ala. R. Evid., did not become effective until January 1, 1996--more than four years after Rieber was convicted--admitting evidence of specific conduct for a limited purpose is consistent with preexisting Alabama law in both criminal and civil cases. See, e.g., Sessions Co. v. Turner, 493 So. 2d 1387 (Ala. 1986) (other misrepresentations held admissible to prove prerequisite knowledge in fraud case); Averette v. State, 469 So. 2d 1371 (Ala. Crim. App. 1985) (evidence admissible in criminal case to prove knowledge); Ex parte Cofer, 440 So. 2d 1121 (Ala. 1983) (dealing with intent as a purpose for admitting evidence of the accused's collateral crimes); Nicks v. State, 521 So. 2d 1018 (Ala. Crim. App. 1987) (evidence of other crimes admissible to prove plan, design, or scheme), aff'd, 521 So.2d 1035 (Ala.), cert. denied, 487 U.S. 1241 (1988); Ford v. State, 514 So. 2d 1057 (Ala. Crim. App. 1987) (dealing with motive as a permissible purpose for admitting evidence of the accused's collateral crimes), cert. denied, 514 So. 2d 1060 (Ala. 1987); Ex parte Arthur, 472 So. 2d 665 (Ala. 1985) (containing an instructive discussion of the identity purpose).

> Evidence § 69.01(8) (5th ed. 1996); Ex parte Arthur, 472 So. 2d 665 (Ala. 1985); Johnson v. State, 820 So. 2d 842, 861 (Ala. Crim. App. 2000); Tyson v. State, 784 So. 2d 328, 344 (Ala. Crim. App.), aff'd, 784 So. 2d 357 (Ala. 2000). 'Under the identity exception to the general exclusionary rule prohibiting the admission of other or collateral crimes as substantive evidence of the guilt of the accused, the prior crime is not relevant to prove identity unless both that and the now-charged crime are "signature crimes" having the accused's mark and the peculiarly distinctive modus operandi so that they may be said to be the work of the same person.' Bighames v. State, 440 So. 2d 1231, 1233 (Ala. Crim. App. 1983). '[E]vidence of a prior crime is admissible only when the circumstances surrounding the prior crime and those surrounding the presently charged crime "exhibit such a great degree of similarity that anyone viewing the two offenses would naturally assume them to have been committed by the same person."' Ex parte Arthur, 472 So. 2d at 668 (quoting Brewer v. State, 440 So. 2d 1155, 1161 (Ala. Crim. App. 1983)). See also Mason v. State, 259 Ala. 438, 66 So. 2d 557 (1953); and Govan v. State, 40 Ala. App. 482, 115 So. 2d 667 (1959) (recognizing that the identity exception is applicable only where both the prior crime and the charged offense were committed in the same special or peculiar manner). 'When extrinsic offense evidence is introduced to prove identity, the likeness of the offenses is the crucial consideration.'"

Petric v. State, 157 So. 3d 176, 192 (Ala. Crim. App. 2013) (internal quotation and citation omitted). In light of the principles quoted above concerning the "common plan" exception to Rule 404(b), Ala. R. Evid., Rieber's argument here is clearly without merit.

As noted above, in the present case, the defense's theory at trial was that someone other than Rieber killed Craig on October 9, 1990. Because identity of the person who committed the charged offense was at issue, the State, not the defense, could have presented collateral-bad-acts evidence to prove

that Rieber was the culprit. For example, if there was evidence in this case showing that Rieber had previously robbed convenience stores and killed the clerks in the same way in which he robbed and murdered Craig, that evidence could have been introduced by the State and admitted under Rule 404(b), Ala. R. Evid., as evidence of a common plan or scheme. This, however, is not true in the case before us. For the foregoing reasons, Rieber's argument here is without merit and he is not entitled to relief on this claim.

B.

Rieber next argues that the circuit court erred by limiting Dr. Alex Stalcup's evidentiary hearing testimony to issues relating to the penalty phase. (Rieber's brief, pp. 64-67.) Specifically, he argues that Dr. Stalcup's testimony was critical to show the effects of severe drug and alcohol use on a person's behavior and that this testimony would have shown that he did not have the intent to kill Craig. Id. This argument is without merit.

Once again, the circuit court "at a Rule 32 hearing has the authority to ensure presentation of testimony and evidence relevant to the petitioner's claims and to the State's defenses" and the court is under no obligation to allow testimony or evidence that is irrelevant or cumulative. McGahee v. State, 885 So. 2d 191, 229 (Ala. Crim. App. 2003). Rule 704, Ala. R. Evid., governs the admissibility of expert testimony in Alabama. This rule states, in pertinent part: "Testimony in the form of an opinion or inference otherwise admissible is to be excluded if it embraces an ultimate issue to be decided by the trier of fact." Rule 704, Ala. R. Evid. This Court has repeatedly held that a circuit court does not commit reversible error by prohibiting a mental-health expert from testifying during the guilt phase of a capital-murder trial to show that the defendant did not have the ability to form intent and has reasoned that this testimony would invade the province of the jury. See, e.g., Wiggins v. State, 193 So. 3d 765, 800-03 (Ala. Crim. App. 2014); Gobble v. State, 104 So. 3d 920, 967-69 (Ala. Crim. App. 2010); Wilkerson v. State, 686 So. 2d 1266, 1278-79 (Ala. Crim. App. 1996); McCowan v. State, 412 So. 2d 847, 849 (Ala. Crim. App. 1982).

In Wilkerson v. State, 686 So. 2d 1266 (Ala. Crim. App.

1996), this Court stated:

> "The appellant contends that the trial court erred by not allowing him to question his expert witness, Dr. Alan Blotcky, a clinical psychologist who performed a court-ordered evaluation of the appellant, as to whether the appellant had the ability to form the requisite intent to commit murder. During an offer of proof in the trial court, the appellant's counsel explained that Dr. Blotcky would testify that the appellant had a diminished capacity to form the requisite intent to commit murder because of the combined effect of intoxication at the time of the crime, borderline intellectual function, and mental disease or defect (i.e., passive-aggressive personality). 'It has been held traditionally in this country that an expert witness cannot give his opinion upon an ultimate issue in the case.' Charles W. Gamble, McElroy's Alabama Evidence § 127.01(5)(d) (4th ed. 1991). More specifically, '[a] witness, be he expert or lay, cannot give his opinion when such constitutes a legal conclusion or the application of a legal definition.' Gamble, supra, at § 128.07.
>
> "The appellant refers us to our opinion in Bailey v. State, 574 So. 2d 1001, 1003 (Ala. Cr. App. 1990), where we stated: '[T]he modern trend is in the direction of permitting experts to give their opinions upon ultimate issues, of which the final determination rests with the jury.' The modern trend culminated in the adoption of Rule 704 of the Federal Rules of Evidence, which abandoned the ultimate issue rule. C. Gamble, supra, at § 127.01(5)(d). However, subsection (b) of Rule 704 contains the following important limitation:
>
>> "'No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense

thereto.'

"Stated differently,

> "'Rule 704(b) does not prohibit an expert witness from stating his opinion and reviewing facts from which a jury could determine whether a defendant had the requisite criminal intent. ... Rather, the rule prohibits an expert witness from testifying that a defendant did or did not possess the requisite mental intent at the time of the crime.'

> "United States v. Orr, 68 F.3d 1247, 1252 (10th Cir. 1995), cert. denied, 516 U.S. 1064, 116 S. Ct. 747, 133 L. Ed. 2d 695 (1996). See also United States v. Frisbee, 623 F. Supp. 1217, 1222-223 (N.D. Cal. 1985) ('the defendant's experts will not be allowed to state an opinion or inference as to whether the defendant did or did not form a specific intent to kill.... No testimony directly or indirectly opining on the issue of specific intent will be allowed'). Thus, even the more permissive federal rule does not allow an expert witness to state an opinion as to the ultimate issue of whether a defendant had the requisite mental state to commit murder. Here, it is clear from the record that the appellant sought only to elicit Dr. Blotcky's opinion on the issue of specific intent. Therefore, even under the modern trend, the appellant's argument that Dr. Blotcky should have been allowed to testify concerning the appellant's intent fails."

686 So. 2d at 1278-79.

Dr. Stalcup was Rieber's expert witness concerning the effects of drugs and alcohol on mental states. (Ev. R. 427.) He offered his opinion on the long-term effect of Rieber's drug and alcohol use on his brain and mental processes. (Ev. R. 433-41.) He opined specifically on the effects of the drugs that Rieber allegedly took on the night of the murder. Id. Dr. Stalcup testified that he did not believe that Rieber was "aware of what he was doing" during the murder and thought he

experienced "an LSD short circuit as opposed to a classic alcohol black out." (Ev. R. 441.)

Even though Dr. Stalcup was able to provide testimony concerning the long-term effect of Rieber's drug and alcohol use on his brain and mental processes, it was proper for the circuit court to determine that he was not allowed to testify whether Rieber "did or did not possess the requisite mental intent at the time of the crime." Wilkerson, 686 So. 2d at 1278-79. Based on our holding in Wilkerson, quoted above, and the record in this case, the circuit court did not commit reversible error in prohibiting Rieber from presenting the expert testimony of Dr. Stalcup as to issues relating to the guilt phase of his trial. Thus, Rieber is not entitled to relief on this issue.

C.

Rieber also contends that the circuit court erred by excluding as inadmissible hearsay law student Mary Sowinski's social-history report covering Rieber's background and the amount of time it took her to compile it. (Rieber's brief, pp. 67-69.) According to Rieber, this ruling was erroneous because the report was not being offered for the truth of the matter asserted but was instead being offered to "prove the kind of evidence that was accessible to Mr. Moran had he made the effort required of counsel in a death penalty case to conduct what amounts, essentially, to a social history of his client." (Rieber's brief, p. 68.)

Rieber's claim here fails to satisfy the requirements of Rule 28(a)(10), Ala. R. App. P. This rule requires that an argument contain "the contentions of the appellant/petitioner with respect to the issues presented, and the reasons therefor, with citations to the cases, statutes, other authorities, and parts of the record relied on." Rule 28(a)(10), Ala. R. App. P. "When an appellant fails to cite any authority for an argument on a particular issue, this Court may affirm the judgment as to that issue, for it is neither this Court's duty nor its function to perform an appellant's legal research." City of Birmingham v. Business Realty Inv. Co., 722 So. 2d 747, 752 (Ala. 1998).

In his brief on appeal, Rieber provides no legal

authority for this claim, nor has he presented any analysis on this issue. Thus, he has failed to satisfy his duty to provide this Court with a sufficient argument under Rule 28(a)(10), Ala. R. App. P.

D.

Finally, Rieber argues that the circuit court erred by prohibiting Kempener from testifying about Moran's statement that he felt he was being underpaid for his work on Rieber's case on the basis that such testimony was inadmissible hearsay. (Rieber's brief, pp. 69-70.) According to Rieber, Moran's statement is admissible under the "present emotional, physical, or mental condition" exception to Alabama's rule against hearsay. (Rieber's brief, p. 70.)

As noted, the Alabama Rules of Evidence apply to Rule 32 proceedings. See Hunt v. State, 940 So. 2d 1041, 1051 (Ala. Crim. App. 2005). Under Rule 801(c), Ala. R. Evid., hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Hearsay evidence is inadmissible unless expressly allowed by statute or rule. Rule 802, Ala. R. Evid. Rule 803, Ala. R. Evid., provides a list of statements that are considered exceptions to the general rule against the admissibility of hearsay. One such exception is found in subparagraph (3) of this rule which provides, in pertinent part, that:

> "A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will."

Rule 803(3), Ala. R. Evid. According to Rieber, this exception applies to Moran's statements about his compensation for representing Rieber during his capital murder trial. We disagree.

During the evidentiary hearing, Kempener was asked

whether Moran had "a feeling about fees that he was receiving." (Ev. R. 317.) Rieber's counsel contended, as he does here, that Kempener's recollection of Moran's statement was admissible under Rule 803, Ala. R. Evid., as a statement of Moran's present mental condition. (Ev. R. 318.) The State objected on hearsay grounds and stated that such testimony "doesn't go to show [Moran's] mental state, it just goes to show you he didn't think he was being compensated enough." Id. The circuit court disagreed with Rieber's counsel's argument and sustained the objection.

Regardless of whether the statement--i.e., Moran's alleged dissatisfaction with the fees cap--fits within the Rule 803(3), Ala. R. Evid., exception discussed above, Rieber has not demonstrated that this is reversible error. Thus, Rieber is not entitled to relief on this claim.

IV.

Rieber argues that the United States Supreme Court's decision in Hurst v. Florida, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016), requires that his death sentence be set aside. (Rieber's brief, p. 71.)[12] In Hurst, the defendant was convicted for first-degree murder and sentenced to death, but the United States Supreme Court vacated the death sentence after finding that Florida's capital-sentencing-scheme violated the defendant's Sixth Amendment right to a jury trial. Id. at 622. According to Rieber, because Alabama's death-penalty scheme is almost identical to the scheme used in Florida and because his jury recommended life without parole, his death sentence is due to be set aside. (Rieber's brief, pp. 71-76.)

This Court has previously stated in State v. Billups, [Ms. CR-15-0619, June 17, 2016] ____ So. 3d ____ (Ala. Crim.

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[12]Rieber also appears to argue that there is a link between the imposition of the death penalty and the proximity of judicial elections. (Rieber's brief, pp. 73-75.) Specifically, he contends that the "watershed nature" of the Hurst decision is "particularly compelling in Alabama where the evidence has shown that judicial elections, as much as anything else, influence override decisions." Id.

App. 2016), that Alabama's capital-sentencing scheme does not violate Hurst. Specifically, this Court held that Alabama's capital-sentencing scheme, unlike the scheme held unconstitutional in Hurst, allows the jury, not the trial court, to make the critical finding necessary for imposition of the death penalty, and is, thus, constitutional and does not violate the United States Supreme Court's decision in Hurst. ____ So. 3d at ____ (quoting Hurst, ____ U.S. at ____, 136 S. Ct. at 624).

Critical to Rieber's claim, in Billups we held that the United States Supreme Court in "Hurst did nothing more than apply its previous holdings in Apprendi [v. New Jersey, 530 U.S. 466 (2000),] and Ring [v. Arizona, 536 U.S. 584 (2002),] to Florida's capital-sentencing scheme. The Court did not announce a new rule of constitutional law, nor did it expand its holdings in Apprendi and Ring." ___ So. 3d at ___. See also Ex parte Bohannon, [Ms. 1150640, Sept. 30, 2016] ___ So. 3d ___ (Ala. 2016) ("The United States Supreme Court's holding in Hurst was based on an application, not an expansion, of Apprendi and Ring ...."). Apprendi and Ring were decided after Rieber's conviction became final, and those decisions do not apply retroactively to Rieber. Boyd v. State, 913 So. 2d 1113, 1146 (Ala. Crim. App. 2003) ("[T]his court has held that Apprendi claims are not applied retroactively to postconviction proceedings. Sanders v. State, 815 So. 2d 590, 592 (Ala. Crim. App. 2001). Our retroactivity analysis of Apprendi applies equally to Ring. Accordingly, Ring claims are not applied retroactively to postconviction proceedings."). Likewise, Hurst, which merely applied Apprendi and Ring, does not apply retroactively to Rieber. Thus, Rieber is not entitled to relief on this claim.

V.

Rieber argues that he is entitled to relief on the merits of claims 1, 2, 5, and 6, in his amended Rule 32 petition. (Rieber's brief, p. 76.) Initially, we note that all four of these claims challenge the constitutionality of Alabama's death-penalty scheme on various grounds. (Rieber's brief, pp. 76-81.) Although we have already discussed that Alabama's death-penalty scheme has been repeatedly upheld as constitutional, see Section IV, supra, we will briefly address claims 1, 2, 5, and 6 of Rieber's amended Rule 32 petition.

A.

With regard to the first claim in his amended Rule 32 petition, Rieber argues that Alabama's death-penalty scheme is unconstitutional because it is unconstitutionally vague. (Rieber's brief, p. 76.) As best we can discern, Rieber appears to challenge the circuit court's labeling of his offense as being "heinous, atrocious, or cruel" and argues that, under Alabama's death-penalty statute, "there is a clear lack of notice as to the kind of conduct that would warrant the imposition of the death-penalty, [thereby] rendering the statute void for vagueness." (Rieber's brief, p. 77.) The circuit court found that this claim was procedurally barred by Rules 32.2(a)(3) and (a)(5), Ala. R. Crim. P., because Rieber could have been raised it at trial or on direct appeal but failed to do so. (C. 2848-49.) After reviewing the record and Rieber's amended petition, we agree with the circuit court's determination here. Moreover, this Court has repeatedly held that this aggravating circumstance is not unconstitutionally vague. See Whatley v. State, 146 So. 3d 437, 499 (Ala. Crim. App. 2010).[13] Therefore, Rieber is not entitled to any relief on this claim.

B.

With regard to the second claim in his amended Rule 32 petition, Rieber argues that Alabama's capital offense statutes--§§ 13A-5-40 and 13A-5-49, Ala. Code 1975--are unconstitutional on their face and as applied because they lead to arbitrary sentencing. (Rieber's brief, pp. 78-79.)

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[13]See also Minor v. State, 914 So. 2d 372, 437 (Ala. Crim. App. 2004), cert. denied, Minor v. Alabama, 548 U.S. 925, 126 S. Ct. 2977, 165 L. Ed.2d 987 (2006); Duke v. State, 889 So. 2d 1 (Ala. Crim. App. 2002); Ingram v. State, 779 So. 2d 1225 (Ala. Crim. App. 1999), aff'd, 779 So. 2d 1283 (Ala. 2000); Freeman v. State, 776 So. 2d 160 (Ala. Crim. App. 1999), aff'd, 776 So. 2d 203 (Ala. 2000); Bui v. State, 551 So. 2d 1094 (Ala. Crim. App. 1988), aff'd, 551 So. 2d 1125 (Ala. 1989), judgment vacated on other grounds, 499 U.S. 971, 111 S. Ct. 1613, 113 L. Ed. 2d 712 (1991); and Hallford v. State, 548 So. 2d 526 (Ala. Crim. App. 1988), aff'd, 548 So. 2d 547 (Ala. 1989).

Relying on the United States Supreme Court's decision in Lowenfield v. Phelps, 484 U.S. 231 (1988), Rieber specifically argues that, "there is simply no way one can define the class of persons eligible for the death penalty" in Alabama and, as such, his death sentence is due to be set aside. Id. In denying Rieber's claim, the circuit court found that he had failed to meet his burden for "pleading and proving by a preponderance of the evidence the facts necessary to entitled" him to relief pursuant to Rule 32.3, Ala. R. Crim. P. (C. 2849-50.) After reviewing the record and Rieber's amended petition, we agree with the circuit court.

The Alabama Supreme Court has repeatedly held that Alabama's capital-offense statutes include a sentencing scheme that is not arbitrary. See Ex parte Hays, 518 So. 2d 768, 774 (Ala. 1986); Daniels v. State, 534 So. 2d 628, 642-45 (Ala. Crim. App. 1985), aff'd, 534 So. 2d 656 (Ala. 1986), cert. denied, 479 U.S. 1040, 107 S. Ct. 898, 93 L. Ed. 2d 850 (1987). Therefore, Rieber is not entitled to relief on this claim.

C.[14]

With regard to the fifth claim in Rieber's amended Rule 32 petition, as best we can discern, Rieber appears to argue that the imposition of the death penalty in his case violated his Eighth Amendment rights because the circuit judge in his case made findings beyond those of the jury. (Rieber's brief, p. 72.) Specifically, Rieber argues that the circuit judge received and relied on information that the jury did not have and made findings that were "utterly inconsistent" with the jury's recommendation. Id.

The circuit court denied this claim on the basis that Rieber failed to prove that the allegations were not procedurally barred from postconviction review, see Rule 32.3, Ala. R. Crim. P., and because he could have, but failed to, raise this claim on direct appeal, see Rule 32.2(a)(3) and (5), Ala. R. Crim. P. (C. 2853-54.) Based on our review of the record, we agree with the circuit court.

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[14]Although this claim is briefly discussed in Section V of Rieber's brief (p. 72), we address this argument here.

D.

Finally, with regard to the sixth claim in his amended Rule 32 petition, Rieber argues that Alabama's death-penalty scheme is cruel and unusual and violates the Eighth Amendment of the United States Constitution. (Rieber's brief, pp. 79-81.) Specifically, Rieber argues that Alabama's use of lethal injection to put inmates to death does not "pass constitutional muster." Id. For the reasons provided herein, the circuit court properly summarily dismissed this claim.

The circuit court summarily dismissed this claim prior to the 2011 evidentiary hearing on Rieber's petition because it found that the claim was insufficiently pleaded pursuant to Rule 32.6(b), Ala. R. Crim. P., since Rieber merely provided a "bare allegation that a constitutional right has been violated." (C. 2856.) We agree with the circuit court's dismissal of this claim.

Moreover, even if Rieber had provided more than a "bare allegation" that Alabama's use of lethal injection violated his Eighth Amendment rights, his claim would still be without merit. This Court has previously held that "'lethal injection does not constitute per se cruel and unusual punishment.'" Townes v. State, [Ms. CR-10-1892, Dec. 18, 2015] ____ So. 3d ____, ____ (Ala. Crim. App. 2015) (quoting McNabb v. State, 991 So. 2d 313 (Ala. Crim. App. 2007)). In fact, both the Supreme Court of the United States and the Alabama Supreme Court have held that lethal injection does not constitute cruel and unusual punishment. See Baze v. Rees, 553 U.S. 35, 54-56, 128 S. Ct. 1520 (2008) (holding that lethal injection does not violate the Eighth Amendment); Ex parte Belisle, 11 So. 3d 323, 339 (Ala. 2008) (holding that lethal injection is not unconstitutional); see also Glossip v. Gross, ____ U.S. ____, 135 S. Ct. 2726, 2732-46, 192 L. Ed. 2d 761 (2015). Therefore, Rieber is not entitled to relief on this claim.

For the foregoing reasons, Rieber is not entitled to relief on the first, second, fifth, and sixth claims found in his amended Rule 32 petition, and the circuit court properly denied these claims.

VI.

Next, Rieber challenges the constitutionality of the $1,000 limit on compensation in a death-penalty case.[15] (Rieber's brief, p. 81.) Specifically, he argues that "Alabama's $1,000 cap on compensation to counsel for capital defendants violated his due process and equal protection rights." Id. Rieber's claim here fails.

His claim is meritless under Alabama caselaw. This Court has been faced with this exact argument before and, in such cases, has previously held:

> "These limitations on compensation have withstood repeated challenges that they ... deprive indigent capital defendants of the effective assistance of counsel, and deny equal protection in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, the Alabama Constitution, and Alabama state law. See Ex parte Smith, 698 So. 2d 219 (Ala.), cert. denied, 522 U.S. 957, 118 S. Ct. 385, 139 L. Ed. 2d 300 (1997); May v. State, 672 So. 2d 1310 (Ala. 1995); Ex parte Grayson, 479 So. 2d 76 (Ala.), cert. denied, 474 U.S. 865, 106 S. Ct. 189, 88 L. Ed. 2d 157 (1985); Sparks v. Parker, 368 So. 2d 528 (Ala.), appeal dismissed, 444 U.S. 803, 100 S.Ct. 22, 62 L. Ed. 2d 16 (1979); Stewart v. State, 730 So. 2d 1203, 1212 (Ala. Crim. App. 1997), aff'd, 730 So. 2d 1246 (Ala. 1999); Boyd v. State, 715 So. 2d 825 (Ala. Crim. App. 1997), aff'd, 715 So. 2d 852 (Ala.), cert. denied, 525 U.S. 968, 119 S. Ct. 416, 142 L.Ed. 2d 338 (1998); Slaton v. State, 680 So. 2d 879 (Ala. Crim. App. 1995), aff'd, 680 So. 2d 909 (Ala. 1996), cert. denied, 519 U.S. 1079, 117 S. Ct. 742, 136 L. Ed. 2d 680 (1997); Barbour v. State, 673 So. 2d 461 (Ala. Crim. App. 1994), aff'd, 673 So. 2d 473 (Ala. 1995), cert. denied, 518 U.S. 1020, 116 S. Ct. 2556, 135 L. Ed. 2d 1074 (1996); Johnson v. State, 620 So. 2d 679 (Ala. Crim. App. 1992), rev'd on other grounds, 620 So. 2d 709 (Ala.), cert. denied, 510 U.S. 905, 114 S. Ct. 285, 126 L. Ed. 2d 235 (1993); Smith v. State, 581 So. 2d 497 (Ala.

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[15]See footnote 1, supra.

Crim. App. 1990), rev'd on other grounds, 581 So. 2d 531 (Ala. 1991). Because this court is bound by the decisions of the Alabama Supreme Court, we are not in a position to reverse that court's approval of the current compensation system.

> "'The decisions of the Supreme Court shall govern the holdings and decisions of the courts of appeals, and the decisions and proceedings of such courts of appeals shall be subject to the general superintendence and control of the Supreme Court as provided by Constitutional Amendment No. 328.'

"§ 12-3-16, Ala. Code 1975. See also Barbour, supra."

Samra v. State, 771 So. 2d 1108, 1112 (Ala. Crim. App. 1999). For these reasons, Rieber's claim is without merit and, thus, he is not entitled to relief on this issue.

VII.

Finally, Rieber argues that his "constitutional rights to due process and equal protection were violated because the State knowingly permitted the spoilation of exculpatory evidence." (Rieber's brief, p. 88.) According to Rieber, because the State failed to appoint counsel for him until two weeks after his arrest, it was "far too late for drug testing to reveal that [he] was under the influence of mind-altering drugs at the time of his arrest." Id. As a result, Rieber says, the circuit court and the jury were unable to consider "irrefutable evidence of [Rieber's] diminished capacity" that would have resulted in either a conviction of a "viable lesser-included offense" or a sentence of life imprisonment without the possibility of parole. (Rieber's brief, pp. 89-90.)

The circuit court found that Rieber failed to prove facts demonstrating that the State permitted evidence to spoil. (C. 2857.) After reviewing the record and Rieber's amended Rule 32 petition, there does not appear to be any evidence presented by Rieber indicating that the State permitted evidence to

spoil. Therefore, the circuit court properly denied Rieber's claim here.

Accordingly, the judgment of the circuit court is affirmed.

AFFIRMED.

Windom, P.J., and Welch and Burke, JJ., concur. Kellum, J., concurs in the result.

THE STATE OF ALABAMA - - JUDICIAL DEPARTMENT
THE ALABAMA COURT OF CRIMINAL APPEALS

CR-15-0355

Jeffery Day Rieber v. State of Alabama (Appeal from Madison Circuit Court: CC90-2177.60)

CERTIFICATE OF JUDGMENT

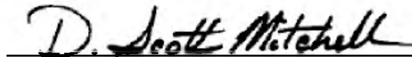
WHEREAS, the appeal in the above referenced cause has been duly submitted and considered by the Court of Criminal Appeals; and

WHEREAS, the judgment indicated below was entered in this cause on September 1st 2017:

Affirmed by Memorandum.

NOW, THEREFORE, pursuant to Rule 41 of the Alabama Rules of Appellate Procedure, it is hereby certified that the aforesaid judgment is final.

Witness.D. Scott Mitchell, Clerk
Court of Criminal Appeals, on this
the 2nd day of February, 2018.



Clerk
Court of Criminal Appeals
State of Alabama

cc: Hon. Karen Hall, Circuit Judge
Hon. Debra Kizer, Circuit Clerk
Lawrence Bensky, Attorney - Pro Hac
James Alan Friedman, Attorney - Pro Hac
Kerry L. Gabrielson, Attorney - Pro Hac
Daniel C.w. Narvey, Attorney - Pro Hac
Frank Mitchel Tuerkheimer, Attorney - Pro Hac
Lauren A. Simpson, Asst. Attorney General

IN THE SUPREME COURT OF ALABAMA

February 2, 2018

1170093

Ex parte Jeffery Day Rieber. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Jeffery Day Rieber v. State of Alabama) (Madison Circuit Court: CC-90-2177.60; Criminal Appeals : CR-15-0355).

CERTIFICATE OF JUDGMENT

WHEREAS, the petition for writ of certiorari in the above referenced cause has been duly submitted and considered by the Supreme Court of Alabama and the judgment indicated below was entered in this cause on February 2, 2018:

Writ Denied. No Opinion. Stuart, C.J. - Bolin, Parker, Shaw, Main, Wise, Bryan, and Sellers, JJ., concur.

NOW, THEREFORE, pursuant to Rule 41, Ala. R. App. P., IT IS HEREBY ORDERED that this Court's judgment in this cause is certified on this date. IT IS FURTHER ORDERED that, unless otherwise ordered by this Court or agreed upon by the parties, the costs of this cause are hereby taxed as provided by Rule 35, Ala. R. App. P.

I, Julia J. Weller, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true, and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 2nd day of February, 2018.

Julia Jordan Weller

Clerk, Supreme Court of Alabama

IN THE CIRCUIT COURT OF MADISON COUNTY, ALABAMA

JEFFREY DAY RIEBER,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No: CC-90-2177.60
	)	
STATE OF ALABAMA,	)	
	)	
Respondent.	)	

ORDER ADDRESSING CLAIMS IN RIEBER'S AMENDED RULE 32 PETITION

This case was assigned to this court on the 13th day of November 2014. After careful consideration of the allegations in Rieber's Amended Rule 32 Petition (amended petition), the responses in the State's Answer and Motion to Dismiss (State's answer), the testimony, exhibits, and arguments presented at the October 3-5, 2011 evidentiary hearing, the parties post-hearing pleadings, the appellate courts' opinions on direct appeal, the trial record, the final arguments of the parties presented on August 5, 2015, and the Petitioner's Memorandum of Law Regarding the

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CIRCUIT COURT DIVISION
MADISON COUNTY, ALABAMA

Inapplicability of Broadnax v. State, this Court finds as follows[1]:

FACTS OF THE CRIME

This Court adopts the trial court's summary of the facts of the crime in its sentencing order as follows:

> Glenda Phillips Craig was twenty-five years old at the time of her death. She was married, and the mother of two small girls ages five and seven. She was murdered October 9, 1990, while working as a convenience store clerk in Mobil-Mart #1 at the intersection of Bradford Lane and Winchester Road in Huntsville, Madison County, Alabama.
>
> Approximately seven to ten days before the murder, the defendant Jeffery Rieber purchased a twenty-two caliber revolver from a man named David Hill for thirty ($30.00) dollars.
>
> There was testimony from at least two witnesses to the effect that the defendant had been in or about the store several times before the murder occurred.
>
> One of the witnesses, Mr. Erskine, was in the store a few days before the shooting, "three to four days, maybe a little longer." Although what the deceased stated to this witness was not admitted as evidence, it can certainly be inferred from his testimony that she was afraid and very nervous in the presence of the defendant; that he had driven up to the store on more than one occasion and

[1] "C.R." refers to the clerk's record on direct appeal; "R." refers to the trial record; "A.P." refers to Rieber's amended Rule 32 petition; "H.R." refers to the evidentiary hearing record.

that the victim acted fearful in his presence. Mr. Erskine himself testified that he feared a robbery was about to take place at the hands of the defendant, and that he advised the victim to call the police. Just a few hours before her death, she inquired of the defendant's identity from a witness named Wayne Gentle who knew the defendant and who identified the defendant for the victim.

The evidence allows the Court to clearly conclude that the defendant, for at least three to four days, had stalked the victim, had targeted the store and her for his crime; that she was nervous, apprehensive and afraid when he appeared. She had also inquired as to his identity from another witness and made some inquiry the answer to which from the witness was "I don't think he would do nothing like that."

The murder of Glenda Craig is on video tape, taken from a surveillance camera which had been installed as a security measure in the store. Mr. Gentle reviewed this tape and testified that the defendant appeared on the film at a time consistent when he himself was in the store to transact business and when the victim inquired of the defendant's identity. This was a few minutes after five o'clock P.M. on October 9, 1990.

Just before eight o'clock P.M. on that same evening, the surveillance tape reflects that the defendant returned to the store. Mrs. Craig was alone in the store standing behind the checkout counter to the defendant's left. The defendant passed outside facing the victim across the counter. The defendant immediately withdrew the twenty-two revolver from his clothing and fired a shot at Mrs. Craig. Her left arm went up in a defensive posture and she fell to the floor behind the counter.

> The defendant proceeded to open the cash register at the counter, stuffing the contents into his pockets. The defendant then leaned over the counter in such a fashion that the victim was within his view. He extended his arm and shot Mrs. Craig a second time.
>
> He then fled the store. The expert testimony reflects that Mrs. Craig was shot at very close range, that the first bullet pierced her left wrist completely and then lodged about one inch under her scalp in the back of her head. The second bullet entered her brain just behind her left ear, and according to the testimony, was the eventual cause of death.
>
> Glenda Craig remained alive for some minutes until a store patron found her and until her husband came in to find her lying helpless, bleeding from the nose and mouth. She was transported to a hospital where she underwent resuscitative efforts and eventually died.
>
> The defendant was taken into custody at his home by law enforcement officials at 3:15 A.M. on October 10, 1990.

(C.R. 82-85)

Rieber's conviction and death sentence were affirmed on direct appeal. Rieber v. State, 663 So.2d 985 (Ala. Crim. App. 1994), affirmed, Ex parte Rieber, 663 So.2d 999 (Ala. 1995).

FACTS FROM THE EVIDENTIARY HEARING

An evidentiary hearing was held on October 3-5, 2011, at which Rieber presented 15 witnesses and offered certain exhibits. Below is a brief summary of the witness testimony.

Teresa Hill

Teresa Hill is Rieber's older sister. Ms. Hill testified that Rieber first smoked marijuana when he was nine years old. Ms. Hill also said she and her siblings witnessed instances of domestic violence between their parents. In the years before the murder, she also witnessed Rieber consume drugs other than marijuana, including crystal meth and LSD. Ms. Hill said when Rieber was discharged from the Navy he used various drugs on a daily basis.

On cross-examination Ms. Hill indicated that Rieber sold LSD between 1986 and 1989. She also said she spoke to Rieber's trial counsel about Rieber's drug use prior to trial.

Warren "Lenny" Rieber

Rieber next called his brother, Warren "Lenny" Rieber, to testify. Mr. Rieber's testimony concerning his brother's drug usage was consistent with Ms. Hill's

testimony. He also said he witnessed his brother using cocaine when Rieber was in his mid-teens. Mr. Rieber saw his brother using drugs at people's houses, including the homes of Jo Duffy and Bill Young. Mr. Rieber said that while he and his siblings lived in Alabama with their father, their mother would send marijuana to them through the mail. Mr. Rieber roomed with his brother for a time and he related an incident where the utilities were turned off because Rieber used the money that Mr. Rieber had given him to pay the bills for drugs.

Shauna Jenkins

Rieber next called his sister, Shauna Jenkins. Ms. Jenkins testified about domestic violence between her parents as well as Rieber's drug use. Ms. Jenkins testified that in the summer of 1988 Rieber's drug use increased following the suicide of Rieber's friend, David Jones. Ms. Jenkins said that she, her mother, her sister, and her brother Lenny, spoke to trial counsel prior to trial.

On cross-examination, Ms. Jenkins indicated she could tell when Rieber was high. She reaffirmed her

penalty phase testimony that she saw Rieber just after 9 p.m. on the night of the incident, that he looked normal to her, and that he did not appear to be high on drugs or alcohol.

John Walls

Rieber next called John Walls, a friend from high school. Mr. Walls testified about his observations of Rieber using drugs and alcohol. Mr. Walls indicated he was not contacted by Rieber's trial counsel.

Beth Piraino

Beth Piraino testified that she lived with the Rieber family for a period of time in 1984. Ms. Piraino recalled Rieber joining the Navy in 1985 and being discharged in 1986. Ms. Piraino testified that while living with the Riebers she smoked marijuana with Rieber and his mother. Ms. Piraino indicated she was not contacted by trial counsel.

On cross-examination, Ms. Piraino indicated she did not see Rieber much after he entered the Navy. She also indicated she had never seen him black out due to using drugs.

Charity Hubert

Charity Hubert testified that she met Rieber when she was 13 or 14 years old. Ms. Hubert's father was in a domestic relationship with Rieber's sister, Shauna. Ms. Hubert and Rieber began a boyfriend/girlfriend relationship when she was 14 years old and he was 19 years old. Ms. Hubert testified she smoked marijuana with Rieber and by the time she was 16 or 17 she was using the same hard drugs as Rieber. After their relationship ended, Ms. Hubert saw Rieber at house parties where drugs were used. Ms. Hubert testified she saw Rieber at Bill Young's house on the day of the murder and that drugs were being used. Ms. Hubert said the police showed up at Mr. Young's house and that people left. She said that Rieber left before the police arrived. Ms. Hubert indicated she was not contacted by trial counsel.

On cross-examination, Ms. Hubert indicated the police arrived at Young's house during daylight hours. She also said she began doing hard drugs, including cocaine and LSD, with Rieber when she was 14 or 15 years old. She also indicated she never recalled Rieber blacking out due to drug use.

Richard Kempaner

Rieber next called Mr. Richard Kempaner, his lead defense counsel.[2] Mr. Kempaner was admitted to practice law in 1961 and his practice focused on criminal defense. At the time he was appointed to represent Rieber in October 1990, there was a $1000 cap on compensation for attorneys appointed to represent capital defendants. Mr. Kempaner testified he took Rieber's case for publicity and to help generate business. Mr. Kempaner maintained a case file throughout Rieber's trial and direct appeal and gave it to Rieber's collateral counsel in 1997 or 1998. Mr. Kempaner testified that after he had received and reviewed discovery from the district attorney, he believed Rieber would be convicted. Mr. Kempaner negotiated a plea agreement with the assistant district attorney to take death off the table, but Rieber's mother would not allow him to plead guilty to capital murder. Mr. Kempaner tried to convince her it was a mistake, but was unsuccessful.

[2] At the time of the evidentiary hearing, Mr. Kempaner's co-counsel, Mr. Daniel Moran, was deceased.

Mr. Kempaner testified that part of his trial strategy was to put error in the record in order to get the conviction reversed. Mr. Kempaner also said the guilt phase defense strategy was mistaken identity. Mr. Kempaner said Mr. Moran was responsible for the penalty phase. Mr. Kempaner had known Mr. Moran for about 20 years and had regular contact with him during their representation of Rieber. Mr. Kempaner knew that Mr. Moran had certain health problems, but those problems did not affect him. Mr. Kempaner said that, other than needing a walker to get around, Mr. Moran appeared to be "in fine shape" during his representation of Rieber. He also said Mr. Moran never complained about not feeling well and there was never an occasion during Mr. Moran's representation of Rieber that Mr. Kempaner believed Mr. Moran was drinking. Mr. Kempaner testified he briefly considered an intoxication defense.

Mr. Kempaner testified he struck an Oriental juror thinking that would put error in the record and would get the conviction reversed. Mr. Kempaner indicated

that he was aware that voluntary intoxication could be used to negate intent in capital murder cases.

On cross-examination, Mr. Kempaner indicated he spent more time preparing for Rieber's trial than was reflected in his fee declaration sheet. He also said taking Rieber's case for publicity did not affect his representation. Mr. Kempaner hired Glen Brooks, a private investigator, to find witnesses to testify for the defense. Mr. Brooks had previously worked for Mr. Kempaner and he felt that Mr. Brooks was an excellent investigator. Mr. Kempaner had represented 15 to 18 capital defendants before being appointed to represent Rieber.

Mr. Kempaner testified that he discussed the mistaken identity defense strategy with Rieber, that Rieber understood the strategy, and that Rieber did not suggest any other strategy to him. Mr. Kempaner believed the State had a strong case against Rieber and his strategy was to keep evidence from being admitted and to try and show Rieber did not murder the victim. A majority of Mr. Kempaner's practice from 1961 until he was appointed to defend Rieber was criminal defense.

Tim Hubert

Tim Hubert testified he lived with Rieber's sister, Shauna, and was acquainted with Rieber from 1986 until 1990. Mr. Hubert said he had seen Rieber smoke marijuana as well as crystal meth two or three times.

Jo Duffy

Jo Duffy testified she met Rieber while in the eighth grade and that they were good friends. Ms. Duffy and Rieber partied a lot together, including at her house. Ms. Duffy said between 1987 and 1990 she saw Rieber use marijuana, crystal meth, LSD, and cocaine. Ms. Duffy often had gatherings at her house and that almost every time Rieber would show up at least once. Ms. Duffy testified there was a gathering at her house on October 9, 1990, and that Rieber was there "at one point" around dark or at dusk. Ms. Duffy recalled that on that occasion Rieber was smoking marijuana and drinking, but could not recall if he used other drugs. Ms. Duffy indicated she was not contacted by trial counsel.

On cross-examination, Ms. Duffy indicated she had never seen Rieber black out while using drugs or seen him get violent.

Sonya Williams

Sonya Williams testified she knew Rieber from high school. Ms. Williams testified she had seen Rieber on the day of the murder at Ms. Duffy's house snorting meth and smoking pot. Ms. Williams indicated on cross she could not recall when Rieber arrived or left Ms. Duffy's house.

Melissa Smallwood

Melissa Smallwood testified that she hung out with Rieber when she was a teenager. Ms. Smallwood testified she had seen Rieber smoke marijuana and seen him on LSD and crystal meth. Ms. Smallwood recalled seeing Rieber driving his mother's car on the day of the murder and him honking at her. Ms. Smallwood said it was daylight when she saw Rieber.

Dennis Howell

Dennis Howell testified he knew Rieber through his sister Shauna. Mr. Howell had seen Rieber smoke marijuana. At the time of the murder, Mr. Howell was

living at Rieber's house while his trailer was being set up. He recalled seeing Rieber come and go a lot on the night of the murder. Mr. Howell recalled at one point seeing Rieber rocking in a recliner chair for 45 minutes to an hour. He indicated he had never see Rieber act like that before. Mr. Howell testified that, on the night of the offense, he was taken to the police station, shown the surveillance videotape from the crime scene, and recognized Rieber on the tape. Mr. Howell remembered being contacted by someone prior to trial on Rieber's behalf, but he could not recall who contacted him or the substance of any conversation.

Dwayne Maroney

Dwayne Maroney testified he saw Rieber at Jeff Goodrich's house on October 9, 1990, and that "everyone" there was doing LSD. Mr. Maroney indicated on cross-examination that Rieber was at Goodrich's house when he arrived and left and that it was daylight. Mr. Maroney had never seen Rieber black out due to using drugs.

Dr. Alex Stalcup

Rieber's final witness was psychiatrist Dr. Alex Stalcup. Dr. Stalcup specializes in treating drug and alcohol addiction. He lives in Oakland, CA and works at the New Leaf Treatment Center in LaFayette, CA.

Dr. Stalcup testified that tests were available at the time of Rieber's arrest in 1990 to determine what drugs were in an individual's system. He also testified about how long certain substances would stay in a person's system. Dr. Stalcup testified about how early exposure to drugs could affect a person's brain development. Dr. Stalcup said that Rieber was probably an addict by age 11 or 12. He opined about the effects Rieber's drug use may have had on him the night of the murders. Dr. Stalcup also stated that he believed that Rieber did not know what he was doing at the time of the offense.

On cross-examination, Dr. Stalcup indicated he was retained by Rieber's collateral counsel in May 2011. He also indicated he had never testified in an Alabama court before Rieber's case.

FINAL ARGUMENTS

On August 5, 2015, this Court, via telephone, heard final arguments from the attorneys representing Rieber and the State.

I. SUBSTANTIVE ALLEGATIONS IN RIEBER'S AMENDED RULE 32 PETITION.

"'Rule 32 is not a substitute for a direct appeal.'" Brown v. State, 903 So.2d 159, 162 (Ala. Crim. App. 2004)(citation omitted). "'[T]he procedural bars of Rule 32 apply with equal force to all cases, including those in which the death penalty has been imposed.' State v. Tarver, 629 So.2d 14, 19 (Ala. Crim. App. 1993)." Boyd v. State, 746 So.2d 364, 374 (Ala. Crim. App. 1999). The Alabama Court of Criminal Appeals has held that "Rule 32 makes no provision for different treatment of death penalty cases." Thompson v. State, 615 So.2d 129, 131 (Ala. Crim. App. 1992).

The State pleaded in its answer and motion to dismiss that a number of allegations in Rieber's amended Rule 32 petition were procedurally barred from post-conviction review. Rieber, therefore, had the burden of proving, by a preponderance of the evidence, that these allegations were not procedurally barred.

Rule 32.3, Ala.R.Crim.P. See Ex parte Beckworth, 2013 WL 3336983, *4 (Ala. July 3, 2013).

A. Allegation That Alabama's Death Penalty Scheme Is Unconstitutional Because It Is Vague.

In part II.B(1), paragraphs 30-31 on page 10, of Rieber's amended Rule 32 petition, he claimed that the statutory aggravating circumstances enumerated in Section 13A-5-49 of the Code of Alabama (1975), were unconstitutionally vague. The State, relying on Rules 32.2(a)(3) and (a)(5), Ala.R.Crim.P, pleaded in its answer that this claim was procedurally barred from post-conviction review.

A post-conviction claim attacking the validity of a State statute is a constitutional claim, not a jurisdictional claim and, therefore, is subject to the procedural bars in Rule 32.2(a), Ala.R.Crim.P. See Sumlin v. State, 710 So.2d 941, 942 (Ala. Crim. App. 1998)(holding that "although [Sumlin] couches his argument [that the trial court lacked subject matter jurisdiction] in jurisdictional terms, this is actually a nonjurisdictional claim that is procedurally barred because it could have been, but was not, raised at trial or on appeal.").

This Court finds Rieber failed to prove that this claim was not procedurally barred from post-conviction review. Rules 32.3, Ala.R.Crim.P. Therefore, this Court finds that Rieber failed to prove he is entitled to relief on this claim.

B. **Allegation That Alabama's Death Penalty Scheme Is Unconstitutional Because It Is Arbitrary On Its Face And As Applied To Rieber's Case.**

This allegation is in part II.B(2), paragraphs 32-33 on pages 10-11 of Rieber's amended Rule 32 petition. The State, relying on Rules 32.2(a)(3) and (a)(5), Ala.R.Crim.P., pleaded in its answer that this claim was procedurally barred from post-conviction review.

A post-conviction claim attacking the validity of a State statute is a constitutional claim, not a jurisdictional claim and, therefore, is subject to the procedural bars in Rule 32.2(a), Ala.R.Crim.P. See Sumlin v. State, 710 So.2d 941, 942 (Ala. Crim. App. 1998).

This Court finds Rieber failed to prove his claim that Alabama's death penalty statute is unconstitutional arbitrary on its face and as applied to his case was not procedurally barred from post-

conviction review. Rule 32.3, Ala.R.Crim.P. Therefore, this Court finds that Rieber failed to prove he is entitled to relief on this claim.

C. **Allegation That Alabama's Death Penalty Scheme Is Unconstitutional Due To Its Provision For Judicial Override.**

This allegation is in part II.B(3), paragraphs 34-35 on page 11, of Rieber's amended Rule 32 petition. In his post-hearing memorandum, Rieber relies on Ex parte Carroll, 852 So.2d 833 (Ala. 2002), to support this allegation. The Alabama Supreme Court held in Carroll that in capital murder cases a jury's sentencing recommendation of life imprisonment without parole should be treated by the sentencing court as a mitigating factor. The State, relying on Rules 32.2(a)(3) and (a)(4), Ala.R.Crim.P., pleaded in its answer that this claim was procedurally barred from post-conviction review.

The Alabama Supreme Court's holding in Ex parte Carroll was not issued until seven years after Rieber's direct appeal became final. Rieber argued that Carroll should be applied retroactively to his case by pointing out it was applied in the 1977 murder case reviewed by

the Alabama Supreme Court in Ex part Tomlin, 909 So.2d 283 (Ala. 2003). Tomlin was a direct appeal of the defendant's fourth conviction for capital murder that was committed in 1977. Tomlin's most recent conviction for capital murder and death sentence occurred in 1999, and was affirmed by the Alabama Court of Criminal Appeals on May 31, 2002. See Tomlin v. State, 909 So.2d 213 (Ala. Crim. App. 2002). The Supreme Court's opinion in Carroll was issued on July 26, 2002. The Alabama Court of Criminal Appeals denied Tomlin's request for a rehearing on November 22, 2002. Because Tomlin's direct appeal to the Alabama Supreme Court of his fourth conviction for the 1977 murder occurred after the Supreme Court had issued Carroll, that case was applicable to his case in his most recent direct appeal. The Alabama Court of Criminal Appeals' has observed that "[i]n neither Carroll nor Tomlin did the Alabama Supreme Court give any indication that those decisions were to be applied retroactively to all cases, even those cases that were final when the decisions in Carroll and Tomlin were announced."

Ferguson v. State, 13 So.3d 418, 429 (Ala. Crim. App. 2008).

This allegation could have been but was not raised at trial or in Rieber's motion for new trial. Additionally, this allegation was raised and addressed on direct appeal. See Rieber v. State, 663 So.2d at 992, aff'd, Ex parte Rieber, 663 So.2d at 1003.

This Court finds Rieber failed to prove his claim that Alabama's death penalty scheme is unconstitutional due to its provision for judicial override was not procedurally barred from post-conviction review. Rule 32.3, Ala.R.Crim.P. Therefore, this Court finds that Rieber failed to prove he is entitled to relief on this claim.

D. Allegation That Alabama's Death Penalty Scheme Is Unconstitutional Because Circuit Judges Are Elected By Popular Vote.

In part II.B(4), paragraph 36 on pages 11-12, of Rieber's amended Rule 32 petition he alleged that all the circuit judges in Alabama that have ever sentenced a capital defendant to death have done so in order to get re-elected. The State, relying on Rules 32.2(a)(3) and (a)(5), Ala.R.Crim.P., pleaded in its answer that

this claim was procedurally barred from post-conviction review.

A post-conviction claim attacking the process by which circuit judges are selected in Alabama is not a jurisdictional claim and, therefore, is subject to the procedural bars in Rule 32.2(a), Ala.R.Crim.P. See Sumlin v. State, 710 So.2d 941, 942 (Ala. Crim. App. 1998).

This Court finds Rieber failed to prove his claim regarding circuit judges in Alabama being elected was not procedurally barred from post-conviction review. Rule 32.3, Ala.R.Crim.P. Therefore, this Court finds that Rieber failed to prove he is entitled to relief on this claim.

E. Allegations That Alabama's Death Penalty Is Unconstitutional As Applied To Rieber's Case.

These allegations are in part II.B(5), paragraphs 37-40 on pages 12-13, of Rieber's amended Rule 32 petition.

Rieber alleged in paragraph 37 that the trial court erred by failing to consider the jury's life without parole recommendation as a mitigating circumstance. The State, relying on Rules 32.2(a)(2)

and (a)(5), Ala.R.Crim.P., pleaded in its answer that this claim was procedurally barred from post-conviction review.

This allegation was raised by trial counsel in their motion for a new trial and was addressed by the trial court. (C.R. 104, 108). Additionally, this allegation could have been but was not raised on direct appeal.

This Court finds that Rieber failed to prove that this allegation was not procedurally barred from post-conviction review. Rule 32.3, Ala.R.Crim.P. Therefore, this Court finds that Rieber failed to prove he is entitled to relief on this claim.

Rieber alleged in paragraph 39 that the trial court erred in finding that the aggravating circumstance of heinous, atrocious, or cruel was applicable in his case. The State, relying on Rules 32.2(a)(2) and (a)(4), Ala.R.Crim.P., pleaded in its answer that this claim was procedurally barred from post-conviction review.

This allegation was raised by Rieber's trial counsel at the hearing on his motion for new trial and

addressed by the trial court. (R. 1082; C.R. 108). This allegation was also raised and addressed on direct appeal. See Rieber v. State, 663 So.2d at 992-993; Ex parte Rieber, 663 So.2d at 1003.

This Court finds that Rieber failed to prove that this allegation was not procedurally barred from post-conviction review. Rule 32.3, Ala.R.Crim.P. Therefore, this Court finds that Rieber failed to prove he is entitled to relief on this claim.

F. Allegation That Allegations In Parts II.B(1)-(5), Singly And Collectively, Violated Rieber's Rights Under The Alabama And United States Constitutions.

This allegation is in part II.B(5), paragraph 40 on page 13, of Rieber's amended Rule 32 petition.

Having found that Rieber failed to prove that the allegations in parts II.B(1)-II.B(5) of his amended Rule 32 petition are not procedurally barred from post-conviction review, this Court finds that there is no cumulative effect to consider. See Ex parte Woods, 789 So.2d 941, 942 n. 1 (Ala. 2001) (holding that "multiple nonerrors obviously don't require reversal."). Therefore, this Court finds that Rieber failed to prove

he is entitled to relief on this claim. Rule 32.3, Ala.R.Crim.P.

G. <u>Allegation That Alabama's Method Of Execution Is Unconstitutional</u>.

This allegation is in part II.B(6), paragraphs 41-44 on pages 13-14, of Rieber's amended Rule 32 petition.

Part II.B(6) of Rieber's amended Rule 32 petition was summarily dismissed at the evidentiary hearing prior to the taking of testimony. (H.R. 12)

H. <u>Allegation That The State Permitted Alleged Exculpatory Evidence To Spoil</u>.

In part II.B(8), paragraphs 50-54 on pages 16-17, of Rieber's amended Rule 32 petition he alleged that his rights to due process and equal protection were violated because the State did not test his blood and urine for mind-impairing substances immediately after he was arrested. Rieber argued this evidence would have caused the trial court to sentence him to life imprisonment without parole and would have provided evidence for the jury to convict him of a lesser-included offence. The State, relying on Rules 32.2(a)(3) and (a)(5), Ala.R.Crim.P., pleaded in its

answer that this claim was procedurally barred from post-conviction review.

At the evidentiary hearing Rieber elicited testimony from Dr. Stalcup that there were tests available in 1990 which could determine what drugs an individual had ingested. However, this Court finds Rieber failed to prove that his claim the State permitted evidence to spoil was not procedurally barred from post-conviction review. Rules 32.3, Ala.R.Crim.P. Therefore, this Court finds that Rieber failed to prove he is entitled to relief on this claim.

I. **Allegations That The State Violated Brady v. Maryland, 373 U.S. 83 (1963).**

These allegations are in part II.B(10), paragraphs 84-86 on pages 23-24, of Rieber's amended Rule 32 petition.

Rieber withdrew these allegations at the evidentiary hearing. (H.R. 333). Therefore, this Court will not address them.

J. **Allegation That Rieber Was Denied A Fair Trial When The Trial Court Reinstated A Juror Struck By His Trial Counsel.**

This allegation is in part II.B(11), paragraphs 87-89 on page 24, of Rieber's amended Rule 32 petition.

Rieber contends that the trial court's reinstatement of a juror his trial counsel had struck violated his right to a fair trial and his Sixth Amendment right to assistance of counsel. The State, relying on Rules 32.2(a)(2) and (a)(4), Ala.R.Crim.P., pleaded in its answer that this claim was procedurally barred from post-conviction review.

This allegation was raised in Rieber's motion for new trial and addressed by the trial court in a written order. (C.R. 102, 108) Additionally, this allegation was raised and addressed on direct appeal. See Rieber v. State, 663 So.2d at 990-991.

This Court finds that Rieber failed to prove that this allegation was not procedurally barred from post-conviction review. Rule 32.3, Ala.R.Crim.P. Therefore, this Court finds that Rieber failed to prove he is entitled to relief on this claim.

K. Allegation That The Pool From Which Rieber's Grand Jury And Petit Jury Were Selected Unconstitutionally Excluded Women, Blacks, And Other Cognizable Groups.

This allegation is in part II.B(12), paragraph 90 on page 24, of Rieber's amended petition. Rieber asserted that "[u]pon information and belief, the

percentage of blacks and women on the venires was significantly less that the percentage that those groups composed of the total population of Madison County." (A.P. p. 24) The State, relying on Rules 32.2(a)(3) and (a)(5), Ala.R.Crim.P., pleaded in its answer that this claim was procedurally barred from post-conviction review.

This Court finds Rieber failed to prove that this allegation was not procedurally barred from post-conviction review. Rule 32.3, Ala.R.Crim.P. Therefore, this Court finds that Rieber failed to prove he is entitled to relief on this claim.

II. ALLEGATION THAT RIEBER'S TRIAL COUNSEL WERE INEFFECTIVE DUE TO INADEQUATE COMPENSATION.

This allegation is in part II.B(7), paragraphs 45-49 on pages 14-16, of Rieber's amended Rule 32 petition. Rieber alleged that "[c]onstitutionally effective representation of a person charged with a capital murder offense requires vastly more hours than [were] compensated for by the Alabama provisions in effect at the time between the offense and [Rieber's] trial and sentence." (A.P. p. 15)

In Samra v. State, 771 So.2d 1108, 1112 (Ala. Crim. App. 1999), the Alabama Court of Criminal Appeals rejected this precise argument, observing that:

> These limitations on compensation have withstood repeated challenges that they violate the separation of powers doctrine, constitute a taking without just compensation, deprive indigent capital defendants of the effective assistance of counsel, and deny equal protection in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, the Alabama Constitution, and Alabama state law. See Ex parte Smith, 698 So.2d 219 (Ala.), cert. denied, 522 U.S. 957, 118 S.Ct. 385, 139 L.Ed.2d 300 (1997) [.] … Because this court is bound by the decisions of the Alabama Supreme Court, we are not in a position to reverse that court's approval of the current compensation system.

(Some internal citations omitted)

Further, Rieber failed to elicit any testimony from Mr. Kempaner proving his representation was adversely affected in any way due to the limits on compensation in effect at the time.

This Court finds that Rieber failed to prove Mr. Kempaner and Mr. Moran were ineffective due to inadequate compensation. Rule 32.3, Ala.R.Crim.P.

III. <u>ALLEGATIONS RIEBER RECEIVED INEFFECTIVE ASSISTANCE FROM HIS TRIAL COUNSEL DURING THE GUILT PHASE OF TRIAL</u>.

These allegations are in part II.B(9)(a), paragraphs 55-74 on pages 17-21, of Rieber's amended Rule 32 petition. As stated above, Rieber was represented at trial and on direct appeal by Mr. Richard Kempner and Mr. Daniel Moran.

"[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." <u>Strickland v. Washington</u>, 466 U.S. 668, 689 (1984). In order to show that Mr. Kempaner and Mr. Moran were ineffective, Rieber had the burden of proving by a preponderance of the evidence that (1) Mr. Kempaner's and Mr. Moran's performance was deficient and (2) their deficient performance caused Rieber to be prejudiced. <u>See</u> <u>Id</u>. at 687. Rieber had the burden of proving that "counsel's errors were so serious as to deprive [him] of a fair trial, a trial whose result is reliable." <u>Id</u>.; <u>see also</u>

Harrington v. Richter, 562 U.S. 86, 112 (2011)(holding that in assessing prejudice under Strickland, "[t]he likelihood of a different result must be substantial, not just conceivable.").

A. Allegation That Rieber's Trial Counsel Were Ineffective For Allegedly Conceding The Application Of The Death Penalty In Their Guilt Phase Opening Statement.

This allegation is in paragraph 55 on pages 17-18 of Rieber's amended Rule 32 petition.

Rieber did not question Mr. Kempaner concerning his guilt phase opening statement. Therefore, this Court finds that Rieber abandoned this allegation of ineffective assistance of counsel. See Clark v. State, 2015 WL 1122521, *21 (Ala. Crim. App. March 13, 2015)("'[A] petitioner is deemed to have abandoned a claim if he fails to present any evidence to support the claim at the evidentiary hearing.'")(citation omitted).

In the alternative, because Rieber presented no evidence to support this ineffectiveness claim, this Court finds that Rieber failed to prove Mr. Kempner's guilt phase opening statement was deficient and caused Rieber to be prejudiced. See State v. Gissendanner,

2015 WL 6443194, *7 (Ala. Crim. App. 2015)(holding that "'[w]hen the record contains no direct evidence of counsel's reasons for the challenged conduct, we "will assume that counsel had a strategy if any reasonably sound strategic motivation can be imagined."'") (citation omitted); see also Broadnax v. State, 130 So.3d 1232, 1255 (Ala. Crim. App. 2013)("It is extremely difficult, if not impossible, to prove a claim of ineffective assistance of counsel without questioning counsel about the specific claim, especially when the claim is based on specific actions, or inactions, of counsel that occurred outside the record.").

Moreover, before the prosecutor and Mr. Kempaner delivered their guilt phase opening statements, the trial court instructed the jury that "[t]hese opening statements the attorneys make to you are not testimony, and they are not evidence in this case, and they are not to be taken by you as such. They simply will be statements of what they think the evidence will show or what they feel the evidence will show." (R. 410). The trial court repeated these instructions to the jury

before the prosecutor and Mr. Kempaner delivered their guilt phase closing arguments. (R. 826)

"Jurors are presumed to follow the trial court's instructions." Evans v. State, 794 So.2d 415, 439 (Ala. Crim. App. 2000). Rieber presented no evidence at the evidentiary hearing proving any member of his jury did not follow the trial court's explicit instructions. This Court finds that Rieber failed to prove he is entitled to any relief on this claim. Rule 32.3, Ala.R.Crim.P.

B. Allegation That Rieber's Trial Counsel Were Ineffective For Failing To Move To Dismiss The Charges Against Him Because The Prosecution Allowed Evidence To Spoil.

This allegation is in paragraph 56 on page 18 of Rieber's amended Rule 32 petition. Rieber alleged his trial counsel should have moved to dismiss the capital murder charges against him because his blood and urine were not tested for drugs during the 14-day lapse between his arrest and the appointment of counsel. Rieber contended that his trial counsel's failure "resulted in a verdict of guilty on a capital offense that would otherwise not have happened." (A.P. at p. 18).

Mr. Kempaner testified the defense strategy during the guilt phase of trial was mistaken identity. In Rieber's statement to police he said, on more than one occasion, that he did not commit the robbery/murder for which he was arrested. (R. 38, 39, and 41). Rieber also told police, on more than one occasion, that he had never been in the convenience store where the robbery/murder occurred. (R. 39). Detective James Parker testified at the hearing to suppress Rieber's statement that at the time he took Rieber's statement Rieber did not appear to be under the influence of drugs or alcohol and that Rieber specifically told Parker that he was not intoxicated. (R. 37, 43). Further, Rieber's sister testified during the penalty phase of trial that she saw Rieber after 9 p.m. the night of the murder and that he "seemed normal" and did not appear high on drugs or alcohol. (R. 977)

Trial counsel had no basis to move to dismiss the charges against Rieber based on the reasonable defense strategy they pursued during the guilt phase of trial. Rieber's defense was mistaken identity, so the issue of whether he had consumed drugs and alcohol prior to the

offense would have been irrelevant. See Magwood v. State, 689 So.2d 959, 981 (Ala. Crim. App. 1996) (holding that "[c]ounsel cannot be held ineffective for failing to make a challenge that has no basis in fact or law.").

This Court finds that Rieber failed to prove this allegation of ineffective assistance of counsel. Rule 32.3, Ala.R.Crim.P.

C. **Allegation That Rieber's Trial Counsel Were Ineffective For Failing To Object To Gruesome Photographs.**

This allegation is in paragraph 57 on page 18 of Rieber's amended Rule 32 petition.

"[T]he rule [is] that decisions to object or not are customarily trial strategy questions." King v. State, 518 So.2d 191, 196 (Ala. Crim. App. 1987). Further, Rieber did not question Mr. Kempaner concerning why he and Mr. Moran did not object to the photographs that were admitted at trial. Rieber also did not present any arguments at the evidentiary hearing concerning this claim. Therefore, this Court finds that Rieber abandoned this allegation of ineffective assistance. See Clark v. State, 2015 WL

1122521, *21 (Ala. Crim. App. March 13, 2015)("'[A] petitioner is deemed to have abandoned a claim if he fails to present any evidence to support the claim at the evidentiary hearing.'")(citation omitted).

In the alternative, because he presented no evidence to support this ineffectiveness claim, this Court finds that Rieber failed to prove his trial counsel's performance was deficient and caused him to be prejudiced. See State v. Gissendanner, 2015 WL 6443194, *7 (Ala. Crim. App. 2015)(holding that "'[w]hen the record contains no direct evidence of counsel's reasons for the challenged conduct, we "will assume that counsel had a strategy if any reasonably sound strategic motivation can be imagined."'") (citation omitted); see also Broadnax v. State, 130 So.3d 1232, 1255 (Ala. Crim. App. 2013)("It is extremely difficult, if not impossible, to prove a claim of ineffective assistance of counsel without questioning counsel about the specific claim, especially when the claim is based on specific actions, or inactions, of counsel that occurred outside the record.").

D. **Allegation That Rieber's Trial Counsel Were Ineffective For Failing To Object To Victim Impact Testimony Elicited During The Guilt Phase Of Trial.**

This allegation is in paragraphs 57-61 on pages 18-19 of Rieber's amended Rule 32 petition.

"[T]he rule [is] that decisions to object or not are customarily trial strategy questions." King v. State, 518 So.2d 191, 196 (Ala. Crim. App. 1987). Further, Rieber did not question Mr. Kempaner about why he chose not to object to testimony from the victim's husband during the guilt phase. Therefore, this Court finds that Rieber abandoned this allegation of ineffective assistance. See Clark v. State, 2015 WL 1122521, *21 (Ala. Crim. App. March 13, 2015)("'[A] petitioner is deemed to have abandoned a claim if he fails to present any evidence to support the claim at the evidentiary hearing.'")(citation omitted).

In the alternative, because he presented no evidence to support this ineffectiveness claim, this Court finds that Rieber failed to prove his trial counsel's failure to object amounted to deficient performance and caused him to be prejudiced. See State v. Gissendanner, 2015 WL 6443194, *7 (Ala. Crim. App.

2015)(holding that "'[w]hen the record contains no direct evidence of counsel's reasons for the challenged conduct, we "will assume that counsel had a strategy if any reasonably sound strategic motivation can be imagined."'")(citation omitted); see also Broadnax v. State, 130 So.3d 1232, 1255 (Ala. Crim. App. 2013)("It is extremely difficult, if not impossible, to prove a claim of ineffective assistance of counsel without questioning counsel about the specific claim, especially when the claim is based on specific actions, or inactions, of counsel that occurred outside the record.").

Moreover, Rieber raised the substantive issue underlying this allegation of ineffective assistance of counsel on direct appeal. In rejecting Rieber's argument, the Alabama Supreme Court held that, although certain victim impact testimony elicited during the guilt phase of trial should not have been admitted, "the aforementioned portions of [the victim's husband's] testimony, although they should not have been permitted, did not operate to deny Rieber a fair trial." Ex parte Rieber, 663 So.2d at 1006.

Rieber presented no evidence or argument at the evidentiary hearing calling the Supreme Court's holding into question. Therefore, this Court finds that Rieber failed to prove his trial counsel were ineffective for not objecting to victim impact testimony being presented during the guilt phase of trial.

E. **Allegation That Rieber's Trial Counsel Were Ineffective For Failing To Fully Investigate Rieber's Past And The Events Of The Day Of The Murder.**

This allegation is in paragraphs 62-63 on page 19 of Rieber's amended Rule 32 petition. Rieber alleged that "[h]ad trial counsel conducted a full inquiry into [his] past and the events of the day of the homicide[,] … trial counsel would have appreciated [that he] could not have formed the intent required for the charges against him." (A.P. p. 19). The crux of Rieber's assertion is that his trial counsel were ineffective because they did not present an intoxication defense during the guilt phase of trial.

"'[T]he mere existence of a potential alternative defense theory is not enough to establish ineffective assistance based on counsel's failure to present that theory.'" Hunt v. State, 940 So.2d 1041, 1067 (Ala.

Crim. App. 2005). Further, in Crosslin v. State, 446 So.2d 675, 682 (Ala. Crim. App. 1983), the Alabama Court of Criminal Appeals held that:

> "... Partial intoxication will not avail to disprove the specific intent; the intoxication must be of such character and extent as to render the accused incapable of discriminating between right and wrong - stupefaction of the reasoning faculty."
>
> "However, it is equally clear that the degree of intoxication exhibited by the accused, such as to reduce murder to manslaughter, even where the evidence is in sharp conflict, is for the jury to decide."

See also Ex parte McWhorter, 781 So.2d 330, 342-343 (Ala. 2000)(holding that "[the] standard is that 'the intoxication necessary to negate specific intent and, thus, reduce the charge, must amount to insanity.'") (citation omitted).

The witnesses presented by Rieber at the evidentiary hearing testified about his history of drug and alcohol abuse. Such testimony, however, would not have been admissible during the guilt phase of Rieber's trial because "[e]vidence that someone was a habitual drug user is not evidence that that person was intoxicated at the time of the murder." Whitehead v.

State, 777 So.2d 781, 833 (Ala. Crim. App. 1999). Likewise, Dr. Stalcup's opinion that Rieber did not know what he was doing at the time of the offense would not have been admissible during the guilt phase of trial. See Hammond v. State, 776 So.2d 884, 887 (Ala. Crim. App. 1998)(holding that "where there is evidence of intoxication, the extent to which the accused is intoxicated is a question to be decided by the jury.").

Charity Hubert, Jo Duffy, Sonya Williams, and Dwayne Moroney testified that they saw Rieber using drugs during the day of the murder. The evidence presented at trial proved that the murder occurred at approximately 8:00 p.m. This Court takes judicial notice that night had long fallen by 8:00 p.m. on October 9, 1990, in Huntsville, Alabama. Evidence that Rieber had been using drugs at some time during the day of the offense would not have proven that he was intoxicated at the time of the offense. See Windsor v. State, 683 So.2d 1027 (Ala. Crim. App. 1994)("Evidence that someone was drinking an alcoholic beverage is not evidence that that person was intoxicated."). Furthermore, in his statement to police Rieber denied

committing the offense or ever being at the convenience store where the offense was committed.

This Court finds that Rieber failed to prove Mr. Kempaner and Mr. Moran were ineffective for not investigating and presenting an intoxication defense at the guilt phase of trial. Rule 32.3, Ala.R.Crim.P.

In paragraph 63, and again in paragraphs 70-71 of his amended Rule 32 petition, Rieber contends that if his trial counsel had conducted a full investigation, "[trial counsel] would have discussed with [Rieber] the option of asking for a jury instruction on the lesser included charge of manslaughter." (A.P. p. 19)

Mr. Kempaner explained at the evidentiary hearing that he did not request a jury instruction on manslaughter because the defense strategy was mistaken identity. Mr. Kempaner also testified that he discussed the guilt phase strategy with Rieber, that Rieber understood the strategy, and that Rieber never suggested presenting another defense, such as intoxication. Rieber did not testify at the evidentiary hearing, so there is no evidence before this Court refuting Mr. Kempaner's testimony. Even if trial

counsel had requested a manslaughter instruction, Rieber would not have been entitled it. See Ex parte Julius, 455 So.2d 984, 987 (Ala. 1984)(holding that "Julius' reliance solely upon the defense of alibi resulted in his failure to produce any evidence warranting a charge on the lesser included offense of manslaughter in the first degree.").

This Court finds that Rieber failed to prove Mr. Kempaner and Mr. Moran were ineffective for not requesting a jury instruction on manslaughter. Rule 32.3, Ala.R.Crim.P.

F. Allegations That Rieber's Trial Counsel Were Ineffective For Failing Object To Prosecutorial Misconduct During The State's Guilt Phase Closing Argument.

These allegations are in paragraphs 64-68 on pages 19-20 of Rieber's amended Rule 32 petition.

"[T]he rule [is] that decisions to object or not are customarily trial strategy questions." King v. State, 518 So.2d 191, 196 (Ala. Crim. App. 1987). Further, Rieber did not question Mr. Kempaner concerning why he chose not to object during the prosecutor's guilt phase closing argument. Therefore, this Court finds that Rieber has abandoned this

allegation of ineffective assistance. See Clark v. State, 2015 WL 1122521, *21 (Ala. Crim. App. March 13, 2015)("'[A] petitioner is deemed to have abandoned a claim if he fails to present any evidence to support the claim at the evidentiary hearing.'")(citation omitted).

In the alternative, because he presented no evidence to support this ineffectiveness claim, this Court finds that Rieber failed to prove his trial counsel's failure to object constituted ineffective assistance of counsel. See State v. Gissendanner, 2015 WL 6443194, *7 (Ala. Crim. App. 2015) (holding that "'[w]hen the record contains no direct evidence of counsel's reasons for the challenged conduct, we "will assume that counsel had a strategy if any reasonably sound strategic motivation can be imagined."'") (citation omitted); see also Broadnax v. State, 130 So.3d 1232, 1255 (Ala. Crim. App. 2013)("It is extremely difficult, if not impossible, to prove a claim of ineffective assistance of counsel without questioning counsel about the specific claim, especially when the claim is based on specific actions,

or inactions, of counsel that occurred outside the record.").

Moreover, Rieber raised the substantive issues regarding the statements identified in paragraphs 66 and 67 of his amended Rule 32 petition on direct appeal. In denying Rieber relief, the Alabama Supreme Court held that "we cannot reasonably conclude that the prosecutor's comments in this particular case, when considered in the context of the entire trial, were so prejudicial as to call into question the correctness of the verdict." Ex parte Rieber, 663 So.2d at 1014.

Rieber presented no evidence or argument at the evidentiary hearing calling the Supreme Court's holding into question. Therefore, this Court finds that Rieber failed to prove his trial counsel were ineffective for not objecting to the prosecutor's guilt phase closing argument.

G. Allegations That Rieber's Trial Counsel Were Ineffective For Failing To Object To Prosecutorial Misconduct During The State's Guilt Phase Closing Arguments.

In paragraph 69 of Rieber's amended Rule 32 petition, he alleged that "the prosecution in this case vouched for its witnesses, expressed its personal

opinions about the case, misstated the evidence, and otherwise argued inappropriately." (A.P. at p. 20)

"[T]he rule [is] that decisions to object or not are customarily trial strategy questions." King v. State, 518 So.2d 191, 196 (Ala. Crim. App. 1987). Further, Rieber did not question Mr. Kempaner concerning why he chose not to object during the prosecutor's guilt phase closing argument. Therefore, this Court finds that Rieber abandoned this allegation of ineffective assistance. See Clark v. State, 2015 WL 1122521, *21 (Ala. Crim. App. March 13, 2015)("'[A] petitioner is deemed to have abandoned a claim if he fails to present any evidence to support the claim at the evidentiary hearing.'")(citation omitted).

In the alternative, because he presented no evidence to support this ineffectiveness claim, this Court finds that Rieber failed to prove his trial counsel's failure to object constituted ineffective assistance of counsel. See State v. Gissendanner, 2015 WL 6443194, *7 (Ala. Crim. App. 2015)(holding that "'[w]hen the record contains no direct evidence of counsel's reasons for the challenged conduct, we "will

assume that counsel had a strategy if any reasonably sound strategic motivation can be imagined."'") (citation omitted); see also Broadnax v. State, 130 So.3d 1232, 1255 (Ala. Crim. App. 2013)("It is extremely difficult, if not impossible, to prove a claim of ineffective assistance of counsel without questioning counsel about the specific claim, especially when the claim is based on specific actions, or inactions, of counsel that occurred outside the record.").

Moreover, Rieber raised the substantive issue underlying this allegation of ineffective assistance on direct appeal, arguing that "several comments made by the prosecutor during his closing argument in the guilt phase of the trial constitute reversible error." Ex parte Rieber, 663 So.2d at 1012. The Alabama Supreme Court rejected Rieber's argument, holding that "[a]fter carefully reviewing the prosecutor's closing argument, we conclude that the comments complained of either were within the scope of permissible argument, or, if they were outside that scope, did not undermine the fundamental fairness of the trial." Id.

Rieber presented no evidence or argument at the evidentiary hearing calling the Supreme Court's holding into question. Therefore, this Court finds that Rieber failed to prove his trial counsel were ineffective for not objecting during the prosecutor's guilt phase closing argument.

H. Allegation That Rieber's Trial Counsel Were Ineffective For Failing To Request Funds For Experts.

In paragraph 72 on page 21 of his amended Rule 32 petition, Rieber alleged that "[t]rial counsel failed to seek funds for expert witnesses, such as potential witnesses referred to in subparagraphs 47(c) and 47(f) above." (A.P. p. 21)

In paragraph 47(c) of his amended Rule 32 petition, Rieber alleged that a ballistics examination "would either provide conclusive evidence of innocence" or overridden "any reluctance [by Rieber] to accept the State's [plea bargain] offer." (A.P. p. 15)

Rieber did not testify at the evidentiary hearing, did not present testimony from a ballistics examiner, nor did he question Mr. Kempaner about why he and Mr. Moran chose not to retain a ballistics examiner.

Rieber presented no evidence at the evidentiary hearing proving that favorable testimony from a ballistics expert was available. He also presented no evidence proving that, even if such testimony was available, it would have persuaded him to take the State's plea offer. Therefore, this Court finds that Rieber abandoned this allegation of ineffective assistance of counsel. See Clark v. State, 2015 WL 1122521, *21 (Ala. Crim. App. March 13, 2015)("'[A] petitioner is deemed to have abandoned a claim if he fails to present any evidence to support the claim at the evidentiary hearing.'")(citation omitted).

In the alternative, because he presented no evidence to support this ineffectiveness claim, this Court finds that Rieber failed to prove his trial counsel because they did not retain a ballistics expert. See State v. Gissendanner, 2015 WL 6443194, *7 (Ala. Crim. App. 2015)(holding that "'[w]hen the record contains no direct evidence of counsel's reasons for the challenged conduct, we "will assume that counsel had a strategy if any reasonably sound strategic motivation can be imagined."'")(citation omitted); see

also Broadnax v. State, 130 So.3d 1232, 1255 (Ala. Crim. App. 2013)("It is extremely difficult, if not impossible, to prove a claim of ineffective assistance of counsel without questioning counsel about the specific claim, especially when the claim is based on specific actions, or inactions, of counsel that occurred outside the record.").

In paragraph 47(f), Rieber contends that his trial counsel were ineffective from not "[o]btaining an expert to testify as to the effect [Rieber's] background and drug use would have on a person." (A.P. at p. 15)

Even if Rieber's trial counsel had considered presenting an intoxication defense during the guilt phase, testimony from an expert would not have been admissible. In Wilkerson v. State, 686 So.2d 1266, 1279 (Ala. Crim. App. 1996), the Alabama Court of Criminal Appeals held that "[w]e are aware of no case holding that a witness can testify as to whether the defendant has the ability to form the requisite intent to commit the charged offense." The Court of Criminal Appeals has also held that "[t]he question of whether a

defendant had the specific intent to commit a murder may be gleaned from the circumstances surrounding the offense and therefore constitutes a matter best suited to a jury's determination." Brown v. State, 982 So.2d 565, 597 (Ala. Crim. App. 2006). Since testimony from an expert regarding Rieber's background and drug use would not have been admissible during the guilt phase of trial, his trial counsel were not ineffective. See Daniel v. State, 86 So.3d 405, 438 (Ala. Crim. App. 2011)(holding that "[c]ounsel is not ineffective for failing to present inadmissible evidence.").

This Court finds that Rieber failed to prove he is entitled to any relief on this claim. Rule 32.3, Ala.R.Crim.P.

I. Allegations That Rieber's Trial Counsel Were Ineffective for Failing to Object to Improper Jury Instructions And The Jury Venires.

In paragraph 73 of his amended Rule 32 petition, Rieber alleged that "[t]rial counsel failed to object to improper jury instructions, such as the reasonable doubt and intent instructions, and failed to challenge the jury venires." (A.P. p. 21)

"[T]he rule [is] that decisions to object or not are customarily trial strategy questions." King v. State, 518 So.2d 191, 196 (Ala. Crim. App. 1987). Further, Rieber did not question Mr. Kempaner concerning why he chose not to object to the trial court's guilt phase jury instructions or the makeup of the jury venires. Therefore, this Court finds that Rieber abandoned these allegations of ineffective assistance. See Clark v. State, 2015 WL 1122521, *21 (Ala. Crim. App. March 13, 2015)("'[A] petitioner is deemed to have abandoned a claim if he fails to present any evidence to support the claim at the evidentiary hearing.'")(citation omitted).

In the alternative, because he presented no evidence to support these ineffectiveness claims, this Court finds that Rieber failed to prove his trial counsel's failure to object constituted ineffective assistance. See State v. Gissendanner, 2015 WL 6443194, *7 (Ala. Crim. App. 2015)(holding that "'[w]hen the record contains no direct evidence of counsel's reasons for the challenged conduct, we "will assume that counsel had a strategy if any reasonably

sound strategic motivation can be imagined.'"'") (citation omitted); see also Broadnax v. State, 130 So.3d 1232, 1255 (Ala. Crim. App. 2013)("It is extremely difficult, if not impossible, to prove a claim of ineffective assistance of counsel without questioning counsel about the specific claim, especially when the claim is based on specific actions, or inactions, of counsel that occurred outside the record.").

Moreover, the Alabama Court of Criminal Appeals and the Alabama Supreme Court affirmed Rieber's conviction and sentence after reviewing the record for plain error, which would have included reviewing the trial court's guilt phase jury instructions. Rieber v. State, 663 So.2d at 998; Ex parte Rieber, 663 So.2d at 1015. Rieber presented no evidence or argument at the evidentiary hearing calling the Court of Criminal Appeals' or the Supreme Court's holdings into question. Therefore, this Court finds that Rieber failed to prove his trial counsel were ineffective for not objecting.

J. Allegation That, Taken as a Whole, Rieber's Allegations of Ineffective Assistance of Counsel During the Guilt Phase Entitle Him To Relief.

This allegation is in paragraph 74 on page 21 of Rieber's amended petition.

"Alabama does not recognize a 'cumulative effect' analysis for ineffective-assistance-of-counsel claims." Carruth v. State, 165 So.3d 627, 651 (Ala. Crim. App. 2014). Additionally, Rieber failed to prove that his trial counsels' preparation for and representation at the guilt phase of trial was deficient and caused him to be prejudiced as required by Strickland. Therefore, even if this Court were to consider any cumulative effect of Rieber's allegations of ineffective assistance against his trial counsel, this Court finds that Rieber would not be entitled to any relief. See Calhoun v. State, 932 So.2d 923, 974 (Ala. Crim. App. 2005)(holding that "'[b]ecause we find no error in the specific instances alleged by the appellant, we find no cumulative error.'")(citation omitted).

K. Allegation That Mr. Kempner Was Ineffective During Plea Negotiations Because He Did Not Show Rieber The Surveillance Video Tape.

In his post-hearing memorandum, as well as during final arguments, Rieber alleged that Mr. Kempner was ineffective during plea negotiations because he did not

show Rieber the surveillance video tape from the Mobile Mart store. Rieber contends that if Mr. Kempner had shown him the surveillance video he would have accepted the State's plea offer of life without the possibility of parole in exchange for pleading guilty to capital murder.

As the State pointed out during final arguments, this claim of ineffective assistance of counsel was not pleaded in Rieber's amended Rule 32 petition nor was it raised during the evidentiary hearing. As such, the State had no opportunity to defend against it. Because Rieber did not raise this claim until after the October 2011 evidentiary hearing, it is not properly before this Court. See Ex parte Jenkins, 972 So.2d 159, 164 (Ala. 2005)(holding that a circuit court's refusal to allow an amendment would be appropriate "for example, if, on the eve of an evidentiary hearing, a Rule 32 petitioner filed an amendment that included new claims of which the State had no prior notice and as to which it was not prepared to defend.").

Moreover, even if this claim was properly before this Court, Rieber failed to prove he would be entitled

to any relief. Mr. Kempner testified that he did not show Rieber the surveillance video tape prior to informing him about the State's plea offer. (H.R. 167) However, Rieber failed to ask Mr. Kempner why he did not show Rieber the video tape prior to discussing the State's plea offer with him. There is no evidence before this Court explaining Mr. Kempner's reasons for not showing Rieber the video tape. See Martin v. State, 62 So.3d 1050, 1068 (Ala. Crim. App. 2010) ("[I]t is well settled that an ambiguous or silent record will not overcome the strong and continuing presumption that counsel's conduct was appropriate and reasonable."). Further, Rieber did not testify at the evidentiary hearing. Therefore, there is no evidence before this Court proving, or even suggesting, that Rieber would have accepted the State's plea offer if he had seen the video tape. See Van Pelt v. State, 2015 WL 4876548, *13 (Ala. Crim. App. Aug. 14, 2015)("Van Pelt's claim that trial counsel failed to communicate with him regarding a plea offer by the State fails to state a claim because Van Pelt does not allege that he would have accepted the offer.").

This Court finds that Rieber failed to prove trial counsel's performance during plea negotiations was deficient and caused him to be prejudiced. Rule 32.3, Ala.R.Crim.P.

IV. ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE PENALTY PHASE OF TRIAL AND AT THE JUDICIAL SENTENCING BEFORE THE TRIAL COURT.

These allegations are in part II.B(9)(b), paragraphs 75-77 on pages 21-22 of Rieber's amended Rule 32 petition.

A. Allegation That Rieber's Trial Counsel Were Ineffective for Conceding the Heinous Nature of the Offense.

This allegation is in paragraph 75 on page 21 of Rieber's amended petition. To support this allegation Rieber referred to Mr. Kempaner's guilt phase opening statement.

Rieber did not question Mr. Kempaner about his guilt phase opening statement. Therefore, this Court finds that Rieber abandoned this allegation of ineffective assistance of counsel. See Clark v. State, 2015 WL 1122521, *21 (Ala. Crim. App. March 13, 2015)("'[A] petitioner is deemed to have abandoned a claim if he fails to present any evidence to support

the claim at the evidentiary hearing.'")(citation omitted).

In the alternative, because Rieber presented no evidence to support this ineffectiveness claim, this Court finds that Rieber failed to prove that Mr. Kempaner's comments during his guilt phase opening statement prejudiced Rieber at the penalty phase. See State v. Gissendanner, 2014 WL 7236991, *7 (Ala. Crim. App. Dec. 19, 2014)(holding that "'[w]hen the record contains no direct evidence of counsel's reasons for the challenged conduct, we "will assume that counsel had a strategy if any reasonably sound strategic motivation can be imagined."'")(citation omitted); see also Broadnax v. State, 130 So.3d 1232, 1255 (Ala. Crim. App. 2013)("It is extremely difficult, if not impossible, to prove a claim of ineffective assistance of counsel without questioning counsel about the specific claim, especially when the claim is based on specific actions, or inactions, of counsel that occurred outside the record.").

Moreover, Rieber's guilt phase defense was mistaken identity. As such, Mr. Kempaner acknowledging

the nature of the offense to the jury during his guilt phase opening statement was reasonable. See Walls v. Buss, 658 F.3d 1274, 1279 (11th Cir. 2011)("Openness in a jury trial is a move that can pay off. We have previously recognized the reasonableness of being forthcoming with the jury."). Additionally, the trial court instructed the jury before the beginning of Rieber's trial and before the parties delivered their guilt phase closing arguments that the prosecutor's and trial counsel's arguments were not evidence and should not be considered as such. (R. 410, 826) Rieber presented no evidence at the evidentiary hearing proving that the jurors did not follow the trial court's explicit instructions. See Evans v. State, 794 So.2d 415, 439 (Ala. Crim. App. 2000)(holding that "[j]urors are presumed to follow the trial court's instructions").

This Court finds that Rieber failed to prove he is entitled to any relief on this claim. Rule 32.3, Ala.R.Crim.P.

B. **Allegations That Rieber's Trial Counsel Were Ineffective During Penalty Phase Before The Jury And At The Judicial Sentencing Before The Trial Court.**

In paragraph 76, pages 21-22 of Rieber's amended Rule 32 petition, he alleged his trial counsel were ineffective before the jury and at the judicial sentencing for not presenting evidence about his troubled past, his history of drug use, and his drug use on the day his murdered the victim.

1. **Allegation that Rieber's trial counsel were ineffective during the penalty phase before the jury.**

Mr. Kempaner testified that Mr. Moran was responsible for preparing for the penalty phase of trial. In paragraphs 17-20 on pages four and five of Rieber's amended Rule 32 petition, he alleged that Mr. Moran was ineffective because he: 1) had been suspended from practicing law in 1989; 2) was in poor physical health; and 3) took numerous prescription medications as a result of his poor health.

Mr. Kempaner testified that, other than being overweight and needing the assistance of a walker, Mr. Moran's health issues did not affect his performance in representing Rieber. Mr. Kempaner said that Mr. Moran appeared to be "in fine shape" during his representation of Rieber and that he never complained

about not feeling well. Mr. Kempaner testified he had seen Mr. Moran's vehicle parked at a local bar but that there was no occasion during Mr. Moran's representation that he believed Mr. Moran was drinking. Further, letters from Mr. Moran's treating physician indicated that his health improved during his representation of Rieber. Finally, this Court finds that the fact that Moran had been disciplined by the Alabama State Bar Association on an unrelated matter prior to representing Rieber is not relevant in determining whether his performance in Rieber's case was deficient and caused Rieber to be prejudiced. See Adkins v. State, 930 So.2d 524, 549 (Ala. Crim. App. 2001)(holding that "[t]he fact that [Adkins' defense counsel] have been disciplined by the Alabama State Bar on unrelated matters has no bearing on their performance in Adkins' trial").

This Court finds that Rieber failed to prove Mr. Moran's performance was deficient in any way due to his health. Rule 32.3, Ala.R.Crim.P.

Rieber also alleged Mr. Moran was ineffective during the penalty phase for not presenting witnesses

to testify about Rieber's background and history of drug abuse.

Mr. Moran called seven witnesses to testify in mitigation at the penalty phase of Rieber's trial. These witnesses included a former employer, former neighbors, friends, and Rieber's sister, Shauna. (R. 937-978) Mr. Moran's focus was to elicited testimony in order to humanize Rieber to the jurors in hope of securing a favorable sentencing recommendation. Mr. Moran elicited testimony from these witnesses focusing on Rieber's good character, his gentle nature, his lack of violence, and his willingness to help others. For example, Rieber's sister, Shauna, told the jury that, since Rieber's arrest for capital murder, he had had a religious conversion, was helping other inmates learn to read, and had joined Alcoholics Anonymous. (R. 974-975)

In addition to witness testimony, Mr. Moran submitted a pretrial mental evaluation and report prepared by Dr. Kathy Ronan from Taylor Hardin Secured Medical Facility into evidence for the juror's consideration. (R. 978-980) Dr. Ronan stated in her

report that "[Rieber] reported a very significant history of abuse, dating back to when he was very young, about age 9." (C.R. 207) Dr. Ronan's report also stated that Rieber had informed her that on the day of the murder "he had been drinking alcoholic beverages prior to the alleged offense, and had also smoked marijuana and used three hits of 'acid'." (C.R. 213) Referring to Dr. Ronan's report, Mr. Moran argued in his penalty phase closing that Rieber did not remember what happened because of the drugs he had taken the day of the murder. (R. 1003) The jury voted seven to five that Rieber be sentenced to life in prison without the possibility of parole.

The testimony presented by Rieber at the evidentiary hearing from his siblings, friends and acquaintances, and Dr. Stalcup focused on Rieber's history of drug abuse. Much of this same evidence was presented to the jury by way of Dr. Ronan's report and does not support Rieber's assertion that Mr. Moran's performance was deficient. See Boyd v. State, 913 So.2d 1113, 1139 (Ala. Crim. App. 2003)("Unpresented cumulative testimony does not establish that counsel

was ineffective."). Further, some of the testimony elicited from witnesses would not have benefited Rieber. Rieber's sister, Teresa Hill, testified that Rieber sold LSD between 1986 and 1989. Charity Hubert testified that she and Rieber began a relationship when she was 13 or 14 years old and Rieber was 19 years old. Ms. Hubert also testified that she smoked marijuana with Rieber that she eventually began using the same hard drugs as Rieber by the time she was 16 years old.

In Dunaway v. State, 2009 WL 4980320, *17 (Ala. Crim. App. Dec. 18, 2009), rev'd on other ground, Ex part Dunaway, 2014 WL 1508697 (Ala. April 18, 2014), the Alabama Court of Criminal Appeals held:

> "'"Strickland cautions that 'there are countless ways to provide effective assistance in a given case' and that 'even the best criminal defense attorneys would not defend the particular client the same way.' 466 U.S. at 689, 104 S.Ct. 2052. Among the 'virtually unchallengeable' tactical decisions left to the judgment of trial counsel are determinations regarding the defense strategy adopted at trial."'"

(citations omitted) The fact that Mr. Moran did not present evidence about Rieber's history of drug abuse during the penalty phase in the manner that Rieber

believes he should have does not establish that Mr. Moran was ineffective.

This Court finds that Rieber failed to prove Mr. Moran's penalty phase investigation and presentation was deficient and caused Rieber to be prejudiced. Rule 32.3, Ala.R.Crim.P.

2. **<u>Allegation that Rieber's trial counsel were ineffective at the sentencing hearing before the trial court</u>.**

Rieber also alleged his trial counsel were ineffective for not presenting mitigation evidence at the judicial sentencing hearing.

The trial court's sentencing order demonstrates that that court considered evidence of Rieber's history of substance abuse in mitigation. (C.R. 89-91) The trial court concluded that Rieber was not under the influence of drugs and/or alcohol nor was he suffering from any mental disease or defect at the time of the offense. (C.R. 91) This Court finds there is no reasonable probability that if the witness testimony concerning Rieber history of drug and alcohol abuse presented at the evidentiary hearing had been presented at the judicial sentencing it would have persuaded the

trial court to follow the jury's recommendation. Also, as noted above, evidence that Rieber sold drugs and was in a sexual relationship with and providing illegal drugs to a teenage girl would not have been mitigating.

This Court finds that Rieber failed to prove Mr. Moran's performance at the sentencing hearing before the trial court was deficient and caused Rieber to be prejudiced. Rule 32.3, Ala.R.Crim.P.

C. **Allegation That Rieber's Trial Counsel Were Ineffective During Penalty Phase Before the Jury For Failing To Object To Improper Jury Instructions.**

In paragraph 77 of Rieber's amended Rule 32 petition, he contends that:

> Trial counsel failed to object to improper jury instructions, such as an instruction informing the jury that its vote was merely an advisory verdict and an instruction suggesting that a finding of aggravating circumstances need not be unanimous, and failed to object to the court's refusal to instruct the jury that residual doubt could be a mitigating circumstance.

(A.P. p. 22)

Rieber did not question Mr. Kempaner concerning why he chose not to object to the trial court's penalty phase jury instructions. Therefore, this Court finds that Rieber abandoned this allegation of ineffective

assistance. See Clark v. State, 2015 WL 1122521, *21 (Ala. Crim. App. March 13, 2015)("'[A] petitioner is deemed to have abandoned a claim if he fails to present any evidence to support the claim at the evidentiary hearing.'")(citation omitted).

In the alternative, because he presented no evidence to support this ineffectiveness claim, this Court finds that Rieber failed to prove his trial counsel's performance was deficient and caused him to be prejudiced. See State v. Gissendanner, 2015 WL 6443194, *7 (Ala. Crim. App. 2015)(holding that "'[w]hen the record contains no direct evidence of counsel's reasons for the challenged conduct, we "will assume that counsel had a strategy if any reasonably sound strategic motivation can be imagined."'") (citation omitted); see also Broadnax v. State, 130 So.3d 1232, 1255 (Ala. Crim. App. 2013)("It is extremely difficult, if not impossible, to prove a claim of ineffective assistance of counsel without questioning counsel about the specific claim, especially when the claim is based on specific actions,

or inactions, of counsel that occurred outside the record.").

Moreover, on direct appeal the Alabama Court of Criminal Appeals specifically held that "[a]ny error that may have occurred [in the trial court's penalty phase jury instructions] is harmless because the jury recommended life imprisonment without parole." Rieber v. State, 663 So.2d at 993. The Court of Criminal Appeals then went on to address all the substantive allegations listed in paragraph 77 and found that Rieber was not entitled to any relief. See Rieber v. State, 663 So.2d at 994-995. Rieber presented no evidence or argument at the evidentiary hearing that would call the Court of Criminal Appeals' holding into question.

This Court finds that Rieber failed to prove his trial counsel were ineffective for not objecting to the trial court's penalty phase jury instructions. Rule 32.3, Ala.R.Crim.P.

V. ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

These allegations are in Part II.B(9)(c), paragraphs 78-83 on pages 22-23 of Rieber's amended

Rule 32 petition. Mr. Kempaner and Mr. Moran represented Rieber on direct appeal.

A. Allegation That Rieber's Appellate Counsel Were Ineffective On Direct Appeal.

In paragraph 78 of Rieber's amended Rule 32 petition, he alleges that:

> At the trial, trial counsel had excluded a juror of Asian ancestry on the ground that jurors of Asian ancestry tended to vote in favor of the prosecution. On appeal, trial counsel's first ground for appeal was that the exclusion of that juror rendered petition's trial unconstitutional, since it constituted impermissible racial discrimination by the State.

(A.P. p. 22)

In Whitson v. State, 109 So.3d 665, 672 (Ala. Crim. App. 2012), the Alabama Court of Criminal Appeals held:

> "'Appellate counsel is presumed to exercise sound strategy in the selection of issues most likely to afford relief on appeal. One claiming ineffective appellate counsel must show prejudice, i.e., the reasonable probability that, but for counsel's errors, the petitioner would have prevailed on appeal.'"

(citations omitted)

Mr. Kempaner testified that part of his trial strategy was to inject error into the record so the

case would be reversed if Rieber were convicted. On direct appeal, Mr. Kempaner and Mr. Moran argued that Rieber's conviction should be reversed because "his attorney struck an Asian-American from the jury venire for racial reasons." Rieber v. State, 663 So.2d at 990. In rejecting this claim, the Alabama Court of Criminal Appeals held that "[Rieber] has not shown us nor can we see how [he] was prejudiced by his defense counsel's striking this particular veniremember." Id. at 991.

Rieber presented no evidence demonstrating what issues Mr. Kempaner and Mr. Moran could have raised on direct appeal that would have caused the Alabama Court of Criminal Appeals or the Alabama Supreme Court to reverse his conviction or sentence. This Court finds that Rieber failed to prove that Mr. Kempaner's and Mr. Moran's performance on direct appeal was deficient and caused him to be prejudiced. Rule 32.3, Ala.R.Crim.P.

B. Allegation That Rieber's Appellate Counsel Were Ineffective For Failing To Argue That The Trial Court Erred In Finding That Rieber Had Stalked The Victim Before The Murder.

This allegation is in paragraph 79, page 22 of Rieber's amended Rule 32 petition.

Rieber did not question Mr. Kempaner concerning why he chose not to raise this issue on direct appeal. Therefore, this Court finds that Rieber abandoned this allegation of ineffective assistance. See Clark v. State, 2015 WL 1122521, *21 (Ala. Crim. App. March 13, 2015)("'[A] petitioner is deemed to have abandoned a claim if he fails to present any evidence to support the claim at the evidentiary hearing.'")(citation omitted).

In the alternative, because he presented no evidence to support this ineffectiveness claim, this Court finds that Rieber failed to prove his trial counsel's guilt phase opening statement was deficient and caused him to be prejudiced. See State v. Gissendanner, 2015 WL 6443194, *7 (Ala. Crim. App. 2015)(holding that "'[w]hen the record contains no direct evidence of counsel's reasons for the challenged conduct, we "will assume that counsel had a strategy if any reasonably sound strategic motivation can be imagined."'")(citation omitted); see also Broadnax v. State, 130 So.3d 1232, 1255 (Ala. Crim. App. 2013)("It is extremely difficult, if not impossible, to prove a

claim of ineffective assistance of counsel without questioning counsel about the specific claim, especially when the claim is based on specific actions, or inactions, of counsel that occurred outside the record.").

Moreover, in reviewing the Alabama Court of Criminal Appeals's holding that the trial court correctly found that the capital murder was especially heinous, atrocious, or cruel, the Alabama Supreme Court specifically found that:

> Suffice it to say that the evidence supports those findings. The evidence indicates that Rieber had "cased" the store and had stalked [the victim] for several days before the murder. Testimony and the videotape from the surveillance camera at the store clearly indicated that [the victim] was aware of Rieber's presence and was apprehensive and afraid of him. As the Court of Criminal Appeals pointed out, evidence as to the fear experienced by the victim before death is a significant factor in determining the existence of the aggravating circumstance that the murder was especially heinous, atrocious, or cruel.

Ex parte Rieber, 663 So.2d at 1003 (footnote omitted). Rieber presented no evidence or argument that would call the Supreme Court's finding into question.

This Court finds that Rieber failed to prove that Mr. Kempaner's and Mr. Moran's performance on direct appeal was deficient and caused him to be prejudiced. Rule 32.3, Ala.R.Crim.P.

C. Allegation That Rieber's Appellate Counsel Were Ineffective For Failing To Argue That The Trial Court Did Not Give The Jury's Sentencing Recommendation Its Proper Weight.

This allegation is in paragraphs 80-81, pages 22-23 of Rieber's amended Rule 32 petition.

As stated above, the Alabama Supreme Court's decision in Ex parte Carroll requiring a sentencing court to consider a jury's life without parole recommendation as a mitigating circumstance was not issued until long after Rieber's conviction and sentence were affirmed on direct appeal. Therefore, Mr. Kempaner and Mr. Moran were not ineffective for failing to raise this issue on direct appeal. See Inmin v. State, 654 So.2d 86, 88 (Ala. Crim. App. 1994)(holding that "[c]ounsel cannot be held ineffective for failing to predict the future course of the law."). Further, for the reasons stated in part I.C of this order, Rieber reliance on Ex parte Tomlin, 909 So.2d 283 (Ala. 2003) is entirely misplaced.

Moreover, on direct appeal, both the Alabama Court of Criminal Appeals and the Alabama Supreme Court held that Rieber's conviction and sentence were proper. Rieber v. State, 663 So.2d at 998 (holding that "[o]ur review of the record leads us to conclude that the trial court's findings [concerning the aggravating and mitigating circumstances] are supported by the record."); Ex parte Rieber, 663 So.2d at 1015 (holding that "the guilty verdict and the sentence are supported by the record."). Further, both the Alabama Court of Criminal Appeals and the Alabama Supreme Court independently weighed the aggravating and mitigating circumstances and concluded that Rieber's death sentence was appropriate. Rieber v. State, 663 So.2d at 998, aff'd, Ex parte Rieber, 663 So.2d at 1015.

This Court finds that Rieber failed to prove that Mr. Kempaner's and Mr. Moran's performance on direct appeal was deficient and caused him to be prejudiced. Rule 32.3, Ala.R.Crim.P.

D. Allegation That Rieber's Appellate Counsel Were Ineffective For Failing To Raise Or Adequately Pursue Issues On Direct Appeal.

In paragraph 82 of his amended Rule 32 petition, Rieber contends that "[c]ounsel improperly failed to raise on appeal numerous issues identified in other claims in this amended petition that trial counsel either failed to identify or failed to adequately pursue during the trial and sentencing phases of this case." (A.P. p. 23)

"Appellate counsel is presumed to exercise sound strategy in the selection of issues most likely to afford relief on appeal." Thomas v. State, 766 So.2d 860, 876 (Ala. Crim. App. 1998), overruled on other grounds, Ex parte Taylor, 10 So.3d 1075 (Ala. 2005). In Payne v. State, 791 So.2d 383, 399 (Ala. Crim. App. 1999), the Alabama Court of Criminal Appeals held that "[a petitioner's] claims of ineffective assistance of appellate counsel depends on whether [the petitioner] proves that appellate counsel failed to present on direct appeal a claim that would have entitled him to relief."

This Court finds that Rieber failed to prove that Mr. Kempaner's and Mr. Moran's performance on direct appeal was deficient and caused him to be prejudiced. Rule 32.3, Ala.R.Crim.P.

CONCLUSION

After careful review of all relevant and applicable law, and for the reasons stated above, Rieber's request for relief from his conviction and sentence is hereby DENIED.

Rieber shall have 42 days from the entry of this Order in which to appeal this Court's ruling.

DONE this the 13th day of November, 2015.

CIRCUIT COURT JUDGE
23rd JUDICIAL CIRCUIT

cc: Frank Tuerkheimer, Counsel for Petitioner
James Friedman, Counsel for Petitioner
Lawrence Bensky, Counsel for Petitioner
Kerry L. Gabrielson, Counsel for Petitioner
Daniel C.W. Narvey, Counsel for Petitioner
Jeffrey Rieber, Petitioner
Jon B. Hayden, Counsel for the State

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA

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October 20, 2017

CR-15-0355 **Death Penalty**

Jeffery Day Rieber v. State of Alabama (Appeal from Madison Circuit Court: CC90-2177.60)

NOTICE

You are hereby notified that on October 20, 2017, the following action was taken in the above referenced cause by the Court of Criminal Appeals:

Application for Rehearing Overruled.

D. Scott Mitchell

D. Scott Mitchell, Clerk
Court of Criminal Appeals

cc: Hon. Karen Hall, Circuit Judge
Hon. Debra Kizer, Circuit Clerk
Lawrence Bensky, Attorney - Pro Hac
James Alan Friedman, Attorney - Pro Hac
Kerry L. Gabrielson, Attorney - Pro Hac
Daniel C.w. Narvey, Attorney - Pro Hac
Frank Mitchel Tuerkheimer, Attorney - Pro Hac
Lauren A. Simpson, Asst. Attorney General

United States Constitution

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

United States Constitution

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress , the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in

aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

CODE OF ALABAMA

1975

With Provision for Subsequent Pocket Parts

Prepared Under the Supervision of

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The Legislative Council

Robert H. Harris, Chairman

by

The Editorial Staff of the Publisher

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death penalty statute does not violate the Constitution by conferring upon the trial judge the right to commute a sentence of death. Beck v. State, 365 So. 2d 985 (Ala. Crim. App.), aff'd, 365 So. 2d 1006 (Ala. 1978), rev'd on other grounds, 447 U.S. 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392, on remand, 396 So. 2d 645 (Ala. 1980).

Court not restricted to statutory mitigating factors. — The sentencing court considered evidence as to any matter that the court deemed relevant to sentence, and was not restricted to those mitigating factors statutorily defined. Kyzer v. State, 399 So. 2d 317 (Ala. Crim. App. 1979), rev'd on other grounds, 399 So. 2d 330 (Ala. 1981).

But the only aggravating circumstances which may be considered under the capital felony statute relating to a defendant's prior criminal history are set out in the statute. Keller v. State, 380 So. 2d 926 (Ala. Crim. App. 1979), cert. denied, 380 So. 2d 938 (Ala. 1980).

Remand for new hearing where improper aggravating circumstances found. — Where trial court found one or more proper aggravating circumstances, but likewise based sentence on one or more improper aggravating circumstances, remandment to trial court for new sentencing hearing should be mandated by appellate court finding aggravating circumstances improper. Bufford v. State, 382 So. 2d 1162 (Ala. Crim. App.), cert. denied, 382 So. 2d 1175 (Ala. 1980).

Crime charged in indictment cannot be used as both criminal charge and circumstances aggravating that charge. Keller v. State, 380 So. 2d 926 (Ala. Crim. App. 1979), cert. denied, 380 So. 2d 938 (Ala. 1980).

Options in sentencing. — In any case in which the jury finds the defendant guilty and imposes the death sentence, the trial court is required to hold a presentence hearing to determine whether to sentence the defendant to death or to life imprisonment without parole; these are the only options for the sentencing authority. Evans v. Britton, 472 F. Supp. 707 (S.D. Ala. 1979), rev'd on other grounds, 628 F.2d 400 (5th Cir. 1980).

§ 13A-5-46. Same — Conducted before jury unless waived; trial jury to sit for unless impossible or impracticable; separation of jury; instructions to jury; advisory verdicts; vote required; mistrial; waiver of right to advisory verdict.

(a) Unless both parties with the consent of the court waive the right to have the sentence hearing conducted before a jury as provided in section 13A-5-44(c), it shall be conducted before a jury which shall return an advisory verdict as provided by subsection (e) of this section. If both parties with the consent of the court waive the right to have the hearing conducted before a jury, the trial judge shall proceed to determine sentence without an advisory verdict from a jury. Otherwise, the hearing shall be conducted before a jury as provided in the remaining subsections of this section.

(b) If the defendant was tried and convicted by a jury, the sentence hearing shall be conducted before that same jury unless it is impossible or impracticable to do so. If it is impossible or impracticable for the trial jury to sit at the sentence hearing, or if the case on appeal is remanded for a new sentence hearing before a jury, a new jury shall be impanelled to sit at the sentence hearing. The selection of that jury shall be according to the laws and rules governing the selection of a jury for the trial of a capital case.

(c) The separation of the jury during the pendency of the sentence hearing, and if the sentence hearing is before the same jury which convicted the defendant, the separation of the jury during the time between the guilty verdict and the beginning of the sentence hearing, shall be governed by the law and court rules applicable to the separation of the jury during the trial of a capital case.

(d) After hearing the evidence and the arguments of both parties at the sentence hearing, the jury shall be instructed on its function and on the

12 Ala 82 rv B0-5-32-3276

relevant law by the trial judge. The jury shall then retire to deliberate concerning the advisory verdict it is to return.

(e) After deliberation, the jury shall return an advisory verdict as follows:

(1) If the jury determines that no aggravating circumstances as defined in section 13A-5-49 exist, it shall return an advisory verdict recommending to the trial court that the penalty be life imprisonment without parole;

(2) If the jury determines that one or more aggravating circumstances as defined in section 13A-5-49 exist but do not outweigh the mitigating circumstances, it shall return an advisory verdict recommending to the trial court that the penalty be life imprisonment without parole;

(3) If the jury determines that one or more aggravating circumstances as defined in section 13A-5-49 exist and that they outweigh the mitigating circumstances, if any, it shall return an advisory verdict recommending to the trial court that the penalty be death.

(f) The decision of the jury to return an advisory verdict recommending a sentence of life imprisonment without parole must be based on a vote of a majority of the jurors. The decision of the jury to recommend a sentence of death must be based on a vote of at least ten jurors. The verdict of the jury must be in writing and must specify the vote.

(g) If the jury is unable to reach an advisory verdict recommending a sentence, or for other manifest necessity, the trial court may declare a mistrial of the sentence hearing. Such a mistrial shall not affect the conviction. After such a mistrial or mistrials another sentence hearing shall be conducted before another jury, selected according to the laws and rules governing the selection of a jury for the trial of a capital case. Provided, however, that, subject to the provisions of section 13A-5-44(c), after one or more mistrials both parties with the consent of the court may waive the right to have an advisory verdict from a jury, in which event the issue of sentence shall be submitted to the trial court without a recommendation from a jury. (Acts 1981, No. 81-178, § 8.)

Editor's note. — In light of the similarity of the provisions, decisions under former § 13A-5-33 are included in the annotations for this section.

Sentencing hearing should not serve function of hearing on petition for writ of error coram nobis. Once having litigated this issue before the same judge who conducted the sentencing hearing, and a determination having been made that the allegations were without merit, the defendant had no right to relitigate the same issue and argue contentions which had already been determined to be without factual support. Hubbard v. State, 382 So. 2d 577 (Ala. Crim. App. 1979), aff'd, 382 So. 2d 597 (Ala. 1980), rev'd on remand, 405 So. 2d 695 (Ala. 1981).

Jury verdict not binding on trial court. — The requirement that the jury fix the punishment at death if it finds the defendant guilty of a capital offense is in no way binding on the trial court as the final sentencing authority. Beck v. State, 396 So. 2d 645 (Ala. 1980).

Act not mandatory where judge empowered to alter jury verdict. — Before a death penalty can be imposed in Alabama, the trial judge is compelled to hold a separate hearing and make written findings of one or more of the aggravating circumstances set forth in the act. If the trial judge fails to find one or more aggravating circumstances, supported by the evidence, he is empowered to alter the verdict of the jury and sentence the defendant to life imprisonment without parole. Since the verdict of the jury is not binding on the trial court the act cannot under any construction be classed as mandatory. Williamson v. State, 370 So. 2d 1054 (Ala. Crim. App. 1978), aff'd, 370 So. 2d 1066 (Ala. 1979), rev'd on remand, 405 So. 2d 698 (Ala. Crim. App. 1981).

But crime charged in indictment cannot be used as both criminal charge and cir-

1 SB16

2 178947-3

3 By Senator Brewbaker

4 RFD: Judiciary

5 First Read: 07-FEB-17

6 PFD: 12/19/2016

1 SB16
2
3
4 ENROLLED, An Act,
5 To amend Sections 13A-5-45, 13A-5-46, and 13A-5-47,
6 Code of Alabama 1975, relating to capital cases and to the
7 determination of the sentence by courts; to prohibit a court
8 from overriding a jury verdict.
9 BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:
10 Section 1. Sections 13A-5-45, 13A-5-46, 13A-5-47,
11 Code of Alabama 1975, are amended to read as follows:
12 "§13A-5-45.
13 "(a) Upon conviction of a defendant for a capital
14 offense, the trial court shall conduct a separate sentence
15 hearing to determine whether the defendant shall be sentenced
16 to life imprisonment without parole or to death. The sentence
17 hearing shall be conducted as soon as practicable after the
18 defendant is convicted. Provided, however, if the sentence
19 hearing is to be conducted before the trial judge without a
20 jury or before the trial judge and a jury other than the trial
21 jury, as provided elsewhere in this article, the trial court
22 with the consent of both parties may delay the sentence
23 hearing until it has received the pre-sentence investigation
24 report specified in Section 13A-5-47(b). Otherwise, the

1 sentence hearing shall not be delayed pending receipt of the
2 pre-sentence investigation report.
3 "(b) The state and the defendant shall be allowed to
4 make opening statements and closing arguments at the sentence
5 hearing. The order of those statements and arguments and the
6 order of presentation of the evidence shall be the same as at
7 trial.
8 "(c) At the sentence hearing evidence may be
9 presented as to any matter that the court deems relevant to
10 sentence and shall include any matters relating to the
11 aggravating and mitigating circumstances referred to in
12 Sections 13A-5-49, 13A-5-51, and 13A-5-52. Evidence presented
13 at the trial of the case may be considered insofar as it is
14 relevant to the aggravating and mitigating circumstances
15 without the necessity of re-introducing that evidence at the
16 sentence hearing, unless the sentence hearing is conducted
17 before ~~a jury other than the one before which the defendant~~
18 ~~was tried~~ a trial judge other than the one before whom the
19 defendant was tried or a jury other than the trial jury before
20 which the defendant was tried.
21 "(d) Any evidence which has probative value and is
22 relevant to sentence shall be received at the sentence hearing
23 regardless of its admissibility under the exclusionary rules
24 of evidence, provided that the defendant is accorded a fair
25 opportunity to rebut any hearsay statements. This subsection

1 shall not be construed to authorize the introduction of any
2 evidence secured in violation of the Constitution of the
3 United States or the State of Alabama.
4 "(e) At the sentence hearing the state shall have
5 the burden of proving beyond a reasonable doubt the existence
6 of any aggravating circumstances. Provided, however, any
7 aggravating circumstance which the verdict convicting the
8 defendant establishes was proven beyond a reasonable doubt at
9 trial shall be considered as proven beyond a reasonable doubt
10 for purposes of the sentence hearing.
11 "(f) Unless at least one aggravating circumstance as
12 defined in Section 13A-5-49 exists, the sentence shall be life
13 imprisonment without parole.
14 "(g) The defendant shall be allowed to offer any
15 mitigating circumstance defined in Sections 13A-5-51 and
16 13A-5-52. When the factual existence of an offered mitigating
17 circumstance is in dispute, the defendant shall have the
18 burden of interjecting the issue, but once it is interjected
19 the state shall have the burden of disproving the factual
20 existence of that circumstance by a preponderance of the
21 evidence.
22 "§13A-5-46.
23 "(a) Unless both parties with the consent of the
24 court waive the right to have the sentence hearing conducted
25 before a jury as provided in Section 13A-5-44(c), it shall be

conducted before a jury which shall return ~~an advisory~~ a verdict as provided by subsection (e) of this section. If both parties with the consent of the court waive the right to have the hearing conducted before a jury, the trial judge shall proceed to determine sentence without ~~an advisory~~ a verdict from a jury. Otherwise, the hearing shall be conducted before a jury as provided in the remaining subsections of this section.

"(b) If the defendant was tried and convicted by a jury, the sentence hearing shall be conducted before that same jury unless it is impossible or impracticable to do so. If it is impossible or impracticable for the trial jury to sit at the sentence hearing, or if the case on appeal is remanded for a new sentence hearing before a jury, a new jury shall be impanelled to sit at the sentence hearing. The selection of that jury shall be according to the laws and rules governing the selection of a jury for the trial of a capital case.

"(c) The separation of the jury during the pendency of the sentence hearing, and if the sentence hearing is before the same jury which convicted the defendant, the separation of the jury during the time between the guilty verdict and the beginning of the sentence hearing, shall be governed by the law and court rules applicable to the separation of the jury during the trial of a capital case.

"(d) After hearing the evidence and the arguments of both parties at the sentence hearing, the jury shall be instructed on its function and on the relevant law by the trial judge. The jury shall then retire to deliberate concerning the ~~advisory~~ verdict it is to return.

"(e) After deliberation, the jury shall return ~~an advisory~~ a verdict as follows:

"(1) If the jury determines that no aggravating circumstances as defined in Section 13A-5-49 exist, it shall return ~~an advisory verdict recommending to the trial court that the penalty be~~ a verdict of life imprisonment without parole;

"(2) If the jury determines that one or more aggravating circumstances as defined in Section 13A-5-49 exist but do not outweigh the mitigating circumstances, it shall return ~~an advisory verdict recommending to the trial court that the penalty be~~ a verdict of life imprisonment without parole;

"(3) If the jury determines that one or more aggravating circumstances as defined in Section 13A-5-49 exist and that they outweigh the mitigating circumstances, if any, it shall return ~~an advisory verdict recommending to the trial court that the penalty be~~ a verdict of death.

"(f) The decision of the jury to return ~~an advisory~~ a verdict recommending a sentence of life imprisonment without

parole must be based on a vote of a majority of the jurors. The decision of the jury to recommend a sentence of death must be based on a vote of at least 10 jurors. The verdict of the jury must be in writing and must specify the vote.

"(g) If the jury is unable to reach ~~an advisory~~ a verdict recommending a sentence, or for other manifest necessity, the trial court may declare a mistrial of the sentence hearing. Such a mistrial shall not affect the conviction. After such a mistrial or mistrials another sentence hearing shall be conducted before another jury, selected according to the laws and rules governing the selection of a jury for the trial of a capital case. Provided, however, that, subject to the provisions of Section 13A-5-44(c), after one or more mistrials both parties with the consent of the court may waive the right to have ~~an advisory~~ a verdict from a jury, in which event the issue of sentence shall be submitted to the trial court without a recommendation from a jury.

"§13A-5-47.

"(a) After the sentence hearing has been conducted, and after the jury has returned ~~an advisory~~ a verdict, or after such a verdict has been waived as provided in Section 13A-5-46(a) or Section 13A-5-46(g), the trial court shall ~~proceed to determine the~~ impose sentence. Where the jury has returned a verdict of death, the court shall sentence the

1 defendant to death. Where a sentence of death is not returned
2 by the jury, the court shall sentence the defendant to life
3 imprisonment without parole. This code section shall not
4 affect a trial court's power to sentence in accordance with a
5 guilty plea.
6 "~~(b) Before making the sentence determination, the~~
7 ~~trial court shall order and receive a written pre-sentence~~
8 ~~investigation report. The report shall contain the information~~
9 ~~prescribed by law or court rule for felony cases generally and~~
10 ~~any additional information specified by the trial court. No~~
11 ~~part of the report shall be kept confidential, and the parties~~
12 ~~shall have the right to respond to it and to present evidence~~
13 ~~to the court about any part of the report which is the subject~~
14 ~~of factual dispute. The report and any evidence submitted in~~
15 ~~connection with it shall be made part of the record in the~~
16 ~~case.~~
17 "~~(c) Before~~ (b) Where the sentencing jury is waived
18 pursuant to Section 13A-5-44 and before imposing sentence the
19 trial court shall permit the parties to present arguments
20 concerning the existence of aggravating and mitigating
21 circumstances and the proper sentence to be imposed in the
22 case. The order of the arguments shall be the same as at the
23 trial of a case. The trial court, based upon evidence
24 presented at trial and the evidence presented during the
25 sentence hearing and any evidence submitted in connection with

it, shall enter specific written findings concerning the existence or nonexistence of each aggravating circumstance enumerated in Section 13A-5-49, each mitigating circumstance enumerated in Section 13A-5-51, and any additional mitigating circumstances offered pursuant to Section 13A-5-52. The trial court shall also enter written findings of facts summarizing the crime and the defendant's participation in it. In deciding upon the sentence, the trial court shall determine whether the aggravating circumstances it finds to exist outweigh the mitigating circumstances it finds to exist.

"~~(d) Based upon the evidence presented at trial, the evidence presented during the sentence hearing, and the pre-sentence investigation report and any evidence submitted in connection with it, the trial court shall enter specific written findings concerning the existence or nonexistence of each aggravating circumstance enumerated in Section 13A-5-49, each mitigating circumstance enumerated in Section 13A-5-51, and any additional mitigating circumstances offered pursuant to Section 13A-5-52. The trial court shall also enter written findings of facts summarizing the crime and the defendant's participation in it.~~

"~~(e) In deciding upon the sentence, the trial court shall determine whether the aggravating circumstances it finds to exist outweigh the mitigating circumstances it finds to exist, and in doing so the trial court shall consider the~~

~~recommendation of the jury contained in its advisory verdict, unless such a verdict has been waived pursuant to Section 13A-5-46(a) or 13A-5-46(g). While the jury's recommendation concerning sentence shall be given consideration, it is not binding upon the court.~~"

Section 2. This act shall apply to any defendant who is charged with capital murder after the effective date of this act and shall not apply retroactively to any defendant who has previously been convicted of capital murder and sentenced to death prior to the effective date of this act.

Section 3. This act shall become effective immediately following its passage and approval by the Governor, or its otherwise becoming law.

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3
4 President and Presiding Officer of the Senate

5
6 Speaker of the House of Representatives

7 SB16
8 Senate 23-FEB-17
9 I hereby certify that the within Act originated in and passed
10 the Senate, as amended.
11
12 Patrick Harris,
13 Secretary.
14
15

16
17 House of Representatives
18 Passed: 04-APR-17
19

20
21 By: Senator Brewbaker

Select Year: 2015 ▼ Go

The 2015 Florida Statutes

Title XLVII
CRIMINAL PROCEDURE AND CORRECTIONS

Chapter 921
SENTENCE

View Entire Chapter

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or the defendant's counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida and disposition rendered within 2 years after the filing of a

notice of appeal. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) AGGRAVATING CIRCUMSTANCES.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any: robbery; sexual battery; aggravated child abuse; abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement; arson; burglary; kidnapping; aircraft piracy; or unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(j) The victim of the capital felony was a law enforcement officer engaged in the performance of his or her official duties.

(k) The victim of the capital felony was an elected or appointed public official engaged in the performance of his or her official duties if the motive for the capital felony was related, in whole or in part, to the victim's official capacity.

(l) The victim of the capital felony was a person less than 12 years of age.

(m) The victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim.

(n) The capital felony was committed by a criminal gang member, as defined in s. 874.03.

(o) The capital felony was committed by a person designated as a sexual predator pursuant to s. 775.21 or a person previously designated as a sexual predator who had the sexual predator designation removed.

(p) The capital felony was committed by a person subject to an injunction issued pursuant to s. 741.30 or s. 784.046, or a foreign protection order accorded full faith and credit pursuant to s. 741.315, and was committed against the petitioner who obtained the injunction or protection order or any spouse, child, sibling, or parent of the petitioner.

(6) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his or her participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

(h) The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty.

(7) VICTIM IMPACT EVIDENCE.—Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence to the jury. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.

(8) APPLICABILITY.—This section does not apply to a person convicted or adjudicated guilty of a capital drug trafficking felony under s. 893.135.

History.—s. 237a, ch. 19554, 1939; CGL 1940 Supp. 8663(246); s. 119, ch. 70-339; s. 1, ch. 72-72; s. 9, ch. 72-724; s. 1, ch. 74-379; s. 248, ch. 77-104; s. 1, ch. 77-174; s. 1, ch. 79-353; s. 177, ch. 83-216; s. 1, ch. 87-368; s. 10, ch. 88-381; s. 3, ch. 90-112; s. 1, ch. 91-270; s. 1, ch. 92-81; s. 1, ch. 95-159; s. 5, ch. 96-290; s. 1, ch. 96-302; s. 7, ch. 2005-28; s. 2, ch. 2005-64; s. 27, ch. 2008-238; s. 25, ch. 2010-117; s. 1, ch. 2010-120.

Note.—Former s. 919.23.

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